„Systems and Developments of Penal Sanctions in Western and Central Europe" How to deal with Dangerous Offenders?

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1. Introduction

Every country of the world struggles with the problem posed by that small group of dangerous offenders. Ever since the *Dutroux* case in Belgium[1], persistent and severe sex offenders have been in the focus of public interest throughout Europe. Accordingly, the relevant criminal law regulations are being tested on occasion to see whether they sufficiently cater for society's demand for security.

Internationally, criminal law has two[2] different approaches towards this problem, namely:

- by increasing the penalty in response to the demand for security[3]
- by providing measures for the prevention of crime and for the rehabilitation of offenders in addition to or instead of the penalty in place.

This paper will provide an overview of recent development in both systems taking the criminal law of Germany, Sweden and the United Kingdom as example. The sanctions applicable to those capable of having criminal responsibility will be the main focus of discussion in this lecture.

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1 See Chambre des Représentants de Belgique: Enquęte parlementaire sur la manière dont l'enquęte, dans ses volets policiers et judiciaires a été menée dans "l'affaire Dutroux-Nihoul et consorts", 1997; recently: *J. Nicolas* and *F. Lavachery*: Dossier pédophilie. Le scandale de l'affaire Dutroux, Paris 2001.

2 A pure measure system also taking up the penalty function has not yet satisfactorily been put into practice. The Soviet Union has also abandoned its single-track legal measure system addressed purely at social dangerousness.

2. German criminal law's treatment of dangerous criminals

The treatment of dangerous recidivists in German criminal law must be examined in the context of the German principle of guilt. The principle of guilt limits the quantum of the penalty. The penalty may, therefore, only be imposed to the extent of the level of guilt established. This fundamental principle leads to the impossibility that the penalty *per se* would fulfil the general public's demand for security, in particular with respect to perpetrators who lack capacity but are nevertheless dangerous.

German criminal law reserves measures for such cases. The sanction applicable to dangerous criminals *with* capacity is known as *Sicherungsverwahrung* (preventive detention). It was introduced in 1933 as part of the so-called measures for the prevention of crime and the rehabilitation of offenders. As further "custodial" measures, German law provides for admission to a psychiatric hospital (§ 63 StGB), which is only applicable to perpetrators with diminished responsibility or incapacity, and for the admission to a treatment centre for drug addicts or alcoholics (§ 64 StGB).

In a slightly simplified form, § 66 par. 1 StGB provides for mandatory preventive detention if the offender:

- is being sentenced to at least 2 years' imprisonment in the instant case,
- (No. 1) has already been given two prison sentences of at least 1 year's duration each,
- (No. 2) has actually served at least two years in prison for these sentences,
- and (No. 3) poses a danger to the general public due to his or her tendency towards serious crime.

In order to fulfil the aim of preventive detention to protect society from really dangerous criminals, prognoses as to the degree of danger involved play an important part from the order for preventive detention up until its potential suspension.

However, the difficulty in supplying reliable criminal prognoses remains as ever an unresolved – perhaps even insoluble – problem[4]. This scepticism

3 The further possibility of generally refraining from increasing sanctions for dangerous recidivists has never been seriously considered so far, but cf. *W. Naucke*: Strafrecht. Eine Einführung, Neuwied und Kriftel, 9. Aufl. 2000, p. 96.

4 *W. Rasch*, Verhaltenswissenschaftliche Kriminalprognosen, in: *W. Frisch* und *T. Vogt*: Prognoseentscheidungen in der strafrechtlichen Praxis, 1. Aufl. Baden-Baden 1994, pp. 17 ff.; *R. K. Hanson* (Predicting sex offender recidivism, London and New Delhi, 2000, p. 1) has described the dilemma as follows: „Even the best predictions, however, will never be perfect because people change. Anyone who chooses to provide risk assessments for sex offenders must accept that their decisions will, at times, expose potential victims to harm, inflict unnecessary restrictions on offenders, and burden society with heedless costs."

is equally applicable to all methods of prognosis. An exacerbating factor is that the aim of preventive detention is to provide protection not against *any*, but solely against *severe* crime. However, it would seldom be the case, even for the preventively detained, that they would commit a serious crime after having served the prison sentence. From a methodological point of view, the resulting low base rate considerably hinders the prognoses' success. Thus all the evidence would point to the conclusion that a considerable number of 'false positives' will be found among the preventively detained, even if an extremely precise method of prognosis were to be developed.[5]

The practice of execution of preventive detention is seen as a further dilemma. From the very beginning of the use of preventive detention there was a demand for sparing the detainee from any unnecessary strain during detention, since he or she was strictly speaking innocent, having already served the penalty – some critics even called for detention in a hotel.[6] Nevertheless the law has allowed for only very few special privileges for the detainee within the penal system.[7] The existing choice of treatment particularly for sex offenders is assessed as insufficient.[8]

This psychological baggage led to great hesitation in the ordering of preventive detention after the 1970 criminal law reform changed the state of the law on preventive detention. Since the eighties the number of orders has fluctuated between 27 and 40 per year.

Even considerations were launched to abolish preventive detention.

The situation changed in 1996/1997. A seven year old child named Natalie was raped and killed in Bavaria. A public outcry supported by the mass media followed when it was known that the offender was on parole and had been released only some months ago from a prison where he served a prison sentence for sexual abuse and rape. Victim support organisations as

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5 The base rate of a prognosis represents the frequency with which the phenomenon to be predicted (here: the commission of another serious offence within a particular time span) occurs in the group under observation (cf. *J. Kühl* und *K.F. Schumann*, 'Prognosen im Strafrecht – Probleme der Methodologie und Legitimation', 7 Recht und Psychiatrie (1989) p.131; *K.F. Schumann*, 'Prognosen in der strafrechtlichen Praxis und deren empirische Grundlagen' in *W. Frisch* und *T. Vogt*, op.cit.„ pp. 31 ff.; *S. Krauss* and *R. Hertwig*, Muss DNA-Evidenz schwer verständlich sein?, Monatsschrift für Kriminologie und Strafrechtsreform 83 (2000), pp. 155 ff.; more general: *Gigerenzer, G.* (in press). Calculated risks: How to know when numbers deceive you. New York.

6 *J. Baumann*: Entwurf eines Strafgesetzbuches Allgemeiner Teil, Tübingen 1963, comment on § 53; cf. especially *P.J. Schmidt*: Probleme der Rückfallkriminalität, Göttingen 1974, pp. 269 ff.

7 Cf. §§ 129-135 StVollzG (Strafvollzugsgesetz, Penal System Act).

8 For an overview: *R. Egg*, Die Behandlung von Sexualstraftätern in sozialtherapeutischen Anstalten, in: *R. Egg*: Behandlung von Sexualstraftätern im Justizvollzug, Wiesbaden 2000, pp. 75 ff.

well as parents of murdered children campaigned for tougher legislation. However, it must be added that public reactions to this case and public and political mobilization would not have been that way without the Belgian Dutroux case which came to light also in summer 1996[9]. Since then the possibility to extend preventive detention is on the political agenda.

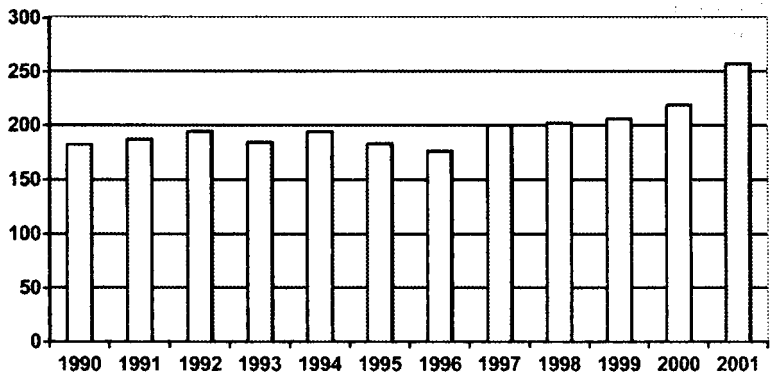
The law against sexual and other dangerous offences implemented in 1998 constituted a first step concerning new legislation on preventive detention[10]. The new law increased on the one hand penalties in case of sexual offences and introduced on the other hand section 66 paragraph 3 which provides for preventive detention in case of a second instead a third conviction for sexual offences. The law also abolished the 10-years-maximum period of preventive detention in case of first imposition.

Both diagrams show changes which result from new legislation.

Orders of preventive detention have risen from 27 in 1993 up to 61, 55 and 60 in 1998, 1999 and 2000.

The number of the detainees has increased from 176 in 1996 up to 257 in 2001.

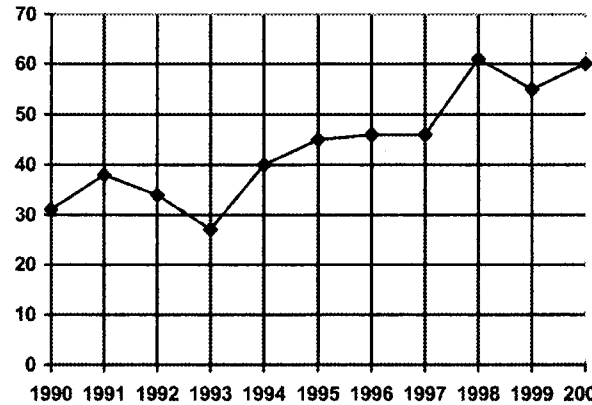
Number of preventively detainees
(Source: Strafvollzugsstatistik)



9 See *H.-J. Albrecht*, Dangerous Criminal Offenders in the German Criminal Justice System, Federal Sentencing Reporter Vol. 10/3, 69-73 (1997).

10 „Gesetz zur Bekämpfung von Sexualdelikten und anderen gefährlichen Straftaten vom 26. Januar 1998".

Orders of preventive detention
(Source: Strafverfolgungsstatistik)



Nevertheless the debate on measures against dangerous offenders is still ongoing. In the beginning of the year 2001 Baden-Württemberg has introduced a new law[11] which allows – as administrative law – even to incapacitate a dangerous offender under certain circumstances after having served his prison sentence without that the trial court has ordered preventive detention[12]. The question arises whether such a law violates the German constitution or even the Convention on Human Rights. In july chancellor Gerhard Schröder demanded in an interview by the yellow press „Bild": Child molesters: Lock them up for ever![13]

11 Straftäter-Unterbringungsgesetz – StrUBG vom 20. Februar 2001, LT-Dr 12/6037
12 In the meantime Bavaria and Saxony-Anhalt have also introduced such laws.
13 Bild am Sonntag vom 8. Juli 2001.

3. The treatment of dangerous criminals under Swedish criminal law

In contrast to Germany since 1981 Sweden has no longer had a custodial measure apart from admission for special care.[14] The reason for this development mainly lies in the disappointment about the largely unsuccessful efforts at rehabilitation of dangerous offenders. There, too, it was impossible to enforce the measure-alternative independently from the penalty. Society's need for protection has thus long been pursued exclusively through the prison sentence, leaving aside the relatively limited psychiatric measure[15]. A special sentencing provision exists for persistent serious recidivism, s. 26 § 3, which raises the maximum penalty by four years. Beyond the requirement of recidivism, which is certainly also taken as an indication of dangerousness, the provision has no prognostic character. Prior convictions may likewise be taken into consideration in the general determination of the penalty. The clear rise in long sentences which coincided with the abolition of internment for dangerous recidivists is a further indication of the fact that preventive aims are pursued in the assessment of longer penalties. Nevertheless harsher sentences for dangerous criminals in Sweden are seldom applied[16].

14 In Iceland, too, indeterminate preventive detention has hardly been applied (*I. Thormundsson*, 'Der sogenannte Neoklassizismus im Verhältnis zur nordischen bzw. isländischen Kriminalpolitik', in *A. Eser* und *K. Cornils*: Neuere Tendenzen in der Kriminalpolitik: Beiträge zu einem deutsch-skandinavischen Strafrechtskolloquium, Freiburg 1987, p. 79); for the efforts at reform in Norway, see *H.K. Bjerke*, 'Zielsetzung und Stand der Strafrechtsreform in Norwegen', in *A. Eser* und *K. Cornils*, op.cit., pp. 131 f.
The situation in Finland is described by *M. Joutsen, R. Lahti* and *P. Pölönen*: National Criminal Justice Profiles, Finland, Helsinki, 2001, p. 37: „According to the Dangerous Recidivists Act, persons guilty of repeated violent offences such as murder, premeditated manslaughter, aggravated assault, or robbery or rape with aggravated violence may be sentenced to "preventive detention" as dangerous recidivists. In this case, once the original sentence is served, the national Prison Board determines whether or not the offender continues to present an evident and serious danger to the life or health of another. If this is the case, the offender will stay in preventive detention. The Prison Board reviews the case at least once every six months. In practice, prisoners detained under this Act serve the full term of their original sentence and are then released on parole. At the end of 1999, 21 prisoners were being held in preventive detention."

15 See *B. Schütz-Gärdén*: Psychisch gestörte Straftäter im schwedischen und deutschen Recht, Freiburg 1999.

16 *K. Cornils* und *N. Jareborg*: Das schwedische Kriminalgesetzbuch. Brottsbalken, Freiburg 2000, p. 34.

4. The treatment of dangerous criminals at criminal law in Great Britain

In Great Britain preventive measures for dangerous recidivists are also a thing of the past. Preventive detention, imposed either subsequently to or instead of the prison sentence, was abolished soon after its implementation. Its successor, the extended sentence, also failed to fulfil the expectations placed upon it.

Although the fundamental rationale of sentencing established by the Criminal Justice Act 1991 is desert, and in contrast to the situation in Sweden, now English law provides three kind of incapacitative sentences:

a) Protective sentences under s 2 (2) (b) of the 1991 Act

S. 2 (2) (b) CJA 1991 states that where the Crown Court is imposing imprisonment for a violent or sexual offence, the term may be for such length as "is necessary to protect the public from serious harm from the offender."

The power "to protect the public" depends, as it is the case in the question of Sicherungsverwahrung, on a prediction of dangerousness. In contrast to German legislation the CJA 1991 does not require the court to consider a psychiatric report, a report from a psychologist, or a presentence report.

As regards the calculation of the sentence many judges have stated what the proportionate sentence for the offence would have been, making it clear how much they have added for "public protection."

b) Discretionary life imprisonment

Life imprisonment remains the maximum sentence for crimes such as manslaughter, rape, robbery, wounding with intent and arson and is also rationalised on grounds of public protection. But the sentence of life imprisonment should only be imposed on offenders committing serious offences and whose history suggests that they will present a danger of serious offending for an indeterminate time.

Life sentences are indeterminate sentences, release being dependent on the Parole Board; and courts should therefore look for evidence of a substantial probability of serious further offending.[17]

c) Automatic Life imprisonment

The 1997 Act now provides for the imposition of automatic sentences of life imprisonment on any offender over the age of 18 years who is convicted of a serious offence, if he has previously been convicted of another serious

17 *A. Ashworth*: Sentencing & Criminal Justice, third edition, London, Dublin, Edinburgh, 2000, pp. 183 ff.

offence. The qualifying offences are listed in s. 2 (5), and include attempts and soliciting to murder, manslaughter, rape or intercourse with a girl under 13, various firearms offences, robbery with a firearm or imitation firearm, and all woundings or grevious bodily harm with intent. So long as the offender is aged 18 at the time of conviction of the second qualifying offence, the court is required to impose a sentence of life imprisonment unless "there are exceptional circumstances relating either to the offence or to the offender which justify its not doing so."[18] For example an automatic life sentence was imposed in a case where the offender had entered a building society in his bedroom slippers, brandished a toy gun and asked for money; he obtained 960 pound, then apologised and left, and a customer relieved him of the bag in which he was carrying the money. He had a previous robbery conviction[19].

5. Conclusion

Some kind of incapacitative sanction is found politically attractive in many jurisdictions. Although the figure of serious offences at least in Germany seems to be stable over the last years Germany and Great Britain have widened their "public protection" sanctions. One of the reasons seems to be an increased sensitivity of the population caused by a changing reporting, especially by the mass medias.

No matter which kind of incapacitative sanction a criminal justice system prefers. Criticism seems the same: In Germany preventive detention is seen "as the dark side of the guilt principle."[20] In Great Britain discretionary life imprisonment, automatic life imprisonment and protective sentences are a departure from the "just deserts" rationale and also difficult to justify.

All these sanctions face an identical problem which is still unresolved: the fallibility of prediction of dangerousness.

In this regard the sanction system in Sweden seems to differ. Although even in Sweden preventive aims are pursued in the assessment of longer penalties they are used very seldom in practice. Due to this fact one can have a suspicion that incapacitative sanctions are to a considerable degree irrational and symbolic.

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18 *A. Ashworth*, op.cit., p. 193.

19 Offen [2000] Crim LR 307; see *A. Ashworth*, op.cit., p. 195; *C. Cobley*: Sex Offenders, Law, Policy and Practice, Bristol 2000, pp. 169 ff. Recent development in *J. Halliday*: Making punishments work: Report of a review of the sentencing framework for England and Wales, Home Office, 2001, 4.25-4.27.

20 Weigend, Sentencing and Punishment in Germany, in: *Tonry/Frase*: Sentencing and Sanctions in Western Countries, 2001, 188-221 (202).

Extracts from laws concerning punishment of dangerous offenders

German Penal Code

Section 66 Placement in Preventive Detention

(1) If someone is sentenced for an intentional crime to a fixed term of imprisonment of at least two years, then the court shall order preventive detention collateral to the punishment, if:

1. the perpetrator has already been sentenced twice, respectively, to imprisonment for at least one year for intentional crimes which he committed prior to the new act;

2. as a result of one or more of these acts prior to the new act he has served a term of imprisonment or deprivation of liberty pursuant to a measure of reform and prevention for a period of at least two years; and

3. comprehensive evaluation of the perpetrator and his acts reveals that, due to his proclivity to commit serious crimes, particularly those as a result of which the victim suffers serious emotional or physical injury, or serious financial loss is caused, he presents a danger to the general public.

(2) If someone has committed three intentional crimes for which he incurred, respectively, imprisonment for at least one year, and if he is sentenced to a fixed term of imprisonment of at least three years for one or more of these acts, then the court may under the provision indicated in subsection (1), no. 3, order preventive detention collateral to the punishment even without a prior sentence or deprivation of liberty (subsection (1), nos. 1 and 2).

(3) If someone is sentenced to a fixed term of imprisonment of at least two years for a serious criminal offense or a crime under Sections 174 to 174c, 176, 179 subsections (1) to (3), 180, 182, 224, 225 subsections (1) or (2), or 323a, as long as the act committed while intoxicated is a serious criminal offense or one of the aforementioned unlawful acts, then the court may order preventive detention collateral to the punishment if the perpetrator has already been once sentenced to imprisonment of at least three years for one or more such crimes which he committed prior to the new act and the requirements indicated in subsection (1), nos. 2 and 3, have been fulfilled. If someone has committed two crimes of the type indicated in sentence 1, as a result of which he has incurred, respectively, imprisonment for at least two years, and if he is sentenced for one or more of these acts to a fixed term of imprisonment of at least three years, then the court may, under the provision indicated in subsection (1), no. 3, order preventive detention collateral to the

punishment even without a prior sentence or deprivation of liberty (subsection (1), nos. 1 and 2). Subsections (1) and (2) shall remain unaffected.

(4) Within the meaning of subsection (1), no. 1, a sentence to an aggregate punishment shall qualify as a single sentence. If remand detention or another deprivation of liberty is credited against a term of imprisonment, it shall qualify as a served punishment within the meaning of subsection (1), no. 2. A prior act shall not be considered if more than five years have passed between it and the subsequent act.

Time in which the perpetrator has been held in custody in an institution by order of a public authority shall not be included in the term. An act upon which judgment was passed outside of the territorial area of application of this law shall be equivalent to an act upon which judgment is passed within this area if it would be an intentional act under the German criminal law, or, in cases under subsection (3), it would be one of the crimes of the type indicated in subsection (3), sentence 1.

Section 67d Length of Placement

(1) ...

(2) If no maximum term has been provided or the term has not yet expired, then the court shall suspend the further execution of the placement and grant probation if it can be expected that the person under placement will not commit any more unlawful acts if released from execution of the measure. Supervision of conduct shall commence with the suspension.

(3) If ten years of placement in preventive detention have been executed, the court shall declare the measure satisfied if there is no danger that the person under placement will, due to his proclivity, commit serious crimes, as a result of which the victim is seriously harmed emotionally or physically. Supervision of conduct shall commence upon satisfaction of the measure.

(4) ...

(5) ...

Swedish Penal Code

s. 26 § 3 Criminal Code

If a person has been sentenced to imprisonment for at least two years and, once the judgement has acquired legal force, he commits a crime for which the penalty is imprisonment for more than six years, he may be sentenced for the relapse for imprisonment for a term which exceeds by four years the maximum punishment imposable for the crime or, in the case of several crimes, the maximum punishment imposable for the crimes pursuant to section 2.

English Criminal Law

PCCS Act 2000, s 80 (CJA 1991, s 2):

Length of custodial sentences

The custodial sentence shall be

a) for such term (not exceeding the permitted maximum) as in the opinion of the court is commensurate with the seriousness of the offence, or the combination of the offence and one or more offences associated with it; or

b) where the offence is a violent or sexual offence, for such longer term (not exceeding the maximum) as in the opinion of the court is necessary to protect the public from serious harm from the offender.

Criteria for imposing a sentence of life imprisonment set out in Hodgson (1967)

A life sentence may only be imposed

(i) "where the offence or offences are in themselves grave enough to require a very long sentence" and

(ii) "where it appears from the nature of the offences or from the defendant's history that he is a person of unstable character likely to commit such offences in future" and

(iii) "where if such offences are committed the consequences to others may be specially injurious, as in the case of sexual offences or crimes of violence."

PCCS Act 2000, s 109 (CSA 1997, s 2):

(1) This section applies where

(a) a person is convicted of a serious offence committed after the commencement of this section; and

(b) at the time when that offence was committed, he was 18 or over and had been convicted in any part of the United Kingdom of another serious offence.

(2) The court shall impose a life sentence, that is to say

(a) where the person is 21 or over, a sentence of imprisonment for life;

(b) where he is under 21, a sentence of custody for life under section 8(2) of the Criminal Justice Act 1982 ("the 1982 Act"),

unless the Court is of the opinion that there are exceptional circumstances relating to either of the offences or to the offender which justify its not doing so.