ISSN 2192 - 6115

Jahrbuch des
Kriminalwissenschaftlichen Instituts
der Leibniz Universität Hannover

Band 1 - 2013

Alexander M. Aumüller

Dealing with dangerous offenders through preventive sentencing

a comparison of Germany and England and Wales

Leibniz
Universität
Hannover

Jahrbuch des Kriminalwissenschaftlichen Instituts der Leibniz Universität Hannover

Alexander M. Aumüller

Dealing with dangerous offenders through preventive sentencing

a comparison of Germany and England and Wales

2013

Publikationsreihe des

Kriminalwissenschaftlichen Instituts der

Leibniz Universität Hannover

Frühjahr 2013

Impressum

Jahrbuch des Kriminalwissenschaftlichen Instituts

http://www.jura.uni-hannover.de/jahrbuch

ISSN 2192-6115 (Print-Ausgabe)

Printauflage: 50 Exemplare

Druckfassung auf chlorfrei gebleichtem Papier

nach ISO 9706

Herausgeber:

Kriminalwissenschaftliches Institut der

Leibniz Universität Hannover

Vorstand:

Professor Dr. Bernd-Dieter Meier (geschf. und V.i.S.d.P.)

Professor Dr. Henning Radtke

Professor Dr. Carsten Momsen

stud.iur. Tobias Schild (Redaktion)

Königsworther Platz 1

30167 Hannover

Tel.: 0511 – 762-8261

Fax: 0511 – 762-8263

Umschlaggestaltung: Arnd Hüneke 2011

Druck: Norbert Vogel

Vorwort der Herausgeber

Mit der Schriftenreihe „Jahrbuch des Kriminalwissenschaftlichen Instituts der Leibniz Universität Hannover" verbindet sich das Ziel, die Tätigkeit des Instituts transparent zu machen und die Ergebnisse seiner Arbeit der interessierten Öffentlichkeit zur Verfügung zu stellen. Das Institut ist im Jahr 2006 gegründet worden, um die Aktivitäten in Forschung, Lehre und Weiterbildung zu kriminalwissenschaftlichen Fragestellungen zu bündeln und ihnen dadurch eine größere Aufmerksamkeit zu sichern. Inhaltlich geht es um ein breites Spektrum an Themen, die sich nicht nur mit dem Strafrecht und dem Strafprozessrecht, sondern auch mit den grenzüberschreitenden Problemen des europäischen und internationalen Strafrechts, den komplexen Wirkungszusammenhängen des Wirtschaftsstrafrechts und der sozialwissenschaftlich geprägten Außenperspektive auf das Recht durch die Kriminologie verbinden.

Am Kriminalwissenschaftlichen Institut entsteht eine große Zahl von Arbeiten, an deren Kenntnisnahme ein übergreifendes Interesse besteht, obwohl die Arbeiten von ihrer Qualität und ihrem wissenschaftlichen Anspruch her in den meisten Fällen nicht das Niveau einer publikationsfähigen Leistung erreichen. Im Wesentlichen geht es dabei um drei Kategorien von Texten. Zunächst geht es um Qualifikationsarbeiten, die von Studierenden im Rahmen ihres Schwerpunktstudiums angefertigt werden. Bisweilen gelingt es Studierenden, innerhalb der vorgegebenen Sechswochenfrist eine Leistung zu erbringen, die aufgrund ihrer Selbstständigkeit, ihrer Methodik oder ihrer Bearbeitungstiefe beeindruckt und die es deshalb verdient, als Muster für andere Arbeiten herangezogen zu werden. In das „Jahrbuch" sollen solche Studienarbeiten aufgenommen werden, die von den Studierenden des hannoverschen Schwerpunkts „Strafverfolgung und Strafverteidigung" angefertigt und von einem Professor des Kriminalwissenschaftlichen Instituts mit „sehr gut" bewertet worden sind. Zum zweiten geht es um Magister- und Masterarbeiten, die im Rahmen des Ergänzungsstudiengangs „Europäische Rechtspraxis" oder eines der in Hannover angebotenen postgradualen Studiengänge erstellt und von einem Professor des Instituts betreut worden sind. Die von den Studierenden in diesem Arbeiten zusammengetragenen rechtsvergleichenden Erkenntnisse sind bei aktuellen Fragestellungen oder Themen mit rechtspolitischem Bezug vielfach auch außerhalb der engen Grenzen des Prüfungsverfahrens von Interesse. Mit „summa" oder in Einzelfällen auch mit „magna cum laude" bewertete Magister- und Masterarbeiten sollen ihren Platz daher ebenfalls im „Jahrbuch" haben. Zum dritten versteht sich die Schriftenreihe als Plattform für die Veröffentlichung von Vorträgen, Diskussionsbeiträgen und Tagungsberichten, die im Zusammenhang mit öffentlichen Veranstaltungen des Instituts stehen. Eine dieser Veranstaltungsreihen ist das „StPO-Symposium", das das Kriminalwissenschaftliche Institut regelmäßig zusammen mit dem Institut für Prozess- und Anwaltsrechts sowie mit Unterstützung durch die

niedersächsische Justiz und die Anwaltschaft organisiert. Die hier von meist profilierten Rednern zu aktuellen rechtspolitischen Fragen gehaltenen Vorträge verdienen es häufig gleichfalls, einer breiteren Öffentlichkeit bekannt gemacht zu werden.

Die Magisterarbeit hat einen auf den Umgang mit als gefährlich bewerteten Straftätern bezogenen Rechtsvergleich zwischen der Deutschland sowie England und Wales zum Gegenstand. Der Rechtsvergleich ist angesichts der in Deutschland intensiv geführten Diskussion um die Sicherungsverwahrung, in der Alternativen kaum in den Blick genommen worden sind, sehr reizvoll. Der Autor stellt vor dem Hintergrund des für beiden Rechtsordnungen geltenden Rahmens der EMRK die einschlägigen rechtlichen Regelungen beider Ordnungen gegenüber und unterbreitet einen Reformvorschlag vor allem für das deutsche Recht.

Prof. Dr. Bernd-Dieter Meier

Prof. Dr. Carsten Momsen

RiBGH Hon.-Prof. Dr. Henning Radtke

Inhalt

Literaturverzeichnis

Archbold, John	Archbold Criminal Pleading, Evidence and Pratice, edited by James Richardson et al., 2009 Edition, London 2009
Arnott, Hamish; Creighton, Simon	*Parole Board Hearings: law and practice, 2. Edition, London 2010*
Ashworth, Andrew	Sentencing and Criminal Justice, 5. Edition, Cambridge et al. 2010
Baltzer, Ulrich	Die Sicherung des gefährlichen Gewalttäters: eine Herausforderung an den Gesetzgeber, Wiesbaden 2005.
Bartsch, Tillmann	Sicherungsverwahrung – Recht, Vollzug, aktuelle Probleme, Baden-Baden 2010
Becker, Kathrein	Sicherungsverwahrung, also Diss. Iur. (Bochum 2009), Holzkirchen 2009
Bender, Soledad	Die nachträgliche Sicherungsverwahrung, also Diss. Iur. (Passau 2007), Frankfurt a. M. et al. 2007
Binding, Karl	Strafrechtliche und strafprozessuale Abhandlung, Leipzig 1915
Blau, Günter	Die Sicherungsverwahrung – ein Nekrolog?, in Krimialpolitik und ihre wissenschaftlichen Grundlagen – Festschrift für Professor Dr. Hans-Dieter Schwind zum 70. Geburtstag, edited by Thomas Feltes et al., Heidelberg 2006, pp. 525-535
Bohlander, Michael	Principles of German Criminal Procedure, Oxford and Portland (Oregon) 2012
	Translation of the German Criminal Code provided by Prof. Dr. Michael Bohlander, 2010, last accessed on 30.03.2012 at http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html
Bundesministerium der Justiz	Konzept des Bundesjustizministeriums zur Umsetzung der Entscheidung des Bundesverfassungsgerichts vom 4. Mai 2011, 2011, last accessed on 29.02.2012 at http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/Konzept_Sicherungsverwahrung_BMJ.pdf?__blob=publicationFile
Carter, Patrick	Securing the future – Proposal for the efficient and sustainable use of custody in England and Wales, 2007, last accessed on 29.02.2012 at http://webarchive.nationalarchives.gov.uk/+/http://www.justice.gov.uk/docs/securing-the-future.pdf
Cavadino, Michael; Dignan, James	The penal system: an introduction, 4. Edition, London 2007.
Clarkson, Christopher	Beyond Just Deserts: Sentencing Violent and Sexual Offenders, in Howard Journal pp. 284-292

Crown Prosecution Service	Provision of Pre-Sentence Reports, 2007, last accessed on 29.02.2012 at http://www.cps.gov.uk/legal/p_to_r/provision_of_pre_sentence_report_information/
Dohna, Alexander Graf zu	Der Stand des Streits um die Strafrechtsreform, in Deutsche Juristenzeitung 33 (1928), pp. 43-47
Easton, Susan; Piper, Christine	Sentencing and Punishment, 2. Edition, Oxford et al. 2008
Eisenberg, Ulrich	Kriminologie, 6. Edition, Munich 2005
Engelhardt, Jürgen	Die Erfahrungen mit der Durchführung des §§ 20a, 42e ff. StGB im Bereich des OLG Celle seit 1945 unter besonderer Berücksichtigung der Erfahrungen mit der Prognose, Munich 1964
Eser, Albin	Zur Entwicklung von Maßregeln der Besserung und Sicherung als zweite Spur im Strafrecht, in Festschrift für Müller-Dietz zum 70. Geburtstag, edited by Guido Britz et al. Munich 2001, pp. 213-236
Finger, Catrin	Vorbehaltene und Nachträgliche Sicherungsverwahrung, also Diss. Iur. (Gießen 2007), Baden-Baden 2008
Fischer, Thomas	Kurzkommentar zum Strafgesetzbuch und Nebengesetze, 59. Edition, Munich 2012
Flaig, Annika	Die nachträgliche Sicherungsverwahrung, also Diss. Iur. (Würzburg 2008), Frankfurt a. M. 2009
Freisler, Rolan; Schlegelberger, Franz; (eds)	Dringende Frage der Sicherungsverwahrung, Berlin 1938
Frister, Helmut	Strafrecht, Allgemeiner Teil, 5. Edition, Munich 2005
Gibson, Brya; Watkins, Michael	Criminal Justice Act 2003: A guide to the new procedures and sentencing, Winchester 2004
Gosling, Martin	Serious offenders and the management of risk, in Criminal Lawyer 2008, 179, pp. 1-2
Greger, Anette	Herausforderung Sicherungsverwahrung - Wie die Praxis mit der Entscheidung des EGMR (M. gegen Deutschland) umgehen kann, in Neue Zeitschrift für Strafrecht 2010, pp. 676-680
Hannich, Rolf	Karlsruher Kommentar zur Strafprozessordnung, 6. Edition, Munich 2008 (cited: Hannich/*Author*)
Halliday, John	Making punishments work – Report of a review of the sentencing framework for England and Wales, 2001, last accessed on 29.02.2012 at http://webarchive.nationalarchives.gov.uk/+/http://www.homeoffice.gov.uk/documents/halliday-report-sppu/

Hammond, W. H; Chayen, Edna	Persistent Offenders, London 1963
Henham, Ralph	Sentencing dangerous offenders: policy and practice in the Crown Court, in Criminal Law Review 2001 pp. 693-711.
Home Office	Justice for all, Cm 5563, 2002, last accessed on 29.02.2012 at http://www.cps.gov.uk/publications/docs/jfawhitepaper.pdf
Hood, Roge; Shute, Stephen; Feilzer, Marth; Wilcox, Aidan	Sex offenders emerging from long-term imprisonment: a study of their long-term reconviction rates and of Parole Board members' judgements of their risk, in British Journal of Criminology 2002, Volume 23, Issue 2, pp. 371-394
Hörnle, Tatjana	Der Streit um die Sicherungsverwahrung - Anmerkung zum Urteil des 2. Senats des BVerfG vom 4. 5. 2011 – NStZ 2011, 450, in Neue Zeitschrift für Strafrecht 2011, pp. 488-493
Hungerford-Welch, Peter	Criminal procedure and sentencing, 7. Edition, Abingdon 2009
Jansing, Jan-David	Nachträgliche Sicherungsverwahrung, also Diss. Iur. (Tübingen 2004), Münster 2004
Jescheck, Hans-Heinrich; Weigend, Thomas	Lehrbuch des Strafrechts, Allgemeiner Teil, 5. Edition, Berlin 1996
Joecks, Wolfgang; Miebach, Klaus; (eds.)	Münchener Kommentar zum Strafgesetzbuch, Volume 4, Munich 2006 (cited: MüKo/*Author*)
	Münchener Kommentar zum Strafgesetzbuch, Volume 1, Munich 2003 (cited: MüKo/*Author*)
Kalf, Wolfgang	*Sicherungsverwahrung* und Schutzbedürfnis der Allgemeinheit vor gefährlichen Straftätern, in "...weil er für die Allgemeinheit gefährlich ist!" edited by Stefan Barton, Baden-Baden 2006, pp. 205-217
Kern, Johannes	Brauchen wir die Sicherungsverwahrung, also Diss. Iur. (Heidelberg 1997), Frankfurt a. M. et al. 1997
Kindhäuser, Urs; Neumann, Ulfrid; Paeffgen, Hans-Ulrich; (eds.)	Nomos Kommentar Strafgesetzbuch, Volume 1, 3. Edition, Baden-Baden 2010 (Cited: NK/*Author*)
Kinzig, Jörg	Die Neuordnung des Rechts der Sicherungsverwahrung, in Neue Juristische Wochenschrift 2011, pp. 177-182
	Das Recht der Sicherungsverwahrung nach dem Urteil des EGMR in Sachen M. gegen Deutschland, in Neue Zeitschrift für Strafrecht 2010, pp. 233-238
Kinzig, Jörg	Entwicklung, Stand und Perspektiven einer Sicherungsverwahrung für Jugendliche und Heranwachsende, in Recht der Jugend und des Bildungswesens 2007, pp. 157-167

	Der Hang zu erheblichen Straftaten und was sich dahinter verbirgt – Zugleich eine empirische Analyse zur Begründung der Anordnung der Sicherungsverwahrung durch die Gerichte, in Neue Zeitschrift für Strafrecht 1998, pp. 14-19
	Die Sicherungsverwahrung auf dem Prüfstand, also Diss. Iur. Freiburg 1996
Krebs, Albrecht	Zur Durchführung der Maßregel Sicherungsverwahrung nach den Bestimmungen des Entwurfes eines Strafvollzugsgesetzes 1973, in Ehrhardt/Göppinger (eds), Straf- und Maßregelvollzug: Situation und Reform, Stuttgart 1974, pp. 121-130.
Kreuzer, Anton	Nachträgliche Sicherungsverwahrung – rote Karte für gefährliche Gefangene oder für den rechtsstaatlichen Vertrauensschutz, in Zeitschrift für Internationale Strafrechtsdogmatik 2006, pp. 145-151
Kreuzer, Anton; Bartsch, Tillmann	Zu einer neuen Strukturierung des Sicherungsverwahrungsrechts – Beendigung gesetzgeberischer Flickschusterei mit Rechtsgewinn an Rechtsstaatlichkeit und Sicherheit ist Gebot der Stunde, in Goltdammer's Archiv für Strafrecht 2008, pp. 655-668
Kröber, Hans-Ludwig	Gang und Gesichtspunkte der kriminalprognostischen psychiatrischen Begutachtung, in Neue Zeitschrift für Strafrecht 1999, pp. 593-599
Lackner, Karl; Kühl, Kristian	Kommentar zum Strafgesetzbuch, 27. Edition, Munich 2011
Laufhütte, Heinrich Wilhelm; Rissing-van Saan; Tiedemann, Klaus; (eds.)	Leipziger Kommentar, Strafgesetz, Volume 3, 12. Edition, Berlin 2008 (Cited: LK/*Author*)
Leipold, Klaus	Das Urteil des Bundesverfassungsgerichts zur Sicherungsverwahrung, in Neue Juristische Wochenschrift-Spezial 2011, pp. 312-313
Lemberger, Friedrich	Die kriminologische Wirklichkeit des gefährlichen Gewohnheitsverbrechers, Munich 1962
Leygraf, Norbert; Nowara, Sabine	Prognosegutachten. Klinische-psychiatrische und psychologische Beurteilungsmöglichkeiten der Kriminalprognose, in Kriminalprognose. Alkoholbeeinträchtigung – Rechtsfragen und Begutachtungsprobleme, edited by Christel Frank and Gerhart Harrer, Berlin et al. 1992, pp. 43-53
Livingstone, Stephen; Owen, Tim; MacDonald, Alison	Prison Law, 4. Edition, Oxford et al. 2008
Lobe, Adolf	Die Maßregeln der Besserung und Sicherung nach dem Entwurf eines StGB, in Juristische Wochenschrift 50 (1921), pp. 786-789.

Marshall, Peter	An analysis of preventive detention for dangerous offenders, in 13. Volume of Auckland University Law Review 2007, pp. 116-143
Ministry of Justice	Offender management statistics quarterly bulletin, prison population tables, updated 25.01.2012, last accessed on 29.02.2012 at http://www.justice.gov.uk/publications/statistics-and-data/prisons-and-probation/oms-quarterly.htm
	LASPO Amendments: Review of Indeterminate Sentences for Public Protection (IPPs); clarifying the law on self defence; and increasing the Magistrates' Court fine limit, 2011, last accessed on 29.02.2012 at http://www.justice.gov.uk/downloads/publications/bills-acts/legal-aid-sentencing/ipp-review-impact-assessment.pdf
Mittelstädt, Otto	Gegen die Freiheitsstrafen, 2. Edition, Leipzig 1879
Mischke, Ulrich	Die Sicherungsverwahrung, also Diss. Iur. (Bochum 2010), Holzkirchen 2010
Monahan, John	The future of violent risk management, in The future of imprisonment, edited by Michael Tonry, Oxford et al. 2004, pp. 237-261
Morgan, Rob	England and Wales, in Imprisonment Today and Tomorrow: International Perspectives on Prisoner's Rights and Prison Conditions, edited by Dirk Van Zyl Smit and Frieder Dünkel, 2. Edition, The Hague et al. 2001, pp. 211-237
Müller, Verena Michaela	Die Verfassungsmäßigkeit des § 66 b Abs. 3 StGB im Licht der Entscheidung des EGMR vom 17.12.2009, in EuR 2011, pp. 418-431
Mushoff, Tobias	Strafe – Maßregel – Sicherungsverwahrung, also Diss. Iur. (Bielefeld 2007), Frankfurt a. M. et al. 2008
Nowara, Sabine	Gefährlichkeitsprognose bei Maßregeln. Zur Güte von Prognosegutachten und zur Frage der Legalbewährung, in "...weil er für die Allgemeinheit gefährlich ist!" edited by Stefan Barton, Baden-Baden 2006, pp. 175-185
Nowara, Sabine; Pierschke, Ralph	Kriminalprognose: Die Qualität von Gutachten/Gutachtern, in 50 Jahre Grundgesetz – kritische Würdigung, europäische Bezüge in der Strafgerichtsbarkeit, edited by Strafverteidigervereinigungen, Organisationsbüro der Strafverteidigervereinigungen, Cologne 2000, pp. 241-249
Nußstein, Karl	Das Therapieunterbringungsgesetz – Erste Erfahrungen aus der Praxis, in Neue Juristische Wochenschrift 2011, pp. 1194-1197
Oetker, Friedrich	Maßregeln der Besserung und Sicherung – Gemeinschädliches Verhalten, in Der Gerichtssaal 92 (1926), pp. 1-52.
Padfield, Nicola	Amending the Parole Board Rules: a sticking plaster response?, in Public Law 2011, pp. 691-698
	Parole and early release: the Criminal Justice and Immigration Act 2008 changes in context, in Criminal Law Review 2009, pp. 166-187

Parole Board for England and Wales	Parole Board, updated 10.01.2012, last accessed on 29.02.2012 at http://www.justice.gov.uk/about/parole-board/index.htm
	Annual Report and Accounts 2010/2011, London 2011, last accessed on 29.02.2012 at http://www.justice.gov.uk/downloads/publications/corporate-reports/parole-board/parole-board-annual-reports-2010-11.pdf
	Members, updated 6.12.2011, last accessed on 29.02.2012 at http://www.justice.gov.uk/about/parole-board/parole-board-members/index.htm
Peglau, Jens	Das BVerfG und die Sicherungsverwahrung – Konsequenzen für Praxis und Gesetzgebung, in Neue Juristische Wochenzeitschrift 2011, pp. 1924-1927
Radtke, Henning	Konventionswidrigkeit des Vollzugs erstmaliger Sicherungsverwahrung nach Ablauf der früheren Höchstfrist? - Innerstaatliche Wirkungen und Folgen des Urteils des EGMR vom 17. 12. 2009, in Neue Zeitschrift für Strafrecht 2010, pp. 537-546
Rasch, Wilfried; Konrad, Norbert	Forensische Psychiatrie, 3. Edition, Stuttgart 2004
Riebe, Patrick	Die Verfassungsmäßigkeit der Sicherungsverwahrung, also Diss. Iur. Göttingen 2009
Roxin, Claus	Strafrecht, Allgemeiner Teil, Volume 1, 4. Edition, Munich 2006
Samuels, Alec	Imprisonment for public protection IPP - what is it all about?, in Criminal Lawyer 2008, pp. 7-9
Schall, Hero; Schreibauer, Marcus	Prognose und Rückfall bei Sexualstraftätern, in Neue Juristische Wochenschrift 1997, pp. 2412-2420
Schewe, Jörg	Die Geschichte der Sicherungsverwahrung, also Diss. Iur. Kiel 1999
Schneider, Ursula	Nachträgliche Sicherungsverwahrung: Ein kriminalpolitischer Sündenfall?, in Kriminalpolitik und ihre wissenschaftlichen Grundlagen – Festschrift für Professor Dr. Hans-Dieter Schwind zum 70. Geburtstag, edited by Thomas Feltes et al., Heidelberg 2006, pp. 413-430
Schönke,Adolf; Schröder, Horst	Kommentar zum Strafgesetzbuch, 28. Edition, München 2010 (Cited: Schönke/Schröder/*Author*)
Sentencing Guidelines Council	Dangerous Offenders - Guide for sentencers and practitioners, 2. Version 2008, last accessed on 29.02.2012 at http://sentencingcouncil.judiciary.gov.uk/docs/web_Dangerous_Offenders_Guide_for_Sentencers_and_Practitioners.pdf
Statistisches Bundesamt	Strafgefangene nach Geschlecht, Alter und Art des Vollzugs, voraussichtliche Vollzugsdauer, 2011, last accessed on 29.02.2012 at http://www.destatis.de/jetspeed/portal/cms/Sites/destatis/Internet/DE/Content/Statistiken/Rechtspflege/Justizvollzug/Tabellen/Content50/Strafgefangene.psml;

	English version including data until 2010 at http://www.destatis.de/jetspeed/portal/cms/Sites/destatis/Internet/EN/Content/Statistics/Justice/ExecutionSentences/Tables/Content50/ConvictedPrisoners,templateId=renderPrint.psml
Steadman, Henry J.; Cocozza, Joseph J.	Careers of the criminally insane: excessive social control of deviance, Lexington (Mass.) et al. 1974
Sturm, Dietrich	Die Sicherungsverwahrung in Deutschland und England, also Diss. Iur. (Bochum 2010), Holzkirchen 2010
Thomas, David	Sentencing Referencer 2005/2006, 2. Edition, London 2005
van Zyl Smit, Dirk	Taking life imprisonment seriously in national and international law, The Hague 2002
van Zyl Smit, Dirk; Ashworth, Andrew	Disproportionate sentences as human rights violations, in Modern Law Review 2004, 67(4) pp. 541-560
von Heintschel-Heinegg, Bernd	Beck'scher Online-Kommentar StGB, 17. Edition, Munich 2011 (Cited: BeckOK/*Author*)
von Hirsch, Andrew; Ashworth, Andrew	Extending Sentences for Dangerousness: Reflections on the Bottoms-Brownsword Model, in Principled Sentencing, 3. Edition, edited by Andrew von Hirsch, Andrew Ashworth and Julian Roberts; Oxford and Portland, Oregon 2009
	Proportionate Sentencing: Exploring the Principles, Oxford et al. 2005
	Protective sentencing under section 2(2)(b): the criteria for dangerousness, in Criminal Law Review 1996 pp. 175-183
von Liszt, Franz	Der Zweckgedanke im Strafrecht, in Strafrechtliche Aufsätze und Vorträge, Volume 1 and 2, Berlin 1905
von Liszt, Franz; Schmidt, Eberhard	Lehrbuch des deutschen Strafrechts, Volume 1, 26. Edition, Berlin et al. 1932
Volckart, Bernd	Praxis der Kriminalprognose, Munich 1997
Ward, Richard; Bettinson, Vanessa	Criminal Justice and Immigration Act 2008: A practitioner's guide, Bristol 2008
Wüstenhagen, Peggy	Sicherungsverwahrung gegen Heranwachsende und Jugendliche, also Diss. Iur. (Passau 2008), Marburg 2008
Youth Justice Board for England and Wales	Criminal Justice Act 2003, 'Dangerousness' and the New Sentences for Public Protection - Guidance for youth offending teams, 2006, last accessed on 29.02.2012 at http://www.yjb.gov.uk/Publications/Resources/Downloads/CJA2003GuidanceforYOTs0406.pdf
Zimmermann, Gernot; Smok, Robin	Überblick zur Rechtsproblematik der Sicherungs-verwahrung im Spiegel der Rechtsprechung des EGMR, in Fachdienst Strafrecht 2011, 314190

Glossary

BGH	*Bundesgerichtshof* (Federal Court of Justice)
BVerfG	*Bundesverfassungsgericht* (Federal Constitutioal Court)
CJA	Criminal Justice Act
CJIA	Criminal Justice and Immigration Act
CSA	Crime (Sentences) Act
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EWCA Crim	Criminal Division of the Court of Appeal of England and Wales
GVG	*Gerichtsverfassungsgesetz* (Judicature Act)
JGG	*Jugendgerichtsgesetz* (Juvenile Court Act)
OLG	*Oberlandesgericht* (Higher Regional Court)
PBR	Parole Board Rules
PCCSA	Powers of Criminal Court (Sentencing) Act
RStGB	*Reichsstrafgesetzbuch* (Imperial Criminal Code)
StGB	*Strafgesetzbuch* (Criminal Code)
StPO	*Strafprozessordnung* (Code of Criminal Procedure)
ThUG	*Therapieunterbringungsgesetz* (Violent Offenders (Custodial Therapy) Act)
UKHL	Appellate Committee of the House of Lords of the United Kingdom
UKSC	Supreme Court of the United Kingdom

Table of cases

Judgments before the European Court of Human Rights

All judgements of the ECtHR are accessible via http://cmiskp.echr.coe.int/tkp197/search.asp?sessionid=84455236&tskin=hudoc-en (Last accessed on 29.02.2012)

Case title	Source	Date
B v Germany	61272/09	19.04..2012
G v Germany	65210/09	07.06.2012
Grosskopf v Germany	24478/03	21.10.2010
Haidn v Germany	6587/04	13.01.2011
Jendrowiak v Germany	30060/04	14.04.2011
K v Germnay	61827/09	07.06.2012
Kallweit v Germany	17792/07	13.01.2011
Kronfeldner v Germany	21906/09	19.01.2012
M v Germany	19359/04	17.12.2009
Mautes v Germany	20008/07	13.01.2011
OH v Germany	4646/08	24.11.2011
S v Germany	3300/10	28.06.2012
Schummer v Germany	27360/04 and 42225/07	13.01.2011
Vinter and Others v The United Kingdom	66069/09; 130/10 and 3896/10	17.01.2012

Judgements of Court in the United Kingdom

Judgements of the Supreme Court/House of Lords of the United Kingdom

Case title	Source	Date
Smith (Nicholas)	[2011] UKSC 37	20.07.2011
R (on the application of Wells) v Parole Board	[2009] UKHL 22	06.05.2009

Judgements of the Court of Appeal (Criminal Division) in England and Wales

Case title	Source	Date
Attorney General's Reference No. 3 of 2004 (Andrew Frank Akuffo)	[2004] EWCA Crim 1532	18.06.2004
Attorney-General's Reference No. 32 of 1996 (Steven Alan Whittaker)	[1997] 1 CrAppR (S) 261	18.07.1996
Bowler (Kevin)	(1994) 15 CrAppR (S) 78	07.05.1993
Chapman (Jamie Lee)	[2000] 1 CrAppR 77	22.07.1999
Considine and Davis	[2007] EWCA Crim 1166	06.06.2007
Costello (Patrick Stuart)	[2006] EWCA Crim 1618	20.06.2006
Crow (William John) and Pennington (Derek)	[1995] 16 CrAppR (S) 409	01.08.1994
D (Hollie Louise)	[2005] EWCA Crim 2292	13.09.2005
Fishwick (Julian James)	[1996] 1 CrAppR (S) 359	18.08.1995
Hodgson (Rowland Jack Forster)	(1968) 52 CrAppR 113	26.09.1967
Hogg (Brian Maurice)	[2007] EWCA Crim 1357	02.05.2007
Ings (David Luke)	[2006] EWCA Crim 2811	06.11.2006
Johnson (Paul Anthony) and Others	[2006] EWCA Crim 2486	20.10.2006

Kehoe (Bridie Joanna)	[2008] EWCA Crim 819	08.04.2008
Kelly (Edward) and Sandford	[2000] QB 198	15.12.1998
Lang and Others	[2005] EWCA Crim 2864	03.11.2005
McDonagh (Martin Dean)	[2005] EWCA Crim 2742	06.10.2005
McNee (Michael) and Others	[2007] EWCA Crim 1529	03.05.2007
MJ	[2012] EWCA Crim 132	09.02.2012
Nelson (Patrick Alan)	[2001] EWCA Crim 2264	24.10.2001
Offen No 1	[2000] 1 CrAppR (S) 565	28.10.1999
Offen No 2 and Others	[2001] 1 WLR 253	09.11.2000
S and Others	[2005] EWCA 3616	19.12.2005
Smih (Nicholas)	[2010] EWCA Crim 246	27.01.2010
Spear (Steven Kenneth)	[1995] 16 CrAppR (S) 242	28.06.1994
Szczerba (Ian Michael)	[2002] 2 CrApp R (S) 387	06.02.2002
Turner (Ian)	[2000] 2 CrAppR (S) 472	28.03.2000
Turner (Mark)	[2006] EWCA Crim 63	18.01.2006
VG	[2012] EWCA Crim 73	17.01.2012
Virgo (Trevor)	(1988) 10 CrAppR (S) 427	31.10.1988
Wilkinson (Edward John) and Others	(1983) 5 CrAppR (S) 105	28.03.1983

Judgements/Decisions of court in Germany

Judgements/Decisions of the Federal Constitutional Court

Date of judgement/decision	Source	File reference
Judgement on 04.05.2011	BVerfGE 128, 326= NJW 2011, 1931	2 BvR 2365/09 et al.
Decision on 05.08.2009	NJW 2010, 1514	2 BvR 2098 and 2633/08
Decision on 23.08.2006	NJW 2006, 3483	2 BvR 226/06
Judgement on 10.02.2004	BVerfGE 109, 190= NJW 2004, 750	2 BvR 834/02 and 1588/02
Judgement on 05.02.2004	BVerfGE 109, 133= NJW 2004, 739	2 BvR 2029/01

Judgements/Decisions of the Federal Court of Justice

Date of judgement/decision	Source	File reference
Decision on 09.11.2010	BGHSt 56, 73= NJW 2011, 240	5 StR 394/10, 440/10 and 74/10
Decision on 12.05.2010	NStZ 2010, 567	4 StR 577/09
Judgement on 11.05.2005	NJW 2005, 2022	1 StR 37/05
Judgement on 12.12.1979	NJW 1980, 1055	3 StR 436/79
Judgement on 25.05.1971	BGHSt 24, 160= NJW 1971, 1416	1 StR 40/71

Decisions of Higher Regional Courts

Date of decision	Source	File reference
OLG Karlsruhe, decision on 15.07.2010	Justiz 2010, 350	2 Ws 458/09
OLG Frankfurt, decision on 24.06.2010	NStZ 2010, 573	3 Ws 485/10
OLG Stuttgart, decision on 01.06.2010	Justiz 2010, 346	1 Ws 57/10
OLG Koblenz, decision on 30.03.2010	JR 2010, 306	1 Ws 116/10
OLG Brandenburg, decision on 06.01.2005	NStZ 2005, 272	2 Ws 229/04

A. Introduction

Imagine the following three offenders: The first is a violent offender. He has committed a number of violent offences like robbery, grievous bodily harm, or attempted murder. Right after his release from prison, he committed another offence and therefore spent most of his life in prison.[1] The second offender committed a series of rapes and sexual assaults on girls.[2] He takes photographs and films the abuse.[3] The third offender committed only one, but very dreadful offence. He developed a sexual interest in his own two-year old son whom he then raped causing very serious harm to the boy.[4] In all these cases, the courts found that the offender was a serious risk to the public because of a certain tendency (the German provisions use the word "propensity") to commit further offences and therefore poses a constant threat to society. This thesis aims to present the way the penal system deal with this specific kind of persistent, dangerous offenders in Germany, England and Wales.[5] The group exists in every society and different approaches have been taken to protect the public.[6] The need to deal with these offenders reaches back to the roots of mankind and early penalties included death penalty, deportation to colonies and servitude on galleys. Yet, eventually indeterminate imprisonment replaced all of the former penalties and is still used today in England and Germany.[7]

The English preventive sentence consists of an often undetermined sentence, which already includes a determined period appropriate for the gravity of the most recent offence (minimum term). On the other hand, the German system combines two differing sanctions, usually imposed in one judgement. One determined sentence and one indeterminate incapacitation order,[8] the so-called *Sicherungsverwahrung*. The first term serves as retribution and is determined taking the seriousness of the offence into account, while *Sicherungsverwahrung* is not seen as a penalty, but a measure to protect society from dangerous offenders. It is consequently indeterminate and will last as long as the offender posses a threat to the public.

---

1 See for example of typical violent cases: Smith [2010] EWCA Crim 246 or M v Germany, (Application no. 19359/04), 17.12.2009.

2 For example: VG [2012] EWCA Crim 73 or Jendrowiak v Germany (Application no. 30060/04) 14.4.2011.

3 VG [2012] EWCA Crim 73 para. 3.

4 MJ [2012] EWCA Crim 132.

5 Since the English and the Welsh legal system form an unit, the findings with regard to England are equally applicable to Wales. For the sake of crispness of expression Wales is not explicitly mentioned hereafter.

6 Marshall 13 AuckULR 2007, 116ff. (127).

7 Kern 1997, 14.

8 Term taken from Bohlander Translation of the German Criminal Code (last accessed 30.03.2012); note that the European Court of Human Rights uses the term "preventive detention", cf M v Germany, (Application no. 19359/04), 17.12.2009.

Both systems share the difficulty of balancing the need for protecting the public with the rights of the offenders. Therefore, the preventive sentencing provisions have been subject to consistent reforms which often had the main purpose to seem though on crime and calm public outrage after particular grave offences.[9] In this context, the thesis looks especially at the retroactive abolishment of the former maximum time limit of ten years for preventive imprisonment in Germany. It was challenged before the national courts and led to a judgement of the European Court of Human Rights with major consequences for the interpretation of the *Sicherungsverwahrung*.

Taking the implications of these different judgements on national and European level into account, the thesis concludes with a reform proposal which derives from a legal comparison of the English and the German system. Since the group of dangerous offenders is very small and the assessment of dangerousness contains several difficulties, the reform should restrict the use of the severe sentence and improve the conditions for the imprisonment aiming to release the offender as soon as possible. This means in particular a clear demand to offer individually tailored therapy to reduce the dangerousness of the offender. Although not every therapy might be successful, it is necessary to take an active approach towards these offenders rather than simply confining them for the rest of their lives as it is mostly done so far by the penal systems in England and Germany.

[9] Ashworth 2010, 238; Mischke 2010, 58.

B. Preventive imprisonment in England and Wales

I. Development of preventive imprisonment until the 1990s

The introduction of the Prevention of Crime Act 1908 marks the beginning of the modern approach of preventive sentencing in England. It was the answer to the pressing need for public protection from persistent thieves and robbers introducing the so-called "double track" system.[10] Not only is the name similar to the German system used today but also the structure of the sentences.[11] It allowed courts to add to the normal, punitive sentence a protective sentence from five to ten years, if the offender had already been convicted of three felonies.[12] The mere focus on previous convictions as a criterion to determine the justification of these exceptional sentences led to a number of impositions of preventive imprisonment for minor offences, which made adjustments necessary. Therefore, the new Home Secretary Winston Churchill issued a circular qualifying the imposition by stating that a "serious aggregation" with regard to the offences and "a serious danger to society" by the offender were necessary.[13]

Later, the Criminal Justice Act (CJA) 1948 reformed the area of preventive imprisonment. Contrary to the sentences after the 1908 Act the new sentences were now a substitute, instead of an addition, for the regular sentences, lasting from 5 to 14 years, only applicable to offenders aged 30 or over. It nevertheless produced the same results punishing minor offenders as well as the targeted "criminal professionals".[14]

This shortcoming was not resolved by the CJA 1967, even amended by the Powers of Criminal Courts Act 1973. Also directed at persistent, serious offenders, it replaced the former sentences with a form of extended imprisonment which in rare cases could even exceed the statutory maximum sentence and prolong the period on probation to support rehabilitation.[15]

This was again repealed in the 1990s until the turn of the millennium by the CJA 1991 and the Crime (Sentences) Act (CSA) 1997, which were in return repealed by the Powers of Criminal Courts (Sentencing) Act (PCCSA) 2000.[16]

II. II. Preventive sentences immediately before the Criminal Justice Act 2003

The PCCSA 2000 sets out four different types of preventive sentencing for sexual and violent offences:

---

[10] van Zyl Smit 2002, 86.

[11] See C.II.1. Two-track system.

[12] Ashworth 2010, 196.

[13] Ashworth 2010, 196.

[14] Hammond/Chayen 1963, 11.

[15] Easton/Piper 2008, 151.

[16] van Zyl Smit 2002, 97ff.

1) Longer than commensurate sentences;
2) Mandatory (minimum) sentences, especially automatic life sentences;
3) Discretionary life sentences and
4) An earlier form of the still used extended sentence

For all offences committed before 05 April 2005, these sentences are still applicable. For the offences afterwards the CJA 2003 repealed most of the provisions. [17]

1) Longer than commensurate sentences

This type of sentence is set out in ss 1(2)(b) and 2(2)(b) CJA 1991, later consolidated in ss 79(2)(b) and 80(2)(b) PCCSA 2000. It empowers the courts to impose terms longer than the regularly proportionate terms if it believes it is necessary to protect the public from serious harm. In any case, the sentences must not go beyond the maximum term of the offence and can only be used in cases of violent or sexual offences. The key definitions "sexual offence", "violent offence" and "protecting the public form serious harm" can be found in s 161 PCCSA 2000. While "sexual offence" is fairly strictly defined listing several offences from provisions such as the Protection of Children Act 1978, the definition of violent offences is wider and less restricted including minor offences causing similar issues as with the previous attempts at preventive sentencing. [18] A violent offence is defined as "an offence which leads, or is intended or likely to lead, to a person's death or to physical injury to a person" including Arson (s 161(3) PCCSA 2000). Furthermore, according to s 161(4) PCCSA 2000 serious harm to the public might be the death or the serious physical or psychological personal injury of a member of the public resulting from a future offence of the violent or sexual offender.

Despite the improvement to provide definitions and therefore restrictions to the use of these sentences the legislator left the courts with two key difficulties which had to be resolved in the following years. The first evolved around the question of determining the risk of future offences. Were only previous conviction to be taken into account or was a medical examination necessary as well? [19] Is the prediction based on a "less robust than average" victim [20] or on an "average victim" [21]? How do the courts assess the probability of a new offence occurring? These questions were not always answered consistently and different guidance was given. [22]

---

17 Ashworth 2010, 228.

18 Clarkson HowJ 1997 284 (286).

19 Clarkson HowJ 1997 284 (287).

20 So in Bowler (1994) 15 CrAppR (S), 78 (82).

21 So in Fishwick [1996] 1 CrAppR (S), 359 (362).

22 Easton/Piper 2008, 152; see B.3.5. Assessing the dangerousness.

Secondly, the question arose how the length of the protective sentences was to be determined, particularly what kind of relationship, if any, exists between this additional and the regular, punitive part of the sentence determined by the seriousness of the offence. In *Crow and Pennington*[23] the Court of Appeal declared both a life sentences and the maximum sentence inappropriate in most cases, although admitting that it would allow the only total protection from an established harm by the offender. Since there should be a "reasonable relationship" between the punitive and the protective part of the sentence, the mentioned sentences are usually too long.[24] The Court of Appeal therefore states that an enhancement of up to 50 per cent additionally to the appropriate term may be adequate, whereas in between 1993 to 1997 the average added period was 73,5 per cent of the appropriate term.[25]

In *Chapman*[26] the Court of Appeal imposed a sentence of a total of ten years consisting of a three years commensurate term and a seven years additional term on a defendant for arson. It abandoned the former approach and declared that the length of the protective sentences was determined by the need for public protection and thus independent from the punitive part of the sentence.[27] This change was also approved by the academic literature, since just a few more years seemed ineffective for public protection and the Court of Appeal had been criticized for upholding sentences which have been regarded as too short for the purpose of preventive sentences.[28]

Despite this change in law, the longer than commensurate sentence was never widely used and narrowly interpreted by the courts. Additionally the statistics indicate a judicial preference for the extended sentences over the longer than commensurate sentences,[29] because, in the eyes of the courts, it serves the aim of Parliament better to shorten the custodial terms for most offenders and restrict the use of protective sentences to a minority of dangerous offenders.[30] The longer than commensurate sentences was consequently repealed by the CJA 2003.

---

23 Crow and Pennington (1995) 16 CrAppR (S) 409.

24 Crow and Pennington (1995) 16 CrAppR (S) 409 (411f.).

25 Clarkson HowJ 1997 284 (289).

26 Chapman [2000] 1 CrAppR 77.

27 Chapman [2000] 1 CrAppR 77 (83).

28 Easton/Piper 2008, 153 with further references.

29 Henham CrimLR 2001 693 (700ff.).

30 Von Hirsch/Ashworth CrimLR 1996 175 (182f.).

2) Mandatory (minimum) sentences

The second kind of sentencing used for public protection is the mandatory (minimum) sentences including automatic life sentences. The statutory basis for these obligatory sentences is laid down in ss 1-4 of the CSA 1997, later re-enacted in ss 109-111 PCCSA 2000.

S 109 PCCSA 2000 contained the automatic life sentences which was aimed at second time offenders aged 18 or over. Both offences must be "serious offences" as defined in a list in s 109(5) PCCSA 2000. This list includes specified offences from murder related offences like attempt, conspiracy or incitement (a) and manslaughter (c) to rape (e) and other sexual offences (f-fg) and finally offences involving a firearm (f-h). It was repealed by the CJA 2003.

However, ss 110 and 111 of the 2000 Act, which aim at persistent offenders of Class A drug trafficking and domestic burglary, are still in force. They follow the same structure. Subsection 1 sets out that, unlike s 109 PCCSA 2000, these sections only apply in cases, in which the offender has already been convicted for two similar offences. Additionally the second offence must have been committed after the conviction for the first offence. Subsection 2 sets out the mandatory minimum sentences of imprisonment for the third offence: Seven years for a Class A drug trafficking offence and three years for the third domes-tic burglary. And finally, subsections 2A, 5 and 6 provide the necessary definitions.

Yet, all three mandatory sentences are just presumptive in the sense that exceptions are possible. The key words are "exceptional circumstances" in s 109 PCCSA 2000 and "unjust to do so in all circumstances" in ss 110 and 111 PCCSA 2000, which introduced difficulties for the court to determine when these circum-stances were present.[31] In *Offen No 1*[32] the offender committed an amateurish robbery in bedroom slippers without any violence. He admitted the offence to his friends, apologized to the victims and the loot was soon discovered, yet it was a substantial amount of money and in the view of the Court of Appeal a planned robbery which left the victims in fear. The Court quoted Lord Bingham CJ in *Kelly and Sandford*[33] defining exceptional as "out of the ordinary course, or unusual, or special, or uncommon" and following this did not find exceptional circumstances in this case. In contrast, in *Offen No 2*[34] the Court of Appeal reversed the earlier finding, because the insignificant risk of great harm to the public through Offen's actions consti-tuted "exceptional circumstances". In *Turner*[35] the outcome was similar determining that the offender did not represent a significant risk to the public considering the gap of 30 years between the two offences. The courts reached similar results in the interpretation of the "get-out" clauses in ss 110-111 PCCSA 2000.

---

31 Easton/Piper 2008, 154.

32 Offen No 1 [2000] 1 CrAppR (S) 565.

33 Kelly and Sandford [2000] QB 198.

34 Offen No 2 [2001] 1 WLR 253.

35 Turner [2000] 2 CrAppR (S) 472.

In *McDonagh*[36] a "substantial gap" was found after ten years had passed and in another *Turner* case[37] the minimum sentences was "unjust" because the offender was not a commercial drug dealer, but a middleman for friends.

The courts are said to use these exceptions to circumvent the restriction of judicial discretion in these provisions and avoid the injustice produced by mandatory sentences, since otherwise severe sentences are likely to be imposed on minor offenders.[38] In addition, the sentences have not proven effective as a deterrent for offenders and are seen as a mere political instrument to demonstrate powerful action against persistent criminals, especially since a sentence of at least seven years would be imposed in most cases of a third time drug trafficking offence anyway.[39] Despite those objections resulting in the rare use of the sentences, only the automatic life sentence is repealed by the CJA 2003, whereas ss 110-111 PCCSA 2000 remain in force.[40]

3) Discretionary life sentences

Also still in force, but certainly narrowed in its scope by the CJA 2003 is the discretionary life sentence. It is only available for offences that carry a life sentences as a maximum sentences, which are nearly 70 offences in England.[41] When imposing a life sentences, the judge is supposed to set a minimum term unless the seriousness of the offence is particularly high (s 82A PCCSA 2000). The criteria for the appropriate use of this severe sentencing power were laid down by the Court of Appeal in *Hodgson*[42] and it must only be used in "the most exceptional circumstances"[43]. First of all, the offence must have been a very grave one. Secondly, the defendant must have an "unstable character" and be likely to commit further offences. Finally, these offences must be "especially injurious" to others.[44] The conditions were further defined over the years. In *Chapman* the Court of Appeal held that the seriousness of the current offence becomes less important the more severe the predicted harm is.[45] The mental stability should usually be

---

36 McDonagh [2005] EWCA Crim 2742.

37 Turner [2006] EWCA Crim 63.

38 Van Zyl Smith/Ashworth MLR 2004, 67(4) 541.

39 Ashworth 2010, 224ff.

40 Easton/Piper 2008, 154f.

41 Easton/Piper 2008, 155f.

42 Hodgson (1968) 52 CrAppR 113.

43 Wilkinson (1983) 5 CrAppR (S) 105 (108).

44 Hodgson (1968) 52 CrAppR 113 (114).

45 Chapman [2000] 1 CrAppR 77 (84).

determined through medical evidence, although conclusions from a history of offending can be sufficient.[46] In *Spear* the Court of Appeal confirmed the requirement of an unstable mind as a general rule, but abandoned the necessity of mental instability in cases of particularly dangerous offers altogether.[47]

However, the introduction of imprisonment for life and for public protection restricted the use of discretionary life sentences to two types of cases. Firstly, the very rare cases in which the court wants to underline the gravity of the offence and base the life sentence on the particular high culpability of the offender, rather than the dangerousness. Secondly, cases involving offences which are not a violent or sexual offences covered by s 225 CJA 2003 and still have a life sentence as the maximum sentence possible, such as Class A drug trafficking.[48] In all other cases the judge should impose one of the new sentences.

4) Extended sentence

The last kind of preventive sentence used before the CJA 2003 is the extension of the period spend on licence after having served the custodial term of the sentence.[49] If the trial judge held the opinion that it is necessary to prolong the period spent on licence, in order to prevent future offences and secure the rehabilitation of the offender, s 85 PCCSA 2000 (as successor of s 44 CJA 1991) provided the statutory basis for that. But this option was only available for violent or sexual offences and the extended period could not exceed ten years for sexual offences and five years for violent offences, but never longer than the maximum sentences of that offence (s 85(4-5) PCCSA 2000. Further guidelines can be found in *Nelson.*[50] The Court of Appeal clarified in this cases that the criteria for the custodial term and the extended period are different. The former was proportionate to the seriousness and the latter determined by a prediction of future harm and therefore the extension period may well exceed the custodial term. Although no strict proportionality between both parts is required, it has some influence on the total sentence.[51]

As mentioned above, the courts used this power frequently and therefore s 227 CJA 2003 incorporates the extended sentence in a slightly different form into the new dangerous offenders' provision of the CJA 2003.

III. Preventive sentences after the Criminal Justice Act 2003

It has already been said that the CJA 2003 introduced some major changes to the sentencing of dangerous offenders for public protection. In ss 224-236 chapter 5 of part 12 CJA 2003 three (new) types of sentences are introduced: imprisonment for life, imprisonment for public protection and a continued form of the

46 Virgo (1988) 10 CrAppR (S) 427 (428).

47 Spear [1995] 16 CrAppR (S) 242.

48 Easton/Piper 2008, 155.

49 See Hungerford-Welch 2009, 817-819 for more on early release.

50 Nelson [2001] EWCA Crim 2264.

51 Nelson [2001] EWCA Crim 2264 para. 19ff.

extended sentence. This new regime of sentences is restricted to be used only for the so-called "specified" or "specified serious" offences, which are committed after 4 April 2005.[52] A specified offence is one of 166 violent or sexual offences listed in schedule 15 CJA 2003 (s 224(1) and (3) CJA 2003). Within this schedule the "specified serious" offences are the ones that are punishable with at least ten years' imprisonment or life imprisonment if regular sentencing provisions applied (s 224(2) CJA 2003). Furthermore, if the conditions for one of the three types of sentences and a mental hospital order following s 37 Mental Health Act 1983 are met, the court may choose which one it wants to impose on the offender.[53] Although the dangerous offender provisions in the 2003 Act were aimed at a small number of very dangerous offenders[54], the long list in schedule 15 in combination with no judicial discretion to impose the sentences, once the trial judge believed the offender is dangerous, led to rising numbers of prisoners being sentenced under the new provision.[55] Moreover s 229(3) CJA 2003 contained a strong presumption of dangerousness once the offender had already been convicted for a specified offence, which increased the numbers of convictions even for relatively minor offences furthermore and made the introduction of the Criminal Justice and Immigration Act (CJIA) 2008 necessary.[56] Corresponding to these difficulties the 2008 Act introduced a new seriousness threshold, repealed the presumption of dangerousness and made the imposition of imprisonment for public protection and the extended sentence discretionary.[57]

1) Imprisonment for life

The imprisonment (or custody[58]) for life replaced the earlier discussed life imprisonment for cases of dangerous offenders. It finds its statutory basis in s 225 CJA 2003 which sets out four conditions for the imposition of this sentence. It is only available for offenders who have committed a serious offence within the meaning of schedule 15 CJA 2003 and for which the regular maximum sentence is life imprisonment (s 225(1)(a) and (2)(a) CJA 2003). These conditions are quite straightforward and need no further explanation. More difficulties and limitations derive from the conditions in s 225(1)(b) and (2)(b) CJA 2003, which require the trial judge to assess the dangerousness of the offender and whether the seriousness of the offences (and one or more associated offences) justifies the imposition of imprisonment for life. Because the assessment of dangerousness plays a major part in all three newly introduced sentences, it will be

52 Sentencing Guidelines Council 2008, 5 (Last accessed on 29.02.2012).

53 Sentencing Guidelines Council 2008, 8 (Last accessed on 29.02.2012).

54 Home Office 2002, 88 para. 5.7 (Last accessed on 29.02.2012).

55 Ashworth 2010, 228f.

56 Carter 2007, 50 (Last accessed on 29.02.2012).

57 Easton/Piper 2008, 160f.

58 Offenders aged over 18 but under 21 are sentenced to custody for life or detention in a young offender institute. After s 61 Criminal Justice and Court Service Act 2000 comes into force, they will be sentenced to imprisonment for life, too.

discussed separately below. It is important to note that, unlike the other two types of sentences introduced by the CJA 2003, imprisonment for life is a mandatory sentence even after the amendment through the CJIA 2008. Hence the trial judge has no discretion once the four conditions are met. Only the third condition softens this and opens the imposition partly to the discretion of the sentencing court. Yet it carries the same difficulties which already troubled the application of the discretionary life sentence.[59] When is the imposition of a life sentence justified?

In *Lang,* Rose LJ argued that the previous case law still applied since it was not Parliament's intention to introduce "a new, more restrictive, criterion for seriousness relating it solely to the offence rather than, also, to the dangerousness of the offender".[60] Nevertheless, the Court of Appeal subsequently emphasised that imprisonment for life may only be imposed because of an extraordinarily grave offence and high culpability of the offender without regard to his dangerousness. For cases which do not meet this threshold, but in which the offender still poses a threat to the public, imprisonment for public protection offers sufficient future protection.[61]

Despite the change in this area of case law, in *McNee* the Court of Appeal confirmed the earlier judgement in *Whittaker*[62] declaring that the condition of mental instability is still required as a general principle, but not an absolute necessity anymore.[63] Although the *McNee* case dealt with a discretionary life sentences because the offence was committed before 2005, it suggests that in most cases the courts will also require mental instability before imposing a sentence of imprisonment for life.[64]

Once a judge has decided imprisonment for life is justified and the other three conditions are met as well, a minimum sentence shall be determined. The Court of Appeal stressed the importance of minimum sentences in *Hogg.*[65] In this case, the Court declared that only in rare and exceptional cases the trial court does not need to set a minimum sentence and dismissed that those circumstances are given in cases in which they are merely based on the extreme dangerousness of an offender.

---

59 Ashworth 2010, 229f.

60 Lang [2005] EWCA Crim 2864 para. 8.

61 Kehoe [2008] EWCA Crim 819.

62 Attorney-General's Reference No. 32 of 1996 (Whittaker) [1997] 1 CrAppR (S) 261 (262).

63 McNee [2008] EWCA Crim 1529 para. 34.

64 Ashworth 2010, 230.

65 Hogg [2007] EWCA Crim 1357 para. 17.

Minimum sentences are so important because s 244 CJA 2003, which orders the regular automatic release after one half of the sentence has been served, does not apply to dangerous offenders convicted to imprisonment for life.[66] Instead the offender may require the Secretary of State to refer his case to the Parole Board[67] to consider an early release only after the minimum period has elapsed (s 28(7) CSA 1997). If the Board is satisfied that the offender does not pose a threat to the safety of the public anymore it will direct the Secretary of State to release him on licence (s 28(5) and (6)(b) CSA 1997). According to s 31 of the 1997 Act this licence will remain in force until the death of the offender.

It should usually be half (only in very exceptional cases more than that[68]) of the determinate sentence which the judge considers appropriate in cases not involving a dangerous offender. The time spent on remand should also be credited.[69]

2) Imprisonment for public protection

Since imprisonment for life is reserved for extraordinarily grave offences with a high culpability of the offender it is not suitable for a large number of dangerous offenders who committed a serious crime which nevertheless did not meet the threshold to justify life imprisonment. Therefore, the Halliday Report suggested a "special" sentence similar to the longer than commensurate sentence. Instead of the regular release on licence after one half of the total sentence has been served, it would have been up to the Parole Board to release the prisoner if they were satisfied further imprisonment is not necessary to protect the public, similar to the system in place for release after the minimum sentence for life imprisonment. Yet after having served the total sentence the prisoner had to be released in any case.[70] The imprisonment for public protection goes beyond these powers.[71] Its purpose is to protect the public from dangerous, violent or sexual offenders and keep them in prison as long as they pose a danger to the public, even if that means they spend the rest of their lives in prison.[72]

Because of the indeterminate nature of this type of imprisonment its use needs to be restricted to a minority of offenders. Yet, before the amendment through the CJIA 2008, s 225(3) CJA 2003 set a mandatory framework for the imposition of imprisonment for public protection, which did not allow the judge to refrain from imposing the special sentence in inappropriate cases and led to a substantial number of these

66 Gibson/Watkins 2004, 147.

67 More information about the Parole Board see D.IV. Conditions for release.

68 See Szczerba [2002] 2 CrAppR (S) 387 (392).

69 Attorney General's Reference No. 3 of 2004 (Akuffo) [2004] EWCA Crim 1532 para. 27.

70 Halliday 2001, para. 4.26ff. (Last accessed on 29.02.2012).

71 Ashworth 2010, 231.

72 Home Office 2002, 95 para. 5.41 (Last accessed on 29.02.2012).

sentences for minor offences with short minimum sentences.[73] Therefore, the 2008 Act changed the former duty of the courts to impose this special sentence into a power to impose it and introduced a fourth condition.[74] According to the amended s 225(1) and (3) CJA 2003, the trial judge may impose imprisonment for public protection, if she or he[75] is convinced that the offender is dangerous, has committed a serious offence as defined in s 224(2) CJA 2003, the imposition of imprisonment for life is not available or not justified, and either the condition in s 225(3A) or (3B) CJA 2003 is fulfilled. The first alternative of the last condition requires an earlier conviction for one of the offences in schedule 15A CJA 2003 which was also introduced by the CJIA 2008 containing 23 particularly serious offences such as murder, manslaughter or rape. If this condition is not fulfilled, the courts can still impose an imprisonment for public protection when the notional minimum term for the current offence is two years or more. Because the regular automatic release after one half of the sentence does not apply to imprisonment for public protection cases, this means that the offence must be serious enough to require at least four years of determinate imprisonment.[76] It aims to reduce the number of imprisonments for public protection in case involving minor offences.[77]

If all the conditions are met, the court has to set a minimum sentence, which should not exceed the maximum sentence of the offence. Like in the case of imprisonment for life, it should do so by considering what the appropriate sentence would be. Half of that notional sentence (with the time spent on remand taken off) will usually be the minimum sentence in these cases (s 82(3) PCCSA 2000). Yet, it is important to note that the dangerousness of the offender, which is already covered by the indeterminate nature of the sentence, must be set aside.[78] Once the minimum term has been served the Parole Board can consider a release on licence, if it is satisfied that the confinement is no longer necessary to protect the public (s 28 CSA 1997). Unlike the licence after a release from life imprisonment, the licence after release from imprisonment for public protection can cease to have effect, if the offender applies to the Parole Board to revise its necessity no earlier than ten years after release from custody and the Parole Board is satisfied the licence is not necessary anymore for public protection (s 31A CSA 1997).

---

73 Carter 2007, 50 (Last accessed on 29.02.2012).

74 Easton/Piper 2008, 160f.

75 Although the author pays regard to sexual equality, hereafter only the male form will be used for the sake of crispness of expression.

76 Gibson/Watkins 2004, 147.

77 Ashworth 2010, 231f.

78 Lang [2005] EWCA Crim 2864 para. 10.

3) Extended sentence

The sentencing provisions dedicated to dangerous offenders in the CJA 2003 also continue the use of extended sentences. Similar to the form used before the 2003 Act, the new sentence allows the court to prolong the period spent on licence. Just as in cases of imprisonment for public protection, the CJIA 2008 abolished the mandatory framework of the extended sentences, so that the courts do no longer have the duty, but the discretion to use this power. The 2008 Act also introduced the same fourth condition as for imprisonment for public protection to restrict its use.[79]

Now s 227 CJA 2003 requires four conditions before an extended sentence may be imposed:

- Firstly the offence must be a specified offence listed in schedule 15 CJA 2003. Differently from the other two types of sentences the offence does not need to be additionally serious, i.e. punishable with at least ten years or life imprisonment. Therefore all 166 offences in schedule 15 CJA 2003 can attract this sentencing power.
- The rest of the conditions follow the structure of imprisonment for public protection: The offender must be dangerous, life imprisonment is not available or not justified, and the offender must either have been already convicted for an offence under schedule 15A CJA 2003 or the current offence must be serious enough to justify at least four years of determinate imprisonment under regular circumstances (s 227 CJA 2003).

If these conditions are met and the court wishes to impose an extended sentence, it must fix a sentence which adds to the appropriate custodial term an "extension period" considered to be necessary to protect the public from future offences (s 227(2C) CJA 2003). Additionally there are further restrictions regarding the length of both parts of the sentence. The appropriate custodial term is defined in s 227(3) CJA 2003, referring to s 153(2) of the same Act as the shortest term commensurate for the seriousness of the offence. It should usually be at least four years because of the condition in s 227(2B) CJA 2003. Only if the court relies on a previous conviction (s 227(2A) CJA 2003), the custodial term may be shorter, but never less than twelve months (s 227(3)(b) CJA 2003). According to s 227(4) and (5) of the 2003 Act this additional period may last up to five years for violent offences and eight years for sexual offence, but never more than the maximum sentence for the offence. Regarding the ratio between both parts of the sentence, the already discussed *Nelson* judgement[80] is still authoritative. Therefore the protective part may well exceed the punitive part of the sentence because they each serve a different aim.

Before the amendment by the CJIA 2008, different opinions existed when the extension period begins. Thomas proposed that it begins once the offender is released from prison and therefore runs concurrently to a licence resulting from a possible early release. In these cases the extension period does not seem

---

[79] Ashworth 2010, 232f.

[80] Nelson [2002] 1 CrAppR (S) 565 para. 19ff.

necessary, since the Parole Board could only direct the release on licence once it was already satisfied the prisoner does not pose a threat to the public anymore (s 247(3) CJA 2003 before the commencement of the CJIA 2008).[81] Yet, the Court of Appeal decided in the case of *S* that the extension period begins to run after the entire custodial period has elapsed including any period spent on licence. It argued that the extended imprisonment is supposed to prolong the supervision, whereas Thomas' proposal could actually lead to a reduction in cases in which the extension period is shorter than the licence period.[82] Especially since, according to the amended s 227(2) CJA 2003, the offender must be released after one half of his custodial term has elapsed without any discretion of the Parole Board,[83] the Court of Appeal's interpretation appears to be right. Otherwise in all cases with an extension period shorter than half of the custodial term, the "extended" sentence would actually mean a shortening of the period spent on licence and therefore a shorter overall sentence.

4) Preventive imprisonment and juvenile offenders

The preventive sentences introduced by the CJA 2003 are also available for dangerous offenders under 18. Although most of the above is equally applicable on young offenders, there are certain modifications. Instead of imprisonment of life, offenders below the age of 18 must be sentenced to detention for life, once the criteria mentioned in s 226 CJA 2003 are met. Although they are the same compared to imprisonment for life in s 225 of the same Act, the court must pay particular attention to the possibility of imposing a detention of public protection instead and may only use detention for life, if it is absolutely "essential to do so".[84] Detention for public protection is the alternative for imprisonment for public protection and can also be found in s 226 CJA 2003. It requires almost the same conditions, but young offenders can only be sentenced to detention for public protection, if the appropriate term is at least 4 years and therefore the notional minimum term would be two years (s 226(3A) CJA 2003). The alternative requirement of a previous conviction for one of the offences in schedule 15A CJA 2003 does not apply. Everything said before about the detention of public protection is *mutatis mutandis* true for the extended sentences for young offenders in s 228 of the 2003 Act.[85] Yet, even if the young offender committed a serious offence and is found to be dangerous, it still might be inappropriate to impose one of these sentences on him.[86] The use of the dangerous offender provisions might be unnecessary, if the court finds the

81 Thomas 2005, 182ff.; Archbold/Richardson et al. para. 5-288.

82 S [2005] EWCA Crim 3616 para. 15ff.

83 Ward/Bettinson 2008, 32.

84 Costello [2006] EWCA Crim 1618 para. 19.

85 Sentencing Guidelines Council 2008, 9f. (Last accessed on 29.02.2012).

86 Lang [2005] EWCA Crim 2864 para. 17vii.

offender to be likely to mature and change sufficiently during a period of a regular detention.[87] The court should also consider the offender's age, the criminal record, any previously served terms, the number of specified offences committed, the seriousness of the caused harm and the attitude towards the offences.[88] In general, if the court thinks it is nevertheless necessary to impose a preventive sentence, an extended sentence, rather than detention for public protection or even life, seems to be appropriate in most cases involving young offenders.[89]

5) Assessment of dangerousness

Assessing the dangerousness is very problematic and causes numerous difficulties, yet it is a condition which usually triggers the imposition of a dangerous offenders' sentence.[90] The question is what is necessary for an offender to be dangerous and how do courts determine that the offender in question meets this threshold.

a) Dangerousness

Applying s 229(1)(b) CJA 2003, an offender is dangerous when there is a significant risk of serious harm for the public caused by a future specified offence. Note that the expected offences need to be a "specified" offence listed in schedule 15, but not necessarily a "serious" specified offence, which is punishable with at least ten years of imprisonment or life imprisonment. Serious harm is defined in s 224(3) CJA 2003 as death or serious personal injury, physical or psychological. Furthermore, a risk is significant, once it is noteworthy, not insignificant or minimal.[91] The Court of Appeal requires a significant risk for the commission of the specified offences as well as a significant risk of them resulting into serious harm.[92] This distinction is important because there are cases in which the risk of new specified offences is significant, yet they will not cause a serious harm. Especially in cases in which specified but not serious sexual or violent offences at a low level are predicted, one will rarely find a significant risk of serious harm to the public.[93] On the other hand, there are rare cases in which serious offences are foreseen, nevertheless they still do not cause a significant risk of serious harm.[94] Yet, the offender is only to be considered dangerous if the court expects both: a specified offence and serious harm as a result.

---

87 Ings [2006] EWCA Crim 2811 para. 18.

88 D [2005] EWCA Crim 2292 para. 17.

89 Sentencing Guidelines Council 2008, 23 (Last accessed on 29.02.2012).

90 Ashworth 2010, 233; Samuels CrimLaw 2008 , 7 (8).

91 Ashworth 2010, 234.

92 Lang [2005] EWCA Crim 2864 para. 7.

93 Lang [2005] EWCA Crim 2864 para. 17iv.

94 Lang [2005] EWCA Crim 2864 para. 17iii.

b) Ways to assess dangerousness

S 229(2) of the 2003 Act serves as a starting point to answer the question how the courts determine the risk of future offences causing serious harm. Subsection 2(a) states that the court *must* have regard to all the information about the circumstances and the nature of the current offence. It *may* also take into account any previous offences, any offending pattern and any other information before the court (s 229(2)(aa) to (c) CJA 2003). Other information in this sense could be the offender's social and economic condition like accommodation, employability, education, associations, relationships and drug or alcohol abuse, but also his mental conditions like emotional state, views and attitude towards offences.[95]

But the courts do not have to consider a possible effect of the imminent prison term. Even if, especially in cases of first time offenders,[96] the experience to be in custody might be able to change the offender's nature and reduce his dangerousness, it would be an "unrealistic burden" on the judge to predict any future changes.[97]

However, all these factors can only be indicators. A previous offence does not prescribe the finding of dangerousness, just like the absence of any criminal record does not necessarily mean the offender does not pose a significant risk of serious harm to the public.[98] Yet, not only *specified*, but all other previous convictions may be taken into account.[99] The court can even consider an earlier misconduct which did not end in a conviction.[100] Especially in cases of offenders younger than 18, who typically do not have a long history of offending, any previous violent or sexually aggressive behaviour might be very useful information to support the court in its decision.[101]

While assessing the risk of serious harm caused by a future offence, the court may look at the harm resulting from the previous offences. Nonetheless, if the offender did not cause actual harm, it might have been merely due to the circumstances and the court is required to assess the risk of serious harm in a different setting.[102]

---

95 Lang [2005] EWCA Crim 2864 para. 17ii.

96 MJ [2012] EWCA Crim 132.

97 Smith [2011] UKSC 37 para. 15.

98 Johnson [2006] EWCA Crim 2486 para. 10i.

99 Johnson [2006] EWCA Crim 2486 para. 10ii.

100 Considine and Davis [2007] EWCA Crim 1166 para. 36.

101 Youth Justice Board 2006, 9 (Last accessed on 29.02.2012).

102 Johnson [2006] EWCA Crim 2486 para. 10iii.

Like the history of offences, the emotional state of the defendant can be ambiguous as well. While inadequacy, suggestibility and vulnerability might lower the culpability, they can also endorse the finding of dangerousness.[103]

A pre-sentence report is a way to gather all this information and assist the court in its assessment (s 158(1) CJA 2003). According to s 156(3) CJA 2003 the courts have to obtain these reports during their assessment. In adult cases they can refrain from doing so, when they think it is unnecessary (s 156(4) CJA 2003). In cases of offenders under 18 the court may use an already existing report, but must not decide without any report (s 156(5) CJA 2003). A pre-sentence report is given orally by a probation officer (s 158(1A) and (2) CJA 2003). For young offenders it must be written and may also be done by a social worker or member of a youth offending team (s 158(1B) and (2) CJA 2003).

These reports contain, *inter alia*, an assessment of the risk and likelihood of serious harm categorised in low, medium, high or very high risk, but they do not evaluate whether or not specified offences cause this risk.[104] Because the courts should be particularly reluctant to impose preventive imprisonment in cases of offender younger than 18, it will normally find a young offender to be dangerous only if the pre-sentence report indicates a very high, in exceptional cases just a high risk of serious harm.[105]

Additionally, if the court is of the opinion that the offender might suffer from a mental disorder, s 157(1) CJA 2003 requires the court to obtain a medical report regarding the offender's mental condition by a medical practitioner with special experience in the diagnosis or treatment of mental disorders (s 157(7) CJA 2003).

However, although the reports may be very helpful and persuasive, they do not bind the court.[106]

c) Difficulties with the assessment of dangerousness

There are two main problems with the assessment of dangerousness in the English system. First of all, although the courts are not bound by the findings of the pre-sentence reports, they tend to follow the expertise of experienced diagnosticians without evaluating the facts themselves.[107] That is problematic, because research indicates that even modern diagnostic methods are not able to produce predictions with a high success rate.[108] This results in the second problem of high numbers of false predictions. Contrary to the public believe, the relapse rate of sexual offenders is as low as 10 per cent and the tendency is to

---

103 Johnson [2006] EWCA Crim 2486 para. 10iv.

104 Sentencing Guidelines Council 2008, 18 (Last accessed on 29.02.2012).

105 Youth Justice Board 2006, 10 (Last accessed on 29.02.2012).

106 Lang [2005] EWCA Crim 2864 para. 17ii.

107 Ashworth 2010, 235.

108 See Monahan 2004, 237ff.

overestimate the dangerousness.[109] Studies in England indicate that for every really dangerous offender up to two non-dangerous offenders are falsely imprisoned.[110] Since, these problems exists similarly in Germany, they will be discussed more closely in the German context.[111]

C. Sicherungsverwahrung in Germany

I. Development of *Sicherungsverwahrung* until 1998

a) Early forms

The need to protect the public from persistent offenders and along with that some sort of incapacitation order has its roots in late medieval times. Because of the generally severe nature of punishment during that time, it was not widely used and nearly insignificant. Yet, ever since imprisonment superseded other forms of early punishment like banishment or death penalty, indeterminate imprisonment became increasingly important as a way to deal with dangerous, persistent offenders.[112] Therefore the General State Law of Prussia (*Allgemeines Preußisches Landrecht*) of 1794 introduced the first version of the two-track system (*Zweispurigkeit*) of criminal penalties and measures of rehabilitation and incapacitation which is still used in German criminal law today.[113] For example § 5 II 20[114] General State Law of Prussia provided for an indeterminate term of imprisonment for thieves and similar offenders additional to the appropriate term lasting as long as thought necessary to protect the public from re-offending. Nevertheless this approach was abolished five years later and preventive custody formed part of neither the Prussian Criminal Code 1851 (*Preußisches Strafgesetzbuch*) nor the Criminal Code for the united German Empire of 1870/71 (*Reichsstrafgesetzbuch*).[115]

b) Academic controversy about the reasons of punishment

Nevertheless, at the end of the 19*th* century the interest in preventive punishment rose again, after Mittelstädt[116] called for a sentencing power allowing courts to impose an indeterminate custody on the rising

---

109 Hood et al. BJC 2002, 42(2), 371ff. (390f.).

110 Ashworth 2010, 235f.

111 See C.II.6.c) Difficulties with the assessment of dangerousness.

112 Kern 1997, 14.

113 Kinzig 1996, 7f.

114 § is the German sign for section, the Roman numeral indicates in case of the General State Law of Prussia the part and the Arabic numeral the title.

115 Kinzig 1996, 8f.

116 Mittelstädt 1879, 70f.

numbers of persistent thieves making a living of burglary.[117] The ensuing debate over the reason of punishment increased this effect.[118] The new modern approach, focussing on the offender, argued that the main reason for punishment is public protection and reform of the offender and courts should only take these factors into account when determining the sentence, leaving aside the severity of the committed offence.[119] The regular sentence system is therefore sufficient and a second track not necessary.[120]

The classic approach towards punishment was that it serves as a retribution for the offence and has to be appropriate to the severity of the offence.[121] A reform of the offender or protection from society was no reason for punishment and therefore must not be considered when determining the length of the sentence.[122] However, this approach called for an addition to the existing system of punishment, a second track, not determined by the severity of the offence, but solely by the need to reform the offender and protect society from him.[123]

In conclusion, both approaches accepted the need for public protection from persistent offenders and therefore agreed on a compromise adopting the two-track system.[124] The classic approach was satisfied because the regular sentence was still determined by appropriateness regarding the gravity of the offence, whereas the additional part settled the claim of the modern approach for a sentence, which takes the nature and the dangerousness of the offender into account.[125] Despite this academic compromise in 1906, a number of bills were drafted to include the *Sicherungsverwahrung* into the German system until its final adoption in 1933. Since 1911 every draft had included a proposal for the two-track system, but they varied in the questions of whether the imposition of *Sicherungsverwahrung* was mandatory, once the conditions are met, whether it could be used instead of a regular imprisonment and whether a court had to renew the *Sicherungsverwahrung* after three years or just check whether the conditions are still given.[126]

---

117 Kinzig 1996, 9ff.

118 See also Schewe 1999, 15ff. for a more detailed look on the debate.

119 Von Liszt 1905, 163ff.

120 Dohna ZStW 33 (1928); Von Liszt/Schmidt 1932, 365.

121 Lobe JW 50 (1921) 786.

122 Oetker GS 92 (1926) 1 (2f.).

123 Binding 1915, 21.

124 Schewe 1999, 34ff.

125 Bartsch 2010, 30f.

126 Schewe 1999, 35ff.

c) Introduction of *Sicherungsverwahrung* during the Third Reich

The Nazis introduced the *Sicherungsverwahrung*, after the Weimar Parliament had not been able to do so, and thus there is always a cloud over the evaluation of this measure.[127] Yet the idea existed long before the Nazis and its codification during the Third Reich is merely a historic coincidence, although the introduced system went beyond the previous proposals.[128] The Habitual Offenders Act[129] introduced a considerably longer sentence for persistent offenders (§ 20a) and measures of rehabilitation and incapacitation (§§ 42a-n) to the Criminal Code of that time.[130] The conditions for the *Sicherungsverwahrung* in § 42e RStGB were a previous conviction as a persistent offender in accordance with § 20a RStGB, which required two previous convictions, and the imprisonment had to be necessary to protect the public. The imposition was mandatory in these cases, but also optional in cases without previous convictions.[131] Although the sentence did not need to be renewed like it was previously proposed, the conditions had to be checked every three years.[132] Furthermore, it was also available in cases which had already been decided but in which the offender still serves the term in prison.[133]

This wide conception led to a large number of convictions exceeding the expectations even at that time.[134] Yet, this development was not disapproved by the Reich Ministry of Justice, which even encouraged the wide use of *Sicherungsverwahrung*[135] after an attempt by the courts to restrict it.[136]

d) Period after World War II

After the fall of the Third Reich, the provisions continued to exist and were still used by the courts of the newly founded Federal Republic of Germany[137], despite the view of the Allies that *Sicherungsverwahrung*

---

127 See for example: Krebs 1974, 122.

128 Kinzig 1996, 7, 16.

129 „Gesetz gegen gefährliche Gewohnheitsverbrecher und über Maßregeln der Sicherung und Besserung" 24.11.1933, RGBl I 995ff.

130 Mischke 2010, 54f.

131 Mischke 2010, 55.

132 Kinzig 1996, 17f.

133 Bartsch 2010, 32f.

134 Kinzig 1996, 19.

135 Freisler/Schlegelberger 1938, 14.

136 Mischke 2010, 55f.

137 This is true for the German Democratic Republic as well, but the highest Eastern German court soon abolished § 20a RStGB including the instrument of Sicherungsverwahrung because of it fascist origin, see: Kinzig 1996, 23ff. The following remarks consider therefore only the situation in West-Germany.

was a typical instrument of the Nazi regime.[138] Yet, the subsequent imposition was abolished and the courts were more reluctant to use this instrument.[139] Like in England, the number of convictions, especially the proportion of minor offences, was still seen as too high[140] and therefore Parliament passed two Acts[141] to reform the system of *Sicherungsverwahrung* which came into force on 1.1.1970 and 1.1.1975.[142] By raising the requirements to underline the nature as an *ultima ratio* instrument, both Acts introduced a system of *Sicherungsverwahrung* in § 66 StGB, which is still largely in place today. It required a minimum term of two years for the current offence, two previous convictions for at least one year imprisonment each, two years of imprisonment must have already been served and the offender must have a propensity to commit crimes.[143] The first conviction of *Sicherungsverwahrung* was limited to a ten-year period and a court was required to check whether the conditions are still fulfilled every two years.[144] This reform was able to reduce the number of convictions, especially for minor, i.e. mainly non-violent property offences tremendously from as high as 902 in 1965 to 182 in 1990.[145]

II. The system of *Sicherungsverwahrung* and its latest reforms

Despite the fact that the need for *Sicherungsverwahrung* was challenged after the successful reform[146] and some Parliamentarians even called for its abolishment[147], the legislature went the opposite way. First of all, the system was expanded to the area of the former German Democratic Republic in 1995, after its use has been explicitly limited to the Western part of Germany during the process of the German reunification because of its fascist origins.[148] Secondly, the legislator, both on state and federal level, introduced an "unique surge" of new law[149] lowering the requirements for "primary"[150] *Sicherungsverwahrung*, allowing a subsequent and deferred form and expanding it towards youth offenders. After these expansions

138 Jansing 2004, 49ff.

139 Bender 2007, 22f.

140 See for example Engelhardt 1964, 9; Lemberger 1962, 126f.

141 „Erstes Gesetz zur Reform des Strafrechts" 25.6.1969, BGBl I 645ff.; „Zweites Gesetz zur Reform des Strafrechts" 4.7.1969, BGBl I 717ff.

142 Bartsch 2010, 32f.

143 Schewe 1999, 82f.

144 Kinzig 1996, 21ff.

145 Bartsch 2010, 34.

146 Fraction of Bündnis90/ Die Grünen (German Green Party) BT-Dr 13/1095.

147 Group of PDS parliamentarians BT-Dr 13/2895.

148 Schewe 1999, 84f.

149 Wüstenhagen 2008, 1.

150 Term taken from Kinzig NJW 2011, 177.

a number of judgements by the European Court of Human Rights and the German Constitutional Court caused a contrary development leading the latter Court to declare the entire system of *Sicherungsverwahrung* to be unconstitutional. Therefore the following explanations describe the current system until the required reform, even though the proposed draft indicates that the most principles will remain unaffected. A closer look will be taken at the entire system including its development and the reform proposal after a general introduction to the German two-track system.

1) Two-track system

As mentioned above, despite existing as an idea previously, the two-track system was firstly codified in 1794 in the General Law of Prussia.[151] The foundation of this system is the distinction between penalties (*Strafe*) and measures of rehabilitation and incapacitation (*Maßregeln der Besserung und Sicherung*). While the former is intended to punish the offender for wrong-doing and is based on his blameworthiness, the latter aims to protect society and reform the offender without any regard to the degree of guilt.[152] Nevertheless, a clear distinction of the aims is not possible, since penalties do not only serve as retribution, but also aim at prevention and reform, whereas the measures can be seen as punishment to some degree.[153] However, both tracks offer different, distinctive sanctions. Penalties are usually imprisonments or fines, in some cases a suspension of the driving licence.[154] Measures of rehabilitation and incapacitation are contained in a conclusive enumeration in § 61 StGB. They are mental hospital orders, custodial addiction treatment orders, detention for the purpose of incapacitation (S*icherungsverwahrung*), supervision orders, disqualification from driving and disqualification from exercising a profession.[155] When the court determines the appropriate sentence, it needs to distinguish between these different aims. A particularly high dangerousness or a special need to reform (for example a drug addiction) of the offender should not be considered when determining the length of imprisonment. Instead the judge should use the available measures to reach these goals in addition to the penalty.[156] To soften any possible hardship suffered from this "double" sentence, the measures are usually served before the custodial term, which is shortened

151 For more about the historic development see: Eser in FS Müller-Dietz 213ff.

152 Roxin 2006, § 1 marginal number 3.

153 Jescheck/Weigend, 1996 § 9 p. 84.

154 Frister 2011, Chapter 6 marginal number 6ff.

155 For more see: LK/Schöch § 61 marginal number 1ff; TTT.

156 Lackner/Kühl § 61 marginal number 2.

accordingly (§ 67 I, IV StGB[157]). Exceptions to this rule are nevertheless possible and *Sicherungsverwahrung* always follows the regular prison term.[158] Furthermore, no measure should be imposed which is disproportionate to the seriousness of the offence and the dangerousness of the offender (§ 62 StGB).

Although the distinction of both tracks of the German sanction system has become more and more questioned[159], especially by the European Court of Human Right with regard to the distinction of regular penalties and *Sicherungsverwahrung,*[160] the German Constitutional Court confirmed the distinction of the two-track system in its latest judgement concerning *Sicherungsverwahrung*, even though it demanded some major, later discussed improvements.[161]

2) "Primary" Sicherungsverwahrung

The primary *Sicherungsverwahrung* has been subject to numerous reforms, the latest being the Reform of the Law of *Sicherungsverwahrung* Act coming into force on 1.1.2011,[162] most of which have expanded its use and left a fairly confusing statutory basis.[163] § 66 StGB contains four different alternatives to impose *Sicherungsverwahrung.*

a) § 66 I StGB

The first alternative in § 66 StGB is mandatory, once the court finds the conditions are fulfilled. Firstly, the offender must be sentenced to at least two years of regular imprisonment for an offence listed in § 66 I 1 No. 1 StGB. This list contains most importantly every offence against the right to life and limb, personal freedom or sexual self-determination (No 1 a). Additionally No 1 b includes offences which have a statutory maximum term of imprisonment of ten years and are offences either listed in chapters one, four, twenty or twenty-eight of the StGB (including high treason, offences against the public order, robbery and blackmail, and offences causing common danger) or offences against public international law or offences against the Misuse of Drugs Act (*Betäubungsmittelgesetz*).

---

157 In German law, Roman numerals are used for subsections and Arabic numerals for sentences within the subsection.

158 Schönke/Schröder/Stree/Kinzig § 67 marginal number 1.

159 Lackner/Kühl § 61 marginal number 2; for the perpetuation MüKo/Radtke Vorbemerkungen zu den § 38ff. margina number 69.

160 M v Germany, (Application no. 19359/04), 17.12.2009.

161 BVerfG NJW 2011, 1931ff.

162 „Gesetz zur Neuordnung des Rechts der Sicherungsverwahrung und zu begleitenden Regelungen" 22.12.2010, BGBl I 2300ff.

163 Kinzig NJW 2011, 177.

The second condition are two previous convictions for one of the offences listed in No. 1 to at least one year imprisonment each (§ 66 I 1 No. 2 StGB). § 66 IV 3 StGB sets a time-limit excluding convictions older than five years. But the latest Act introduced an exception raising the time-limit for cases against the sexual self-determination to 15 years, which counteracts its general intention to restrict the use of *Sicherungsverwahrung*.[164]

No. 3 requires the offender to have served two years in prison or a similar facility like a mental hospital as a measure of rehabilitation and incapacitation.

Finally, the offender must impose a danger to the public because of a propensity to commit serious crimes, especially those which result in a serious trauma or physical injury of the victim (§ 66 I 1 No. 4 StGB).

b) § 66 II StGB

A facultative imposition of *Sicherungsverwahrung* is also available for offenders without any previous convictions, if the condition in § 66 II StGB are met. It is subsidiary to subsection 1 and aims at serial offenders, which were able to abscond from justice until their first trial.[165] The court may impose *Sicherungsverwahrung* consecutive to the regular term, when the offender has committed three offences contained in the list in § 66 I No. 1 StGB, for which he incurred at least one year of imprisonment each and is sentenced to not less than a three year term for one of them. Furthermore the offender must put the public at risk because of his propensity to commit serious offences in accordance to § 66 I No. 4 StGB.

c) § 66 III 1 and 2 StGB

Following a series of sexual offences against children creating an enormous public outcry, the Sexual and Other Dangerous Offences Act[166] introduced § 66 III StGB with the intention to facilitate the imposition of *Sicherungsverwahrung* in these sexual related cases.[167] Therefore, § 66 III StGB expands the list of relevant offences to a number of sexual offences involving minors and/or an abuse of a position of trust. For these offences, sentence 1 and 2 contain two alternatives of a facultative *Sicherungsverwahrung* similar to the conception in the previously discussed subsections. Yet the number of (previous) offences is lower, whereas the length of the custodial term must be higher. Sentence 1 shares its conditions mainly with subsection 1, but requires only one previous conviction which in return must be for at least three years. Sentence 2, like subsection 2, does not require a previous conviction, but may be imposed in cases

164 Kinzig NJW 2011, 177 (178).

165 Bartsch 2010, 56f.

166 „Gesetz zur Bekämpfung von Sexualdelikten und anderen gefährlichen Straftaten" 26.1.1998, BGBl I 160 ff.

167 Mischke 2010, 58.

of (only) two offences. One of the offences has to be sentenced with at least three years, the other offence(s) with at least two years imprisonment.

In any case, § 66 I No. 4 StGB must be fulfilled, i.e. the offender has a propensity to commit further offences resulting in a serious trauma or physical injury of the victim (§ 66 III 1 and 2 at the end StGB).

3) Deferred Sicherungsverwahrung

§ 66a StGB, introduced by an Act in 2002[168], provides the courts with the power to postpone the decision whether to impose *Sicherungsverwahrung* until shortly before the release of the offender from prison.[169] A second, executive court, the so-called penalty enforcement chamber (*Strafvollstreckungskammer*)[170] will then make the final decision at the end of the prison term evaluating the offender, his offences and his development in custody.[171] If it is satisfied that the offender is likely to commit serious offences causing serious emotional trauma or physical injury to the victims, it is required to impose *Sicherungsverwahrung* (§ 66a III StGB). It is important to note, that § 66a III StGB does not require a propensity to commit offences, but merely an expectation of the court that the offender will commit more offences.[172]

After its introduction, § 66a StGB merely contained one possibility to defer a sentence of *Sicherungsverwahrung*. Then, the court could use its power only, if the conditions in § 66 III StGB were met (§ 66a I No. 1 and 2 StGB) and it cannot be established with sufficient certainty, but is nevertheless likely, that the offender poses a danger to the public because of his propensity to commit serious offences (§ 66a I No. 3 StGB).

The already mentioned Reform of the Law of *Sicherungsverwahrung* Act expanded the availability of the deferred *Sicherungsverwahrung* greatly. It added a second, very wide alternative.[173] According to § 66a II No. 1 StGB the court can already use this sentence, if the offender is sentenced to five years of imprisonment for only one offence against life and limb, personal freedom, sexual self-determination, certain forms of robbery and blackmail or an offence causing common danger. Thus, no previous offence is required. Furthermore the conditions in § 66 StGB must not be fulfilled (No. 2), but it is at least likely that the condition in § 66 I 1 No. 4 StGB are met (No. 3).

---

168 „Gesetz zur Einführung der vorbehaltenen Sicherungsverwahrung" 28.8.2002, BGBl I 3344ff.

169 Becker 2009, 19f.

170 Term taken from Bohlander 2012, 178.

171 Finger 2008, 56ff.

172 Kinzig NJW 2011, 177 (180).

173 Kinzig NJW 2011, 177 (178f.).

Secondly, the Act weakened the rule that the final decision, whether the court will impose *Sicherungsverwahrung*, must be taken at least six month before the release from prison.[174] Now the court only *should* decide six months before the release (§ 275a V StPO).

4) Subsequent Sicherungsverwahrung

The first subsequent form of preventive imprisonment was not introduced by federal, but by state legislation. Some of the states in Germany wanted a subsequent imposition of *Sicherungsverwahrung* in cases in which the offender reveals his dangerousness only during his period in custody and therefore adopted respective laws.[175] Yet, after complains to the Constitutional Court by two affected prisoners, in February 2004 the highest court in Germany declared the state laws to be unconstitutional.[176] Nevertheless, the Court reasoned that it was not the subsequent form, which conflicts with the German Basic Law, but the states simply did not have the legislative competence to pass such laws.[177] The Court could have declared the provisions to be void (§§ 78, 95 III Federal Constitutional Court Act, *Bundesverfassungsgerichtsgesetz*), but instead it allowed the use to be continued until the end of September of the same year, giving the federal legislator the chance to make a decision whether or not to adopt a similar law on the federal level.[178] Although it did not give a clear opinion, whether such a subsequent form would be constitutional, the majority judgement hinted into the direction that under strict conditions aimed at particular dangerous offenders it might not be unconstitutional.[179]

After the judgement, which was said to almost force the legislator to pass such a law,[180] almost all parties, except the Liberal Party (FDP), agreed on the Introduction of Subsequent *Sicherungsverwahrung* Act[181], although the majority in the Bundestag had previously been very reluctant to allow even a deferred version of *Sicherungsverwahrung* and it was seen as far as one could go.[182] The Act introduced the § 66b StGB which allowed the imposition of *Sicherungsverwahrung* even in cases in which the original judgement did not impose or defer the decision to impose *Sicherungsverwahrung.* It was intended to be used as a measure

174 So former version of § 66a II 1 StGB.

175 Bartsch 2010, 39ff. naming Baden-Württemberg, Bavaria, Lower Saxony, Saxony-Anhalt and Thuringia.

176 BVerfGE 109, 190ff.

177 BVerfGE 109, 190 (211).

178 BVerfGE 109, 190 (236f.).

179 BVerfGE 109, 190 (238f.).

180 So dissenting opinion in BVerfGE 109, 190 (246); but also Blau 2006, 525 (527).

181 „Gesetz zur Einführung der nachträglichen Sicherungsverwahrung" 28.7.2004, BGBl I 1838ff.

182 Kreuzer ZIS 2006, 145 (146).

of last resort in very narrow circumstances, in which the other two forms were not available.[183] In specified cases, the court could impose *Sicherungsverwahrung*, if during the time in custody the offender revealed for the first time that he poses a particular danger to the public and is likely (propensity is not required) to commit further grave offences.[184] Although the Constitutional Court approved these rules in 2006[185] and they were even partly expanded[186], the Reform of the Law of *Sicherungsverwahrung* Act abolished a big part of the provision because of its rare use and a big number of possibly affected prisoners.[187] Nevertheless one alternative in § 66b StGB remains in force. The court can still impose *Sicherungsverwahrung* subsequently in cases, in which the offender is very likely to commit further grave offences. He must have been convicted to a sentence of at least three years of imprisonment, which he served in a mental hospital and from which he has been released, because the conditions are no longer met(§ 66b StGB).

5) *Sicherungsverwahrung* and juvenile offenders

How far the reforms to expand the use of *Sicherungsverwahrung* have come can be seen with the expansions towards young offenders.[188] Because the character of young offenders can be formed easier and education is the main goal when sentencing young offenders, preventive sentencing did not use to be available for offenders under 18.[189] Furthermore, although the *Sicherungsverwahrung* was available for young adults (*Heranwachsende*), meaning offenders between 18 and 21 (§ 1 II JGG), the courts had the power to refrain from its imposition, which they used greatly.[190] This resulted in the abolishment of *Sicherungsverwahrung* in these cases in 1970.[191]

a) Deferred *Sicherungsverwahrung* for adolescent offenders

Yet, the Offences Against Sexual Self-Determination Act[192] expanded the use of the deferred *Sicherungsverwahrung* to offenders over 18, but under 21. Although § 106 III 1 JGG still bans the use of the primary form of *Sicherungsverwahrung* imposed in the same judgement which also imposes the regular

183 Bender 2007, 42.

184 Bender 2007, 43ff.

185 BVerfG NJW 2006, 3483.

186 Bartsch 2010, 51f.

187 Kinzig NJW 2011, 177 (180).

188 More detailed: Wüstenhagen 2008, 101ff.

189 Flaig 2009, 39.

190 Kinzig RdJB 2007, 155 (156f.).

191 Bartsch 2010, 43.

192 „Gesetz zur Änderung der Vorschriften über die Straftaten gegen die sexuelle Selbstbestimmung und zur Änderung anderer Vorschriften" 27.12.2003, BGBl I 3007ff.

sentence, the newly introduced § 106 III 2 JGG lays down that a court may defer the imposition of *Sicherungsverwahrung* on an adolescent offender, who is sentenced to at least five years imprisonment for an offence listed in § 66 III StGB (No. 1), from which the victim was in danger to or actually suffered a serious emotional trauma or physical injury. Furthermore, the offender must have committed at least one offence mentioned in No. 1 before (No. 2) and have the propensity to commit such offences in the future (No. 3).[193] Compared to the use towards adults, the relevant offences in § 106 III 2 JGG are further restricted having regard to the consequences for the victim.[194]

b) Subsequent *Sicherungsverwahrung* for young adults

Furthermore, the Act, which introduced the subsequent *Sicherungsverwahrung* for adults, also added the subsection 5 and 6 to § 106 JGG, which expanded its use towards adolescent offenders.[195] If the offender is sentenced to at least five years for an offence specified in § 106 III 2 No. 1 JGG and reveals a particular danger to the public only during custody, the court may impose *Sicherungsverwahrung* even subsequent to the original sentence (§ 106 V 1 JGG). According to § 106 V 2 JGG the courts may also use this power in cases, in which a deferred *Sicherungsverwahrung* was not available at the time of the original judgement, but the dangerousness was already known.

Additionally, § 106 VI JGG contains a provision like § 66b StGB allowing courts to impose *Sicherungsverwahrung* on particular dangerous offenders subsequently to a release from mental hospital.

c) Subsequent *Sicherungsverwahrung* for offenders under 18

This tendency to expand the use of *Sicherungsverwahrung* was not restricted to adult and adolescent offenders, but also reformed the area of offenders under 18 years. Introduced by the *Sicherungsverwahrung* for Young Offenders Act 2008[196], § 7 II-IV JGG allows to impose *Sicherungsverwahrung* "only" subsequently under conditions similar to the ones used in adolescents cases. It is important to note that, just like for the subsequent imposition in adolescent cases, a previous offence is not necessary.[197] Additionally, the court can even consider previously known facts, which indicate a particular danger, because of the absences of a primary or deferred form of *Sicherungsverwahrung* for young offenders.[198] Thus, the offender does not need to reveal his dangerousness for the first time during the period in custody like in the majority

193 MüKo/Altenhain § 106 JGG marginal numbers 13ff.

194 Wüstenhagen 2008, 125.

195 Bartsch 2010, 50.

196 „Gesetz zur Einführung der nachträglichen Sicherungsverwahrung bei Verurteilungen nach Jugendstrafrecht" 8.7.2008, BGBl I 1212ff.

197 Mischke 2010, 24.

198 Bartsch 2010, 108.

of cases of offenders older than 18.[199] Further differences are that young offenders must be sentenced to at least seven years of imprisonment (§ 7 II JGG), the list of relevant offences is much shorter and § 7 IV JGG requires the courts to check whether the conditions are still met every year, unlike the usual two-year reviews in § 67e II StGB.

6) Assessment of dangerousness

After having discussed the legal basis for preventive imprisonment in Germany in its different forms, it can be seen that all forms share a common structure, which is very similar to the one used in England.[200] Their conditions can be divided into conditions, which take the immediate offence(s) and the history of offending into account (formal conditions), and conditions, which ask the court to assess the offender's nature and the risk to the public (material conditions). The formal conditions are very straightforward and have already been discussed as far as relevant. Yet, the material conditions possess more difficulties.[201] Like in England, first of all the question arises under which conditions an offender is to be considered dangerous, secondly, how courts assess whether these conditions are satisfied.

a) Dangerousness

The starting point of an analysis of dangerousness is § 66 I 1 No. 4 StGB. Accordingly, an offender imposes a danger to the public if a comprehensive evaluation indicates that he has a propensity to commit serious crimes, especially those which result in a serious trauma or physical injury of the victim (§ 66 I 1 No. 4 StGB). The same formula is used in cases, in which a court wants to defer the imposition of *Sicherungsverwahrung* on an adolescent offender (§ 106 III StGB). For the adult form of deferred *Sicherungsverwahrung* the court must find that the offender is likely to fulfil this condition. If the second court wants to actually impose a deferred sentence later on, there must be a high probability but not necessarily propensity that the offender will commit future offences resulting in a serious trauma or physical injury of the victim (§ 66a III 2 StGB).[202] The same applies to all forms of subsequent preventive sentencing (§§ 66b StGB, 7 II-III, 106 V-VI JGG).

Propensity requires not only that the offender committed a number of offences, but his nature must be so that he is always ready or ceases every opportunity to commit an offence.[203] The propensity serves as a connection between all offences, past and future ones.[204] The Federal Court of Justice stated that the

---

199 Kreuzer/Bartsch GA 2008, 655 (659).

200 Sturm 2010, 100ff.

201 Rieber 2009, 13ff., 19.

202 § 106 III 2 JGG refers to § 66a III 2 StGB as well.

203 BeckOK/Ziegler § 66 marginal number 13; Kinzig NStZ 1998, 14ff.

204 Finger 2008, 42.

courts should consider the following factors: social background, personality, general social behaviour, frequency and nature of the previous offences or relapse rate.[205] However, the cause for the propensity is irrelevant.[206]

Propensity is not required if the court wants to impose an originally deferred or subsequent *Sicherungsverwahrung*, because of the generally higher requirements for the imposition[207] and the rareness of new evidence suggesting a propensity arising under the strictly regimented conditions in custody.[208] Although this has been criticised and the courts even read the requirement into the provisions[209], the clear wording after numerous reforms strongly suggests that the legislator did not see the need for propensity.[210] Instead, there must be a high probability that the offender will commit further grave crimes. Mere probability is not sufficient.[211] Therefore the requirement of a high probability is only fulfilled if many more or much stronger arguments indicate that the individual offender will commit severe offences in the future.[212]

Finally, only serious offences resulting in a serious trauma or physical injury of the victim satisfy the threshold of endangering the public. This requirement is intended to exclude minor offences and aims at offences with a big impact on the victim.[213] Until the last reform a serious economic damage was a sufficiently grave impact, but it has now been abolished to put the focus more on violent and sexual offenders.[214]

b) Ways to assess dangerousness

If these factors determine the dangerousness of an offender, how do courts know these conditions are met? The relevant provisions, especially § 66 I 1 No. 4 StGB, ask the courts to evaluate these factors comprehensively, taking the person of the offender, the offences and complementary the time in custody into account. This is supposed to secure that not singular incidents, but rather the entire personality, personal background, age, medical conditions, employability, relationships and alternative protection

205 BGH NJW 1980, 1055; NK/Böllinger/Pollähne § 66 maginal number 82.

206 BGHSt 24, 160 (161).

207 BVerfG NJW 2006, 3483 (3484).

208 BT-Dr 14/8586, 7.

209 Finger 2008, 58ff; Bender 2007, 85ff.

210 BVerfG NJW 2006, 3483 regarding the old version of § 66b II StGB.

211 BT-Dr 15/2887, 13.

212 OLG Brandenburg NStZ 2005, 275.

213 Flaig 2009, 133.

214 Kinzig NJW 2011, 178.

measures are considered while assessing the dangerousness.[215] Although the time in custody can be heeded complementary, it is merely an additional support for the decision and must not be used as a sanction for misbehaviour in custody.[216]

Yet, the question remains, how courts predict whether or not an offender will commit serious offences in the future. Although every prediction contains a level of uncertainty, it aims to deliver a rational basis for the decision.[217] It is usually based on (a mix of) three different methods: a statistical, an intuitive and a clinical method.[218] The statistical method allocates the offender into a specified group, for which it predicts a relapse rate on the base of statistics.[219] Because of the statistical basis, it is seen as very rational and comprehensible.[220] Yet, useful data are rare, based on small numbers and include very subjective factors like socialisation, which takes away a lot of the advantages.[221] Furthermore, the probability has to be determined with regard to the specific, individual case. Determining an abstract relapse rate for a particular personality disorder, from which the offender suffers, does not satisfy this requirement.[222]

The intuitive method is based on personal impressions a judge gains from the records and the offender during the trial.[223] Because of its weak, subjective and unclear basis, it is heavily criticised and rejected as a basis for the imposition of a preventive sentence.[224]

Finally, the clinical method uses the expert knowledge of psychiatrists, psychologists and other criminologically trained specialists.[225] This method is used by the German judiciary following §§ 246a, 275a III StPO, which demands that an expert is to be heard before *Sicherungsverwahrung* is imposed. In cases of a subsequent imposition § 275a III 2 StPO even requires two experts. They explore the nature of the offender by using tests, experiments and observations. Afterwards, they give a prediction based on their experience and statistical evidence.[226] Usually an examination follows three steps, in which the

215 BT-Dr 15/2887,12f.; Flaig 2009, 131.
216 BVerfGE 109, 190 (241).
217 Jansing 2004, 73.
218 Rasch/Konrad 2004, 388f.
219 Flaig 2009, 151ff.
220 Volckart 1997, 7.
221 Jansing 2004, 74f.
222 BGH NJW 2005, 2025.
223 Flaig 2009, 151.
224 Volckart 1997, 7f.
225 Mischke 2010, 36f.
226 Jansing 2004, 74; a more detailed overview Mischke 2010, 37ff.

expert at first analyses the individual past of the offender, reasons for the offence(s) and the history of offending focusing on factors which indicate a potential of re-offending. In a second step, the examiner needs to determine whether there has been a change modifying the potential risk. Finally, the expert answers the question whether the risk is sufficiently reduced making future offences unlikely, which justifies a release.[227]

c) Difficulties with the assessment of dangerousness

A simplified summary of the assessment of dangerousness is therefore, the courts ask experts, mostly psychiatrists, whether the offender will commit serious offences in the future. The expert will then run a few tests and tell the court the answer, which will then lead the court to impose or not to impose a preventive sentence. This simplification underlines the enormous difficulties resulting from the assessment of dangerousness.

Despite improvements in methods and conditions,[228] examinations by experts are difficult, at times arbitrary and can be incorrect. Most obviously, an analysis of the character of an offender difficult to do and very complex. As a result, the reports often suffer from a large number of mistakes and even the experts often point out the limitation of their examination.[229] Even the most skilled experts might deliver insufficient examinations because of flaws like superficiality.[230] Same experts take too little time for the analyses resulting in shallow, undifferentiated reports.[231] They are often not sufficiently trained, do not use scientific standards or interpret the results incorrectly.[232] Some studies even find that there is no significant difference between the prediction of an expert and a layman.[233] Furthermore, the reports often do not contain important parts, like a sexual history for sexual offenders, in some cases they might not even give the prediction which was explicitly demanded.[234]

Another problem of the predictions is that they are often based on the previous offences, rather than specific characteristics of the offender. Yet, the formal conditions already take the previous convictions into account.[235] This means if the offender has the necessary previous convictions, experts and courts are

---

227 Kröber NStZ 1999, 593 (594); a more detailed overview Mischke 2010, 43ff.

228 Schneider 2006, 413 (421).

229 More detailed: Kinzig 1996, 332ff. and Jansing 2004, 102ff.

230 Nowara/Pierschke 1999, 241 (242f.).

231 Eisenberg 2005, 439 marginal number 30; Jansing 2004, 104.

232 Nowara/Pierschke 1999, 241 (243f.); Schall/Schreibauer NJW 1997, 2412 (2414).

233 Leygraf/Nowara 1992, 42 (43).

234 Jansing 2004, 104f.

235 Jansing 2004, 111f.

very likely to find that he has a high probability or propensity to commit serious offences.[236] This is particularly troublesome after some forms of *Sicherungsverwahrung* were introduced which require a reduced number or no previous convictions.[237]

Yet, not only the experts, but also the judges are criticised. Although the final decision lays with the judge and the expert reports contains the already mentioned weaknesses, the judge will follow the experts in 88,7 per cent of the cases without extensively questioning them.[238] Because judges often do not feel comfortable making decisions on prospective possibilities, the courts have the tendency to pass the responsibility in this respect on to the experts by asking for very clear and precise statements, which criminology is not able to deliver.[239] Furthermore, the courts seldom ever hear two experts, if it is not required.[240] But in the very rare cases in which the expert denies dangerousness, the court is more likely to ask for a second report by another expert.[241] Since the second expert often confirms the first impression of the judge, it is almost certain that the offender will be found dangerous, once the court even considers imposing a preventive sentence and accordingly assesses the dangerousness of the offender. Yet, courts often do not consider the imposition of *Sicherungsverwahrung* even though the formal conditions are fulfilled.[242] In fact, the use of this sentence varies widely between different court districts leading to the conclusion that certain judges and public prosecutors are more likely to impose or request it.[243]

Finally, despite having done everything that is necessary, the courts and experts can be mistaken in the end. A dangerous offender can be released (false negative) or an offender can be kept in prison, although he is not dangerous (false positive).[244] If a dangerous offender is released and commits another offence, this creates a public outcry blaming the courts and experts for their inability to determine the dangerousness and protect the public. Because of this fear, the experts and courts tend to be more ready to find dangerousness and to impose a preventive sentence, once the other requirements are met.[245] In fact, only in 3,2 per cent of the cases an expert reaches the conclusion that the offender is not dangerous.[246] On

---

236 Eisenberg 2005, 168 marginal number 17.

237 Jansing 2004, 113.

238 Jansing 2004, 97; Kern 1997, 139f.

239 Jansing 2004, 106f.; Schall/Schreibauer NJW 1997, 2412 (2414).

240 Kern 1997, 120.

241 Jansing 2004, 98.

242 Jansing 2004, 98f.

243 Kern 1997, 48; Kinzig 1996, 348.

244 Mischke 2010, 34f.

245 Jansing 2004, 113f.; Kinzig 1996, 89f.

246 Kinzig 1996, 330.

the other hand, if an offender is wrongly imprisoned, the public concerns are much smaller, because of the criminal background of the offender. Nevertheless, this cannot justify or cover up the fact that an individual is falsely deprived of his freedom.[247] The problem is that there are no tests to determine the number of these falsely imprisoned persons. Nevertheless, two mass releases from mental hospitals in the USA indicate that the numbers of dangerous offenders are overrated and the number of false positives may be as high as 97 per cent.[248] Although these numbers cannot be transferred directly to the German *Sicherungsverwahrung*, the dangerousness is at least overestimated.[249] One estimation of false positives is between 60 to 70 per cent.[250]

In conclusion, in a lot of cases the courts do not consider the imposition of *Sicherungsverwahrung* and therefore do not ask an expert to assess the dangerousness of the offender. But if they do, it is most likely that the examination is positive and will be followed by the court imposing of the preventive sentence and probably causing a high number of false positives.

7) Other important provisions regarding *Sicherungsverwahrung*

a) Suspension of the preventive sentence according to § 67c I StGB

According to § 67c I StGB, before the offender starts to serve the preventive part of the sentence after the regular custodial part, a court shall review whether the requirements for the imposition of *Sicherungsverwahrung* are still fulfilled. Therefore, the court needs to determine whether the time spend in custody changed the prediction of future offences likely to be committed by the offender.[251] If it is satisfied that the offender does not pose a threat to the public anymore, the preventive term will be suspended, but is not terminated.[252] The offender is released on probation and subject to a special, stricter supervision (*Führungsaufsicht*) according to § 68 StGB.[253] Only in cases in which the court wants to suspend the preventive term, §§ 463 III 3, 454 II 1 StPO require another expert examination. Otherwise, it can base its decision on a previous examination.[254]

---

247 Jansing 2004, 102.

248 Kinzig 1996, 87ff.; Steadman/Cocozza 1974, 140.

249 Flaig 2009, 158f.; Kinzig 1996, 89.

250 Rasch/Konrad 2004, 391.

251 LK/Rissing-van Saan/Peglau § 67c marginal number 5.

252 Bartsch 2010, 115.

253 Fischer § 67c marginal number 5; for more details see LK/Schneider Vor § 68.

254 Bartsch 2010, 115f.

b) Suspension of the preventive sentence according to § 67d II StGB

Also during the prison time spent in preventive custody, the court needs to review whether the offender is still dangerous on a regular basis (§ 67d II StGB). These interval lasts usually two years for adolescent and adult offenders according to § 67e II StGB. For offenders under 18 years the period is shortened to one year (§ 7 IV 2 JGG). The process is very similar to the previously discussed provision. Again, the court needs only another expert examination according to §§ 463 III 3, 454 II 1 StPO, if it wants to suspend the preventive sentence. The offender is also released on probation and subject to the stricter supervision (§ 67d II 2 StGB).

The offender can be release if the court expects that he will not commit any more unlawful acts (§ 67d II 1 StGB). Previously to the already mentioned Sexual and Other Dangerous Offences Act 1998,[255] the text stated that the offender can be release if it can be justified to test that he will not commit further offences.[256] The reason for the change was the false impression of the public that offenders could be released despite a prediction of future offences.[257] While the change was supposed to be merely textual and not to change the conditions for the suspension,[258] following the reform offenders were less often released after being reviewed during *Sicherungsverwahrung*.[259]

c) Terminate the preventive sentence according to § 67d III StGB

This provision was introduced by the already mentioned reform in 1998.[260] Before, the offender had to be released after ten years, if he served a preventive sentence for the first time.[261] The change created an interesting dialogue between the European Court of Human Rights and the Constitutional Court in Germany, which will be discussed in the following section after a look at the provision today.

According to § 67d III StGB, a court now just has to review whether the preventive term can be terminated after the offender has spent ten years in preventive imprisonment. Unlike in the previously discussed provisions, an expert examination is now mandatory for this decision and every following decision of review in accordance with § 67d II StGB (§ 463 III 4 StPO). Furthermore, the provision assumes the offender should be released and requires for the continuation of imprisonment that the court actually expects the offender to commit serious offences resulting in serious emotional trauma or physical injury to the victims. While

---

255 „Gesetz zur Bekämpfung von Sexualdelikten und anderen gefährlichen Straftaten" 26.1.1998, BGBl I 160 ff.

256 Bartsch 2010, 117.

257 BT-Dr 13/9062, 9.

258 BT-Dr 13/9062, 5.

259 Bartsch 2010, 292f.

260 Mushoff 2008, 32f.

261 The version of § 67d I StGB before 31. January 1998.

the previously discussed provisions required a positive expectation of the offender's future behaviour, this provision does merely require the court to have no negative expectations.[262] Through these differing thresholds the legislator had regard to the increasing importance of individual freedom the longer the confinement lasts.[263] Another difference is that the imprisonment is terminated, not just suspended, if the court does not find that the offender still poses the danger to commit new serious offences. The offender is nevertheless subject to supervision according to § 68 StGB after the release (§ 67d III 2 StGB).

8) Dialogue of the courts

a) Judgement of the Federal Constitutional Court of 5.2.2004

The Constitutional Court had to deal with two main problems in this case. First of all, whether an unlimited form of *Sicherungsverwahrung* is compatible with human dignity and personal freedom guaranteed in articles 1 and 2 II 2 of the German Basic Law.[264] Secondly, whether the new provision was in breach with of strict prohibition of *ex post facto* laws in article 103 II Basic Law.[265] While article 103 II Basic Law states that an act is only punishable if the sanction was defined by law before the act was committed, according to article 1a III Introductory Act to the Criminal Code (*Einführungsgesetz zum StGB*)[266] the ten-year-limit was also repealed in cases in which, at the time of the act and the conviction, the offender and the judge expected a maximum term of preventive imprisonment of not more than ten years.

The Court decided that the unlimited deprivation of freedom is compatible with the human dignity, because the aim to protect society from dangerous offenders serves as a justification.[267] Nevertheless, it is important that the unlimited *Sicherungsverwahrung* should not deprive the offender of any chance of release.[268] Therefore, the main aim of the preventive sentence has to be resocialisation.[269]

A similar approach is taken to justify the infringement of personal freedom. The Court emphasises the principle of proportionality in this context and said that after the offender has served ten years in preventive custody, the sentence should be terminated or at least suspended. The continuation should be a measure of last resort.[270] Additionally, since the *Sicherungsverwahrung* is a special measure of prevention and

---

262 Fischer § 67d marginal number 15.

263 BVerfGE 109, 133 (161).

264 BVerfGE 109, 133 (149ff., 156ff.).

265 BVerfGE 109, 133 (167ff.).

266 Version before 31.4.2004, until 29.7.2004 subsection IV.

267 BVerfGE 109, 133 (151).

268 BVerfGE 109, 133 (150).

269 BVerfGE 109, 133 (151).

270 BVerfGE 109, 133 (161).

not a penalty aimed at retribution like regular imprisonment (two-track system), the Court requires a clear distinction privileging preventive over regular prisoners.[271] In conclusion, in the opinion of the Court, the newly introduced provisions satisfy these conditions and are not in breach with article 1 or 2 Basic Law.[272]

The two-track system delivers also the main argument of the Court, why the abolition of the time limit is not a breach of the prohibition on retroactive laws. Article 103 II Basic Law only prohibits the introduction or prolongation of penalties excluding measures of rehabilitation and incapacitation such as the *Sicherungsverwahrung*.[273] It is not a penalty in this sense, because it aims at the protection of society and is based on the dangerousness of the offender, unlike penalties which aim at retribution and are based on the culpability of the offender.[274] Similarities in practice between the two forms do not change this classification, in the view of the Court.[275]

Furthermore, the Constitutional Court also declared that the change is not in breach of the *prohibition of retrospective legislation and the concept of legitimate expectations enshrined in the rule of law*, because the protection of the society outweighs the expectation of the offender to be released after ten years.[276]

b) Decision of the Federal Constitutional Court on 23.8.2006

In this case, the Constitutional Court faced the same issues already discussed in the previous section, but this time in relation to the subsequent imposition of *Sicherungsverwahrung*.[277] With regard to the question of article 103 II Basic Law and the general principle of *non-retrosactivity* the Court simply referred to the previously discussed judgement.[278] The Court maintained that the subsequent imposition does not breach the right to freedom, because it serves the aim to protect society and is restricted to a small number of cases and offenders.[279]

This decision was confirmed using the same arguments by another decision of the Constitutional Court in August 2009 only shortly before the judgement of the European Court of Human Rights.[280]

---

271 BVerfGE 109, 133 (166f.).
272 BVerfGE 109, 133 (151ff.; 157ff.).
273 BVerfGE 109, 133 (167ff.).
274 BVerfGE 109, 133 (172ff.).
275 BVerfGE 109, 133 (176).
276 BVerfGE 109, 133 (185ff.).
277 BVerfG NJW 2006, 3483ff.
278 BVerfG NJW 2006, 3483 (3484).
279 BVerfG NJW 2006, 3483 (3484).
280 BVerfG NJW 2010, 1514ff.; more detailed Müller EuR 2011, 418ff.

c) Judgement of the European Court of Human Rights on 17.12.2009

A number of cases similar to these previously discussed regarding the abolition of the maximum period went to the European Court of Human Rights.[281] In the first case the applicant M committed a series of grave offences, including attempted murder, robbery, blackmail and dangerous assault, and had only spent a few weeks outside of prison since adulthood.[282] In November 1986 he was finally convicted to 5 years of imprisonment for another attempted murder and robbery of a woman and the court additionally imposed a sentence of *Sicherungsverwahrung* because of his propensity to commit serious crimes.[283] After the offender has served the five years of regular imprisonment and the additional ten year of preventive imprisonment, he filed the previously discussed complain to the Constitutional Court, in which he stated his continued preventive imprisonment beyond the previous ten-year-maximum breaches in particular his right to human dignity and freedom, the prohibition of retrospective criminal laws and the protection of legitimate expectations under the rule of law.[284]

The European Court then had to decide whether the continued imprisonment is in breach of his right to freedom in article 5 I ECHR or the principle of *nulla poena since lege* contained in article 7 I 2 of the Convention.[285]

aa) Article 5 I ECHR

At the beginning of it evaluation of article 5, the Court clarified that the article contained an exhaustive list of justification of the deprivation of liberty and *Sicherungsverwahrung* must therefore fall within at least one of the grounds.[286] The Court did not consider the exceptions in article 5 I 2 (b), (d) and (f) ECHR relevant in this context.[287]

The German Government argued that the applicant's continued preventive imprisonment is justified by article 5 I 2 (a) ECHR, which legitimates an imprisonment after a conviction of a competent court. Since the *Sicherungverwahrung* was ordered by a competent court without any time limit, the requirement of

---

281 M v Germany, (Application no. 19359/04), 17.12.2009; Schummer v Germany, (Applications nos. 27360/04 and 42225/07); Mautes v Germany, (Application no. 20008/07); Kallweit v Germany, (Application no. 17792/07), all on 13.1.2011.

282 M v Germany, (Application no. 19359/04), para. 7ff.

283 M v Germany, (Application no. 19359/04), para. 12.

284 M v Germany, (Application no. 19359/04), para. 26ff. giving a good summary of the judgement of the Constitutional Court.

285 M v Germany, (Application no. 19359/04), para. 79ff.; 106ff.

286 M v Germany, (Application no. 19359/04), para. 86.

287 M v Germany, (Application no. 19359/04), para. 102.

article 5 I 2 (a) ECHR is fulfilled.[288] The European Court agreed that the initial imposition occurred after the conviction and is therefore justified by 5 I 2 (a) ECHR.[289] Yet, it disagreed with regard to the extension beyond the ten year period. The Court did not find a sufficient causal connection between the initial judgement and the imposition beyond ten years, because the initial imposition must be read within the light of the provision at the time, which allowed only ten years of preventive imprisonment and without the change in law the second court could not have ordered the continuation of imprisonment.[290] Also, the Court did dismiss the argument that the initial court did not determine the length of the *Sicherungsverwahrung* to be not more than ten years, since it did only have jurisdictions to impose it, but not to determine its final duration.[291]

Furthermore, the Court did not find that the second decision after the review according to § 67d III StGB satisfies the requirement of a "conviction" in article 5 I 2 (a) ECHR, since it does not involve the finding of new guilt.[292] Therefore, the continued *Sicherungsverwahrung* cannot be justified by article 5 I 2 (a) ECHR.

Although the Court considered the second alternative of sub-paragraph (e) in article 5 ECHR, it did not think it justifies the continued *Sicherungsverwahrung*, since the sub-paragraph requires the prevention of a sufficiently concrete and specific offence, whereas the preventive sentencing aims at too general offences.[293]

Finally, the exception in article 5 I 2 (e) ECHR for "unsound minds" does not legitimate the continuation in this particular case because the previous examinations did not find M to be mentally ill. It might however be possible justification in other cases.[294] In conclusion, the Court found a breach of article 5 ECHR.

bb) Article 7 I 2 ECHR

The European Court emphasises the importance of article 7 ECHR, which prohibits in particular a retrospective change in criminal law creating a disadvantage for the accused.[295] To achieve the protection intended by article 7 ECHR effectively the Court needs to freely determine whether "penalty" in article 7 ECHR includes the measure in question. Relevant indicators for the classification are whether it is imposed

288 M v Germany, (Application no. 19359/04), para. 83ff.
289 M v Germany, (Application no. 19359/04), para. 96.
290 M v Germany, (Application no. 19359/04), para. 100.
291 M v Germany, (Application no. 19359/04), para. 99.
292 M v Germany, (Application no. 19359/04), para. 96.
293 M v Germany, (Application no. 19359/04), para. 102.
294 M v Germany, (Application no. 19359/04), para. 103.
295 M v Germany, (Application no. 19359/04), para. 117f.

following a conviction, the characterisation of the measure under domestic law, its nature and purpose, the procedures involved in its making and implementation, and its severity.[296]

Although the Court recognises that *Sicherungsverwahrung* is not considered to be a penalty taking the German two-track system and the case-law of the Constitutional Court into account, the European Court did not agree with this approach.[297] It argues that the preventive sentence is imposed as part of a conviction for a criminal offence and is a deprivation of liberty just like a regular penalty.[298] Furthermore, the detainees live under the same conditions, despite minor differences, and have the same possibilities of therapy like regular (long-term) prisoners, although the Court found a particular high importance of specially tailored psychological care and support.[299] *Sicherungsverwahrung* is imposed by a regular criminal court and its aim is not merely preventive, but also punitive like regular imprisonment, especially with regard to its impression on the detainees.[300] Finally, its unrestricted duration and the high threshold for release make it to one of the most severe measures within the German system.[301] In conclusion, *Sicherungsverwahrung* is a penalty within the meaning of article 7 I ECHR and the change in law therefore meant an additional penalty imposed retrospectively on the applicant, which amounts to a breach of article 7 I ECHR.[302]

cc) Consequences of the judgement

The Court affirmed this judgement in four similar cases in 2011.[303] Following the same reasoning, it furthermore decided in another case that the imposition of *Sicherungsverwahrung* subsequently to the initial judgement, which did not impose a preventive sentence, is in breach of article 5 ECHR.[304] Although the European Court did not deal with a breach of article 7 I ECHR, the already established line of argument can be applied *mutatis mutandis* to cases of subsequent imposition of *Sicherungsverwahrung*.[305] Moreo-

296 M v Germany, (Application no. 19359/04), para. 120.

297 M v Germany, (Application no. 19359/04), para. 125ff.; 133.

298 M v Germany, (Application no. 19359/04), para. 124; 127.

299 M v Germany, (Application no. 19359/04), para. 127ff.

300 M v Germany, (Application no. 19359/04), para. 130f.

301 M v Germany, (Application no. 19359/04), para. 132.

302 M v Germany, (Application no. 19359/04), para. 133ff.

303 Schummer v Germany, (Applications nos. 27360/04 and 42225/07); Mautes v Germany, (Application no. 20008/07); Kallweit v Germany, (Application no. 17792/07), all on 13.1.2011; Jendrowiak v Germany (Application no. 30060/04) 14.4.2011.

304 Haidn v Germany, (Application no. 6587/04), 13.1.2011.

305 BGH NStZ 2010, 567; Müller EuR 2011, 428f.

ver, the Court confirmed that the imposition of a preventive sentence is normally justified by article 5 I 2 (a) ECHR and that the system of *Sicherungsverwahrung* in general is not in breach with the Convention, but only cases involving the retroactive abolishment of the maximum period or a subsequent imposition.[306]

Regarding the consequences for detainees it is important to note that the judgements of the European Court have effect only between the parties (*inter partes*), but do not affect the general law (*inter omnes*), i.e. other prisoners in the same circumstances.[307] Yet, unlike in previous cases, the Court did not order the immediate release of the applicants giving Germany time to react to the judgements and adjust the law.[308] The ensuing rulings of Higher Regional Courts (*Oberlandesgerichte*) and the Federal Court of Justice disagreed on the question whether the detainees are to be released or not in consequence of the European judgements.[309]

After a few offenders were released, the German legislator reacted with the introduction of the Violent Offenders (Custodial Therapy) Act (ThUG)[310], because the permanent surveillance of these few offenders became increasingly difficult.[311] As part of the already discussed Reform of the Law of *Sicherungsverwahrung* Act, which restricted the subsequent imposition of *Sicherungsverwahrung*, but expanded the possibilities to defer it, this act allows in § 1 ThUG the imposition of a custodial therapy order, if the offender is to be released or even has already been released (§ 1 II ThUG), because of the prohibition of retroactivity. The other three conditions are that the offender is or was imprisoned for an offence listed in the catalogue in § 66 III StGB; another offence violating the right to life and limb, personal freedom or sexual self-determination of the victim gravely is very likely because of a psychiatric disorder of the offender; and the order is necessary to protect the public (§ 1 ThUG). The psychiatric disorder has to be severe enough to justify the imposition, but less than a psychiatric illness, which would allow a mental hospital order under § 63 StGB.[312] § 8 ThUG requires two independent, psychiatric experts to be heard, who have never treated the offender before.

---

306 Grosskopf v Germany, (Application no. 24478/03), 21.10.2010 para. 45ff.; already in M v Germany, (Application no. 19359/04), para. 96.

307 Kinzig NStZ 2010, 233 (238).

308 Greger NStZ 2010, 676 (680).

309 For an immediate release: OLG Karlsruhe Justiz 2010, 350ff.; OLG Frankfurt NStZ 2010, 573ff.; against it: BGHSt 56, 73ff.; OLG Stuttgart Justiz 2010, 346ff.; OLG Koblenz JR 2010, 306ff.; Radtke NStZ 2010, 537ff. with further references.

310 „Gesetz zur Therapierung und Unterbringung psychisch gestörter Gewalttäter – Therapieunterbringungsgesetz" 22.12.2010, BGBl. I 2010, 2300, 2305ff; term taken from Bohlander 2012, 236.

311 Zimmermann/Smok FD-StrafR 2011, 314190.

312 Nußstein NJW 2011, 1194 (1198).

According to § 12 ThUG the term is restricted to 18 month, but can be prolonged infinitely. The only difference compared to the high conditions for the first imposition is that just one expert examination is necessary for the extension. Also, this expert should not have examined the offender more than once before (§ 12 II ThUG).

Finally, the decision is not made by a criminal, but by a civil chamber of the Regional Court (*Landgericht*) (§ 4 I ThUG). This provision and § 2 ThUG, which demands the placement in a special therapy facility and not a prison, underline in particular that this deprivation of freedom is supposed to be separated as fas as possible from any criminal and penal context to avoid a breach of article 7 ECHR and meet the justification in article 5 I (e)ECHR for "unsound minds".[313]

d) Judgement of the Federal Constitutional Court on 4.5.2011

The German Constitutional Court gave maybe the most important answer to the judgement of the European Court on Human Rights on 4.5.2011.[314] In short, the Court quashed the whole system of *Sicherungsverwahrung* and declared it to be unconstitutional and applicable only until 31.5.2013.[315] This interim period is aimed to avoid a legal vacuum, which would have been caused if the provisions had been struck down, and allow the legislator to sufficiently reform the entire system adapting it to this judgement and the judgements of the European Court of Human Rights.[316] Similar to the cases before the European Court, the applicants claimed in particular that the subsequent imposition of Sicherungsverwahrung and the retrospective abolishment of the ten-year-limit breach their right to freedom in article 2 II 2 German Basic Law and the concept of legitimate expectations enshrined in the rule of law (articles 2 II in conjunction with 20 III Basic Law).[317] Despite having decided differently in 2004 and 2006, the Constitutional Court changed its interpretation of the relevant provisions, because, even though the European judgement does not affect the German Constitution directly, the judgements need to be taken into account to avoid a further breach of the Convention on Human Rights.[318] Nevertheless, the Court resisted to give up the two-track system and continues to interpret Sicherungsverwahrung as a special measure, rather than a penalty.[319] In the opinion of the Court, the distinction is justified by the differing reasons and aims of regular penalties and special measures of rehabilitation and incapacitation. While the justification for penalties is an individual wrongdoing and it is aimed at retribution, the purpose of Sicherungsverwahrung is public

313 Kinzig NJW 2011, 177 (181f.).

314 BVerfG NJW 2011, 1931ff.

315 Peglau NJW 2011, 1924f.

316 BVerfG NJW 2011, 1931 para. 168ff.

317 BVerfG NJW 2011, 1931 (1933).

318 BVerfG NJW 2011, 1931 para. 82.

319 BVerfG NJW 2011, 1931 para. 100ff.

protection and it is only legitimate because the public interest in it outweighs the individual interest in freedom.[320]

aa) Breach of the right to freedom

The right to freedom is of particular high importance and therefore every infringement must be subject to a close scrutiny.[321] Having said this, the Court finds that the system of *Sicherungsverwahrung* is in breach with article 2 II 2 Basic Law guaranteeing the right to personal freedom, because *Sicherungsverwahrung* is a disproportionate infringement as long as there is no clear distinction between the way it is served compared to a regular prison term.[322] The detainees require special therapies, which aim at a reduction of their dangerousness, resocialisation and their release as the first and most important goal.[323] This is particular crucial, because the European Court of Human Rights argued, *inter alia*, that *Sicherungsverwahrung* is a penalty within the meaning of article 7 ECHR, because of the similar conditions under which it is served.[324]

Although the Constitutional Court has already demanded a reform and a clearer distinction in 2004 the legislator continued to expand the use of preventive imprisonment and did not develop a system making this necessary therapy available. The latest reform in 2010, introducing the Violent Offenders (Custodial Therapy) Act discussed above, is a first step, but these provisions are not applicable in old cases, in which the last offence is committed before 1.1.2011.[325] The Court criticises especially the lack of financial and personal means for the required therapies. Since the detainees are often unwilling to undergo therapy, it is important to offer great motivational support, which is not given in the current system resulting in low numbers of preventive prisoners in therapy.[326] These shortcomings do not only affect the time spend in preventive custody, but also the time after release and the previous time in regular custody.[327] Although the regular prison term could be used to work with the dangerous offenders so he could be released on probation before actually serving any preventive term, the available therapy placements are often given to regular offenders and the preventive imprisonment is seldom suspended.[328] Furthermore, privileges like a

320 BVerfG NJW 2011, 1931 para. 103ff.
321 BVerfG NJW 2011, 1931 para. 96f.
322 BVerfG NJW 2011, 1931 para. 95.; 166.
323 BVerfG NJW 2011, 1931 para. 101.
324 BVerfG NJW 2011, 1931 para. 102.
325 BVerfG NJW 2011, 1931 para. 120.
326 BVerfG NJW 2011, 1931 para. 123.
327 BVerfG NJW 2011, 1931 para. 122.
328 BVerfG NJW 2011, 1931 para. 125.

leave of prison for a few hours or even a few days with or without an escort by an officer are granted particularly rare, even though they are very important for a sufficient examination of the development of the offender in custody.[329] In consequence, the detainees are often ill-prepared for the time after a release. This problem is increased by the lack of support in this crucial time.[330] Finally, the periods of two years, in which the courts review whether the conditions of *Sicherungsverwahrung* are still fulfilled, are too long.[331]

To sum up, the current system does not pay sufficient regard to the special situation of detainees and under these conditions a preventive term is a disproportionate deprivation of freedom and therefore a breach of article 2 II 2 Basic Law.

bb) Breach of the concept of legitimate expectations

Additionally to the previous findings, the Constitutional Court declared that the provisions relating to the subsequent imposition of preventive imprisonment and the retrospective abolishment of the maximum term also breach the *concept of legitimate expectations enshrined in the rule of law (articles 2 II and 20 III Basic Law).*[332] *The offenders expect to be released after ten years of preventive imprisonment or do not expect the subsequent imposition of Sicherungsverwahrung at all, because a subsequent imposition or a prolongation was not available at the time of their conviction. These expectations will usually outweigh the public interest in protection, since every undetermined imprisonment is an extraordinarily grave infringement of the right to freedom, which is a particular important right.*[333] *The balance strikes even more in favour of the expectation of the detainees after the findings of the European Court. Although the German Court states that it can and will continue to interpret Sicherungsverwahrung as a special measure and not a penalty like the European Court, the European judgements backs the previous findings of a strong need to improve the situation of the detainees and draw a clearer distinction between both forms of imprisonment.*[334]

Furthermore, the Constitutional Court follows the European Court regarding article 5 ECHR. Because of the reasons given in the previously discussed European judgements, only article 5 I 2 (e) ECHR may serve as a

329 BVerfG NJW 2011, 1931 para. 126.

330 BVerfG NJW 2011, 1931 para. 127.

331 BVerfG NJW 2011, 1931 para. 121.

332 BVerfG NJW 2011, 1931 para. 131ff.

333 BVerfG NJW 2011, 1931 para. 136.

334 BVerfG NJW 2011, 1931 para. 139ff.

justification for the subsequent imposition or extension beyond the former ten years maximum of *Sicherungsverwahrung.*[335] Although neither the European, nor the German Court give a clear definition of "unsound mind", they require a true mental disorder, which is persistent and makes a confinement in a special facility necessary. Possible examples are an anti-social personality or psychopathic disorder.[336]

In conclusion, the public interest in protection only prevails the expectation of the offender, if the execution of preventive sentence can be sufficiently distinct from a regular prison term, the requirements of article 5 I 2 (e) ECHR are met and the offender poses a high risk of severe violent or sexual offences.[337] Since these requirements are not contained, nor can they be read into the current provisions, the subsequent imposition and the extension of *Sicherungsverwahrung* breaches the *concept of legitimate expectations.*[338]

cc) Consequences of the judgement for the detainees

The consequences for the detainees are small, since the Constitutional Court did not declare the provisions to be void, but applicable until the 31.05.013.[339] It does not question *Sicherungsverwahrung* in general.[340] However, until the reform by the legislator the relevant provision are only applicable to cases, in which the evaluation of the offender and his behaviour (in custody) reveals a particular high risk of severe violent or sexual offences.[341] Offenders, serving terms based on a subsequent imposition and the extension of *Sicherungsverwahrung,* can only be kept in custody under the additional condition that an offender suffers from a psychiatric disorder making future grave offences very likely. The Court refers to § 1 ThUG in these cases to justify the deprivation of freedom in line with the exception in ar-ticle 5 I 2 (e) ECHR and therefore fulfil the requirements of the European Court.[342] Until 31.12.2011, the *Strafvollstreckungskammern* needed to review for every offender whether these conditions are fulfilled.[343] Finally, the Court halved the review period for all cases to six month for offenders under 18 and one year for all others.[344]

dd) Consequences of the judgement for the legislator

335 BVerfG NJW 2011, 1931 para. 143ff.
336 BVerfG NJW 2011, 1931 para. 152; 155.
337 BVerfG NJW 2011, 1931 para. 156.
338 BVerfG NJW 2011, 1931 para. 157ff.
339 Peglau NJW 2011, 1924 (1926).
340 BVerfG NJW 2011, 1931 para. 99.
341 BVerfG NJW 2011, 1931 para. 172.
342 BVerfG NJW 2011, 1931 para. 173.
343 BVerfG NJW 2011, 1931 (1933f.).
344 BVerfG NJW 2011, 1931 (1934).

Additionally to the guideline for the applicability of the provisions regarding *Sicherungsverwahrung* during the interim period, the Constitutional Court also specified some minimum requirements, which the legislator needs to take into account while reforming the system.[345] Yet, even though the Court declared numerous provision to be unconstitutional, some of them, like § 66 StGB, do not require a reform, as soon as *Sicherungsverwahrung* is sufficiently distinct from a regular imprisonment. The wide declaration is supposed to increase the pressure on the legislator.[346] While the federal legislator needs to set the framework and adjust the review periods, the state legislators have to ensure a clear distinction of regular and preventive imprisonment through appropriate provisions.[347] Therefore the minsters of justice on state and federal level discussed a reform to implement the guidelines given by the Court and presented a concept in September 2011 including various changes to the system.[348]

(1) Dealing with (about to be) released offenders

Some offenders have already been released after the European judgements, some will have to be released after 31.5.2013 when the interim period elapses since their imprisonment is based on provisions which are in breach with the concept of legitimate expectations, either because it was imposed subsequently to the conviction or because it goes beyond the ten year maximum which was still in place at the time of conviction.

For releases based on the judgements of the European Court for Human Rights, the Violent Offenders (Custodial Therapy) Act continues to be applicable allowing a further imprisonment or even a re-imprisonment if the offender suffers from a psychiatric disorder creating a particular high risk of severe violent or sexual offences (§ 1 ThUG).[349] For cases in which the Constitutional Court allowed a further imprisonment on the same basis until May 2013, the draft adopts the interim guidance of the Court. It introduces § 316 f Introductory Act to the Criminal Code (*Einführungsgesetz zum Strafgesetzbuch*), which contains a condition modelled exactly on § 1 ThUG. Only if this high threshold is met, the breach of the offender's expectations is justified and the preventive imprisonment can be continued beyond the interim period.[350]

345 Leipold NJW-S 2011, 312.

346 Hörnle NStZ 2011, 488 (492).

347 BVerfG NJW 2011, 1931 para. 130.

348 Bundesministerium der Justiz (Federal ministry of justice) 2011 (Last accessed on 29.02.2012); the concept has been passed by the Bundestag on 08.11.2012 but still needs to be passed by the Bundesrat.

349 Bundesministerium der Justiz 2011, 10 (Last accessed on 29.02.2012); for the requirements of the Violent Offenders (Custodial Therapy) Act see C.II.8.c)cc).

350 Bundesministerium der Justiz 2011, 9f. (Last accessed on 29.02.2012).

The condition related to the mental health of the offender is necessary to justify the deprivations of freedom using article 5 I 2 (c) ECHR to avoid another breach of the Convention.[351]

(2) Stressing the special characteristics of *Sicherungsverwahrung*

The proposed draft will not only transfer the previously discussed interim guidelines directly into law, but also introduces more general provisions which follow mostly the judgement's guidelines of how to stress the distinction between *Sicherungsverwahrung* and a regular sentence by privileging detainees. First of all, the Constitutional Court demanded a stronger emphasis on the fact that a preventive sentence is a measure of last resort. It may therefore be imposed only in the most exceptional circumstances and everything needs to be done to avoid it or keep it at least as short as possible.[352] To fulfil this requirement the concept of the Ministry of Justice points at the introduced restrictions by the already discussed reform which came into force in January 2011 abolishing the option to impose a preventive sentence for property offences and restricting the subsequent imposition to very narrow cases, almost abolishing it.[353] Furthermore, the draft plans to introduce § 66c II StGB, which requires already during the regular term of imprisonment that all efforts are made, especially in form of therapy, to allow the suspension of the preventive term before the offender actually starts to serve it.[354]

This *ultima ratio* character of *Sicherungsverwahrung* is closely connected to the second demand of the Court that prisons develop an individual plan for every offender to reduce his dangerousness. Ideally, the plan should start during the regular imprisonment and include (individually designed) therapies, but can also consider further job training, the tackling of financial or family problems and the preparation of the time after custody.[355] This requirement is put on a legal basis in the proposed § 66c StGB. Number 1 in subsection 1 requires an individually tailored therapy plan which clearly aims to reduce the offenders dangerousness and allows his release on probation as soon as possible.[356]

Thirdly, the notional § 66c I No. 1 StGB also demands intensive, motivating support to counteract lethargy, which was found by the Court in different cases.[357] It stated that offenders are often unwilling to participate in therapy and it is important to motivate them further through a realistic chance to be released and

351 Hörnle NStZ 2011, 488 (490f.); Kinzig NJW 2011, 177 (181).

352 BVerfG NJW 2011, 1931 para. 112.

353 Bundesministerium der Justiz 2011, 2f. (Last accessed on 29.02.2012).

354 Bundesministerium der Justiz 2011, 6f. (Last accessed on 29.02.2012).

355 BVerfG NJW 2011, 1931 para. 112f.

356 Bundesministerium der Justiz 2011, 4. (Last accessed on 29.02.2012).

357 Bundesministerium der Justiz 2011, 4. (Last accessed on 29.02.2012).

the granting or removal of privileges.[358] For example, leaves from prison for a few hours or even a few days, ideally without an officer, have to be granted, because they are very important to determine the risk of re-offending and to prepare the time after custody. The Constitutional Court further suggested installing a special board composed of experts to avoid that these relaxation are denied because of exaggerated fears.[359] Even though the draft does not include the introduction of a special board possibly comparable to the Parole Board, § 66c I No. 3 StGB is aimed to fulfil the requirement making the demanded privileges mandatory, as long as there is no concrete sign of danger. Additionally, it will require close arrangements between the prison and outside institutions which can facilitate the reintegration after the release of the offender.[360]

Fourthly, according to the judgement the everyday life of the detainees needs to reflect sufficiently that *Sicherungsverwahrung* is not a penalty. It should match a normal life outside of prison as far as possible and offer especially possibilities to maintain social and family relationships. Although a clear distinction to a normal prison is necessary, this requires only separated sections, but not an own building only for detainees.[361] Consequently, that is exactly how the draft in § 66c I No. 2 StGB describes the way the prisons should be designed for the preventive detainees.[362]

Fifthly, since the preventive term must be suspended as soon as the offender is not dangerous anymore, the Court set the appropriate reviewing period at one year, sometimes earlier if there are any indicators for a substantial change.[363] The draft transfers this period into § 66e II StGB, but goes even beyond it setting a shorter period of six month after ten years of *Sicherungsverwahrung*.[364]

Finally, the draft will create some very strong measures to ensure these requirements are fulfilled in practice. First of all, § 66c I 3 StGB will contain the clear order to release the offender after the regular term, if the reviewing court thinks the therapy requirements have not been meet during regular custody.[365] According to the new 119a of the Prison Code (*Strafvollzugsgesetz*), the court has to review whether the prison conditions fulfil the set standard during the regular term and ask for improvements if necessary. According to subsection 3, it should do that every two years, but can prolong the period up to five years

358 BVerfG NJW 2011, 1931 para. 114.

359 BVerfG NJW 2011, 1931 para. 115f.

360 Bundesministerium der Justiz 2011, 5. (Last accessed on 29.02.2012).

361 BVerfG NJW 2011, 1931 para. 115.

362 Bundesministerium der Justiz 2011, 4f. (Last accessed on 29.02.2012).

363 BVerfG NJW 2011, 1931 para. 118.

364 Bundesministerium der Justiz 2011, 6. (Last accessed on 29.02.2012).

365 Bundesministerium der Justiz 2011, 8. (Last accessed on 29.02.2012).

paying regard to the overall length of the term of the particular offender.[366] Secondly and very similar, as soon as the offender starts to actually serve the preventive term, a court has to check whether a sufficient therapeutic support is offered. If this is not the case, § 67d III 1 StGB as drafted requests the court to set a time limit of three to six month, after which the offender needs to be released if the support is still not available.[367] Thirdly, the draft secures that the offender gets the legal aid to claim these rights,[368] as required by the Constitutional Court.[369]

In summary, the Court ordered the legislator to pass provisions which improve the way *Sicherungsverwahrung* is served, if this instrument should be continued to be used. The proposed concept tries to follow these guidelines and especially the provisions, which order a release of the offender, if the necessary therapy is not offered, will secure the enforcement in practice.

(3) Reforming the *Sicherungsverwahrung* for the youth

Furthermore, the drafted reform will introduce some changes to the system of *Sicherungsverwahrung* in cases of young and adolescent offenders (§§ 7, 106 JGG). The primary form of preventive imprisonment will still not be available in these cases. Furthermore, the subsequent imposition will be abolished, too. Instead, the judge can defer the imposition to a second later judgement, if the offender committed "only" one grave offence and similar offences are at least likely in the future.[370] This follows the general trend of narrow the scope of the subsequent imposition, but to allow it to be deferred in more cases. The reason behind this development is that the possibility of a subsequent imposition of this severe measure is like a sword of Damocles. Even offender which do not need to expect the imposition, often fear the possible undetermined imprisonment, which increases frustration and aggravates resocialisation efforts.[371] Contrary, if the imposition needs to be reserved at the time of the conviction, the number of affected offenders is much smaller and this group might be motivated to use a therapy to avert a preventive sentence altogether.[372]

e) Reaction of the European Court of Human Rights

The first reaction by the European Court of Human Rights to the German Constitutional Court's judgement followed on 24. November 2011 in a case in which the offender appealed against his imprisonment beyond

366 Bundesministerium der Justiz 2011, 7f. (Last accessed on 29.02.2012).

367 Bundesministerium der Justiz 2011, 5f. (Last accessed on 29.02.2012).

368 Bundesministerium der Justiz 2011, 8 (Last accessed on 29.02.2012).

369 BVerfG NJW 2011, 1931 para. 117.

370 Bundesministerium der Justiz 2011, 11f. (Last accessed on 29.02.2012).

371 Bundesministerium der Justiz 2011, 2; 11 (Last accessed on 29.02.2012).

372 Bundesministerium der Justiz 2011, 3 (Last accessed on 29.02.2012).

the ten year limit.[373] In this judgement the European Court affirmed explicitly the stand, in particular the requirement to offer intensive, individual care, which the Constitutional Court took in its judgement in May 2011.[374] Furthermore, the Court examined closely whether the offender's continued imprisonment can be justified by article 5 I 2 (e) ECHR. It found that it cannot, because the imprisonment in question was not originally based on a mental disorder and additionally the offender is not detained in institution suitable for such patients.[375]

Following the same principles, the European Court re-affirmed its stands in similar cases in 2012 dealing with the subsequent form of *Sicherungsverwahrung*.[376] Especially the cases of *K, G* and *S* are interesting in this context, because there the German courts based their imposition of subsequent *Sicherungsverwahrung* on subsection 3 of § 66b StGB which continues to apply even after the recent reforms abolishing the use of subsequent *Sicherungsverwahrung* almost completely. Only if the offender is detained in a mental hospital and dangerous, but about to be released because the conditions for the mental hospital order are not met any more, a court can still impose a subsequent form of *Sicherungsverwahrung*. The Strasbourg Court reasoned that there is a breach of Article 7of the Convention, since *Sicherungsverwahrung* (in its current form) is a penalty within the meaning of Article 7 and it was not available subsequent to a mental hospital order at the time of conviction.

Yet the Court still did not rule out the possibility that a preventive sentence might be justified by article 5 I 2 (e) ECHR, if a mental disorder is diagnosed and the custody served in an appropriate institution. Moreover, although it did not deal with the Violent Offenders (Custodial Therapy) Act explicitly, the Court acknowledges repeatedly the will of the German legislator and Constitutional Court to use the Act to justify the retroactive imposition or extension of *Sicherungsverwahrung* in these cases.[377] Additionally, it did not order the release of the applicants, but found the interim guidelines for these cases given by the Constitutional Court to be sufficient to avoid further breaches of the Convention.[378] This supports the conclusion that the European Court does not only approve the judgement of the Constitutional Court but also might hold the respective provisions of the Violent Offenders (Custodial Therapy) Act and the proposed draft to be in line with the European rights.

---

373 OH v Germany (Application no. 4646/08), 24.11.2011; affirmed in Kronfeldner v Germany (Application no. 21906/09), 19.01.2012.

374 OH v Germany (Application no. 4646/08), para. 51ff.

375 OH v Germany (Application no. 4646/08), para. 84ff.;B v Germany (Application no. 61272/09) para. 67ff.

376 B v Germany (Application no. 61272/09), 19.04.2012; K and G v Germany (Application nos. 61827/09 and 65210/09), 07.06.2012; S v Germany (Application nos. 3300/10), 28.06.2012.

377 See exemplary S v Germany (Application nos. 3300/10), para. 48; 51.

378 OH v Germany (Application no. 4646/08), para. 119.

D. Comparison of both approaches

After the development and the legal basis for preventive sentencing in both legal systems have been discussed separately, it is useful to compare both approaches directly in order to gain an answer to the question, how the law deals with dangerous offenders in England and Germany. Furthermore, this will allow to find points which can be transferred to the other system to improve it.

The English sentencing provisions offer four preventive sentences. Firstly, the undetermined sentences of the imprisonment for life or public protection and secondly the determined ones of extended sentence and the mandatory minimum term set out in ss 110 and 111 PCCSA 2000 for a third offence of burglary or Class A drug trafficking. In Germany, preventive sentencing has always the form of the undetermined *Sicherungsverwahrung*. Only the requirements and the point of time for its imposition vary. While in England the preventive sentence can only be imposed at the time of conviction, *Sicherungsverwahrung* can be imposed next to the regular sentence in the same judgement, can be deferred to a second later judgement and also, in rare cases, be imposed later on without this adjournment.

The great similarity of all of these sentences is the aim to prevent a certain kind of offender to endanger the public security by the imposition of longer prison terms. Even the development of the groups on which the provisions focused is alike. At first, persistence, especially of thieves, was the main problem. This changed when violent, but even more so sexual offenders gained increasingly more attention from the media and therefore the public, leading to an expansion towards these offenders. Furthermore, over the years both systems have seen many reforms struggling to balance public protection and the danger of too wide provisions resulting in large numbers of severe, undetermined sentences.

This leaves three question to be answered: How is the imposition restricted to really dangerous offenders? Secondly, how is the preventive sentence served? And finally, when is the offender to be released? Yet, since the answer to these questions often depends on the status, the dangerous offenders provisions have within the legal system, this will be looked at first.

I. Status of preventive sentencing within the legal system

The most fundamental difference between the English and the German system is the status they assign to their preventive sentencing system. Although in both systems preventive sentencing can be summarised as an extension of the total time in custody, the positions differ in fact. *Sicherungsverwahrung* enjoys a special status within the German sentencing system because of the two-track system. It distinguishes penalties based on culpability aiming mainly at retribution and measure of rehabilitation and incapacitation going beyond that. In case of *Sicherungsverwahrung*, the aggravation is based on dangerousness and tries to reform the offender. A dangerous offender will therefore face a regular penalty and additionally a

preventive sentence. Even though the separation was questioned by the German academics[379] and in the judgement of the European Court of Human Right in *M v Germany*[380] with regard to the preventive sentence because of a lack of distinctive features, the German Constitutional Court confirmed the distinction of the two-track system in its latest judgement concerning its constitutionality. Yet, it found that the differences needs to be clearer leading to a privileged form of custody for detainees going beyond the alterations in place so far.[381] The English system on the other hand does not know such a strict distinction, but imposes just one sentence on the offender which combines a term appropriate for the gravity of the latest offence and a term resulting from the particular dangerousness of the offender.

The foregoing results into a difference in the status of the provisions within the legal system which can be underlined with statistical evidence. While in England 13.825 prisoners served an undetermined sentence (life or imprisonment for public protection) in 2011,[382] only 504 prisoners were in *Sicherungsverwahrung* in the same time.[383] To allow a better comparison, one should add the 2048 life prisoners in Germany, which actually do not serve a preventive sentence according to the two-track system. Even then, only 4,25 per cent of the total German prison population serve an undetermined sentence, compared to 16,04 per cent in England. This underlines that while *Sicherungsverwahrung* is an exceptional instrument going beyond the regular sentencing powers, the English preventive sentences are ordinary, even though possibly undetermined sentences within the English sentencing system.[384] Yet, the differences are so fundamental that it would be superficial to assume adopting or abolishing the two-track system solves existing problems. Both ways have advantages and disadvantages, therefore a more detailed comparison of the aforementioned questions is necessary.

II. Conditions for the imposition

It has already been indicated that the rough structure is very similar. The imposition of a preventive sentence in both legal systems is restricted through the conditions that the offender committed a certain kind and/or number of offences (formal conditions) and poses a threat to the public because of future offences (material conditions).

379 Lackner/Kühl § 61 marginal number 2.

380 M v Germany, (Application no. 19359/04), 17.12.2009, para. 127ff.

381 BVerfG NJW 2011, 1931 para. 111ff.

382 Data for England and Wales taken from Ministry of Justice 2012, Offender management statistics quarterly bulletin, table 1.2 (Last accessed on 29.02.2012).

383 Data for Germany taken from Statistisches Bundesamt (Federal Statistical Office) 2011, Strafgefangene/Convicted prisoners (Last accessed on 29.02.2012).

384 Home Office 2002, 95 para. 5.41 (Last accessed on 29.02.2012); Sturm 2010, 65.

1) Formal conditions

The formal conditions restrict the imposition of preventive sentences by confining the relevant offences or requiring a number of previous offences and/or a minimum gravity.

a) List of relevant offences

First of all, both systems limit the number of relevant offences. Schedule 15 of the CJA 2003 contains an explicit list of 166 sexual and violent offences. For the purpose of imprisonment for life and public protection, this list is further restricted to specified offences which are schedule 15 offences with no less than a ten year maximum sentence. Additionally, schedule 15A contains a list of 23 particular serious offences for the requirement in ss 225 (3A) and 227 (2A), which demands the commission of a previous offence.

The German system does not contain an extra list for relevant previously committed offences, but refers to the list of trigger offences whenever previous offences are a mandatory requirement. However, the preventive sentencing provisions offer four, mostly similar lists of relevant offences in §§ 66 I, III, 66a II StGB and § 7 II JGG. The lists name only few offences explicitly, but require more generally for example an "offence against the sexual self-determination", which is mentioned in every list. In sum, they contain similar sexual and violent offences like Schedule 15 CJA 2003, whereas just § 66 I, III StGB additionally includes certain other offences, especially drug offences with a maximum of at least ten years. In fact, the two lists in § 66 StGB contain the same but one offences, so that one list is redundant and should be abolished. The small variance in offences is a result of the various discussed reforms to find the right balance between the requirements. The general trend is the fewer formal requirements there are overall, the higher is the threshold for the remaining ones.[385]

In conclusion, the enumeration of offences which are able to trigger the imposition of preventive sentences is an important way to restrict its use. Yet, even the lists which allow the imposition of an undetermined sentence contain more than 100 offences in both justice systems, which can be committed in a wide range of (non-hazardous) manners. Therefore, the qualification in § 7 II JGG should be expanded to all relevant offences of the formal conditions in both systems. § 7 II JGG, which already contains the shortest list due to the impact of the sentences on young offenders, requires in any case that the victim was in danger to or actually suffered a serious emotional trauma or physical injury. Even though the effect might be limited since the impact on the victim is often considered when determining the dangerousness, this assessment is so difficult and contains so great uncertainty that only a formal requirement like this is able to ensure the imposition just for really dangerous offences.

385 Kinzig NJW 2011, 177ff.

b) Previous offences and minimum gravity

It has been mentioned that the different formal conditions balance each other in order to find the right threshold. This is especially true for the requirements which consider previous offences and the gravity of the trigger offence.

It becomes particularly apparent with regard to the forth requirement for the imprisonment for public protection and the extended sentence (ss 225 (3B), 227 (2B) CJA 2003). Here either a previous extraordinarily grave offence contained in schedule 15A CJA 2003 or alternatively a gravity of the latest offence, which justifies a notional minimum term of two years, is required. To impose the imprisonment for life, the offence in question must be appropriately serious, but no previous offence is required.[386] In contrast, there is no seriousness threshold for the mandatory minimum sentences, but it must be the third similar offence.[387]

The German situation is more complex and offers various different possibilities. The minimum regular terms reflecting the gravity of the offences range from none at all up to seven years.[388] This is usually combined with a minimum number of offences contained in the aforementioned lists. For example, § 66 I StGB requires the trigger offence to be of such gravity that at least two years imprisonment will be imposed. Additionally, the offender must have already been convicted twice for no less than one year and has already served two years in a prison or similar institution. These requirements contain the original idea that *Sicherungsverwahrung* should only be imposed on offenders who have been warned and did not reform although they already have been to prison.[389] In § 66 II StGB on the other hand no previous convictions are necessary, but three offences are required which are grave enough for at least one year imprisonment and one of these must be worth at least three years. Overall the offender must have committed at least three offences either way. In § 66 III StGB this number is already reduced to two, whereas in the case of § 66a II StGB it is enough that the offender committed only one offence to allow the court to postpone the question whether to impose a preventive sentence to the end of the custodial term.

In conclusion, it becomes obvious that while in England either a minimum gravity or a previous offence is required, in Germany usually more than one offence and additionally a certain degree of gravity is necessary to impose a preventive sentence. A previous conviction gives the offender a warning and a number of offences allow a better analysis of the offender's behaviour.[390] Although it might be possible to reveal the dangerousness of an offender even after just one maybe not even particular grave offence, this seems

386 Cf. s 225(2)(b) CJA 2003 discussed in B.III.1. Imprisonment for life.

387 Cf. ss 110, 111 PCCSA 2000 discussed in B.II.2. Mandatory(minimum) sentences.

388 § 66b StGB: no gravity requirement; § 7 II JGG: 7 years.

389 Lackner/Kühl § 66 marginal number 4.

390 Sturm 2010, 103.

nevertheless unlikely with regard to the difficulties with the assessment of dangerousness. Yet, there are very exceptional cases of obviously dangerous offenders in which the imposition is necessary after just one offence, but they must offer a high degree of certainty regarding the likelihood of re-offending.[391] Nevertheless, a high formal threshold is desirable to avoid the imposition of a preventive sentence too easily, especially taking the tendency to overestimate the dangerousness into account.[392]

2) Material conditions

The material condition is the distinguishing feature of the preventive sentences in both systems.[393] The offender is not only imprisoned because he committed a crime, but also because he is dangerous. The definition of dangerousness is very similar in the two legal systems. A dangerous offender is one that will commit further grave offences resulting into serious harm of the victim and therefore making public protection necessary. However, the level of expectation of these offences is different. Since s 229(1)(b) CJA 2003 states that the offender needs to pose a "significant risk" to the public, the English system does only require more than a mere possibility.[394] In contrast, the German provisions usually require an at least expected (§ 66a StGB) or even an established propensity to commit offences (§ 66 StGB) meaning a high expectation, almost a certainty that the offender will cease the next opportunity to commit another serious offence.[395] Even if just a high probability is required (§§ 66b StGB, 7 II, 106 V, VI JGG), a mere probability of future offences is never sufficient for the imposition of a preventive sentence.[396]

Even more interesting is the comparison of the way these expectations are reached. It has been previously mentioned that the assessment of dangerousness contains a number of great difficulties. It is just not possible to predict the future conduct of an offender. Both systems have to accept this fact and nevertheless try to reach the highest possible degree of certainty.[397] Firstly, in both system the assessment is done by the court and involves a comprehensive evaluation of the offender taking information like the social background, medical and mental conditions, drug abuse, the offending history and pattern into account.[398] Yet, the support of the court for this evaluation is designed differently. While in Germany an expert has to

391 Bartsch 2010, 340.

392 von Hirsch/Ashworth 2005, 55; Jansing 2004, 113f.; Kinzig 1996, 89f.

393 Ashworth 2010, 233f.; Sturm 2010, 73.

394 Archbold/Richardson et al. para. 5-306.

395 Kinzig NStZ 1998, 14ff.

396 BT-Dr 15/2887, 13.

397 Sturm 2010, 76.

398 Lang [2005] EWCA Crim 2864 para. 17ii; Flaig 2009, 131.

examine the offender's personality and his background in every case, the English system establishes the necessity of a pre-sentence report as a rule but the court can refrain from obtaining it.[399]

Furthermore, the persons filing these reports differ greatly. In England it is a probation officer according to s 158 CJA 2003 and in Germany it is in most cases a medical expert, especially a psychiatrist.[400] Therefore, even though *Sicherungsverwahrung* is not aimed at mentally ill offenders, the focus is much more on a mental analysis in Germany,[401] while the English probation officers are not medical experts, but specially trained to evaluate the risk of re-offending.[402] Along with the difficulties of the false (positive and negative) predictions, a similarity for the two legal systems is the tendency to follow the expert without further questioning.[403]

Overall, it has already been discussed that the difficulties with the assessment of dangerousness, especially the inability to predict the future behaviour with absolute certainty, is a weakness of this extensive sentencing power.[404] But this weakness is even increased by low material requirements like "significant" risk or mere "probability". To justify the harsh measure of preventive imprisonment a substantial risk or an at least high probability of future serious offences should be required.[405] Furthermore, to support the independent evaluation of the judge, a substantial expert report should be mandatory and not in the discretion of the court like in England.[406] Yet, the judge must not follow these reports blindly, but scrutinises them to ensure that they are substantive enough. Finally, the German preference for medical expert seems improper when considering that the preventive sentence does not aim at insane offenders.[407] Criminologically trained experts like an English probation officer are specialists in the prediction of future criminal behaviour and therefore more suitable for most cases as long as there is no indication of a mental disorder.

3) Conclusion

In general, the formal and material conditions for a preventive sentence in England are lower than the requirements for *Sicherungsverwahrung*. This is mainly due to the fact that the preventive sentencing is an extraordinary additional sentencing power in Germany, whereas it forms a regular part of the English

399 See §§ 246a, 275a III StPO and s 156 CJA 2003.

400 Kinzig 1996, 328; Nowara 2006, 175 (185).

401 Sturm 2010, 83.

402 Crown Prosecution Service 2007 (Last accessed on 29.02.2012).

403 Ashworth 2010, 235; Jansing 2004, 97.

404 Cf. C.II.6.c) Difficulties with the assessment of dangerousness.

405 Ashworth 2010, 237.

406 Schall/Schreibauer NJW 1997, 2412 (2416f.).

407 Sturm 2010, 120.

penalty system. Nevertheless, the provisions in both systems need to pay regard to the fact that the classification as a dangerous offender means a possibly lifelong imprisonment, which is not based on what the offender has done but what he is predicted to do. This prediction is very hard to make and contains a large amount of uncertainty. Therefore, high formal and material safeguards should be established to avoid an excessive imposition of these severe sentences. Especially, the imposition after just one committed offence should be the very rare exception and go along with a particular high gravity of the committed offence and an even higher certainty with regard to future offences. Moreover, only offences which (could have) caused a serious emotional trauma or physical injury should be considered for all formal requirements. In terms of the material threshold, the difficulties with the assessment of dangerousness and the low success rates cause high numbers of falsely imprisoned, hence the provisions ought to require a higher degree of certainty that the offender poses a real threat. And finally to support the courts in this question, expert reports should be compulsory and done by criminologically trained, rather than medical experts to underline the difference between a mental hospital order and preventive sentences.

III. Conditions of imprisonment

The difference in the conditions of imprisonment is another result from the status given to preventive sentences by the two systems. Consequently, the English preventive sentence is served in regular prison units. The sole distinction between the prisoners is the necessary level of security from the lowest D to the highest A varying for dangerous offenders from A to C.[408] Even though long term prisoners have often better educational, training and work opportunities, can wear their own clothes and prepare their own meals, dangerous offenders are not treated with special therapy but can participate in regular "offending behaviour programmes" like every other prisoner.[409] These findings are especially problematic, since English prisons tend to be overcrowded and prisoners are transferred frequently, which hinders possible improvements to the behaviour of the offender.[410]

Contrary, the special status of *Sicherungsverwahrung* demands also a special treatment of the detainees. Notwithstanding certain present shortcomings, which have already been discussed, the proposed draft to reform the system aims especially to improve the conditions for these offenders. This will include personalised therapy plans including efforts to motivate the offenders, separated wards and a life like imprisonment as far as possible.[411] If these conditions are not met, the offender needs to be released.[412] Although

408 Livingston/Owen/MacDonald 2008, para 4.17ff; Padfield CrimLR 166 (180).

409 Easton/Piper 2008, 287ff.; overwiew by Morgan 2001, 211ff.

410 Cavadino/Dignan 2007, 8; Easton/Piper 2008, 289ff.

411 Cf. C.II.8.d)dd)(2) Stressing the special characteristics of Sicherungsverwahrung.

412 Bundesministerium der Justiz 2011, 5f. (Last accessed on 29.02.2012).

these changes will not amount to the hotel like imprisonment some German academics demanded in the past,[413] it will soften the severe effects caused by the undetermined nature of preventive imprisonment.[414]

In England this effect, including feelings of anxiety and hopelessness, increases notably after the halfway release point has passed.[415] Therefore, since the two determined preventive sentences order an automatic release after half of the imposed sentence, the aforementioned effect is only problematic in the cases of imprisonment for life or public protection. However, the adoption of the German special treatment and extra conditions for detainees is not mandatory, since the European Court of Human Rights restated recently that any convictions to a life sentence is not in breach with the European Convention, even if a whole life order is imposed and the convicted cannot expect to be released before his death, as long as it does not amount to the high threshold of "gross disproportionality".[416]

However, if the offender is found to be dangerous, imprisonment alone will not change him. Even though it is not against the European Convention to confine an offender until the rest of his life as long as it does not amount to inhuman or degrading treatment, the aim should be to reduce the dangerousness. This aim is especially important, since the preventive term is solely based on the fact that the offender is dangerous.[417] It mainly requires individual therapy offers.[418] The German Constitutional Court pointed in the right direction even though critics say the Court might be too optimistic about the effects since therapy will fail on some offenders.[419] Nevertheless, most therapy offers will pay off for the offender and the public in the long run, since even an individual therapy specialised on the need to a dangerous offender is still cheaper than to imprison him for the rest of his life.[420] Therefore, the expansion of treatment possibilities for preventive prisoners in England is very sensible to create a real hope to be released.[421]

---

413 Eisenberg 2005, 452 marginal number 65; Rieber 2009, 38.

414 The European Court of Human Rights cites numerous reports of international organisation which outline these difficulties caused by long term imprisonment in M v Germany, (Application no. 19359/04), 17.12.2009, para. 76ff.

415 van Zyl Smit 2002, 105.

416 Vinter v The United Kingdom, (Applications nos. 66069/09, 130/10 and 3896/10), 17.1.2012, especially para. 93.

417 Drenkhahn/Morgenstern/van Zyl Smit CrimLR 2012, 167 (182f.).

418 At least briefly considering such a special treatment for dangerous offenders in England and Wales: von Hirsch/Ashworth 2009, 85 (88f.).

419 Hörnle NStZ 2011, 488 (492).

420 Mischke 2010, 174.

421 See similar approach as part of a reform proposal by the Ministry of Justice 2011, para. 27ff. (Last accessed on 29.02.2012).

IV. Conditions for release

Following the previous point, the conditions for the release from preventive imprisonment plays a crucial role in both laws. The regular release provisions apply for the two determined forms of preventive imprisonment in England. Therefore, after one half of the total imposed term the offender has to be released automatically. He will spend the second half on licence, which can be recalled if the offender does not fulfil the licence conditions.[422] Furthermore, in cases of an extended sentence the extension period will be added to the time on licence.[423]

For the undetermined sentences, the English system assigns the question of whether the offender should be released to the Parole Board, which is a multidisciplinary independent body with 232 members including psychologists, psychiatrists, probation officers, but mainly judicial and independent members.[424] After the minimum term has elapsed, one single member will review the case and either refer it to a panel for an oral hearing or decide that the offender is not suitable for release (rule 16(2) Parole Board Rules (PBR) 2011). In the latter case, the prisoner may still ask for an oral hearing according to rule 17(1) PBR 2011. Rule 3(3) of the previous PBR 2004 required a penal to be formed out of three members. Usually this is still the case, but since the hearings are resource intensive, rule 5(2)(a) PBR 2011 now states that the Chairman will appoint "one or more members".[425] During the hearing the penal will determine the level of risk posed by the offender through reports about therapy participation, anger management, drug abuse, and attitude towards the offence and victims.[426] Furthermore, it will question witnesses and the offender and then decide whether to release him within 14 days (rules 25 and 26 PBR 2011). If the offender is not released, the offender can apply for the next review within two years according to s 28(7)(b) CSA 1997.

In Germany, the previous mentioned *Strafvollstreckungskammer* is in charge of the enforcement of the imprisonment (§§ 462a, 463 StPO). According to § 78b I GVG three judges will review cases involving the suspension (§§ 67c I and 67d II StGB) or the termination (§ 67d III StGB) of *Sicherungsverwahrung.* Under § 67e II StGB the court needs to review the cases every two years, however this period will be shortened to one year by the proposed reform.[427] Reviews according to §§ 67c I, 67d II StGB require only a new expert examination if the court wants to suspend the further imprisonment (§§ 463 III 3, 454 II 1 StPO),

422 Gibson/Watkins 2004, 147.

423 Ashworth 2010, 233.

424 Parole Board 2011, Members (Last accessed on 29.02.2012); for more information on the Parole Board see: Arnott/Creighton 2010, 23.

425 Parole Board 2011, 5f.; 47.

426 Gosling CrimLaw 2008, 179,1 (2).

427 Bundesministerium der Justiz 2011, 6 (Last accessed on 29.02.2012).

whereas for the termination after ten years of *Sicherungsverwahrung* according to § 67d III StGB and every review after these ten years the examination is mandatory (§ 463 III 4 StPO).

Yet, the consultation requirement is not the only difference, but also the thresholds for the proof of dangerousness are different. Generally, there are two possibilities. Either the offender will be released if it is proven that he does not pose a danger to the public anymore. Or the offender will be released when it cannot be proven that he still poses a danger to the public. The difference looks small, but while the first alternative presumes the offender is still dangerous and the imprisonment should be continued, the second presumes the imprisonment should be terminated and requires an anew proof of dangerousness for a continuation.

The English system uses the first alternative since public protection is the primary aim.[428] Therefore, the Parole Board has to hold the opinion that a further imprisonment is not necessary anymore (s 28(6)(b) CSA 1997).

In Germany, the first alternative is used at the end of the custodial term and during the first ten years of preventive imprisonment, while the second needs to be applied afterwards. §§ 67c I, 67d II StGB order the continuation of the imprisonment unless the court expects that no future unlawful acts will be committed by the offender. Contrary, after the first ten years in *Sicherungsverwahrung* have elapsed, § 67d III StGB orders the release of the offender unless the offender still poses a danger to commit serious offences resulting in serious emotional trauma or physical injury to the victims. It is noteworthy that first of all, the gravity of the expected offences is higher and secondly, this provision assumes that the offender should be released after ten years of preventive imprisonment.

In conclusion, the comparison shows that especially the bodies in charge of the release of a preventive prisoner differ. One might even think that the Parole Board is a model which should be adopted in Germany.[429] Supposedly, the advantages are that the Board is comprised out of different experts, not only medical experts.[430] Furthermore, the independence from the courts and the gap between review and conviction is said to allow a better communication with the offender, because before the accused is actually convicted he will be reluctant to give details about the offence.[431] Additionally, the separation supposedly moves the focus towards to future rather than relying on offences in question during the conviction hearing.[432]

---

428 Parole Board 2012, Parole Board (Last accessed on 29.02.2012).

429 Sturm 2010, 121.

430 Sturm 2010, 118ff.

431 Sturm 2010, 115ff.

432 Sturm 2010, 110ff.

Yet, only the first argument contains a true advantage of the Parole Board over the German *Strafvollstreckungskammer*. Judges should be supported by experts who should not only be medical experts. Therefore, the hearing of an expert ought to be the rule and exceptions very rare and well-reasoned. Examples for such an exception are cases in which there are no indications at all that the risk has changed. However, in respect of the other two arguments there is no great difference between the Parole Board and the *Strafvollstreckungskammer,* since both bodies specialise in decisions regarding convicted offenders in custody.[433] They will review the case only after the custodial term has already passed. Therefore they can concentrate on the future conduct and are not at risk of mixing questions of dangerousness with culpability issues. Although the independence of the Parole Board from the courts is said to be an advantage, it is sensible to assign this decision of release to judges, since the reviews have a big impact on the offender determining whether he is going to be released or continued to be imprisoned. This importance is underlined by the fact that § 78b I GVG requires the *Strafvollstreckungskammer* to sit with three judges for such a decision. The Parole Board Rules 2011 open to much discretion in this regard.[434] Just one member is necessary to review the case and only in cases of life imprisonment it needs to be a judge (s 5(2) and (4) PBR 2011). Even though today the penal usually consists out of three members, the number is very likely to be reduced considering the ever-increasing work load of the Parole Board.[435]

Finally, the offender should be released unless the review establishes that he still poses a risk to society.[436] Compared to the presumption that the imprisonment should be continued, this threshold is lower and will lead to fewer detainees, but it is nevertheless able to offer sufficient protection of the public. Consequently the offender does not have the difficult maybe even impossible task to prove that he is not a threat anymore.[437] To diminish the remaining doubt about the future conduct of the offender, the changes must go hand in hand with strict conditions for the licence and a close control for the time after release.[438] But in the end, a realistic prospect to be released is vital to both systems.

V. Proposal for reform

A number of reform ideas have been put forward in the previous section and most of them apply equally to both legal systems. The key goals are that, firstly, the conditions for the imposition of preventive sentences should be strict enough to reflect the severe impact of an undetermined sentence. This is particular

433 Parole Board 2012, Parole Board (Last accessed on 29.02.2012); Hannich/Appl § 462a marginal number 2.

434 Padfield PL 2011, 691 (696).

435 Parole Board 2011, 5f.; 47.

436 Padfield PL 2011, 691 (698).

437 Becker 2009, 114f.; R (on the application of Wells) v Parole Board [2009] UKHL 22 gives an example of the difficulties of this task without professional support.

438 Mischke 2010, 174.

important with regard to the imposition of preventive sentences on young offenders, for whom the undetermined nature of the sentences is even more devastating. Secondly, the time in custody should be used to reduce the dangerousness. This demands specialised therapy offers meeting the needs of dangerous offenders. And finally, the overall aim of the provisions has to be the release of the offender as soon as possible.

Both systems have already been subject to several reforms. Yet, unlike the English system which underwent a profound renewal by the CJA 2003, the diverse and complex German system is the result of a number of small reforms which abolished and added requirements or even entire imposition options, but always focused on singular aspects and did not attempt such an extensive renewal.[439] The previously discussed proposal of the Federal Ministry of Justice seems to continue in this line, even though a revision of the entire system is necessary after numerous changes including the introduction of the possibility to defer the imposition of *Sicherungsverwahrung* or impose it subsequently (which was widely abolished again), the judgement of the European Court of Human Rights and the reaction by the German Constitutional Court declaring the system to be unconstitutional.[440] The following proposal for such a far-reaching reform allows a combination of the strengths of the English and the German system to the advantage of not only the public security, but also the offenders' rights. This new system should include the previously mentioned ideas. Moreover, it should be simple and clear by offering only one type of preventive sentence and one way to impose it. Both systems allow a variance which creates uncertainty and is not necessary.

1) Only one type of preventive sentence

At the end of 2011 the Legal Aid, Sentencing and Punishment of Offenders Bill was introduced to the British Parliament acknowledging the lack of clarity, the rising numbers of prisoners serving preventive sentences and the resulting need of another reform.[441] This reform idea proposes the replacement of imprisonment for public protection with a new mandatory life sentence with stricter conditions and the wider use of a new form of extended sentences.[442] Yet, this will not be able to solve current difficulties. The extended sentence is not really a sentence for public protection, since the extension period only prolongs the time spend on licence, while the offender has to be released after the first half of the custodial period regardless of the risk to the public. Even if the offender needs to serve two-thirds or even the whole period under the new provisions,[443] just a few more years imprisonment seem ineffective to protect the

439 Kreuzer/Bartsch GA 2008, 655 (656).

440 Earlier likewise requests, e.g., by: Becker 2009, 114; Kalf 2006, 205 (215f.).

441 Ministry of Justice 2011, 1 (Last accessed on 29.02.2012); the Bill was passed by the UK Parliament and came into force on 01.05.2012.

442 Ministry of Justice 2011, para. 23ff. (Last accessed on 29.02.2012); Drenkhahn/Morgenstern/van Zyl Smit CrimLR 2012, 167 (183f.).

443 Ministry of Justice 2011, para. 25 (Last accessed on 29.02.2012).

public from an offender who is found to be dangerous and very likely to re-offend.[444] The same reason led the German legislator to abolish the maximum period of *Sicherungsverwahrung*.[445]

Additionally, the proposed Bill will lead to an extensive use of life imprisonment,[446] although the suitability of life imprisonment as a public protection measure is questionable. The courts will then have to impose a life sentence in cases they would not have done so before.[447] The former life imprisonment will be mixed with imprisonment for public protection even though a distinction is sensible, since the reasons and aims of these two sentences are very different. Offenders serving the imprisonment for public protection are not imprisoned beyond the determinate sentences because of what they did, but because of what they might do. The justification is therefore an uncertain assumption and the aim in these cases must be a reduction of this assumed risk to society resulting in the earliest possible release after the appropriate custody term. On the other hand, this is not required for life prisoners with a high culpability since they have committed very grave offences which alone justify their long imprisonment. Mixing these two sentences will inevitably lead to a higher number of affected prisoners and therefore undifferentiated therapy offers. A further specialised therapy for dangerous offenders allowing an early release will then be impossible. Instead, the imprisonment for public protection should be distinct from the life imprisonment limiting the use of the latter to particular grave offences. Combined with the abolishment of the extended sentence, this will leave just one protective sentencing power allowing a more effective focus one this special type of dangerous offender and the necessary therapy offers similar to the German approach.

2) Only one way to impose the preventive sentence

Additionally to the previously discussed, the here proposed system will only contain one way to impose a preventive sentence. The former primary way to impose the preventive sentence in the conviction judgement will then be reduced to a deferral leaving the final imposition to a later judgement at the end of the custodial term.[448] This follows the German trend to expand the possibilities to defer the imposition of the preventive sentence and restrict the subsequent form to a minimum. This minimum (§§ 66b StGB; 1 ThUG) is limited to old German cases decided under previous law, in which an undetermined form of preventive imprisonment was not available at the time of the conviction, but the offender is undoubtedly particular dangerous and thus cannot be released.[449] The subsequent form caused frustration and depression for a large number of non-dangerous offenders fearing the later imposition of a preventive sentence simply

444 Easton/Piper 2008, 153 in regard of "longer than commensurate sentences".

445 BT-Dr 13/9062, 10; Lackner/Kühl § 67d marginal number 7a.

446 Ministry of Justice 2011, para. 24 (Last accessed on 29.02.2012).

447 Drenkhahn/Morgenstern/van Zyl Smit CrimLR 2012, 167 (184).

448 Bartsch 2010, 337.

449 Bartsch 2010, 345.

because they fulfilled the formal requirement.[450] The proposed approach avoids this uncertainty since it requires the courts to reserve any later imposition in the conviction judgement.

Furthermore, deferring the imposition also contains several advantages compared to the now abolished, actual imposition in the first judgement, which is today the primary way to do it in both systems. Firstly, since the imposition is deferred until the second judgement, it is not final. The offender can still avoid the additional term using therapy offers during the regular part of his sentence, which usually lasts for several years giving enough time for a reform. Even though both systems already require a review before the preventive part of the sentence begins, the first term often passes in vain not offering the necessary therapies. Not only the offenders, but also the prison staff have the impression that the preventive sentence will follow in any event.[451] A clearer separation of the conviction judgement, in which the preventive sentence is just reserved, and the review in a second judgement, which might or might not lead to the imposition, would counteract this attitude. It will also put pressure on the prisons to offer necessary therapy and on the offender to use it.[452]

The second advantage of a definite imposition at a later stage is that the conclusive determination of dangerousness follows only after the conviction for the trigger offence. Previously, the examining expert always needed to pretend the offender is already found guilty to come to a conclusion, which hindered sufficient communication between the offender and the experts and made the already complex assessment even more difficult.[453] The court still needs to assess the dangerousness under the proposed system, in order to decide which offender will have to be considered in a second judgement. Yet, it is not the basis for the final imposition anymore, but only for the later assessment. So far the courts could only take the offender at the time of the first judgement into account, mostly unable to predict possible effects of mere imprisonment or therapies.[454] Under the proposed system, the judge is able to consider the impact of custody on the offender when the dangerousness is reassessed in the later judgement. Furthermore, offenders will ideally already have undergone therapy and are more likely to cooperate with the reviewing body and its experts. This will lead to better, more reliable evaluations.[455]

Thirdly, the courts will be more ready to defer the final decision than to actually make it right away. Especially the German courts are very reluctant to impose a preventive sentence even in cases in which it would be necessary, because they fear the severe impact and do not want to sabotage possible therapy

450 Bundesministerium der Justiz 2011, 2; 11 (Last accessed on 29.02.2012).

451 Bartsch 2010, 336.

452 Bartsch 2010, 337f.

453 Schall/Schreibauer NJW 1997, 2412 (2417); Sturm 2010, 111.

454 Smith [2011] UKSC 37; BeckOK/Ziegler § 66 marginal number 16.

455 Sturm 2010, 108.

attempts.[456] The new system will therefore improve the public protection. But it will also strengthen the offenders' rights in the contrary cases when broad media coverage about a grave crime pressures the judges and experts to find the offender to be dangerous.[457] In these cases, the preventive sentence can only be reserved and the public interest will have passed at the time of the second judgement.

3) Not only a change of names

Nevertheless, such a distinction between the first judgement done by regular courts and the second decision by the Parole Board or the *Strafvollstreckungskammer* is not new to either system. Neither is the idea that offenders should have access to an appropriate therapy. The judgement by the German Constitutional Court and the following reform can serve as an example how to ensure that the reform is not merely done on paper, but also put into effect. Firstly, the Court proposed to install a special body to review decisions in cases of preventive sentencing.[458] The German legislator did not follow this suggestion, yet it is a good way to underline the distinction between the two stages. More importantly, it would create a body which is specialised in the assessment of dangerousness, familiar with its difficulties and therefore less likely to overestimate the danger. Moreover, the reports with the previously discussed faults like inexperience and a lack of depth would be avoided.[459] This institution could be shaped like the Parole Board and therefore profit from the experiences of experts from different fields. Following the model of the Parole Board, the penal should consist of three members and include a judge, a psychologist or psychiatrist and an experienced criminologically trained member.[460]

The second way to ensure therapies are offered is to release the offender if he does not have access to them. This is a sharp, but necessary sword. For example, in the case of *Wells* the House of Lords continued the imprisonments for public protection of four offenders even though they did not have access to required training to prove that they are not dangerous anymore.[461] The reform will not pose a threat to the public security if it is implemented like the German legislator plans to do it. This means that before the offender is actually released, the prisons and the department of criminal justice need to get time to react to avoid the release.[462]

---

456 Baltzer 2005, 273; Bender 2007, 74.

457 Jansing 2004, 113f.; Kinzig 1996, 89f.

458 BVerfG NJW 2011, 1931 para. 115f.

459 Schall/Schreibauer NJW 1997, 2412 (2417).

460 Parole Board 2011, 5.

461 R (on the application of Wells) v Parole Board [2009] UKHL 22; similar in the first BVerfG judgement: BVerfGE 109, 133.

462 Bundesministerium der Justiz 2011, 5f.; 9f. (Last accessed on 29.02.2012).

In summary, the existing systems have a number of weaknesses, the greatest being that prison conditions did not met provisional requirements. That has to be the main aim of every reform. The proposed system would be less complex and put pressure on the offenders and the prisons by giving the offender the opportunity to reform and requiring the prison to actually offer valid therapies. Compared to the English system, it would emphasise this exceptional sentencing power by leaving just one extraordinary preventive measure which involves higher restriction for the imposition and a special treatment during the time in custody. This would then lead to a more restricted use of this severe power, but once it is imposed the offender would still have the chance to avoid its negative impacts. Yet, by strengthening the prospect to be released if the offender uses therapy offers, especially the German courts, which have been reluctant to impose this measure even in appropriate cases, will be more ready to use their power. It therefore pays more regard to the offenders' rights and increases the public protection at the same time.

E. Conclusion

In conclusion, this thesis recommends a more active approach of the penal system to really offer a solution to the problem of dangerousness offenders. So far, the reaction of both systems is almost plain imprisonment. Although the German two-track system demands a much stronger distinction, the current systems in both countries are very similar. The two systems split the sentence in a regular term appropriate for the trigger offence and a preventive term allowing a further imprisonment. While striking the balance between public protection and right of the offenders to freedom, both penal systems have decided to favour the public protection and to imprison the offender as long as it is necessary. This approach is not in breach with the European Convention or criticised by the European Court for Human Rights, unless the preventive term is imposed or prolonged retroactively.

However, there is undoubtedly a particular kind of offender that has a propensity to commit offences, but the group is very small. Furthermore, it must not be forgotten that the further preventive imprisonment is not justified by any action of the offender. Even though he is a convicted criminal, the regular sentence already imposes the suitable penalty for these offences. Taking additionally the difficulties and uncertainties of the assessment of dangerousness into account, these offenders therefore deserve a better system. Paying regard the small group and its specific needs, the use of this sentencing power should be highly restricted avoiding large numbers of affected prisoners. This means not to blend the group of dangerous offenders with other serious offenders like the latest English Bill replacing the imprisonment for public protection with an expansion of the regular life sentence. Instead, it is necessary to concentrate the preventive sentencing power in one clear measure with respectively qualified imposition conditions. As proposed, this measure should distinguish stronger between the conviction judgement and the review of the case at the end of the regular custodial term. While only reserving the preventive sentence at the first instance, the prison staff and the affected offenders get the chance to avoid the actual imposition. The soonest possible release must be the overall aim in every decision. This will mainly require the improvement

of therapy offers both in England and Germany. Combined with probation requirements like the continuation of therapy after release, this reform will be able to introduce the necessary limitations.

The other great weakness so far is the insecurity of the assessment of the offender to determine the risk to society. Unfortunately, no reform will be able to fully eliminate this. Yet, giving the offender a better chance to prove that he is not dangerous will soften the issue. Furthermore, the existing problems with inadequate reports and the constricted background of the expert, especially in Germany, can be reduced by the proposed adjustments. Firstly, the judge delivering the conviction judgement should closely scrutinise the expert report to obviate insufficient reports. He should than conclude making an independent assessment. Secondly, the reviewing judgement at the end of the regular term should be given by a specialised court including medical and non-medical experts similar to the English Parole Board. This will prevent a too narrow perspective on the preventive sentencing cases and ensure the establishment of a certain expertise in this field, which then makes the overestimation of dangerous less likely.

However, considering that a lot of the proposed changes are not entirely new to neither law systems, it is more importantly that this body will also oversee the implementation of the reform into practice. Thus, it can admonish the department of correction and the prisons if prison conditions do not fulfil the required standard and ultimately release the offender.

Finally, the proposed system will definitely produce costs. Yet, first of all, the reduction of cost for the imprisonment resulting from the shorter additional terms will compensate a big part of the increase. Secondly, the fact that the dangerous offender is not imprisoned for a wrongdoing, but the greater good of society, puts a strong obligation on the state to invest these extra costs. Only under these circumstances will the preventive sentencing respect the rights of the offender as far as possible and nevertheless offer (at least) the same level of protection for society as the current system.