

Exceptional Law in Europe with Emphasis on “Enemies”
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Abstract

The first goal of this presentation is to suggest that the theory of the enemy, created by Günther Jakobs, may be helpful to understanding changes in criminal justice policies, but is not an accurate explanation able to justify the current modification of our criminal law and criminal procedure system. Beyond any theoretical controversies, drawing a line between citizens and enemies is not only impossible but in fact useless, since the same person will be held as a citizen during ordinary detention and as an enemy during preventive detention or administrative internment. In Jakob’s view, the legal person or subject is turned into an enemy to prevent him from relying on the rule of law. As such, it must be criticized.

The second goal of this article is to show how exceptional laws, which derogate from essential principles of ordinary criminal law, are made acceptable in our countries through the distinction between substantive and procedural due process. Even under article 5 of the European Convention on Human Rights, offenders, aliens and the mentally ill may be deprived of their liberty provided some substantive and procedural safeguards are met. Case-law on German preventive detention is very significant: while the courts do not challenge the legitimacy of preventive detention measures under Article 3, they refuse to place people beyond the reach of the legislative or executive branches, beyond the reach of state regulation. Procedural due process makes such measures acceptable to all, except the detainee.

The third goal of this presentation is to highlight that preventive detention is not focused only on the classic deprivation of liberty, but can also appear in a variety of means of control, treatment and surveillance even before trial or after incarceration. While preventive detention is the “penalty” the most decried by numerous authors because it appears to be a penalty after a penalty, it is but the tip of the iceberg: the surveillance system conceived in France in 1998, then broadened and reinforced in 2005, 2007, 2008, 2010 and 2011, constitutes a genuine law of “preventive punishment”. As such surveillance is not considered “preventive detention” stricto sensu, substantive and procedural guarantees are less strict than those for preventive detention as such. And yet, each kind of surveillance measure is linked to the other, in such a way that it leads to an extension of preventive deprivation of liberty. It is difficult to assess the relevance of this analysis for other European countries, but it would be interesting to know to what extent undesirable people can be subjected to permanent surveillance.

The extension of exceptional law through its normalization (within the scope of criminal justice policy) and “civilization” (within the scope of migration and public health policies) shows that the enemy can be anyone. Weakening the criminal liability concept has strengthened the dangerousness concept and justifies the permanent monitoring of a part of the population, claimed to be a threat to the life of the other part of the very same population. Criminal risk management is being put forward before accountability. It seems as if the security policy has even reached another step, of applying the precautionary principle. In short, risk management policy accepts risk but wants to reduce it: risk is “normal”. A precautionary approach is different: first, no threat whatsoever is tolerable; second, all threat must be eliminated. It also allows for reversing the burden of proof: the

threatening suspect must prove his lack of dangerousness. Criminal Law is currently characterized by a continuum of security and control, which can be insured by measures applicable indefinitely, in both time and space. More than simply substituting security measures for criminal penalties and replacing repressive intent with an intent to monitor and treat, this continuum involves deliberate confusion in the use of the criminal “tools”.

Indefinite/preventive detention has been well-known in many European countries, such as Switzerland, Belgium, Germany, the Netherlands, Austria, and Italy, for quite a long time. In these countries, recidivist and “abnormal” offenders may be subject to preventive/indefinite detention. In France, recent legislation introduced what is often called a product of authoritarian laws of the 1930s: the Act of February 25, 2008 created a system for the preventive detention of dangerous people, called “*rétention de sûreté*” (security detention).

A theoretical framework created – or renewed – by Günther Jakobs, might be helpful to describe and understand the recent shifts, especially in France but also in other countries. In the mid-1980s, Günther Jakobs set out his theory of the criminal law of the enemy¹. Briefly, he draws a distinction between the criminal law of the citizen and the criminal law of the enemy, between *Bürgerstrafrecht* and *Feindstrafrecht*. Citizens are deemed to be willing and able to comply with criminal law in the future, whereas enemies are presumed to no longer be able or willing to do so. Because the latter place themselves outside society, they are no longer deemed to be citizens or even human beings, so do not have the right to benefit from the ordinary safeguards, Criminal law of the enemy is characterized by early, even extra-judicial repression (*Vorverlagerung*), even before any offense has been committed (*ante delictum*). Its goal is to neutralize, distance and control people considered enemies, that is, “dangerous people”. Procedural guarantees are significantly weakened. Günther Jakobs explains and tries to justify the existence of exceptional laws, such as anti-terrorist legislation, by the quality of “enemy”: no rule of law for the enemies of the rule of law.

This German theory can also be read as a legal form of a biopolitical security policy², aimed to protect life in its barest form. Any threat against the life of the population – but not against the territory – must be detected and neutralized. The identification of an “intimate enemy” or a “personal enemy”³ leads to distinctions among the population of a country, and civil liberties are no longer protected.

Jakobs’ theoretical framework must be considered in the light of the European Convention on Human Rights (ECHR) and its interpretation by the European Court for Human Rights (ECtHR). In a very early decision⁴, the ECtHR addressed this question in a case pertaining to the use of an anti-terrorist law in Ireland, which that can be described as an exceptional law. Article 17 of the

1 G. Jakobs, “Kriminalisierung im Vorfeld einer Rechtsgutsverletzung”, ZStW 97 (1985), pp. 751; G. Jakobs, “Feindstrafrecht? – Eine Untersuchung zu den Bedingungen von Rechtlichkeit?”, HRRS August/September 2006, pp. 289.

2 M. Foucault, *Sécurité, Territoire, Population* – Cours au Collège de France (1977-1978), Seuil, 2004.

3 *Inimicus* and not *Hostis*.

4 ECtHR, *Lawless v. Ireland*, July 1. 1961.

Convention provides that “nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention”. The Irish government argued that this provision should be read such that persons who are terrorists may be deprived of the fundamental individual rights guaranteed by Articles 5 and 6 of the Convention. The ECtHR rejected the Irish government's arguments and held that article 17 is not a basis for denying the guarantees of the Convention to any natural person⁵.

This decision does not mean that an exceptional law is never admissible. On the contrary, Article 15 of the Convention allows contracting States to derogate from certain rights guaranteed by the Convention in case of war or other public emergency threatening the life of the nation⁶. Derogations are allowed when three conditions are met. Firstly, there must be a war or a public emergency threatening the life of the nation. Secondly, measures must be strictly required by the exigencies of the situation. Thirdly, measures must comply with other obligations under international law. Moreover, no derogation from Articles 2, 3, 4 (§ 1) and 7 may be made under this provision.

In a more recent decision⁷, *A v. United-Kingdom*, the ECtHR had to assess the compliance of the Anti-terrorism, Crime and Security Act with the Convention, especially with its articles 3 and 5. It recalls that “the Court is acutely conscious of the difficulties faced by States in protecting their populations from terrorist violence. This makes it all the more important to stress that Article 3 enshrines one of the most fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention [...], Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 notwithstanding the existence of a public emergency threatening

5 “7. Whereas in the opinion of the Court the purpose of Article 17 (art. 17), insofar as it refers to groups or to individuals, is to make it impossible for them to derive from the Convention a right to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the Convention; whereas, therefore, no person may be able to take advantage of the provisions of the Convention to perform acts aimed at destroying the aforesaid rights and freedoms; whereas this provision which is negative in scope cannot be construed a contrario as depriving a physical person of the fundamental individual rights guaranteed by Articles 5 and 6 (art. 5, art. 6) of the Convention; whereas, in the present instance G.R. Lawless has not relied on the Convention in order to justify or perform acts contrary to the rights and freedoms recognised therein but has complained of having been deprived of the guarantees granted in Articles 5 and 6 (art. 5, art. 6) of the Convention; whereas, accordingly, the Court cannot, on this ground, accept the submissions of the Irish Government.”

6 Article 15 of the Convention states:

“1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (§ 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.”

7 ECtHR, *A. v. United-Kingdom*, 19 February 2009, *Application no. 3455/05*

the life of the nation. Even in the most difficult of circumstances, such as the fight against terrorism, and irrespective of the conduct of the person concerned, the Convention prohibits in absolute terms torture and inhuman or degrading treatment and punishment⁸.”

To validate the existence of an emergency situation under article 5, the Court “recalls that in *Lawless* [...], it held that in the context of Article 15 the natural and customary meaning of the words 'other public emergency threatening the life of the nation' was sufficiently clear and that they referred to 'an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed'”. The Court quotes the different cases in which this question was raised. In the *Greek Case*, the Commission held that the emergency should be actual or imminent, affect the whole nation to the extent that the continuance of the organized life of the community was threatened. Moreover, the crisis or danger had to be exceptional, in that the normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order, were plainly inadequate. In *Ireland v. United Kingdom*, the Article 15 test was satisfied, since terrorism had for a number of years represented “a particularly far-reaching and acute danger for the territorial integrity of the United Kingdom, the institutions of the six counties and the lives of the province's inhabitants”. Finally, in *Aksoy v. Turkey*, Kurdish separatist violence was considered as having given rise to a “public emergency” in Turkey⁹. In each case, terrorism as a situation, and not one terrorist as a person, legitimated the public emergency.

Irrespective of anti-terrorist exceptional legislation, many European laws contain rules that derogate from ordinary criminal law and/or procedure when aliens, the mentally ill, sexual offenders, recidivists, or perpetrators of crimes against minors are concerned. It is however difficult to accept that these exceptional laws, which potentially infringe some rights of the Convention, are justified by the existence of a situation under Article 15. Given this decision of the ECtHR, the questions are much more complex than the theory of Günther Jakobs seems to take into account. In fact, this theory may be useful to describe parts of a phenomenon, but it does not seem to be an accurate explanation justifying any of the current modifications of our criminal law and criminal procedure system.

Beyond any theoretical controversies¹⁰, drawing a line between citizens and enemies is not only impossible, because of the lack of objective criteria¹¹, but in fact useless, since the same person may be held as a citizen during ordinary detention, then as an enemy during preventive detention or administrative internment. Even though states have been permitted to use the qualification of “enemy” or “dangerous person” in a continuous way¹², the European Court's case law does not allow all infringements. In our view, neither the theory of a criminal law of the enemy nor the derogations under Article 15 of the European Convention on Human Rights may sufficiently justify the ongoing development of exceptional law guided by a precautionary approach.

8 *Id.*, Pt. 126.

9 *Id.*, Pt. 176.

10 Jakobs' position is being discussed throughout the world.

11 G. Giudicelli-Delage, *Rev. sc. crim.* 2009.

12 For alien terrorists held in criminal detention and, after release, in administrative internment for the purposes of deportation.

This presentation will focus on classic preventive detention for criminal offenders, which is based on a blurred vision of concepts. Criminal liability no longer depends solely on guilt, but on dangerousness as well, which leads to the acceptance of indefinite and undefined (at the time of sentencing) security measures. Whereas some European laws address crime through a twin-track system¹³ and claim that preventive detention is a security measure, other countries remain on a one-track system or a multiple-track system. Derogations are admitted after meeting strict procedural safeguards, which Jakobs does not even suggest in his theory. What is interesting is that such acceptance is followed by or even ensures an extension of exceptional legislation, which is thus normalized within the context of criminal law, and “civilized” when applied to aliens and the mentally ill, who are beyond the scope of criminal law and are not protected by criminal procedure. This is why exceptional laws should be discussed not only in terms of procedural safeguards, but above all, in terms of compliance with the very essence of the rule of law.

I. Classic Preventive Detention for mentally-ill or repeat offenders

In quite a few European countries, the concept of criminal liability has become considerably weaker over the past dozen years and dangerousness has been clearly emphasized, such that the term “dangerous offenders” includes not only recidivists but also first-time offenders. Changes in the concept of criminal liability have also led to changes in criminal punishment¹⁴. In accepting dangerousness as a criterion for punishment, individuals are punished for offenses they might or might not commit. Punishment therefore becomes prospective, not just retrospective. According to Günther Jakobs, ante-delictum “measures” are no longer prohibited, but the failure to either draw or accept a clear difference between criminal penalties and security measures (A) leads to the – false – compliance of exceptional laws with fundamental criminal principles and puts an end to the *nullum crimen* principle (B).

A. The (failure of the) distinction between criminal penalties and security measures

After a brief presentation of four European systems, the difficulty in maintaining a distinction between penalties and security measure will be addressed.

In Belgium¹⁵, the Act of April 9, 1930 on social defense against the mentally ill and ordinary offenders created a type of indefinite detention, which is (still) considered a criminal penalty. Today, a

13 *System der Zweispurigkeit*. X. Pin, “L’internement de sûreté en Allemagne: une mesure de défense sociale à la dérive”, *Déviance et société*, 2010/4 – Vol. 34, p. 527, part. p. 535 ff.

14 M. Delmas-Marty, *Libertés et sûreté dans un monde dangereux*, Seuil, La Couleur des Idées, 2010.

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Two recent laws are of more particular concern: the Act of April 21, 2007 on internment of the mentally ill and the Act of April 26, 2007 on placement at the sentencing court's disposal. The entry into force of the law of April 21, 2007, initially scheduled for January 1, 2009, was postponed until February 1, 2012 at the latest by article 7 of the Act of July 24, 2008. This postponement was affirmed by the Constitutional Court (decision 2/2010 of

complementary penalty called “placement at the sentencing court’s disposal” (*mise à disposition du Tribunal de l’application des peines*) has replaced placement at the government’s disposal, which was the subject of several ECtHR decisions. This complementary penalty, which is mandatory¹⁶ or optional depending on the case, is added to the main penalty when there is a risk that even a first-time offender “will repeats serious offenses harming the physical or mental integrity of a person and there is no way to contain that risk through release under parole”. Complementary penalties are implemented after classic, that is, criminal, detention, for the purposes of protecting law and order. When an offender is considered mentally ill at the time of the judgment, internment in a psychiatric hospital¹⁷ may be ordered as a security measure if the person is likely to commit new offenses because of the mental disorder. Both deprivations of liberty aim to neutralize a dangerous offender is present. But they are based less on social defense than on the morality of the offenders, who have acted with contempt for the value of human life. According to several Belgian researchers, this shift in the justification for a penal measure explains the extension of the scope of application of preventive detention¹⁸.

As Jörg Kinzig will of course focus his presentation on Germany¹⁹, I will just say that Germany has long distinguished between criminal penalties (*Strafe*) and security measures (*Massregel der Besserung und der Sicherung* – literally, measure of amendment and security), and continues to do so despite recent decisions by the European Court of Human Rights (ECtHR) concerning the compliance of preventive detention with the Convention. Indeed, *Sicherungsverwahrung* belongs to the category of “security measures”. Each variation of *Sicherungsverwahrung* relies on the common base of dangerousness, which can be defined as a probability of recidivism, with or without a link with mental disorder. Between 1998 and the numerous recent decisions of the ECtHR²⁰, successive reforms extended the personal and substantive scope of application of preventive detention²¹.

January 20, 2010). The Act of April 26, 2007 was scheduled to enter into force before July 1, 2009, but this date was changed to February 1, 2012 by article 8 of the Act of July 24, 2008.

16 In cases of repeated criminal offenses and some heinous crimes.

17 Y. Cartuyvels, « La défense sociale en Belgique, entre soin et sécurité », *Déviance et société*, 2010/4, Vol. 34, pp. 615.

18 Philippe Mary, Dan Kaminski, Eric Maes and Françoise Vanhamme, “Le traitement de la ‘dangerosité’ en Belgique: internement et mise à la disposition du gouvernement”, *Champ pénal/Penal field* [on line], Vol. VIII | 2011, posted October 25, 2011, consulted April 27, 2012. URL: <http://champpenal.revues.org/8188>; DOI: 10.4000/champpenal.8188.

19 J. Kinzig, *Die Legalbewährung gefährlicher Rückfalltäter – Zugleich ein Beitrag zur Entwicklung des Rechts der Sicherungsverwahrung*, MPI für ausländisches und internationales Strafrecht, Band K 138, Duncker & Humblot, Berlin, 2008.

20 For instance, ECtHR, Haidn v. Germany, Application n° 6587/04 ECtHR, Kallweit v. Germany, 13 January 2011, Application n° 17792/07; ECtHR, Mautes v. Germany, 13 January 2011, Application n° 20008/07; ECtHR, Schummer v. Germany, 13 January 2011, Application n° 27360/04 et 42225/07; ECtHR, Jendrowiak v. Germany, 14 April 2011, appl. N° 30060/04; ECtHR, Mork v. Germany, 9 June 2011, Application n° 31047/04 and 43386/08; ECtHR, Schmitz v. Germany, 9 June 2011, Application n° 30493/04; Refer to <http://combatsdroitshomme.blog.lemonde.fr/2011/06/10/retention-de-surete-et-droit-transitoire-la-lecon-de-droit-allemande-et-europeenne-cour-edh-5e-sect-9-juin-2011-mork-c-allemande-et-schmitz-c-allemande/> [consulté le 17 septembre 2011]; ECtHR, Schönbrod v. Germany, 24 November 2011, Application n° 48038/06; ECtHR, O.H. v. Germany, 24 November 2011, Application n° 4646/08.

21 J. Leblois-Happe, X. Pin, J. Walther, German criminal law column, RIDP n° 76, 2005, pp. 139, part. pp. 155; RIDP n° 76, 2005, pp. 503, part. pp. 514; RIDP n° 77, 2006, pp. 729, part. pp. 739; RIDP n° 78, 2007, pp. 621, part. pp. 639; C. Saas, Actualités du droit pénal allemand, Rev. sc. crim. n° 1, 2009, forthcoming; C. Saas, S.

In Switzerland, the Criminal Code of 1937 introduced two forms of preventive detention, for mental ill offenders and for ordinary offenders. At that time, there was a strong distinction between both types of detention. Preventive detention for ordinary offenders did not require a mental disorder, whereas its counterpart for mentally ill offenders could be applied to ordinary offenders. The reform of the Swiss Criminal Code led to the internment of dangerous offenders²². In the meantime, the Constitution underwent a reform, following the successful request by federal initiative to institute life-long commitment of sexual or violent offenders considered to be very dangerous and incurable²³. Since 8 February 2004, Article 123a of the Swiss Constitution states: “(1) If a perpetrator of sexual or other violent crimes is qualified by expert testimony necessary for sentencing as extremely dangerous without chance of therapy, he may be imprisoned for life due to the high risk of repeat offences. Early release or temporary leave are barred.

(2) New expert testimony is only admissible if new scientific facts establish that the criminal can successfully receive therapy and does no longer present a danger to the public. In case of release due to such new testimony, the administrative agency responsible for the release is liable for any repeat offences.

(3) All expert testimony regarding perpetrators of sexual or other violent crimes must be presented by at least two independent and experienced experts on the basis of all relevant facts. “

In France, “pure” preventive detention was instituted in 2008²⁴. The French system is largely modeled on the 1933 German law regarding dangerous offenders that instituted preventive detention (*Unterbringung in der Sicherungsverwahrung*) and preventive/indefinite detention mechanisms. But it has also instituted unparalleled surveillance through life-long measures, such as electronic monitoring or compulsory treatment²⁵. When a Court of sessions sentences a person to at least 15 years of detention for an offense listed in the Code of Criminal Procedure²⁶ and the convicted person seems particularly dangerous, such dangerousness being “characterized by a very high probability of recidivism because s/he has a serious mental disorder”²⁷, it may retain jurisdiction and order preventive detention after the sentence has been served. Preventive detention lasts one year, and can be renewed without limit. In 2010, law on preventive detention was changed. It led to an extension of the list of offenses allowing the placement under preventive detention.

In each of the four countries mentioned, dangerousness constitutes a common basis for preventive detention, a crossroad where ordinary and mentally ill offenders meet. But dangerousness is still a riddle, as it is not limited to having a mental disorder or being a repeat offender. Sexual offenses and juvenile delinquency are the prime catalysts for the various reforms in these countries,

Trautmann, *Actualités du droit pénal allemand*, every Column n° 1 of the *Rev. sc. crim.* since 2005. See also J. Leblois-Happe, “*Rétention de sûreté vs Unterbringung in die Sicherungsverwahrung: les enseignements d’une comparaison franco-allemande*”, *AJP* n° 5/2008, pp. 209.

²² 12 December 2002.

²³ In the Swiss-German version of the text, the reference is “*untherapiebar*”. In the French one, the word is “non amendable”.

²⁴ The Act of 25 February 2008 was supplemented by the Act of 10 March 2010.

²⁵ See III.A.

²⁶ Please refer to article 706-53-13 of the Code of Criminal Procedure.

²⁷ Please refer to article 706-53-13 of the Code of Criminal Procedure.

where “presumed recidivists” and “offenders presumed dangerous but mentally competent” are now subject to a preventive detention based on precaution rather than risk management.

The *summa divisio* between the concepts of criminal penalties and security measures, as well as their related legal regime, are no longer as relevant and operative as they once were. In 1994, French legislators grouped all criminal sanctions into a single category called “penalties”, which was worthy of criticism even then because some of the sanctions were akin to security measures. Since adoption of the Act of 12 December 2005, however, this single category has been split into two or even three, without benefit of any theoretical reflection on the law of security measures. The Act of 25 February 2008, amended by the Act of 10 March 2010, constitutes the climactic, bald-faced intrusion of security measures into the Code as a category unto itself. In the same way, the changing qualification of “sanctions” that may be ordered against a “beneficiary” of a declaration that s/he is legally incompetent due to mental illness illustrates some terminological confusion²⁸. If one follows the analysis of the *Conseil constitutionnel* (French constitutional court), there is now even a category of “preventive penalties” that may be indefinite and are applicable immediately or retroactively. My presentation will therefore now focus on one of the main derogations to the ordinary criminal law principles, namely the prohibition of retroactive application of a more severe new criminal law, especially in France and Germany.

B. The end of the *nullum crimen nulla poena sine lege* principle

Irrespective of ECHR Article 15 § 2, exceptional laws may derogate even from the main principles of criminal law. However, preventive detention may not constitute a punishment.

In France, the wedge into the classical criminal system based on liability and not on dangerousness is certainly the decision of the *Conseil constitutionnel* of December 2005²⁹, in which it refused to apply the substantive due process, and especially the prohibition of retroactivity, of criminal law. Its decision was explicitly based on dangerousness. The Act under review had created judicially supervised surveillance of dangerous people, which is a means to control detainees after release (during the period corresponding to sentence reductions), for example by electronic monitoring. Such judicially supervised surveillance was foreseen even with respect to people who committed offenses before the Act's entry into force, thus opening up the possibility of retroactive application of the Act.

The issue, which is quite well-known in Germany and the case law of the European Court of Human Rights, is whether such judicially supervised surveillance is a security measure or a criminal penalty. If the former, the Act may be applied retroactively; if the latter, it may not (in the French legal system, the prohibition of the retroactive application of criminal law is based on article 8 of the Declaration of the Rights of Man and Citizens of 1789). The *Conseil constitutionnel's* decision is based on the argument that the qualification of a “tool” as a criminal penalty/punishment or as a security measure depends on the grounds for and goals of the “tool”. As judicially supervised surveillance of

28 Security measures for lawmakers, penalties for the Criminal Chamber in a decision of 21 January 2009 (Bull. crim. n° 24); security measures for the Criminal Chamber in a decision of 16 December 2009 (Bull. crim. n° 216).

29 Decision n° 2005-527 DC, December 8, 2005.

dangerous people, even by way of electronic monitoring, is based on dangerousness rather than guilt and has for its only purpose the prevention of recidivism, it is neither a punishment nor a penalty. Hence, the Act is constitutional. It must be noted, however, that the criminal courts consider that electronic monitoring constitutes a penalty when it is combined with socio-judicial monitoring, and cannot be applied retroactively. It would be an understatement to say that the complexity of the system reaches new heights here.

In 2008, the same issue arose again, this time with respect to applying preventive detention, created by the Act of February 25, to offenders having committed a crime before the entry into force of this act and being tried after it? The *Conseil constitutionnel*³⁰ held preventive detention to be a “measure” based on the significant dangerousness and not the guilt of a person: the Court of Sessions allows preventive detention to be ordered after criminal detention has been served only to prevent the recidivism of a person suffering from a “serious mental disorder”. Therefore, “preventive detention is neither a punishment nor a penalty resembling a punishment”, and it may be inferred that the act creating preventive detention does not have to comply with article 8 of the Declaration of 1789, which provides that a more severe law applies only in the future. However, the Constitutional Court is aware of the flaws of its argumentation and, though it provides no real basis for its solution, goes on to say that since preventive detention is a deprivation of liberty that may last a lifetime and is ordered after a criminal verdict, it will not be applied to offenders having committed a crime before the entry into force of the Act.

This argumentation shows many weaknesses, one of which is the lack of logic. Moreover, this decision conceals the possibility of increasing the use of preventive detention. By not considering preventive detention as part of the criminal justice system, the *Conseil constitutionnel* even fails to ensure the application of its decision. In fact, the first “purely preventive” detentions were not expected to be ordered under this Act until 2020, but even after the decision of the *Conseil constitutionnel*, retroactive application of preventive detention was possible subsequent to other measures.

For example, a detainee sentenced in 1995 to 20 years in prison would ordinarily be released under probation. But pursuant to the Act of 2008, probation (a form of surveillance of dangerous people) may be replaced by security surveillance, which can then lead to preventive detention if the offender does not meet the obligations linked to the security surveillance. The first French case of preventive detention arose in 2012, 8 years earlier than expected, and constitutes an eloquent illustration of the type of “population” affected by preventive detention: people who are mentally ill but cannot find a place in today's overcrowded psychiatric hospitals³¹.

The *Conseil constitutionnel* is certainly less rigorous than the German Federal Constitutional Court³². Where the latter remains blind, the first sees double: preventive detention can be either a

30 Decision n° 2008-562 DC, February, 21st 2008.

31 ECtHR, *Morsink v. Netherlands*, 11 May 2004, Application n° 48865/99.

32 BVerfG, May 4, 2011; J. Kinzig, « *Die Neuordnung des Rechts der Sicherungsverwahrung* », NJW 2011.177; C. Saas, “*Avis d’orange sur l’internement à durée illimitée des délinquants* », AJPénal 2011.462.

criminal penalty or a security measure depending on the legal consequences the *Conseil constitutionnel* holds to be admissible, which is quite an upside-down argument.

The position of the European Court of Human Rights on the German Law on preventive detention is very interesting³³. Its argumentation could be applied *mutatis mutandis* to the French preventive detention system, as it also allows retroactive application, even if indirectly, of a more severe criminal law. In *M. v. Germany*, the applicant complained that the retrospective extension of his preventive detention from a maximum period of ten years to an unlimited period of time was prohibited by Article 7 § 1 of the Convention, which states that “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.” It should be recalled that no derogation to this provision, which constitutes an “essential element of the rule of law”³⁴ under article 15, is permitted. The Court adds that the guarantee enshrined in article 7 “should be construed and applied, as follows from its subject and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment”³⁵. In order to achieve this goal, the Court holds the concept of penalty to be autonomous, such that the Court will independently assess whether a “measure” should be considered to constitute a penalty within the meaning of Article 7³⁶ or to execute a penalty³⁷. Applying these principles to the case, the Court deems that “the applicant's preventive detention was prolonged with retrospective effect, under a law enacted after the applicant had committed his offence – and at a time when he had already served more than six years in preventive detention”³⁸. It then addresses the question of the determination of the nature of preventive detention. German preventive detention may be ordered only against someone who has been sentenced for an intentional offense to at least two years’ imprisonment. The qualification of preventive detention as a security measure under German Criminal Law is ambiguous. Comparing German preventive detention to its Belgian counterpart, “placement at the Government’s [sentencing court’s?] disposal”, the ECtHR underlines the similarities of these systems and the fact that Belgium qualifies such preventive detention as a penalty³⁹. Going beyond the qualification under domestic law, however, the ECtHR holds that preventive detention entails a deprivation of liberty, observing, “in particular, that there appear to be no special measures, instruments or institutions in place, other than those available to ordinary long-term prisoners, directed at persons subject to preventive detention and aimed at reducing the danger they present and thus at limiting the duration of their detention to what is strictly necessary in order to prevent them from committing further offences.”⁴⁰

33 ECtHR, *M. v. Germany*, 17 December 2009, Application n° 19359/04. K. Kinzig, “Das Recht der Sicherungsverwahrung nach dem Urteil des EGMR in Sachen M. gegen Deutschland”, NStZ 2010.233; H. Radtke, “Konventionswidrigkeit des Vollzugs erstmaliger Sicherungsverwahrung nach Ablauf der früheren Höchstfrist? Innerstaatliche Wirkungen und Folgen des Urteils des EMGR vom 17. 12.2009”, NStZ 2010.537.

34 ECtHR, *M. Vs Germany*, Pt. 117.

35 *Ibid.*, Pt. 117.

36 *Id.*, Pt. 120.

37 *Id.*, Pt. 121.

38 *Id.*, Pt. 123.

39 *Id.*, Pt. 126.

40 *Id.*, Pt. 128

The Court focused on the fact that persons in preventive detention, which may be indefinite, are in particular need of psychological care and support, and found “that there is currently an absence of additional and substantial measures – other than those available to all long-term ordinary prisoners serving their sentence for punitive purposes – to secure the prevention of offences by the persons concerned.”⁴¹ The Court added that “the execution of both penalties and measures of correction and prevention serves two aims, namely to protect the public and to help the detainee to become capable of leading a socially responsible life outside prison. Even though it could be said that penalties mainly serve punitive purposes whereas measures of correction and prevention are mainly aimed at prevention, it is nonetheless clear that the aims of these sanctions partly overlap. Furthermore, given its unlimited duration, preventive detention may well be understood as an additional punishment for an offence by the persons concerned and entails a clear deterrent element. In any event, as the Court has previously found, the aim of prevention can also be consistent with a punitive purpose and may be seen as a constituent element of the very notion of punishment.”⁴² The Court therefore held preventive detention under the German law at issue to constitute a “penalty” for the purposes of Article 7 § 1 of the Convention. More particularly, such detention in the case of M. constituted an “additional penalty which was imposed on the applicant retrospectively, under a law enacted after the applicant had committed his offence.”⁴³ There was therefore a violation of Article 7 § 1 of the Convention.

The Court's reasoning and the result in this case is important for France to the extent the Act of 2008 indirectly allows retroactive application of preventive detention. To the extent psychological care is scarce, it will be punitive rather than corrective.

These exceptional systems, in the way they are derogating to the very basic principles of ordinary criminal Law, are being made admissible through a wide range of safeguards guaranteed under domestic law.

II. Strict Safeguards

To comply with Article 5 of the European Convention of Human Rights, the four countries considered here that have instituted preventive detention for the purpose of preventing the possible repetition of offenses, even by first-time offenders, have implemented strict substantive and procedural safeguards.

This provision states that :

« 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a. the lawful detention of a person after conviction by a competent court;

⁴¹ *Id.*, Pt 129.

⁴² *Id.*, Pt 130.

⁴³ *Id.*, Pt. 135.

- b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
 - c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offense or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
 3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Preventive detention shall therefore comply with the principles laid down in article 2. First, preventive detention is only admissible when one of the grounds for deprivation of liberty contained in the list of article 5 § 1 is present. Second, Article 5 § 4 appears also especially important as an habeas corpus protection, ensuring that everyone deprived of liberty is entitled to judicial review of the lawfulness of his detention.

A. The connection between conviction and preventive detention – substantive safeguards

Article 5 § 1 contains a list of instances in which a person may be lawfully deprived of her/his liberty, including “after conviction by a competent court”. This phrase is the basis for the legal challenge against German law (and very likely against the French law in the future)⁴⁴. “Conviction” must be understood, as the Court has said, as a “finding of guilt after it has been established in accordance with the law that there has been an offense AND the imposition of a penalty or other measure involving deprivation of liberty”⁴⁵. “After” contains not only a temporal indication – detention must follow the conviction – but also a causal indication. The Court insists that “after” means that the detention “must result from, follow and depend upon or occur by virtue of the

44 ECtHR, *Weeks v. United-Kingdom*, 2 March 1987, Pt. 54.

45 ECtHR, *M. Vs Germany*, Pt. 117, Pt. 87.

'conviction'⁴⁶. The temporal and causal nature of the link between conviction and deprivation of liberty is the key to understanding all of the case-law on the German preventive detention law. Moreover, the Court recalls that the causal link may be weakened after a while, so that a lawful deprivation of liberty at the outset may be transformed into an arbitrary deprivation of liberty.

Applying these principles to the first case on *Sicherungsverwahrung* submitted to it, the Court recalls that it has already held that preventive detention in many European systems is justified under Article 5 § 1(a). For instance, it considers the Belgian system of placement at the Government's [sentencing court's] disposal, which is a supplemental penalty ordered in addition to imprisonment, to be lawful detention decided by a competent court “after conviction”⁴⁷.

Even if, in the German government's view, preventive detention is not fixed with regard to an offender's personal guilt but to the danger he presents for society, the Court sticks to the grounds exhaustively listed in Article 5⁴⁸. In a later decision, *Jendrowiak v. Germany*⁴⁹, the Court develops this part of its argument, holding that Article 3 obliges state authorities to take reasonable steps to prevent ill-treatment, but “does not permit a state to protect individuals from criminal acts of a person by measures which are in breach of that person's Convention rights, in particular the right to liberty as guaranteed by Article 5 § 1”⁵⁰.

In *Jendrowiak v. Germany*, same facts and issues as in *M. v Germany* were at stake. May the prolongation of a first ten-year period of preventive detention occur on the basis of a new law, entered into force after the initial conviction? In order to determine whether the preventive detention of *Jendrowiak* complies with Article 5 § 1 (a), the Court considers two different periods: the initial ten-year period, and the prolongation of the preventive detention beyond 10 years. As for the initial preventive detention, the Court holds that it resulted from a conviction decided by a sentencing court, which found him guilty of attempted murder and imposed a penalty and preventive detention on him⁵¹. Taking the second period into account, the Court asks whether there is still a “sufficient causal connection between the applicant's conviction by the sentencing court [...] and his continuing

46 *Id.*, Pt. 88.

47 *Id.*, Pt. 94.

48 It refuses to qualify the detention as lawful under Article 5 § 1(c). See Pt. 102: “Under sub-paragraph (c), second alternative, of Article 5 § 1, the detention of a person may be justified 'when it is reasonably considered necessary to prevent his committing an offence'. In the present case the applicant's continued detention was justified by the courts responsible for the execution of sentences with reference to the risk that the applicant could commit further serious offenses – similar to those of which he had previously been convicted – if released . . . These potential further offenses are not, however, sufficiently concrete and specific, as required by the Court's case-law (see, in particular, *Guzzardi*, cited above, § 102) as regards, in particular, the place and time of their commission and their victims, and do not, therefore, fall within the ambit of Article 5 § 1 (c). This finding is confirmed by an interpretation of paragraph 1 (c) in the light of Article 5 as a whole. Pursuant to paragraph 3 of Article 5, everyone detained in accordance with the provisions of paragraph 1 (c) of that Article must be brought promptly before a judge and tried within a reasonable time or be released pending trial. However, persons kept in preventive detention are not to be brought promptly before a judge and tried for potential future offences.”

49 ECtHR, *Jendrowiak vs. Germany*, 14 April 2011, Application n° 30060/04.

50 ECtHR, *Jendrowiak v. Germany*, Pt. 37.

51 ECtHR, *M. v. Germany*, Pt. 96.

deprivation of liberty after 8 September 2001". At the time the initial preventive detention was decided, it was limited to 10 years, so without the change in the law in 1998, the court for the execution of sentences, which decided the further deprivation of liberty of the applicant, would not have been allowed to extend the preventive detention. There was thus a violation of Article 5 § 1.

In France, preventive detention will not be decided by the ordinary sentencing court itself, but by a special, preventive detention court (*juridiction régionale de la rétention de sûreté*, JRRS) without a reasonable temporal connection and only a loose causal connection to the initial conviction. On the contrary, Belgium's placement at government's [the sentencing court's] disposal was held by the ECHR to be lawful under Article 5 § 1 precisely because it is decided by the sentencing court as part of the initial judgment⁵². It is therefore not a penalty after a penalty.

Later in its discussion, the Court points out that the prolongation of detention was not foreseeable: it "has serious doubts whether the applicant, at the relevant time, could have foreseen to a degree that was reasonable in the circumstances that his offense could entail his preventive detention for an unlimited period of time. It doubts, in particular, whether he could have foreseen that the applicable legal provisions would be amended with immediate effect after he had committed his crime."⁵³ What can be considered *obiter dictum* will certainly have consequences in France, as preventive detention will apply to offenders who committed crimes before the change in the law. It was absolutely unforeseeable before 2008 that a conviction might lead indirectly to preventive detention for an unlimited period of time, but because surveillance measures may cover a convicted person's entire life, overlapping or lead one to another in the case of a breach of obligations, preventive detention will likely concern people convicted before the Act of 2008 entered into force.

B. The initial decision by a court and judicial review of preventive detention – procedural safeguards⁵⁴

It is primarily the job of the criminal court to order internment (conditional or definitive). The use of experts is widespread: in Germany, Switzerland and Belgium, the court calls on one or two experts; in France a succession of experts testifies from the beginning to the end of the criminal proceeding. But experts are not the only resource on which trial courts and sentence application courts rely: some countries also have specialized commissions and even specialized courts. This is the case in Switzerland, which has a federal commission that must be instituted on the model of the specialized commission instituted in 1993 by the agreement between eastern and northwestern Switzerland on the execution of sentences. The task of this specialized commission, which is composed of people working in the areas of criminal justice, psychiatry and sentence execution, is to advise the authorities charged with ruling on ending internment or release on probation. In 2003, the specialized commission operating in eastern Switzerland and northwestern Switzerland reviewed 51 cases, using criteria

52 ECtHR, *De Schepper v. Belgium*, 13 October 2009, Application n° 27428/07, part. pt. 41.

53 ECtHR, *M. v. Germany*, Pt. 104.

54 Please refer to a previous publication on this particular issue : J. Danet et C. Saas, « De l'usage des notions de « délinquants anormaux » et « délinquants d'habitude » dans les législations allemande, belge, française et suisse », *Champ pénal/Penal field* [En ligne], Vol. VII | 2010, mis en ligne le 18 décembre 2010, Consulté le 06 mai 2012. URL : <http://champpenal.revues.org/7955> ; DOI : 10.4000/champpenal.7955

aimed at estimating the risk of recidivism of particularly dangerous offenders. According to a Swiss administrative judge, such practices have made it possible to solve the problem of recidivism among dangerous offenders. This model, which has apparently been proven effective, was adopted by the Swiss federal legislature: the specialized federal commission delivers a report on which the cantonal authority for the execution of sentences bases its decision to order new treatment or not. If following the treatment has significantly reduced the offender’s dangerousness, internment will end and be replaced by lifelong treatment in a secure facility.

In France, procedural safeguards applicable to both the initial decision of prevention detention and judicial review of such detention are modeled on the classic guarantees of criminal procedure⁵⁵. The French system combines a commission and a specialized court. First a pluridisciplinary security commission deliberates on the offender’s dangerousness. If it concludes that s/he is particularly dangerous, it may suggest to the regional preventive detention court (JRRS) that the offender be placed in preventive detention (*rétenion de sûreté*). While the commission is political in nature, the regional court functions like any other court: the proceedings are adversarial and defense rights are guaranteed. There are thus four judicial mechanisms, even when they rely on experts or specialized commissions – and judicial mechanism means appeal.

Whether the mandatory or optional complement to a prison term, an alternative to a prison sentence, or exclusive of such a sentence, preventive internment in theory takes place in establishments distinct from detention centers. In Germany, preventive detention must be executed differently from traditional prison sentences. Either distinct establishments or separate areas within prisons or jails must be used. Preventive detention, which is a measure designed to protect society from dangerous individuals, must also foster the detainee's integration or reinsertion into society. Due to the possibility of lifelong preventive detention, the conditions of detention are better than for traditional detainees⁵⁶. In addition, a person in preventive detention may be exceptionally be granted leave (*Sonderurlaub*) of up to one month to prepare for release. The rest of her/his status is governed by the provisions applicable to traditional detainees.

In Belgium, placement at the government's disposal was usually carried out in a secure facility. In France, the Act of February 25 2008 created special, medico-socio-judicial centers, the first of which opened in Fresnes in late 2008. The incarceration regime is also less strict for interneers. In Switzerland, pursuant to article 64(4) of the NCPS (New Penal Swiss Code, internment is implemented in an establishment for the execution of security measures or an establishment cited in article 76(2) of the NCPS. Switzerland is thus the second country, with Belgium, where internment need not necessarily occur in a distinct establishment, because article 76 lists establishments in the prison system.

The “improved incarceration regime” must also be noted. While its requirements seem to be met everywhere but perhaps Switzerland, they cannot hide the fact that individuals deemed to be dangerous are, in all likelihood, closed off from other detainees and society for life, whether they are or might be recidivists, suffer from a mental disorder, or committed particularly heinous crimes.

55 *Une procédure garantiste.*

56 CPT/Inf (2007) 18 of 18 April 2007.

Moreover, the European Court of Human Rights has insisted in numerous decisions on Article 5 § 4, which states that anyone deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court, and his release ordered if the detention is not lawful⁵⁷.

Lastly, internment is theoretically for a limited time. In German, the need for preventive detention must be reexamined every two years for adults, and every year for minors. In France, Belgium and Switzerland, preventive detention and placement at the sentencing court's disposal is limited⁵⁸. However, in all these countries to the exception of Belgium, the measure may be renewed an unlimited number of times, which means potentially unlimited internment. These systems do of course provide a way out, conditionally or definitively, but the doors are not wide open. It is difficult to argue that internment does not comply with ECHR article 5 § 4 when the internee can appeal the internment decision to a court, possibly with the help of a specialized commission.

It seems to me that the only system that would certainly be found guilty of violating article 5 § 4 by the European Court of Human Rights is the Swiss system of lifelong internment, because internment cannot be challenged unless new scientific knowledge establishes that the offender can be rehabilitated. This means the authority for executing the sentence will first make sure new scientific knowledge is available before ordering a new examination. Not only is the concept of “scientific knowledge” extremely vague, but the requirement of “new” scientific knowledge seems unjustified to the extent that an offender who refuses the treatment initially suggested but later consents may be rehabilitated without the need for any new treatments or scientific or therapeutic advances. The practical consequence is that challenges to lifelong internment will be extremely rare. Nonetheless, while the other three systems seem to offer greater procedural and institutional guarantees, these in fact tend to ensure that unlimited deprivation of liberty complies with the European Convention on Human Rights.

III. Extension of Preventive Detention – Blurring the Frontiers

Once courts begin upholding exceptional laws on the basis that dealing with enemies/threatening people warrants or even requires bypassing core principles (non-retroactivity of harsher legislation, no *ante-delictum* detention or deprivation of liberty, unlimited detention, etc.), it becomes easier to label people or groups of people as “dangerous” or “enemies”. At the same time, extending such laws becomes all the more likely when moral considerations get the upper hand over social defense.

Exceptional laws can no longer be seen as the mere temporary suspension of the rule of law for emergency reasons. The extension of preventive control to a wide range of people, whether criminal offenders or not, illustrates the strength (and dangerousness) of exceptional laws.

57 CEDH, *X vs Royaume-Uni*, Série A n° 46, § 52 ; CEDH, *Winterwerp contre Pays-Bas*, Série A n° 33, § 55 ; CEDH, *Van Droogenbroeck contre Belgique*, Série A n° 50, § 48, CEDH, *Pérez contre France*, Série A n° 325-C, § 30.

58 CEDH, *De Schepper contre Belgique*, 13 octobre 2009, req. n° 27428/07.

In addition, the deliberate vagueness of such laws and the contradictory decisions of the French criminal court, made within a few months of each other on exactly the same point, makes it possible to extend the scope of preventive “measures”, while the flexibility allows states to use criminal tools against people who are not criminals. In France, for example, most of the security measures under dispute claim as justification the need to take extraordinary measures against “dangerous” people who are considered “enemies”. Though this of course includes perpetrators of serious crimes, such as sexual offenders (SSJ), offenders against minors, murderers, and terrorists, it also includes aliens and the mentally ill.

The extension of preventive and permanent control to a wide range of offenders shows a “normalization” of exceptional laws in the context of criminal justice. But such control has also been extended to areas not governed by criminal law, such as migration and public health. One can therefore speak of a “civilization” of exceptional law.

A. Normalization of exceptional laws

Though the French system seems, at first sight, to be behind other European systems, an in-depth analysis shows that French criminal law has several tools to extend the scope of criminal justice to what are called “dangerous people”, even after a prisoner’s release, and even before any criminal judgment. Through tools such as electronic monitoring, preventive detention (*rétenion de sûreté*), preventive surveillance (*surveillance de sûreté*), judicially supervised surveillance of dangerous people (*surveillance judiciaire des personnes dangereuses*), and socio-judicial monitoring (*suivi socio-judiciaire*), a web surveillance is woven and criminal punishment is extended through time and space⁵⁹. While preventive detention is the “penalty” authors have attacked the most, it is but the tip of the iceberg in France: the surveillance system conceived in 1998, then broadened and reinforced in 2005, 2007, 2008, 2010 and 2011, constitutes a genuine law of “preventive punishment”.

By instance, socio-judicial monitoring (*suivi socio-judiciaire*) may have a life-long duration and includes a treatment order. Created in 1998, it concerned only sexual offenders. Since 1998, its scope has been extended to numerous offenses, including serious offenses against the persons and intra-familial offenses. Because socio-judicial monitoring is treated as a penalty in the Penal Code, the Criminal Procedure Code, and case law, courts should not be able to even consider it, much less order it, when an offense was committed before the law introducing it entered into force. It is nonetheless possible today to place an individual under surveillance not only when socio-judicial monitoring was possible but not ordered, but also when the offense was committed before such monitoring was created. This is but one illustration of cascading punishment based on past action but justified by future considerations, blending aspects of retribution and social defense. It is one of the most striking examples of preventive punishment in France. It also shows that there is spatial and temporal expansion⁶⁰ of criminal punishment through measures such as socio-judicial monitoring. It is the same for electronic monitoring, which is a possibly life-long measure, when it accompanies a preventive surveillance⁶¹.

59 A. Van Gennep, *Les rites de passage*, 1909, Picard, Paris, reprinted 1981.

60 A. Van Gennep, *Les rites de passage*, 1909, Picard, Paris, reprinted 1981.

⁶¹ Please refer to article 706-53-19 of the Code for Criminal Procedure.

Deprivation of liberty for the purposes of control and treatment is not considered as “preventive detention” *stricto sensu*. Hence, the substantive and procedural guarantees are usually less strict than for such detention. Nevertheless, softer forms of indefinite deprivation of liberty may well lead to harder forms of preventive detention. This extension, which has passed review by the *Conseil constitutionnel*, has not yet been challenged before the European Court of Human Rights. Because the French legislation is modeled on the old German system, the recent decisions by the ECtHR, and in particular, its discussion regarding foreseeability, are very important for France⁶².

It is difficult to assess the relevance of this analysis for other European countries but I would be interested to know how far undesirable people can be submitted to permanent control.

B. “Civilization” of exceptional laws

Administrative internment (*rétenion administrative*) concerns only aliens before deportation. Internment is distinct from detention in at least three ways. First, it does not constitute punishment for having committed a crime, but is a way to limit the free movement of persons considered a threat or at least undesirable. Moreover, it is used to ensure a person's presence for deportation. Second, internment is not based on a judicial decision, but on a mere administrative one. Third, internment does not necessarily involve full deprivation of liberty in a jail; house arrest may be used. Seen in this light, the regulatory intent of administrative internment certainly prevails over repressive intent.

But the EU return directive has affected French legislation regarding both administrative internment and detention, which are now case in the new light of preventive detention. With the Act of June 16, 2011, which transposed the directive into French law, the legislator authorized prolonging administrative internment beyond the ordinary limit of 45 days to a period that can attain 6 months. The longer period better serves Article L. 552-7 of the French Immigration Code (CESEDA), which targets “terrorist aliens” who cannot be detained or imprisoned for various reasons but cannot be deported either because they are at risk of torture or inhuman treatment in their own country. The image being portrayed is that of notorious international criminals, and indeed, this provision has been applied to very few people. One such person, however, is a Frenchman⁶³ convicted of terrorism who was born in Algeria. He could not be deported to Algeria after he completed his prison term because, Algeria, as well as several other countries, refused to accept him⁶⁴. He has therefore been under house arrest for the past several years, despite the recent decision⁶⁵ in which the ECtHR recalled that an alien deprived of liberty for the purposes of deportation shall not be detained only for security reasons, especially when deportation is no longer possible.

In addition, the Act of June 2011 transposed criminal tools into the administrative field without rigorous procedural safeguards. Thus, article L. 571-3 CESEDA, which also concerns terrorists, provides that a house arrest can include electronic monitoring for an initial period of 3 months, and

62 B. Aubert, C. Saas, “Les échos entre Cours suprêmes”, AJP n° 6/2011, pp. 277.

63 His French citizenship has been revoked, which was possible because he has Algerian citizenship.

64 ECtHR, *Daoudi v. France*, 4 December 2009, Application n° 19576/08.

65 ECtHR, *M.S. v. Belgium*, 31 January 2012, Application n° 50012/08, esp. Pt. 155.

may be prolonged for up to two years. Considering that electronic monitoring is restricted, at least in theory, to approximately 6 months, it is difficult to understand how two years would be possible. Article L. 562-1 CESEDA also provides that parents of minor children living in France can be subject to house arrest with electronic monitoring. As the violations of the obligations linked to electronic monitoring are punished by three years' imprisonment under article L. 624-4 CESEDA, this mechanism contributes to a “self-feeding”, circular system in which aliens subject to electronic monitoring will be punished by detention if they fail to meet any of their obligations during the monitoring period. Enemy? Citizen? Or merely a body under surveillance and not a legal person anymore?

IV. Preventive Detention in the Light of Article 3 of the European Convention, an Outcome?

The European Court of Human Rights had to appreciate the compliance of preventive detention with Article 3 in the cases of *Haidn v. Germany*⁶⁶, *Schummer v. Germany*, and *Jendrowiak v. Germany*. The applicants claimed that the retrospective abolition of the maximum period for preventive detention was in breach of Article 3 because it made it impossible to foresee when (or whether) they would be released. But the Court did not reach a decision on this issue because the complaints under Article 3 were dismissed either for non-exhaustion of domestic remedies or for not having reached the minimum level of severity to fall within the scope of Article 3.

As the Court has stated more than once⁶⁷, the imposition of an irreducible life sentence may raise an issue under Article 3 when there are no prospects for release. If national law provides for review of such a sentence, this will be sufficient to comply with Article 3.

The developments of the Court in *Schummer v. Germany*⁶⁸ are especially interesting, as the Court holds that the principles developed in its case-law pertaining to prison sentences must apply *mutatis mutandis* to preventive detention of a person who has fully served her prison sentence⁶⁹. Recalling that “ill-treatment, including punishment, must attain a minimum level of severity if it is to fall within the scope of Article 3”, the assessment depends on “the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim”⁷⁰. It must be added that sentencing usually falls outside the scope of the Convention, unless it is an arbitrary or disproportionately long sentence. The Court reiterates that “likewise, it cannot be excluded that leaving a detainee in uncertainty over a long time as to his future, notably as to the duration of his imprisonment, or removing from a detainee any prospect of release might also give rise to an issue under Article 3”⁷¹. In *Schummer*, the Court observed that all prospect of release was not removed from him, as the preventive detention was reviewed at regular intervals to ensure that it was still necessary.

66 ECtHR, *Haidn v. Germany*, 13 January 2011, Application n° 6587/04.

67 For a recent example, see ECtHR, *Vinter v. United Kingdom*, 17 January 2012, Applications nos. 66069/09 and 130/10 and 3896/10.

68 ECtHR, *Schummer v. Germany*, 13 January 2011, Applications nos. 27360/04 and 42225/07

69 *Id.*, Pt. 78.

70 *Id.*, Pt. 77.

71 *Id.*, Pt. 78.

Whereas this first argument can be accepted without any discussion, the second argument on the good faith of the national authorities, who did not subsume that the prolongation of preventive detention fails to comply with the Convention⁷², appears quite strange. Whereas it cannot be disputed that regular review means there is a prospect of release, at least in theory, it seems strange that the Court was willing to rely on the good faith of the national authorities, who did not believe that prolonging preventive detention violated the Convention.

In France, after the *Conseil constitutionnel* ruled on preventive detention, the President asked Vincent Lamanda, who was then President of the *Cour de cassation*, to find a way to overrule the *Conseil constitutionnel's* prohibition of retrospective application of a criminal law. Will the retrospective application of preventive detention, which is an indefinite deprivation of liberty, be considered to be made in good faith?

Exceptional laws, justified by the concept of enemies, have been added to ordinary law, adding the intent to neutralize, monitor or treat to the existing intent to punish and prevent. As the French philosopher Paul Ricoeur pointed out, repressive measures are commensurate with the seriousness of the offense and therefore limited. On the contrary, measures such as indefinite or indeterminate preventive detention are not and cannot be commensurate with dangerousness, which may not be limited in time but must certainly be limited in terms of gravity. Such measures thus make a mockery of our attempts to weigh the gravity of a criminal act and make the punishment fit the crime. The limited debt of the offense may be contrasted with the indefinite debt of dangerousness. The lack of borders around punishment constitutes a “risk” for our criminal justice system, as punishment is spilling over the lives of people who are not or no longer offenders.

72 *Id.*, Pt. 80.