Incompatible Contrasts? – Preventive Detention in Germany and the European Convention on Human Rights

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In Germany preventive detention is nowadays understood as an indeterminate, potentially life-long confinement, which extends the convicted offender's confinement beyond his or her regularly served prison sentence. The underlying argument here is the assumption, based on the severity of the committed crime, that the previous offender is likely to re-offend, once released. Mostly, this argument is applied to instances of violent or sexual crimes; however, nonviolent crime against property and legal estate may also lead to preventive detention in Germany. Such individuals will only receive parole if they can sufficiently demonstrate that they no longer pose a threat to the community – a demand very hard to meet, since these inmates are usually excluded from any efforts of social reintegration. Preventive detention has not at all times been an indeterminate confinement, but in recent years, in Germany considerable changes, aimed at a rather uncompromising policy of locking away presumably dangerous delinquents, have been made in the criminal law system, one of them being the abolishment of the restriction in time through a reform of the governing law in 1998. In a seminal decision of 17 December 2009, the European Court of Human Rights (ECHR) in Strasbourg took issue with the German regulation and found that preventive detention as practiced in Germany "is to be qualified as a 'penalty'" and not simply as a measure of correction and prevention (M. v. Germany , judgement of 17 December 2009. 5 th Section, App. no. 19359/04, p. 27, para. 133). Hence, a basic principle of penal justice was breached by the new law of 1998 mandating the retroactive application of the rule of unlimited detention against presumably dangerous delinquents for reasons of public security. This pertains to the discharge of at least 80 prison inmates subject to preventive detention before 1998 when this measure had still been restricted to an ultimate duration of ten years. Since the appeal of Germany against this judgement was immediately refused by the court on 11 May 2010, the legal situation has become quite promising for preventive detention inmates – and a worry to legislators, police and the general public. This article will give an overview of the idea and history of origins of preventive detention and the legal changes in the German Criminal Code that underlie the decision of the ECHR. It will attempt an outlook by considering the prospective outcome of future law suits against German legal statutes relating to preventive detention, and will also describe the present situation and current legal recommendations, including the much-discussed alternative of detention in psychiatric wards. The article will close with a brief comparative look at the related legal problems arising in countries with a criminal law which is based on the establishment of personal guilt of the offender while facing public pressure to detain persons for protective reasons.
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