Sanction Policies in Europe
An Introduction

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Looking Back: Criminal Law and Crime Prevention

- Some 40 years ago: Announcing the „Farewell to Kant and Hegel“ („Der Abschied von Kant und Hegel“)

- Turning away from „just and desert“ and moving toward criminal law aimed at prevention of crime and protection of basic interests of societies
  - Friendly treatment of criminal offenders (rehabilitation)
  - Evidence based crime policies
  - Inclusion and integration
  - Crime prevention is based (also) on social welfare policies

- Today the preventative and welfare oriented criminal law according to critics has been replaced by a criminal law pursuing security and accommodating feelings of security
Lines in the Development of Alternative Sanctions

- **Monetary Penalties**
  - Summary Fines/Day Fines
  - Forfeiture and Confiscation
    - Policy: Incapacitation
  - Policy: Economizing, Diversion from Prison

- **(Partially) Suspended Sentences**
  - Probation and Parole
    - Policy: Rehabilitation

- **Community Service**
  - Community Sanctions
    - Policy: Supervision and Rehabilitation

- **Restitution**
  - Compensation
    - Mediation
      - Policy: Comforting the Victim

- **Treatment "Sanctions"**
  - Drugs, Alcohol, Sexual Deviance
    - Policy: Treatment/Risk Control

- **Physical Control of Precarious Populations**
  - Policy: Incapacitation and Risk Control

- **Intermediate Sanctions**
  - Electronic Monitoring
    - Front and Back End
      - Policy: Supervision

- **Intermediate Sanctions Combinations**
  - Policy: Supervision and Discipline

- **Imprisonment and Alternatives**
Problems in Implementing Alternatives and Intermediate Sanctions

- The Problem of Responding to Unsettled Groups
- Credibility and Sentencing Goals
- „Democracy at Work“: Public Demands for Punishment
- Proliferation of Security Policies
New Models of Offenders and Offending

- Rational Criminals and Criminal Networks - Organized Crime and Organized Illicit Markets
  - Rational choice
- Predators and Monsters: Violent Individuals

- New Precarious (Unsettled) Groups and New Dangerous Classes
  - Drug Offenders
  - Foreign and Ethnic Minorities
  - Illegal Immigrants
  - Long-Term Unemployed
Welfare and Criminal Policies – Growing Distance

- Franz v. Liszt: The best criminal policy is a good social welfare policy
- 'Nothing Works' doctrine results in discrediting of rehabilitation as a leading goal of punishment
  - Breaking the link between welfare policy and criminal policy
- Welfare policies and welfare institutions are increasingly seen as part of social control (Foucault)
- The rise of the welfare state goes hand in hand with an increase in crime (high crime societies)
  - Crime problems become in particular apparent where social welfare is concentrated
- Social welfare policies fail where support was necessary
  - Protecting abused and neglected children
Imprisonment in Europe: a heterogeneous picture
The Proliferation of Security Policies
Sentencing and systems of sanctions

- One track systems (punishment only)
  - Majority of CoE member countries
  - Sentence length also determined by preventive needs

- Two track systems (punishment and measures of rehabilitation and security)
  - Germany, Switzerland, Austria, Denmark
  - Punishment justified with guilt
  - Preventive detention justified with necessity

- Exceptional one track system (Sweden)
  - Punishment applies also to those judged not responsible due to insanity
Preventive Detention and security

- Preventive detention beside a prison sentence (Germany, Austria, Switzerland)
  - Prior convictions, prison time served, habitual criminal
  - High risk of relapse into serious crime
  - Expert evidence (risk assessment)
- Preventive detention instead of a prison sentence (Denmark)
- France (2008): After completion of a prison sentence of 15 years or more imposed for violent/sexual crimes and an assessment of dangerousness based on the evaluation of a commission, detention for public security may be imposed
Preventive detention: duration

- **Two track systems**
  - Indeterminate (Germany and most other countries)
  - Determinate (Austria, Switzerland, 10 years)
  - Detention for life: Switzerland
    - In particular sexual murder
    - Release possible only if experts provide for new evidence that offenders may be treated effectively

- **One track systems**
  - Life sentences (without parole)
  - Sentence enhancement in case of recidivism
  - Imprisonment for public protection (sentence is split into a punitive part and in a preventive part)
New Institutions and arrangements

- Swiss Commission for the Assessment of Treatment ("treatability") of Offenders Detained for Life

- Risk Management Authority (Scotland)
  - Policy development
  - Risk assessment research and standards
  - Accreditation of "risk assessors"

- Multi-Agency Public Protection Arrangements (England)

- Heads etc. programmes for released sexual offenders at risk of re-offending (Germany)
The Course of Preventive Detention (Sicherungsverwahrung) in Germany

- German criminal law allows for so-called measures of rehabilitation and security which do not depend on personal guilt but on the degree of dangerousness (necessity principle).

- This two track approach is based on the conviction that proportional punishment limited by the principle of personal guilt may not be sufficient to respond effectively to dangerous criminals.

- Measures of treatment and security address three groups of criminal offenders assessed to be particularly at risk of serious recidivism:
  - the mentally ill (mental illness and violence)
  - the addicted (alcohol and violence)
  - the habitual offender (the untreatable offender (Franz v. Liszt); enemies)
Pursuit of Security through preventive detention

- 1998 Law on Combating Sexual Crime
  - Extension of preventive detention through reducing formal requirements
    - Requirement of prior convictions reduced to 1 prior conviction (sexual and violent crime and a prison sentence of 3 years or more) in case of sexual and violent crime
    - No prior convictions required if at least two separate criminal offences (which carry a minimum prison sentence of 2 years) and if sentenced to 3 years imprisonment or more
    - Abolition of 10 years maximum in case of first time imposition, retroactive application
- 2002
  - Introduction of the conditional incapacitative sentence (imposition postponed if dangerousness of the offender cannot be established beyond reasonable doubt at time of trial)
- 2003
  - Introduction of a conditional incapacitative sentence for young adults (minimum prison sentence of 5 years)
Closing Loopholes

- **2004**
  - Introduction of a subsequently applicable sentence of preventive detention (nachträgliche Sicherungsverwahrung)
  - Restricted to serious violent and sexual crime
  - Facts indicating dangerousness not known during the trial become apparent during enforcement of a prison sentence
  - Substantive conditions (dangerousness and criminal habit) are established; risk of relapse into serious violent/sexual crimes
  - Either formal requirements of §66 are fulfilled (prior convictions) or prison sentence of 5 years or more for violent/sexual criminal offences

- **2008**
  - Introduction of subsequent preventive detention for juvenile offenders: prison sentence of 7 years or more, sexual or violent crime, risk of relapse into serious violence/sexual crime
Constitutional Challenges

- Supreme Court and Federal Constitutional Court have upheld all amendments 1998 – 2008 against challenges brought forward
  - Retroactivity
  - Proportionality

- Argument: preventive detention does not equal criminal punishment
The European Court of Human Rights and Preventive Detention

- Case of M. v. Germany, (Application no. 19359/04), judgment, Strasbourg, 17 December 2009, Final, 10/05/2010
  - Art. 5 §1 ECHR
    - No causal connection between sentencing decision (Art. 5 §1 a ECHR) and continuing deprivation of freedom (after 10 years had expired)
  - Art. 7 ECHR
    - The measure of preventive detention (§66 German Criminal Code) is criminal punishment in the light of the European Convention („going behind appearances“, „assessing the substance“)
      » Prevention and punishment overlap (prevention may be regarded to be a constituent element of punishment)
      » Preventive detention is enforced in ordinary prisons
      » Special detention regimes do not apply to detainees
  - Prohibiton of retroactivity applies
Prisoners With Long Prison Sentences (100,000) 2006

Source: European Sourcebook

Germany total including preventive detention

- 10-20 years
- > 20 years
- Life
- Total long prison sentences
Decision of the Federal Constitutional Court, May 2011

- A landmark decision
  - All provisions concerning preventive detention are unconstitutional
  - Violation of the right to freedom (disproportional restriction of freedom)
  - The provisions on preventive detention may be applied until May 31, 2013 (with restrictions); then, the Federal legislator has to introduce legislation which complies with the standards developed by the Federal Constitutional Court
  - Preventive detention represents a massive restriction of personal freedom
  - Preventive detention therefore can only be justified if
    - The dangers assumed outweigh restriction of personal freedom
    - Detention conditions are established which reduce the need for detention as fast as possible
    - Detention conditions reflect a visible difference compared with conditions of serving a prison sentence (providing for a significant distance between prison and preventive detention facility)
    - Stricter implementation of the proportionality principle (e.g., annual review of dangerousness instead review every 2 years)
Preventive Detention amended

- Abolition of „subsequent“ preventive detention (§66b) for adults
- Restriction of preventive detention essentially to felonies and violent/sexual crime
- Introduction of (enforced) electronic monitoring for offenders released from prison or other forms of detention and assessed to pose a risk of serious crime
  - GPS, tracking
  - Interference with equipment: criminal offence (maximum 3 years prison)
- Introduction of detention in a special psychiatric hospital for offenders considered a high risk if this is due to „psychological“ disorders
What Do We Know About Incapacitation?

- Does incapacitation reduce crime?
- New interest voiced by economists in the 1990s
  - American prison experiment and econometric research
  - Mixed results (comparable to death penalty and violence-gun research)
    - High costs
    - Mass re-entry of released prisoners

- Comparative research shows significant decreases in crime without resorting to mass imprisonment
  - Canada, European countries
Crime and Prisoner Rates Germany and US 1961 - 2010

![Graph showing crime and prisoner rates for Germany and the US from 1961 to 2010]
Preventive Detention and Prevention of Crime

- What method to assess the efficiency of preventive detention?
- Natural experiments
- A study of recidivism of prisoners deemed to be dangerous by prison administration and Public Prosecutor and for whom preventive detention was applied for before release but rejected by the court

- Between 2004 and 2006 77 cases
- After 1.5 – 3.5 years non crimes recorded for 50 persons
  - 10 sentenced to a fine
  - 5 sentenced to suspended prison
  - 12 sentenced to imprisonment, among which 3 with additional preventive detention
  - Appr. 75% of ex-prisoners assessed to be dangerous do not recidivate or are re-sentenced to lieght penalties (petty crime)

- Corresponds to the results of research on Baxter and Dixon
Conclusions

- Alternatives and intermediate criminal sanctions have been to a certain extent successful.

- Security policy tends to neutralize the „proprium“ of criminal law: personal responsibility and blame.

- Proliferation of preventive detention adopts various forms.

- Preventive detention must be contained by strict implementation of proportionality and is confined to grounds in line with the ECHR.
  - Insanity, addiction, habitual criminals.

- The future.
  - How to deal with dangerousness located in
    » Agency, free will
    » Affiliation, networks.