The ECHR and the German System of Preventive Detention

An overview of the current legal situation in Germany

4th Conference on the Future of Adversary Systems Preventive Detention and Criminal Justice
Ravenna 19-7-2011

Prof. Dr. Jörg Kinzig
Introduction

The murder case of Jan O.
The murder case of Jan O.

Judgement

• Life imprisonment
Introduction

The murder case of Jan O.

Judgement

• Life imprisonment
• Placement in a psychiatric hospital
• Placement in preventive detention
I. Introduction

II. A German speciality: the twin-track system of sanctions
I. Introduction

II. A German speciality: the twin-track system of sanctions

III. Placement in a psychiatric hospital

IV. Placement in preventive detention
I. Introduction
II. A German speciality: the twin-track system of sanctions
III. Placement in a psychiatric hospital
IV. Placement in preventive detention
V. Some empirical information on the use of both measures
I. Introduction
II. A German speciality: the twin-track system of sanctions
III. Placement in a psychiatric hospital
IV. Placement in preventive detention
V. Some empirical information on the use of both measures
VI. Recent legal developments in Germany
I. Introduction

II. A German speciality: the twin-track system of sanctions

III. Placement in a psychiatric hospital

IV. Placement in preventive detention

V. Some empirical information on the use of both measures

VI. Recent legal developments in Germany

VII. The most urgent challenges
Outline

I. Introduction

II. A German speciality: the twin-track system of sanctions

III. Placement in a psychiatric hospital

IV. Placement in preventive detention

V. Some empirical information on the use of both measures

VI. Recent legal developments in Germany

VII. The most urgent challenges
II. The twin-track system of sanctions

Penal reactions

Penalties

Measures of correction and prevention
II. The twin-track system of sanctions

Penal reactions

Penalties

- Prison Sentences
- Fines

Measures of correction and prevention
II. The twin-track system of sanctions

Penal reactions

Penalties

- Prison Sentences
- Fines

Measures of correction and prevention

- Placement in a psychiatric hospital s. 63
- Placement in an institution for withdrawal treatment s. 64
- Placement in preventive detention ss. 66-66b
I. Introduction

II. A German speciality: the twin-track system of sanctions

III. Placement in a psychiatric hospital

IV. Placement in preventive detention

V. Some empirical information on the use of both measures

VI. Recent legal developments in Germany

VII. The most urgent challenges
Section 63
Placement in a Psychiatric Hospital

“If someone committed an unlawful act and at the time lacked capacity to be adjudged guilty (Section 20) or was in a state of diminished capacity (Section 21), the court shall order placement in a psychiatric hospital if a comprehensive evaluation of the perpetrator and his act reveals that, as a result of his condition serious unlawful acts can be expected of him and he therefore presents a danger to the general public.”
III. Placement in a psychiatric hospital

Section 63
Placement in a Psychiatric Hospital

“If someone committed an unlawful act and at the time lacked capacity to be adjudged guilty (Section 20) or was in a state of diminished capacity (Section 21), the court shall order placement in a psychiatric hospital if a comprehensive evaluation of the perpetrator and his act reveals that, as a result of his condition serious unlawful acts can be expected of him and he therefore presents a danger to the general public.”

Mainly two preconditions

• Somebody has to commit an unlawful act with at least diminished criminal responsibility and
III. Placement in a psychiatric hospital

Section 63
Placement in a Psychiatric Hospital

“If someone committed an unlawful act and at the time lacked capacity to be adjudged guilty (Section 20) or was in a state of diminished capacity (Section 21), the court shall order placement in a psychiatric hospital if a comprehensive evaluation of the perpetrator and his act reveals that, as a result of his condition serious unlawful acts can be expected of him and he therefore presents a danger to the general public.”

Mainly two preconditions

• Somebody has to commit an unlawful act with at least diminished criminal responsibility and
• As a result of his condition it is expected that he commit serious unlawful acts and is therefore a danger to the general public.
Section 20
Insanity

“Any person who at the time of the commission of the offence is incapable of appreciating the unlawfulness of their actions or of acting in accordance with any such appreciation due to a pathological mental disorder, a profound consciousness disorder, debility or any other serious mental abnormality, shall be deemed to act without guilt.”
Section 20
Insanity

“Any person who at the time of the commission of the offence is incapable of appreciating the unlawfulness of their actions or of acting in accordance with any such appreciation due to a pathological mental disorder, a profound consciousness disorder, debility or any other serious mental abnormality, shall be deemed to act without guilt.”

Section 21
If the capacity of the offender to appreciate the unlawfulness of his actions or to act in accordance with any such appreciation is substantially diminished at that time … due to one of these reasons, the sentence may be mitigated.
III. Placement in a psychiatric hospital

Section 20
Insanity

“Any person who at the time of the commission of the offence is incapable of appreciating the unlawfulness of their actions or of acting in accordance with any such appreciation due to a pathological mental disorder, a profound consciousness disorder, debility or any other serious mental abnormality, shall be deemed to act without guilt.”

Section 21

If the capacity of the offender to appreciate the unlawfulness of his actions or to act in accordance with any such appreciation is substantially diminished at that time … due to one of these reasons, the sentence may be mitigated.
I. Introduction
II. A German speciality: the twin-track system of sanctions
III. Placement in a psychiatric hospital
IV. Placement in preventive detention
V. Some empirical information on the use of both measures
VI. Recent legal developments in Germany
VII. The most urgent challenges
Preventive detention

- is imposed in addition to a sentence of imprisonment
Preventive detention

- is imposed in addition to a sentence of imprisonment
- requires that the perpetrator has acted in a state of responsibility
IV. Placement in preventive detention

Preventive detention

- is imposed in addition to a sentence of imprisonment
- requires that the perpetrator has acted in a state of responsibility
- is indefinite
Preventive detention

- is imposed in addition to a sentence of imprisonment
- requires that the perpetrator has acted in a state of responsibility
- is indefinite
- does not start before the offender has served his prison sentence
Preventive detention

- is imposed in addition to a sentence of imprisonment
- requires that the perpetrator has acted in a state of responsibility
- is indefinite
- does not start before the offender has served his prison sentence
- is suspended as soon as there are justifiable reasons for testing whether the detainee can be released
Preventive detention

- is imposed in addition to a sentence of imprisonment
- requires that the perpetrator has acted in a state of responsibility
- is indefinite
- does not start before the offender has served his prison sentence
- is suspended as soon as there are justifiable reasons for testing whether the detainee can be released
- was limited to a maximum of ten years before 1998
IV. Placement in preventive detention

Preventive detention

• is imposed in addition to a sentence of imprisonment
• requires that the perpetrator has acted in a state of responsibility
• is indefinite
• does not start before the offender has served his prison sentence
• is suspended as soon as there are justifiable reasons for testing whether the detainee can be released
• was limited to a maximum of ten years before 1998
• was heavily criticized for its execution in practice
IV. Placement in preventive detention

Preventive detention

- is imposed in addition to a sentence of imprisonment
- requires that the perpetrator has acted in a state of responsibility
- is indefinite
- does not start before the offender has served his prison sentence
- is suspended as soon as there are justifiable reasons for testing whether the detainee can be released
- was limited to a maximum of ten years before 1998
- was heavily criticized for its execution in practice

Extension of preventive detention since 1998
Preventive detention

- is imposed in addition to a sentence of imprisonment
- requires that the perpetrator has acted in a state of responsibility
- is indefinite
- does not start before the offender has served his prison sentence
- is suspended as soon as there are justifiable reasons for testing whether the detainee can be released
- was limited to a maximum of ten years before 1998
- was heavily criticized for its execution in practice

Extension of preventive detention since 1998

- Since 1998 the limits for the imposition of preventive detention have been lowered almost every year
Preventive detention

- is imposed in addition to a sentence of imprisonment
- requires that the perpetrator has acted in a state of responsibility
- is indefinite
- does not start before the offender has served his prison sentence
- is suspended as soon as there are justifiable reasons for testing whether the detainee can be released
- was limited to a maximum of ten years before 1998
- was heavily criticized for its execution in practice

Extension of preventive detention since 1998

- Since 1998 the limits for the imposition of preventive detention have been lowered almost every year
- In 2002 German legislator introduced a deferred order of preventive detention (s. 66a of the German Criminal Code)
Preventive detention

- is imposed in addition to a sentence of imprisonment
- requires that the perpetrator has acted in a state of responsibility
- is indefinite
- does not start before the offender has served his prison sentence
- is suspended as soon as there are justifiable reasons for testing whether the detainee can be released
- was limited to a maximum of ten years before 1998
- was heavily criticized for its execution in practice

Extension of preventive detention since 1998

- Since 1998 the limits for the imposition of preventive detention have been lowered almost every year
- In 2002 German legislator introduced a deferred order of preventive detention (s. 66a of the German Criminal Code)
- In 2004 Introduction of the so-called subsequent preventive detention.
IV. Placement in preventive detention

Three models of preventive detention

1. Traditional form of preventive detention (s. 66)

   Criminal offence
   Imposition of a Prison sentence and Preventive detention
   Execution of prison sentence
   Execution of preventive detention

2. Deferred order of preventive detention (s. 66a)

   Criminal offence
   Imposition of a Prison sentence Deferred order of Preventive detention
   Execution of prison sentence
   Imposition of preventive detention
   Execution of preventive detention

3. Subsequent preventive detention (s. 66b)

   Criminal offence
   Imposition of a Prison sentence
   Execution of prison sentence
   Imposition of preventive detention
   Execution of preventive detention
I. Introduction

II. A German speciality: the twin-track system of sanctions

III. Placement in a psychiatric hospital

IV. Placement in preventive detention

V. Some empirical information on the use of both measures

VI. Recent legal developments in Germany

VII. The most urgent challenges
V. Empirical information

Imposition of measures of correction and prevention 1975-2010
(Source: StrafverfStA, since 2007: Whole Germany)
V. Empirical information

Number of Detainees in Germany (1975-2010)
(Source: StrafvollzSta 2010, p. 12, 32;
numbers for ss. 63, 64 StGB: Western Germany; since 1995: Germany)

Psychiatric Hospital s. 63
Withdrawal treatment s. 64
Preventive detention s. 66
I. Introduction
II. A German speciality: the twin-track system of sanctions
III. Placement in a psychiatric hospital
IV. Placement in preventive detention
V. Some empirical information on the use of both measures
VI. Recent legal developments in Germany
VII. The most urgent challenges
VI. Recent legal developments

Jurisdiction of the Strasbourg Court

- December 2009: European Court decided that the retrospective prolongation of preventive detention beyond the former ten-year maximum period violated art. 5 § 1 and art. 7 ECHR
VI. Recent legal developments

Jurisdiction of the Strasbourg Court

• December 2009: European Court decided that the retrospective prolongation of preventive detention beyond the former ten-year maximum period violated art. 5 § 1 and art. 7 ECHR

• Need to release all prisoners serving more than ten years in preventive detention which had committed their offences before 1998?
VI. Recent legal developments

Jurisdiction of the Strasbourg Court

• December 2009: European Court decided that the retrospective prolongation of preventive detention beyond the former ten-year maximum period violated art. 5 § 1 and art. 7 ECHR.

• Need to release all prisoners serving more than ten years in preventive detention which had committed their offences before 1998?

• Need to release of all prisoners serving subsequent preventive detention?
New preventive detention law (2011)

- The possibilities to impose the traditional form of preventive detention (s. 66) were restricted.
VI. Recent legal developments

New preventive detention law (2011)

- The possibilities to impose the traditional form of preventive detention (s. 66) were restricted.
- The option for the courts to impose a deferred order of preventive detention (s. 66a) was expanded.
VI. Recent legal developments

New preventive detention law (2011)

- The possibilities to impose the traditional form of preventive detention (s. 66) were restricted.
- The option for the courts to impose a deferred order of preventive detention (s. 66a) was expanded.
- Subsequent preventive detention (s. 66b) was abolished for all new crimes but is still available for all criminal offences prior to 2011.
VI. Recent legal developments

**New preventive detention law (2011)**

- The possibilities to impose the traditional form of preventive detention (s. 66) were restricted.
- The option for the courts to impose a deferred order of preventive detention (s. 66a) was expanded.
- Subsequent preventive detention (s. 66b) was abolished for all new crimes but is still available for all criminal offences prior to 2011.
- Introduction of a new Law on the Treatment and Placement of Violent Offenders Suffering from a Mental Disorder (Therapieunterbringungsgesetz – ThUG).
  Aim: to keep in detention persons who may or will be released from preventive detention in the light of the case-law of the ECHR.
VI. Recent legal developments

Jurisdiction of the Federal Constitutional Court

• May 2011: Federal Constitutional Court decided that all provisions on the imposition and duration of preventive detention were not compatible with the fundamental right to liberty of the detainees
VI. Recent legal developments

Jurisdiction of the Federal Constitutional Court

• May 2011: Federal Constitutional Court decided that all provisions on the imposition and duration of preventive detention were not compatible with the fundamental right to liberty of the detainees.

• In addition: provisions on the retrospective prolongation of preventive detention and on the retrospective imposition of preventive detention infringed the rule-of-law precept of the protection of legitimate expectations.
VI. Recent legal developments

Jurisdiction of the Federal Constitutional Court

- May 2011: Federal Constitutional Court decided that all provisions on the imposition and duration of preventive detention were not compatible with the fundamental right to liberty of the detainees.

- In addition: provisions on the retrospective prolongation of preventive detention and on the retrospective imposition of preventive detention infringed the rule-of-law precept of the protection of legitimate expectations.

**but:** continued applicability of the provisions until the end of May 2013.
VI. Recent legal developments

Transitional arrangements

1. In the so-called old cases, placement in preventive detention or its continuance may only be imposed if a high risk of the detainee’s committing most serious crimes of violence or sexual offences can be inferred from specific circumstances of the detainee’s person or conduct and where the detainee suffers from a mental disorder.
VI. Recent legal developments

Transitional arrangements

1. In the so-called old cases, placement in preventive detention or its continuance may only be imposed if a high risk of the detainee’s committing most serious crimes of violence or sexual offences can be inferred from specific circumstances of the detainee’s person or conduct and where the detainee suffers from a mental disorder. The executing courts must immediately examine whether these prerequisites of continued preventive detention exist; where they do not exist, the courts are to order the release of the detainees by the end of December 2011 at the latest.
VI. Recent legal developments

Transitional arrangements

1. In the so-called old cases, placement in preventive detention or its continuance may only be imposed if a high risk of the detainee’s committing most serious crimes of violence or sexual offences can be inferred from specific circumstances of the detainee’s person or conduct and where the detainee suffers from a mental disorder. The executing courts must immediately examine whether these prerequisites of continued preventive detention exist; where they do not exist, the courts are to order the release of the detainees by the end of December 2011 at the latest.

2. In the transitional period, the other provisions on the imposition and duration of preventive detention may only be applied subject to the proviso of a strict review of proportionality; as a general rule, proportionality is only respected where there is a danger of the person affected committing serious crimes of violence or sexual offences in the future.
Outline

I. Introduction
II. A German speciality: the twin-track system of sanctions
III. Placement in a psychiatric hospital
IV. Placement in preventive detention
V. Some empirical information on the use of both measures
VI. Recent legal developments in Germany
VII. The most urgent challenges
VII. The most urgent challenges

- The federal state the “Bund” and also the German “Länder” are obliged to develop a new concept regarding the accommodation and even more important, the range of therapies for the rehabilitation of the preventive detainees.
VII. The most urgent challenges

• The federal state the “Bund” and also the German “Länder” are obliged to develop a new concept regarding the accommodation and even more important, the range of therapies for the rehabilitation of the preventive detainees.

• In the so-called old cases, German courts are now obliged to determine the exact meaning of the prerequisite that a detainee must suffer from a mental disorder to justify continued prevention detention.
VII. The most urgent challenges

- The federal state the “Bund” and also the German “Länder” are obliged to develop a new concept regarding the accommodation and even more important, the range of therapies for the rehabilitation of the preventive detainees.

- In the so-called old cases, German courts are now obliged to determine the exact meaning of the prerequisite that a detainee must suffer from a mental disorder to justify continued prevention detention.

- Even if a German Court will prolong preventive detention after having decided that the detainee suffers from a mental disorder the question comes up if the Strasbourg Court will accept this change of jurisdiction.
VII. The most urgent challenges

• The federal state the “Bund” and also the German “Länder” are obliged to develop a new concept regarding the accommodation and even more important, the range of therapies for the rehabilitation of the preventive detainees.

• In the so-called old cases, German courts are now obliged to determine the exact meaning of the prerequisite that a detainee must suffer from a mental disorder to justify continued prevention detention.

• Even if a German Court will prolong preventive detention after having decided that the detainee suffers from a mental disorder the question comes up if the Strasbourg Court will accept this change of jurisdiction.

• March 2012: draft law concerning the implementation of the constitutional requirement of establishing a differentiation between preventive detention and prison sentences (Abstandsgebot)
Thank you for your attention!

contact details

Prof. Dr. Jörg Kinzig
Geschwister-Scholl-Platz
72074 Tübingen
Germany

kinzig@jura.uni-tuebingen.de