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**Zabezpečovací detence z pohledu vybraných zahraničních právních úprav**  
**Preventive Detention as Seen from the Perspective of Selected Foreign Laws**  
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*Summary*

In recent years preventive detention has become a subject of international attention, mainly in conjunction with a crucial decision of the European Court of Human Rights on 17 December 2009 (M. v. Germany) that was followed by a surprising decision of the German Federal Constitutional Court on 4 May 2011. It is the development of the institution of preventive detention in Germany, especially from 1998 onwards, that shows how, in a country that is otherwise characterised by long-term stability in its system for criminal sanctions and their imposition, individual forms and legal grounds for the imposition and the duration of this protective measure have been extended as a result of political interventions (Albrecht, 2013). In this respect we can also mention a very interesting, but nevertheless unfounded, line of reasoning used by the German Federal Ministry of Justice before the European Court of Human Rights in the case of M. v. Germany; the Ministry asserted that the legislation on preventive detention contributed to a low number of prisoners in Germany. The aforementioned argumentation on preventive detention corresponds to a current trend in criminal policy: ensuring the safety of citizens against potentially dangerous offenders can be identified throughout the world as having been the main reason since the 1990s for implementing criminal policy reforms, with a focus on the area of criminal penalties including protective measures (Albrecht, 2011). The specialised and largely foreign (other than Czech) literature also presents some critical views, asserting that a shift has taken place in the focus of the model for the protection of society, specifically from the proper investigation of offences and subsequent punishments of offenders to efforts to identify a certain group of ‘dangerous individuals’ who – because of their status – ought to be deprived of their personal freedom for purely preventive reasons (Ashworth & Zedner, 2014).

If we make a broader comparison, it is clear that problems with dealing with *dangerous offenders* also occur in the Anglo-American legal system. Different legislative solutions, including legislation on preventive detention, always show specific features as a result of

historical development and, in particular, of the specific needs of the criminal sanctions system in the particular country (cf. Šámal & Škvain, 2005). In addition, various tragic cases of serious sexual offences, often committed against children and which have been widely discussed in the media, have had a significant impact on shaping the protective detention legislation (McSherry, Keyzer & Freiberg, 2006).

Although the approaches towards the problems under discussion can differ significantly, the basic questions, related to finding a suitable way of treating a specific group of high-risk offenders, remain essentially the same within every legal system. In relation to the institution of preventive detention, the problems of the possible intrusion into the basic human rights of the detained person, and the gravity of any such intrusion, can in this respect be regarded as of great importance (Keyzer, 2013a).

The research was mainly focused on a basic analysis of preventive detention legislation with regard to selected foreign (i.e. Australian and German) laws. The aim was not to give an exhaustive description of the given legislation, but, in a comprehensible way, to point out the most important contexts for this legal institution, so that the findings could contribute to its proper understanding and possibly also prevent inappropriate interference in the current Czech legislation on preventive detention. The part of the research summarised in this monograph focuses on preventive detention legislation in Australia, or in the individual Australian jurisdictions where this special measure is in force, and on the relevant legislation in the Federal Republic of Germany. The selection is not random, although these laws show considerable differences even when the different concepts that apply generally in the legal systems are taken into account.

Classic methods were used to solve the task, namely an analysis of the relevant laws, including basic case law and a study and analysis of the specialist foreign literature and other original sources, and the comparative method was also used for part of the study.

In the Czech penal code *preventive detention*, along with protective treatment, the confiscation of items and protective education, is classified as a *protective measure*. This classification can, of course, can raise some doubts, specifically concerning the definition of this institution in association with the protective treatment in chapter five of the penal code (which is devoted to criminal sanctions) (Šámal & Škvain, 2011). Neither in the foreign literature nor in the individual laws is the term ‘preventive detention’ interpreted and used in a unified way. With regard to this lack of terminological unity, the following interpretations can

be considered in relation to ‘preventive detention’ in the broadest sense (Caianiello & Corrado, 2013, p. XXV):

- *Ante delictum* or *praeter delictum detention*. A person’s liberty is, in these cases, restricted not on the basis of a criminal charge, but merely on the basis of the person’s status following a political decision to identify individual persons as a ‘threat to society’. Examples are decisions made under the *Military Commission Act 2006* (USA) or the *Community Protection Act 2006*, which governs immigration policy in the United States of America;
- A measure of a procedural nature whose purpose is to prevent the offender (when still a defendant) from committing further crimes. In most European countries this type of preventive detention is defined as the institution of custody during criminal proceedings;
- Modalities within a custodial sentence. Typically this involves placing a convicted offender in a prison with a high-security regime (e.g. under Section 41 of the Italian law on custodial sentences). The stricter regime for serving the sentence is, in this case, based on the need to prevent the offender from committing further crimes;
- A preventive measure taken in reaction to the offender committing a criminal offence or an offence that is otherwise punishable (i.e. in different circumstances, e.g. unless committed by persons not criminally liable). The offender’s danger to the public in terms of his or her potential for repeat offending must usually be proved. Here, the time when the preventive detention is imposed is decisive. If the preventive detention is imposed after a convicted offender has served a custodial sentence, we speak of *post-sentence preventive detention*.

The problems of preventive detention have been intensively discussed within individual Australian jurisdictions since the early 1990s (Keyzer & Blay, 2006). Preventive detention, in the form of post-sentence preventive detention, was first introduced in the state of Victoria by the *Community Protection Act 1990 (Vic)*. Another landmark in the development of Australian preventive detention legislation is the case of Gregory Kable from New South Wales (NSW), whose expected release, in the same way as that of Garry David, attracted much political debate. In reaction to this situation the government of New South Wales submitted a proposal to parliament for a special law that would enable the further detention of persons who had already served their custodial sentences and were due to be released (Rees &

Fairall, 1995). The *Community Protection Act 1994 (NSW)* was subsequently adopted and came into effect on 6 December 1994. In 1996, however, the High Court of Australia decided that the *Community Protection Act 1994 (NSW)* should be revoked, because the powers given to the Supreme Court of New South Wales were incompatible with the exercise of federal jurisdiction (Hanks, Keyzer & Clarke, 2004).

As a consequence of this judgment of the High Court of Australia, no new legislation on preventive detention was adopted in any of the Australian jurisdictions until 2003 (Keyzer & Blay, 2006).

*Post-sentence (preventive) detention* was first introduced by the (special) *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)* in the state of Queensland in 2003. This was the first law in whole of Australia to introduce the possibility that a measure could be imposed for an unlimited time with the aim of depriving a convicted offender of his personal freedom after he had served his custodial sentence, based on the presumed dangerousness of this person to the public. As is clear from the explanatory memorandum, the *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)* was adopted in reaction to increasing concerns about public safety after the release of offenders who had been convicted of sexually motivated crimes, not only because of the repulsive nature of the offences, but also because of the lack of evidence of the rehabilitation of those convicted offenders who refused to participate in special therapy programmes [*Explanatory Memorandum, Dangerous Prisoners (Sexual Offenders) Bill 2003 (Qld) 1*]. The *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)* came into effect on 6 June 2003, just three days after it had been presented for discussion in the unicameral parliament of the state of Queensland (Keyzer & Blay, 2006). Following the adoption of the *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)* and the subsequent ruling of the Supreme Court of Australia in *Fardon v. Attorney-General* in 2004, similar laws were adopted in Western Australia [*Dangerous Sexual Offenders Act 2006 (WA)*], New South Wales [*Crimes (High Risk Offenders) Act 2006 (NSW)*], Victoria [*Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)*] and the Northern Territory [*Serious Sex Offenders Act 2013 (NT)*]. As part of the basic overview of individual laws, it is necessary to mention that the New South Wales legislation was substantially amended in 2013 by the *Crimes (Serious Sex Offenders) Amendment Act 2013*. The amended legislation in New South Wales is now applicable not only to a group of high-risk sex offenders, but also to high-risk violent

offenders; this was also reflected in the change of the name of the relevant law (Keyzer & McSherry, 2013).<sup>1</sup>

Numerous objections have been raised within Australian academic and judicial fields to the concept of post-sentence preventive detention (Keyzer & McSherry, 2013). The criticism is not aimed only at this concept, but also at, for example, the special form of custodial sentence of *indefinite detention* and the concept of preventive punishment in general (Cumes, 2013). Although in the Fardon case the Supreme Court of Australia ruled that the *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)* does not contradict the federal constitution, discussions concerning, primarily, the legality of this special measure continue to abound (Cumes, 2013). The aforementioned decision of the Supreme Court of Australia played a key role in the development of this special form of legislation, for the case represented a test of the constitutionality not only of the *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)* in force in the state of Queensland but also of the whole concept of the special treatment of a specific group of convicted offenders in Australia.

Other objections are that the imposition of post-sentence preventive detention infringes:

- The principle of proportionality and finality of the sentence imposed;
- The rule of law;
- The principle of *ne bis in idem* (*double jeopardy*);
- The principle of non-retroactivity;
- The principle that deprivation of liberty should be based only on the commission of a criminal offence (McSherry, Keyzer & Freiberg, 2006).

Apart from the custodial life sentence (*lebenslange Freiheitsstrafe*), preventive detention (*Sicherungsverwahrung*) is considered one of the severest sanctions in Germany. This opinion is primarily based on the fact that the protective measure is connected to a deprivation of personal liberty that may be indefinite in time and therefore potentially lasts for a lifetime (Dünel & van Zyl Smit, 2004). The institution of preventive detention has also been subject to long-term criticism. The specialist literature states that the role of preventive detention as a tool of criminal policy is contentious (Meier, 2009). It is often pointed out that between 1998

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<sup>1</sup> The original name of the law in question was *The Crimes (Serious Sex Offenders) Act 2006 (NSW)*.

and 2008 the legislator inappropriately extended and eventually almost obscured the statutory conditions for imposing this preventive measure (Kinzig, 2010). The question of whether it is even possible to make a reliable prediction of the future commission of a serious offence after the execution of a custodial sentence can be seen as another problematic factor (Schönke & Schröder, 2014).

The purpose of preventive detention in Germany is to ensure the protection of the public against a specific group of high-risk offenders who are likely to commit (repeatedly) a particularly serious crime in the future (Meier, 2009). When compared with the former legislation, the emphasis is on the treatment and rehabilitation of the convicted offender as part of the execution of this protective measure, and therefore not only on simple 'neutralisation'. This purpose follows from the current legislation on the execution of this protective measure, which explicitly includes an obligation to provide the convicted offender with assistance for social reintegration (§ 129 StVollzG).<sup>2</sup>

The legislation on preventive detention (*Sicherungsverwahrung*) in Germany is found in the penal code, namely in the provisions of Sections 66 to 66c StGB. An important source is also included in the provision within sections 7 and 106 of the Juvenile Justice Act of 1953 (*Jugendgerichtsgesetz*, JGG) which is *legis specialis* to the penal code. The procedural context is governed by the Criminal Procedure Code (StPO). The execution of preventive detention was originally governed in all the states of Germany by the law on custodial sentences and measures involving the restriction (deprivation) of personal liberty (*Strafvollzugsgesetz*, StVollzG); this was in force until 31 December 2007.<sup>3</sup> Following changes to the German Constitution (GG), the German states have had independent legislative powers within this area since 1 January 2008. Some states of Germany have used this power and adopted their own laws that also cover the conditions for execution of preventive detention.<sup>4</sup>

The German legislation on preventive detention is, when compared, for example, with the relevant Czech legislation, quite complex. In principle it distinguishes three basic forms of preventive detention:

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<sup>2</sup> The purpose of preventive detention is also defined in the laws of some of the states of Germany covering (among other things) the conditions for the execution of this protective measure (cf., for example, Article 2 of a particular law on preventive detention – *Bayerisches Sicherungsverwahrungsvollzugsgesetz*, BaySvVollzG).

<sup>3</sup> *Gesetz über den Vollzug der Freiheitsstrafe und der freiheitsentziehenden Maßregeln der Besserung und Sicherung (Strafvollzugsgesetz - StVollzG)*.

<sup>4</sup> See cf. e.g. Baden-Württemberg (JVollzGB), Bayern (BayStVollzG), Hamburg (HmbStVollzG), Essen (HstVollzG), Niedersachsen (NJStVollzG).

- Primary preventive detention (*Sicherungsverwahrung*) – Section 66 StGB;
- Reservation of preventive detention (*vorbehaltene Sicherungsverwahrung*) – Section 66a StGB;
- Post-sentence preventive detention (*nachträgliche Sicherungsverwahrung*) – Section 66b StGB;

However, the current German legislation on preventive detention sets out seven variations (legal reasons) for the imposition of this criminal sanction, within the aforementioned basic forms. Depending on the legislative requirements, we can also distinguish between cases in which a court *must* impose preventive detention (mandatory form) and those in which, provided that the legal conditions are have been met, it *may* decide to impose this criminal sanction (facultative form):

- variation no. 1 – Section 66 par. 1, StGB, mandatory form,
- variation no. 2 – Section 66 par. 2, StGB, facultative form,
- variation no. 3 – Section 66 par. 3, first sentence, StGB, facultative form,
- variation no. 4 – Section 66 par. 3, second sentence, StGB, facultative form,
- variation no. 5 – Section 66a par. 1, StGB, facultative form,
- variation no. 6 – Section 66a par. 2, StGB, facultative form,
- variation no. 7 – Section 66b StGB, facultative form (Kilchling, 2014).

The analysis of the legislation on preventive detention in Australia (or in the different Australian jurisdictions whose laws define this institution) and in Germany reveals that the institution of preventive detention is, when one makes a broader legal comparison, not understood in a unified way. This conclusion is not necessarily surprising if one takes into account the generally different conceptions of the two legal systems. The different legislative solutions to preventive detention in Australia and the Federal Republic of Germany show specific signs as a result of historical development and, in particular, of penal and political needs. On the other hand, it should be pointed out that the fundamental legal problems (questions) connected with preventive detention are basically the same in both states. The problems can be discussed primarily from the standpoint of the interference of preventive detention with the basic human rights and freedoms of the person in detention, the possible alternatives to preventive detention, and the use of specialised risk assessment tools (Keyzer,

2013a). The role of preventive detention as a tool of criminal policy is, at the very least, controversial (Meier, 2009). Despite that it has been observed during recent decades that politicians increasingly tend to support the use of this criminal sanction, usually in connection with dramatic reactions of the public to publicised cases of sex crime (Albrecht, 2011). The aforementioned conclusion is, however, also true for the laws that provide for preventive detention outside the criminal law, usually as a preventive measure of a non-penal nature.

From the perspective of the Australian legislation, post-sentence preventive detention is used purely as a preventive measure, and not as a legal consequence of a criminal offence or an action that is otherwise punishable (i.e. in different circumstances, e.g. unless committed by persons not criminally liable). Despite the elements that are said to constitute preventive detention, post-sentence preventive detention has regularly been included among preventive detention schemes in the broader sense, for example along with the possibility of imposing indefinite detention. However, it is necessary to make a strict distinction between indefinite detention and this preventive measure. The imposition of indefinite detention, a special form of punishment by the deprivation of personal liberty, is only applicable as part of the decision-making process on guilt and punishment for a criminal offence that has been committed. This is in clear contrast to the Australian conception of preventive detention [*post-sentence (preventive) detention*], which is imposed as a subsequent (preventive) measure only (Mackenzie & Stobbs, 2010). On the other hand, in the German legislation preventive detention (*Sicherungsverwahrung*) is defined as one of the preventive measures (*Maßregeln der Besserung und Sicherung*). The basic theoretical foundation of this legislation is that the impositions of a penalty that is limited by the offender's level of guilt cannot effectively ensure the safety of the public in all cases (Albrecht, 2013).

Although the approaches to the concept of preventive detention in the laws studied in this paper differ significantly, the main purpose of this legal institution remains the same – to ensure the safety of the public against a specific ('narrow') group of high-risk offenders who are likely (in the future) to commit a serious crime repeatedly (cf. Meier, 2009). The execution of preventive detention, however, cannot focus on mere neutralisation (insulation), when an emphasis must be also placed on the possibility of the treatment and rehabilitation of the offender, if this is possible given the state of his health. Otherwise, the preventive detention would represent a mere extension to the custodial punishment that has usually already been served.



In this respect one can point to a ‘transformation’ of the German legislation, in relation to the crucial judgement of the European Court of Human Rights on 17 December 2009 (*M. v. Germany*) that was followed by the decision of the Federal Constitutional Court on 4 May 2011. On the other hand, the legislation on the secondary purpose of preventive detention in the different Australian jurisdictions can be considered inconsistent. The comparison of the individual laws reveals interesting findings. According to Article 3 of the *Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld)*, in Queensland a primary purpose of the legislation in question is to ensure the appropriate protection of the public and to do so either by the continuing detention of the offender or by deciding on a special form of supervision, and further to ensure the continuous monitoring, care and treatment of the special group of convicted offenders in order to achieve their rehabilitation or correction (cure). However, in the legislation of Western Australia [Article 4 of the *Dangerous Sexual Offenders Act 2006 (WA)*], correction is not mentioned at all; and the legislation of New South Wales [Article 3 of *The Crimes (High Risk Offenders) Act 2006 (NSW)*] contains a requirement for rehabilitation, but does not mention that monitoring, care and treatment must be ensured, and focuses on the ‘mere’ protection of the public (Keyzer & McSherry, 2013). The *Serious Sex Offenders Act 2013 (NT)* of the Northern Territory, on the other hand, explicitly states as its primary purpose the improvement of protection and the safety of victims of serious sex crimes and of the public in general. The tools to achieve these objectives (goals) are monitoring, and the imposition of post-sentence preventive detention or a special form of supervision for convicted persons who have committed serious sex crimes and represent a serious threat to the public. A secondary purpose of the cited law is the explicit provision of conditions for the rehabilitation, care and treatment of these convicted offenders.

From the analysis of the laws in question, and seen from the perspective of a broader comparison with other laws, it is possible to classify the Australian conception of post-sentence preventive detention as a *Community Protection Model*, whereas the German legislation on preventive detention can be classified as a *Clinical Model* (cf. Connelly & Williamson, 2000).

While preventive detention is a measure that is unlimited in time, the people in detention are required to be provided with special care in the form of therapeutic and rehabilitation programmes that create conditions that reduce the risk of recidivism and in this way help towards their possible release. In this respect, it is of crucial importance whether the care and

treatment that is required to be provided is actually available in the conditions in which the execution of the measure takes place and during the imposition of this measure.

In terms of defining the formal and especially the material conditions that must be met before preventive detention is imposed, it is possible to trace certain differences in the meaning of the ‘presumed dangerousness’ that the convicted offender must represent for the public or an individual after his possible release (cf. McSherry, 2014).

In the laws of the different Australian jurisdictions we can find quite similar definitions of this material condition. In Queensland, for example, the presumed dangerousness must be demonstrated by evidence in the preliminary hearing that the convicted offender represents a serious danger to the community. The Supreme Court draws a conclusion of presumed dangerousness by considering whether there is *an unacceptable risk* that a convicted offender will repeatedly commit serious sex crimes if he is released after serving his sentence or if he is released from his custodial sentence and no special form of supervision is imposed on him. When deciding whether to classify the convicted offender as *a person representing a serious danger to the community*, the decision of the Supreme Court must be based on *acceptable and cogent evidence*, a *high degree of probability* that the offender will commit a serious sex crime, and other circumstances set out in law. By contrast, the German legislation defines the material conditions for the imposition of preventive detention (*Sicherungsverwahrung*) with regard to the particular form of preventive detention and the person (whether adult or juvenile) upon whom it is or will be imposed. For instance, in the case of primary preventive detention (Section 66 StGB) it must follow from the overall assessment of an offender and his actions that, because of his disposition to commit serious criminal offences, particularly those that cause severe mental or physical damage to the victim, the offender represents, at the time of the conviction, a danger to the community. Perfectly logically, the material conditions are modified in the case of a reservation on the imposition of preventive detention in accordance with Section 66a StGB (*vorbehaltene Sicherungsverwahrung*), for at the time of decision the court only reserves an option to order preventive detention in the future. However in this case as well it needs to be identifiable, or at least probable with sufficient certainty, that the defendant represents a danger to the community by reason of his tendency to commit serious crimes that cause severe mental or physical damage to the victim.

The Czech criminal law, in a similar way to the German law, defines the institution of preventive detention as a protective measure (Section 100 of the penal code). Although the institution of preventive detention has always been part of the recodification of the substantive

criminal law in the penal code, this new protective measure was introduced by an amendment no. 123/2008 Coll. effective from 1 January 2009, however in a reduced version, while the penal code no. 140/1961 Coll. was still in force (Šámal, 2012; Škvain, 2007). After the introduction of the new penal code in 2009 (law no. 40/2009 Coll.) the institution of preventive detention was included in the full text, effective from 1 January 2010. A subsequent amendment of the penal code adopted by law no. č. 330/2011 Coll., effective from 1 December 2011, modified the formal condition for the imposition of the obligatory form of preventive detention in accordance with Section 100 par. 1 of the penal code, by unifying the category of ‘criminal offences’ (offences) as crimes punishable by any of the three forms of preventive detention (Šámal, 2012). Another fundamental change is the alternative of changing the protective treatment of detention in a psychiatric hospital to preventive detention, in accordance with Section 99 par. 5 of penal code, without satisfying the general conditions stated in Section 100 par. 1 or 2 of the penal code. The aforementioned amendments to the legislation can be considered as non-systematic, because they should be implemented only after they have been properly evaluated.

A broader comparison with other laws suggests that the Czech model of preventive detention can be classified as a *Clinical Model*, because, besides the protection of the community, it also emphasises the therapeutic, rehabilitative and other effects on detained persons (Šámal & Škvain, 2005, 2011; Kuchta, Kalvodová & Škvain, 2014). From a general point of view, it is possible to state that the Czech legislator maintained the necessary ‘distance’ between preventive detention and custodial sentence. The Czech legislation on preventive detention also fulfils the other minimum requirements defined in the decision of the German Federal Court on 4 May 2011, namely that preventive detention must be only imposed as *ultima ratio* in relation to other protective measures; the detention must take place away from custodial sentences in special buildings that are suitable in terms of the purpose of the execution of such a protective measure; the detained persons must be provided with treatment programmes that are aimed at reducing the level of the danger they represent for the community; and finally, in accordance with the principle of proportionality, there must be a review of the reasons for the further continuation of the preventive detention at least once every 12 months. In these basic respects it is possible to regard the legislation on preventive detention as satisfactory.

When comparing the different formal and material conditions required for the imposition of preventive detention under the Czech legislation, the analysed laws seem very detailed and

even complicated. In contrast with the German legislation, it is also possible in the Czech Republic to impose preventive detention on an insane person. Comparing the material conditions for the imposition of this criminal sanction in greater detail, we find that the Czech penal code requires that *the continuing liberty of the perpetrator of a criminal offence or an offence otherwise punishable would represent a danger to the public in the future* [cf. Section 100 par. 1 or 2 letter a) of the penal code]. When compared with the German legislation, for example, no further detail is given for this condition. When examining the formal conditions, the Czech legislation is more general than the foreign laws analysed above. This situation was to a certain extent caused by legislative changes as part of which the categories of criminal offences were unified as *crimes*.

The analysis of the different conditions for the imposition of preventive detention also shows that, in the Czech legal environment too, the institution of preventive detention can be used, in relation to other protective measures or sanctions, only as a last resort (*ultima ratio*). In this respect it is possible to mention that the state can use the deprivation of personal liberty as a tool for the protection of the public, but that at the same time the state must aim for the rehabilitation of the offender. The experience from abroad shows that the non-systematic extension of conditions or the implementation of new forms of this institution, especially under the pressure of dramatic reactions of the public to highly publicised cases of sex crimes, can at a later time result in serious legal consequences whose correction is usually complicated and financially demanding.

Translated: Ema Vlčková