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LEGAL PROBLEMS IN USING PREVENTIVE DETENTION OR PREVENTIVE SUPERVISION OF OFFENDERS DANGEROUS TO SOCIETY

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Abstract: Under the influence of crime management ideology in European legislatures, the measures of preventive detention of persons marked as dangerous to society (offenders of sexual crime - especially if victims are children, offenders of violence crime, terrorists etc.) "are brought to life again". After completed prison sentence, the preventive supervision of dangerous offenders can be applied indefinitely. The preventive detention and preventive supervision questions basic human rights of convicts. Therefore, the paper examines the judicature of the European court for human rights and the Recommendations of the Council of Europe (2014) 3 in connection with dangerous perpetrators and evaluated the adjustment of criminal legislature of the Republic of Serbia with them. It is stated that by the preventive detention and supervision, the network of social control is unjustly widened. Criticizing the legislature of the Republic of Serbia, the author warns that the introduction of infallible legal presumption on dangerous condition of each perpetrator of criminal offences against sexual freedom committed against minors, regardless of the seriousness of the criminal offence, circumstances under which it was committed and perpetrator's personality traits is not in keeping with democratic values and the Constitution. Because they are not individualized, preventive supervision measures will not be effective and their execution presents unnecessary financial burden to society. Because of this, the changes of the law, which foresee subsequent supervision of perpetrators of criminal offences against sexual freedom committed against minors, are recommended.

Keywords: preventive detention, preventive supervision, dangerous offenders, the Council of Europe, human rights, the Republic of Serbia.

INTRODUCTION

In accordance with the ideology of crime risk management, since the end of 20th century, within the framework of "new penology", different techniques of control of behaviour of convicts and other persons which are designated as dangerous to society - like perpetrators of criminal offences against sexual freedom (especially if victims are children), perpetrators of serious criminal offences with elements of violence, potential terrorists and the like, have been developed (hereinafter, following abbreviated terms will be used: "dangerous perpetrators", "dangerous convicts", while criminal offences which are classified as especially socially dangerous will be called 'dangerous criminality"). The control of the behaviour of dangerous perpetrators is achieved by the application of the so-called preventive detention against persons on probation or convicts after completion of prison sentence. Instead or on the lapse of preventive detention, the control of the behaviour of those persons who are at large is achieved by the application of measures of preventive supervision and correction. Such supervision can be of indefinite duration, even life-long. In addition to obligation to suffer limitation of freedom of movement, which is connected with supervision, a dangerous perpetrator can be obligated to participate in proper treatments and programmes (medical, educational, correctional). The violation of these obligations leads to repeated detention of that person.

Where do such measure in modern criminal law come from? The "revamped" positivistic idea on preventive detention of persons dangerous to society was accepted in a series of European penal codes during the 30's of the last century, including the Penal Code of the Kingdom of Yugoslavia. Just as a reminder, similar provisions were used in Nazi Germany for fighting political opponents and members of non-Aryan race.

On the other hand, preventive supervision which is usually carried out by the application of electronic devices, represents modern measure of techno-correction, applied for the reduction of expenses of prison system and minimizing crime risks. The idea to preventively supervise dangerous "sexual predators" first came into being in the USA, as the result of "moral panic" and "penal populism" demands. From the USA,

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the practice of proactive crime risk management spread to Europe, despite different social policy. This was influenced by similar social movements and severe crackdown of the public and media on "sex monsters", after discovering organized activities of pedophiles and commission of series of kidnappings and brutal murders of minor victims in the last decades of the 20th century in Great Britain, France, Belgium and many other countries. In the period from 1993 to 1997 in Czech Republic, Poland, Russia and in other parts of Europe, the increase of child pornography was noted.

Measures of preventive detention or supervision of persons - dangerous perpetrators of criminal offences are expression of modernization of punishing according to the needs of consumer-oriented society. Such approach neglects the importance of sociological and individual-psychological factors of criminality and artificially equals criminal behaviour with other detrimental phenomena in the society. Approach to prevention of such detrimental phenomena, regardless of the difference in their cause is the same - forecast of risk of damage and undertaking activities for elimination or minimization of risk. When that approach is applied to the prevention of criminality, formal state reaction to criminality ceases to be connected with moral condemnation of the behaviour of the perpetrator of criminal offence (which was until now the basic characteristic of criminal punishment). It gives rise to spreading the network of social control towards dangerous criminality, to which all attention of the society is directed. Symbolic reduction of risk from committing dangerous criminality is experienced as success in preventing total criminality, although it is not in keeping with the reality. The consequence is the "holy war", which modern society has declared to dangerous criminality, in which all means are allowed, even those which additionally limit the freedom of convicts, although they have already served a sentence. In conditions of shaken or unaccepted democratic values in some environments, the application of such conservative attitude can be problematic from the standpoint of constitutionality. In view of the fact that in the Republic of Serbia, the first step was made towards the introduction of the preventive supervision of dangerous perpetrators made in 2013, by passing the Act on special measures for the prevention of criminal offences against sexual freedom committed against minors (hereinafter ZPM), it was necessary to examine to what extent that legal act is adjusted with international standards of the Council of Europe and to remind ourselves of actual judicature of the European court for human rights (hereinafter European court).

RECOMMENDATION OF THE COUNCIL OF EUROPE (2014) 3 REGARDING DANGEROUS PERPETRATORS

The resurrected positivistic ideology about the need for the continuation of detention for preventive reasons or supervision of dangerous convicts, was expressed in the Recommendation of the Committee of Ministers of member states of the Council of Europe, in connection with dangerous perpetrators, which was adopted on 19 February 2014. It should provide equalization of national legislatures regarding risk management from dangerous criminality and basic level of respecting basic human rights of dangerous perpetrators, where the application of "implements" of new penology against dangerous criminality could not be avoided. Article 1 (a) defines the concept of a dangerous perpetrator - it is a person caught in committing a very serious sexual or criminal offense of violence against a person, where there is big probability that that person will commit serious criminal offences again. The recommendation includes the definition of violence, risk, risk management, as well as secure preventive detention and preventive supervision. According to the definition, the measure of preventive detention of a person dangerous to society is determined by court, on the basis of the requirements prescribed by national legislature. These conditions do not need to be connected only with gravity or type of previously committed criminal offence, but can relate to the forecast of future criminal activity of a dangerous perpetrator. The measure is carried out as part of probation or after completion of prison sentence, when the convict is to be released. In paragraphs 16 and 17 of the Recommendation, it is stressed that the requirement for detention is the very estimation of the risk of danger of that person to society, while par. 18, 19, 20 and 22. emphasize the requirement to be provided for respect of human rights and dignity of the person convicted, against whom the measure is imposed, as well as to motivate the convict to join the programmes meant for changing his attitudes and habits.

Preventive supervision against a dangerous perpetrator can be imposed as alternative to preventive detention or as part of probation, pardoning release or after completed imprisonment sentence (par. 23). With preventive supervision, the court can instruct the convict to fulfill one or more obligations such as: regular reporting to competent authorities, reporting change of place of residence, work place or status in proper way and within certain time-limits, prohibition to leave place of abode or territory without approval, restrain order or prohibition of contact with victim, his/her relatives or certain other persons, prohibition of visiting certain area, place or institution, prohibition of residing in certain place, prohibition of performing certain jobs which could lead to the commission of criminal offences of similar nature, participation in training programmes, professional, cultural, educational or similar activities, participation in different treatments and regular subjection to analyses, carrying electronic devices for continual electronic monitor-

ing and the like (par. 24). Such supervision can be of indefinite duration or life-long. As we can see, preventive supervision fits into the so-called alternative measures applied after condemnation ("*back door*" system), as the treatment in community is the basis of risk management. Bearing in mind that these measures are more humane than detention, we must point out the possible uncertainly long limitation of freedom and rights of the convict and that the intensifying of punishment inevitably leads to a greater social isolation of individuals. For these reasons, par. 41 points out that the level of security measures should be adjusted to the necessary minimum and secure their re-examination after the lapse of certain period. The execution of preventive supervision is entrusted to the national probation departments, whose work is monitored by the European Committee for criminality issues.

The data in the reports regarding the needs, capacity and possibilities of dangerous perpetrator are the basis for application of proper mental or medical treatment (and if necessary, placing the same in prison hospital) or the programme of social hospitalization - par. 42-44. The treatments should maintain health and self-respect of dangerous perpetrators, to the extent in which it is allowed by the duration of sanction and to enable the development of feeling of responsibility and encourage him to change attitudes and develop social skills in order to include better in the society and respect the laws in the future (par. 45). To that end, such person can be included in proper work or educational activities (in keeping with par. 46), and special attention of prison management should be directed toward specific needs of older perpetrators and needs for education of younger people (par. 47).

As we can see, the Recommendation (2014) 3 favours introduction of different security measures which mean "punishment after punishment" of dangerous perpetrators, which already became a usual phenomenon in England and Wales, Scotland, in Scandinavian countries, France, Belgium and Germany. But, such practice sometimes comes to collision to judicature of the European court.

ATTITUDES OF EUROPEAN COURT ON PREVENTIVE DETENTION

In judicature of the European court is not moot that preventive detention of dangerous offenders can be considered legitimate under terms of Article 5 of the European Convention, if it is imposed by court decision on any ground stipulated in section 1-a-f, providing that accumulation of several reasons is possible in the same case. When talking about the detention of a dangerous perpetrator who could repeat the crime, court practice gives only the framework criteria for evaluation when it will not be in keeping with the European Convention on human rights and basic freedoms (hereinafter European Convention). In individual judgments, the existence of causal relationship between the conviction of a perpetrator for criminal offence (as documented by his dangerous condition) and his preventive detention is evaluated differently. In case X versus the United Kingdom, the European court determined that forced hospitalization in a mental institution of the person who was released on probation (meaning "after conviction"), is not in contradiction with Art. 5-1-a and 5-1-e of the Convention, although the deprivation of freedom did not occur because of the violation of probation release and condemnation for new criminal offence committed, but according to the decision of competent administrative authorities and evaluation of a psychiatrist that that paranoid person, due to the progression of the disease, became dangerous to the environment. That way, the court determined that the deprivation of the freedom of a dangerous individual which "follows or depends on" or comes "on the basis" of condemnation can be legitimate, although it needs not follow directly after it. But in the case Guzzardi versus Italy, the European court pointed out that the condemnation represented "token that the person was pronounced guilty" and it cannot be connected with Art. 5-1-a of the Convention – the deprivation of the freedom of a person which is undertaken without condemnation, only for the purpose of the prevention of his future criminal behaviour.

In the case Van Droogenbroeck versus Belgium, the European court took the stand that there was no violation of Art. 5-1 of the Convention, but adjudged compensation of non-pecuniary damages to the petitioner, because of violation of Art. 5-4. Van Droogenbroeck was convicted of repeated property-related crime. Since 1972, when he was, by the decision of the minister responsible for legislature, assigned for the first time on completion of the sentence, to the programme of semi-detention for a more successful reintegration (from which he fled) until 1978, Van Droogenbroeck was arrested several times on charges and convictions for criminal offences committed, whereupon against him preventive detention was extended. Each time he was assigned to the prison bloc meant for repeat offenders, and in the case of probation release he refused to observe obligations which were imposed upon him, so that he was jailed again. By examining Belgian regulations, which allow executive authorities to apply preventive detention of shorter or moderate duration, on the basis of forecast on dangerous repeat offenders, the European court warned of the possibility of wrong assessment, but nevertheless stated that Belgian authorities showed much patience and trust toward the ex-convict and gave him several opportunities to improve his behaviour, which he abused. As

regards the connection between condemnation and imprisonment, the European court was satisfied that "condemnation" of criminal offence committed can entail not only punishment but some other measures too, and that condemnation and preventive detention should make "an integral whole".

According to this, the attitude that "condemnation" under terms of Art. 5-1 of the European Convention, does not mean only punishment pronounced for committing a criminal offfence, but it can also imply the method of executing part of prison punishment, security measure of obligatory treatment or some other measure of the deprivation of freedom which follows after completed prison sentence. But such detention must be causally connected with earlier condemnation of a dangerous person and be founded on a court decision. Such interpretations are completely explained in the judgments related to the case M. versus Germany and Haidn vs. Germany in which Germany was pronounced responsible for the violation of Art. 5 and 7 of the European Convention. After the judgment in the case M vs. Germany, followed the "avalanche" of similar cases in which only the violation of Art. 7 of the European Convention was mostly stated.

At the time when M. (a habitual offender) was convicted of a committed criminal offence, preventive detention could last up to 10 years after completed punishment. On the basis of the court decision, as he had already spent 5 years serving sentence of imprisonment, M. was preventively detained for 7 more years, when he was to be released. Due to the changes in German penal code, the preventive detention extended to the period longer than 10 years, so in 2001 the court rejected appeal by M. to be released. By checking legitimacy of the deprivation of freedom in this court, the European court determined that preventive detention could be summarized as "condemnation". By analyzing German system of criminal sanctions, in which preventive detention is regulated as a security measure, the court determined that such preventive detention has the character of a specific deprivation of freedom for preventive reasons. The preventive component of the decision of criminal court must be connected with condemnation, even if it reduces to statement of possible future danger of convicted persons. However, the danger cannot be connected with general possibility that a convict can commit a criminal offence in the future, but must be concretized in terms of the type of criminal offence, the commission which is likely to be expected and sometimes, a circle of potential victims. Besides, it was questionable that mental disorder of M. had been stated, but not to the extent of pathological, so that the question of his accountability or reduced degree of guilt when he was convicted of criminal offence committed, was not asked. Nevertheless, the circumstances under which he committed the attempt of murder and banditry, as well as later criminal offences, indicated his inclination to spontaneous violence which seriously impairs physical integrity of victims, and thus his danger to society, which was accepted by the European court too.

But in the case of M. vs. Germany, the direct causal-consequential relationship between previous condemnation and preventive detention was broken by the completion of imprisonment of 7 years, so that further detention of M. meant arbitrary continuation of the deprivation of freedom, which cannot be connected with Art. 5 of the European Convention. The fact that preventive detention was extended by retroactive application of the law, which was not valid at the time of condemnation of M for criminal offence committed, was the reason that the European court established the violation of Art. 7 of the European Convention.

SOLUTIONS IN THE LEGISLATURE OF THE REPUBLIC OF SERBIA

In the Republic of Serbia, ZPM was passed in 2013, which introduced the control of behaviour of the released convicted persons, who committed a criminal offence against sexual liberty against minors. Although ZPM does not speak of a dangerous perpetrator, from nature of measures which would be applied towards convicts for criminal offences against sexual liberty after the completion of imprisonment, it is obvious that this is a preventive supervision of a dangerous convict. Article 7 sect. 1 of ZPM foresees the following measures: reporting to the police and administration for the execution of criminal sanctions, prohibition of visiting places where minors gather (kindergartens, schools, etc.), obligation to attend professional counselling and other institutions, obligatory reporting change of residence, place of abode or work place and obligatory reporting travelling abroad. Such limitation of rights and freedom of convicts can last up to 20 years after the completion of imprisonment, providing that the need for further application of the measure can be re-examined after 2 years at the request of the convict, and in each case the court is obligated to do such ex-officio after 4 years. It remains unsaid whether each convict is automatically affected by all 5 limitations or not and with what circumstances the court will be guided in deciding on termination or extension of further supervision. It is unusual that the type of criminal offence committed (against sexual freedom) and the age of the victim automatically indicate that we are dealing with a dangerous perpetrator, although those offences mutually considerably differ both according to the characteristics or by social danger (which is expressed by prescribed punishment span). The law does not foresee a possibility that the forecast of danger of a convict can be established on the basis of medical or mental expertise of personality

of perpetrator and does not consider necessary social anamnesis of conditions he lives in. So the law, not the court, gives "legal diagnosis" of the dangerous condition of a perpetrator. For this reason, the solutions in ZPM decline from par. 13 and 14 of the Recommendation (2014) 3, according to which the risk of future criminal behavior of a dangerous perpetrator must be established by the decision of the court, providing that it is possible that separate expert report could form the basis for such court decision. Putting all criminal offences against sexual freedom into the same basket is contrary to Art. 1 a of the Recommendations, which determines who is considered to be a dangerous perpetrator.

The persons convicted of criminal offences (even against sexual freedom), should not be treated as "enemies" of society. In order to give a chance for reintegration into society of such convicts, it is necessary to fulfill preventive supervision with correctional measures. The success of the application of those measures depends on the readiness of the convict to cooperate by active participation in proper programmes. Because of this, the Recommendations indicate the need that a dangerous convict be motivated to participate in a programme. In ZPM, this is not mentioned even in declarative way - obviously because the obligations and prohibitions in Art. 7 sec. 1 are construed as new punishment after punishment. Admittedly, the measures stipulated in Art. 7 sect. 1 par. 1-5 basically correspond to those which are prescribed in the Recommendations. But legal nature of those measures is not clear - they cannot be classified as criminal sanctions, or legal consequences of condemnation, but represent measures sui generis, which re-sanction the perpetrator for criminal offence committed. As ZPM does not define any criteria or procedure of the evaluation of the danger of a convict, the measures stipulated by the law cannot be considered even as the so-called *risk-based sentence*, which are founded on the evaluation of the risk to society (such as for example, security measures). Hence, they represent anomaly of criminal and legal system which is contrary to constitutional guarantees of citizens' rights and freedoms.

ZPM could remain an example of a hurried acceptance of an unusual and ineffective legal solution which unjustly favours the request of the public that the law on the execution of un-custodial sanctions and measures (hereinafter: ZIVS), does not regulate the execution of measures of Art. 7 of ZPM. The probation department is competent for their execution. The provisions of chapter VII ZIVS (Art. 58-61) indicate the urgency of the procedure: within 3 days the perpetrator of a criminal offence against sexual freedom must be reported to the competent custodian, who within 3 days should start the preparations for the execution of measures and establish the cooperation with the police, counselling institution and other subjects involved in the execution of the measure, and in subsequent-time limit of 8 days to make the operational programme with which the convict should be acquainted. The operational programme will be obviously made on the basis of those reports which were acquired during the detention of the person in a correctional institution. ZIVS does not develop details regarding the manner of the execution of certain obligations, which were necessarily just because ZPM did not foresee them either. For example, where and how long a person convicted of a criminal offence of illicit sexual act will execute the obligation of visiting professional counselling and other institutions, what those institutions are and how long the therapy will last - for 2, 4 or 20 years. Unusual legal void in ZIVS seems to be the result of the need to regulate, at any price, even provisionally, a method of the execution of measures of Art. 7 sect. 1 of ZPM. As in ZPM or ZIVS there is no mention of the criteria the court will be guided with during extending the measures which will motivate the convict to participate actively in the programme, when ZPM has a completely passive role in their execution. Because of this, in addition to the basic idea which follows a foreign model, everything else can be evaluated as error in legislature, which should be improved as soon as possible, not only for the protection of human rights of convicts, but in the interest of the efficient protection of the society from crime.

CONCLUSION

As we can see, the Recommendation of the Council of Europe (2014) 3 in connection with dangerous perpetrators tries to establish sensitive balance between the need for the protection of society from criminality and basic human rights of dangerous convicts. It is not an easy task and for this reason, measures of additional detention or supervision of dangerous perpetrators should not be imposed without clear evidence that such measures are necessary for the protection of society. In conditions of not firmly established rule of the law in certain countries, such as Serbia, the introduction of such measures bring bigger damage to constitutionally guaranteed rights of citizens than benefit to the protection of society and potential crime victims. But at the same time, it surely prevents social reintegration of perpetrators. Even if we had ideal legislature, limited economical resources and insufficient capacities of the probation department would make moot the possibility of effective execution of supervision measures and correction of behaviour of dangerous convicts. For this reason *de lege ferenda* should re-examined the need for the existence of ZPM or at least to change its provisions, so that they are in keeping with the most important international standards for the protection of human rights of convicts.

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