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Legal Constraints on the Indeterminate Control  
of 'Dangerous' Sex Offenders in the Community:  
A European Comparative and Human Rights  
Perspective

Issue Editor: Michiel van der Wolf

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# Legal Control on Social Control of Sex Offenders in the Community: A European Comparative and Human Rights Perspective

Michiel van der Wolf (Issue Editor)\*

## Abstract

This paper provides first of all the introduction to this special issue on 'Legal constraints on the indeterminate control of "dangerous" sex offenders in the community: A European comparative and human rights perspective'. The issue is the outcome of a study that aims at finding the way legal control can not only be an instrument but also be a controller of social control. It is explained what social control is and how the concept of moral panic plays a part in the fact that sex offenders seem to be the folk devils of our time and subsequently pre-eminently the target group of social control at its strongest. Further elaboration of the methodology reveals why focussing on post-sentence (indeterminate) supervision is relevant, as there are hardly any legal constraints in place in comparison with measures of preventive detention. Therefore, a comparative approach within Europe is taken on the basis of country reports from England and Wales, France, Germany, The Netherlands and Spain. In the second part of the paper, the comparative analysis is presented. Similar shifts in attitudes towards sex offenders have led to legislation concerning frameworks of supervision in all countries but in different ways. Legal constraints on these frameworks are searched for in legal (sentencing) theory, the principles of proportionality and least intrusive means, and human rights, mainly as provided in the European Convention on Human Rights to which all the studied countries are subject. Finally, it is discussed what legal constraints on the control of sex offenders in the community are (to be) in place in European jurisdictions, based on the analysis of commonalities and differences found in the comparison.

**Keywords:** social control, folk devils, moral panic, dangerousness, sex offenders

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## 1 Introduction: Background, Relevance and Approach

### 1.1 Law as an Instrument and Controller of Social Control

In 1985, then already an influential author in sociology and criminology, Stanley Cohen published his book 'Visions of social control'. In regard to the term *social control*, he discerns that it appears in the literature as a neutral term to cover all social processes to induce conformity ranging from infant socialization through to public execution, as well as a negative term to cover both the obvious and putative hidden element in all state-sponsored social policy, whether called health, education or welfare. For his own purpose of showing shifts in programmed social control, he then narrows the term to

the organized ways in which society responds to behavior and people it regards as deviant, problematic, worrying, threatening, troublesome or undesirable in some way or another. This response appears under many terms: punishment, deterrence, treatment, prevention, segregation, justice, rehabilitation, reform or social defence.<sup>1</sup>

Many, if not all, of these responses are established through law, making law the most prominent instrument of social control as he defines it.

Regarding the current developments in criminal law, Cohen's visions seem to be truly visionary. Among the shifts he observed in 1985 is a generally enlarging and more intrusive system, 'subjecting more and newer groups of deviants to the power of the state and increasing the intensity of control directed at former deviants'.<sup>2</sup> This development is echoed in the chain of writings since then on the criminal justice implications of the identified 'risk society',<sup>3</sup> 'culture of fear'<sup>4</sup> and the sup-

1. S. Cohen, *Visions of Social Control* (1985), at 1.

2. *Ibid.*, 38.

3. E.g. U. Beck, *Risk Society. Towards a New Modernity* (1992).

4. E.g. F. Furedi, *Culture of Fear: Risk Taking and the Morality of Low Expectation* (1997).

plementary 'risk paradigm'.<sup>5</sup> The international literature on how fear and risk are 'managed' through criminal justice emphasizes similarly that the subsequent array of legislative and policy-making initiatives in the Western world is targeted at certain groups of criminal offenders. These groups seem to be singled out for legal control as 'dangerous' because of the way in which they are perceived as 'different' to the social norm. And as fear-based policies tend to view 'justice' as synonymous with discipline, these groups are being viewed as 'beyond principles of due process'.<sup>6</sup>

This notion is itself deviant from a general view in legal theory that especially criminal law is not only an instrument of the exertion of State power, for example, to ensure safety for the general public, but also a balancing mechanism to keep that exertion in check and protect (the rights of) the individual. As law was already identified as the instrument of social control par excellence, the question that arises and that is addressed in this research is what remains of law as a controller of that control in the current advanced stage of Cohen's enlarging system.

## 1.2 Focus on Sex Offenders as the Folk Devils of Our Current Moral Panic

Among the usual suspects that appear in literature as the mentioned targeted groups are terrorists, immigrants, mentally disordered and sex offenders. Particularly in regard to that last group, the term *social control* is currently fashionable again.<sup>7</sup> And this observation applies similarly to the association between sex offenders and two other phrasings, not introduced but coined in another classic work by Stanley Cohen from 1972, 'Folk Devils and Moral panics'. While Cohen used these terms for describing the social reaction to the groups of Mods and Rockers, two at the time conflicting British youth subcultures, they are now being used, for example, to understand the dynamics surrounding re-entry of sex offenders in the community after release from custody.<sup>8</sup>

Sex offenders seem to have become today's 'folk devils', a term used by Cohen to describe the mechanism of why a certain group of people is portrayed in folklore or media as deviant and to blame for crimes and other social problems.<sup>9</sup> Jenkins identified in the United States a number of persisting allegations regarding the threat posed by sex offenders that were accepted as facts by the population even though they contained only 'fragments of truth':

- Children face a terrible danger of being sexually abused.
- Sexual abuse is a problem of wide dimensions.
- Sex offenders are compulsive and offend frequently.
- Sex offenders cannot be cured or rehabilitated.
- Sexually deviant behaviour can escalate to murder.
- Sex with adults causes lasting harm to victims.
- Sexual abuse can produce the so-called cycle of abuse such that abused children will later perpetrate the same act against new victims.<sup>10</sup>

These allegations show that the shift from the possible threat of sex offenders to moral outrage is usually made through emphasizing the subgroup convicted for a sex offence against children, often unjustly equated with the group of paedophiles.<sup>11</sup> Explaining the shift in status from threat to moral outrage is also mainly attempted in regard to this subgroup. In 'The moral crusade against paedophilia', sociologist Frank Furedi argues that 'the paedophile personifies evil in 21st-century society; the child predator possesses the stand-alone status of the embodiment of malevolence'.<sup>12</sup> He describes how what first emerged as a moral panic in the 1980s mutated into a coherent and enduring ideology of evil. The overreaction, also in the media, leads to the idea of an omnipresent threat of this behaviour, which is in fact quite rare. The 'normalisation' of an existential threat haunting childhood and 'the natural order of things' leads to suspicion concerning intergenerational relations and even no-touch and no-picture rules in nurseries and schools. It also creates zealous moral entrepreneurs or crusaders as it provides opportunities for moral positioning against the one evil that all of us can agree on – the strategic position of a last-standing uncontested moral code. Furedi believes this to be connected to the sacralisation of the child as moral opposite of the evil paedophile. In a world of existential disorientation, the child serves as the main focus for both emotional and moral investment.<sup>13</sup> Some believe that a sublimated form of guilt accounts for this dynamic. For example, David Garland, another sociologist who has worked on criminal justice, wrote that 'the intensity of current fear and loathing of child abusers seems to be connected to unconscious guilt about negligent parenting and widespread ambivalence about the sexualisation of modern culture'.<sup>14</sup> Since using children as a moral shield is now widely practiced by policy makers and fear entrepreneurs, this is too often taken literally in the front row of a mob in front of a courthouse or an identified paedophile home. Psychiatrist and publicist Theodore Dalrymple suggests that exposing children to such scenes is itself abusive, claiming that most of the adults taking their children to such

5. Meaning the avoidance of risk in many areas of personal and social life, for example, presented in a series named 'beyond the risk paradigm' on different aspects of society. E.g. C. Trotter, G. McIvor & F. McNeill (eds.), *Beyond the Risk Paradigm in Criminal Justice* (2016).

6. D. Denney, 'Fear, Human Rights and New Labour Policy Post-9/11', 42 *Social Policy and Administration* 560 (2008).

7. E.g. D.R. Laws, *Social Control of Sex Offenders* (2016); D. Rickard, *Sex Offenders, Stigma, and Social Control* (2016).

8. M. Boone and H. Van de Bunt, 'Dynamics between Denial and Moral Panic: The Identification of Convicted Sex Offenders in the Community', 63 *Probation Journal* 23 (2016).

9. S. Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (1972).

10. P. Jenkins, *Moral Panic: Changing Concepts of the Child Molester in Modern America* (1998), at 1-4.

11. For a more detailed description of the dynamics of moral panic with regard to sex offenders, see Laws, above n. 7.

12. F. Furedi, 'The Moral Crusade against Paedophilia', in V.E. Cree, G. Clapton & M. Smith, *Revisiting Moral Panics* (2016).

13. F. Furedi, *Paranoid Parenting* (2008).

14. D. Garland, 'The Concept of a Moral Panic', 4 *Crime Media Culture* 9 (2008), 17.



mobs live in the very circumstances that are most likely to give rise to the, also sexual, abuse of children; therefore, such actions are related to a feeling of guilt.<sup>15</sup> Ironically, paedophilia itself may be a condition associated with poor childhood conditions.<sup>16</sup>

Furedi and Garland agree that in its quality of uniting all sections of society panic over child abuse is a different or indeed a genuine moral panic, not one of periodic outburst but a permanent regime of vigilance, comparable with that of the Medieval witch-hunt. Furedi concludes that as throughout history, the security of children has relied on adults' assuming responsibility for their welfare, and the mistrust that now envelops inter-generational relations threatens to discourage male adults from assuming this responsibility: 'Arguably, the disengagement of many adults from the world of children represents a far greater danger than the threat posed by a (thankfully) tiny group of predators.'<sup>17</sup>

That those convicted of a sex offence against children serve as the scapegoat also for other groups targeted by social control is, for example, demonstrated by the widespread need for authorities to protect them from other inmates in (remand) prison.<sup>18</sup> As the unique moral status of the sacred child is a narrative beyond discussion, 'any opinion can be justified by simply referring to children, and without having to explain why and how children justify it'.<sup>19</sup> It explains why Furedi observes that campaigners who are usually vigilant about encroachment on civil liberties when it comes to new anti-terrorism laws have appeared indifferent to the vetting of millions of adults under different schemes designed to police those who work with or come into contact with children.<sup>20</sup> Since through these dynamics, of all the targeted groups, sex offenders seem to be least protected against the advancements of social control, they are rendered to be the most interesting focus of this search for the last legal constraints standing. Cohen already argued that on the level of the administration mass 'moral panic', which the pursuit of folk devils can evoke, influences legislation and policy-making.<sup>21</sup>

In addition, there are other arguments for this limitation in scope. As the deviance of sex offenders is often enveloped in the medical model,<sup>22</sup> similarly to the group of mentally disordered, the interlinking of such discipline with the notion of 'risk' as used in assessments, primarily by mental health practitioners, particularly leads to

serious ethical and human rights implications.<sup>23</sup> Moreover, different, for example, from the group of terrorists that is targeted before becoming first offenders, the nature of the (potential) harm by sex offenders is such that measures of control are often concentrated post-sentence to avoid *re-offending*. As these are usually measures of a preventive nature – as the served sentence has already addressed retributive demands – and subsequently often of indeterminate duration, both of these characteristics invoke particular legal theoretical discussions.

### 1.3 Focus on Post-Sentence Control in the Community through Supervision

Just as sentences aiming at the right to liberty can be carried out through custody or within the community, preventive post-sentence measures can be divided in broad terms into control through custody and control in the community. In instrumental criminal justice terminology, they can be divided into schemes of preventive detention and of supervision, and from the civil rights side, the division can occur as deprivation of liberty and restriction of liberty. Much of the current international critical scholarly discussion focuses on preventive detention.<sup>24</sup>

First of all, this is to be understood in consideration of its presumed more invasive character. But perhaps Stanley Cohen begs to differ. Probably the most prominent shift in social control he observed already in 1985 was that from incarceration to community control. He found these alternative methods 'not necessarily more humane and, indeed, they might be less humane by disguising coercion, increasing invisible discretion or (for the mentally ill) simply dumping deviants to be neglected or exploited'.<sup>25</sup> He discerns that decarceration was a seemingly benign initiative in service of diminishing the discretion of institutions and a search for rehabilitation, while in fact it was mainly a response to fiscal pressures and a retrenchment of welfare policies. Recently, the empirical evidence to support part of this claim was delivered in the finding that, at least in Europe, community sanctions have not truly served as an alternative for imprisonment, but rather as a supplementary sanction.<sup>26</sup> A comparable dynamic is believed to be true for the more recent alternative of electronic monitoring.<sup>27</sup> This is part of the explanation for the current prison overcrowding, according to the Council of Europe.<sup>28</sup> As

15. T. Dalrymple, *Spoilt Rotten. The Toxic Cult of Sentimentality* (2010).

16. Not just through what is called the cycle of abuse, but also through a sign of lack of (also physical) growth. Physical height is a manifestation of in utero and childhood conditions, and pedophilic individuals have generally been reported to be of lesser height. I.V. McPhail and J.M. Cantor, 'Pedophilia, Height, and the Magnitude of the Association: A Research Note', 36 *Deviant Behavior* 288 (2015).

17. Furedi (2016), above n. 12, at 209.

18. E.g. Dalrymple, above n. 15.

19. A. Meyer, *The Child at Risk: Paedophiles, Media Responses and Public Opinion* (2007), at 60.

20. Furedi (2016), above n. 12, at 207.

21. Cohen (1972), above n. 9.

22. Compare Laws, above n. 7, chapter 4.

23. B. McSherry, *Managing Fear: The Law and Ethics of Preventive Detention and Risk Assessment* (2014).

24. E.g. P. Keyzer (ed.), *Preventive Detention: Asking the Fundamental Questions* (2013); M. Caianello and M.L. Corrado, *Preventing Danger: New Paradigms in Criminal Justice* (2013).

25. Cohen (1985), above n. 1, at 38.

26. M.F. Aebi, N. Delgrande & Y. Marguet, 'Have Community Sanctions and Measures Widened the Net of the European Criminal Justice Systems?', 17 *Punishment & Society* 575 (2015).

27. See the recent special issue on electronic monitoring: M. Nellis and M. Martinovic, 'Editorial', 34 *Journal of Technology in Human Services* 1 (2016); and A. Hucklesby, K. Beyens, M. Boone, F. Dünkler, G. McIvor & H. Graham, *Creativity and Effectiveness in the Use of Electronic Monitoring: A Case Study of Five Jurisdictions*, EMEU-Report (2016).

28. Council of Europe, *White Paper on Prison Overcrowding* (2016).

schemes of supervision may be marketed with a similar rationale of being an alternative for preventive detention, similar scepticism is warranted.

But probably a more important reason why critical discussion has focussed on detention instead of supervision is that the 'tools' for discussion from both a theoretical and human rights perspective are more readily at hand, while discussing supervision requires exploring more of a grey area.

In sentencing theory, discussions on preventive schemes focus first on the debate on the sentencing goals of punishment versus prevention and the relation with the (severity of the) original offense. An exemplary finding from the Canadian Supreme Court was that a ten-year term of community supervision appended to the end of a sentence under a 'long-term offender' statute could be validated on the grounds that the supervision was not punishment.<sup>29</sup> A second line along which, from a theoretical perspective, the issue may be approached is through the principles of proportionality and least intrusive means. As supervision is predominantly considered to be a less severe sanction, it raises very little discussion in comparison with the vast literature on preventive detention.

From an international human rights perspective, especially the right to liberty and the subsequent prohibition of arbitrary deprivation of liberty, laid down in many relevant conventions,<sup>30</sup> is the focus of discussion. Again exemplary is that in her thorough, thirty-plus-page analysis of the international human rights framework on preventive schemes, McSherry can only devote two sentences to restriction of liberty:

Supervision orders in relation to offenders also raise concerns about the violation of the right to liberty, but have not been subject to the same level of scrutiny at the international level as preventive detention regimes. Presumably, these orders can be justified if there are sufficient procedural safeguards attached to them.<sup>31</sup>

Therefore, this research is aimed at trotting on this unexplored terrain to find where the borders of social control in the community are drawn, if any are in fact drawn. For example, which of the presumed procedural safeguards that McSherry mentions actually need to be in place? In keeping with Cohen's increased intensity of control directed at 'former deviants', this research focuses on post-sentence or post-custody supervision schemes, although pre-crime or other post-crime (also pre-trial) schemes may be addressed indirectly.

Of course, supervision is not the only legal framework for post-sentence social control of sex offenders, as, for example, free-standing restriction orders and registration and community notification are other possibilities. Since comparative research showed that the severe schemes of registration, notification and restriction orders, virtually limiting the possibilities to live to designated compounds or literally somewhere under a bridge, are especially American phenomena unmatched in other jurisdictions,<sup>32</sup> free-standing orders of this kind are not focused on. However, supervision orders generally come with conditions of many different kinds, including restrictions such as location bans, possibly enforced through electronic monitoring, or other measures of control that could also be imposed independently or through other legal frameworks, such as a treatment order. Another increasingly common example of such a condition is the obligation to undergo DNA-collection, which has human rights implications of its own. Falling outside the scope of this study are so-called collateral consequences of the conviction of a sex, or even any other, offence. These are the additional civil or administrative actions, which are triggered by the conviction – although some of these may be part of the conviction. They could include loss or restriction of a professional license, ineligibility for public funds including welfare benefits and student loans, loss of voting rights, loss of residential status for immigrants, etcetera. They could also be indirectly triggered by the impossibility of receiving a certificate of good conduct, necessary for many of the above-mentioned rights or privileges. In the United States, these collateral consequences can be so severe that they have been compared to the historical concept of 'civil death'.<sup>33</sup>

Next to the legally organized consequences are, of course, the societal consequences of the stigma of being a sex offender, which will form a more hidden barrier for many necessary requirements for true reintegration, such as finding a job. Since social life involves presenting to others information pertaining to self, individuals perceived as deviant experience particular problems in the demanded 'impression management' because the stigma can discredit their social identity.<sup>34</sup> Even though falling outside Cohen's definition, the stigma and its consequences can easily be labelled an instrument in the wider definition of social control. Coping with the stigma itself may even be part of the explanation for the fact that sex offenders demonstrate heightened levels of negative emotions, traumatic experiences, mental health issues, and emotion dysregulation, with its subsequent treatment needs.<sup>35</sup>

29. *R v. LM*, 2 SCR 163 (2008).

30. Art. 9 of the Universal Declaration of Human Rights; Art. 9 of the International Covenant on Civil and Political Rights; Art. 14 of the Convention on the Rights of Persons with Disabilities; Article 5 of the European Convention on Human Rights; Art. 7 of the American Convention on Human Rights; Section 7 of the Canadian Charter of Rights and Freedoms; the 14th amendment to the United States Constitution; Section 22 of the New Zealand Bill of Rights Act 1990.

31. McSherry, above n. 23, at 185.

32. See Laws, above n. 7.

33. G.J. Chin, 'The New Civil Death: Rethinking Punishment in the Era of Mass Conviction', 160 *University of Pennsylvania Law Review* 1789 (2012).

34. Laws, above n. 7, at 15 shows examples of that and refers to E. Goffman, *Stigma: Notes on the Management of Spoiled Identity* (1963).

35. J. Willemsen, V. Seys, E. Gunst & M. Desmet, '"Simply Speaking Your Mind, from the Depths of Your Soul": Therapeutic Factors in Experiential Group Psychotherapy for Sex Offenders', 16 *Journal of Forensic Psychology Practice* 151 (2016).

#### 1.4 Focus on Comparing Jurisdictions in Europe

As it is argued that there is no firm framework of international human rights law with regard to supervision, while theoretical notions underlying criminal law are generally at the disposal of (federal, national or regional) legislators or courts to be picked at their convenience, this research seems to require a bottom-up approach and the exploration of sentencing theory, legislation and practice within individual jurisdictions. Obviously, a comparative approach is needed in order to find generalities and draw conclusions above the national level.

To have at least some guidance from an international law perspective, for the purpose of this research, jurisdictions from within Europe were chosen. Article 5 of the European Convention on Human Rights is considered a well-elaborated provision on the right to liberty.<sup>36</sup> First of all it immediately shows that the right is not absolute and can be breached in accordance with a procedure prescribed by law and in the mentioned list of cases – relevant are the conviction by a competent court (1, a) and detention of persons of unsound mind, alcohol drug addicts or vagrants (1, e). In addition, in the sub-sections of the article and in the case law of the European Court of Human Rights (ECHR), many safeguards concerning the deprivation of liberty are also deducted from it.<sup>37</sup> Next to the principles of legal certainty (accessibility and foreseeability) and no arbitrariness, for example the right to have the lawfulness of the detention speedily examined by a court and the right to compensation for unlawful detention. For the purpose of this research, the most relevant elaboration of Article 5 was established in the case of *Guzzardi v. Italy*, where the ECHR considered that

the difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance' and that 'the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion.'<sup>38</sup>

Guzzardi was placed under special supervision with compulsory residence on the island of Asinara, with

many other restrictions.<sup>39</sup> On the basis of the actual situation on the island and cumulative and combined factors like the extremely small size of the area where he was confined, the almost permanent supervision to which he was subject, the all but complete impossibility for him to make social contacts and the length of his enforced stay resulted in the consideration that on balance the case was to be regarded as one involving deprivation of liberty. The court noted, 'In certain respects the treatment complained of resembles detention in an "open prison" or committal to a disciplinary unit.' It subsequently found that there was a breach of Article 5, sub 1 because on the basis of prevention there was no ground for deprivation of liberty. Even the attempt of the state to classify this mafia member as a vagrant (sub 1, under e) failed.

Of course, this decision gives rise to testing supervision frameworks on the safeguards of Article 5, as in an individual case where the restrictions are so severe that they may be considered deprivation of liberty. In literature also, the fact that a breach of conditions in a supervision framework may lead to 'recalled' detention is mentioned as an additional rationale for this test.<sup>40</sup> As the jurisdictions in this comparative research are all subject to the European Convention on Human Rights, their attention for this consequence in the legislative process and in judging individual cases of supervision is of particular interest.

Even though restriction of liberty is not part of the Convention as such, in the additional Fourth protocol, Article 2 provides for the right to liberty of movement and freedom to choose residence. As these rights are qualified rights, they may be subject to restrictions if provided by law and necessary in a democratic society, for example, to prevent (re-)offending. Of the five jurisdictions in this comparison, Spain and the United Kingdom signed but never ratified this protocol, mainly on

36. See McSherry, above n. 23, at 178.

37. See ECHR, *Guide on Article 5 of the Convention. Right to Liberty and Security*, Council of Europe/ECHR (2014).

38. ECHR, *Guzzardi v. Italy*, Appl. No. 7367/76, 06-11-1980.

39. In its decision, the Court further directed that the applicant should, see n. 38:

- start looking for work within a month, establish his residence in the prescribed locality, inform the supervisory authorities immediately of his address and not leave the place fixed without first notifying them;
- report to the supervisory authorities twice a day and whenever called upon to do so;
- lead an honest and law-abiding life and not give cause for suspicion;
- not associate with persons convicted of criminal offences and subjected to preventive or security measures;
- not return to his residence later than 10 p.m. and not go out before 7 a.m., except in case of necessity and after having given notice in due time to supervisory authorities;
- not keep or carry any arms;
- not frequent bars or night-clubs and not take part in public meetings;
- inform the supervisory authorities in advance of the telephone number and name of the person telephoned or telephoning each time he wished to make or receive a long-distance call.

40. E.g. M. Van der Wolf and M. Herzog-Evans, 'Supervision and Detention of Dangerous Offenders in France and the Netherlands: A Comparative and Human Rights' Perspective', in M. Herzog-Evans (ed.), *Offender Release and Supervision: The Role of Courts and the Use of Discretion* (2014), 193.

the grounds that they contained rights for migrants that were not fully provided for in domestic law.<sup>41</sup>

The comparison will therefore show whether this makes any difference with regard to supervision frameworks for (sex) offenders and also whether all sorts of soft law from European alliances is given a different significance. Not only do different jurisdictions have different room for manoeuvre or use different interpretations of the leeway received from the ECHR, but because they do not share (exactly) similar legal traditions, theoretical discussions about a similar phenomenon may actually be very different both in perspective and in outcome. The aim of this research is therefore to explore legal constraints on the social control of sex offenders through frameworks of supervision from a comparative perspective, focusing both on constraints from a national theoretical or doctrinal perspective and the interpretation of ECHR constraints in national legal practice.

The jurisdictions that are part of this comparative project were selected first because they all share relatively recent or current legislative initiatives to safeguard society against alleged dangerous (sex) offenders through supervision frameworks. In addition, these jurisdictions represent different legal traditions. Of course, England (along with Wales) stands out with its common law tradition and absence of a codified sentencing system. But while other jurisdictions share the continental European civil law tradition, these jurisdictions have different traditions in sentencing dangerous offenders. Germany and the Netherlands have a very long and continuous tradition of a twin-track system of criminal sanctions – penalties and safety-measures – dating back to the grand Classical versus Modern school debate around the turn of the twentieth century and the authoritarian period in the 1920s and the 1930s. Nevertheless, in terms of legal frameworks for supervision, their systems show many differences. Whereas Spain had a similar history, safety measures aiming at ‘social defense’ were misused during the Franco regime and thereafter in the 1970s discredited and abolished. Safety measures only reluctantly reappeared in the 1990s. In France, on the other hand, the 1970s were the heydays of the *Defense Sociale Nouvelle*, leading to the adoption of safety measures. The specific histories of these relatively more novel twin-track systems will also show to affect their development. As the core of this research, from all five jurisdictions criminal law scholars with an expertise in sentencing have written papers on this topic on the basis of a similar outline to aid the comparison. In alphabetical order of the respective countries, Nicky Padfield wrote the English perspective, Martine Herzog-Evans the French, Bernd-Dieter Meier the German, Sanne Struijk and Paul Mevis the perspective from the Netherlands, and Lucia Martínez Garay and Jorge Correcher Mira the Spanish. Their ‘country reports’ are the other contributions to this special issue. Up to this point, this paper has provided the background, relevance and approach of

this research by means of an introduction. From here on, the paper will present a comparative analysis of the findings in the other papers. Evidently, not all the contents in those papers will be reproduced in this analysis nor will references be repeated; for further information, one will have to turn to the individual contributions. The focus will rather be on the relevant differences or generalities for the aim of finding the possible legal constraints that seem to be in place to keep the social control of sex offenders in the community in check. Nevertheless, any reader who wishes to be informed in detail on the situation in the respective jurisdictions is first requested to read the other contributions and then return to the remainder of this paper. The analysis presented hereafter follows the outline that can also be observed in the other contributions. Both the questions asked and the different, or comparable, answers will be highlighted and discussed – without the aim of a complete overview. In asking scholars to write the country reports the comparison is intended to go beyond description into the realm of criticism, as a means to add to the debate of this under-debated topic.

## 2 Comparative Analysis

### 2.1 Cultural Context, Legislative Overview and Framework for Evaluation

In all the country papers, a similar hardening of the attitude towards sex offenders over recent decades is described. As a starting point for the moral panic concerning paedophiles (in England) in the introduction, the 1980s were identified, but legislative responses to sex offenders seem to follow from the 1990s, with England and Wales, Germany and France as ‘early responders’. On the basis of this growing support base for measures directed at this group, in keeping with Cohen’s theory of moral panic all authors report a (less or more implicit) connection between legislative activity and specific examples of societal upheaval or media controversy surrounding sex offenders, for example, committing a (new) offence or re-entering the community. While these are generally controversies at the national level, especially in the neighbouring countries the Belgian Dutroux case, discovered in 1996, is reported to have had a transnational impact on awareness regarding the possible severity of sexual offences towards children and subsequent legislation. A higher rate of sex offenders in prison, like in several of the jurisdictions, may also just be related to this increased awareness, leading to more reporting of such crimes or priority in policing.

In the context of the arsenal of measures of social control directed at sex offenders, registers are in place in certain countries. In England since the 1997 Sex Offenders Act, in Germany, for example, on a State level, and in Spain since 2015, especially directed at providing information for determining the possibility of working (with minors) after release. These provisions confirm the stigma of sex offenders within the broader

41. H. Keller and A. Stone Sweet, *A Europe of Rights, The Impact of the ECHR on National Legal Systems* (2008), at 398.



group of offenders. In theory, in all countries the mental health system may be used to control (potential) sex offenders when meeting the criteria for the respective measures, possibly also as a result of the fact that the criminal justice system and mental system are often interwoven inter alia through placement provisions. Because of a lack of statistics this has to remain a hypothesis for now. Schemes such as exist in some US states that aimed at preventive detention of post-sentence sex offenders through mental health law do not seem to be in place.<sup>42</sup> However, a German act under civil law from 2010 (Therapy and Placement of Mentally Disturbed Violent Offenders Act) shows similarities. It was meant as a makeshift after the retroactive application of indefinite post-sentence preventive detention was interpreted by the ECHR as amounting to the retroactive imposition of a heavier penalty incompatible with the convention. The act allows placement in closed institutions for those considered to be of unsound mind and if there is a high probability that they will affect the life, personal integrity, freedom, or sexual self-determination of others so that their placement is considered necessary for public protection.

It is recognized that legislative changes directed at sex offenders include those in substantive law increasing the criminalization of various forms of sexual conduct, sometimes distancing the harm principle in favour of a more moral conception of criminal wrongdoing. Possession of virtual child pornography may be an example thereof, and its facultative status with regard to criminalization in treaties from the Council of Europe, seems to recognize this doctrinal vulnerability.<sup>43</sup> The widening scope of sexual offences is often accompanied by increasing the possible penalty for such offences. In that sense, the increased punitivity of sex offences is merely part of the wider development in criminal politics in the researched countries, explained in the Spanish contribution as 'punitive populism'. The term refers to the widespread idea that these legislative reactions are only responding to the societal upheaval, but not the real problems and needs concerning criminal policy, which are obscure anyway by lack of a serious analysis or empirical evidence. Most of the authors not only report that this has evoked much doctrinal resistance, but also point out that this is directed less at preventive supervision as neither explicitly punitive nor detention.

Turning to legal frameworks (partly) aimed at preventing (also) sexual reoffending in the community, in general five types of frameworks can be distinguished. The first is through community-based punishments or release on parole/conditional release of a sentence of imprisonment. The second, in the continental jurisdictions that separate punishment from (safety) measures in doctrine, is through the imposition of a conditional/

suspended measure of often post-sentence preventive detention or a conditional release from preventive detention (including extensive frameworks of leave). The third is, in jurisdictions with a similar doctrine, independent measures of often post-custody or even post-sentence supervision under criminal law, including high-intensity and extended supervision after early release. The fourth is civil preventative orders (in some jurisdictions called the realm of administrative law); in the jurisdiction that does not have (safety) measures as a sanction distinct from punishment, such as in England and Wales, these orders seem to serve as an alternative. The fact that breaches of these orders are criminal offences demonstrates that. The fifth, only in England and Wales, is post-sentence supervision under Multi-Agency Public Protection Arrangements (MAPPA). These are 'simply' arrangements between police, probation and prison services to coordinate the management of dangerous offenders in the community. Based in legislation, the formulated duty to cooperate for institutions involved in providing health, housing, social services, education, social arrangements, employment and electronic monitoring includes a legal basis for supervision and control post-release and even post-sentence.

That the common law jurisdiction of England and Wales does not have a criminal or sentencing code is probably partly to blame for the custom in the last decades to create and adopt in a high-frequency new 'acts', named after the objective: Sex Offenders Act 1997; Sexual Offences Act 2003; Criminal Justice Act 2003; Criminal Justice and Immigration Act 2008; Legal Aid, Sentencing and Punishment of Offenders Act 2012; Offender Rehabilitation Act 2014; Anti-Social Behaviour; Crime and Policing Act 2014; etcetera. The English contribution shows that new legal frameworks are created and existing frameworks often adapted, for example, with regard to different types of sentences of indeterminate custody as well as specific civil preventative orders for sex offenders, such as Sexual Harm Prevention Orders (SHPO) and Sexual Risk Orders, which in 2015 replaced the somewhat narrower Sexual Offences Prevention Orders and Risk of Sexual Harm Orders. In the French contribution nonetheless, even though historically one of the frontrunners in the codification of law, a similar legislative 'frenzy' is presented. The difference with England and Wales is, however, that all these adaptations are directly visible in the current code, while over the channel it is even difficult for scholars to make out which elements of acts are still applicable and which have been altered by later acts. In France, a 'true life' sentence was created in 1994 after a paedosexual killing. The Dutroux case triggered the enactment of 'socio-judicial supervision' (*suivi socio-judiciaire* – SSJ) in 1998, consisting of mandatory treatment and supervision both possible as a stand-alone community sentence and post-custodial supervision. A decade later, four 'safety measures' had been added to the arsenal: 'judicial safety surveillance of dangerous offenders' (*Surveillance judiciaire des personnes dangereuses* – SJPD), 'GPS-electronic monitoring' (*Placement sous surveillance électronique*)

42. See J.S. Blackman and K. Dring, *Sexual Aggression against Children. Pedophiles' and Abusers' Development, Dynamics, Treatability, and the Law* (2016), chapter 10.

43. Council of Europe, Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2007/2010) and Convention on Cybercrime (2001/2004).

*que mobile* – PSEM), ‘safety surveillance’ (*Surveillance de sûreté* – SS), and ‘safety detention’ (*Rétention de sûreté* – RS), followed in 2014 by a measure focusing on diminished responsible mentally disordered offenders, some of whom were thought to be sex offenders.

As the German sanctioning system has long and continuously had safety measures in place with preventive detention (*Sicherungsverwahrung*) and supervision (*Führungssicht*), the legislative changes that followed from 1998 (with the Act to combat sexual offences and other dangerous offences) onward aimed at adapting these provisions generally to widen their scope of applicability or intensifying the possible control. The supervision is in fact a form of high-intensity and extended parole for persons with a high-risk prognosis after a prison sentence or preventive detention of a certain length. Since 1998, it is an indeterminate measure as before it was restricted to a maximum of five years. Also since then, the constraints for the imposition and execution of supervision are lower in the case of convicted sex offenders than they are in other cases. While supervision is regularly put into operation upon release from prison after having served at least two years, it is only one year in the case of sex offenders; and the duration of supervision may be extended for life in the case of convicted sex offenders (and a second, very small group of offenders) if the offender has been sentenced to two years of imprisonment and after release either violates a direction or ‘other specific circumstances give reason to believe that there may be a danger to the general public by the commission of further serious offences’. These legislative changes have created an exceptionally weaker legal position for convicted sex offenders in comparison with other offenders.

In the Netherlands, the safety measure of preventive detention for diminished responsible offenders has similarly been in place since what is called the authoritarian period in the 1920s and 1930s. As the mental disorders considered eligible for imposition of such an entrustment order (*Terbeschikkingstelling* – TBS) are defined in broad terms, it has always been the sanction to harvest sex offenders considered dangerous. Different from Germany, there has never been an indeterminate stand-alone safety measure of supervision in place – a fixed and short-term location or contact ban order was enacted in 2012 – until in 2015 the order of long-term supervision, continuing after prison or a TBS-order, was adopted by parliament. Up until now (November 2016), the order has not been enacted. As dangerous offenders were considered to be in the TBS-system, the need for supervision in the community has been organized through an extensive system of leave and the instalment of conditional release in 1997, the maximum term of which has been changed from three to nine years in 2007, while the same adopted act of the stand-alone measures also contains the possibility of the unlimited prolonging of conditional release from TBS, as well as that of conditional release from prison.

In Spain, although the punitivity of sex offences and the evolution of a new twin-track system had been on the

rise since the mid-1990s, some incidents in the mid-2000s caused enough *alarma social* to also adopt a supervision order. In 2010, the safety measure of ‘supervised release’ was enacted for post-prison control of sex offenders and terrorists.

In order to find the current legal constraints governing supervision, the authors of the respective countries were asked to evaluate the legal frameworks for post-sentence supervision in their jurisdiction both *de jure* and *de facto* in light of the national legal theory doctrine on sentencing, the principles of proportionality and least intrusive means, and the national position on the human rights framework of the ECHR.

## 2.2 Evaluation in Light of Sentencing Theory

In the schemes this study focuses on, three elements in particular raise questions in light of sentencing theory: first of all the fact that they are mainly post-sentence, second that they are often indeterminate, and third that they merely consist of restriction of liberty.

Concerning the first question, in the English perspective, Padfield raises the question why public protection justifies post-sentence ‘punishment’? ‘What, in fact, do we mean by “post-sentence” punishment – if the offender is still being “controlled”, should this be considered as post-sentence or as part of the punishment, part of the sentence?’ In this study, England and Wales is the only jurisdiction that has not adopted at some point in history a twin-track system of sentencing in which dogmatically punishment is regarded as dominantly retrospective and retributive, while safety measures are dominantly prospective and preventative in nature. It explains the questions raised, which on the continent would be replied with a simple statement: ‘a safety measure is in theory not considered punishment’. Obviously, the English rejoinder would be that you could give it a different name on paper, but ‘if it looks like a duck, swims like a duck, and quacks like a duck ...’. Indeed, the theoretical notion that the experienced suffering in preventive detention is different from that in prison as it is not ‘intended’ will sound ridiculous to the detainee at hand. The English perspective also shows that the discussion on retribution versus prevention is predominantly drawn into that on the purposes of sentencing leading to a variety of indeterminate sentences, while for exclusively preventive measures civil orders can come into play. Again for the ‘offender’, the restrictions will feel similarly punitive and criminal in nature.

In the German perspective, Meier explains how in the Classical school tradition in continental European jurisdictions punishment was governed by the guilt principle and thus administered to the extent of guilt. Conditional/suspended sentencing and conditional release/parole were among the first triumphs attributed to the Modern school around the turn of the twentieth century, whose deterministic view of man shifted the focus prospectively to prevention and rehabilitation. Even though the Modern school was internationally united in the *Internationale Kriminalistische Vereinigung*, the way

in which a compromise was formed with the Classical school through a twin-track system differs between the continental jurisdictions. In the Netherlands, for example, precondition for the Classical school to accept the compromise was to only enact indeterminate preventive detention for mentally disordered offenders who could not be held (fully) responsible for their crimes. Other than in Germany and France, the Dutch do not have a measure of indeterminate preventive detention for fully responsible offenders, although in practice the disorder criterion is interpreted in a way that, for example, regarding sex offenders more or less the same sort of people fall under its scope. In Spain, a similar approach seems to have been taken in the 1990s, when the twin-track system was re-introduced with historical lessons learned. The aim of the introduced measures was rehabilitation rather than security, the duration was subject to strict limits of proportionality (with the alternative prison sentence as reference) and the execution order was safety measure before (and counting as) the prison sentence.

This hybrid between the two tracks – a blurry system also observed in France – corresponds with the Dutch pragmatic changes to the system over the past century, through which sentences can now be disproportionate to the extent of guilt on grounds of prevention and safety measures may be terminated as disproportionate to the severity of the offence and corresponding prison sentence. So when it was argued in Spain that the long lack of safety measures – like in England and Wales – had blurred the concept of punishment, the Dutch showed that both tracks can be blurred while existing next to each other. From a dogmatic perspective, Germany seems to remain as the most distinct twin-track system through upholding the principle of punishment to the extent of guilt, even though for measures the law requires ‘proportionality to the seriousness of the committed offence or the expected offence’.

The indeterminacy of the frameworks is self-evident in a strict twin-track system because the duration should be proportionate to the aim of public protection and other than guilt dangerousness is not determined retrospectively. All authors mention, however, the limited validity of risk assessment, which seems to call for caution concerning the indeterminate duration of a measure. Emphasizing the seriousness of the committed offence may also be done out of diagnostic deliberations as an expression of the robust empirical finding that past behaviour is still the best predictor for future behaviour. Procedural safeguards, such as judicial review on prolongation, are generally also part of the counterbalance to that uncertainty. But in Spain, for example, the framework for supervision is deliberately not indeterminate, again safeguarding proportionality from the perspective of legal protection against the (experienced misuse of) State power. In the Netherlands, the measure of long-term supervision would be the first safety measure of indeterminate duration not limited to mentally disordered offenders. This has crossed a theoretical border in a sense that the label of mental disorder suggests

to ensure treatment, which could be considered a positive obligation of effort to avoid the possible indeterminacy. This suggests that the fact that supervision is not considered as invasive as detention may be used as an argument to cross existing theoretical borders. The Spanish authors seem to acknowledge this suggestion as well.

Even without the requirement of mental disorder, rehabilitative aims are reported in several jurisdictions as a complimentary justification for safety measures next to public protection (and treatment). Of course this does not mean that rehabilitative or treatment-considerations may determine the continuation or termination of the measure, as in the past has been the case in the Netherlands. In jurisdictions like Germany and Spain, rehabilitation seems to be most strictly engrained in law as the objective of the sentencing system. All authors express the concern, however, that in practice supervision will be used to control more than to treat or rehabilitate given the fact that the latter is much more costly in terms of financial and personnel resources.

The prospective focus of safety measures is not only reported – most strongly in the French contribution by Herzog-Evans – to be prone to conflict with proportionality, but also with legality. The element of prohibition of retrospective implementation of law is mentioned, but the ECHR has limited the relevance of Article 7 in regard to ‘harsher punishment’ as not to include changes to provisions regarding the execution of a sanction (at the expense of the individual undergoing that sanction), for example, in the case of *Kafkaris v. Cyprus* (2008). More important is the question whether safety measures may be imposed because of dangerousness without an established offence or after serving a sentence for an established offence. Among the mentioned English preventative orders based on the risk of sexual harm, the former and latter are observed because a conviction is not always required but merely an ‘act of a sexual nature’, while the order may be imposed free standing, even after the sentence. As these orders are civil in nature, some high-principled standards of criminal law may be bypassed to an extent, such as a lower burden of proof. In Germany, preventive detention could be imposed post-sentence until the ECHR amended that. For supervision, it is still possible, but in general supervision applies by default after a prison sentence or preventive detention of a certain length. Another aspect of the encounters of the *Sicherungsverwahrung* with the ECHR is also related to legality in way; as the safety measure proceeds for a long time, the established offence is being distanced in a way that it gradually diminishes as a justification for further deprivation of liberty. As related to Article 5 ECHR, this will be addressed in paragraph 2.5. Again this suggests that for supervision, these theoretical borders may be crossed more easily.

The fact that frameworks of supervision are considered restriction of liberty instead of deprivation of liberty has not yet raised other theoretical questions than the above-mentioned suggestions that some theoretical con-

straints may be less rigid for a less intrusive measure. In the German perspective, Meier, for example, notes that the depth of intrusion of a measure has to match the degree of dangerousness so the risk requirement may be less high for supervision than detention. Apart from Cohen's opposite view on the intrusiveness on both frameworks, it is important to note that supervision may involve deprivation of liberty. For example, treatment in a mental hospital may be a condition. Conditions are generally not coerced but enforced through sanctions on breaching conditions, with (recall to) deprivation of liberty as the sanction. And with recalled deprivation of liberty, warnings of backdoor sentencing, double or additional punishment surface in doctrine in the respective countries. In the English perspective, a case is mentioned in which a breach of a civil order was punished with initially four and after appeal three years, which Padfield considers putting the lie to the distinction between civil and criminal sanctions.

### 2.3 Legal Frameworks for Indeterminate Supervision: Evaluation of Proportionality

The principle of proportionality regarding measures is described in the German perspective as consisting of four elements: legitimacy of the aim, suitability to achieve the aim, necessity to achieve the aim, and adequacy considering the competing interests. The third element of necessity entails that the aim cannot be reached by less intrusive means, which are at hand in the arsenal of social control, and will be addressed in the next paragraph. The legitimacy of the aim of public protection is not in question in any jurisdiction, and so in this paragraph mainly the elements of suitability and adequacy are evaluated.

The suitability of the respective frameworks in achieving the aim incorporates an analysis of their pre-legislative justification. In the introduction, a variety of loose to strong connections to incidents concerning sex offenders that caused societal upheaval has been established as a trigger for legislation. The recent adoption of a supervision order in the Netherlands was strongly related to incidents concerning the re-entry of sex offenders in the community. This seems to explain why novel restrictions as a ban to live in certain areas or a duty to move are part of these provisions. The added value of the possibly life-long order was also explained by the government with regard to the offence of possession of child pornography, which due to proportionality deliberations could only lead to preventive detention for a maximum of four years (without the option of an extension for conditional release). In the Dutch contribution, the authors question the proportionality of the order related to the problem referring to the expected low numbers of execution of the order, an expected low success rate and the costs of required resources, in particular related to the empirical finding that societal upheaval concerning re-entry of sex offenders only occurs in a small minority of cases and generally disappears quickly.

The enactment of supervised release in Spain in 2010 was in part connected to specific sexual offences. It was aimed at terrorists and sex offenders and later widened to apply to certain violent offenders. It was scrutinized both for being unnecessary given the low level of violent and sexual offending rates in Spain and for being too soft and thus ineffective in protecting the public against sex offenders. The French SSJ was justified through the somewhat opposing objectives of neutralisation, rehabilitation and treatment. Whereas the first two are fought over by different political views, there is consensus about the idea that sex offenders, the initial target group, need treatment, more so than the group of violent offenders which was added later. The order and following safety measures could also be deemed necessary because in France the sentences for sex offenders are quite lenient, with an average of eight years for rapists. In England, as mentioned, some of the acts in recent history changing the sentencing system as well as some of the civil preventative orders are – also by name – designated for (future) sex offenders. In Germany, the supervision order has known a longer history, but the data suggest that sex offenders form a large part of the population.

As all the above-mentioned frameworks of supervision are aimed at prevention, the suggestion is that sex offenders pose a significant danger to society. All authors consider dangerousness a dangerous concept because of the limited predictive validity of (state-of-the-art) risk assessment. Empirical findings are presented to suggest that risk of reoffending is overestimated in general, through methodological flaws in assessment (such as a low base rate) or in reaction to societal upheaval in case of reoffending (false negatives). The assumption that sex offenders are at a higher risk of reoffending than other offenders cannot be validated by empirical data, which are subsequently lacking in pre-legislative justifications. Our knowledge does not yet distinguish amongst the group of sex offenders the characteristics of those actually posing a high risk for reoffending. Therefore, harsher restrictions on the broad group of sex offenders than on other offenders do not seem to be proportionate in terms of suitability to the intended aim of public protection. Moreover, all authors of the country contributions suggest that this double overestimation of risk and the plausible high number of false positives as a consequence is an additional problem in that respect.

The adequacy of the frameworks of supervision requires weighing the hardships of the individual, or the depth of intrusion of the supervision, against the gains of the public, the likelihood and seriousness of further offences if no supervision would be executed. This evaluation requires both the law in books and the law in action. How is the law defined, in terms of criteria for imposition, duration, the kind of restrictive conditions or directions that can be put in place and the procedural safeguards governing the process? And how are these legal possibilities used in practice, applied in individual cases of sex offenders and with what effect?



Apart from the exceptions explained in paragraph 2.2, an offence of a certain seriousness is required for most frameworks of supervision. In the French perspective, for example, is spoken of a very restricted list of extremely serious offences. Sometimes, the imposition of supervision is indirectly related to the seriousness of the offence through a requirement of the length of the prison sentence or the preventive detention, like in Germany. This is comparable in the Netherlands although the prison sentence has had to be imposed for an offence against the inviolability of the body, meaning a violent or sex offence. As in Spain, the framework is supervised 'release' – it only applies to offences for which parole is in place and is mandatory for sex offences. In England and Wales, Sexual Harm Prevention Orders are for those who were convicted or cautioned for a 'relevant' offence not necessarily a sex offence – Serious Risk Orders just require 'an act of a sexual nature' – as long as there is a risk for sexual harm. This definition shows that in addition to past behaviour generally a dangerousness criterion is required. In countries with many possible measures, the definition of dangerousness may differ per framework, more or less proportionate to the intrusiveness of the corresponding restrictions. In France, for example, the criterion may either be absent (for SSJ, just committing a violent or sex offence suffices), 'dangerousness', 'particular dangerousness' or a 'proven risk of recidivism'. 'Particular' refers to 'a high probability of recidivism because of a serious personality disorder', and as in France psychoanalysis is still dominant 'perversion' is regarded as a personality disorder and is most often used. 'Proven' refers to expert testimony, but evidence-based risk assessment is neither required nor valued. In Spain, the criterion itself refers to the testimony: 'prediction about the future behaviour of the subject that states that he will probably commit new crimes'. Nevertheless, the law omits to require expert testimony for supervised release. For the German supervision order, a prognosis of high risk is necessary. In England and Wales, before 2015 the criterion for the mentioned civil orders was a risk of 'serious' sexual harm as if there was any other kind. Currently, the definition is risk of sexual harm to the public in the United Kingdom or children or vulnerable adults abroad. In the Netherlands, imposition of the supervision order requires an easily met general public safety criterion, but execution requires risk of recidivism of an offence serious enough for imposition of the order, or risk for 'seriously damaging behaviour towards victims or witnesses.' For this last criterion, only a risk assessment by the Probation Services is needed.

The Dutch criteria show a twofold procedure of imposition by the court at sentencing and a court decision of execution at the end of custody in which the initial duration and specific restrictions are formulated. In Spain, a similar twofold procedure exists, although it is not the Public Prosecutor but the Court for Penitentiary Control (CPC) requesting the execution. In Germany, only as an exception could it be a judge imposing supervision because the main route is by default after the

mentioned custodial sanctions. In England and Wales, an SHPO may be imposed at the time of sentencing or on free-standing application to the magistrates' court by the police or National Crime Agency; for a Sexual Risk Order, only the latter situation is available. In France, SSJ is imposed by the sentencing court, while the other safety measures are imposed (after custody) by the judge in charge of the execution of sanctions (*juge de l'application des peines* – JAP) or a special chamber of the court of appeal.

Concerning the duration of the measure, the distinction must be made between an initial duration and a maximum duration. Spain is the only country in which there is in fact no indeterminate, or possibly life-long, supervision order. The duration of supervised release lasts between one and five years, or between five and a maximum of ten years, depending on the seriousness of the offence. At least annually the CPC should make a proposal to the court to terminate or change the restrictions. In France, SSJ has a maximum duration of ten years for felonies, twenty years for crimes, thirty years by special decision and can be perpetual for lifers. However, through the safety measure of Safety Surveillance supervision can be prolonged for two years and renewed ad infinitum. Concerning SSJ, the JAP decides whether to review the order periodically or to entirely delegate supervision to the probation service. The German supervision can be of determinate duration between two and five years, or indeterminate if there is no cooperation with the treatment and a risk for serious reoffending. With a fixed duration, judicial review is every six months, with indeterminate duration of two years. The Dutch supervision order may be imposed and prolonged for a period of two, three, four or five years, which is then also the term for review. The civil orders in England and Wales are imposed for determined periods with a minimum duration, which may be repeated at the end of that period. At the request of the individual or the police, the court can also order to prolong, alter or terminate the measure.

With regard to the kind of restrictions that can be put in place, the civil preventative orders have no constraints in law. The law requires the individual to notify the police of his or her name and address, including where this information changes. Of the countries in which the restrictions are specified in law, it is ominous that most restrictions focus on control, such as notification, location or contact bans, controlled by electronic monitoring – in France, this is a possible additional safety measure – and labour or housing restrictions. Less restrictions are rehabilitative in nature, like a duty to participate in (possibly clinical) treatment, to do educational programmes or find a job. Paying damages is a kind of restorative condition. Herzog-Evans notes that in France the restrictions are not so different from parole, but the difference with release and most community sentences is that for safety measures no consent is needed, possibly also lowering the rehabilitative effect. Breaching the condition may result in a maximum prison sentence of six months in the Netherlands, one year

in Spain, three years in Germany and five years in England and Wales. In France, in regard to SSJ the possible sanction on breaching a restriction is pre-determined by the sentencing court and can be up to three years if the initial offence was a felony and seven years if it was a crime. However, the JAP is in charge of implementation and can decide to partially implement the pre-determined sanction.

The fact that sanctions can be combined at sentencing may lead to a situation in which first a prison sentence may be followed by a long period of preventive detention and later supervision. If the prison sentence was short because of the seriousness of the committed offence and extent of guilt, what followed will be considered disproportionate sooner, even though from a preventive point of view the seriousness of a possible further offence is leading. In jurisdictions where orders can be made free-standing, all sorts of concurrence between legal frameworks may occur. In the English perspective, some guidance is given, especially also by a court of appeal decision stating that next to an indeterminate sentence a civil preventative order is generally unnecessary. Nevertheless, the question is raised whether a judge in charge of the execution, like in France or Spain, would be helpful in this respect.

In the literature mentioned in the introduction, it was merely suggested that supervision would not be illegitimate as long as there were procedural safeguards in place. Of course, for impositions during sentencing, ordinary due process principles of criminal procedure regulations pertaining to sentencing will be in place. The twofold procedure in the Netherlands and Spain is itself a procedural safeguard. All countries seem to have possibilities for appeal, recurring and/or the option of demanding judicial review in place in the stage of execution. Imposition after the sentence may require additional safeguards, as is the case regarding French safety measures. One example is the required three layers of risk assessment for most safety measures: (a) by an expert; (b) after a placement of up to six weeks in clinical environment; and (c) by a so-called multidisciplinary commission for safety measures. Probably only in the Netherlands, and England and Wales may evidence-based risk assessment instrument be mandatory. Counter-expertise however is generally only paid for by the government if the court finds it necessary, although in the adversarial system in England and Wales it might be considered more of a right.

These safeguards will be important because in a few contributions studies are mentioned that found that a lack of experienced procedural fairness may actually increase the risk of recidivism (during supervision), just as isolation does, which may be the case if control is not combined with counselling, treatment, social support and a focus on 'the realisation of meaningful lives' instead of 'the prevention of risks', needed for supervision to have the required effect. Therefore, how the legal framework is applied in practice will be more important for the evaluation of adequacy.

Two types of empirical data would be of interest in this evaluation: data on the frequency of application of the supervision orders and data on their effectiveness in reducing reoffending. As the Dutch order has not been enacted yet, no data exist. There are no data for Spain as well, since the order was enacted in 2010 and is imposed at sentencing in combination with custody and executed thereafter. In the other countries where supervision has a longer history, the authors of the contributions complain about a lack of data, nonetheless. However, German data suggest that supervision is imposed more for five years than for two years, revealing that the courts seem to act risk oriented. In France on the other hand, courts seem to be more cautious from the perspective of liberties of the individual. SSJ is far from being systematically imposed on sex offenders. The data also show that with a mean duration of six years paedosexual offenders are longer under supervision than other sex offenders. Electronic monitoring is not often used, but if it is used it is on a sex offender in a large majority of the cases. In a recall study from a few years ago, a figure of 25% was established. In England and Wales studies show an effect in reducing reconvictions of violent and sex offenders after the introduction of MAPPA. But more recent data show an increase of cautions, reconvictions and/or recall on licence, under MAPPA or with civil orders. This at least seems to suggest a shift towards control instead of support.

In Spain, the biggest concern regarding an effective practice is the lack of a designated authority to carry out the control: 'a supervised release without a supervisor'. This is only one aspect of the lack of adequate resources, urging Martínez Garay and Correcher Mira to say that effective management of sex offenders in the community will only be possible if the legal framework is backed up by these resources. Even though the situation in other countries may not be as desperate, most authors echo this concern. For example, in France, cooperation between the different services is not like under MAPPA.

Especially in France, and England and Wales, the judiciary has aided in drawing borders concerning the proportionality of certain restrictions in individual cases. As suggested by the data, the judiciary is cautious in restricting liberties, although sex offenders are generally the most restricted group, judging by a finding concerning contact bans. However, concerning electronic monitoring administrative courts have urged the prison services to refrain from serious infringements on the private lives of those under monitoring: for example, being awakened several times during the night as a direct result of the poor technology used. Also, bans or controls on use of computers or the Internet are only allowed if it is established that a non-contact sex offence (such as downloading child pornography) has been committed. A similar ruling was made by a court of appeal in England and Wales in 2015. A blanket prohibition on computer use or the Internet access is disproportionate because it restricts the defendant in the use of what is nowadays an essential part of everyday living for a large

proportion of the public, as well as a requirement of much employment. Moreover, a direction under a civil order relating to activity with children should be justified by demonstrating that the risk is not already catered for by other regulations. In another 2015 case, directions prohibiting contact with minors were too stringent and reformulated to incorporate a clause like ‘such as is inadvertent and not reasonably avoidable in the course of lawful daily life’. In a 2010 case, the UK Supreme Court had already ruled that indefinite notification requirements were disproportionate, leading to the possibility of appeal after being on the register for a very long time. However, those under SHPOs may not appeal. In a Dutch case, a civil court in summary proceedings explicitly ruled that two of the restrictive conditions imposed on a conditionally released offender – an area restraining order with associated electronic monitoring for five municipalities – were disproportionate. These rulings suggest that restrictions should be proportionate also as not to hinder rehabilitation too much.

#### 2.4 Place among Other Sentences and Preventative Measures: Evaluation of Alternative Less Intrusive Means

Are the legal frameworks for indeterminate supervision, and their practical utilization, considered necessary in addition to all other – possibly less intrusive – alternatives? Especially concerning new legislation of such frameworks, the government should justify that the aim of public protection cannot be reached through existing means. Otherwise, as Struijk and Mevis underline, additional community sanctions are an unnecessary widening and strengthening of the net of social control. As the different characters of the respective legal frameworks for supervision are now known well enough, this paragraph will elaborate on the main alternatives.

As is pointed out in the English and French perspective, despite the existence of alternatives most sex offenders will just pass through prison. As many frameworks of supervision focus on necessary control after custody, the apparent observation is that imprisonment itself does not reduce dangerousness, probably on the contrary. In the Spanish perspective most prominently, a reference is made to studies that show a risk-reducing effect for a significant percentage of sex offenders after rehabilitation treatments received during prison sentence. Nevertheless, in most of the studied countries treatment programmes are not nationally implemented. In France they are, but Herzog-Evans is critical about their lacking of an evidence base. In England and Wales, sex offenders are generally required to do courses, but they mainly go through the system with many queues and delayed advances in placement or hearings. In a case of an indeterminate sentence, it was ruled that such delays breached the ‘right’ to rehabilitation in showing that there is no longer a present danger. Indeed supervision may be needed less if sex offenders left prison more rehabilitated than is the case now. The Spanish authors consider the lack of rehabilitative programs in deep contrast with

their constitutional aim of rehabilitation. After prison, no legal options or programmes are in place other than sporadic initiatives for volunteers like Circles of Support and Accountability, which does have an established preventive effect.

Of course, if the released sex offenders meet the criteria of mental health law, they could be coerced to commitment in a mental hospital and/or medication. As mentioned, a lack of data leads only the hypothesis of sex offenders controlled in that way. In some countries, such as France, through flexible placement provisions it is also possible to place sex offenders in secured mental health facilities during the time of the sentence. This could be used to reduce reoffending risk, but in the Netherlands, for example, this is generally only used as crisis interventions.

Restrictions on liberty in the community can be reached through other legal frameworks. Of course, other criminal sentences than custody may be used as an alternative, like conditional or suspended sentences or release as the most obvious. But in most jurisdictions, accessory sentences also may be imposed (in addition). In Spain, these can be imposed because of dangerousness, and some scholars consider them safety measures. In the German legal system, similar restrictions are possible under police laws, based on the duties of the police to ensure security (or public order) through security law as part of administrative law. The danger must be more concrete than under criminal law, but Meier doubts whether such restrictions are less intrusive. Also in the Netherlands, restrictions are possible under administrative law, but not as restrictive as the supervision order under criminal law.

The recently adopted Dutch supervision order was explicitly justified by the legislator as necessary to fill existing gaps in legislation. As traditionally dangerous offenders are addressed through the TBS-order, possibly also imposed conditionally, it was deemed problematic that TBS has recently been less imposed because defendants refuse to cooperate with the required (personality) assessment. This leads to evaluators refraining from giving an advice, which leads to less impositions even though law allows for imposition, nonetheless. This suggests that dangerous offenders who should be in TBS are now just serving sentences, and therefore the government needed supervision afterwards. The problem, however, is not addressed at its roots. Defendants do not want to receive a TBS-order because the mean length of duration has risen to eight-plus years. Attempts to reduce this length are underway, but the possible result of less ‘refusers’ is not awaited. Another gap is considered the maximized TBS at four years for non-violent offenders, such as hands-off sex offences. Again, the problem could be solved by abolishing that modality. In terms of less intrusive means, it is interesting that along with the supervision order, the perpetual prolongation of parole after prison for dangerous offenders and the perpetual prolongation of conditional release from TBS preventive detention were adopted. These two changes seem to cover many gaps, and their

results could have been awaited before introducing the supervision order. Finally, as mentioned the societal upheaval concerning re-entry of sex offenders seemed necessary to address, even though in practice mayors of Dutch towns already use civil proceedings for imposing supervisory conditions on presumed dangerous ex-offenders returning to their community. This sometimes works as long as the time for conditional release has expired and the conditions are not too severe. A more severe option under civil law is the mentioned makeshift placement in closed institutions of preventive detainees considered to be of unsound mind, after the ECHR ruled the retrospective post-sentence imposition of their preventive detention incompatible with the convention. The question is, however, whether similar or any other constraints from a human rights perspective seem to control supervision.

## 2.5 Evaluation from a Human Rights Perspective

In the introduction (paragraph 1.4), the framework for this evaluation has already been given. In the mentioned *Guzzardi*-case, it was adopted that restrictions may be so severe as to amount to deprivation of liberty. In such a case, the safeguards of Article 5 ECHR come into play. Have the national legislators or judiciary in a single case ever tested restrictions through a supervision framework against the requirements of Article 5 ECHR? Or are restrictions measured against Article 2 Protocol 4 or other protected rights or liberties in the convention? And what other human rights documents – possibly soft law – are considered?

Although the studied jurisdictions have different ways of integrating the ECHR and subsequent case law in national law – described in the respective contributions – the ECHR and its subsequent case law are taken at heart – although in some countries more often by scholars than judiciary, let alone government. That this is not restricted to case law regarding their own country is demonstrated by the fact that almost all authors of the country contributions mention case law on Article 5 regarding the German situation (of preventive detention). As described, in this case law some elaborated safeguards relevant for preventive frameworks were formulated. Concerning the grounds for deprivation of freedom there has to be a ‘sufficient causal connection between the conviction and the deprivation of liberty at issue’ (1, a). The ground of ‘when it is reasonably considered necessary to prevent his committing an offence’ (1, c) only applies to pre-trial detention and not custody for preventive purposes without the person concerned being suspected of having already committed a criminal offence (*Ostendorf v. Germany* 2013).

It can be argued that as the causal relation is progressively weakened as the preventive detention continues, in order to keep perspective the execution should be distanced from a prison sentence (in special facilities – compare the French decision on the internal regulations in Fresnes) and possibly a requirement of ‘unsound mind’ (1, e) should be in place (like in the Dutch TBS-

order); compare the mentioned German makeshift when retroactive imposition of preventive detention was considered a heavier penalty incompatible with the legality requirements of Article 7 ECHR. That article also requires foreseeability, while Article 4 Protocol 7 states the right not to be punished twice.

A supervisory framework would only have to comply with these and other safeguards of Article 5 if its restrictions (in a single case) are to be considered a deprivation of liberty. The fact that the *Guzzardi* case is not mentioned by the legislator or judiciary may be consoling, in the sense that no restrictions of such severity are ever used, or worrying in the sense that people are not aware of the fact that restriction of liberty can turn into deprivation of liberty. In the Netherlands, concerning the legal requirement of one year of conditional release from TBS, if the dangerousness criterion is not met judiciary tends to impose the lightest possible restrictions as said to comply with Article 5. The idea that restriction can turn into deprivation, also through recall after breaching directions, has led some authors – of the contributions most strongly in the Dutch, French and Spanish perspective – to argue that supervisory frameworks as a precaution should comply with the safeguards of Article 5 as not to come into trouble in case restrictions are deemed as deprivation of liberty in a single case. That also seemed to be the idea of the Dutch legislator, as in the pre-legislative justification of the recently adopted Dutch framework an extensive human rights check was presented, including the standards of article 5 ECHR. Struijk and Mevis suggest that the twofold procedure of imposition at sentencing and the execution decision at the end of the sentence was directly related to the case law regarding the German *nachträgliche Sicherungsverwahrung*. However, they also see a downside of this procedure in terms of the required foreseeability (in Article 7) whether the order will be executed or not and with what restrictions and how the individuals behaviour in custody may influence the decision. Nonetheless, they consider the framework itself not to be in violation with the ECHR. The same is true for Meier’s opinion on the German framework; he also considers the post-custody formulation of directions not to be a form of a second punishment.

The fact that both Article 5 and Article 3 – the prohibition of inhumane treatment, for example, in cases of life sentences – seem to require perspective seems to be in line with a requirement of detention aimed at rehabilitation as expressed in some constitutions as well as Article 10(3) ICCPR, even though the ECHR does not explicitly formulate it as a right.

In national case law, sometimes restrictions within a framework of supervision are considered an infringement on certain rights and liberties under the ECHR, not justified as provided by law, having a legitimate aim or necessary in a democratic society. In determining this, the interests of the offender have to be balanced against the rights and freedoms of potential victims (*Colon v. the Netherlands* 2012). In the Convention on the Protection of Children against Sexual Exploitation



and Sexual Abuse (2007/2010), states have the obligation to provide preventive measures. This balance of interests is also provided for in German constitutional law.

In German case law, a direction to take up residence at a specific place prescribed by the competent division of the regional court was not covered by national law and was a violation of the released person's freedom of movement also under Article 2 (1), ECHR fourth protocol. In a pre-trial case, a direction to carry the equipment for electronic monitoring was considered a restriction of the offender's freedom of action under national law. In another case, the direction to make an effort to find employment immediately after release, in a sense of an obligation to accept any employment offered to him by an agency, was considered a violation of the released person's occupational freedom under national law and Article 15 Charter of Fundamental Rights of the European Union. In a final case, it was ruled that the direction not to publish right-wing ideas for a period of five years after release was a disproportionate interference with the offender's freedom of expression under national law and Article 10 (1) ECHR.

In national case law, the human rights perspective plays a role in relation to possible restrictions in a single case. However, as was described in paragraph 2.2 in relation to that or on top of that principles like certainty and proportionality may play an independent but similar role. This is to be understood through the fact that the ECHR itself provides merely a low threshold of minimum rights, while national courts can also be expected to develop equal, if not stronger, protections.

Of course, under the ECHR, infringements on certain rights and liberties may be justified if they are proportionate to a legitimate aim and pressing social need. In addition, all sorts of soft-law rules and recommendations have in common that they call for proportionality, defining this principle as proportionate to the seriousness of the committed offence, not the alleged offenders' risk and danger. For example the Council's Recommendation on Community Sanctions and Measures (2000/22, updated a 1992 version) merely states that a community sanction or measure ordinarily shall not be of indeterminate duration. But Struijk and Mevis consider a determined initial duration with possible prolongation as determinate enough. Other relevant recommendations are those on Probation Rules (2010/1) and conditional release (2003/22). With regard to electronic monitoring, a separate recommendation was recently adopted by the Council of Europe (2014/4),

to define a set of basic principles related to ethical issues and professional standards enabling national authorities to provide just, proportionate and effective use of different forms of electronic monitoring in the framework of the criminal justice process in full respect of the rights of the persons concerned.

Evaluation research showed that in terms of compliance generally, the rules are rather vague and lack of specific-

ity resulting in all jurisdictions broadly adhering to the recommendation. Nevertheless, more detailed examination suggests that compliance is sometimes more technical than real and that more needs to be done in order for jurisdictions to comply more fully.<sup>44</sup>

### 3 Conclusion

The aim of this study was to find the legal constraints governing the supervision of sex offenders in the community because this group was presumably the group on which social control has its firmest grip. In all five studied jurisdictions in the past decades, changed attitudes towards sex offenders have expanded the legal possibilities of post-sentence supervision in a variety of new or adapted existing legal frameworks. Indeed, the provisions suggest that sex offenders are the group with the least protection in a sense that principles can be breached sooner. Even though the authors report a lack of empirical data, at least it can be concluded that this expansion (initially) leads to a more frequent use of supervision frameworks in practice, while in jurisdictions with several options to ensure supervision not all schemes are similarly popular. This general expansion suggests that in the process existing legal borders have been crossed or at least extended.

With regard to the legal constraints posed through sentencing theory, it may be concluded that in a twin-track system the more a safety measure, for example, for reasons of legal protection, is blurred with retrospective notions (of punishment) such as proportionality to the committed offence and the requirement of a committed offence (legality), the more theoretical borders seem to be acknowledged. The perspective of England and Wales shows that punishment can be blurred with preventive notions, or refuge can be taken to civil law, in a way that the original safeguards of punishment seem of lesser importance. It is suggested that if supervision is considered as less intrusive than detention, theoretical borders may be crossed sooner, such as a requirement of treatment or rehabilitation especially for indeterminate measures. However, like Stanley Cohen, some of the authors of the contributions suggest that this assessment of intrusiveness may deserve reconsidering.

With regard to constraints posed by the principle of proportionality, it is first important to note that many differences can be observed regarding the specific procedural safeguards that are in place. How serious should the required offence be, how high the threshold of dangerousness and how is the quality of the assessment of risk safeguarded, at what stage in the proceedings and by whom should supervision be imposed, when is indeterminacy justified and how frequent is periodic review possible, what possible restrictions may be imposed and what is the penalty on breaching them, what other procedural safeguards are in place and how differs the

44. Huckleby *et al.*, above n. 27.

imposition in theory and in practice? Some difference may be explained through the principle itself by the rationale that more intrusive measures require more balancing safeguards. However, in that evaluation some fairly intrusive frameworks may be lacking counterbalance. This is even more true in practice than in theory, as the assessment of dangerousness itself seems to require counterbalance. Concerning concrete restrictions in case law, the principle of proportionality does seem to pose legal constraints on what are considered disproportionate restrictions. Especially a blanket prohibition on computer use or the Internet access may be considered disproportionate in several countries because it restricts the defendant in the use of means necessary for rehabilitation into modern society.

With regard to constraints posed by the principle of necessity or least intrusive means, the fact that supervision is generally considered less intrusive than alternative options of deprivation of liberty – even under mental health law – seems to justify supervision frameworks. However, as most frameworks of supervision serve as a safety net or last resort at the end of a long trajectory through the criminal justice system, it is essentially the ineffectiveness of that system that provides for the necessity of supervision. Resorting to supervision must not be used as a means to further erode treatment and rehabilitative efforts in the criminal justice system, meanwhile adding to its own necessity.

With regard to human rights constraints, many of the former discussions are echoed. The notion by the ECHR in the *Guzzardi* case that restrictions may be so severe as to amount to deprivation of liberty has led some authors to suggest that as a precaution also for frameworks of supervision, the safeguards of Article 5 should be in place. Rehabilitation efforts may be considered part of the requirements of Article 5 *inter alia*. In national case law sometimes directions of restriction of liberty are considered an infringement on certain rights or freedoms under the ECHR, including Article 2, fourth protocol, and Article 10. The requirement that infringements in order to be justified should be proportionate to the intended aim is in keeping with soft-law requirements and the finding that in national case law restrictions are also tested on these principles, while the ECHR solely provides minimum standards.

Having asked scholars to evaluate the supervision frameworks in place in their respective countries, it is of interest to know on which note they end their contributions. Two main concerns can be identified. First of all, most authors – including Meier whose wordings are most closely followed here – focus on the fact that from a theoretical point of view indeterminate supervision may be consistent with the principle of proportionality, but this requires assessing the degree of dangerousness which is in practice flawed by inevitability of systematic errors, making the protective function of the proportionality principle in theory remarkably more promising than in practice. The necessity and the adequacy of (indeterminate) supervision can in practice be easily misjudged. In order to address this problem, of impor-

tance is not only evidence-based risk assessment, but also improving the validity of these prediction methods. Possibly also in light of the prohibition of ‘arbitrary’ impositions, Herzog-Evans argues that this should be countered also by a possibility of counter-expertise.

The second concern is the fact that the frameworks of supervision are prone to be in contradiction with the requirement of rehabilitation as they seem to favour control. According to Struijk and Mevis, this is related to the principle of least intrusive means or necessity, in the sense that the framework of supervision is mainly necessary as a result of a lack of treatment and rehabilitation efforts in other frameworks. Without rehabilitation efforts, supervision is deemed to be ineffective, and subsequently disproportionate. Herzog-Evans, and Martínez Garay and Correcher Mira point out that for rehabilitation more resources are needed. Padfield concludes that ‘ironically, it may be the cost of controls and supervision in the community that effect more changes in the future ... Then it may not be a culture of “human rights” that protects sex offenders from disproportionate restriction and surveillance, but simply a financial calculation.’

It would indeed be a bitter conclusion that it is not predominantly law that controls the social control of sex offenders in the community. This study shows, however, that even though law does yield to the demands of social control in facilitating all kinds of measures directed at sex offenders, it still provides some legal constraints on the restrictions of rights and liberties under frameworks of supervision, mainly through safeguards derived from human rights or the principles of proportionality and necessity. However, as frontiers of supervision of sex offenders are continuously being pushed, and any small next step can easily be considered necessary and proportionate, those principles are rendered increasingly less meaningful. As these principles are also prone to various interpretations, their connection to human rights jurisprudence – like that on art. 5 ECHR – will remain relevant.

This study hopefully aids in initiating more debate and research on what remains an under-debated and under-researched issue. In fact, the debate itself is probably a vital part of the counterweight required in keeping the advancements of social control in check.

# Legal Constraints on the Indeterminate Control of 'Dangerous' Sex Offenders in the Community: The English Perspective

Nicola Padfield\*

## Abstract

This article explores the legal constraints imposed on the rising number of so-called 'dangerous' sex offenders in England and Wales, in particular once they have been released from prison into the community. The main methods of constraint are strict licence conditions, Multi-Agency Public Protection Arrangements and civil protective orders such as Sexual Harm Prevention Orders. 'Control' in the community is thus widespread, but is difficult to assess whether it is either effective or necessary without a great deal more research and analysis. Post-sentence 'punishment' has been largely ignored by both academic lawyers and criminologists. The article concludes that financial austerity might prove to be as important as the human rights agenda in curbing the disproportionate use of powers of control.

**Keywords:** Dangerous, sex offenders, human rights, community supervision, punishment

## 1 Introduction

### 1.1 Changing Attitudes to Sex Offenders

In England and Wales, as in much of Europe, attitudes to sex offenders appear to have hardened in recent years. Whether this is the result of a culture of fear or 'moral panics' in an age of anxiety and insecurity is for others to judge.<sup>1</sup> But 'sex scandals' appear to have filled the press in recent times. Some scandals have involved those in high places in society, involving allegations against both the dead (ex-Prime Minister Edward Heath or entertainer Jimmy Saville, for example) and the living. Several celebrities are currently serving lengthy sentences for offences carried out many years ago: for example, in 2014, three famous individuals were imprisoned for sexual offending dating back many years. Rolf

Harris, an entertainer and artist, once a well-loved 'national treasure', is now serving a five-year, nine-month sentence imposed for offences carried out between 1968 and 1986; Max Clifford, a famous publicist, is serving eight years and is now facing further charges; and Stuart Hall, a TV and radio presenter, was convicted at two separate trials and served two consecutive periods of thirty months' imprisonment.

There has also been enormous media coverage surrounding the grooming and rape of vulnerable girls by 'rings' of, often, British Muslim or Pakistani-heritage men: perhaps the most famous was the Rotherham scandal: five men were found guilty of many offences committed between 1997 and 2013 involving the grooming and rape of vulnerable teenage girls. The men were sentenced in 2010 to between four and eleven years' imprisonment. Much of the press coverage has focused on the failure of the public authorities to act effectively against widespread sexual abuse against vulnerable girls.<sup>2</sup> There have been other similar and more recent convictions resulting from 'rings' of sexual offenders in Derby (2010), Rochdale (2012), Oxford (2013), Telford (2013), Bristol (2014) Banbury (2015) and Peterborough (2014, 2015). Most recently, in July 2015, six Asian men from Aylesbury were convicted of serious sexual offences against schoolgirls and were sentenced in September to lengthy terms of imprisonment, up to nineteen-and-a-half years. Similar prosecutions have started in Newcastle. There has also been a trail of scandals surrounding sex abuse by priests of various churches.<sup>3</sup>

These gangs, and the celebrities, attract enormous media attention, but it is difficult to prove any direct link between media portrayals and the number of sex offenders convicted and sent to prison, which has been rising steadily. Sex offenders now make up 17% of the prison population:

At the end of June 2015 there were 11,490 sentenced sex offenders in the prison population, which is 10% higher than twelve months before, and 33% higher when compared to June 2010. Furthermore, when

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1. See Van der Wolf (this issue).

2. See e.g. A. Jay, 'The Independent Inquiry into Child Sexual Exploitation in Rotherham 1997-2014', OBE, available at: <[www.rotherham.gov.uk/downloads/file/1407/independent\\_inquiry\\_cse\\_in\\_rotherham](http://www.rotherham.gov.uk/downloads/file/1407/independent_inquiry_cse_in_rotherham)>.

3. There is now a major public inquiry into institutional child sexual abuse, chaired by a New Zealand judge, Lowell Goddard, which is scheduled to take many years and to cost millions of pounds: see <[www.csa-inquiry.independent.gov.uk/about-the-inquiry](http://www.csa-inquiry.independent.gov.uk/about-the-inquiry)>.

compared to the sentenced populations for other offence groups, the sex offender sentenced population has increased the most over this five year period. This is consistent with the recent 'Crime in England and Wales' bulletin from the Office for National Statistics that reported the highest number of sexual offences recorded by the police since 2002/03, for the year ending March 2015 (p. 6, Offender Management Statistics Bulletin, England and Wales, Quarterly January to March 2015).<sup>4</sup>

So, more offences are being reported to the police, more offenders are being convicted and offenders are also serving longer sentences. Of course, it is difficult to know whether there are more sex offenders in society, or whether victims and complainants are simply more prepared to come forward than was the case in earlier times. The political response would appear to have been largely one of passing more and more laws,<sup>5</sup> and the judiciary has responded, as these statistics show, by passing longer and longer sentences.

The focus of this article is on the control of sex offenders in the community. I shall highlight a number of key characteristics of, and worrying developments in, the English system: a flexible and risk-averse prison release system; growing numbers of offenders recalled to prison after release on licence; an uncomfortable relationship between mental health law and penal law. These developments must all be evaluated, for our purposes, in the context of growing euro-scepticism and widespread wariness of a culture of human rights. The questions raised are important and under-researched: 11,490 sentenced sex offenders in the prison population today is an enormous number, and there are currently 65,083 offenders subject to Multi-Agency Public Protection Arrangements (MAPPA) in the community.<sup>6</sup> To what extent is 'control' in the community either effective or necessary? Attempting to change attitudes within society might be a more appropriate response.

## 1.2 Overview

Public protection has been high on the political agenda in England for many years, which has resulted in much legislative change. It is difficult to describe the current law with simplicity or with clarity. Many sex offenders are serving indeterminate sentences. When (if) released from prison, they will be subject to licence conditions, probably for life. But even those who are sentenced to

determinate, fixed term, sentences (and who are normally released at the halfway point) will be subject not only to licence conditions until the end of their sentence, but also to other preventative orders. All sex offenders have been required to register with the police since the Sex Offenders Act 1997, which resulted in the setting up of a sex offenders' register. This register is now known as the Violent and Sex Offender Register (ViSOR), and the rules governing registration are found in the Sexual Offences Act 2003, as amended. The register is managed by the National Crime Agency, a policing body created by the Crime and Courts Act 2013.<sup>7</sup>

The length of time that sex offenders are required to maintain their details on the register is not short. Anyone imprisoned for thirty months or more must remain on the register indefinitely. Notification periods are as follows:

- Imprisonment for a fixed period of thirty months or more, imprisonment for an indefinite period, imprisonment for public protection (IPP), or admission to hospital under restriction order, or subject to an Order for Lifelong Restriction: indefinitely.
- Imprisonment for more than six months but less than thirty months: ten years.
- Imprisonment for six months or less, or admission to hospital without restriction order: seven years.
- Caution: two years.
- Conditional discharge or (in Scotland) a probation order: period of discharge or probation.
- Any other: five years.

(Finite notification periods are halved if the person is under eighteen when convicted or cautioned). In *R (on the application of F and Thompson) v. Secretary of State for the Home Department* [2010] UKSC 17, the Supreme Court upheld an earlier decision of the Court of Appeal and issued a declaration of incompatibility under section 4 of the Human Rights Act 1998 in respect of notification requirements for an indefinite period. These indefinite notification requirements were, they said, disproportionate. As a result, the Government has introduced a review and appeal process for those who have been on the register for more than fifteen years, or eight years for juveniles (see the Sexual Offences Act 2003 (Remedial) Order 2012). Those who continue to pose a significant risk will still remain on the register for life. Those subject to a Sexual Offences Prevention Order (SOPO; see later) may not apply for a review of their indefinite notification requirements.<sup>8</sup>

The register is of course useful for the police, and other agencies, in order to 'manage' sex offenders in the community. How is this done? We must identify a number of routes for supervision:

4. See Ministry of Justice, 'Offender Management Statistics Quarterly: January to March 2015' (2015), available at: <[www.gov.uk/government/statistics/offender-management-statistics-quarterly-january-to-march-2015](http://www.gov.uk/government/statistics/offender-management-statistics-quarterly-january-to-march-2015)>. See also Ministry of Justice, *Story of the Prison Population 1993 – 2012 England and Wales* (2013), at <[www.justice.gov.uk/statistics/prisons-and-probation/prison-population-1993-2012](http://www.justice.gov.uk/statistics/prisons-and-probation/prison-population-1993-2012)>.

5. Every year, there is a significant statutory change: see the changes in the Anti-Social Behaviour, Crime and Policing Act 2014 discussed later in this article for a recent example.

6. MAPPA data in this article come from the Ministry of Justice, *Multi-Agency Public Protection Arrangements Annual Report 2013/14* (2014), available at: <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/369414/mappa-annual-report-2013-14.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/369414/mappa-annual-report-2013-14.pdf)>.

7. A subject outside the scope of this article is the accountability of the police in England and Wales: there have been many changes in recent years, reflecting tensions between local and national accountability, and different understandings of the importance of police 'independence'.

8. See 'Sexual Offences Act 2003 (Remedial) Order 2012', available at: <[www.gov.uk/government/publications/sexual-offences-act-2003-remedial-order-2012](http://www.gov.uk/government/publications/sexual-offences-act-2003-remedial-order-2012)>.



1. supervision in the community for those still serving a sentence of imprisonment, or those serving community-based punishments,
2. post-sentence supervision under MAPPA,
3. civil preventative orders (breaches of which are criminal offences).

Before exploring these measures, I will offer some comments on the context in which they apply. There is disappointingly little empirical evidence available and the issues are seriously under-debated: for example why does public protection justify post-sentence ‘punishment’? What, in fact, do we mean by ‘post-sentence’ punishment – if the offender is still being ‘controlled’, should this be considered as post-sentence or as part of the punishment, part of the sentence?

## 2 Evaluation in the Light of Legal Theory

English law has long been ambivalent about the justifications for sentencing – or perhaps, simply recognises a plethora of sometimes contradictory justifications. When Parliament enacted section 142 of the Criminal Justice Act 2003, most judges were unimpressed. It enacted for the first time the provision that any court sentencing an offender must have with regard to the following purposes of sentencing:

- a. the punishment of offenders,
- b. the reduction of crime (including its reduction by deterrence),
- c. the reform and rehabilitation of offenders,
- d. the protection of the public and
- e. the making of reparation by offenders to persons affected by their offences.

This appeared to most sentencers to be a statement of the ‘blindingly obvious’.<sup>9</sup> Sentencers knew (and know) that sentencing involves a complicated balancing of conflicting aims. Since the Criminal Justice Act 1991, judges have been urged to impose proportionate, or commensurate, sentences in the sense that a ‘custodial sentence must be for the shortest term (not exceeding the permitted maximum) that in the opinion of the court is commensurate with the seriousness of the offence, or the combination of the offence and one or more offences associated with it’ (s. 153(2) Criminal Justice Act 2003), but it is difficult to articulate how this is applied in practice. Even in 1991, sentencers were entitled to impose ‘longer than commensurate’ sentences on some offenders, and the shorthand concept of ‘dangerousness’ has been used since the Criminal Justice Act 2003. It would be useful to have research that analysed which of the

purposes of punishment are taken into account more often, and by which judges and for which offences (although, of course, what judges say they do may not be what they actually do). When it comes to serious sex offenders, it is possible to assume that the courts may put particular weight on punishment and protection of the public, not reform and rehabilitation, but this is not known.

Quite apart from the legislative framework, there is a lively academic and largely theoretical debate on the purposes of punishment. It is difficult to know how much influence this has had on Parliament or practice. Andreas von Hirsch’s work<sup>10</sup> had a significant influence in the 1990s when versions of modern retributivism replaced reform and rehabilitation as preferred theoretical aims for the system. It is perhaps a challenge for those of us who seek to put rehabilitation at the heart of the system today that we must recognise that reform and rehabilitation went out of fashion in the 1980s and 1990s for good reasons: not least, a fear of inconsistent sentencing. However, most of the discussion focuses on the purposes of punishment at the first sentencing stage, what might be called ‘front door’ sentencing – there has been little debate on the philosophical justifications for early release and control in the community post-sentence. When it comes to preparing prisoners for release, the uncertainties make ‘progress’ through the system more difficult to achieve. Is public protection more important than rehabilitation? Until we give rehabilitation a greater priority, people will continue to get ‘stuck’ in the system.

Interestingly, the concept of rehabilitation seems to be more often discussed in the context of the many appeals against deportation imposed on foreign nationals who have served lengthy custodial sentences, than in the sentencing cases themselves.<sup>11</sup> I would argue that rehabilitation is highly relevant to the reduction in the risk of re-offending: if a person is rehabilitated, the public are safer. Rehabilitation and public protection march together more easily than often assumed.

9. This has been stated to me several times at judicial training conferences; the reality may be more dangerous – does the legislation perpetuate certain myths? For example, severe sentences do not themselves deter offenders: more important is the certainty, or subjective assessment of the likelihood, of being arrested and prosecuted.

10. See e.g. A. von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (1987) or A. von Hirsch, *Censure and Sanctions* (1996).

11. See e.g. *Taylor v. Secretary of State for the Home Department* [2015] EWCA Civ 845, where the Court of Appeal (Civil Division) upheld the deportation of a Colombian woman. Moore-Bick concluded, ‘I would certainly not wish to diminish the importance of rehabilitation in itself, but the cases in which it can make a significant contribution to establishing the compelling reasons sufficient to outweigh the public interest in deportation are likely to be rare. The fact that rehabilitation has begun but is as yet incomplete has been held in general not to be a relevant factor ... rehabilitation is relevant primarily to the reduction in the risk of re-offending. It is less relevant to the other factors which contribute to the public interest in deportation’ (at para. 21).

### 3 Legal Frameworks for Indeterminate Supervision: Evaluation of Proportionality

What is meant by indeterminate supervision? Most serious sex offenders who are convicted serve lengthy custodial sentences, and it is essential to understand the mechanisms whereby they find themselves in due course ‘supervised’ in the community. This ‘supervision’ may be indeterminate, via a number of different routes.

#### 3.1 The Sentencing Framework

##### 3.1.1 Life Sentences

Many sex offenders in England receive an indeterminate sentence. This was particularly common between 2003 and 2012, when the option of IPP existed. From April 2005 to July 2008, IPP was more or less mandatory for a repeat rapist or indeed for anyone convicted of one of many sex offences who in the eyes of the court posed a ‘serious risk of serious harm’. There are therefore many sex offenders serving IPP in prison (and some in the community), and it will remain a relevant sentence for the rest of their lives. (After ten years on licence post-release, an IPP prisoner may apply to have his licence conditions lifted, but no one has yet been in a position to do this.) There is also a ‘discretionary life sentence’ that is imposed on very serious offenders. For example, in May 2015, the Court of Appeal upheld four life sentences imposed on the four men convicted in the ‘Oxford’ sex ring case mentioned in the Introduction: see *Karrar* [2015] EWCA Crim 850.<sup>12</sup> The Court of Appeal held that life sentences, with minimum terms ranging from seventeen to twelve years, were appropriate for these men who had been involved in the serious sexual exploitation of vulnerable young teenage girls over a number of years. A little guidance on when a life sentence is appropriate was given by the Court of Appeal in *PG* [2104] EWCA Crim 1221, updating earlier guidance given by Bingham LJ in *AG’s Reference No. 32 of 1996 (Whittaker)* [1997] 1 Cr App R(S) 261. The case of *PG* involved a 64-year-old policeman who had abused his position as a scuba-diving instructor over ten years to lure young boys into sexual activity and then abused his position as a police officer to hide what he had done. He was also convicted of the anal rape of his wife. The Court, led by the current Lord Chief Justice, substituted a determinate sentence of twenty years for the trial judge’s life sentence, with a minimum term of twelve years. But it is a difficult case from which to draw clear guidance as there had been procedural errors at trial and the Court held that it would, on the basis of this, be

‘unfair, unsafe and unjust’ for the Court of Appeal to set about making the finding of ‘dangerousness’ on the material available to them, which should have been done by the trial judge. But the Court did repeat the words of Lord Bingham that discretionary life sentences should be passed only in the most exceptional circumstances and that there should be good grounds for believing that the offender may be a serious danger to the public for a period that cannot be reliably estimated at the date of sentence.

##### 3.1.2 Extended Sentences

Many of those who might well have received an indeterminate IPP between 2003 and 2012, when it was abolished, now receive an ‘extended sentence’. The current style of extended sentence was introduced in the Criminal Justice Act 2003 but these sentences did not become common until 2008, as ‘dangerous’ offenders were until then likely to fall foul of the draconian IPP provisions and to receive a truly indeterminate sentence. The Criminal Justice and Immigration Act 2008 made IPP much more discretionary – and judges were then able to impose an extended sentence rather than one that was totally indeterminate on many offenders who they considered ‘dangerous’. With an extended sentence, the judge imposes the ‘appropriate custodial term’, but then adds an extended supervision period of up to five years for violent offenders and up to eight years for sexual offenders.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 abolished both IPP and the 2003-style Extended Sentence (now known within the prison world as an EPP, an extended sentence for public protection) and replaced them with a new form of Extended Determinate Sentence (now known as an EDS). The main change concerned release, as we will see later. But the EDS is becoming common as judges will frequently consider a sex offender to pose a serious risk of serious harm, the current test of ‘dangerousness’. A recent and interesting example is the case of the Cambridge doctor who pleaded guilty to many sex offences committed against boys under his professional care in hospital (unnecessary genital examinations): see *Bradbury* [2015] EWCA Crim 1176. The trial judge imposed a total sentence of twenty-two years, stating that he was satisfied that this offered sufficient protection for the public such that he did not need to impose an extended sentence. He also imposed a lifelong SOPO.<sup>13</sup> But the Court of Appeal decided to ‘restructure’ the sentence so that the ‘custodial element’ would be sixteen years, and added to the total term an extension licence period of six years. There is much that can be said of this case,<sup>14</sup> but for our purposes, it serves as an example of the lengthy sentences imposed on sex offenders. Bradbury will not be considered for release until he has served over ten years.

12. The trial judges sentencing remarks are available at: <www.judiciary.gov.uk/judgments/dogar-and-others-sentencing-remarks/>. The judgement of the Court of Appeal is available free of charge on <www.bailii.org>. Most academics and law students rely on the commercial providers of law reports: mainly Westlaw and LexisNexis.

13. See later.

14. See N. Padfield, ‘Bradbury: A Tangle of Extended Sentences?’ *Current Sentencing Practice News* 2, at 5-8 (2015).

### 3.1.3 Determinate Sentences

All those sex offenders who the court decides do not require life or an extended sentence, but who cross the so-called 'custody threshold' will receive a determinate sentence, fixed in line with guidelines published by the Sentencing Council, in particular the *Definitive Guideline on Sexual Offences*,<sup>15</sup> and with reference to the guidance from the Court of Appeal. The most serious rapes involve a starting point of fifteen years custody, within a category range of thirteen to nineteen years. The least serious (itself a contentious area) involve a starting point of five years, in a category range of four to seven years' custody. The guidelines identify many aggravating and mitigating factors that, in seeking to control judicial discretion, have turned sentencing law into a particularly complex area. See, for a recent example, *AG's Reference Nos. 2 and 13 of 2015 of 2015 (McClaren and Whitelaw)* [2015] EWCA Crim 1223 where the Court of Appeal held that sentences of nine years' imprisonment were neither unduly lenient nor manifestly excessive for two offenders, both aged twenty-one, who had raped an intoxicated 18-year-old woman in an alleyway outside a nightclub (the main argument at trial had turned on whether she was capable of giving consent). The Court held that it had been appropriate not to impose a consecutive sentence for digital anal penetration by one of the offenders (this was a prosecution appeal). They were young men with no previous convictions: the judgement focused on where they should be placed on the guideline (in Category 2A) – there is no discussion of 'dangerousness' or SOPOs. Nine years was an appropriate sentence.

## 3.2 Release from Prison

As this article requires a debate of supervision in the community, we will move swiftly over the way sex offenders progress (or do not progress) through the prison system, although it is well worth noting the fact that now there are so many sex offenders in the system, many spend much of their time in specialist prisons and they are not simply segregated as 'vulnerable offenders' in separate wings in mainstream prisons. The prison system is under extraordinary pressure as the Government works hard to 'save' huge sums of money in the criminal justice system.<sup>16</sup> There has been little research

specifically on the perceptions of sex offenders in prison, although Iewins' work stands out.<sup>17</sup> It would be useful to know much more about the delays faced by sex offenders hoping to be transferred to prisons of lower levels of security and about the damage caused by the fact that many wait for years to take courses that have been deemed essential. But we focus here on the release and supervision of offenders in the community.<sup>18</sup>

### 3.2.1 Supervision in the Community for Those Still

*Serving a Sentence of Imprisonment, or for Those Serving Community-Based Punishments*

Those serving life (which includes IPP prisoners) are only released from prison following the direction of the cautious Parole Board.<sup>19</sup> They are considered for release once they have served their minimum term. They are unlikely to be released unless they have progressed through the prison system satisfactorily, completing relevant courses, and have spent time in an 'open' prison. They will also need the support of their Offender Manager (a probation officer) who will have prepared a release plan.

The rules on release of extended sentence prisoners have changed extraordinarily frequently, which makes it difficult for staff and prisoners to understand the rules and, of course, leads to feelings of injustice: over the past ten years, some extended sentence prisoners have been eligible to be released automatically at the halfway point in their sentence (which is the rule for those serving determinate sentences); some have been released at the discretion of the Parole Board, considered first when they had reached the halfway point. The current position is that most will not be considered for release until they have reached the two-thirds point. They are not to be released unless the Parole Board is satisfied that 'it is no longer necessary for the protection of the public' that they should be confined (s. 246A(6) of the Criminal Justice Act 2003, as amended). This reverse burden seems to imply that more EDS prisoners (such as Bradbury, discussed earlier) will stay in prison for the whole of the custodial part of the sentence.

All prisoners, whenever released, will be subject to licence conditions. One of the most worrying aspects of supervision in the community is the rate at which it fails, and offenders are recalled to prison. The recall rate

15. See 'Sexual Offences Definitive Guideline', available at: <[www.sentencingcouncil.org.uk/wp-content/uploads/Final\\_Sexual\\_Offences\\_Definitive\\_Guideline\\_content\\_web1.pdf](http://www.sentencingcouncil.org.uk/wp-content/uploads/Final_Sexual_Offences_Definitive_Guideline_content_web1.pdf)>.

16. See HM's Chief Inspector of Prisons *Annual Report 2014-15*, available at: <[www.justiceinspectorates.gov.uk/hmiprison/inspections/annual-report-2014-15/#.VcDNEqbbn0d](http://www.justiceinspectorates.gov.uk/hmiprison/inspections/annual-report-2014-15/#.VcDNEqbbn0d)>. It makes grim reading. 'Assessed outcomes in the prisons we reported on in 2014-15 fell sharply across all areas and, overall, the outcomes we reported on in 2014-15 were the worst for 10 years' (at page 10). The Report speaks of rising levels of violence: 'more prisoners were murdered, killed themselves, self-harmed and were victims of assaults than five years ago. There were more serious assaults and the number of assaults and serious assaults against staff also rose' (page 8). Particularly worrying is the 'dismal picture' of purposeful activity and of staff shortages: as the Inspector says 'It is hard to imagine anything less likely to rehabilitate prisoners than days spent mostly lying on their bunks in squalid cells watching daytime TV' (page 13).

17. See A. Iewins, 'Living Among Sex Offenders: Identity, Safety and Relationships at Whatton Prison' (2015), available at: <[https://d19ylpo4aovc7m.cloudfront.net/fileadmin/howard\\_league/user/pdf/Publications/Living\\_among\\_sex\\_offenders.pdf](https://d19ylpo4aovc7m.cloudfront.net/fileadmin/howard_league/user/pdf/Publications/Living_among_sex_offenders.pdf)>, which explores experiences related to safety, the management of identity, the development of hierarchies and the formation and maintenance of friendships within a prison that only holds sex offenders.

18. For European comparisons, see N. Padfield, D. van Zyl Smit & F. Dünkel (eds.), *Release from Prison: European Policy and Practice* (2010).

19. For annual statistics, see the Parole Board's annual reports, the most recent of which is available at: <[www.gov.uk/government/publications/the-parole-board-for-england-and-wales-annual-report-2014-to-2015](http://www.gov.uk/government/publications/the-parole-board-for-england-and-wales-annual-report-2014-to-2015)>; and N. Padfield (ed.), *Who to Release? Parole, Fairness and Criminal Justice* (2007); N. Padfield, 'Sanctions against Dangerous Offenders in England and Wales: Does More Mean Better?' in C. Villacampa (ed.), *Protección jurídico-penal de la libertad e indemnidad sexual de los menores* (2015), at 481-511.

has been rising for years, and the latest statistics state that the recall population has increased by 17% in the past twelve months.<sup>20</sup> It is not at all clear why this happened. Certainly, there are huge changes going on with the fragmentation of the National Probation Service and the recent creation of Community Rehabilitation Companies, which now carry out 70% of the work previously done by probation service staff.<sup>21</sup> And the Offender Rehabilitation Act (ORA) 2014 has expanded licence supervision so that anyone sentenced to more than a day in prison will receive at least twelve months supervision on release. But this came into effect only for those who were sentenced after 1 February 2015. Accordingly, on 30 June 2015, 157 prisoners were recorded as being recalled under ORA 2014, representing only 3% of the recall population. Offenders may be recalled not only because they are alleged to have re-offended, but also if there is any deterioration in behaviour that leads the National Offender Management Service (NOMS) to decide that there is an increased risk of the offender committing further offences. Figures on sex offenders recalled are difficult to identify: but on MAPPA figures (see next section), we learn that in 2013/2014, 850 Level 2 and Level 3 MAPPA eligible offenders (*i.e.* higher risk sex offenders) were returned to custody for breach of their licence, a decrease of 6% from the previous year. This continues the overall downward trend since 2007/2008 and is consistent with the reduction in the number of offenders managed at this level, not necessarily reflecting an overall reduction in numbers. But at the same time, it would appear that there has been a sharp increase in the sentencing of sex offenders in the community for breach of SOPOs (see the following). Supervisors and managers are likely to be particularly 'risk averse' when it comes to sex offenders, and the subject has not received adequate academic or other scrutiny. Research could usefully explore when and how sex offenders are dealt with under MAPPA, SOPO or on licence.<sup>22</sup> What the official licence statistics reveal is a priority concern that those who are recalled are returned swiftly to prison and are not 'lost' to the system:

Between April 1999 and March 2015, 190,714 of those released on licence were recalled to custody for breaching the conditions of their licence, e.g. failing to report to their probation officer. Of all those recalled over the period, 99.4% were returned by the end of June 2015. In the latest quarter there were 4,240

recalls, which included the recall of 112 offenders who were serving custodial sentences of less than twelve months. The ORA expanded licence supervision meaning that it is now possible to recall these offenders to custody.

Of all those released on licence and recalled to custody between April 1999 and March 2015, there were 1,135 who had not been returned to custody by the end of June 2015. This includes 4 people who had been recalled after a sentence of less than 12 months. The proportion of prisoners not returned to custody over this period is 0.6% and this is a relatively constant figure when compared to previous years. A further 18 offenders had not been returned to custody as of 30 June 2015 after recall between 1984 and April 1999, meaning the total number of offenders not returned to custody at the end of June 2015 was 1,153. These figures include some offenders believed to be dead or living abroad but who have not been confirmed as dead or deported.

Of the 1,153 not returned to custody by 30 June 2015, 147 had originally been serving a prison sentence for violence against the person offences and a further 40 for sexual offences.<sup>23</sup>

Thus, the focus of the official statistics is on the 'success' of recall. But more relevant may be studies of how difficult it can be for sex offenders to 'succeed' on licence.<sup>24</sup> The reality of living life on licence has been discussed in a few academic research projects. Clearly, many offenders struggle to live with their stigmatisation as sex offenders, and complying with the demands of a licence is a significant challenge.<sup>25</sup> As we shall now see, life on licence may be made even more challenging by the constraints also imposed by MAPPA (see next section).

### 3.2.2 Post-Sentence Supervision under MAPPA

MAPPA exist in each of the forty-two criminal justice areas in England and Wales. These are extraordinary bodies, legally speaking: simply 'arrangements' designed to help protect the public from serious harm by sexual and violent offenders. They require local criminal justice agencies and other bodies dealing with offenders to work together in partnership in dealing with these

20. Offender Management Statistics Bulletin, England and Wales Quarterly January to March 2015, Ministry of Justice, Statistical Bulletin, 30 July 2015, available at: <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/449528/offender-management-statistics-bulletin-jan-mar-2015.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/449528/offender-management-statistics-bulletin-jan-mar-2015.pdf)> (last visited 27 May 2016).

21. See N. Padfield, 'The Magnitude of the Offender Rehabilitation and "Through the Gate" Resettlement Revolution', *Criminal Law Review* 99 (2016).

22. See final section, and my study of recalled offenders, N. Padfield, 'Understanding Recall 2011', University of Cambridge, Faculty of Law Research Paper No. 2/2013. Available at SSRN: <<http://ssrn.com/abstract=2201039> or <http://dx.doi.org/10.2139/ssrn.2201039>>.

23. Ministry of Justice (2015), above n. 20, at 12.

24. N. Padfield, 'Recalling Conditionally Released Prisoners in England and Wales', 4 *European Journal of Probation* 34, at 34-45 (2012); Editorial to that special issue, available at: <[www.ejprob.ro/index.pl/recalling-conditionally-released-prisoners-in-england-and-wales](http://www.ejprob.ro/index.pl/recalling-conditionally-released-prisoners-in-england-and-wales)>.

25. See C. Appleton, *Life after Life Imprisonment* (2010); L. Digard, 'When Legitimacy Is Denied: Offender Perceptions of the Prison Recall System', *Probation Journal* 57, at 43-61 (2010), Padfield, above n. 22.



offenders. The 'responsible authorities' of the MAPPA include<sup>26</sup>

- The National Probation Service
- Her Majesty's Prison Service
- Police forces.<sup>27</sup>

MAPPA, which are coordinated by the Public Protection Unit of NOMS within the Ministry of Justice, were introduced by Criminal Justice and Court Services Act 2000 and strengthened by Criminal Justice Act 2003. They evolved from professional practice during the 1990s, which recognised that there should be more 'joined-up' work with dangerous offenders. The MAPPA process involves an assessment of risk posed by an offender, upon which a risk management plan is subsequently based. Offenders posing the highest risk are referred to a Multi-Agency Public Protection panel meeting, where the offender's risk and management plan is discussed with the participating agencies.<sup>28</sup> Although each area is required to publish an annual MAPPA Report, it is difficult to know how effective they are in practice. For example the most recent report from Cambridgeshire provides two case studies.<sup>29</sup> The first is that of a man serving a life sentence for committing a sexually motivated murder: 'Whilst he remains monitored, his motivation to lead a law abiding life offers the best protection the community can have'. The second was the story of a man released at the end of his sentence, having been recalled to prison when he was on a licence:

He continues to pose a high risk of harm to the public, particularly children and the vulnerable. He has to abide by a Court imposed Order that prohibits him from having contact with potential victims. To help him avoid offending after many years in prisons and hospital, Mr F was given substantial support by the NPS, Housing and other agencies. At the same time, the police worked with probation to monitor his progress. Mr F broke the Order, was arrested and is now serving a further substantial prison sentence.

These are not, I suspect, untypical stories of 'success' and 'failure'. But what we do not have is any real evi-

dence that MAPPA work 'properly'. There has been some research.<sup>30</sup> Peck's study showed a reduction in reconviction rates among sexual and violent offenders released between 2001 and 2004 compared to 1998-2000, which coincided with the introduction of MAPPA in 2001. But of course this cannot evaluate the specific impact of MAPPA on reconvictions. In any case, reconviction is a blunt measure of re-offending. And, more importantly from our perspective, is MAPPA supervision 'proportionate'?

A huge number of offenders are monitored under MAPPA. On 31 March 2014, there were 65,083 MAPPA-eligible offenders, of whom 71% were registered sex offenders.<sup>31</sup> They are divided into one of three levels:

- Level 1 – Ordinary Agency Management (information will usually be exchanged between relevant agencies, especially between police and probation, but formal multi-agency meetings will not be held to discuss the offender's case).
- Level 2 – Active Multi-Agency Management (the risk management plans for these offenders require the active involvement of several agencies via regular multi-agency public protection meetings).
- Level 3 – Active Multi-Agency Management (as with offenders managed at Level 2, the active involvement of several agencies is required; however, the risk presented by offenders managed at Level 3 means that the involvement of senior staff from those agencies is additionally required to authorise the use of additional resources, such as for specialised accommodation).

The majority of sex offenders are managed at Level 1. In 2013/2014, there were 2,238 sex offenders being managed at Level 2, and only 244 being managed at Level 3. All sex offenders are nowadays on the sex offender register, *i.e.* they are required to notify the police of certain details, with further notification required if any of those details change. A breach of this notification requirement is itself a criminal offence and can lead to a caution or conviction. The number of category 1 offenders who were cautioned or convicted for breaches of their notification requirement was 2,057 in 2013/2014, or 4.5 offenders cautioned or convicted per 100 offenders. This is a 31% rise from 2012/2013 when there were 1,576 offenders who were cautioned or convicted, and is the highest level for up to eight years.

The notification requirements are seriously enforced: the number of sex offenders who were cautioned or convicted for breaches of their notification requirement was 2,057 in 2013/2014, or 4.5 offenders cautioned or convicted per 100 offenders. This was a surprising 31% rise from 2012/2013 (and as we shall see later, the number of people sent to prison for breaching SOPOs is also rising sharply). Thus, MAPPA and the notification requirements would seem to be used by managers to control sex offenders in the community. We turn now to

26. The published guidance is dated: the latest version is called 2012, version 4, updated from the 2009 version. See <[www.justice.gov.uk/downloads/offenders/mappa/mappa-guidance-2012-part1.pdf](http://www.justice.gov.uk/downloads/offenders/mappa/mappa-guidance-2012-part1.pdf)>. This does not take into account recent changes in the law and practice of supervision since the ORA 2014. Some insights can be gained by reading the annual reports of different MAPPA in the country: see <[www.gov.uk/government/collections/multi-agency-public-protection-arrangements-mappa-annual-reports](http://www.gov.uk/government/collections/multi-agency-public-protection-arrangements-mappa-annual-reports)>.

27. A number of other agencies are under a duty to co-operate with the 'Responsible Authority'. These include Children's Services, Adult Social Services, Health Trusts and Authorities, Youth Offending Teams, UK Border Agency, local housing authorities and certain registered social landlords, Jobcentre Plus and electronic monitoring providers.

28. A useful summary is found in M. Peck, *Patterns of Reconviction among Offenders Eligible for Multi-Agency Public Protection Arrangements (MAPPA)*, Ministry of Justice Research Series 6/11 (2011).

29. See 'Cambridgeshire-MAPPA Annual Report 2013-14', available at: <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/368913/Cambridgeshire\\_-\\_MAPPA\\_Annual\\_Report\\_2013-14.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/368913/Cambridgeshire_-_MAPPA_Annual_Report_2013-14.pdf)>.

30. J. Wood and H. Kemshall, *The Operation and experience of MAPPA* (Home Office Online report 12/07, 2007); Peck, above n. 28.

31. Ministry of Justice (2014), above n. 6.

a closely related regime: the use of civil orders, breaches of which are criminal offences.

### 3.2.3 Civil Preventative Orders

Part II of the Sexual Offences Act 2003 introduced SOPOs (which were not restricted only to sex offenders).<sup>32</sup> They could be imposed by a sentencing judge as a consequence of conviction, or the police could apply separately to a court for a SOPO in relation to anyone convicted of over 200 offences listed in Schedules 3 and 4 of the Act. Before making a SOPO, the court had to be satisfied that it was necessary to protect the public or any particular member of the public from serious sexual harm. This was defined as protecting the public in the UK or any particular members of the public from serious physical or psychological harm, caused by the defendant committing any of the offences listed in Schedule 3 of the Act – section 106(3) Sexual Offences Act 2003. Breach of the requirements attached to a SOPO is a criminal offence. As we shall see, in 2015 SOPOs were replaced by similar, but broader, SHPOs (Sexual Harm Prevention Orders). But let us look first at some data on SOPOs.

In 2013/2014, the courts imposed 3,243 SOPOs, compared to 3,064 in 2012/2013. This was an increase of 6%, which continued the year on year rise, reflecting the increased use of SOPOs by police. There were 178 Level 2 and Level 3 MAPPA offenders sent to custody for breach of their SOPO. This was a sharp increase of 34% from 133 in 2012/2013. In 2013/2014, there were 7.2% of Level 2 and Level 3 offenders sent to custody for breach of their SOPO, which is a significant increase from 2012/2013 when the figure was 4.8%.<sup>33</sup>

There has been a significant amount of litigation surrounding SOPOs: largely in connection with appeals against sentence, and focused on questions of proportionality and the reasonableness and clarity of individual conditions. Useful guidance was given in *Smith* [2015] EWCA Crim 1772, where the Court of Appeal considered four separate cases and gave guidance for future cases. Thus, they say that those sentenced to an indeterminate sentence do not need a SOPO, unless there was some very unusual feature that meant that such an order could add something useful and did not run the risk of undesirably tying the hands of the offender managers later (since the offender will be on indeterminate licence).

By contrast, a SOPO may plainly be necessary if the sentence is a determinate term or an extended term. In each of those cases, whilst conditions may be attached to the licence, that licence will have a defined and limited life. The SOPO by contrast can extend beyond it and this may be necessary to protect the public from further offences and serious sexual harm as a result.

The same is true, only more clearly, where the sentence is a suspended sentence. The SOPO serves a different purpose from the suspension of the sentence, and its duration is certain to be longer, since it cannot be made unless prohibitions for at least five years are called for: s 107(1)(b) (paras. 14-15).

In terms of specific conditions, the Court of Appeal said that

A blanket prohibition on computer use or internet access is impermissible. It is disproportionate because it restricts the defendant in the use of what is nowadays an essential part of everyday living for a large proportion of the public, as well as a requirement of much employment. Before the creation of the internet, if a defendant kept books of pictures of child pornography it would not have occurred to anyone to ban him from possession of all printed material. The internet is a modern equivalent (para. 20).

Thus, it is now recognised that a total, blanket, ban on computer use is disproportionate. Another common term prevents offenders from socialising or working with children. But such a term must be justified as required beyond the restrictions anyhow placed upon sex offenders working with children. The Disclosure and Barring Service (DBS) carries out criminal record checks for specific positions, professions, employment, offices, works and licences included in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 and those prescribed in the Police Act 1997 (Criminal Records) regulations.<sup>34</sup> Sex offenders are thus in any case banned from engaging in any form of teaching, training or instruction of children, and any form of care, advice, guidance or therapy, and from acting as a driver for children's activities. The Court of Appeal suggested that judges should ordinarily require the Crown to justify an application for a SOPO term relating to activity with children by demonstrating the risk that is not already catered for by the wider DBS law.

A recent example is *Gass* [2015] EWCA Crim 579. A 28-year-old man, convicted of offences of sexual activity with a 14-year-old female family friend and sentenced to seven years' imprisonment, challenged an indeterminate order that included the following terms, prohibiting him from:

- a. 'seeking or undertaking employment including voluntary work, whether for payment or otherwise which is likely at some time to allow him unsupervised access to a child under the age of 16 years (where that contact is more than transient and a child or a young person's parents or guardian is absent)';
- b. 'seeking the company of or being inadvertently in the sole company of any person under the age of 16 years

32. S. Shute, 'The New Civil Preventative Orders', *Criminal Law Review* 417 (2004).

33. Ministry of Justice (2014), above n. 6, at 15.

34. The DBS replaced the Independent Safeguarding Authority that had been created by the Safeguarding Vulnerable Groups Act 2006 – see the Protection of Freedoms Act 2012. Those who wish to work with children are required to have a DBS check: see <[www.gov.uk/government/publications/dbs-check-eligible-positions-guidance](http://www.gov.uk/government/publications/dbs-check-eligible-positions-guidance)>.

in the absence of that child or young person's parents or guardian'. The Court of Appeal removed (a) and reformulated (b) to read:

having unsupervised contact of any kind with any female under 16 other than (i) such as is inadvertent and not reasonably avoidable in the course of lawful daily life or (ii) with consent of the child's parents or guardian who has knowledge of his conviction and the terms of this order. (This prohibition was not to apply to one named child).

What is a suitable punishment for a man who repeatedly breaches a SOPO? In *Cooper* [2015] EWCA Crim 684, the Court of Appeal had to consider the case of a man who had repeatedly broken the terms of his SOPO, which included prohibitions on him having 'any unsupervised contact of any kind with any male or female under the age of 16 other than such as is inadvertent and not reasonably avoidable' and 'initiating contact or seeking to communicate with any female who is alone in a public place other than such as is inadvertent and not reasonably avoidable'. He had initiated conversations with a boy and a lone woman in a public place – for which he received a four-year sentence. The Court of Appeal reduced this to three years, but clearly agreed that a significant sentence was required on a man who was considered to be posing a very high risk of re-offending and a very high risk of serious harm to members of the public. But a three-year sentence for breach of a 'civil' order puts the lie to the distinction between civil and criminal sanctions.

The Sexual Offences Act 2003 also introduced foreign travel orders and risk of sexual harm orders.<sup>35</sup> These have been less used than SOPOs and can be glossed over here because all these were replaced from 8 March 2015 by a new pair of preventative orders: SHPOs and Sexual Risk Orders. Why were these new orders required? The changes have arisen largely out of a review of the previous orders commissioned by the police (the Association of Chief Police Officers (ACPO) Child Protection and Abuse Investigation Working Group), led by Hugh Davies QC, which was published in May 2013.<sup>36</sup> The focus of that review was the sexual exploitation of children internationally. They resisted the term 'serious', borrowed from existing legislation, 'since it pre-supposes that there is some category of sexual harm that may be caused to a child that is not intrinsically serious or that is not worthy of prevention' (p. 3). But the changes of the Anti-Social Behaviour, Crime and Policing Act 2014 go further than the ACPO Review suggested and are not limited to offences against children.

SHPOs can be imposed on someone convicted or cautioned for a relevant offence and who poses a risk of sexual harm to the public in the UK or children or vulnera-

ble adults abroad. It may impose any restriction that the court deems necessary for the purpose of protecting the public from sexual harm, and makes the offenders subject to notification requirements for the duration of the order. The SHPO is available at the time of sentencing for a relevant offence, or on free-standing application to the magistrates' court by the police or National Crime Agency after the time of the conviction or caution.

A Serious Risk Order can be made by a court in respect of someone who has done an act of a sexual nature and who, as a result, poses a risk of harm to the public in UK or children or vulnerable adults abroad. They do not need to have been convicted of an offence. A court may impose any restriction that it deems necessary for the purposes of protecting the public from harm (this includes harm from the defendant outside the UK, where those to be protected are children and vulnerable adults), and requires the individual to notify the police of his/her name and address, including where this information changes. As with the SHPO, a Serious Risk Order is available on a free-standing application to a magistrates' court by the police or the National Crime Agency.

Finally, we should note that Notification Orders can now be made by a court, on the application by a chief officer of police, in relation to someone who has been convicted, cautioned or had a relevant finding made against them for specified sexual offences in a country outside the UK. In effect, this broadly makes those convicted abroad subject to the notification requirements of Part II of the 2003 Act as if they had been convicted of or cautioned for a relevant offence in the UK.

An emerging issue is the question of costs. In an interesting recent example (*Chief Constable of Warwickshire v. MT* [2015] EWHC 2303 (Admin)), the chief constable of Warwickshire won his appeal against a court order that he should pay a sex offender £3,189.60 after he had withdrawn his application for a SOPO. Following the offender's release from a thirteen-year sentence, the chief constable became concerned that the offender was acting in breach of his licence conditions and applied for a SOPO. The chief constable withdrew his application when he learnt that the offender was moving away from his administrative area. The original court had ordered the chief constable to pay the offender's costs associated with this application but on appeal it was held that because the chief constable had not acted dishonestly or unreasonably in bringing the application, the appropriate order was no order as to costs. Doubtless questions of cost are vitally important in relation to much decision making in relation to MAPPA/SOPO by the authorities. The costs to the offender may be less obvious.

## 4 Evaluation

How do we evaluate English law? Clearly, the 'mainstream' sentencing regime is punitive: sex offenders face lengthy custodial sentences, and release is always sur-

35. Shute, above n. 32.

36. See H. Davies QC, 'Civil Prevention Orders Sexual Offences Act 2003', available at: <[www.ecpat.org.uk/sites/default/files/the\\_davies\\_review.pdf](http://www.ecpat.org.uk/sites/default/files/the_davies_review.pdf)> (last visited 27 May 2016).



rounded by complex licence conditions. These licence conditions may run in parallel with, or be followed by, other burdensome requirements, imposed under MAP-PA or the civil orders. A key question is proportionality – are the measures imposed on offenders (ex-offenders) too burdensome, too onerous and too intrusive? What is ‘intrusive’ or less ‘intrusive’, of course, depends on the perception of the person subject to the relevant measure. And the level of intrusion will depend on the precise conditions attached – whether this is a licence condition or a civil order.

It is clear that, in theory, in English law civil preventative orders are not formally part of the ‘sentence’ of a court imposed as a punishment for a crime. These are independent measures, civil in nature (even though breach of one is a criminal offence). There has been little discussion as to the ways in which the ‘main’ sentence might be modified because of the availability of other sanctions. It seems to me that the distinction between ‘civil’ and ‘criminal’ makes little sense. Of course, the fact that a measure is labelled as civil lowers the burden of proof, so it makes it easier for the police to obtain. But the outcome will undoubtedly feel punitive, and criminal in nature, to the offender.

There are also other routes to ‘punishment’, certainly to non-consensual detention and to other restrictions on liberty, under the Mental Health Acts 1983 (as amended). People can seek voluntary help with psychiatric services, and they may also be detained involuntarily for treatment. But this would be rare in the case of non-convicted sexual abusers. Psychiatric services are hard-pressed, and often are reluctant to intervene when their intervention is not obviously therapeutic. They tend to be only marginally involved in working with sex offenders, and mental health issues relating to individual sex offenders are often overlooked.<sup>37</sup> It may well be that there are those who have expressed serious interest in sex abuse have been detained under the Mental Health Act, but no data on this are available.

Perhaps the most important and currently unanswered questions surround the interplay between the different measures:

1. Should a judge when sentencing consider the availability of SOPOs when deciding whether to give an indeterminate, an extended or a determinate sentence to an offender who stands at the threshold of being ‘dangerous’?
2. Should the licence conditions take into account a possible SOPO? Should offenders released from prison face one set of conditions and not two?
3. Who should set the conditions, and who should monitor them? In England at the moment, as we have seen, as well as MAPPA, the Parole Board and the prison authorities have a significant role in identifying relevant licence conditions.

37. See e.g. J. Borrill, *The Multi-Agency Management of Sex Offenders in the Community – The Mental Health Foundation* (2000).

Judges have been persuaded that it is unhelpful for them to suggest licence conditions at the point of sentence. These are imposed in the name of the prison governor at the time of release. It would be timely to review the supervision of sex offenders in the community in order to see whether the system might be better ‘joined up’. Whether the advantages of judicial involvement in sentence supervision and implementation, as seen in other jurisdictions, would transfer to the English context should be explored.<sup>38</sup>

#### 4.1 A Human Rights Perspective

The European Convention on Human Rights (ECHR) was not incorporated into domestic law until the Human Rights Act 1998. This statute, recognising the supremacy of Parliament, does not give the judges the power to strike down legislation, but merely to issue a declaration where any statutory provision is incompatible with the European Convention. The Government will usually then act on the ruling and change the law – but not always. But the common law continues to flow strongly in parallel with the European jurisprudence. Lord Cooke put the point well in the prisoners’ rights case of *R (Daly) v. Home Secretary* [2001] 2 AC 532:

The truth is, I think, that some rights are inherent and fundamental to democratic civilised society. Conventions, constitutions, bills of rights and the like respond by recognising rather than creating them.... The point that I am emphasising is that the common law goes so deep (at para. 30).

A recent example is *Abedin v. Secretary of State for Justice* [2015] EWHC 782 (Admin), which involved a challenge by a prisoner who had been recalled to prison while on licence. The frustration for Abedin was that, once recalled to prison when on licence, the law had been changed and as a recalled offender his fixed release date became the end of his full term of imprisonment, rather than at the three-quarter stage. He challenged this under Articles 5 and 7 of the ECHR. Laws LJ, giving the judgement of the High Court, carefully reviewed a host of European and domestic precedents. The Court held that there was no violation of Articles 5 and 7 of the ECHR despite the decision of the *European Court of Human Rights in Del Rio Prada v. Spain* [2014] 58 EHRR 37. The relevant European and English authorities showed that there had been no erosion in principle of the well-established distinction between the penalty imposed, and the means of its enforcement or execution: Abedin lost on both common law and ECHR principles. Much of the litigation concerns the period that the offender serves in prison. It is scandalous that many sex offenders ‘queue up’ to do the courses required of them before the Parole Board will direct their release. There have also been lengthy delays in moving them to open

38. M. Herzog-Evans and N. Padfield, ‘The JAP: Lessons for England and Wales?’ *Criminal Justice Alliance* (2015), available at: <[http://criminaljusticealliance.org/wp-content/uploads/2015/04/cja\\_policy-briefing3\\_200315.pdf](http://criminaljusticealliance.org/wp-content/uploads/2015/04/cja_policy-briefing3_200315.pdf)> (last visited 27 May 2016).



conditions, and many delayed Parole Board hearings. The prison authorities were unprepared for the surge of IPP cases after 2005, and hundreds of IPP prisoners have got 'stuck' in the system. In *Secretary of State for Justice v. Walker and James* [2008] EWCA Civ 30, the Lord Chief Justice did not mince his words:

This appeal has demonstrated an unhappy state of affairs. There has been a systemic failure on the part of the Secretary of State to put in place the resources necessary to implement the scheme of rehabilitation necessary to enable the relevant provisions of the 2003 Act to function as intended (para. 70).

The case went to the House of Lords in *Wells v. Parole Board* [2009] UKHL 22, and then to the ECtHR in *James, Lee and Wells v. UK* [2013] 56 EHRR 12, which held that there was a breach of Article 5(1).

Recently, in *R (Kaiyam) v. Secretary of State for Justice* [2014] UKSC 66, the Supreme Court declined to follow the decision of ECtHR in *James*: although it was implicit in the scheme of ECHR Article 5 that the state had a duty to provide a reasonable opportunity for a prisoner subject to an indeterminate sentence to rehabilitate himself and to demonstrate that he no longer presented a danger to the public, that was an ancillary duty that could not be brought within the express language of either Article 5(1)(a) or Article 5(4), and did not therefore affect the lawfulness of detention, just the possibility of damages. On the facts follow:

- The delay for H in being transferred to open conditions had deprived him, contrary to Article 5, of a reasonable opportunity to demonstrate that he was no longer a danger to the public, an opportunity that the Secretary of State himself had said that he should have. There had been though no breach of Article 14 in discriminating between pre- and post-tariff prisoners.
- Similarly, for M, the delay in being able to commence an extended SOTP until nearly three years after the expiry of his 'tariff' period (and after the Secretary of State had provided for a timetable that was not fulfilled) had deprived him of the reasonable opportunity to demonstrate that he was no longer a danger, in breach of Article 5.
- The delay for K, however, in being able to commence various rehabilitative treatment programmes did not breach his Article 5 rights. He had been provided with a reasonable opportunity to demonstrate that he was no longer a risk to the public through courses on enhanced thinking, drug awareness and victim awareness, but his responses to those programmes had been poor.
- In *R*, Lord Hughes (for the majority) held that the delay in being able to commence an extended SOTP until nearly nine months after the expiry of his 'tariff' period did not breach his Article 5 rights. The question was not whether he had been deprived of access to a particular course, but whether he had been given a reasonable opportunity to demonstrate that he was

no longer a danger to the public. Lord Mance (dissenting) considered that Article 5 required that R be given a reasonable degree of access to the extended SOTP, which he had not been given in the circumstances of the present case.

What does this case tell us? First, some sorry examples of the delays inherent in the system. Secondly, it illustrates the parallel lives of the common law and the ECHR. There is at the moment in England a growing (?) political resentment of the European Union, and this overflows into a wariness of the European Court of Human Rights and its 'liberal Judges'. It seems clear that as we enter a political period when it is possible that the Government may talk seriously of withdrawing from a number of European institutions, the judiciary will make it increasingly clear that prisoners' rights are as protected by a dynamic common law as well as by the ECHR. Both the common law and the ECHR are living and evolving. In any case, the ECHR itself provides merely a low threshold of minimum rights, common law judges, quite as much as European court judges, can be expected to develop equal if not stronger protections. What is clear is that the domestic lower courts always assess SOPOs against principles of certainty and proportionality. The higher courts spend much legal energy on applying (and distinguishing) both ECtHR and domestic jurisprudence.

## 6 Conclusion

How 'dangerous' are sex offenders? The number of MAPPA eligible offenders charged with Serious Further Offences (SFO) in 2013–2014 was 174. This was a 14% rise from 2012/2013 when there were 149 offenders charged with an SFO. But, of the 174 offenders charged with an SFO in 2013/2014, 143 were being managed at Level 1, 28 at Level 2, and 3 at Level 3.<sup>39</sup> The fact that only three of these were 'Level 3' offenders reminds us that predicting rare events remains, as ever, difficult.<sup>40</sup> We have noted the huge numbers of sex offenders in the community, many of whom are of course ex-offenders.

There are evident tensions between security and justice, and between public protection and rehabilitation. Despite attempts in the past decade to 'join up' the prison and community parts of sentences, there continues to be little continuity in 'management'. Once sex offenders

39. MAPPA data in this article come from the Ministry of Justice, *Multi-Agency Public Protection Arrangements Annual Report 2013/14* (2014), available at: <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/369414/mapa-annual-report-2013-14.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/369414/mapa-annual-report-2013-14.pdf)> (last visited 27 May 2016).

40. J. Craissati and O. Sindall, 'Serious Further Offences: An Exploration of Risk and Typologies', 56 *Probation Journal*, 9–27 (2009); N. Padfield, *The Sentencing, Management and Treatment of 'Dangerous' Offenders* (2010), available at: <[www.coe.int/t/dghl/standardsetting/cdpc/PC-GR-DD/PC-CP\(2010\)10rev5\\_E\\_vs260111\\_-THESENTENCINGMANAGEMENTANDTREATMENTOFDANGEROUSOFFENDERS.pdf](http://www.coe.int/t/dghl/standardsetting/cdpc/PC-GR-DD/PC-CP(2010)10rev5_E_vs260111_-THESENTENCINGMANAGEMENTANDTREATMENTOFDANGEROUSOFFENDERS.pdf)>.

are released, the authorities appear to monitor sex offenders closely, under both licence conditions and MAPPA, often indefinitely. It is already extraordinarily difficult for sex offenders to reintegrate, and the pressures of supervision and monitoring can be counterproductive. As Craissati writes:

...really thoughtful risk management does not always consist of rights and wrongs, but of dilemmas ... there is a fine line between control and persecution, one that is difficult to detect at times, and that social exclusion – in the current climate – seems to be an unavoidable consequence of rigorous risk management.... The possibility that stringent risk management approaches embodied within the MAPPA recreates – for some offenders – the disturbing experiences of their early lives seems absolutely clear. That it may paradoxically result in triggering greater levels of offending is an uncomfortable idea, as is the suggestion that in order to reduce risk, sometimes professionals and agencies may need to take risks.<sup>41</sup>

More intensive monitoring can have negative as well as positive results. Digard concluded that

disregard for procedural fairness may decrease offender's levels of mental well-being, engagement in their management, motivation to forge new lives, and respect for authorities and the civic values they represent. It may inhibit the maintenance of an effective probation/client relationship and increase resistance.<sup>42</sup>

Yet the 'control' exercised over sex offenders appears to be getting ever-tighter: for example by the lowering of the threshold for the new SHPO (as we have seen, where it used to be that a court had to be satisfied that an order was necessary to protect the public from 'serious' sexual harm, now it is simply that the court is satisfied that the order is necessary to protect from sexual harm).

Much of what appears to go under MAPPA is 'characterised by the use of restriction, surveillance, monitoring and control, compulsory treatment and the prioritisation of victim/community rights over those of offenders'.<sup>43</sup> It seems unlikely that the 'fear' and public fascination with the sorts of sexual offending outlined in the Introduction will disappear. Lengthy sentences will continue to be the norm. It is vital that the courts remain vigilant, whether it is under the umbrella of the

common law or the ECHR, to safeguard the rights of offenders.

It is extraordinary that the subject has not had more scrutiny from academic criminologists and lawyers: the extent of post-custodial and post-sentence supervision has not caught the attention of academics as it should have done. Academic criminologists<sup>44</sup> and lawyers have failed to engage policy makers, particularly in underscoring the difficulties faced by sex offenders in their attempts to leave their criminal pasts behind them, especially in the current climate, and in questioning the weight and burdens of disproportionate monitoring. Ironically, it may be the cost of controls and supervision in the community that effect more changes in the future.<sup>45</sup> Politicians may start to worry about the costs of MAPPA, ViSOR and the widespread use of civil protective orders and to question their effectiveness. Then it may not be a culture of 'human rights' that protects sex offenders from disproportionate restriction and surveillance, but simply a financial calculation.

41. J. Craissati, 'The Paradoxical Effects of Stringent Risk Management: Community Failure and Sex Offenders' in N. Padfield (ed.), *Who to Release? Parole, Fairness and Criminal Justice* (2007), at 227; see also N. Padfield, 'Discretion and Decision-Making in Public Protection', in M. Nash and A. Williams (eds.), *The Handbook of Public Protection* (2010).

42. See Ministry of Justice (2015), above n. 20, at 60.

43. H. Kemshall, 'MAPPA, Parole and the Management of High-Risk Offenders in the Community', in N. Padfield (ed.), *Who to Release? Parole, Fairness and Criminal Justice* (2007), at 206; see also H. Kemshall, 'Risk, Rights and Justice: Understanding and Responding to Youth Risk', 8 *Youth Justice* 21-37 (2008).

44. An honourable exception is S. Maruna and T. LeBel, 'Welcome Home? Examining the "Re-Entry Court" Concept from a Strengths-Based Perspective', 4 *Western Criminology Review* 91 (2003).

45. Between 2010-2011 and 2014-2015, the NOMS saved almost £900 million, a reduction of nearly a quarter against its 2010-2011 baseline. It has a savings target of a further £91 million for 2015-2016: see National Offender Management Service, 'Annual Report and Accounts 2014/15' (2015).

# Legal Constraints on the Indeterminate Control of ‘Dangerous’ Sex Offenders in the Community: The French Perspective

Martine Herzog-Evans\*

## Abstract

France literally ‘discovered’ sexual abuse following neighbour Belgium’s Dutroux case in the late 1990s. Since then, sex offenders have been the focus of politicians, media and law-makers’ attention. Further law reforms have aimed at imposing mandatory supervision and treatment, and in rare cases, preventive detention. The legal framework for mandatory supervision and detention is rather complex, ranging from a mixed sentence (custodial and mandatory supervision and treatment upon release or as a stand-alone sentence) to so-called ‘safety measures’, which supposedly do not aim at punishing an offence, but at protecting society. The difference between the concepts of sentences and safety measures is nevertheless rather blurry. In practice, however, courts have used safety measures quite sparingly and have preferred mandatory supervision as attached to a sentence, notably because it is compatible with cardinal legal principles. Procedural constraints have also contributed to this limited use. Moreover, the type of supervision and treatment that can thus be imposed is virtually identical to that of ordinary probation. It is, however, noteworthy that a higher number of offenders with mental health issues who are deemed ‘dangerous’ are placed in special psychiatric units, something that has not drawn much attention on the part of human rights lawyers.

**Keywords:** Preventive detention, mandatory supervision, sex offenders, retrospective penal laws, legality principle

## 1 Introduction

### 1.1 A Late Onset

It was essentially with the *Dutroux* case in neighbouring Belgium that France suddenly discovered the issue of sex offences against children, which it had previously ignored – just as it only criminalised rape in 1980.<sup>1</sup> The press thus played an important role in drawing attention

to a type of offence that its patriarchal culture had preferred to ignore. France, however, does not have a widely read populist press, in contrast with, for instance, England and Wales. Therefore, in addition to describing events that have occurred or court hearings that deal with high-profile sex offenders, it also tends to raise deeper questions, such as why sex offenders tend to commit new crimes and whether treatment works – although it tends to ignore science in doing so. Nonetheless, as in many other jurisdictions, when a sex offender who has been released on parole (*libération conditionnelle*) reoffends quite dramatically, the media raises questions as to why he was released in the first place and tends to cast blame on a system that allows such a thing to happen and, in some cases, onto those who made the decision or those who assessed him/her as being low risk. For instance, in a recent case in which the offender, a psychopath with twenty prior convictions and numerous violations of previous community sentences and measures, sexually abused and battered two young women, one of whom nearly died, the press pointed to the fact that he was on ‘semi-freedom’ (*semi-liberté*), a measure whereby the offender has to spend nights in prison, but can circulate in the community during the day.<sup>2</sup>

### 1.2 Sex Offending and Politics

Inevitably, then, the press – and, even more so, the widely watched 8 O’clock evening news – is an essential piece of the equation when it comes to understanding French sex offences law. For indeed, virtually every single piece of legislation that has been enacted over the past two decades has reacted to a ‘*fait divers*’ (high-profile crime), and this has been true whether the extant government was punitive (‘the right’) or more lenient (‘the left’). In 1994, a ‘true life’ (*perpétuité réelle*) sentence was created following the death of a child by a paedophile; in 1998, the ‘socio-judicial supervision’ (*sui-vi socio-judiciaire* – SSJ) Act enacted by the socialist government directly followed the Dutroux case. By the time Nicolas Sarkozy became the Minister of the Interior (2002–2007) and then the President (2007–2012), the media’s attention had fully switched to sex offenders, and in particular, recidivists. During a ten-year legislative frenzy, Nicolas Sarkozy enacted no less than twelve

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1. Prior to 1980, rape was a felony.

2. *Le Parisien*, 11 août 2015.

criminal law Acts, several of which focused, *inter alia*, on sex offenders (2005, 2007, 2008, 2010, 2012 Acts<sup>3</sup>). Each time, he reacted to yet another high-profile case. For instance, the 2012 Act was passed following the *Meilhon* case,<sup>4</sup> in which a repeat offender who had sexually assaulted his co-inmate – information that was not communicated by the prison-based probation service to its community-based fellow agency – abducted a young girl after his release, whom he raped and assassinated. The media's attention focused on the licence he was given following his release: no supervision whatsoever had been put in place because of the local probation services' extreme workload (200 cases per probation officer).

Every single point of Mr Sarkozy's laws was fiercely criticised by the left opposition, in particular, those imposing various forms of mandatory supervision or detention (*mesures de sûreté*: 'safety measures') on sex offenders upon their release. Yet, the current socialist government's former Minister of Justice, Ms Taubira, did not abrogate a single point of them, and quite the contrary, added one more 'safety measure' to the legal system, focusing on offenders who had been declared partially irresponsible by reason of insanity, some of whom, though not all, were sex offenders. Currently, the media's and politicians' attention are no longer on sex offenders, and high-profile cases do not draw as much attention as they did, as the main focus is now on terrorists – as it was in the mid-1990s during the series of attacks on France.

Sex offenders – along with recidivists, with whom they were often confused – were thus seen as national public enemies from 1998 to the major Paris *Charlie Hebdo* attack of January 2015. The legal heritage of those years, as well as its rationale, has been left untouched.

What is clear then is that France mostly deals with such issues in a purely political and 'communicative' (to the media and the public) fashion; evidence and science play little part in such debates nor in the legislations that are enacted.

### 1.3 A Focus on Treatment

The 1998 Act fairly balanced punitive and treatment/rehabilitative goals.<sup>5</sup> Although the Dutroux case did precipitate action, mandatory supervision and treatment for sex offenders had been 'in the air' since the aforementioned 1994 reform, and they had been advocated

by various commissions<sup>6</sup> and specialists.<sup>7</sup> In a rare case of bipartisan agreement, the 1998 Act was submitted to Parliament by the right-wing Minister of Justice Michel Toubon, and it was his socialist successor, Elisabeth Badinter, who obtained its enactment in 1998, after new elections had interrupted her colleague's initial attempt. A similar lack of dispute marked the creation of the new safety measure by Ms Taubira in 2014. In both cases, this was because both legislations mostly consisted in imposing treatment, something over which there was strong political consensus.

Conversely, the entire Sarkozy era was plagued with argumentative debates and disputes, probably because the conservative politician's stance was perceived as being excessively punitive<sup>8</sup> – even though the treatment component was still at the forefront,<sup>9</sup> as many of the influencing commissions of the time reveal.<sup>10</sup> It did not help because such reforms took place against the backdrop of other very punitive penal reforms.<sup>11</sup> Many critics have also complained about his frantic legislative production, which vastly transformed 'sentence implementation' law (*droit de l'exécution des peines*) to the point that this legal field has become one of the most uselessly complex of all. Each law consisted in refined bifurcations and possibilities aimed at restricting parole and coercing sex offenders into treatment whilst they were in prison and after their release (for a simplified overview, see Table 1 on pages 72–73).

More recently, criticism has furthermore focused on the lack of human and financial resources in both the justice and health sectors, and on the lack of evidence-based support for the assessment and treatment of sex offend-

3. Loi no. 2005-1549, 12 December 2005; Loi no. 2007-1198, 10 August 2007; Loi no. 2008-174 25 February 2008; Loi no. 2010-242 10 March 2010; Loi no. 2012-409 27 March 2012.

4. Inspection des services pénitentiaires, *Rapport relatif aux conditions de prise en charge de M. Tony Meilhon par le SPIP de Loire-Atlantique*, 10 février (2011). Inspection judiciaire, Inspection de fonctionnement du service de l'application des peines du tribunal de grande instance de Nantes, Février, No. 13/2011 (2011).

5. J. Castaignède, 'Le suivi socio-judiciaire applicable aux délinquants sexuels ou la dialectique sanction-traitement', *Recueil Dalloz* 23 (1999); P. Salvage, 'Les soins obligatoires en matière pénale', *JCP ed. G.*, I, 4062 (1997); J. Castaignède, 'La prise en charge des abuseurs sexuels par le droit pénal', in R. Cario and J.-C. Heraut (eds.), *Les abuseurs sexuels: quel(s) traitement(s)?* (1998) 19.

6. T. Lemperière, *Rapport de la commission d'étude sur l'évaluation et l'expertise psychiatrique des condamnés* (1997); C. Balier, C. Parayre & C. Parpillon, 'Traitements des auteurs de délits et crimes sexuels. Conclusions et recommandations du groupe de travail', *Forensic* 13 (1996).

7. D. Sagury, 'Des soins pour les délinquants sexuels', *Le Monde* 15-16 December, at 15 (1996).

8. M. Herzog-Evans, 'Récidive: surveiller et punir plus plutôt que prévenir et guérir', *AJ Pénal* 305 (2005).

9. J.-L. Senon and C. Manera, 'L'obligation de soins dans la loi renforçant la lutte contre la récidive', *AJ Pénal* 367 (2007).

10. And notably: J.-P. Garraud, *Rapport sur la Mission Parlementaire confiée par le Premier Ministre à Monsieur Jean-Paul Garraud, député de la Gironde, sur la Dangersité et la prise en charge des individus dangereux*, Ministère de la Justice et Ministère de la santé et des solidarités (2006); E. Blanc, *Rapport d'information sur le suivi des auteurs d'infractions à caractère sexuel, en conclusion des travaux d'une mission d'information relative à l'exécution des décisions de justice*, presided by M.J.-L. Warsmann, 29 February, National Assembly, No. 4421 (2012); E. Milgrom, P. Bouchard & J.P. Olié, 'La prévention médicale de la récidive chez les délinquants sexuels', 194 *Bulletin de l'Académie nationale de médecine* 1033 (2010).

11. J. Danet, *Justice pénale, le tournant*, Paris, Le Monde Actuel, Folio (2006); V. Gautron, 'De la société de surveillance à la rétention de sûreté. Etapes, faux semblants, impasses et fuites en avant', *AJ Pénal* 54 (2009); M. Herzog-Evans, 'French Post Custody Law (2000-2009): From Equitable Trial to the Religion of Control', 1 *European Journal of Probation* 97 (2009).



ers,<sup>12</sup> which has rendered the reforming logorrhoea of the past two decades largely useless.

With the exception of the 1998 Act, which had reformed the health and criminal laws equally, the changes adopted thereafter essentially delegated the definition of the legal framework to criminal law. That said, nothing could be done without the contribution of health services, which were increasingly mandated by penal courts to assess and care for sex offenders. It is also important to understand that, parallel to the mandatory treatment imposed under criminal law, France also detains offenders under the umbrella of mental health law. Sex offenders who are diagnosed with a serious mental health condition or who are currently deteriorating can naturally be transferred to psychiatric wards for treatment under ordinary health law regulations. The most dangerous of them can also be detained in special psychiatric structures (*Unités pour Malades Difficiles* – UMD – Serious Patient Units) regulated essentially by the Health Code, which was amended in 2011.<sup>13</sup> Sex offenders can thus be detained under this more discreet regime, very few political or academic debates have addressed it.

#### 1.4 Three Different Reforming Era

Focusing essentially on criminal law rules, one can distinguish three different eras.<sup>14</sup> The 1998 reform consisted in creating a new *sentence*, which, at the time, was lawful in view of the general legal framework and principles. This sentence, SSJ, consists in mandatory treatment and supervision and is either a stand-alone community sentence or a post-custodial supervision sentence. In many ways, with the exception of the legal framework for treatment (see 2.6), this is, in fact, not dissimilar to a regular probation sentence or a custodial sentence combined with a probation licence upon release.

During Nicolas Sarkozy's governance, on the other hand, many criminal law principles were violated. The principle of legality was thus attacked when a 2007 Act imposed mandatory treatment for people who could have been liable to SSJ, but had not been thus sentenced. The principles of legality, safety and perhaps proportionality were also weakened when two laws (2005, 2008) created a total of four 'safety' measures (judicial safety surveillance of dangerous offenders – SJPD; GPS-electronic monitoring – PSEM; safety surveillance – SS; safety detention – RS<sup>15</sup>) that are restric-

tive or custodial measures imposed without a new offence having been committed: they allow for the long-term post-custodial supervision of sex and other violent offenders and considerably extend the cases where release must be preceded by risk assessment – risk assessment that, as we shall see, is outdated and unreliable. Parallel to this, Nicolas Sarkozy also made it much more difficult for sex offenders, recidivists and people serving long prison sentences to obtain an early release. Ms Taubira's 2014 law reform, for her part, broke with tradition by creating her own safety measure, whilst dispensing with the solid procedural safeguards that her predecessor had put into place to compensate for the substantial law violations inherent in such safety measures.

In practice, SSJ is used more frequently than any of the other tools, as courts patently favour measures that are compatible with essential criminal law principles. That being said, most sex offenders are, in practice, submitted to ordinary sentences and measures, such as probation orders and custodial sentences, both of which can include a treatment obligation.

There are currently no proposals for the extension of safety measures. However, the opposition is already adopting its usual 'tough on crime' rhetoric in the media, prior to the upcoming regional (December 2015) and presidential elections (2017), and it is highly likely that the current legal arsenal will be extended if the opposition wins the election. In view of the recent terrorist attacks on France in 2015, it is likely that such changes will not focus on sex offenders.

It is impossible to list all of the specific regulations and constraints to which sex offenders are submitted. Therefore, focus will be on SSJ and the five existing safety measures hereafter.

## 2 Legal Frameworks for SSJ and Safety Measures

### 2.1 Pre-Legislative Justification

The justifications presented for SSJ and safety measures have always represented a balance between three different and somewhat opposing objectives: neutralisation, rehabilitation and treatment. Whether from the left or the right, politicians have justified every single point of these measures by referring to these goals. Indeed, the right places a little more emphasis on safety, whilst the left places more emphasis on rehabilitation. However, they have had a similar focus on treatment. Their discourse, identically, has thus been that all sex offenders and some violent offenders need treatment and supervision when they are released; those committing the more serious of these offences need, in addition to treatment and supervision, some form of containment, be it via GPS-EM or custody. Amongst specialists and academics, there has not been much opposition to the rehabilitative and treatment dimensions of these sentences and

12. M. Herzog-Evans, 'Outils d'évaluation: sortir des fantasmes et de l'aveuglement idéologique', *AJ Pénal* février 75 (2012) and our consultation to the Parliament, available at: <<http://herzog-evans.com/observations-ecrites-concernant-le-projet-de-loi-de-programmation-relative-a-l'exécution-des-peines/>> (last visited 27 May 2016)

13. E. Péchillon 'Censure partielle de la loi du 5 juillet 2011 relative aux soins sous contrainte: vers une réforme en profondeur de la psychiatrie avant octobre 2013? Note sous Conseil constitutionnel, décision no. 2012-235 QPC du 20 avril 2012, Association de réflexion et de proposition d'actions sur la psychiatrie', 26 *JCP Adm.* 2230 (2012).

14. For a detailed presentation, see M. Herzog-Evans, *Droit de l'exécution des peines* (2016).

15. SJPD: Surveillance judiciaire des personnes dangereuses; PSEM: Placement sous surveillance électronique mobile; SS: Surveillance de sûreté; RS: Rétention de sûreté.

measures. The public debate has essentially focused on safety detention. The media and politicians (left opposition) have mostly criticised the assault on the general law principles embodied by safety detention, but have mostly ignored the mandatory forms of supervision, which unfortunately has allowed the latter, particularly SJPD, to prosper, in spite of the commission of similar violations and of the considerable increase in their scope.

## 2.2 Target Group

Initially, the exclusive target group for SSJ was sex offenders. Gradually, rather serious violent offences were added, including some forms of domestic violence and arson. Although, in practice, the list of offences has increased, and its original scope has become a bit more blurry, this sentence still essentially targets serious violent and sexual offences.<sup>16</sup> The target groups for judicial surveillance and PSEM are identical because the person must be liable to SSJ for these measures to apply.

Safety detention and supervision are, so far, limited to a very restricted list of extremely serious offences (Art. 706-53-13 of the Penal Criminal Code (PPC)), namely: murder or premeditated murder, torture and barbarous acts, rape; abduction and sequestration when committed against a minor; and aggravated forms of murder or premeditated murder, torture and barbarous acts, rape, abduction and sequestration when committed against an adult.

## 2.3 Definition of Risk and Danger

Leaving aside SSJ, for which no danger criterion is imposed other than having committed a sex or violent offence for which the law states that SSJ can be pronounced, amongst safety measures, there is always a reference to either 'dangerousness' or the 'risk of recidivism', or both. Here, legislators have obviously not attempted to be clear and precise – thus adding to the violation of the principle of legality – and the level of confusion is such that it has become something of a joke amongst lawyers.

As Table 1 shows, with SJPD, a 'proven' risk of 'recidivism' is required (Art. 723-29 of the PPC). A patent dual legal difficulty arises here. First, the concept of 'recidivism' – as opposed to reoffending – has a very narrow legal definition under French law. This means that if the offender is 'lucky' enough to escape the intricacies of the concept of recidivism,<sup>17</sup> but does reoffend, he cannot be subjected to SJPD. Secondly, because most experts are either unaware or reject evidence-based

risk assessment tools,<sup>18</sup> it cannot be said that the level of risk can be 'proven' according to the current scientific state of the art. As a matter of fact, in most cases, experts tend to confusingly conclude that 'one cannot exclude that Mr X shall reoffend'. Adding to the legal uncertainty, Article 723-31 of the PPC then requires that the risk of recidivism must be established by expert testimony, stating that the person in question is 'dangerous'. In other words, the risk of recidivism has to be proven via the person's dangerousness! It is also the person's dangerousness, which is the governing criterion for PSEM (Art. 131-36-10 of the Penal Code (PC)). However, in this case, it does not have to be 'proven', but merely mentioned by experts in their written testimony.

With regard to SS and RS, the confusion stems from the use of the concept of 'particular dangerousness' (Art. 706-53-13 of the PPC), which, one can attempt to guess, refers to serious risk, although, in French, 'particular' can also translate into specific. According to the PPC, this dangerousness further has to be characterised by 'a high probability of recidivism because they [the persons in question] suffer from a serious personality disorder'. In other words, it is dangerousness which is proven by a risk of recidivism (sic), rather than the other way around. Furthermore, a 'serious' personality disorder is an additional condition, which raises the following question: what distinguishes a serious personality disorder from a less serious one, and how can this adjective provide the clarity and consistency required of criminal law decisions under the cardinal principle of legality? It does not help because French psychologists and psychiatrists do not always follow international guidelines, and use their own unheard of personality disorder categorisations, the most widely used being 'perversion',<sup>19</sup> a concept that finds its root in psychoanalysis.<sup>20</sup>

16. On this extension: Herzog-Evans (2016), above n. 14, spe. chap. 428.

17. Recidivism is defined as being a second offence committed after a previous one has been punished by a criminal court of law and all appeals and have been either exhausted or not used. Recidivism further requires that the second offence is committed within a specific time frame, which varies depending on the nature of the offence (misdemeanour, felony, crime). With regard to certain classes of felonies, the second offence additionally must be of an identical or a similar nature as defined by the Penal Code (Penal Code, art. 132-8 to 132-16-5 – Herzog-Evans, *Récidive*, Encyclopédie Pénale et Procédure Pénale, Dalloz).

18. A. Baratta, A. Morali & O. Halleguen, 'La dangerosité des malades mentaux bénéficiant de l'article 122-1. A propos d'une étude rétrospective portant sur 58 cas', 88 *L'information psychiatrique* 559 (2012). In English: M. Herzog-Evans, "'What on Earth Can This Possibly Mean?" French Reentry Courts and Experts Risk Assessment', 44 *International Journal of Law and Psychiatry* 98, online first: doi:10.1016/j.ijlp.2015.08.036 (2015).

19. G. Pirlot and H.L. Pedinielli, *Les perversions sexuelles et narcissiques*, 3rd edn (2013).

20. S. Freud, *Drei Abhandlungen zur Sexualtheorie (Three Essays on the Theory of Sexuality)* (1905).

In itself, the dangerousness criterion has been nearly unanimously criticised in French legal doctrine,<sup>21</sup> including by traditionally conservative lawyers.<sup>22</sup> Indeed, it has been argued that this concept cannot be defined in a precise and predictable fashion, as required by the principle of legality. Although some authors have attempted to theorise this construct and have, for instance, distinguished between ‘criminological dangerousness’ and ‘psychiatric dangerousness’,<sup>23</sup> a dichotomy widely used by psychiatrists in their testimonies, such a dichotomy has been rejected by the minority of practitioners who have adopted a more evidence-based approach.<sup>24</sup>

One of the major issues with evaluations has also been the very possibility that risk can be assessed, with some left-leaning commentators seriously doubting it and referring to a ‘Minority Report’ syndrome.<sup>25</sup> Currently, the vast majority of experts<sup>26</sup> and the majority of judges<sup>27</sup> are opposed to actuarial or other structured risk assessment tools. There also is a patent lack of a ‘danger culture’ amongst psychiatrists.<sup>28</sup> This resistance is both political and theoretical: by far the dominant treatment model in France is psychoanalysis and the general population has adopted this treatment framework as if it were an absolute truth.<sup>29</sup>

Things may improve in the future, as some practitioners are obtaining training in evidence-based assessment,

particularly those operating in *Centres Nationaux d'Evaluation* (CNE – National Assessment Centres), which are in charge of an additional level of assessment required by some safety measures.

The recent safety measure created by Ms Taubira relies on a more reliable criterion: it applies to offenders who have been declared partially irresponsible by reason of insanity, according to Article 122-1 of the PC (Art. 706-136-1 of the PPC).

### 2.3.1 General Presentation of the Legal Framework

The rules governing SSJ and safety measures are so complex that this article will present a table rather than engaging in endless descriptions (see next page).

Under the current French Constitution (1958), it is the executive power, i.e. the government, who submits laws to the legislature, which has little room to manoeuvre when it comes to discussing Bills. Moreover, only Bills submitted by the executive have a chance to be registered in the Parliament’s diary. The 1958 Constitution also allows the executive to benefit from its own very large legislative domains.<sup>30</sup> Lastly, administrations, and particularly the prison services, regularly issue internal circulars that infringe on the domains of both decrees and laws, and this is alas particularly true in the case of criminal law.<sup>31</sup> In view of these Constitutional principles, SSJ and safety measures were created by laws, but the details of their regime have been subjected to several decrees.<sup>32</sup> To summarise, the executive enjoys considerable legislative powers.

## 2.4 Procedural Provisions

SJJ abides by ordinary criminal procedure regulations pertaining to sentencing, which comprise public hearings, the rights to counsel and to appear in court for an adversarial hearing, and access to the file and other due process principles.<sup>33</sup> For safety measures, a host of procedural safeguards have been put in place, which has contributed to their limited use. However, from a human rights viewpoint, they do not sufficiently compensate for the aforementioned loose criteria. As shown in Table 2 on page 75, except for the right to appear in court, to have access to the file, and to counsel and appeal, most of the rules vary from one measure to another. Reformers have considered that the higher the court making the decision, the more protected offenders would be. A more stringent condition appears to be the three layers of risk assessment imposed by most safety measures: a) by an expert; b) after a placement of up to six weeks in the aforementioned CNE, by these centres’ multidisciplinary teams of practitioners; and c) by a so-called multidisciplinary commission for safety measures (*Commission multidisciplinaire des mesures de sûreté* –

21. See inter alia: P.-J. Delage, ‘La dangerosité comme éclipse de l'imputabilité et de la dignité’, *RSC* 797 (2007); P. Mbanzoulou, ‘La dangerosité des détenus. Un concept flou aux conséquences bien visibles: le PSEM et la rétention de sûreté’, *AJ Pénal* 171 (2008); P. Mbanzoulou, H. Baze, O. Razac & J. Alvarez, *Les nouvelles figures de la dangerosité* (2008); G. Giudicelli-Delage, ‘Droit pénal de la dangerosité – Droit pénal de l'ennemi’, *RSC* 69 (2010); A. Coche, ‘Faut-il supprimer les expertises de dangerosité?’, *RSC* 21 (2011); J.-L. Senon and C. Manzanaera, ‘Psychiatrie et justice: de nécessaires clarifications à l'occasion de la loi relative à la rétention de sûreté’, *AJ Pénal* 176 (2008); C. Protais and D. Moreau, ‘L'expertise psychiatrique entre l'évaluation de la responsabilité et de la dangerosité, entre le médical et le judiciaire. Commentaire du texte de Samuel Lée’, *Séminaire GERN ‘Longues peines et peines indéfinies. Punir la dangerosité’*, Paris, 21 March (2008); M. Benezec, T.H. Pham & P. Le Bihan, ‘Les nouvelles dispositions concernant les criminels malades mentaux dans la loi du 25 février 2008 relative à la rétention de sûreté et à la déclaration d'irresponsabilité pénale pour cause de trouble mental: Une nécessaire évaluation du risque criminel’, 167 *Annales Médico-Psychologiques* 39 (2009).

22. P. Conte, S. Tzitzis & G. Bernard, *Peine, dangerosité. Quelles certitudes?* (2010).

23. P. Mbanzoulou, ‘La dangerosité’, in M. Herzog-Evans (ed.), *Transnational Criminology Manual*, Volume I (2010) at 109.

24. A. Baratta, A. Morali & O. Halleguen, ‘La dangerosité des malades mentaux bénéficiant de l'article 122-1. A propos d'une étude rétrospective portant sur 58 cas’, 88 *L'information psychiatrique* 559 (2012).

25. In this vein: F. Fiechter-Boulvard, ‘La dangerosité: encore et toujours...’, *AJ Pénal* 67 (2012).

26. *Ibid.*

27. Herzog-Evans (2015), above n. 18.

28. O. Halleguen, ‘Prise en charge des patients psychiatriques dangereux’, presentation at the conference of the Institut pour la Justice, December 14 – PDF of the presentation available at: <[www.institutpourlajustice.org/wp-content/uploads/2012/10/EA-N%C2%B014\\_mail1.pdf](http://www.institutpourlajustice.org/wp-content/uploads/2012/10/EA-N%C2%B014_mail1.pdf)> (last visited 7 November 2015) (2013).

29. M. Borch-Jacobsen, J. Cottraux, D. Pleux, J. Van Rillaert & C. Meyer, *Le livre noir de la psychanalyse. Vivre, penser et aller mieux sans Freud* (2005).

30. F. Mitterrand, *Le coup d'état permanent* (1964); D. Rousseau, ‘L'objet de la Constitution ce n'est pas l'Etat mais la société’, *Critique* 428 (2012).

31. For illustrations, see Herzog-Evans (2016), above n. 14, spe. chap. 01, and in the case of safety detention, see M. Herzog-Evans, ‘Les textes d'application de la loi Rétention de sûreté’, *Recueil Dalloz* 3098 (2008).

32. *Ibid.*

33. S. Guinchard and B. Buisson, *Procédure pénale*, 10th edn (2014).

Table 1 Legal Framework – Overview

Year of the Act	Legal nature of the measure	Name of the sentence or measure	Coerced treatment whilst in prison	Coerced treatment when in the community	Mandatory supervision or detention	Electronic device	Max duration	Target group	Retrospective	Risk criteria
1998	Sentence	Socio-Judicial Surveillance (SSJ)	Yes	Yes	Yes	GPS-EM can be added	10 years (felonies) or 20 years (crime) or 20/30 years by special decision perpetual for lifers (special decision)	Sex and violent offender (at least relatively serious offences)	No	/
2005	Safety measure	Judicial Supervision Dangerous Persons (SJPD)	Not in itself (yes when added to 2007 Act)	Yes	Yes	Not per GPS-EM can be added	For the total duration of all remission granted during the custodial sentence	Offender who incurred SSJ sentenced to 7 years (5 if 2 times recidivist)	Yes (any risk of reoffending proven after the 2005 Act)	'Proven' risk of 'recidivism' + dangerousness
2005	Safety measure Not as standalone but attached to parole/SSJ/SJPD/ or SS	GPS-EM (PSEM)	Not in itself (but yes when mandatory with the measure it is attached to)	Yes	Yes	Yes	For the maximum duration of the measure it is attached to	Offender who incurred SSJ sentenced to 7 years (5 if 2 times recidivist)	Yes if with SPJD and SSJ	Dangerousness
2007	Obligation attached to a sentence, measure or safety measure	/	Yes	Yes	/	/	/	Originally: offender who incurred SSJ but was not sentenced to it – Since 2014: only those who have been sentenced to SSJ	/	/



Table 1 Legal Framework – Overview (continued)

Year of the Act	Legal nature of the measure	Name of the sentence or measure	Coerced treatment whilst in prison	Coerced treatment when in the community	Mandatory supervision or detention	Electronic device	Max duration	Target group	Retrospective	Risk criteria
2008 (amended 2010)	Safety measure	Safety Surveillance (SS)	Not in itself (yes when added to 2007 Act)			Not per GPS-EM can be added	2 years renewable ad infinitum  Can be used to prolong parole, SSJ or SJPD	Offenders who committed a very serious sexual offence listed in Art. 706-53-13 PCC	Yes when it prolongs SSJ, SJPD and parole	Risk of committing the sex offender listed in Art. 706-53-13 PCC
2008 (amended 2010)	Safety measure	Safety Detention (RS)	Yes	/	/	/	2 years renewable ad infinitum	Offenders who committed a very serious sexual offence listed in Art. 706-53-13 PCC Can also be imposed as a sanction for violating SS	Yes when pronounced for the violation of SS  No when pronounced by a criminal court	'Particular' dangerousness  Serious personality disorder
2014	Safety measure	Treatment Obligation	/	Yes	/		5-10 years	Offenders released from prison without SSJ who have been partially declared irresponsible by reason of insanity	No	/

CPMS). The reason why these layers limit the number of safety measures that are being imposed is that they take a minimum of six to twelve months to complete, which is a precious time that many courts do not have and a very costly and demanding system in terms of material and human resources. Moreover, judges are not impervious to the fact that CPMS is not composed of risk assessment experts, but of lawyers, gendarmes and laypersons, along with one psychologist or psychiatrist. In practice, they simply follow the conclusions contained in the expert testimony or in the CNE reports.<sup>34</sup> However, because, in most cases, none of the aforementioned will have used evidence-based tools, an exceptionally high level of false negatives or false positives is to be expected,<sup>35</sup> which is not compensated by a right to a counter-assessment. Indeed, if the offender asks for a counter-assessment, he depends on the good will of the judge, who has the discretion to determine whether to appoint another state-funded expert or whether the offender must pay privately for an independent expert, which would not be covered by legal aid.<sup>36</sup>

Public hearings are not the rule in the implementation of French sentences, as legislators have always considered that people's privacy was more important at this stage of the criminal process.<sup>37</sup> However, with the more stringent safety measures (SS and RS), the offender who requires a public hearing is obligatorily granted one. In practice, very few offenders actually request a public hearing, many preferring it to be held in camera.<sup>38</sup> More debatably, with RS, most hearings are held via videoconferencing,<sup>39</sup> which creates difficulties for the defence.<sup>40</sup>

Astonishingly, the Taubira Act (2014) has not implemented a single procedural safeguard beyond the basic due process rules, and even those due process rules are the result of doctrinal interpretation, as the law is completely silent on this point.<sup>41</sup> The competence lies with a single judge court, the sentence implementing judge (*juge de l'application des peines* – JAP), that is a judge in charge of release, sanctions and supervising offenders serving a community sentence or measure. Moreover, rather than requiring expert testimony, the law originally only requested a 'medical opinion'. Fortunately, a decree has 'corrected' the law – a classic violation of a superior norm, but in this case a welcomed one – and stipulated that it should, in fact, be an independent expert.

Importantly, none of the procedures – with the exception of SSJ and RS, when they are pronounced *ab initio*

by a criminal sentencing court – allow the victim to be present in court or to be represented.

## 2.5 Maximum Length of Mandatory Supervision

As seen in Table 1, SSJ can be perpetual when it follows the release of a lifer, and is otherwise potentially very lengthy, although, as we shall see later, courts have been quite reasonable in that respect. SJPD typically lasts for two to three years, depending on the extent to which offenders have benefited from remission for good conduct (Art. 721 PPC) or for re-socialisation efforts (Art. 721-1 PPC). Before the 2014 Act, remission granted to recidivists was half of the length, which was granted to first-time offenders, with the paradoxical consequence that they could be supervised under SJPD for shorter durations. The 2014 Act has abrogated this discrimination. It is precisely because the length of SJPD could not exceed that remission, thereby ensuring that the total length of social control exercised upon the offender would not exceed the total length of the pronounced custodial sentence, that the Constitutional Council (CC) had initially declared SJPD compatible with the constitution. However, legislators wanted to control sex offenders for extended periods of time and to allow for the prolongation of shorter measures. This is why the 2008 Act allowed SS to be used in order to prolong SSJ and SJPD (and incidentally, parole). The first decision was to be made for one year (two as of the 2010 Act) and could be renewable *ad infinitum*. In other words, via SS, legislators have allowed the courts to perpetually prolong a sentence (SSJ), a release measure (parole) and a temporary safety measure (SJPD), in direct violation of the principle of legality.

## 2.6 Conditions Attached to Safety Measures

In spite of such shocking violations of the general principles of criminal law, what can actually be imposed in most cases is an ordinary form of probation, which means the offender is placed under the supervision of a JAP and a probation service. This ordinary probation is thus usually regulated by exactly the same rules as those governing community sentences and measures (i.e. Arts. 132-44 and 132-45 PC), with most judges choosing just a few amongst the twenty-two possible obligations listed in Article 132-45. These generally are paying damages, fixing one's abode at a particular address, getting treatment and seeking employment. The main difference in cases involving sex offenders is that the courts tend to add contact-restraining obligations.<sup>42</sup> When a specific treatment 'injunction' (as opposed to a regular treatment 'obligation') is imposed, as provided for in the rules governing SSJ (which can be imposed for SJPD, with or without PSEM, and for SS), two medical practitioners are in charge of supervision instead of one: a coordinating doctor and a treatment doctor. Rather than adding to the pressure on the offender, one of them, the 'coordinating doctor' acts as a shield between the JAP and

34. A. Morice and N. D'Hervé, *Justice de sûreté et gestion des risques. Approche pratique et réflexive* (2010).

35. And found: A. Baratta, A. Morali & O. Halleguen, 'La vérité sur l'expertise post-sentencielle: évaluation clinique contre échelle actuarielle', 170 *Annales Médico-Psychologiques* 96 (2012).

36. Herzog-Evans (2016), above n. 14, spe. chap. 811.

37. *Ibid.*, chap. 01.

38. G. Lorho, 'L'audience devant la JRRS', *AJ Pénal* 109 (2014).

39. *Ibid.*

40. V. Bianchi, 'Quels droits de la défense pour la personne placée sous surveillance de sûreté ou en rétention de sûreté?', *AJ Pénal* 106 (2014).

41. Herzog-Evans (2016), above n. 14, spe. chap. 537.

42. For the Courts' typical practices, see M. Herzog-Evans, *French Reentry Courts: Mister Jourdain of Desistance* (2014).

Table 2 Procedural Provisions – Overview

Measure	Court of law	Offender heard	Right to council (defence)	Access to the file	Public hearing	Right to appeal and court of cassation	Risk assessment by independent expert	Risk assessment by the National Assessment Centre	Risk assessment by the pluridisciplinary commission for safety measures	Right to require another assessment
SSJ	Sentencing courts (for felonies or crimes)	Yes	Yes	Yes (via the attorney)	Yes	Yes (correctional chamber of the court of appeal)	Yes	No	No	Yes if the court allows
SJPD	3 JAP tribunal (TAP)	Yes	Yes	Yes (via the attorney)	No	Yes, CHAP is competent	Yes	No (except when with PSEM)	No (except if with PSEM)	Yes if the court allows
PSEM	3 JAP tribunal (TAP)	Yes	Yes	Yes (via the attorney)	No	Yes, CHAP is competent	Yes	Yes	Yes	Yes if the court allows
SS	Special chamber of the court of appeal (JRRS)	Yes	Yes	Yes (via the attorney)	Yes if the offenders request it	Yes, special chamber of the Court of Cassation is competent (JNRS)	Yes	Yes	Possible but not mandatory (Art. R 53-8-45 CPP)	Yes if the court allows
RS	Special chamber of the court of appeal (when it sanctions the violation of SS) (JRRS)  Sentencing court for crimes	Yes	Yes	Yes (via the attorney)	Yes if the offenders request it when sanctioning the violation of SS  Yes, in principle, if pronounced by the criminal sentencing court	Yes, special chamber of the Court of Cassation is competent (JNRS)  Ordinary chamber if pronounced by Criminal sentencing court	Yes	Yes	Yes	Yes if the court allows
Mandatory treatment of partially irresponsible	One judge court – JAP)	Yes	Yes	Yes (via the attorney)	No	Yes (correctional chamber of the court of appeal)	Law: no: mere 'medical opinion' Decree: expert	No	No	Yes if the court allows

the offender, in order to better protect his privacy against potential violations of the principle of professional secrecy. Offenders are thus better protected than they would be with regular probation with an ordinary treatment obligation. Recently, however, violations of the secrecy principle were imposed in the latest Sarkozy reforms (2010–2012), which, in particular, allow a health practitioner to bypass the coordinating doctor and to communicate to the JAP that some changes are occurring that are increasing the level of risk.

Other than that, offenders' liberties are not impacted much more than those of regular probationers. Notably, bans or even controls on their use of computers or the Internet cannot be imposed.<sup>43</sup> It is only when it is established that they have committed a non-contact sex offence (such as downloading paedo-pornographic images or videos) that they can be sentenced. Without adequate control, this is bound to be rare. In the same vein, under the current legislation, there is simply no way to regularly control their alcohol or drug intake, and no alcohol consumption ban can be imposed; offenders can only be banned from going to bars – which leaves them free to buy as much alcohol as they want from supermarkets.<sup>44</sup>

It is only when PSEM is added to a sentence or measure that it becomes very stringent because PSEM technology is not discreet and is extremely dysfunctional, as we shall see next. Safety detention is perhaps the most shocking of all of the measures because it deprives ex-offenders of their liberty when they have not committed a new offence. It is therefore reassuring that this measure has hardly ever been used.

## 2.7 Practical Use of Safety Measures

The overall use of SSJ increased during the first year, but has stabilised since 2010. However, SSJ is still far from being systematically imposed on sex offenders. For instance, in 2010, only 39.1% of the total sentences for rape comprised SSJ, whilst the use of SSJ with other sex offences ranged from 4.4% to 9.4%. Judges tend to impose SSJ much more frequently when there are several sex offences. They pronounce it in 87.5% of multiple rape cases; likewise, when the person is a reoffender, he has 4.7 times more chance of being thus sentenced. Conversely, a minor incurs 4.2 times less risk of being sentenced to SSJ.<sup>45</sup> Overall, the length of SSJ has been quite reasonable, and far from the legal maximum, even from the very beginning of its implementation.<sup>46</sup> Official statistics published in 2013<sup>47</sup> reveal that the average

length is six years for crimes and five years for felonies, and paedophiles tend to be sentenced to longer SSJ than other sex offenders. Recidivists also serve longer SSJ sentences: eight years on average, as opposed to six for a criminal.

It is very difficult to obtain data pertaining to the use of safety measures. There simply are no regular public statistics published on this subject. Most of what we know was published in a Parliamentary report, 'the Blanc Report',<sup>48</sup> in 2012. We thus learn that 80% of PSEM are pronounced in sex offence cases and that, in most of these cases, the measure is pronounced alongside a SJPD safety measure. The figures are rather low: in 2011, only 53 people were subjected to PSEM, and a total of 132 people were subjected to PSEM from 2007 to 2011. The percentage of recall over this period was 25%. If this measure has not been used frequently, it is because of the judiciary's mistrust in safety measures in general. In the case of PSEM, it is also because the technology is far from being operational. Many cases of alarms ringing whilst the person was in court or at the probation service for a regular meeting have been reported,<sup>49</sup> along with multiple occurrences where the person was awakened several times during the night by a dysfunctional alarm or perhaps by deliberately malicious behaviour on the part of the monitoring team.

There are unfortunately no official data on SJPD, with the result that, incredibly, there is no way of knowing how frequently it is being used.<sup>50</sup> The same is astonishingly true with SS. However, in this case, in 2012, a Parliamentary question was put to the Ministry of Justice,<sup>51</sup> which answered that, by 20 December 2012, twenty-two people had been submitted to SS since the enactment of the 2008 Act. The Ministry of Justice also revealed that nineteen were still under supervision. The Ministry added that, in most cases, SS had been pronounced in order to prolong SJPD and that most of them pertained to sex offences.<sup>52</sup>

We know of the imposition of RS via the media, which tells us just how rarely it happens. In practice, five people have so far been placed under safety detention for very short periods of time, as revealed by the Deprivation of Liberty General Controller (*Contrôleur général des lieux de privation de liberté* – hereafter the Controller) in 2015.<sup>53</sup>

None of the practices described here have been evaluated academically. However, some reports have

43. A recent case examined by the Civil Tribunal of Reims (Reims, TGI, Ord. Référé, 28 September 2011, No. 11/00180) thus had to reject the victim's application for the offender to be banned from using Facebook, available at: <www.numerama.com/magazine/19996-un-ex-delinquant-sexuel-echappe-a-l-exclusion-des-reseaux-sociaux.html> (last visited 8 November 2015).

44. Herzog-Evans, (2016), above n. 14, spe. chap. 613.

45. R. Josnin, 'Le recours au suivi socio-judiciaire', 121 *Infostat Justice* February (2013).

46. V. Carrasco, 'Le suivi socio-judiciaire: bilan de l'application de la loi du 17 juin 1998', 94 *Infostat Justice* May (2007).

47. R. Josnin, 'Le recours au suivi socio-judiciaire', 121 *Infostat Justice* February (2013).

48. E. Blanc, *Rapport d'information sur le suivi des auteurs d'infractions à caractère sexuel, en conclusion des travaux d'une mission d'information relative à l'exécution des décisions de justice*, Commission presided over by M. J.-L. Warsmann, 29 February, National Assembly, No. 4421 (2012).

49. *Ibid.*

50. We also asked the people in charge of the intranet data available to judges, which are not communicated to the public, whether data existed, but were not published. We were told that no such data were collected at all.

51. Written Question No. 00845 by M. Jacques Mézard, Senator, *JO Sénat* 19 July (2012).

52. Ministry of Justice Answer, *JO Sénat* 20 December, 3007 (2012).

53. CGLPL, Avis du 5 octobre 2015 relatif à la rétention de sûreté, *JO* 5 November, 59 (2015).



addressed their implementation. The aforementioned Blanc report (2012) recommended that more evidence-based assessment and treatment should be delivered in the case of safety measures and SSJ.

## 2.8 Jurisprudence's Control over Safety Measures

Immediately after a law is passed, and before it is promulgated by the president of the Republic, members of both chambers of the Parliament (National Assembly and Senate) can refer it to the CC for an appraisal of its constitutionality. This first-line control of the legislation presented in this article was seized by the MPs in 2005,<sup>54</sup> 2008<sup>55</sup> and 2014.<sup>56</sup> In each case, the CC considered that the new measures were compatible with the Constitution, and particularly, with the constitutional principles of necessity, in spite of the perpetual nature of several of them. However, in the case of RS, the CC attempted to limit its retrospective nature, whilst turning a blind eye to this very retrospective nature in the case of SS. The CC stated that it could not be retrospective when RS is pronounced by a criminal court. This led to a special commission<sup>57</sup> consulted by the then Minister of Justice Ms Dati, which stated that when RS was pronounced as a sanction for the violation of SS, it could conversely be retrospective. To ensure this would be the case, Nicolas Sarkozy had it set in legislative stone with a new 2010 Act without, it must be noted, meeting any significant opposition.

Overall, first (sentencing courts, JAP, TAP, JRRS) and second (courts of appeal) level courts have been extremely cautious in the use of SSJ and safety measures. Most courts have preferred to opt for regular forms of supervision, first because it ensures that legal principles are not violated. Indeed, French courts are very attached to the principles that regulate criminal law and in particular the principle of legality, the consequence being that any piece of legislation that infringes this principle is typically ignored or marginalised. A second reason why courts have preferred regular forms of supervision can be found in JAP and TAP's professional culture: their main guideline is rehabilitation and desistance. A third obstacle to the wide implementation of safety measures has been practical in nature: courts are well aware that there simply are not enough psychiatrists (particularly in the case of a treatment injunction, where two psychiatrists are required) and probation officers to adequately supervise offenders, even those who have committed serious crimes.

Most courts have fourthly been very constrained by the dangerousness or reoffending risk criteria, particularly in the case of SJPD, for which they have to be 'proven'. Thus, one court, for instance, rejected the prosecutor's requisitions for SJPD pertaining to an offender who had

committed a sex offence against a minor under the age of 15, because, in his case, experts had indicated that 'he may benefit from treatment', which meant that his risk of reoffending had not been 'proven'.<sup>58</sup> In the same case, though, the court of appeal then pronounced SJPD – retrospectively, with regard to the date of the offence – which was confirmed by the Court of Cassation.<sup>59</sup>

Courts have also exercised control over the execution of the two most stringent safety measures. In the case of PSEM, administrative courts have considered that the prison services should do a better job of protecting offenders from 'serious infringements on their private lives' (notably being awakened several times during the night) as a direct result of the poor technology used in the case of PSEM, although, in one particular instance, the offender's application failed, as he had not used an adequate procedure.<sup>60</sup> In the case of RS, the Court of Cassation (JNRS chamber) overturned a placement in RS where the court and experts had assessed the person as being dangerous solely based on the fact that he refused to submit to treatment.<sup>61</sup> For its part, the Controller recently criticised this measure's regime in no uncertain terms, stating in particular that it violated all of the general principles of criminal law and procedure (specifically, the principles of legality and the prohibition of retrospective criminal laws that are harsher), that detention was too similar to regular prison detention, and therefore violated the principle of proportionality, and that the treatment offered was of insufficient quality. However, she complimented the prison services for the good conditions of detainees' quarters and cells. She nonetheless called for the outright abolition of safety detention.<sup>62</sup> The highest administrative Court, the Council of State, has abrogated the Fresnes RS centre's internal regulations pertaining to visitations and correspondence, precisely because they were too similar to prison regulations and were therefore too restrictive.<sup>63</sup> Conversely, and quite contradictorily, the Council of State refused to abrogate another decree that had initially allowed the institution of such restrictions.<sup>64</sup>

Moreover, most jurisdictions have had no trouble in implementing SJPD, PSEM and SS retrospectively, with only a few exceptions.<sup>65</sup> With PSEM, in big cities, where schools, kindergartens and sports settings for children abound, some offenders must be limited to a very strict perimeter, which, contrary to the general legal principle governing criminal law, has not led to

54. CC, 8 décembre 2005, no. 2005-527 DC.

55. CC, 21 février 2008, no. 2008-562 DC.

56. CC, 7 août 2014, no. 2014-696 DC.

57. V. Lamanda, *Amoinrir les risques de récidive criminelle des condamnés dangereux*, Rapport au président de la République, 30 May (2008).

58. TAP Agen, 8 June 2009, no. 200700102931, *AJ Pénal* 421, obs. M. Herzog-Evans (2009).

59. Court of Cassation, Criminal Chamber, 1 April 2009, *AJ Pénal* 321, obs. M. Herzog-Evans (2009).

60. CE 26 October 2011, *Beaumont*, *Applic.* No. 350081, *AJDA* 434, note G. Eveillard (2012).

61. JRRS, 17 December 2014.

62. CGLPL, *Avis* du 5 octobre 2015 relatif à la rétention de sûreté, *JO* 5 November 59 (2015).

63. CE 31 October 2011, *Applic.* No. 332707.

64. CE 26 November 2010, *Applic.* No. 323694.

65. Court of Appeal, CHAP, Versailles, 1 April 2008, *AJ Pénal* 323, obs. M. Herzog-Evans (2008).

significant judicial control.<sup>66</sup> This is in direct violation of Article IV-19 of the Recommendation CMRec(2014)4 on electronic monitoring, which states: 'In cases where electronic monitoring relates to exclusion from, or limitation to, specific zones, efforts shall be made to ensure that such conditions of execution are not so restrictive as to prevent a reasonable quality of everyday life in the community'.

## 2.9 Authorities in Charge of Supervision and Breach

It is the JAP, a general release and re-entry court, assisted by state probation officers – and in many cases, with the added support of the third sector – which are in charge of supervising offenders serving a SSJ or a safety measure. Again, in this respect, there is no difference from a regular form of probation. In some cases, the JAP may ask the police to conduct an investigation, but in practice the police do not like being associated with the supervision of people serving community measures, preferring to focus on those who have not yet been sentenced.

Importantly, these practitioners and agencies work separately, and sequentially, rather than in an integrated way. There is no French equivalent to England and Wales' MAPPA,<sup>67</sup> and quite conversely, the overall attitude and culture are rather territorial and corporatist,<sup>68</sup> with the consequence that collaboration is rather rare.<sup>69</sup> As a result, the flow of information between practitioners is not sufficient, which sometimes contributes to crimes being committed.<sup>70</sup>

The rules governing sanctions for the violation of SSJ and safety measures are complex and intricate, and Table 3 attempts to clarify these rules (see next page). Sanctions can also apply when the person refuses SJPD, PSEM or treatment. In most of these cases, the rules are laid down either in the PC or the PPC, and fair trial and procedural principles apply. However, with the exception of SS and RS, for which the JRRS is still competent, when the sanction is custodial, it is systematically imposed by the JAP, not a collegial court. It is also note-

worthy that, for the recently added safety measure, the 2014 Act has again opted for the application of ordinary sentencing rules, rather than granting competence to the JAP. This is a sign of defiance towards the JAP, which has been perceptible in recent years,<sup>71</sup> notably because the prison services have become extremely powerful and have been put in charge of drafting sentence implementation Bills. The JAP's role – or the prosecutor's – is to refer a violation of a treatment order to a felony court, which can impose a sentence for two years' imprisonment, along with a fine of 30,000 euros.

## 2.10 Evidence-Based Practices

When most of the reforms presented in this article were enacted, there was no debate pertaining to their compatibility with the current state of scientific knowledge. France continues to lag behind in evidence-based practices (EBP), and it was only recently made aware of EBP during a 'Consensus Conference' held in February 2013.<sup>72</sup> For the most part, the treatment of sex offenders comprises anti-androgens (when the person is cared for by a psychiatrist, which is not always the case) and/or psychoanalysis or psychodynamics therapy, although the latter is of little use,<sup>73</sup> and the former must be complemented by cognitive-behavioural treatment (CBT), as the Medical Academy has recently acknowledged.<sup>74</sup> Since 2008, French prison and probation services have tried to put in place spurious Risk-Needs-Responsivity programmes called PPR (*programmes de prévention de la récidive*: reoffending prevention programmes) – the acronym subliminally evoking RNR. Such programmes, however, have little to do with EBP, and an implementation study<sup>75</sup> revealed that they actually comprise 'loose' psychodynamic-like group work, and has little to do with CBT.<sup>76</sup> The programmes have been extended nationwide in spite of the lack of outcome evaluations and serious concerns over their potential negative

66. Such as in this case, where the court de facto limited the offender to one street block: Court of Appeal (CHAP) Bordeaux, 29 Mai 2009, *AJ Pénal* 509, obs. M. Herzog-Evans (2009).

67. J. Wood and H. Kemshall, *The Operation and Experience of Multi-Agency Public Protection Arrangements (MAPPA)*, Home Office Online Report 12/07 (2007).

68. M. Herzog-Evans, 'Explaining French Probation: Social Work in a prison Administration', in I. Durnescu and F. McNeill (eds.), *Understanding Penal Practice* (2013) 63; and 'France: Legal Architecture, Political Posturing, 'Prisonbation' and Adieu Social Work', in G. Robinson and F. McNeill (eds.), *Community Punishment. European Perspective* (2015) 51.

69. M. Herzog-Evans, "'All Hands on Deck": (re)mettre le travail en partenariat au centre de la probation', *AJ Pénal* March: 139 (2013).

70. As in the *Chloé* case (2013), where a probation officer simply sent a fax to the JAP informing him/her that a sex offender had disappeared, rather than contacting him/her in person (the fax machine happened to be out of order), allowing the offender to abduct and rape a young girl for an entire week, before they were miraculously found by the police in Germany thanks to a road accident. See Television Network France Info, available at: <[www.francetvinfo.fr/faits-divers/enlvements/les-rates-de-la-justice-dans-l-affaire-chloe\\_173177.html](http://www.francetvinfo.fr/faits-divers/enlvements/les-rates-de-la-justice-dans-l-affaire-chloe_173177.html)> (last visited 7 November 2015).

71. A. Gentilini, 'Le juge de l'application des peines: vers une disparition?', in F. Ghelfi (ed.), *Le droit de l'exécution des peines. Espoirs ou désillusion* (2014) 107; M. Herzog-Evans, 'La déjuridictionnalisation de l'application des peines', in S. Boussard (ed.), *Les droits de la personne détenue* (2013) 259.

72. See the conference website, available at: <<http://conference-consensus.justice.gouv.fr/>> (last visited 8 November 2015). Also see pertaining to France's backwardness in terms of risk assessment: M. Herzog-Evans, 'Outils d'évaluation: sortir des fantasmes et de l'aveuglement idéologique', *AJ Pénal* 75 (2012); and in terms of treatment: M. Herzog-Evans, *Moderniser la probation française. Un défi à relever* (2013).

73. See inter alia W.L. Marshall, Y.M. Fernandez, L.E. Marchall & G. A. Seran (eds.), *Sexual Offender Treatment. Controversial Issues* (2006); D.R. Laws and W.T. O'Donohue (eds.), *Sexual Deviance. Theory, Assessment, and Treatment* (2008).

74. Académie de Médecine, 'La prévention médicale de la récidive chez les délinquants sexuels', 194 *Bulletin de l'Académie nationale de médecine* 1033 (2010).

75. V. Moulin, *Les groupes de parole de prévention de la récidive des personnes placées sous main de justice*, Mission Droit et Justice, April (2012).

76. O. Vanderstucken and M. Benbouriche, 'Interventions cognitivo-comportementales et prise en charge des auteurs d'agression sexuelle en France: entre Santé et Justice', in J.-L. Senon, G. Lopez & R. Cario (eds.), *Psycho-criminologie: clinique, prise en charge, expertise* (2012) 123.

Table 3 Legal Nature of Safety Measures and Fair Trial

Measure	Custodial	Non-custodial	Fair trial and appeal	Competent court
SSJ	– Execution of the custodial sentence determined in advance by the sentencing court in case of a future violation (3 years for felonies and 7 years for crimes)	– Adding PSEM – Adding more obligations or increasing the number of appointments with the probation officer or JAP	Yes	JAP
SJPD	– Remission withdrawal, partial or total (return to prison to serve the sentence)	– Adding PSEM	Yes	JAP
PSEM	Depends on the measure to which it is attached: – Revocation of parole – Remission withdrawal (SJPD) – RS (if with SS)	– Adding more obligations or increasing the number of appointments with the probation officer or JAP	Yes	JAP
SS	– Placement in RS for a maximum of 2 years, renewable ad infinitum	– Adding PSEM – Adding more obligations or increasing the number of appointments with the probation officer or JAP	Yes	– JRRS if custodial – JAP if non-custodial
RS	None, other than its probable prolongation	/	Yes	JRRS
Mandatory treatment if partially irresponsible offender	Two-year custodial sentence	Fine of 30,000 euros	Yes	Sentencing court

impact.<sup>77</sup> In most cases, however, community treatment of sex offenders is implemented by local and unspecialised psychiatrists or psychologists, although in recent years specialised centres called CRIAV (*Centres de Ressources pour les Intervenants auprès des Auteurs de Violences Sexuelles* – Resources Centres for Practitioners in charge of Sex Offenders) have been created, some of which are currently trying to become informed about EBP. It is noteworthy, however, that France has yet to create an accreditation panel comprising internationally renowned specialists who are able to discriminate between EBP and non-EBP programmes. As we have seen, risk assessment is, so far, largely based on non-EBP, whether it is conducted by ‘experts’ or by proba-

tion officers, although there are now modest signs of change.<sup>78</sup>

EBP are contentious for a number of reasons. First, they are wrongly assimilated to punitive policies, and as was mentioned previously, most issues pertaining to crime are highly politicised in France. Secondly, they go against the deeply ingrained psychoanalysis background of most health practitioners, who tend to be hostile to CBT. A third reason is that they require structure and protocols, which breaks with discretionary traditions.

77. O. Vanderstukken and M. Benbouriche, ‘Principes de prévention de la récidive et principe de réalité en France: les programmes de prévention de la récidive à la lumière du modèle « Risque-Besoins-Réceptivité »’, *AJ Pénal* November 522 (2014). For a more optimistic view, see R. Palaric, ‘Les groupes de parole de prévention de la récidive en France: observation des effets produits’, 21 *Pratiques Psychologiques* 259 (2015).

78. See, for instance, J.-P. Guay and D. Lafortune, ‘L’évaluation du risque de récidive et l’intervention basée sur les données probantes: les conditions nécessaires à l’implantation de méthodes structurées d’évaluation et d’intervention efficace’, 21 *Pratiques Psychologiques* 293 (2015).

### 3 The Place of Safety Measures within the Legal System

#### 3.1 Character of the Framework

'Safety measures' by definition correspond to a legal label that attempts to justify that such measures do not have to abide by general criminal law rules. There is therefore no doubt that SJP, PSEM, SS and RS are indeed 'safety measures'. Conversely, if SSJ appears at first glance as being a 'sentence', thereby abiding by general criminal law principles, in reality its regime is mixed. It is a sentence in the sense that it is indeed used to punish a person who has committed an offence and is pronounced by sentencing courts. However, it leads to a (post release) mandatory supervision and treatment regime that is similar to that of safety measures, and can be prolonged via SS, a safety measure.

The concept of safety measure is indeed rather blurry. It is originally derived from the School of Social Defence as modernised by Marc Ancel,<sup>79</sup> and had all but disappeared by the time the New Penal Code of 1994 was enacted. At that time, it was all but forgotten in the renewed legal framework. However, safety measures were resuscitated during Nicolas Sarkozy's era and are now firmly part of the criminal law landscape, notably via the dangerousness criterion.<sup>80</sup> Previously, the concept of a safety measure appeared to be outdated, because it did not fit within a society that, at the time, did not yet use crime as a political tool, and because the legal doctrine had struggled to distinguish between sentences and 'safety measures', regardless of how hard it had tried to do so.<sup>81</sup> Indeed, a safety measure is supposedly not a sentence, but does apply exclusively to offenders, with this minimal difference: rather than aiming at punishment or rehabilitation, it aims at protecting public safety. However, in most cases, it is certainly perceived by the offender as being punitive because of its controlling and constraining nature, and in their current state and focus on treatment, most safety measures also endeavour to rehabilitate. Moreover, most sentences likewise aim at protecting the community. In other words, the distinction between safety measures and sentences is so blurry that it cannot predictably be used in a democratic society governed by the principle of legality.

Nonetheless, French Courts have used the distinction to justify violations of general criminal law principles, in particular, Article 7 of the European Human Rights Convention and its nearly identical formulation in Article 8 of the French Declaration of Human Rights

(*Déclaration des Droits de l'Homme et du Citoyen* – DDH – 1789). For instance, such has been the case for France's mandatory commitment of mentally ill offenders, a measure that is regulated by Article 706-136 of the PPC, an article situated right before the newly created mandatory treatment established by the 2014 Act (Art. 706-136-1 PPC).<sup>82</sup> It does not help because the European Human Rights Court has recently ruled similarly that the mandatory commitment of mentally ill persons was not a sentence and, therefore, that Article 7 did not apply.<sup>83</sup> The reasoning behind this ruling is that this measure applies to former offenders who have been deemed partially irresponsible by reason of insanity, in the same vein as the newly created 2014 Act. For the ECHR, what counts is that the decisions pronouncing such safety measures are not in themselves 'sentencing' decisions, but are merely stating that the person has a condition that is disposed to lead to legal consequences. In its aforementioned 2008 decision, the CC ruled that Article 8 of the DDH was not violated because safety measures are 'not pronounced because of the person's guilt' but because of 'his particular dangerousness'.<sup>84</sup> In essence, however, safety measures are also put in place because French sentences for sex offenders are quite lenient, with an average of eight years for rapists,<sup>85</sup> and therefore, correspond to a deinstitutionalisation movement. As Razac aptly puts it, they may be perceived as being 'the ambulatory treatment of a behavioural anomaly, which is a source of danger for the community'.<sup>86</sup>

#### 3.2 Alternatives for Prevention

In France, sex offenders can only be the target of criminal or health law measures. Civil law does not deal with legal issues other than contract, family or torts. With regard to criminal law, in most cases, sex offenders are sentenced to regular custodial or community sentences. They are thus submitted to regular probation and treatment obligations. They can benefit from early release measures such as parole and many others,<sup>87</sup> and mandatory treatment is a typical obligation attached to such measures. This is probably a good thing, as release measures are granted based on release plans submitted by offenders, whereas safety measures are entirely

79. M. Ancel, *La défense sociale nouvelle* (1966).

80. J. Danet, 'La dangerosité, une notion criminologique séculaire et mutante', *Champ Pénal* (2008), available at: <<http://champpenal.revues.org/6013>> (last visited 8 November 2015).

81. M. Patin 'La place des mesures de sûreté dans le droit positif moderne', *RSC* 415 (1948); V.R. Schmelck, 'La distinction entre la peine et la mesure de sûreté', in Collective, *Mélanges Patin* (1965) 181.

82. Court of Cassation, Criminal Chamber, 16 December 2009, no. 09-85.153; 14 April 2010, no. 09-82.291; 12 October 2011, no. 10-88.126.1

83. See ECHR, *Berland v. France*, Applic. No. 42875/10, 3 September 2015.

84. CC, 21 February 2008, no. 2008-562 DC, spe. § 9; A. Botton, 'A la recherche de la peine perdue en droit constitutionnel', 9 *Droit Pénal* 7 (2015).

85. The average sentence for rape has consistently oscillated between 8.3 and 8.4 years since 2001 (with the exception of 8.9 in 2010), if life sentences, which, in practice, are only imposed for rape committed in extreme circumstances, are excluded: P.V. Tourmier, *Observatoire des prisons et autres lieux d'enfermement. Tableau de bord du 1er mai 2013* (2013).

86. O. Razac, 'Les ambiguïtés de l'évolution de l'application des peines à l'aune des « nouvelles mesures de sûreté »', *AJ Pénal* 397 (2008). My translation.

87. The French legal system is characterised by a great diversity of early release measures: Herzog-Evans (2016), above n. 14.



imposed on offenders, and therefore, raise serious worries in terms of compliance.<sup>88</sup>

Health or mental health law also organises the mandatory commitment of mentally ill persons, whether they are sex offenders or not. Such internment is, since the 2011 Act<sup>89</sup> on mental health, decided by a judicial criminal judge, the Judge of Liberties and Detention (*juge des libertés et de la détention*). The 2011 Act followed a decision by the CC which stated that the previous law, pursuant to which an administrative authority, the Prefect, had decisional power, violated the Constitution.<sup>90</sup> Dangerous people can also be interned in the aforementioned UMD. These structures, which were recently declared constitutional,<sup>91</sup> focus both on treatment and public safety, although they house the most dangerous of all offenders, often with little hope of significant improvement. A recent study showed that most of those affected are sex offenders.<sup>92</sup> During Nicolas Sarkozy's presence in the government, six new UMDs were opened, whereas previously there had been only four, all created between 1910 and 1963. Interestingly, whereas human rights activists did campaign quite vociferously against RS, they have been mostly silent concerning UMDs, despite the fact that they host about 550 patients (vs. 5 in RS and for very short periods of time), and the difference between the two is rather blurry; both measures are quite similar in many respects to Dutch TBS.<sup>93</sup>

To sum up, there is a graduation of intervention: less dangerous offenders tend to be dealt with by general criminal or (mental) health rules, whereas the most dangerous or repeat offenders are dealt with by criminal or health (internment in UMD) safety measures.

## 4 Evaluation from a Human Rights Perspective

### 4.1 Human Rights Restrictions Intentionally Imposed by Legislators

Under French law, only legislators are allowed to create or add human rights constraints. Courts can only implement the law and the constitution. Leaving aside the

highly contentious concept of the 'safety measure' and its main criterion, dangerousness, the constraints that are actually imposed on offenders by most safety measures and SSJ are, as we have seen, quite similar to regular probation, and the courts do not make an excessive use of the obligations that they could impose. A difficulty arises, however, in terms of consent: whereas release and most community sentences are pronounced with the consent of the offender, safety measures are imposed whether they like it or not. Consent is nonetheless not a constitutional or a cardinal principle of criminal law, and its importance can only be stressed on the basis of theoretical<sup>94</sup> or empirical<sup>95</sup> arguments.

The detention of dangerous offenders, whether with RS or UMD, raises serious issues in terms of the right to freedom of movement and the right to family contact. It also raises serious issues with regard to the principles of necessity and proportionality. However, it is mostly in view of the principles of the non-retrospectivity of harsher penal laws and of legality that they have been contested.

That being said, as we have seen, the Council of State has ruled that part of the internal regulations of Fresnes were illegal, because they were too similar to prison regulations, particularly in terms of visitation and correspondence, and because they imposed undue limitations on the person's right to a family life. However, these constraints were nowhere near those in place in the *Guzzardi* case,<sup>96</sup> a case that has never been mentioned in French jurisprudence<sup>97</sup> or doctrine, which makes the French ruling rather progressive.

### 4.2 European Human Rights and French Safety Measures

Article 5 has not been utilised in French jurisprudence with the view of safeguarding offenders from RS, although the condemnation of Germany<sup>98</sup> has raised debates in the French legal doctrine. Most French authors have considered French regulations to be compatible with Article 5, mainly because its procedure offers sufficient guarantees, and because the detention in Fresnes focuses mainly on treatment, rather than confinement.<sup>99</sup> This statement is highly debatable in view of the decrees that govern it.<sup>100</sup> Authors have also opined that French RS does not violate Article 5 because it was not sufficiently similar to German Safety

88. M. Herzog-Evans (ed.), *Offender Release and Supervision: The Role of Courts and the Use of Discretion* (2015). On the importance of motivation for sex offenders, see P.M. Yates, D. Prescott & T. Ward, *Applying the Good Lives and Self-Regulation Models to Sex Offender Treatment: A Practical Guide for Clinicians* (2010).

89. E. Péchillon, 'Les quatre temps du soin sous contrainte: Une loi dont l'application concrète inquiète les professionnels', 32 *La lettre des professionnels de santé* 8 (2011).

90. CC, 26 November 2010, *Applic. No.* 2010-71 (QPC).

91. CC, 14 February 2014, *Applic. No.* 3012-367 (QPC).

92. A. Baratta, J.-L. Senniger & S. Aroudj, 'Les auteurs de violence sexuelle en unité pour malade difficile', 171 *Annales Médico-Psychologiques* 513 (2013).

93. M.J.F. van der Wolf and M. Herzog-Evans, 'Mandatory Measures: "Safety Measures". Supervision and Detention of Dangerous Offenders in France and the Netherlands: A Comparative and Human Rights' Perspective', in M. Herzog-Evans (ed.), *Offender Release and Supervision: The Role of Courts and the Use of Discretion* (2015) 193.

94. M. Herzog-Evans, 'Consent and Probation: An Analogy with Contracts', 7 *European Journal of Probation* 143 (2015).

95. Herzog-Evans (2015), above n. 88.

96. See ECHR, *Guzzardi v. Italy*, *Applic. No.* 7367/76, 3 November 1980.

97. It is important to understand that French courts are not governed by the rule of precedent and are strictly forbidden from expressly referring to cases, whether national or European. This does not mean that a given case cannot influence a French court; however, the court would not be allowed to expressly mention it.

98. See ECHR, *M. v. Germany*, *Applic. No.* 19359/04, 17 December 2009.

99. J.-P. Céré 'La rétention de sûreté à l'épreuve de la Convention européenne des droits de l'homme', *AJ Pénal* 220 (2008); D. Roets, 'La rétention de sûreté à l'aune du droit européen des droits de l'homme', *Recueil Dalloz* 1840 (2008).

100. M. Herzog-Evans, 'Les textes d'application de la loi Rétention de sûreté', *Recueil Dalloz* 3098 (2008).

Detention.<sup>101</sup> This statement is equally debatable in view of the direct German – and Dutch<sup>102</sup> – inspiration for French Safety Detention.<sup>103</sup>

As was mentioned previously, legal disputes have arisen especially with respect to the issue of retrospective laws. However, rather than referring to Article 7 or the rather undemanding *Kafkaris* ruling,<sup>104</sup> the courts have referred mostly to Article 8 of the DDH, which is unsurprising, given that most of these disputes have been of a constitutional nature. In all of these cases, a general acceptance of the retrospective nature of harsher penal reforms has prevailed. There is only a very limited exception concerning RS: the Constitutional Council has ruled that it cannot be retrospective when it is pronounced by a criminal sentencing court, but it has not disputed it could be when it is pronounced as a sanction for the violation of SS;<sup>105</sup> this has allowed the internment of five offenders, albeit for very short periods of time (all under two months) in retrospective conditions (they had all committed their offences before 2008).

## 5 Conclusion

There are no less than five safety measures in French criminal law, and a specific sentence (SSJ) that deals with sex offences. Of these five, four comprise mandatory supervision upon release; one consists in additional incarceration. Courts also have several other mental health options (internment in a psychiatric hospital and internment in an UMD) that are available to them. The legal regulations are extremely intricate and complex, which makes it difficult to draw a broad picture of the French legal landscape. At the same time, their sheer complexity, and particularly, their extremely slow pace and cumbersome procedures have contributed to the overall very modest use of safety measures, notably the most constraining ones. The courts have been extremely prudent in their use of safety measures, and this has a lot to do with the judiciary's professional culture, which comprises both a strong belief in criminal law principles and a belief in rehabilitation,<sup>106</sup> along with a considerable lack of material and human resources. For this reason, in practice, most sex offenders are still processed through general criminal law procedures and rules, whether they are custodial and community sentences or various early release measures with supervision.

Moreover, in terms of the constraints imposed on offenders, except for RS and PSEM, the supervision imposed in the context of safety measures and SSJ is virtually identical to regular probation. The difference between mandatory safety supervision and regular probation is also becoming more blurry, as parole can now be linked to PSEM and prolonged by SS, and can be perpetual in the case of lifers. However, safety measures have had a detrimental impact on early release measures such as parole. Courts can now safely deny sex offenders' parole, a measure for which they would be blamed if a new offence was committed, but then impose mandatory supervision, when the offender has served his/her entire sentence. If parole and safety measures' supervision is virtually identical, a significant difference is that parole is applied for by the prisoner, who has to work on his/her own release plan. Safety measures' on the other hand, are imposed upon him. It is therefore doubtful that the same level of 'substantive compliance'<sup>107</sup> and adherence to the measure is achieved in both cases.

That being said, the absence of financial and human resources prevents both legislators and the courts from imposing very constraining measures, and the lack of a collaborative culture and EBP awareness means that such policies have little chance of making a difference. In spite of the punitive discourse that gained momentum during the Sarkozy era, in reality, sex offenders still enjoy most of their rights, including the right to become inebriated and to fully access the Internet. For the most part, 'safety' is brandished as a mere gimmick for political purposes, but is not realised in practice. Inevitably, then, high-profile cases regularly awaken France from its daze, just long enough for it to pass new laws, before it falls back into the arms of Morpheus.

101. J. Leblois-Happe, 'Rétention de sûreté vs Unterbringung in die Sicherungsverwahrung: les enseignements d'une comparaison franco-allemande', *AJ Pénal* 209 (2008); C.A. Kupferberd, 'Sicherungsverwahrung ou la rétention de sûreté allemande', *Dr. pénal* 8 (2008).

102. As a report by two senators reveals: Ph. Goujon and Ch. Gautier, *Les délinquants dangereux atteints de troubles psychiatriques*, 420 Rapp. Sénat (2006).

103. J. Leblois-Happe, above n. 101; C. A. Kupferberd, above n. 101.

104. See ECHR, *Kafkaris v. Cyprus*, Applic. No. 21906/04, 12 December 2008.

105. CC, 21 févr. 2008, no. 2008-562 DC.

106. M. Herzog-Evans (2014), above n. 42.

107. G. Robinson and F. McNeill, 'Exploring the Dynamics of Compliance with Community Penalties', 12 *Theoretical Criminology* 431 (2008).

# Legal Constraints on the Indeterminate Control of 'Dangerous' Sex Offenders in the Community: The German Perspective

Bernd-Dieter Meier\*

## Abstract

After release from prison or a custodial preventive institution, offenders may come under supervision in Germany, which means that their conduct is controlled for a period of up to five years or even for life by a judicial supervising authority. Supervision is terminated if it can be expected that even in the absence of further supervision the released person will not commit any further offences. From the theoretical point of view, supervision is not considered a form of punishment in Germany, but a preventive measure that is guided by the principle of proportionality. After a presentation of the German twin track system of criminal sanctions and a glimpse at sentencing theory, the capacity of the principle of proportionality to guide and control judicial decisions in the field of preventive sanctions is discussed. The human rights perspective plays only a minor role in the context of supervision in Germany.

**Keywords:** Supervision, twin track system, principle of proportionality, human rights, violent and sex offenders

## 1 Introduction

### 1.1 Political Background

The general attitude towards violent and sex offenders changed in Germany in the second half of the 1990s. The reasons were multifaceted, but of major importance was the media coverage of several sexual offences against young girls in the mid-1990s. There was the much talked about case of Marc Dutroux, who kidnapped, raped and killed teenage girls in Belgium. In Germany, there was the case of a seven-year-old girl who was abused and murdered by a patient during day release in the vicinity of a mental hospital in 1994. There were the murders of two girls in 1996 and 1997 in Bavaria and Lower Saxony who were sexually abused and killed by ex-convicts after their release from a prison

sentence. The call for harsher sentences for 'dangerous' sex offenders grew louder and exerted considerable pressure on the German legislature, the judiciary, and the authorities of prisons and mental hospitals.

Parliament reacted in 1998 by the enactment of a law that brought remarkable changes to the German system of criminal sanctions.<sup>1</sup> The system as a whole still dated from a reform period in the late 1960s and had undergone the lapse of time without major interventions by public policy. The new law tightened the requirements for conditional release from prison and other custodial institutions by accentuating the necessity to consider public security interests. It became obligatory to obtain the opinion of a psychiatrist before a long-term sentence or a custodial preventive measure could be suspended. Directions to undergo medical treatment were allowed without the prior consent of the convicted person as long as he was not of an invasive nature or treatment for addiction, which meant that a convicted person could be compelled to go to psychotherapeutic treatment after his release. The scope of post-release supervision was widened; it was imposed by law on sex offenders having served a full sentence of more than one year in prison, whereas the law stipulated at the same time that other offenders must have served more than two years to trigger supervision after release. The courts were allowed to impose indeterminate supervision, if the offender did not consent to or comply with a medical treatment or an addiction treatment direction. Last but not least, the scope of preventive detention, in place since the 1930s, was widened by reducing the formal requirements for its imposition if an offender had been convicted of a felony (minimum prison sentence of one year), a sex offence or a qualified offence against the person.

The general attitude was not softened by these changes, fear of crime and the willingness to inflict punishment on dangerous offenders, namely sex offenders, remained on a high level. Although international comparisons showed that public opinion in Germany differed considerably from that in other countries, especially England and Wales and the USA, in that the approval rate of the public for imprisonment was still remarkably lower in

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1. Act to combat sexual offences and other dangerous offences of 26 January 1998, Federal Law Gazette I page 160; the act is commented by H. Schöch, 'Das Gesetz zur Bekämpfung von Sexualdelikten und anderen gefährlichen Straftaten vom 26.1.1998', 51 *Neue Juristische Wochenschrift* 1257 (1998).

Germany than in other countries,<sup>2</sup> the general attitude could not be ignored by German policy makers. Not only the conservatives who had authored the law of 1998, but also the social democrats who were in power 1998–2005 stood for a rigid course on dangerous and sex offenders. In 2001, Chancellor Schröder publicly articulated what many people deemed necessary: ‘Lock them away, forever’.<sup>3</sup> As a consequence, the first decade of the new century saw a continued shifting in the system of criminal sanctions with a further tightening of the restrictions on dangerous and sex offenders. Again and again, the scope of preventive detention was extended. The limitation of ten years for the first-time detainees was abolished retroactively, new forms of deferred and subsequent detention were introduced, and unlimited preventive detention was allowed for young adults and even for juveniles.<sup>4</sup> In addition, but without reference to specific incidents or cases, the provisions of supervision were enhanced and adapted to new security requirements in 2007.<sup>5</sup> Core elements of the Act of 2007 were the extension and fortification of the directions that may be imposed on a convicted offender after release as well as the further extension of the scope of indeterminate supervision. New directions were the order to present himself at certain times to a doctor, a psychotherapist or a forensic ambulance service, and the order to undergo psychiatric, psycho- or socio-therapy. Indeterminate supervision was additionally allowed for offenders, especially sex offenders, who violated directions, if this gave reason to believe that there was a danger to the general public by the commission of further serious offences.

The year 2009 brought a turning point. On 17 December 2009, the European Court of Human Rights ruled that the 1998 retrospective extension of preventive detention to an unlimited period of time had been incompatible with the right not to have a heavier penalty imposed than the one applicable at the time of the offence (Art. 7 ECHR).<sup>6</sup> On 13 January 2011, the Court confirmed that judgement and held that the subsequent order of preventive detention did not have the necessary causal connection between the conviction and the deprivation of liberty at issue, and therefore violated the detainee’s right to liberty and freedom (Art. 5 ECHR).<sup>7</sup> On 4 May 2011, the German Federal Constitutional

Court abandoned earlier judgements and found that there was no enough distance between the execution of a prison sentence and the execution of preventive detention, *i.e.* sentences and preventive detention were executed in similar settings and under similar conditions (*e.g.* in similar-sized cells). Therefore, all legal provisions of the imposition and duration of preventive detention were declared incompatible with the fundamental rights guaranteed by the German constitution, the so-called Basic Law.<sup>8</sup> Consequently, two new laws were enacted in 2010 and 2012, by which the requirements for the imposition and execution of preventive detention were redesigned. The first was a reaction to the 2009 decision of the European Court of Human rights; it practically abolished the subsequent order of preventive detention.<sup>9</sup> The second was a reaction to the 2011 decision of the Federal Constitutional Court; it determined that the execution of preventive detention and the antecedent imprisonment have to aim at the minimisation of the offender’s dangerousness and offer enough measures for an open, liberty-oriented detention regime.<sup>10</sup> Since then, the general debate on the proper handling of dangerous offenders has become less agitated and fearful in Germany. Public opinion seems to have eased off for a while, at last.

## 1.2 Supervision in the Twin Track System

Before going into the details of the indeterminate control of sex offenders in the community, it should be noted that the German system of criminal sanctions is a twin track system like in many other countries on the European continent. ‘Twin track’ means that the divergent functions of criminal sanctions are separated in the sentencing process and assigned to either the retributive track of penalties (imprisonment and fines), or the preventive track of custodial or non-custodial measures (‘measures of rehabilitation and security’). Entry requirement for the first track is the offender’s legal responsibility, and that for the second is the likelihood of further offences, which may be considered a synonym for the offender’s ‘dangerousness’. An offender who is convicted for drink-driving, for instance, is fined (punishment) and additionally disqualified from driving if necessary (a preventive measure) in Germany. A mentally ill or an addicted offender may receive a prison sentence and be additionally sent to a mental hospital or custodial addiction treatment, the time spent in custody for the latter credited against the sentence. A violent or a sex offender, to mention a third example, who is considered a danger to the general public, because the court finds a high risk of further serious offences resulting in serious emotional trauma or physical injury to the victim, has to serve the sentence of imprisonment first and is placed in preventive detention afterwards until the

2. J. van Dijk, J. van Kesteren & P. Smit, *Criminal Victimisation in International Perspective. Key Findings from 2004 – 2005 ICVS and EU ICS* (2007), at 147; K.-H. Reuband, ‘Steigende Repressionsneigung im Zeitalter der “Postmoderne”?’ 15 *Neue Kriminalpolitik* 100 (2003); K.-H. Reuband, ‘Steigende Punitivität oder stabile Sanktionsorientierungen der Bundesbürger? Das Strafverlangen auf der Deliktebene im Zeitvergleich’, 21 *Soziale Probleme* 97 (2010).

3. E.C. Rautenberg, ‘Wegschließen für immer!’, 54 *Neue Juristische Wochenschrift* 2608 (2001).

4. J. Kinzig, *Die Legalbewährung gefährlicher Rückfalltäter. Zugleich ein Beitrag zur Entwicklung des Rechts der Sicherungsverwahrung* (2008), at 9.

5. Act to reform supervision and to revise the provisions on subsequent preventive detention of 13 April 2007, Federal Law Gazette I page 513, with commentary by U. Schneider, ‘Die Reform der Führungsaufsicht’, 27 *Neue Zeitschrift für Strafrecht* 441 (2007).

6. ECtHR, *M. v. Germany*, Applic. No. 19359/04.

7. ECtHR, *Haidn v. Germany*, Applic. No. 6587/04.

8. Federal Constitutional Court of Germany, 4 May 2011, 2 BvR 2365/09.

9. Act to reorder the provisions on preventive detention of 22 December 2010, Federal Law Gazette I page 2300.

10. Act to implement the imperative of distance in the provisions on preventive detention of 5 December 2012, Federal Law Gazette I page 2425.



preventive measure is suspended or terminated. The advantage of the twin track system is seen in the effect that the penalties do not necessarily have to serve preventive needs. Because it is usually only a small group of offenders who show specific preventive needs, the consequence of the twin track system is that the general level of punishment can be kept at a rather moderate level (in Germany, the prison population rate per 100,000 population was 84.1 in 2013).<sup>11</sup> It is generally not assumed that the rate of recidivism, which appears to be quite high in Germany (46.2% of the persons released from imprisonment in 2007 were reconvicted after three years<sup>12</sup>), can effectively be reduced just by longer or harsher sentences.

In the German twin track system of criminal sanctions, there are two differing forms of non-custodial control of offenders: probation and supervision. Probation is a part of the retributive, penalty track and dependent on the suspension of a prison sentence. In Germany, sentences not exceeding two years may be suspended if there are reasons to believe that the convicted offender will not commit further offences. The normative assumption is that, in these cases, the preventive needs are better met by avoiding the offender's imprisonment. In the same way, the court may grant conditional early release from a prison sentence if the release is appropriate considering public security interests, *i.e.* if, again, it can be expected that the convicted person will not commit further offences. The basic requirement for probation is thus a low risk of reoffending, the courts having to be convinced that the offender will observe the directions, follow the guidance of a probation officer and not disappoint the expectation that no further offences are committed. The operational period may not exceed five years, an indeterminate control is not possible.

Supervision, on the other hand, is a non-custodial preventive measure of rehabilitation and security. Either it may be imposed by the courts, which is not relevant in practice (less than hundred cases per year<sup>13</sup>), or it emerges as the automatic consequence of the termination of a prison sentence or the suspension or termination of a custodial preventive measure (mental hospital, addiction treatment, preventive detention). The risks of further offences are varied in these cases. The risk is low if a custodial measure is suspended (because the suspension is bound by law to a low risk of re-offending, according to sec. 67d(2) German Criminal Code the offender must be expected not to commit any more unlawful acts if released). It is high if the offender had

to serve a full prison sentence or if a measure is terminated because the maximum period has expired (addiction treatment, two years) or because the continued enforcement of the measure would be disproportionate; if it were low, the offender would have been released earlier. During supervision, the released person is under the guidance and control of a supervising authority, a probation officer, forensic ambulance services, the courts and in some cases the police.<sup>14</sup> The offender's conduct is structured and influenced by directions imposed by the courts. The period of supervision may last between two and five years, or may be indeterminate. In all of these cases, supervision is terminated if the court expects that the convicted person will, even in the absence of further supervision, not commit any further offences.

It is because of the last mentioned indeterminate, potentially life-long control that supervision is considered the most intrusive community measure of German law. In spite of its substantial theoretical significance, however, there are no official statistics on the frequency of supervision in Germany. The only data available stem from an unofficial gathering organised by *Deutsche Bewährungshilfe e.V.*, a professional association for probation officers. This data collection indicates that there has been a considerable increase in supervision cases from 24,800 in 2008 to 36,700 in 2014 (+47.9%).<sup>15</sup> The reasons for the rise are unknown, but it can be assumed that there is a connection with the development of mental hospital and custodial addiction treatment orders, which has also seen a considerable increase in the past two decades.<sup>16</sup>

## 2 Indeterminate Supervision in the Light of Sentencing Theory

In Germany, the origins of the twin track system date back to the scholarly discussions of the late nineteenth/early twentieth century on the justification of punishment. Two conceptions competed, the conception of punishment as retribution for a crime committed in the past (classical school, in Germany tied to the name of Karl Binding, 1841–1920) and the conception of punishment as a means to prevent future crimes (modern school, propagated by Franz von Liszt, 1851–1919).<sup>17</sup> The result of the dispute was a compromise, which took suggestions of the Swiss professor Carl Stooss (1849–1934) and split the differing functions of punish-

11. Council of Europe, *Annual Penal Statistics. Space I – Prison Populations. Survey 2013* (2014), at 42.

12. J.-M. Jehle, H.-J. Albrecht, S. Hohmann-Fricke & C. Tetel, *Legalbewährung nach strafrechtlichen Sanktionen. Eine bundesweite Rückfalluntersuchung 2007 bis 2010 und 2004 bis 2010* (2013), at 36, available at: <[www.bmfv.de/DE/Ministerium/Fachthemen/AbtII/IIA7/Rueckfallstatistik\\_doc.html?nn=1468684](http://www.bmfv.de/DE/Ministerium/Fachthemen/AbtII/IIA7/Rueckfallstatistik_doc.html?nn=1468684)> (last visited 12 August 2015). An overview of recidivism studies in various European countries is given on the Internet: <<http://wp.unil.ch/space/publications/recidivism-studies/27/>> (last visited 19 April 2016).

13. Statistisches Bundesamt, *Rechtspflege. Strafverfolgung* (2013), table 5.5.

14. B.-D. Meier, *Strafrechtliche Sanktionen*, 4th edn (2015), at 296–301.

15. See <[www.dbh-online.de/fa/](http://www.dbh-online.de/fa/)> (last visited 31 July 2015).

16. M.P. Rohrbach, 'Die Verschärfung der Führungsaufsicht', 97 *Monatsschrift für Kriminologie und Strafrechtsreform* 248 (2014); see also C. Morgenstern, A. Hecht, 'Rechtstatsachen zur Führungsaufsicht im kriminalpolitischen Kontext', 58 *Bewährungshilfe* 186 (2011).

17. T. Vormbaum, *Einführung in die moderne Strafrechtsgeschichte*, 2nd edn (2011), at 137.

ment into the two systematically different tracks of penalties and measures. The first draft law based on this compromise was published as early as 1909,<sup>18</sup> but it was only a quarter of a century later that the new twin track system was formally enacted in 1933.<sup>19</sup> Since then, the existence of the twin track system has become an integral and undisputed part of criminal law in Germany.

In the German twin track system, retributive penalties are justified by looking back to the committed offence. The offender is punished because he has committed a crime, no further justification needed. At bottom, punishment is retaliation. It is a necessary means to the restoration of justice because, in retributive thinking, the wrong committed by the offender can only be evened out by the infliction of a suffering on him, a consideration unfolded by German idealism, mainly by Immanuel Kant (1724–1804). In today's German criminal law theory, however, it is not the wrong of the offence that is counterbalanced by the sentence but rather the offender's guilt, *i.e.* his personal responsibility for the violation of law. An offender may only be punished if when committing the crime he was aware that he was acting unlawfully, he was capable to appreciate the unlawfulness of his actions and act accordingly, and it could reasonably be expected from him to abide by the law because he was not in a situation of duress. Guilt is, in other words, the blameworthiness of the offender for not using his capacity to abide by the law.<sup>20</sup>

In sentencing theory, these considerations legitimising the right to punish are transferred to the determination of the severity of the sentence for a given offence. All aspects that can be related to the offence are evaluated in the light of guilt, which includes not only the offence itself but also the pre- and post-offence behaviour (earlier sentences, confession, redress, etc.).<sup>21</sup> It is in this sense the notion of guilt has to be understood if German law stipulates in sec. 46(1) Criminal Code: 'The guilt of the offender is the basis for sentencing'. The popular saying that punishment should fit the crime thus does not apply in German law. Punishment is rather construed as a function of guilt. The concept of guilt does not imply that preventive aspects from deterrence to rehabilitation are completely irrelevant in the retributive track of punishment. They are not of major importance, though, and may only be considered in the range defined by the severity of offender's individual guilt. A convicted person may therefore not be sent to prison for a longer period of time than required by the degree of his guilt, even if security reasons require the placement in a mental hospital or preventive detention afterwards.<sup>22</sup> As supervision, on the other hand, is not

considered a form of punishment but a preventive measure, it may be inflicted without regard to the offender's severity of guilt.

The theoretical justification of the preventive track of custodial and non-custodial measures is less clear. Most authors identify a utilitarian principle of predominant public interest that legitimises any form of intervention into the private sphere as long as the safeguards of proportionality are observed.<sup>23</sup> In the case of preventive criminal sanctions, the principle of predominant public interest emerges as a means to protect the public against the danger of further offences. The offence committed in the past provides the motivation, but not the justification for the offender's conviction and the imposition and execution of sanctions; the justification is derived solely from the risk of future offences and the imminent danger for public security. The principle of predominant public interest is, however, strictly bound to the proportionality of the sanction. As sec. 62 of the German Criminal Code states: 'A measure of rehabilitation and incapacitation must not be ordered if its use is disproportionate to the seriousness of the offence committed by or expected to be committed by the convicted person and to the degree of danger he poses to society'. As sec. 62 applies to all forms of preventive measures in German law, supervision is likewise bound to the principle of proportionality. Supervision may only be imposed and executed if and as long as it is necessary to achieve its aim of public protection.

In the focus of all preventive measures is the concept of danger, *i.e.* the prospect that further offences will be committed. Under the principle of proportionality, 'danger' must be understood as a dynamic concept, which needs to be adapted to the depth of intrusion into the private sphere going along with the different forms of preventive measures. Custodial measures may, for instance, be justified only with a greater degree of 'danger' than non-custodial measures, an indeterminate mental hospital order requires a greater degree of danger than a custodial addiction treatment order, which is limited to two years in German law.<sup>24</sup> Similar considerations apply to different embodiments of supervision. The more intensive forms, particularly indeterminate supervision or its combination with specific directions such as electronic monitoring, require a greater degree of danger than minor forms that may be less intrusive. The 'degree of danger' addressed in sec. 62 German Criminal Code can, at least in theory, be related to the likelihood as well as to the seriousness of the future offences; the more serious the expected offences are, the lower the likelihood by which they are expected may be, and vice versa. Nearness of the expected offences and the validity of the instruments used for risk assessment

18. Reichsjustizamt, *Vorentwurf zu einem Deutschen Strafgesetzbuch. Begründung. Allgemeiner Teil* (1909), at 147.

19. Act against dangerous habitual offenders and on measures of security and rehabilitation of 24 November 1933, Imperial Law Gazette I page 995.

20. Federal Court of Justice, 18 March 1952, GSSt 2/51.

21. Meier, above n. 14, at 192; see also F. Streng, *Strafrechtliche Sanktionen*, 3rd edn (2012), at 255.

22. Federal Court of Justice, 4 August 1965, 2 StR 282/65.

23. W. Frisch, 'Die Maßregeln der Besserung und Sicherung im strafrechtlichen Rechtsfolgensystem', 102 *Zeitschrift für die gesamte Strafrechtswissenschaft* 369, at 382 (1990); G. Kaiser, *Befinden sich die kriminalrechtlichen Maßregeln in der Krise?* (1990), at 12; see also Federal Constitutional Court of Germany, 4 May 2011, 2 BvR 2365/09.

24. A. Desecker, *Gefährlichkeit und Verhältnismäßigkeit. Eine Untersuchung zum Maßregelrecht* (2004), at 132.

may be seen as additional aspects that may be taken into account. Proper judgements on the ‘danger’ a convicted person poses to society are thus quite a difficult task and sometimes hard to achieve in practice.<sup>25</sup> Whenever a court feels that it lacks the necessary empirical knowledge, expert opinion must be heard.

Supervision is construed as a preventive measure that is imposed and executed under criminal law in Germany. It is justified by the predominant interest in public security and is bound to the principle of proportionality, the hardship going along with its imposition or execution being acceptable, provided that it is proportionate to the degree of danger attributed to the offender. Indeterminate supervision is no exception. According to sec. 68c(2) German Criminal Code, indeterminate supervision is permitted, if the convicted person does not consent to or comply with a medical treatment or an addiction treatment direction and ‘a danger to the general public through the commission of further serious offences is to be expected’ (introduced in 1998). According to sec. 68c(3), indeterminate supervision is permitted, if in the case of a suspended mental hospital order there is reason to believe that the convicted person is otherwise about to lapse into a state of mental incapacity or if a violent or a sex offender violates directions imposed on him by the court or ‘other specific circumstances give reason to believe that there may be a danger to the general public by the commission of further serious offences’ (introduced in 2007). As indeterminate supervision results in a substantial, potentially life-long restriction of the offender’s liberty, the legal provisions have to be applied carefully and restrictively by the courts.<sup>26</sup>

There is, of course, more academic debate on sentencing theory, the principles of sentencing, the theoretical justification of the preventive measures, and the concepts of danger and proportionality than has been outlined here. The concept of personal guilt has been challenged by authors who recommend the replacement by a sentencing system that is solely built on the severity of the offence and the concept of harm, thus unburdening the present system of the necessity to consider highly individualised aspects of personal guilt and preventive needs.<sup>27</sup> Moreover, it has been pointed out that the concept of danger, which underlies all preventive measures, requires reliable forensic prediction methods independent of judgemental discretion, which are difficult to achieve in practice; the suggestion has been that the empirical foundation of the preventive measures should be replaced by a normative system of a fair distribution

of risks.<sup>28</sup> All of these approaches, however, have not been taken up by the legislature or the judiciary; their influence has been limited to academic circles. Nevertheless, in the past few years, it could be observed that there has been a new, increased awareness of the methodological problems of prediction methods throughout the courts and the forensic institutions.

### 3 Indeterminate Supervision and the Principle of Proportionality

#### 3.1 Law in Books

In German law, the principle of proportionality consists of four elements: there must be an aim for the measure legitimate under Basic Law, the measure must be suitable to achieve the aim, the measure must be necessary to achieve the aim, *i.e.* the aim cannot be reached by less intrusive means, and considering the competing interests the measure must be adequate.<sup>29</sup> In the context of supervision, the first of these elements is not questionable. It is generally acknowledged that the protection of the public is an objective that may legitimately be pursued by the state. Averting dangers to protect the public is in Germany considered one of the main functions of the state, which may even be derived from the fundamental rights guaranteed by the constitution. According to the German Federal Constitutional Court, the basic rights do not only constitute a defence against the state, but they also establish claims, *i.e.* in the case of criminal law, the claim to receive protection against unlawful attacks.<sup>30</sup>

The second element, suitability, depends on how the measure of supervision is organised. It is obvious that the public protection provided by a non-custodial measure differs from the protection granted by custodial measures such as preventive detention or imprisonment. Nevertheless, supervision is not a totally inept (and therefore disproportionate) means to prevent the convicted person from re-offending. German law uses a twofold approach for the execution of supervision, which is a combination of control and support. Most powerful is the supervising authority, a branch of the general administration of justice that has the task to control the conduct of the convicted person and the fulfil-

25. *Ibid.*, at 187.

26. Marburg Regional Court, 13 January 2014, 11 StVK 9/14; K.-H. Groß, *Münchener Kommentar zum Strafgesetzbuch*, 2nd edn (2012), sec. 68c n. 7; J. Kinzig, *Schönke/Schröder. Strafgesetzbuch. Kommentar*, 29th edn (2014), sec. 68c n. 2.

27. T. Hörnle, *Tatproportionale Strafzumessung* (1999); T. Hörnle, ‘Das antiquierte Schuldverständnis der traditionellen Strafzumessungsrechtsprechung und -lehre’, 54 *Juristenzeitung* 1080 (1999); but see also Streng, above n. 21, at 314-17.

28. Streng, above n. 21, at 166-67; W. Frisch, ‘Defizite empirischen Wissens und ihre Bewältigung im Strafrecht’, in R. Bloy, M. Böse, T. Hillenkamp, C. Momsen & P. Rackow (eds.), *Gerechte Strafe und legitimes Strafrecht. Festschrift für Manfred Maiwald* (2010), 239 at 252; W. Frisch, *Prognoseentscheidungen im Strafrecht. Zur normativen Relevanz empirischen Wissens und zur Entscheidung bei Nichtwissen* (1983), at 53-55, 161-70.

29. J. Kaspar, *Verhältnismäßigkeit und Grundrechtsschutz im Präventionsstrafrecht* (2014), at 101; Dessecker, above n. 24, at 343.

30. Federal Constitutional Court of Germany, 25 February 1975, 1 BvF 1/74; 29 May 1993, 2 BvF 2/90; K. Stern, ‘Die Schutzpflichtenfunktion der Grundrechte: Eine juristische Entdeckung’, 63 *Die öffentliche Verwaltung* 241 (2010); V. Epping, *Grundrechte*, 6th edn (2015), at 59.

ment of the directions imposed upon him by the court.<sup>31</sup> If the convicted person does not comply with the directions, the supervising authority informs the court and has the right to file a request for prosecution because non-compliance with court orders constitutes a new offence in Germany punishable with up to three years of imprisonment (sec. 145a German Criminal Code). Social support, on the other hand, comes from a probation officer who is assigned by the court. The probation officer has the task to offer assistance and care according to social work standards. Their work is supplemented by forensic ambulance services, which were introduced in 2007. If the court imposed a therapy direction, *i.e.* a direction to undergo psychiatric, psycho- or socio-therapy, the forensic ambulance services offer these options to the offender. The three institutions (supervising authority, probation officer and forensic ambulance service) are by law obliged to work together and disclose secrets to each other (sec. 68a German Criminal Code). In the case of sex offenders released from prison or custodial preventive measures, the cooperation of the three institutions is additionally reinforced by the police. Since 2006, all German states have developed special programmes for the supervision of this particular group of offenders. The common feature of these programmes is that all sex offenders undergo individual risk assessments in round-table conferences chaired by the police. In these conferences, the risk is categorised, and the measures considered necessary and appropriate to prevent the convicted sex-offenders from re-offending are determined individually.<sup>32</sup> Although the effectiveness of these programmes or of supervision as a whole has not yet been evaluated empirically in Germany, it can safely be assumed that the measures help to reduce the risk of further offending and thus make a contribution to public protection. The measure of supervision is, in other words, not unsuitable to reach its aim.

The third element of proportionality, necessity, is dependent on the existence of less intrusive means to achieve the aim of public protection. In the German legal system, these less intrusive means can only come from the police laws, *i.e.* from the laws addressing safety and security needs and requirements. In this context, it is necessary to understand that in the German legal system, the position of the police is based on two foundations: criminal law and security law as part of administrative law. If police activities result from a criminal offence committed in the past, the legal basis is criminal law; in all other cases it is security law.<sup>33</sup> Most preventive measures impossible under criminal law can be

imposed under the security laws as well if a danger for public security is expected. Football hooligans, for instance, which may not have committed a criminal offence in the past, may nevertheless be registered, categorised, addressed and supervised according to the security laws if the police expects a danger for public security, especially if they expect the commission of an offence.<sup>34</sup> Under specific circumstances, even arrest and detention of a hooligan may be justified and are compatible with European law.<sup>35</sup> Police activities based on the security laws can thus not necessarily be considered less intrusive than activities based on criminal law, although they are bound to a different, more restrictive degree of 'danger': the police laws stipulate that the danger must be 'concrete', *i.e.* it must be sufficiently probable that public security will be affected by some damaging event. The preventive measure of supervision under criminal law, on the other hand, is only bound to the 'danger that the (convicted) person will commit further offences' (sec. 68(1) German Criminal Code), which appears to be a more general concept. The differences, however, are marginal. The criminal courts are by law obliged to terminate supervision, 'if it can be expected that even in the absence of further supervision the person will not commit any further offences' (sec. 68e(2) German Criminal Code). It is therefore hardly possible to claim that supervision based on criminal law is disproportionate because public security measures under police law are less intrusive.

The last element of proportionality, adequacy, compares the different interests at hand. The hardship imposed upon the individual must be appropriate to the gains reached for the public. It is in this context that the intensity in type and duration of the particular form of supervision (*e.g.* its indeterminate length) must be weighted and balanced against the likelihood and the seriousness of further offences that the convicted person is expected to commit in the absence of supervision, and the imposition of supervision is expected to avert. The seriousness of the offence(s) committed in the past, which is also mentioned in sec. 62 German Criminal Code as an element of the evaluation, is in this context only of minor importance because supervision is typically only imposed if the offence(s) committed in the past may be considered as 'serious'; whether imposed by court or executed as an automatic consequence of the judgement, supervision becomes operational only in conjunction with custodial sanctions, not with fines or other non-custodial consequences of the committed offence. Provided that the degree of danger that is necessary for the imposition of supervision (notably the seriousness and the likelihood of the future offences) can be established in the particular case, the proportionality test thus requires that the depth of intrusion into the offender's private sphere is elaborated and weighted.

31. A. Dessecker, 'Von der Polizeiaufsicht zur Führungsaufsicht und zurück?', in E. Hilgendorf and R. Rengier (eds.), *Festschrift für Wolfgang Heinz* (2012) 631, at 634.

32. D. Ruderich, *Führungsaufsicht* (2014), at 245; S. Thomaßen, 'Konzeption zum Umgang mit rückfallgefährdeten Sexualstraftätern (KURS NRW)', 6 *Forensische Psychiatrie, Psychologie, Kriminologie* 25 (2012); M.P. Rohrbach, *Die Entwicklung der Führungsaufsicht unter besonderer Berücksichtigung der Praxis in Mecklenburg-Vorpommern* (2014), at 152; Rohrbach, above n. 16, at 257.

33. F. Schoch, 'Doppelfunktionale Maßnahmen der Polizei', 35 *Juristische Ausbildung* 1115 (2013).

34. T. Siegel, 'Hooligans im Verwaltungsrecht. Stadionverbote und andere polizeirechtliche Maßnahmen zur Eindämmung von Gewalt in Fußballstadien', 66 *Neue Juristische Wochenschrift* 1035 (2013).

35. ECHR, *Ostendorf v. Germany*, Applic. No. 15598/08.



This can hardly be done in a general way because in practice supervision may be executed in a variety of forms emphasising either the aspects of social support and reintegration or the aspects of guidance and control. For a legal discussion, however, it is sufficient to know that supervision is established by law as a flexible instrument that can and must be adapted to the convicted person's individual developments after release.<sup>36</sup> All decisions on the particular execution of supervision can subsequently be reviewed, modified or vacated by the courts (sec. 68d(1) German Criminal Code), the maximum duration may be reduced and the measure may be terminated (sec. 68c(1) and 68e(2) German Criminal Code). All subsequent decisions are subject to legal review (sec. 463(2) German Code of Criminal Procedure). The flexibility and adaptability of the law thus preclude (at least in theory) a situation in which supervision may be considered a hardship for the offender not in balance with the gains reached for public security. From a theoretical point of view, supervision, and even indeterminate supervision, is consistent with the principle of proportionality.<sup>37</sup>

### 3.2 Law in Action

The obvious question is how the theoretical concept of proportionality is applied in practice, *i.e.* whether the imposition and execution of supervision are applied in a way that is suitable, necessary and adequate to achieve the aim of public protection. Empirical data are available from a study conducted by a research team headed by German criminologists Jörg Kinzig and Alexander Baur from Tübingen University. The study is based on the examination of 606 records of supervision cases and the questioning of over 900 professionals in the field of supervision; it can be considered representative for the situation in Germany.<sup>38</sup>

Kinzig and Baur differentiate between three types of supervision: supervision after suspension of a custodial preventive measure (type I, low risk), supervision after termination of a custodial preventive measure (type II, which is a combination of different subgroups, high risk) and supervision after having served a full prison sentence (type III, high risk). In all of these cases, supervision is imposed by law and the courts' decisions are restricted to the execution of the measure. The judicial decisions on the execution include assignment of the supervising authority and appointment of a probation officer, imposition of directions, determination of the period of supervision and subsequent decisions. With respect to the principle of proportionality, the determination of the duration of supervision is most interesting. Although the law provides that the period may be fixed between two and five years, five years being the preset duration, if the courts make no decision (sec. 68c Ger-

man Criminal Code),<sup>39</sup> in practice the courts are reluctant to exert the discretion granted by law and in most cases stick to the maximum duration of five years instead. In the Kinzig and Baur study, the period was held at five years in 64.6% of the type I cases, 65.5% of the type II cases and 81.2% of the type III cases, whereas the minimum of two years was fixed only in 0.8%, 4.3% and 2.0% of the three groups, respectively.<sup>40</sup> This distribution is noticeable because it differs from the distribution that might be expected if probability calculation was applied; especially in the type I group of low-risk offenders, one might expect a remarkably lower percentage of maximum periods. Even if Kinzig and Baur also found that life-long supervision is in practice very rare,<sup>41</sup> the distribution thus signals that the majority of the courts act risk oriented and cautious in Germany, showing less interest in the offenders' liberty rights than in the idea of public security. Apart from that, the theoretical option to revise the one-sided distribution by subsequent decisions (sec. 68d German Criminal Code) is in practice made use of only in a small number of cases.

In light of these findings, the question arises, what is known about the 'real' rate of further offences committed by convicted persons under supervision? The effort to give an empirically validated answer is confronted with a series of methodological problems. Nevertheless, there is an analysis of the national register of criminal convictions conducted under the guidance of German criminologists Jörg-Martin Jehle and Hans-Jörg Albrecht. The study analysed inter alia the reconviction rates of all persons who had either been convicted and received a non-custodial sanction by German courts in 2007, or been released from imprisonment or a custodial preventive measure in 2007; in both cases the period under observation was three years. Directly comparable to the Kinzig/Baur study are only the results concerning convicted persons with a full prison sentence (type III supervision in the Kinzig and Baur study). Jehle and Albrecht found that, in this group, 40.4% of the persons released from prison re-offended within the observation period of three years. Other than in the Kinzig/Baur study in which the authors differentiated between suspension and termination of a custodial measure (type I and II), Jehle and Albrecht differentiated between offenders who had been sanctioned with an isolated custodial measure and offenders who had received the measure as an addendum to a retributive punishment (*i.e.* a combination of retributive and preventive punishment). In the first case, the reconviction rates were considerably lower (5.0% after release from mental hospital, 24.2% after release from custodial addiction treatment) than those in the second case (23.2% after mental hospital, 41.9% after addiction treatment, 39.4% after

36. H. Schneider, *Strafgesetzbuch. Leipziger Kommentar*, 12th edn (2008), sec. 68d n. 6.

37. For determinate supervision, see Federal Constitutional Court of Germany, 15 August 1980, 2 BvR 495/80.

38. A. Baur and J. Kinzig (eds.), *Die reformierte Führungsaufsicht* (2015).

39. Dresden Higher Regional Court, 12 December 2008, 2 Ws 380/08; H. Ostendorf, *Nomos Kommentar Strafgesetzbuch*, 4th edn (2013), sec. 68c n. 5; but see also Berlin Higher Regional Court, 20 June 2011, 2 Ws 159/11.

40. Baur and Kinzig, above n. 38, at 533.

41. *Ibid.*, at 538 and 543.

preventive detention).<sup>42</sup> The reconviction rates in the Jehle and Albrecht study, however, include all kinds of convictions (offences similar to the earlier offences or not) and all kinds of sanctions (custodial and non-custodial); they may therefore not necessarily be interpreted as indicators of a general 'dangerousness' of the convicted persons under supervision. Reconvictions because of serious offences similar to the first offence are not as frequent as a misreading of the Jehle and Albrecht figures might suggest.

Empirical data, in the contrary, suggest that the likelihood of further offences is overestimated in judicial practice. In Germany, several studies have been conducted on the development of convicted persons' criminal behaviour after release. The examined persons either could not be sent to preventive detention or had to be released from preventive detention for formal reasons, although the judicial authorities were convinced that the persons in question were 'dangerous', *i.e.* although they exhibited a high risk of committing further serious violent or sex offences. A study by Jürgen L. Müller et al. found that of all offenders officially considered as 'dangerous' (n = 25), 60% re-offended in an observation period of two years. Only in 28% of the cases, however, the authors classified the re-offence as 'serious', because the offender received an unsuspended prison sentence of more than eighteen months, while 32% of the cases were considered 'minor'.<sup>43</sup> Similar results were shown in a study by Michael Alex from Bochum University. In his study, Alex examined a sample of 121 high-risk offenders who had to be released from prison, after they had served their full sentence, although the public prosecutor still considered them dangerous. In this group, Alex found a rate of 52% of ex-inmates re-convicted after an observation period of at least forty-eight months. In more than half of the cases (29.8%), the re-offence was considered 'serious', because the offenders were sanctioned with unsuspended prison sentence, while in the rest of the cases the offenders received milder forms of punishment.<sup>44</sup>

These and similar results in other studies<sup>45</sup> can be explained by the systematic difficulties hindering the exact prediction of events with a low base rate: the lower the base rate, the larger is the rate of false positives, if all other circumstances are kept equal.<sup>46</sup> As serious offences have a low base rate (the more serious the lower it is), the prediction of future offences is burdened with the methodological problem that false positives will inevitably be predicted more often than false negatives. Prediction is, in other words, burdened with a systematic bias that seems to be unknown to the majority of courts but

that becomes apparent in the results of empirical research.<sup>47</sup> Moreover, it must be noted that the factual basis of prediction is often quite thin. The future development of many of the risk and protective factors considered relevant by most prediction methods (*e.g.* relations to significant others, employment and place of residence) is unknown to courts and expert witnesses at the time of prediction, so their influence on the convicted person's future behaviour can hardly be assessed properly.<sup>48</sup> The consequence is a bitter finding about the capacity of the principle of proportionality to guide and control judicial decisions in the field of preventive sanctions: if the prediction of the 'degree of danger' (*cf.* sec. 62 German Criminal Code), which is necessary for the imposition and execution of these sanctions, is in practice flawed by the inevitability of systematic errors, the protective function of the proportionality principle is in theory remarkably more promising than in practice. The necessity and the adequacy of (indeterminate) supervision can in practice easily be misjudged.

## 4 Alternative (Less Intrusive) Means

It has already been pointed out that there are no means in German law that are as suitable as supervision to achieve the aim of public protection and that are at the same time less intrusive. Police law interventions are not necessarily less intrusive than post-release supervision. Civil law offers no alternatives as well. In 2010, a new law was enacted in Germany, which provides for the placement of persons who had to be released from preventive detention, because the retroactive application of indefinite post-sentence preventive detention was interpreted by the European Court of Human Rights as amounting to the retroactive imposition of a heavier penalty incompatible with European human rights law.<sup>49</sup> These persons may be placed in closed institutions if they are considered to be of unsound mind (*cf.* Art. 5(1)(e) ECHR) and if there is a high probability that they will affect the life, personal integrity, freedom or sexual self-determination of others so that their placement is considered necessary for public protection (sec. 1 Therapy and Placement of Mentally Disturbed Violent Offenders Act). The act was held compatible with German constitutional law, provided it is interpreted in accordance with the constitution meaning that there must be a very high risk of further crimes with a very severe impact on the victims.<sup>50</sup> Placement in a closed institution thus is not a measure less intrusive than supervision and may therefore not be seen as an alternative. Neither may the appointment of a custodian

42. Jehle *et al.*, above n. 12, at 83.

43. J.L. Müller, 'Legalbewährung nach Gutachten zur nachträglichen Sicherungsverwahrung', 94 *Monatsschrift für Kriminologie und Strafrechtsreform* 256 (2011).

44. M. Alex, 'Kriminalprognose und Legalbewährung – Wie zuverlässig lässt sich Rückfallgefahr vorhersagen?', in K. Höfler (ed.), *Brauchen wir eine Reform der freiheitsentziehenden Sanktionen?* (2015) 21, at 26.

45. Kinzig (2008), above n. 4, at 213 and 217.

46. J. Kühl and K.F. Schumann, 'Prognosen im Strafrecht – Probleme der Methodologie und Legitimation', 7 *Recht & Psychiatrie* 126 (1989).

47. Meier, above n. 14, at 372.

48. Alex, above n. 44, at 33.

49. Act on the therapeutic placement of mentally disturbed violent offenders of 22 December 2010, Federal Law Gazette I page 2300.

50. Federal Constitutional Court of Germany, 11 July 2013, 2 BvR 2302/11.

to the convicted person be considered an alternative. According to German civil law, a custodian may be appointed if a person by reason of a mental illness or a physical, mental or psychological handicap cannot take care of his affairs (sec. 1896 German Civil Code). The aim of the appointment, however, is not public protection but the safeguarding of the best interests of the person under custodianship (sec. 1901(2) German Civil Code). The target groups thus are different; custodianship and supervision have objectives that must be kept apart clearly.

Against this background, it may come as a surprise that there are some authors in German academic literature who are of the opinion that supervision is not compatible with the principle of proportionality.<sup>51</sup> They bring the example of a high-risk offender who is sanctioned for a violent or a sex offence with imprisonment of, e.g. two years and placed in preventive detention afterwards. Because of the high risk of re-offending, the convicted person will not get an early release after sixteen months (*i.e.* two-thirds of twenty-four months), but he will have to serve the full term of two years (sec. 57(1) German Criminal Code). Afterwards, he may have to spend up to ten years in preventive detention (sec. 67d(3) German Criminal Code), followed by a period of up to five years during which he will be subject to supervision (sec. 68c(1) German Criminal Code). The convicted person is thus under the control of the criminal justice authorities for up to seventeen years, although his punishment was only two years; this is considered disproportionate. The problem with examples like this is that they obtain their persuasive power only from the severity of offence committed in the past, but do not give any information on the seriousness and likelihood of the future offences. Because the duration of preventive detention has to be suspended as soon as it can be expected that the offender will not commit further offences if released (sec. 67d(2) German Criminal Code), the example tacitly implies that there is still a certain risk of re-offending at the end of the ten-year period of preventive detention that excludes an earlier release, but it is, on the other hand, not sufficient for a prolongation of preventive detention for more than ten years. The individual risk may, however, be sufficient to justify the measure of supervision because supervision is a non-custodial measure and therefore less intrusive than preventive detention. With respect to its aim to protect the public against further offences, there are no surrogates in German law capable to achieve the same aim by a smaller burden on the convicted person's liberty rights. As a result, it seems inevitable to accept that, in the given example, supervision probably is not a disproportionate means of control.<sup>52</sup>

The example once again shows that the potential of the principle of proportionality is limited because it does not provide for the difficulties to predict reliably dangers to the public. Danger and necessity are concepts that can be described and applied in theory better than in practice. What remains is unease about a preponderance in public policy of security considerations over liberty rights. In this context, it seems worthwhile to note that Kinzig and Baur made a highly interesting suggestion that aims at a legislative re-evaluation of the competing interests. The authors recommend a reduction in the maximum duration of supervision from presently five years (sec. 68c(1) German Criminal Code) to three years, which may be extended for two more years if necessary.<sup>53</sup> As the diverging interests at hand, public protection as well as liberty rights, are provided for by this suggestion in a balanced and responsible way, it cannot be excluded that the proposition might be taken up by German public policy.

## 5 The Human Rights Perspective

The compromise between public security and individual liberty rights that defines the convicted person's legal position in Germany today is only indirectly influenced by the European human rights perspective. The German Federal Constitutional Court ruled in its judgement of 4 May 2011 that the European Convention on Human Rights does not rank higher or on the same level as German constitutional law but that it ranks below the constitution and has only the legal force of ordinary federal law.<sup>54</sup> A violation of European human rights can therefore not be contested by an appeal to the German Constitutional Court. The German constitution, *i.e.* the Basic Law, is nevertheless considered as open and friendly to international law. 'Friendly' means that the constitution has to be interpreted in light of the European Convention and the European Court's judgements as long as this does not lead to a weakening of the standard of protection of the basic rights according to the constitution. The German Constitutional Court identified as one of the examples for such a weakening the so-called multipolar settings involving more than one affected party, where the rights involved needed to be carefully balanced against each other and where more protection given to one party would inevitably imply less protection for the other.<sup>55</sup> According to the Constitutional Court, the principle of proportionality is the preferential method to incorporate the European Court's deliberations into national law.

51. Ostendorf, above n. 39, pre secs. 68-68g n. 15; see also H. Pollähne, 'Effektivere Sicherheit der Bevölkerung und schärfere Kontrolle der Lebensführung', 90 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtsprechung* 414 (2007); C. Morgenstern, 'Neues zur Führungsaufsicht', 18 *Neue Kriminalpolitik* 153 (2006).

52. Ruderich, above n. 32, at 90.

53. Baur and Kinzig, above n. 38, at 592.

54. Federal Constitutional Court of Germany, 4 May 2011, 2 BvR 2365/09, n. 83.

55. *Ibid.*, n. 93; B. Peters, 'Germany's Dialogue with Strasbourg: Extrapolating the Bundesverfassungsgericht's Relationship with the European Court of Human Rights in the Preventive Detention Decision', 13 *German Law Journal* 182 (2012).

In the 1980s, the German Constitutional Court ruled that supervision imposed by law as an automatic consequence of release after two years of imprisonment was consistent with the principle of proportionality.<sup>56</sup> In those days, the European Convention was not paid much attention to by the German judiciary, though, and the duration of supervision was limited to a maximum of five years. The question thus arises as to whether the law which was expanded in 1998 and 2007 with the option of indeterminate supervision is still in accordance with European fundamental rights, even if these only indirectly influence the interpretation and practice of German national law.

For such a re-examination, it is necessary to decide in the first step whether supervision is a form of deprivation of the convicted person's liberty or whether it is just a restriction of liberty. From the German perspective, the distinction may seem to be only of minor importance because the specific safeguards for deprivation of liberty in Article 104 Basic Law (namely formal law and judicial order) are undoubtedly met, but Article 5 ECHR constitutes additional safeguards, which must be met if deprivation of liberty is under scrutiny.<sup>57</sup> In the *Guzzardi* case, the European Court specified some of the criteria relevant to the distinction between deprivation and restriction of liberty, above all type, duration, effects and manner of implementation of the particular measure.<sup>58</sup> Of these, duration is a criterion that might give cause to classify supervision as deprivation of liberty, because the preventive measure may in exceptional cases last for life, while all other criteria suggest that the convicted person is not deprived of but only restricted in his liberty. The duration of a measure alone, however, may hardly be sufficient to exclusively decide on the appropriate classification of the measure, rather it seems necessary to make an overall assessment of the given criteria. Such an overall assessment would focus on the function of the measure and emphasise the fact that supervision serves as a non-custodial means in the transition process between custody and unrestricted liberty. From the functional point of view, supervision as an abstract sanction category should therefore rather be classified as merely a restrictive measure, which would have the consequence that the safeguards of Article 5 ECHR do not apply.

A different evaluation might come to mind if supervision is seen in connection with particular directions by which the offender is de facto prevented from leaving certain places or areas, e.g. the direction to carry the equipment for electronic monitoring and not leave home.<sup>59</sup> If these cases are judged as deprivation of liberty, they have to comply with the safeguards of the Convention, i.e. the direction must be considered either as a consequence of the earlier conviction (Art. 5(1)a ECHR)

or as necessary to prevent the convicted person from committing further offences (Art. 5(1)c ECHR). Both options have their own disadvantages. In the first case, it seems doubtful whether there is a 'sufficient causal connection between the conviction and the deprivation of liberty at issue',<sup>60</sup> and in the second case, it is doubtful whether the potential further offences are 'sufficiently concrete and specific'.<sup>61</sup> So far, the problem has not been discussed in Germany.<sup>62</sup> Nevertheless, it can be assumed that the connection between the conviction and the said directions probably is sufficient enough to comply with the Convention. In those cases in which supervision is the automatic consequence of release from prison or a custodial preventive measure, the courts' subsequent decisions are predetermined by law; they are dependent on the earlier conviction and the determination of the concrete form of punishment.

If supervision is considered a restriction of liberty, another fundamental right comes into view that is guaranteed in German national law as well as in European law: the right not to be punished twice (Art. 103(3) Basic Law, Art. 4 ECHR Protocol No. 7). In most cases, preventive supervision emerges as a criminal sanction at a time when the primary sanction (imprisonment and/or a custodial preventive measure) has been executed and the convicted person expects to regain unrestricted liberty. From the released offender's point of view, it can be presumed that the period of guidance and control that follows, if he is under supervision, has the appearance of a second punishment. Nevertheless, technically a violation of the basic right not to be punished twice must be rejected, first because supervision is not considered a form of punishment in Germany (but a preventive measure), and second because it is not construed as an independent judgement, but as a legal, i.e. automatic consequence of the conviction. The judicial decisions that follow after release (e.g. on the duration of supervision, the directions and the cooperation of the institutions) modify the execution of supervision, they are subsequent decisions, but they are not a second punishment for the offence.<sup>63</sup> Neither does supervision, by the way, violate the right that there must be no punishment without law (Art. 103(2) Basic Law, Art. 7(1) ECHR) because the specific consequences of supervision are laid down in the Criminal Code and are part of the legal framework that establishes the consequences of the conviction, from the duty to bear the costs of the proceedings to the entry of the conviction and other particulars in the federal central criminal register. If the European Court ruled in the *Kafkaris* case that the term 'law' implies qualitative requirements, including those of

56. Federal Constitutional Court of Germany, 15 August 1980, 2 BvR 495/80, n. 6.

57. R. Esser, *Löwe-Rosenberg. Die Strafprozessordnung und das Gerichtsverfassungsgesetz*, 26th edn (2012), EMRK Art. 5 n. 24.

58. ECtHR, *Guzzardi v. Italy*, Applic. No. 7367/76, n. 92.

59. Cf. Esser, above n. 57, EMRK Art. 5 n. 27.

60. ECtHR, *Haidn v. Germany*, Applic. No. 6587/04, n. 75.

61. ECtHR, *M. v. Germany*, Applic. No. 19359/04, n. 102; *Haidn v. Germany*, Applic. No. 6587/04, n. 90.

62. Cf. H.-U. Paeffgen, *Systematischer Kommentar zur Strafprozessordnung*, 4th edn (2012), EMRK Art. 5 n. 33c.

63. Nuremberg Higher Regional Court, 10 November 2014, 2 Ws 509/14, n. 17.



accessibility and foreseeability,<sup>64</sup> these requirements are met by German law beyond doubt.

Thus in the end, it is the general principle of proportionality, again, which has to be examined, because in German legal thinking any measure by state authorities that is an interference with the general freedom of action granted by German constitutional law (Art. 2(1) Basic Law) must comply with the rule of law principle of which the proportionality of the measure is an integral part. It has already been pointed out that the German Federal Constitutional Court ruled as early as 1980 that preventive supervision is fully consistent with the principle of proportionality because it may be applied only in those cases in which further offences are expected. The flexibility of the principle, which is a consequence of the open and unspecified notions used in its construction ('necessary', 'adequate'), however, leaves little room for a speculation that how the Constitutional Court would evaluate indeterminate supervision today if the case were brought forward. Neither can it be expected that the European human rights perspective would bring a change because the convicted person's individual rights would still have to be balanced against public security interests. It is highly probable that the Constitutional Court would reaffirm its earlier decision and hold that supervision is still in accordance with the fundamental rights laid down in the German constitution and the European Convention.

This finding may seem somewhat disillusioning, but it should be noted that it refers to supervision as only an abstract sanction category, defined by law. It does not refer to the execution of supervision in particular cases, especially to the legitimacy of certain subsequent decisions on the directions imposed on the convicted offender after release. The Dresden Higher Regional Court, for instance, recently found that a direction to take up residence at a specific place prescribed by the competent division of the regional court was not covered by the German Criminal Code and was a violation of the released person's freedom of movement (Art. 11(1) Basic Law, Article 2(1) ECHR Protocol No. 4).<sup>65</sup> In Germany, freedom of movement may only be restricted in the way that the convicted person is directed not to leave his place of domicile or a specified area without the permission of the supervising authority (sec. 68b(1) No. 1 German Criminal Code). In the same way, the Dresden Court found that the direction to make an effort to find employment immediately after release is a violation of the released person's occupational freedom (Art. 12(1) Basic Law, Art. 15 Charter of Fundamental Rights of the European Union).<sup>66</sup> He may only be directed to report to an employment agency (sec. 68b(1) No. 9 German Criminal Code), but he is not obliged to accept any employment offered to him by the agency.<sup>67</sup> The Federal Constitutional Court, too, had to decide

several cases in which individual rights had to be balanced against public security interests. In the beginning of 2015, it found in an interim decision that the direction to carry the equipment for electronic monitoring (sec. 68b(1) No. 12 German Criminal Code) is a restriction of the offender's freedom of action (Art. 2(1) Basic Law), which may be demanded of him until the court finally decides on the case.<sup>68</sup> On the other hand, some years earlier, it ruled that the direction not to publish right-wing ideas for a period of five years after release (sec. 68b(1) No. 4 German Criminal Code) was a disproportionate interference with the offender's freedom of expression (Art. 5(1) Basic Law, Art. 10(1) ECHR).<sup>69</sup> Summing up, it must be concluded that the human rights perspective certainly plays a role in German judiciary, but that this role is revealed mainly in connection with the execution of supervision, not in connection with its imposition by law or its function as an abstract sanction category.

## 6 Conclusion

The indeterminate control of 'dangerous' offenders in the community is in Germany provided for by the preventive measure of supervision. Supervision is a combination of control and social support that starts off when a convicted person is released from prison or a custodial preventive measure. Regularly the period of supervision lasts for five years, but it can be shortened as well as extended to indeterminate supervision. In addition, supervision can be combined with directions given to the convicted person to influence his conduct of life and make sure that no further offences are committed. As a result of the legal developments since 1998, the constraints for the imposition and execution of supervision are lower in the case of convicted sex offenders than they are in other cases. While supervision is regularly put into operation, if a convicted person is released from prison after having fully served for at least two years, it is only one year in the case of sex offenders (sec. 68f(1) German Criminal Code). While the requirements for indeterminate supervision are generally quite strict (sec. 68c(2) and (3) German Criminal Code), the period of supervision may be extended for life in the case of convicted sex offenders (and a second, very small group of offenders) if the offender has been sentenced to two years of imprisonment and after release either violates a direction or 'other specific circumstances give reason to believe that there may be a danger to the general public by the commission of further serious offences' (sec. 68c(3) No. 2 German Criminal Code). This gives the courts a wide discretion. Against this background one might say that in Germany, too, the legal position of convicted sex offenders is quite exceptional.

64. ECtHR, *Kafkaris v. Cyprus*, Applic. No. 21906/04, n. 140.

65. Dresden Higher Regional Court, 5 June 2015, 2 Ws 248/15, n. 16.

66. *Ibid.*, n. 22.

67. Groß, above n. 26, sec. 68b n. 26; Kinzig (2014), above n. 26, sec. 68b n. 14.

68. Federal Constitutional Court of Germany, 22 January 2015, 2 BvR 2095/14, n. 17.

69. Federal Constitutional Court of Germany, 8 December 2010, 1 BvR 1106/08.

While in the vast majority of cases supervision is imposed by law in Germany, *i.e.* it is the automatic, legal consequence of release from specified custodial sanctions, the execution of supervision with respect to duration and directions is mainly governed by the principle of proportionality. Suitability, necessity and adequacy are the criteria that are of overall importance in this context. All restrictions imposed upon the convicted person are justified if, and to the degree that, they are suitable, necessary and adequate to achieve the aim of public protection, *i.e.* to prevent the convicted person from committing further offences. The central legal constraint of proportionality is thus dependent on the validity and reliability of the predictions about the offender's future criminal conduct, which is in its essence an empirically based statement built on the findings of criminological research. Its reliance on the accuracy of empirical prediction methods delimits the protective function of the proportionality principle to guide and control judicial decisions in the field of preventive sanctions. What is expected by the law, clear and unambiguous assessments on the likelihood and the seriousness of future offences, can, however, hardly be provided for in practice, neither by the courts nor by psychiatric, psychological or criminological expert witnesses. The consequence is in practice a somewhat cloudy mixture of non-distinctive considerations that are flawed by a systematic bias in that they overestimate the risk of re-offending. On the long run, this situation can only be changed by two developments: a clearer distinction between the different target groups of supervision and their differential risks on the side of the courts, and on the side of the experts more empirical research aiming at the further improvement of the validity and accuracy of the prediction methods. The conflict between public security and individual liberty rights, which is in the background of the imposition and the execution of supervision, can only be solved adequately by empirically based, value-oriented judgements of the courts, assigning the diverging interests their due weight.

# Legal Constraints on the Indeterminate Control of 'Dangerous' Sex Offenders in the Community: The Dutch Perspective

Sanne Struijk & Paul Mevis\*

## Abstract

In the Netherlands, the legal possibilities for post-custodial supervision have been extended considerably in recent years. A currently passed law aims to further increase these possibilities specifically for dangerous (sex) offenders. This law consists of three separate parts that may all result in life-long supervision. In the first two parts, the supervision is embedded in the conditional release after either a prison sentence or the safety measure 'ter beschikking stelling' (TBS). This paper focuses on the third part of the law, which introduces an independent supervisory safety measure as a preventive continuation of both a prison sentence and the TBS measure. Inevitably, this new independent sanction raises questions about legitimacy and necessity, on which this paper reflects from a human rights perspective. Against the background of the existing Dutch penal law system, the content of the law is thoroughly assessed in view of the legal framework of the Council of Europe and the legal principles of proportionality and less restrictive means. In the end, we conclude that the supervisory safety measure is not legitimate nor necessary (yet). Apart from the current lack of (empirical evidence of) necessity, we state that there is a real possibility of an infringement of Article 5(4) ECHR and Article 7 ECHR, a lack of legitimising supervision 'gaps' in the existing penal law system, and finally a lack of clear legal criteria. Regardless of the potential severity of violent (sex) offenses, to simply justify this supervisory safety measure on the basis of 'better safe than sorry' is not enough.

**Keywords:** Dutch penal law, preventive supervision, dangerous offenders, human rights, social rehabilitation

## 1 Introduction

Similar to many other Western jurisdictions,<sup>1</sup> the question how to control alleged dangerous offenders and to prevent them from reoffending is an ongoing debate in the Netherlands. This debate was once held primarily along the lines of preventive detention and incapacitation, particularly regarding mentally disordered offenders<sup>2</sup> and repeat offenders,<sup>3</sup> while now the emphasis in Dutch penal law is (also) on supervision, again a similar trend as throughout Europe.<sup>4</sup> As stated in the editorial of this special issue, the supervision itself is usually legally constituted either as an alternative to prosecution or custodial sentencing, or as (different forms of) an autonomous (community) sanction. In the Netherlands, both forms of supervision exist, and sometimes a supervision modality actually occurs in both, *e.g.* the modality of a ban to contact certain people (*e.g.* the victim) and community service.<sup>5</sup> Yet, as in many other civil law jurisdictions, supervision within the Dutch system is not primarily perceived as autonomous sentencing but rather as 'alternative' sentencing, acting as the replacement of a suspended prison sentence or as part of a conditional release from imprisonment.<sup>6</sup> The latter types of alternative, community sentencing are not new to the Dutch penal law system. Already in 1886, the legal possibility of conditional release after a prison sentence was introduced, followed by the introduction of the independent conditional sentence in 1915 and the introduction of the possibility of suspension of remand in 1926. In practice, extensive use is made of all these supervision modalities.

Yet, as a result of many social and penological developments, supervision has been increasingly consolidated and extended in Dutch penal law in the past decades. Against the backdrop of both a culture of fear<sup>7</sup> and a trend of public security together with a strong believe

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1. J. Kinzig, 'Preventive Measures for Dangerous Recidivists', 5 *EJCLCLJ* 27 (1997).

2. M.J.F. van der Wolf, *TBS veroordeeld tot vooroordeel* (2012).

3. S. Struijk, *De ISD in perspectief* (2011).

4. F. McNeill and K. Beyens, *Offender Supervision in Europe* (2013).

5. G. McIvor, K. Beyens, E. Blay & M. Boone, 'Community Service in Belgium, the Netherlands, Scotland and Spain: A Comparative Perspective', 2 *European Journal of Probation* 82 (2010).

6. M. Boone and M. Herzog-Evans, 'Decision-Making and Offender Supervision', in F. McNeill and K. Beyens (eds.), *Offender Supervision in Europe* (2013), 51.

7. F. Furedi, *Culture of Fear Revisited* (2006).

that penal law is an effective, managerial means to achieve this objective,<sup>8</sup> not only existing supervision modalities were expanded, but new modalities were created as well. This emergence and consolidation of supervision in Dutch penal law was also significantly driven by several high-profile (legal cases against) (sex) offenders. This is not so much the punishment for their wrongdoing, but rather their post-custodial re-entry into society caused for public concern and upheaval. Notwithstanding the conditional nature of the (early) release of alleged dangerous ex-offenders, citizens are increasingly under protest concerning the presence of such an ex-offender in their neighbourhood. As a consequence of this 'not in my backyard' backlash, the Probation Services, as the implementing authority in regard to the re-integration, have trouble in finding mayors who are actually willing to let the re-integrating offenders stay in their community.<sup>9</sup> Not only did this result in penal and civil lawsuits, e.g. regarding the disclosure of the ex-offenders residence,<sup>10</sup> but it has also further intensified the debate on the re-integration, freedom of movement and privacy of dangerous (sex) offenders, on the one hand, and the social pressure under which the local administration and the Probation Services have to operate, on the other hand. This is a process in which the Probation Services as such have changed in recent years from an offender-support organisation into an offender-control organisation,<sup>11</sup> making structured decisions on risk assessment.<sup>12</sup> Meanwhile, the requisite balancing of interests between respecting (basic) rights of the dangerous ex-(sex)offender and the interests of victims and society seems to be inclined towards the latter interests. For example the Dutch legislator<sup>13</sup> has responded to the tricky question if, how, when and where to re-integrate dangerous (sex) offenders after their custodial sentence, by extending the penal law system. Because the prevention of reoffending has become very important, if not the main goal of the Dutch sanction system,<sup>14</sup> this legal extension is mainly aimed at

long-lasting, possibly even indeterminate forms of post-custodial release supervision. It is precisely this 'back door sentencing form'<sup>15</sup> that this special issue focuses on. Therefore, the scope of this article is also limited to post-custodial release supervision modalities.

The first and important recent legal change concerning Dutch post-custodial supervision is the conversion of the unconditional early release after two-thirds of the prison sentence into a conditional release. Furthermore, new (restrictive) conditions were created and enshrined in law, and, finally, the unconditional release from the institution for the admission of dangerous mental disordered offenders with provision by the State (in Dutch the TBS 'met dwangverpleging') was curbed. Since 2013, an unconditional termination of this TBS safety measure is possible only if it is preceded by one year of conditional termination. In addition to these reinforcements of existing supervision modalities, a currently passed law – 24 November 2015<sup>16</sup> – is focused on a threefold increase in the post-custodial supervision of dangerous (sex) offenders. First, by aiming to extend the length of parole after a prison sentence. Second, by aiming to extend the length of parole after the TBS measure. Last, by aiming to introduce a new independent supervisory safety measure as a preventive continuation of both a prison sentence and the TBS measure. All three parts of this law could result in life-long supervision. Given both the almost inherent severe restrictive nature of the supervisory conditions and the limited validity of assessment of dangerousness,<sup>17</sup> the modality of (possibly) life-long supervision raises questions not only about the legal limits to it, but also about the transparency, fairness, and accountability of this type of sentencing and the decisions taken.<sup>18</sup>

Focusing on the currently passed – but not implemented yet – law on post-custodial release supervision in the Netherlands, this article will reflect on the aforementioned questions from a primarily human rights perspective. Before addressing this perspective in detail in Section 5, first the main features of the Dutch penal law system will be outlined, as well as its sentencing theory (Section 2). Then, the content of the law – particularly the third part – will be evaluated against the legal principles of both proportionality (Section 3) and less intrusive means (Section 4), in each case against the background of the already existing post-custodial supervision modalities. Finally, in the concluding remarks (Section 6), it is argued that the legal constraints are such that the new independent supervisory safety measure is not legitimate (yet).

8. R. van Swaaningen, 'Public Safety and the Management of Fear', 9 *Theoretical Criminology* 289 (2005).

9. M. Boone, H.G. van de Bunt & D. Siegel, *Gevangene van het verleden* (2014), and the prior study H.G. van de Bunt, N.L. Holvast & J. Plaisier, *Toezicht op zedendelinquenten door de politie in samenwerking met de reclassering* (2011).

10. In this context, it is important to note that, unlike many other jurisdictions in and outside Europe – see T. Thomas, 'European Developments in Sex Offender Registration and Monitoring', 18 *EJCLCJ* 403 (2010) – the Netherlands has no mandatory sex offender notification nor registration policy. Although the call (from citizens and politicians) to implement such policy is getting stronger, it still does not seem to happen, especially since recent research showed that in general the notification and registration with regard to sex offenders do not have (positive) effect on their recidivism (R.P. van der Horst, H.J.M. Schönberger & C.H. de Kogel, *Toezicht op zedendelinquenten. Effectiviteit en veronderstelde werkzame mechanismen van vormen van toezicht* [2012]).

11. A. Menger and A.G. Donker, 'Bronnen van professionele effectiviteit', 38 *Justitiële verkenningen* 24 (2012).

12. J. Bosker, C. Witteman & J. Hermanns, 'Structured Decisions about Dutch Probation Service Interventions', 60 *Probation Journal* 168 (2013).

13. In the Netherlands, the legislator is constituted by both the Government (including the King) and Parliament.

14. Struijk (2011), above n. 3.

15. N. Padfield, R. Morgan & M. Maguire, 'Out of Court, Out of Sight?', in M. Maguire, R. Morgan & R. Reiner (eds.), *The Oxford Handbook of Criminology* (2012), 955.

16. *Stb.* 2015, 460.

17. See e.g. A. Ashworth and J. Roberts, 'Sentencing: Theory, Principle, and Practice', in M. Maguire, R. Morgan & R. Reiner (eds.), *The Oxford Handbook of Criminology* (2012), 866.

18. Padfield et al., above n. 15.



## 2 Outlines of Both the Dutch Penal Law System and the Underlying Sentencing Theory

As briefly mentioned in the introduction, the concept of (preventive) supervision is not new to the Dutch penal law system and has even increased in recent years. This fits the contemporary penal policy in the Netherlands, driven by ‘increasing political and public concern about the costs of imprisonment and of reoffending’.<sup>19</sup> Indeed, reducing reoffending has been strongly prioritised in Dutch sentencing in recent years. Regarding this prioritised goal, the Dutch penal law system has an abundant history of searching for such penal sentences so that reoffending can be reduced, and preferably prevented effectively.<sup>20</sup> Particularly noticeable in this respect is the two-sidedness of this penal quest. In contrast to many jurisdictions, yet similar to, for example Germany,<sup>21</sup> the Netherlands has a bifurcated, two-track system of retrospective, retributive penalties, on the one hand, and prospective, preventive measures, on the other hand. The penalties and measures differ significantly, at least in theory. In practice, though, the distinction is more subtle. In recent decades, the objectives of custodial penalties and safety measures have grown closer together.<sup>22</sup> This is partly because the current Dutch sentencing theory is a compromise between the traditional Neo-Classical theory and the subsequent Modern theory.<sup>23</sup> Furthermore, one of the main arguments justifying the distinction between penalties and measures – in that a measure, unlike a penalty, does not aim to cause the offender to suffer – is rather unsatisfactory from both a pragmatic and a moral point of view as the offender does not actually feel whether the suffering is intentionally inflicted upon him.<sup>24</sup> Nevertheless, to be able to understand the Dutch supervision modalities, it is important to clarify the differences between penalties and measures. These differences are generally described as follows.

The penalty is intended to retaliate against the offence that the offender committed in the past, stemming directly from fundamental notions of guilt, criminal responsibility and just deserts, which underlie the Dutch Neo-classical theory of punishment.<sup>25</sup> Consequently, the penalty is not only strictly bound with proportionality limits, *i.e.* it may not be more intrusive than the offence itself or the extent of the offenders’ guilt, but also bound with determined duration at the moment of sentencing. Dutch examples of a penalty are the prison sentence and the community service, both always with a fixed legal maximum duration at the moment of sentencing, although this may include (providing that the law allows it for certain crimes) the possibility of a conviction to lifetime imprisonment.

In contrast, the (safety) measure, imposed either in addition to a penalty or instead of it, is intended to safeguard society from future harm such as recidivism or dangerousness.<sup>26</sup> Consequently, the measure is not strictly bound with proportionality limits, at least not related to the seriousness of the offence, and may take as long as necessary to reduce the offenders’ risk and thereby effectively protecting society.<sup>27</sup> This conceptualisation of the safety measure stems directly from the ‘Modern’ criminal law theory, also known as the ‘social defence’ movement, which was particularly influential in the beginning of the nineteenth century.<sup>28</sup> Whereas the view of the Neo-Classical theory was mostly limited to both the offence and an appropriate retaliation for it, the Modern theory explicitly expanded that view to the offender. Prompted by the rise in (behavioural) scientific knowledge about the causes of crime, modern theorists explicitly beheld how the system could counteract these causes as effectively as possible in order to prevent crime. Moreover, individual-based deterrence became the central aim of Dutch penal sentencing, seeking to effectively protect society and prevent reoffending in the future.<sup>29</sup> Consequently, this called for a significant change of the Dutch Penal Code, which in accordance with the Neo-Classical theory was originally rather simple and uniform with a leading role for the penalty. Deciding to overstep the inherent boundaries of the penalty, and thereby ‘ignoring’ or ‘overruling’ the predetermined, proportionate sentencing as one of the major protecting principles of the Neo-Classical Theory, various safety measures were introduced in both the previous and the current century.<sup>30</sup> Some of these measures are asset-related, *e.g.* the measure to confiscate illegally obtained benefits, or property-related, *e.g.* the measure to extract (dangerous) objects an offender used committing his offence or that were found during crimi-

19. F. McNeill, ‘Community Sanctions and European Penology’, in T. Daems, S. Snacken & D. van Zyl Smit (eds.), *European Penology* (2013), 171, at 172.
20. Struijk (2011), above n. 3; S. Struijk, ‘Punishing Repeat Offenders in the Netherlands: Balancing Between Incapacitation and Treatment’, 33 *Behavioral Sciences & the Law* 148 (2015) and M.J.F. van der Wolf and M. Herzog-Evans, ‘Mandatory Measures: Safety Measures?’, in M. Herzog-Evans (ed.), *Offender Release and Supervision: The Role of Courts and the Use of Discretion* (2014), 193.
21. K. Drenkhahn, ‘Secure Preventive Detention in Germany’, 31 *Behavioral Sciences & the Law* 312 (2013) and B.-D. Meier, *Strafrechtliche Sanktionen* (2015).
22. Van der Wolf and Herzog-Evans, above n. 20.
23. C. Kelk and Ch. Haffmans, ‘De strafrechtelijke maatregelen en het tanende tweesporenstelsel’, in J.P. Balkema *et al* (eds.), *Gedenboek honderd jaar Wetboek van Strafrecht* (1986), 333.
24. J.W. de Keijser, ‘Never Mind the Pain, It’s a Measure! Justifying Measures as Part of the Dutch Bifurcated System of Sanctions’, in M. Tonry (ed.), *Retributivism Has a Past: Has It a Future?* (2011), 188.

25. *Ibid.* and Struijk (2011), above n. 3.

26. See *e.g.* T. Kooijmans, *Op maat geregeld?* (2002) and Van der Wolf and Herzog-Evans, above n. 20.

27. According to Dutch penal law, though, penalties and measures can to a high extent be imposed simultaneously.

28. M.S. Groenhuijsen and D. van der Landen (eds.), *De moderne richting in het strafrecht* (1990).

29. Struijk (2011), above n. 3.

30. Van der Wolf and Herzog-Evans, above n. 20.

nal investigations. Other safety measures, and more relevant to this study, are offender-related. And exactly as in many other Western world jurisdictions,<sup>31</sup> Dutch safety measures are most frequently applied to a variety of alleged dangerous offenders.

In Dutch penal law, there are two examples of custodial safety measures dating back to the era in which the Modern theory was prevailing. First, the custodial safety measure for habitual offenders, adopted in 1929.<sup>32</sup> Based on both objective and subjective legal criteria, a judge could decide whether alleged dangerous habitual offenders can be kept in preventive detention for a minimum of five and a maximum of ten years after execution of the initially imposed prison sentence. The detention as such was aimed at the incapacitation of the habitual offender or, if susceptible, at improvement of his behaviour. The central notion of dangerousness was defined as 'he who unceasingly and even professionally reoffends'. The legal criteria hardly further demarcated this notion, as well as the specific offender target group for imposing this safety measure, because these criteria required only past reoffending and 'a necessary and justified' preventive detention to prevent future reoffending. For these, and other fundamental reasons, the custodial safety measure for habitual offenders had, despite the adoption by Parliament, never formally taken effect and, consequently, the statutory regulation was withdrawn in 1988.

The second and most renowned Dutch example of such a safety measure dating back to the Modern theory is the aforementioned TBS measure for mental disordered and (thus) dangerous offenders. The main reason for introducing this custodial TBS measure in 1928 was because neither the prison sentence nor the general psychiatry was able to adequately respond to this offender category.<sup>33</sup> Although the TBS measure is designed as a custodial sanction, the actual execution takes place in specific treatment institutions aiming at one's rehabilitation. With the twofold justification of both public protection and treatment of the mental disordered offender, the still existing TBS measure is potentially and only for rather serious and violent crimes of indeterminate duration. In these cases, the measure can be prolonged indefinitely as long as, in the opinion of the judge, deprivation of liberty is still necessary because the offender's treatment has not (yet) diminished the danger he poses to society. Consequently, the TBS measure is the ultimate form of preventive detention in the Dutch penal law system. Of course, the life-long imprisonment is an ultimate sentence as well, yet not preventive by nature. Because of the divergent goals of the TBS measure and the life-long imprisonment – the first is aimed at rehabilitation, the latter is inherently not – the Dutch Supreme Court ('Hoge Raad') has ruled that both sanctions may not be imposed simultaneously.<sup>34</sup>

The TBS measure has remained an accepted measure up until today because of continuing adjustments to the system.<sup>35</sup> One of the most significant adjustments is that the previous medical model was replaced by a legal model,<sup>36</sup> leading to the introduction of various legal constraints in 1988. Furthermore, it led to the introduction of the conditional, supervisory TBS measure in 1997. Within the framework of this alternative to the custodial variant, the court imposes several conditions – behavioural and/or restrictive – to which the convicted offender must adhere. The Probation Services are responsible for monitoring the compliance. Violating the conditions may lead to custodial TBS. In order to reduce the number of imposed custodial TBS measures, this supervisory alternative has been strengthened in recent years, most importantly by raising the maximum duration from four to nine years. An opposite adjustment to the TBS sentencing scheme is that the custodial TBS measure in recent years may even be justified by solely the aim of public protection, subordinating the aim of treatment. Cost-effectiveness deliberations even led to the introduction of a so-called 'longstay-ward' as an official differentiation within the TBS domain in 1998.<sup>37</sup> When a TBS detainee is placed on such a ward, the focus is no longer on treatment, or rather the treatment is no longer aimed at rehabilitation.

Rehabilitation has always been a recognised objective in Dutch penal law. Already in the past, the Dutch Supreme Court has given a broad interpretation to this objective, stating that the rehabilitation duty for the Government is not limited to the period *after* detention, nor exclusively aimed at a possible return to the *Dutch* society.<sup>38</sup> Yet, over the past decades, the legal interpretation of rehabilitation has been subject to change. This is mainly because – although this objective is regulated by article 2 of both the Dutch Acts concerning the execution of imprisonment and the TBS order – it is not a constitutional right, in contrast to some other Western jurisdictions such as Germany.<sup>39</sup> Moreover, the definition of rehabilitation in the Dutch Prisons Act is certainly not conclusive but leaves ample room for interpretation because for a long time the definition is as follows: 'the execution of the custodial sentence is made subservient to the offenders' rehabilitation as much as possible'.

Arising from the fact that rehabilitation is thus not an absolute right in Dutch penal law, the actual meaning and the content of this penal principle are to a large extent dependent on the prevailing sentencing theory and penal policy. In recent times, under the influence of the dominant theoretical concepts of risk society and utilitarian instrumentalism, rehabilitation is primarily

31. J. Pratt, *Punishment and Civilisation* (2002).

32. See extensively Struijk (2011), above n. 3 and Struijk (2015), above n. 20.

33. Van der Wolf, above n. 2.

34. Dutch Supreme Court 14 March 2006, NJ 2007, 345.

35. Van der Wolf and Herzog-Evans, above n. 20.

36. Kelk and Haffmans, above n. 23.

37. H.J.C. van Marle and M.J.F. van der Wolf, 'Safety Measures in the Netherlands. The TBS', in M. Herzog-Evans (ed.), *Transnational Criminology Manual* (2010) 439.

38. Dutch Supreme Court 16 January 1987, NJ 1987, 405.

39. D. van Zyl Smit and S. Snacken, *Principles of European Prison Law and Policy* (2009) and Padfield *et al.*, above n. 15.

defined as risk-based. One could even argue that, in the Netherlands, rehabilitation is now more narrowly conceptualised as reducing reoffending,<sup>40</sup> which calls for a strict control system and results in an authoritarian rather than an anthropocentric system.<sup>41</sup>

The most recent change in the legal definition of rehabilitation was the addition of two text parts in 2015. The first added phrase was that in the process of granting freedoms to detainees, such as granting a leave, one needs to take into account the safety of society and the interests of victims and survivors. This was undoubtedly triggered by some high-profile (sex) offenders, who escaped and reoffended during their leave. Second, the phrase was added that the execution of the custodial sentence is made subservient to the offenders' rehabilitation, depending on his behaviour during detention. This second change in the legal definition of rehabilitation is to a large extent attributable to the global 'What Works' movement, which has been firmly embraced in the Netherlands since the turn of the century.<sup>42</sup> The movement has not only led to a growing interest in, and subsequent development of, various programmes for behavioural change, both within prison and as part of community sentences, but it has also made the detainee himself responsible for the actual extent to which is invested in his rehabilitation. On the basis of his proven willingness and efforts to participate in reducing reoffending and rehabilitation interventions, as well as the outcomes of risk assessment tools, his conditional release can be determined. More broadly, this principle of the offenders' individual responsibility also underlies the current detention regime in the Netherlands. Every inmate will start his detention in a basic programme, but (only) by exhibiting good behaviour he may be promoted to a plus programme with more freedoms and possibilities.<sup>43</sup> Thus, in the current penal trend in the Netherlands, rehabilitation-oriented sanctions seem to be reserved for only the 'privileged' offenders who are expected to (and are able to) achieve success in this respect.<sup>44</sup>

This penal trend holds certainly true for yet another custodial safety measure, the so-called ISD measure for repeat offenders ('inrichting voor stelselmatige daders').<sup>45</sup> Although the ISD measure may also be imposed in a supervisory variant, ultimately it is a custodial safety measure aiming to prevent future reoffending and harm. The main underlying concept of dangerousness differs significantly from the TBS measure. The ISD measure is specifically aimed at repeat offenders, who are not necessarily mentally ill – which by itself is

not a legal criterion for imposing the ISD measure – although in practice almost every repeat offender suffers from a mental disorder, or even a co-occurring disorder.<sup>46</sup> The repeat offenders are rather perceived as dangerous because they continuously exhibit criminal behaviour,<sup>47</sup> resulting moreover in (often addiction driven) 'highly visible', but rather 'light' urban crimes. The danger they pose to society is thus strongly nuisance related, which is something completely different from the danger the TBS offenders usually pose and the severe crimes they usually commit.<sup>48</sup> Therefore, in contrast to the TBS measure, the ISD measure is legally of determinate duration with a maximum of two years. In contrast to the legislator's intentions, both judges and penitentiary workers appear to strive for as much treatment (of the individuals' behavioural problems and/or addiction and/or mental disorder) as possible. Consequently, the ISD measure constantly balances between incapacitation and treatment.<sup>49</sup>

Both the implemented safety measures TBS and ISD focus on a more or less specific offender category and are (partly) custodial by nature, depriving the offender of his or her liberty. That does not apply for the recently introduced (2012) community-based supervisory safety measure. It is an independent restraint sentence for a maximum of two years, by which the court can impose restrictive conditions on the offender such as a ban on contacting certain people, a ban on doing certain voluntary work, a duty to report to the Probation Services, a duty to undergo clinical treatment or, finally, a duty to move. The measure may be imposed for any committed offence, and its underlying dangerousness concept is defined in broad terms as restoring the public order and preventing harmful behaviour towards civilians, victims or witnesses. Moreover, violation of the conditions ordered by the court results in detention (equally ordered by the court) up to six months, which does not lift the validity of these conditions. In practice, this supervisory safety measure appears to be particularly imposed on offenders who have been sentenced to a prison sentence of less than a year, and who therefore legally do not apply for conditional release.<sup>50</sup>

Altogether, arising from the notion that reoffending should be prevented, especially from dangerous offenders, various safety measures have been adopted in Dutch penal law. The offender-related safety measures are either custodial by nature, or involve non-custodial sentencing in the community. The sanction system was

40. McIvor *et al.*, above n. 5.

41. McNeill, above n. 19.

42. A.A. van den Hurk and P.Ph. Nelissen, "'What Works': een nieuwe benadering van resocialisatie van delinquenten", 5 *Sancties* 280 (2004).

43. Freedoms and possibilities, to some extent, can be seen as 'normal' conditions for an acceptable detention regime, e.g. increased opportunities for both education and receiving visitors, and the ability to be transferred to a limited secured regime.

44. Struijk (2011), above n. 3 and M.M. Boone, *Our Own Rascals First* (2012).

45. Struijk (2011), above n. 3 and Struijk (2015), above n. 20.

46. N. Tollenaar and A.M. van der Laan, *Monitor veelplegers 2013*, WODC (2013).

47. One of the legal criteria for imposing the ISD measure is prior recidivism of at least three convictions in the last five years. It is because of this total number of three that the ISD measure has been referred to as 'a watered-down version of the American "three strikes" practice': Van Swaaningen, above n. 8.

48. Van der Wolf, above n. 2.

49. Struijk (2015), above n. 20.

50. S. Meijer, 'De gedragsbeïnvloedende en vrijheidsbeperkende toezichtsmaatregel als instrument in de strijd voor de maatschappelijke (schijn)veiligheid', in M.S. Groenhuijsen *et al.* (eds.), *Roosachtig strafrecht* (2013), 385.

recently once again expanded (and even completed, one might say) with both the introduction of various legal possibilities to execute the imposed sanction pending appeal and the possibilities to immediately arrest offenders who violate their conditions. To this extent the even more recently enacted law to expand post-custodial supervision fits well in the development of the Dutch sentencing scheme. In the following section, we will further discuss the content and legal framework of this latter law, with special reference to the independent supervisory safety measure.

### 3 Legal Frameworks for Indeterminate Supervision: Evaluation of Proportionality

The fact that community sentences must also be proportionate to the seriousness of the offence for which the sentence is imposed<sup>51</sup> stems from the realisation that, despite their character of merely freedom restricting, these supervisory sentences quite often have a punitive content. In this respect, Van Zyl Smit and Snacken commented that ‘all attempts to limit the rights of released persons beyond their sentence should be approached with considerable caution because they could amount to additional punishment’.<sup>52</sup> This realisation, and development, is to be welcomed as supervision imposed with restrictive conditions such as an extended reporting requirement, or participation in a treatment programme, or an obligation to move, may indeed result in a harsher punishment than short prison sentences. Yet, it is certainly not easy to determine whether a supervisory sentence is in fact disproportionate. The international human rights framework within which this must generally be determined will be discussed in Section 5. In the present section, though, the legal framework of the presently discussed Dutch law is discussed, in order to determine whether or not it set limits to the extended supervision, and whether the three parts of the law are proportionate to the extent of the problem they should resolve. In this respect, attention is also paid to the pre-legislative justification of the draft law and its possible future practice.

As mentioned, the possibility of early release has already existed for a long time in Dutch penal law. The current legal framework constitutes a conditional release, as it has always been since 1886, except for an intervening period of twenty years when it was a standard release. The current conditional release is after two-thirds of the prison sentence, provided that it is an unconditional sentence of at least one year. The probationary period of the release may not last longer than the remaining one-third of the sentence, albeit with a minimum duration of

one year for the probation of the general condition. By virtue of the general, standard prevailing condition, the convict should refrain from reoffending. In contrast, the more specific conditions, relating to the offender and his individual behaviour, do not have such a minimum term. By means of the first part of the currently enacted law, the Dutch legislator wants to change that. Although that may be understandable for reasons of consistency of legislation, the imposition of the general condition for one year is clearly much less invasive than the yearlong imposition of a specific condition aimed for behavioural change or restraint.<sup>53</sup> However, this has not stopped Parliament from adopting an amendment that gives the court the possibility to extend the probationary period even continuously for up to two years. Consequently, any offender who has been sentenced by the court to an unconditional imprisonment of at least one year may therefore, in principle, be life-long supervised. Not only does he have to adhere to the imposed conditions for an indeterminate time, but he also has to fear for the execution of the remaining part of the prison sentence whenever he fails to adhere, although execution does require a separate court order.

The second part of the law specifically concerns the safety measure TBS for dangerous mentally disordered offenders. As stated earlier, this safety measure can be imposed both conditionally, maintaining the offender in the community, and unconditionally, detaining the offender in a secured treatment facility. In the unconditional custodial variety, the legislation allows the possibility of a conditional termination for reasons of a progressive and supervised re-integration. The probationary period of this conditional termination is set at a maximum of nine years. Until 2008, this period was three years. When the law was changed and the duration was set at nine years, the possibility of an indefinite probationary duration was discussed.<sup>54</sup> However, the legislator deliberately chose not to introduce such an indefinite supervision modality, based on research showing that after nine years the chances of reconviction significantly decreases in relation to the preceding period.<sup>55</sup> It is therefore all the more remarkable that the Government by means of the enacted bill introduces such an indefinite duration anyway. The general justification is that, for certain crimes, a possibly indefinite probationary period of the conditionally terminated TBS measure is a harsh, yet necessary and proportionate means to guarantee both the fundamentals of the TBS scheme and its termination. More specifically, the legislator justifies this new post-custodial supervision modality by highlighting new research showing that the percentage of repeat offenders with a very serious offence among sex offenders still increases for a long time after discharge

51. D. van Zyl Smit and A. Ashworth, ‘Disproportionate Sentences as Human Rights Violations’, 67 *The Modern Law Review* 541 (2004).

52. Van Zyl Smit and Snacken, above n. 39.

53. M.J.F. van der Wolf and S. Struijk, ‘(Levens)lang toezicht als zelfstandige maatregel: wordt nu echt de Rubicon overgestoken?’, 6 *Sancties* 368 (2014).

54. *Ibid.*

55. E. Leuw, *Recidive na de tbs*, WODC (1999) and B.S.J. Wartna, S. el Harbachi & L.M. van der Knaap, *Buiten behandeling*, WODC-Recidivestudies (2005).



from the custodial TBS facility, and that adequate forms of supervision and guidance may be useful for the purpose of reducing the risk of recidivism longer than nine years after discharge.<sup>56</sup>

Yet, this justification has much to criticise.<sup>57</sup> For example the 'new' research findings relate to the long-term recidivism of TBS detainees who were released in the 1970s and 1980s of the past century. Thus, it is highly questionable to what extent this has relevance for the future outflows and recidivism of TBS detainees. Furthermore, the latest legislative change in 2008 has not been evaluated, making it as yet unknown in how many cases the current maximum supervision period of nine years is actually fully exploited. Let alone that it can serve as a justification for introducing an even longer and possibly life-long supervision period. On the other hand, there are legal constraints, particularly the fact that it is up to a court to periodically review whether a renewal of the conditional termination is appropriate or not. Nevertheless, one may ask for a more solid justification in order to add such a modality of long, possibly life-long supervision to the TBS scheme, especially because this form of extended supervision is expected to occur only in exceptional cases. Considering the fact that in practice there seems to be little need for additional supervision after a probationary period of nine years, both legal scholars and legislative advisory bodies have labelled the proposal as unnecessary and premature.

To an even greater extent this holds true for the third proposal of the draft law. As briefly mentioned earlier, this proposal involves the introduction of an independent supervisory safety measure. This measure may also imply (life-)long supervision after the (un)conditional termination of the TBS measure, albeit not as contingent modality within the TBS scheme itself, but as an independent sanction. According to the intended legal framework, the procedure of this sentencing scheme is rather unique for Dutch penal law as the judicial decisions on imposition and execution are separated, both in time and authority. In this twofold procedure, the imposition of the new measure requires a concurrent imposition of a (un)conditional TBS measure or a (partly conditional) prison sentence of a maximum of four years or more. The latter possibility applies only for crimes against the inviolability of the body, thus particularly for (sexually) violent offenders. Indeed, this proposal seems to be focused primarily on sex offenders, aiming for public protection through their behavioural change and restraint. Public protection is also the general basis for the imposition of the measure, together with the aforementioned condition of a concurrent imposed sentence. Following the first stage of the imposition, the second stage of the twofold procedure is (of course) the execution. However, the supervisory safety measure is not

executed immediately after the verdict. On the contrary, the execution will only start once the imposed TBS measure or prison sentence is (un)conditionally terminated. As this may take a while, usually for many years, the Dutch Government has wisely decided to make the execution a non-standard procedure. It requires another, separate judicial decision from the court, at the request of the Public Prosecutor, (soon) before the TBS measure or the prison sentence will end. It is then up to the court to decide whether the current situation is such that the previously imposed measure must actually be enforced. The legal requirements for execution are different, and more onerous than the requirements for imposition. The court may decide to execute the measure if there is a risk of recidivism relating to such an offence that would legitimise the imposition of this measure, or if enforcement is needed to avoid seriously damaging behaviour towards victims or witnesses. Both requirements are rather subjective by nature and call for a risk assessment. Remarkably, no multidisciplinary advice is needed, merely an advice from the Probation Services showing, *inter alia*, the results of the risk assessment. The use of such a risk assessment is not new to the Dutch sentencing scheme, as it already applies to other (existing) safety measures, such as the aforementioned ISD measure for repeat offenders.<sup>58</sup> However, in addition to the fact that the (predictive) validity of those risk instruments is still highly criticised,<sup>59</sup> this criticism may apply even stronger to the new supervisory measure because of its possibly indefinite duration, and the fact that the actual decision to execute the measure is legally immediately enforceable. However, a separate appeal may be lodged against this second decision.

Only in this second phase of the procedure – the execution – does the court further specify both the duration and the content of the measure. As to the duration of the measure, the court may order the enforcement of the measure for a period of two, three, four or five years. Upon expiry and based on the aforementioned execution requirements, the duration may be extended unlimited by the court for another two, three, four or five years. Thus, the supervisory safety measure may last indefinitely. On the other hand, the legal framework guarantees in any case that a judge periodically assesses whether an extension is appropriate. As to the content of the measure, the court may impose fourteen conditions, whether or not combined. Those conditions are explicitly mentioned in the legislation. In addition, the court may also ordain electronic monitoring. For the most part the fourteen conditions are restrictive, such as a notification requirement and a ban to have contact with certain persons. Others are therapeutic, such as a duty to participate in treatment. The court can order this condition with or without a clinical admission. In the first case, the admission lacks the consent of the offender; he or she is not so much restricted in his or

56. *Kamerstukken II 2013/14*, 33 816, n. 3, page 7 and *Kamerstukken II 2013/14*, 33 816, n. 6, page 28.

57. As stated before by legal scholars such as S. Struijk, 'En nog meer en langduriger toezicht: de overheid als Rupsje Nooitgenoeg', 3 *Sancties* 137 (2014) and Van der Wolf and Struijk, above n. 53.

58. Struijk (2011), above n. 3 and Struijk (2015), above n. 20.

59. M. Moerings, 'Persistent Offenders', in M. Boone and M. Moerings (eds.), *Dutch Prisons* (2007), 187.

her freedoms but rather deprived of his or her liberty. A second reason why the supervisory safety measure may turn into deprivation of liberty is the fact that alternative detention with a maximum duration of six months per (extended) term will occur whenever a condition is breached. It is because of these legal possibilities of deprivation of liberty that in our view this measure must comply with the test required by Article 5 ECHR. Both this test and the question whether the measure actually does comply will be addressed in detail in Section 5.

The aforementioned conditions are as such not new to the Dutch penal law system. Already in the framework of many supervision modalities, it is possible to set these conditions.<sup>60</sup> The draft law does introduce three new conditions, though. A ban to do certain voluntary work, a ban to live in certain areas and the opposite duty to move. These conditions are clearly very restrictive by nature, as well as clearly driven by the (housing) problems of re-integrating sex offenders. The same is reflected in the pre-legislative justification, in which the Dutch Government explicitly refers to the added value of the measure.<sup>61</sup> According to the Government, this added value is especially true for crimes such as possessing child pornography. As this is not considered to be a serious offence, it may 'only' legitimise a custodial TBS order for a maximised period of four years. Therefore, according to the legislator, additional supervision would be required by means of the proposed supervisory safety measure.

However, in light of the proportionality test, one may actually question the added value. The foremost concern is the fact that in practice there seems to be limited need for this measure. An impact analysis showed an expected annual execution of the proposed measure regarding thirteen to thirty-three sex offenders and fourteen to twenty-nine violent offenders.<sup>62</sup> Out of a total Dutch population of nearly seventeen million inhabitants, this is quite a small number. Together with the expected success rate of 5% to 30%, and the expected pragmatic and financial bottlenecks in the enforcement of this possibly life-long supervision, the question arises as to whether the measure is proportionate to the extent of the problem. This is especially true when one takes into account the fact that the public upheaval resulting from the sex offenders' re-integration occurs only in a small minority of cases and generally disappears quickly.<sup>63</sup> Therefore, the above-mentioned question and legal issue will most likely lead to reluctance among the judiciary, perhaps not so much with respect to the imposition of the measure, but rather with regard to the subsequent decision whether the measure must be executed. As with most other forms of risk-based sentencing, the judiciary bears great responsibility to balance the various interests in a just manner. As Henham stated eloquently, 'the risk management issue must be

resolved by the judiciary who remain the unenviable arbiters of predicted dangerousness'.<sup>64</sup> With regard to the Dutch safety measure for repeat offenders – the aforementioned ISD measure – judges appear to be quite capable to weigh the interests well and to sentence in such a way that it is proportionate to both the extent of the problem and the future risk the offender poses.<sup>65</sup> Nevertheless, the level of dangerousness of repeat offenders differs significantly from sex offenders and violent offenders, for example because of the different degrees of the offences committed by these offenders: petty crime versus sex offences and violent offences.

But no matter how far-reaching the consequences of the latter crimes are, this does not say anything about the prediction whether a convicted sex offender or violent offender will truly reoffend in future. And that prediction is beset with various obstacles, including a lack of precision and predictive value.<sup>66</sup> In that respect, it can be strongly criticised that the legal framework on the new supervisory safety measure does not require a multidisciplinary advice to the court in order for them to impose or execute the safety measure. Only an advice of the Probation Services, stating the outcomes of the risk assessment, is required or, if the court sets a condition that involves treatment or inclusion in a forensic care facility, a medical certificate. This meagre requirement pinches even more so when one considers the two aforementioned, rather subjective requirements for executing the supervisory safety measure. Especially the required necessity to avoid seriously damaging behaviour towards victims or witnesses will be difficult to scientifically support. As long as this continues, it contributes to our previously stated view that the enacted law is premature.

Another argument for that opinion is the fact that, according to the Dutch sentencing theory, a safety measure is proportionate only if it is not merely imposed in the public interest, but also to serve, at least to a certain extent, the individual interest.<sup>67</sup> Yet, the latter interest is clearly missing in the law presently discussed. Naturally, the aim that the (sex) offender can carefully and gradually return to society may also be of his individual interest, as explicitly indicated in the pre-legislative justification, but that strongly depends on the content of the supervision. Will the supervision be truly focused on the completion of the offenders' rehabilitation and behavioural change, or predominantly the control of the offender? On that imperative question, the legislator has not said anything yet. Given the fact that this safety measure may also be imposed on offenders who are not mentally disturbed – those who have not been sentenced to the TBS measure, but instead to a

60. F.W. Bleichrodt, P.A.M. Mevis & B. Volker, *Vergroting van de slagvaardigheid van het strafrecht; een rechtsvergelijkend perspectief* (2012).

61. *Kamerstukken II* 2013/14, 33 816, n. 3.

62. *Ibid.*

63. Boone *et al.*, above n. 9.

64. R. Henham, 'The Policy and Practice of Protective Sentencing', 3 *Criminology and Criminal Justice* 57 (2003).

65. Struijk (2011), above n. 3 and Struijk (2015), above n. 20.

66. N. Morris and M. Miller, 'Predictions of Dangerousness', 6 *Crime and Justice* 1 (1985) and L.M.J. Simon, 'An Examination of the Assumptions of Specialization, Mental Disorder, and Dangerousness in Sex Offenders', 18 *Behavioral Sciences & the Law* 275 (2000).

67. W.P.J. Pompe, *Beveiligingsmaatregelen naast straffen* (1921).

prison sentence – one may fear that the focus will be on control. Research concerning supervision shows, however, that control is effective only when combined with counselling, treatment, social support and a focus on ‘the realisation of meaningful lives’ instead of ‘the prevention of risks’.<sup>68</sup> An important side note, though, is that it is still unknown how effective supervision will be if it takes many years, let alone life-long.<sup>69</sup> The lack of prospect as a result of the indefinite duration of the proposed supervisory safety measure may very well diminish these effects.<sup>70</sup> If so, the new measure is not likely to contribute to public safety. Given the equally existing fear of a self-fulfilling prophecy and the possibility that this supervisory measure may isolate the convicted (sex) offender, which leads to dangerous situations,<sup>71</sup> the measure may easily have a counterproductive effect. The necessity of this measure is therefore anything but clear.

## 4 Legal Gaps? An Evaluation of Alternative, Less Restrictive Means

In order to protect society, a further step in the supervision of (conditionally) released inmates may very well be legitimate, even if it results in an (even more severe) human rights restriction, provided, though, that other less restrictive means (LRM) for supervision are (proved to be) insufficient. If this element is not addressed properly, community sanctions tend to be infected by what is known as the problem of ‘Net Widening’: new sanctions, introduced as an alternative, causing a wider and stronger net of social control.<sup>72</sup> In the pre-legislative justification of the draft law, the legislator proclaims that the proposed supervisory safety measure complies with this LRM test.<sup>73</sup> In fact, the critique with regard to – the supposed failure of – the current penal sanctions concerning the offender category of dangerous sex and/or violent offenders is one of the main arguments of the legislator to underline the necessity of the new supervisory measure. According to the legislator, the most pressing supervision ‘gaps’ are threefold.<sup>74</sup>

First, the problem of mentally disturbed suspects of whom the Public Prosecutor demands a custodial TBS order but who refuses to cooperate with the required multidisciplinary assessment, causing the judiciary to struggle with the dilemma whether they can still impose a TBS order or not.<sup>75</sup> Although the Dutch Supreme Court has ruled that, in such circumstances, a court may indeed impose a TBS order, provided that the disorder can be sufficiently established otherwise,<sup>76</sup> in practice this infamous trend among mentally disturbed suspects has already resulted, and even still results, in a strong decrease in the numbers of imposed TBS orders.<sup>77</sup> Because many of these suspects are sentenced with a prison sentence instead, the duration of their post-release supervision is usually not very long. In an attempt to tackle this troubling problem, the legislator has made the new supervisory measure possible not only for offenders who have been sentenced with a TBS order but also for violent offenders who have been sentenced for an offence punishable (with some exceptions) with a prison sentence of four years or more.

The second supervision ‘gap’ that the legislator aims to fill by introducing this supervisory measure is the maximised length of the conditional TBS order. Under existing law, this conditional order may last for no longer than nine years. The third supervision ‘gap’ relates to another TBS variant, the maximised custodial TBS order. In contrast with the indeterminate custodial TBS order, this maximised variant may last no longer than four years and may only be imposed for non-violent offences. The law rules that if the court decides to prolong the custodial TBS order, exceeding the four-year term, the relevant violent offence must be explicitly justified in the judgement. Based on the prevailing doctrine of the Court of Arnhem-Leeuwarden – the highest court in the Netherlands in cases concerning the prolongation of TBS orders – the extension judge had a wide discretion with regard to the assessment of the maximisation of the TBS order.<sup>78</sup> In other words, this judge could independently assess whether there was a violent crime, resulting in a maximised duration of the TBS measure. The extension judge was even allowed to deviate his judgement from the initial sentence whereby the TBS measure was imposed. However, in 2012, the European Court of Human Rights (ECtHR) disapproved of this doctrine.<sup>79</sup> The Strasbourg Court ruled that whenever the TBS order was imposed, the judgement must justify whether the offender has committed a violent crime. In the absence of such a justification, the extension judge may not assess independently if the TBS order was imposed for a violent crime and consequently if this order is maximised or indeterminate.

68. See e.g. A. McAlinden, ‘The Use of “Shame” in the Reintegration of Sex Offenders’, 45 *British Journal of Criminology* 373 (2005); Van der Horst *et al.*, above n. 10 and B. Weaver, ‘Control or Change? Developing Dialogues between Desistance Research and Public Protection Practices’, 61 *Probation Journal* 8 (2014).

69. Van der Horst *et al.*, above n. 10.

70. Van der Wolf and Struijk, above n. 53.

71. Nationaal Rapporteur Mensenhandel en Seksueel Geweld tegen Kinderen, *Isoleren zedendelinquenten is niet de juiste weg* (2013).

72. E. Reznichenko, ‘Cost-Effective Criminal Enforcement: A Law and Economics Approach’ (Doctoral dissertation on file at the EUR, Rotterdam) (2015).

73. *Kamerstukken II* 2013/14, 33 816, n. 3.

74. *Ibid.*

75. M.J.F. van der Wolf, E.M. Gremmen, H.J.C. van Marle & P.A.M. Mevis, ‘Worstelen met de weigerende observandus’, 74 *Delikt en Delinkwent* 775 (2012).

76. Dutch Supreme Court 22 May 2012, ECLI:NL:HR:2012:BW6184.

77. DJI, *Forensische Zorg in getal 2010-2014* (2015).

78. Court of Appeal Arnhem 30 May 2011, LJN BQ6616.

79. ECtHR, *Van der Velden v. the Netherlands*, Applic. No. 21203/10, 31 July 2012.

According to the ECtHR that would not only be in conflict with Dutch legislation but also with the legal certainty as required by Article 5(1) ECHR.

At first glance, the three arguments made by the legislator seem to be valid. However, to our opinion,<sup>80</sup> there is much to object. Each of these arguments directly relates to the TBS sentencing scheme, stating that it is ineffective in order to protect society from dangerous released offenders. Yet, instead of a thorough reform of the existing scheme of this safety measure – if needed at all – the legislator decided to introduce a new safety measure. Why such a radical change in the sentencing scheme whereas a less stringent solution may be on hand? Or, to quote Brems and Lavrysen, why to use a sledgehammer to crack a nut?<sup>81</sup> Moreover, it is strange that precisely the only part of this threefold law that does seek to directly change the TBS system – *i.e.* the earlier mentioned second part of the draft law, aiming to alter the maximised conditional termination of the TBS order in an indeterminate duration – is at odds with the equally introduced supervisory safety measure. It is redundant to abolish the maximum term of conditional TBS termination, making the supervision possibly life-long, while at the same time introducing a separate safety measure that also allows for life-long supervision after termination of the TBS order. Surely at least the evaluation of this already drastic change in the TBS scheme should be awaited before a new measure is added to the sanction system. The ISD measure for repeat offenders shows that it is necessary to await such an evaluation of existing measures instead of hastily introducing a new measure.<sup>82</sup>

This criticism with regard to the new supervisory safety measure based on the LRM test also holds true when one recalls the first part of the law – the possibility to continuously extend the probationary period associated with the conditional release from imprisonment, making it possibly life-long. Therefore, also in terms of a prison sentence, indeterminate supervision of dangerous offenders will be possible, which again undermines the legislator's argument of disturbing supervision 'gaps'. In fact, when one looks at the Dutch sentencing scheme as a whole, it appears that in the past decades there has been truly a rise of (preventive) supervision modalities.<sup>83</sup> By introducing new and strengthening existing both front door and back door supervision modalities, the Government aims to achieve a more effective criminal justice system.<sup>84</sup> But even outside the criminal justice system, if for some reason the penal foundation for a legitimised supervision ends, there are opportunities from other legal jurisdictions to protect society or to enhance a good rehabilitation of the offend-

er. For instance, in the presence of a disorder from which danger arises, the possibility exists to place someone into a psychiatric hospital. If the present draft law on Forensic Care is adopted, this possibility will belong to the jurisdiction of the criminal court so that it can better meet the end of a penal sentence. Together with another draft law on Mandatory Mental Health, this possibility will also allow for mandatory medication or supervision modalities.<sup>85</sup> Finally, the law allows for mayors to ask in civil proceedings for imposing supervisory conditions on supposedly still dangerous ex-offenders who return in the mayor's community.<sup>86</sup>

## 5 Evaluation from a Human Rights Perspective

Given the sharp increase of supervision in many Western jurisdictions, the stringent character and the (possibly life-)long-term nature thereof, and the attendant questions of human rights considerations, one would expect a clear human rights framework. But already on the Dutch national level, there is no legal or constitutional framework to test these kinds of penal developments because the Constitution (Art. 120) forbids judges to declare a law in breach of the constitution. Nevertheless, considering the fact that according to the same Constitution (Art. 94) international (human rights) law – more precisely, binding treaty provisions and resolutions by international organisations – takes precedence over national law, one would expect an international catalogue of criteria. Yet, the opposite is true. Unlike the penal concept of (preventive) detention, for which the directly applicable and legally binding framework of Articles 3 and 5 ECHR applies to assess whether the detention is legitimate and whether its execution is humane, such a framework is lacking with regard to the penal concept of (preventive) supervision. As set forth in the editorial of this special issue, there is no clear, uniform legal framework to assess whether supervision is a legitimate punishment as such, but rather a heterogeneous framework. Based on the description of this legal framework of the Council of Europe in the editorial, we will evaluate next whether the currently enacted Dutch law – more specifically the new supervisory safety measure – is legitimate or that it may form a breach of a certain (human) right.

With respect to the non-legally binding recommendations within the framework of the Council of Europe, and relevant to the present Dutch draft law, the current European Rules on Community Sanctions and Measures (Rec(2000)22) merely states that a community

80. Largely following Van der Wolf and Struijk, above n. 53.

81. E. Brems and L. Lavrysen, "'Don't Use a Sledgehammer to Crack a Nut': Less Restrictive Means in the Case Law of the European Court of Human Rights", 15 *Human Rights Law Review* 139 (2015).

82. Struijk (2011), above n. 3.

83. Van der Wolf and Struijk, above n. 53 and Bleichrodt *et al.*, above n. 60.

84. Bleichrodt *et al.*, above n. 60.

85. J. Legemaate *et al.*, *Thematische wetsevaluatie gedwongen zorg* (2014).

86. C.E. Huls and J.G. Brouwer, *De terugkeer van zedendelinquenten in de wijk* (2013). However, this is not allowed during a conditional release (Court Midden-Nederland 6 November 2013, ECLI:NL:RBMNE:2013:5494) or if the conditions are too severe (Court of Appeal Den Bosch 5 March 2013, ECLI:NL:GHSHE:2013:BZ3488).



sanction or measure ordinarily shall not be of indeterminate duration.<sup>87</sup> This provides some grounds and flexibility for the justification of both the supervisory safety measure and the two other parts of the Dutch law, all of which supervisory modalities may indeed be of infinite length. However, in principle, the duration of the modality is actually determined in advance by the judge, after which it can be renewed infinitely. In this respect, it is also important that not only the aforementioned recommendation but also other applicable recommendations, such as the recently adopted recommendation with regard to electronic monitoring (Rec(2014)4), call for proportionality, defining this principle as proportionate to the seriousness of the committed offence, not the alleged offenders' risk and danger.

The proportionality requirement for introducing and implementing a national modality of supervision also derives from Article 2 Fourth Protocol ECHR,<sup>88</sup> a *second 'entrance'* for assessing the new supervisory safety measure. The implication of this requirement that an interference must be necessary, *i.e.* that it corresponds to a pressing social need and is proportionate to the legitimate aim pursued, is also true for assessing the extent to which a supervisory modality infringe on the offenders' right to respect for his private and family life, his home and his correspondence under Article 8 ECHR. This assessment is certainly relevant to the various supervision conditions permitted under the Dutch draft law, which inevitably involve a fundamental restriction of one's freedom of movement and privacy. This certainly applies for the restrictive conditions mentioned in the previous sections such as restraining orders concerning certain areas or to have contact with certain people, a ban to do certain voluntary work, a ban to live in certain areas and the opposite duty to move from a certain area. In the pre-legislative justification of the proposed supervisory safety measure, the Dutch Government justifies explicitly that, and why, these conditions, as well as the proposed measure as such, may very well satisfy the aforementioned necessity requirement.<sup>89</sup> Yet, to our opinion, the adduced justification that the new possibility of restrictive conditions for a (life-)long period will provide additional customisation possibilities for achieving a controlled and gradual rehabilitation of certain dangerous offenders is not convincing enough, especially because in recent years this argument is already used very often to extend the range of conditional supervisory modalities.<sup>90</sup> It does stop at some point. Especially considering the fact that in practice little need seems to exist for the introduction of such a severe (life-)long supervisory safety measure, as discussed in Section 3. Not only do the impact analysis and expected success rate concerning the supervisory

safety measure show rather low numbers, but moreover, and perhaps even more important, not all executive authorities are keen on actually implementing this measure. This specifically holds true for the judiciary. In the Netherlands, the judiciary is inclined to exert strict control over the proportionality in the imposition and execution of sanctions, not only by the criminal court,<sup>91</sup> but by the civil court in summary proceedings as well. In a recent example of such proceedings, the civil court explicitly ruled that two of the restrictive conditions imposed on a conditionally released offender – an area restraining order with associated electronic monitoring for five municipalities – were disproportionate and therefore needed to be suspended.<sup>92</sup>

To sum up, the legal notions of proportionality and LRM certainly do provide an entrance for both national courts and the ECtHR, to decide whether the application of certain restrictive conditions in individual cases is acceptable. Nevertheless, as mentioned, Dutch developments do not differ from the general 'line' in penal legislation and sentencing policy in many other European Countries. This makes it more difficult for the Strasbourg Court because it can hardly condemn a jurisdiction that is 'beyond the average'. Moreover, as the Court seems to be in favour of reducing long-term imprisonment, it is provisionally not to be expected that it will adopt a critical approach towards supervision as an alternative form of punishment.

By discussing the execution of the (restrictive) conditions that can potentially be imposed in the context of supervision, we come to the *third 'entrance'* for assessing the supervisory safety measure from a human rights perspective. This relates to the complex legal possibility that supervision is that restrictive and far-reaching, given the degree and intensity of the conditions imposed on the offender, that it does not apply so much to the test of Article 2 Fourth Protocol but rather to the more stringent test of Article 5 ECHR. This possibility stems from case law of the ECtHR,<sup>93</sup> applied by the courts in the Netherlands.<sup>94</sup> However, it is difficult to predict in advance when supervision in a certain case may fall within the scope of Article 5 ECHR. One might expect that a notification order, to report to the Probation Services, may as such not fall within this scope, in contrast perhaps to (combinations of) more restrictive conditions such as life-long restraining orders. With regard to the new safety measure, this may very well be the case. As mentioned in Section 3, there are some possibilities where this supervisory measure could turn into the deprivation of the offenders' liberty, *e.g.* because of a condition to participate in treatment with clinical admission, or because of the legal effect of alternative deten-

87. C. Morgenstern, 'European Initiatives for Harmonization and Minimum Standards in the Field of Community Sanctions and Measures', 1 *European Journal of Probation* 128 (2009).

88. Again, for an elaborated description of this legal framework, see the editorial of this issue.

89. *Kamerstukken II* 2013/14, 33 816, n. 3.

90. Struijk (2014), above n. 57.

91. See *e.g.* Dutch Supreme Court 27 March 2012, ECLI:NL:HR:2012:BV6996, with regard to the conditional supervisory TBS measure.

92. Court of Appeal Den Haag 30 July 2014, ECLI:NL:RBDHA:2014:9411.

93. See *e.g.* ECtHR, *Guzzardi v. Italy*, Applic. No. 7367/76, 6 November 1980; see further Bleichrodt *et al.*, above n. 60.

94. See *e.g.* Court of Appeal Arnhem-Leeuwarden 9 January 2014, ECLI:NL:GHARL:2014:67 and Court of Appeal Arnhem-Leeuwarden 20 February 2014, ECLI:NL:GHARL:2014:1669.

tion for a maximum duration of six months whenever a condition is breached. Surely those conditions have to meet the requirements of Article 5 ECHR. Consequently, it may be possible that, in a certain case, the complete set of imposed conditions is so restrictive that what seems to be (only) restriction of liberty in practice amounts to deprivation of liberty.

Knowing the legal difficulties and the importance of this assessment with regard to Article 5 ECHR, the Government has given quite some attention to it in their pre-legislative justification. This was obviously prompted by recent case law of the ECtHR concerning the German safety measure ‘nachträgliche Sicherungsverwahrung’, a modality of preventive detention, which to the opinion of the Court constituted a violation of Articles 5 and 7 ECHR.<sup>95</sup> The main problem concerning this preventive detention measure was twofold. First, the lack of a causal link between the preventive detention and a specific offence, required by Article 5(1)a, and second, the fact that this measure was not based on a conviction within the meaning of that provision, required by Article 5(1)c. To our knowledge, when the Dutch safety measure enters into force, it would not constitute a violation of the convention on these restriction grounds. First, the aforementioned possibility of alternative detention whenever a condition is breached is likely to involve lawful detention under Article 5(1)a because that detention is directly linked to a conviction by a competent court. The same might be true for the second, and equally aforementioned, possibility of mandatory participation in treatment with clinical admission. Yet, this possibility does have to meet the additional requirements stated by the ECtHR in order to be the ‘lawful detention of a person of unsound mind’ within the meaning of Article 5(1)e.<sup>96</sup>

In our opinion, the proposed measure could generally withstand the test of Article 5 ECHR. First, because of the twofold sentencing procedure the Government proposes – the execution does not involve additional punishment – and the fact that both the decision to impose the supervisory safety measure and the decision to actually execute the imposed measure are made by an independent court, while both decisions can be reviewed in appeal. That in itself is a strong legal safeguard, besides various other safeguards such as the procedure in which the offender may ask the court to change or terminate the conditions imposed upon him, as well as the extension procedure that automatically involves a periodic judicial review of the necessity of (further extending) the measure.<sup>97</sup> Yet, regarding the

new measure as a whole we do have serious doubts concerning the requirements of proportionality and necessity, as elaborated on before. Both the questions whether the measure will meet these requirements and whether the conditions that would actually be imposed on the offender would be that stringent and grave that they could not meet the (other) requirements of Article 5 ECHR, are to be answered by the judiciary. Moreover, another bottleneck might be the fact that as a result of the twofold sentencing procedure – whereby the decision making on the imposition and the execution of the measure is separated in time, which could easily amount to over ten years because the equally imposed prison sentence or TBS safety measure has to be fully executed first – the offender cannot foresee at the time of his conviction whether the imposed supervisory safety measure will actually be executed or not, nor can he foresee the specific content of the measure or by which behaviour he may influence the extension decision. Moreover, in so far as this latter unforeseeability relates to a proper treatment, the offender is highly dependent on the Government. Therefore, although we would not argue that Article 5 ECHR is seriously at stake, once the law is implemented it may be assessed by the (national) courts as an infringement of the requirement of foreseeability as derived from Article 7 ECHR.

The *fourth* and in our view perhaps most important or at least most fundamental ‘*entrance*’ for human rights assessment might be found in another direction., Article 10(3) ICCPR – a binding provision in the Netherlands – calls for a prison system that provides in treatment of detainees, which is primarily aimed at ‘reformation and social rehabilitation’. Reading this provision as part of the guarantee for humanity in para. 1, one might argue that, with this provision, a right to reformation and social rehabilitation is guaranteed as a human right,<sup>98</sup> which includes a much more profound and broader concept than the Dutch reducing reoffending concept of rehabilitation.<sup>99</sup> At least, it contains a strong urge for member states to aim for a true rehabilitation and a full return to society. This concept calls upon member states to accept this aim as a positive obligation for their sanction system including the execution of custodial sanctions. Moreover, the ECtHR has stated that a true, social rehabilitation is a mandatory factor in penal policy.<sup>100</sup> However, as disappointing as it might be, in the same case law, the Court has added that ‘the Convention does not guarantee, as such, a right to rehabilitation’. Yet, within the framework of the Council of Europe,

95. ECtHR, *M. v. Germany*, Applic. No. 19359/04, 17 December 2009 and ECtHR, *Jendrowiak v. Germany*, Applic. No. 30060/04, 14 April 2011; see further J. Kinzig, ‘The ECHR and the German System of Preventive Detention: an Overview of the Current Legal Situation in Germany’, in M. Caianiello and M.L. Corrado (eds.), *Preventing Danger: New Paradigms in Criminal Justice* (2013), 71, as well as the contribution of Meier in this special issue.

96. See e.g. ECtHR, *Winterwerp v. the Netherlands*, Applic. No. 6301/73, 24 October 1979.

97. Such as required in ECtHR, *X v. UK*, Applic. No. 7215/75, 5 November 1981.

98. J. de Lange and P.A.M. Mevis, ‘De beoordeling van de menswaardigheid van detentiesituaties’, *Sancties* 157 (2003).

99. Struijk (2011), above n. 3; Struijk (2015), above n. 20; M.M. Boone, ‘Judicial Rehabilitation in the Netherlands: Balancing between Safety and Privacy’, 3 *European Journal of Probation* 63 (2011) and S. Meijer, ‘De opmars en evolutie van het resocialisatiebegrip’, 9 *Delikt en Delinquent* 688 (2015).

100. See e.g. ECtHR *Khoroshenko v. Russia*, Applic. No. 41418/04, 30 June 2015, para. 121; ECtHR *Harachiev and Tolumov v. Bulgaria*, Applic. No. 15018/11 and 61199/12, 8 July 2014, paras. 243-6, and ECtHR *Vinter v. UK*, Applic. No. 66069/09, 130/10 and 3896/10, 9 July 2013, paras. 111-6. See e.g. Meijer (2015), above n. 99.

soft rules do incite a right to rehabilitation, *e.g.* Article 6 European Prison Rules. Moreover, in many cases concerning (life-)long imprisonment, the ECtHR stresses the prospect of rehabilitation as an important legal aim and principle.<sup>101</sup> In this approach of the Court, one can clearly read a dedication if not an obligation towards a long series of efforts for an offender's full return into society. In our view, this approach does not only relate to imprisonment as such but moreover and mainly to the 'in between' period of conditional release as well.

How does this relate to the Dutch law striving for indeterminate supervision? Our first objection is that, if the new supervision modalities are to be characterised first and foremost as a mechanism aiming to control the offenders' conduct, this aim is by far not enough to regard these modalities as part of social rehabilitation in its true form. The second objection is that these supervision modalities, especially those of (life-)long duration, effectively hamper social rehabilitation. As we already argued in Sections 3 and 4, research shows that even if there might be an argument for supervision beyond the currently possible duration, the mere emphasis on control is not effective and thus not legitimate.

Concerning the specific content of the Dutch law, the same applies for the modality of supervision after a prison sentence. In this respect, the justification by the Government is that even if the imposed sanction is legally ending, the aim of preventing recidivism may imply that the offender's return to society is not permitted without ongoing control. This justification is highly debatable though, because if an unconditional return to society is not accepted as a possibility, in the end the execution of imprisonment as such is disputed. Moreover, one might seriously wonder whether in this line of reasoning such a control-oriented supervision can be legitimised in terms of social rehabilitation. One could even raise the question as to what extent these supervision modalities actually lean on a conviction for a criminal offence. Finally, because such a control-oriented system persists in excluding offenders, it is a wilful created handicap for true 'anthroposophic' rehabilitation of the offender 'into one of us'. Consequently, in our view such a supervision system may very well come up for discussion with the ECtHR.

The same objections and concerns are true with regard to the new independent supervisory safety measure. Although the judge would impose this sanction together with a conviction for the offence, ensuring a clear and causal link between the supervision and a specific offence, its execution will take place in an unforeseen time after the execution of an equally imposed prison sentence or TBS measure. Thus, it can be unmasked as another modality aiming for ongoing control after the execution of an initial punishment as proportionate reaction to the offence. The fact that the supervisory safety measure is applied simultaneously with the punishment is a mere pretext to avoid a breach of Article 5

ECHR, influenced by the German case law regarding the preventive detention modality of 'nachträgliche Sicherungsverwahrung'. This procedural provision can and may not hide the true character of the new Dutch measure: the perilous non-acceptance of an offender's unconditional return into society.

In this respect, only the last part of the law – preventive supervision after a TBS measure – might be criticised less, yet only because and in so far this TBS measure is aimed at treatment and influencing the offender's behaviour instead of control. If the offender's restriction of liberty instead of his deprivation of liberty is thought to be sufficient to meet this aim as well as to reduce his risk, then this new post-custodial supervision modality more or less entails a variation of the already existing concept of the conditional TBS measure. But again only if the execution and the treatment are based on the prospect of true rehabilitation instead of mere control.

## 6 Conclusion

Central to this article is the currently enacted law on post-custodial release supervision in the Netherlands, focusing on a threefold increase in the post-custodial supervision of dangerous (sex) offenders. All three parts of the law could result in life-long supervision of these offenders. The first two parts do so by extending the possibilities of supervision as part of the conditional release after the execution of either a prison sentence or a TBS safety measure. The third part, though, introduces an independent supervisory safety measure, which is to be executed after either a prison sentence or a TBS measure is conditionally or unconditionally ended. Because of the profound change that such a new independent safety measure will trigger the Dutch penal sanction system, we have particularly analysed and assessed the latter part, both in relation to the Dutch sentencing theory and the existing sanctions in the Dutch penal law system, as to the legal criteria resulting from a human rights framework such as proportionality and LRM. Resulting from that analysis, we come to the main conclusion that the new independent supervisory safety measure is not legitimate (yet). The main argument is not so much a clear violation of the human rights framework – although the imposed conditions may be that restrictive and severe that they could amount to a violation under Article 5(4) ECHR, and the actual content of the measure may furthermore be so unforeseeable that it could amount to an infringement of Article 7 ECHR – but rather the fact that the need for this measure is still unclear.

This has much to do with the current lack of (empirical evidence of) the necessity of this possibly life-long supervisory measure, the lack of legitimising supervision 'gaps' in the existing penal sanction system, the fact that the other parts of the discussed law equally result in a possibility of life-long supervision of the same offender category, the lack of any individual interest that could

101. See *e.g.* ECtHR *Vinter v. UK* and ECtHR *Khoroshenko v. Russia*.

legitimise the imposition and execution of this preventive safety measure, the much broader European penal concept of ‘social rehabilitation’ to which the Dutch concept should comply but currently fails to do so, and finally, the lack of clear criteria in the legal framework for both determining the initial dangerousness of the offender and deciding whether the supervisory measure needs to be extended and how the offender could influence this decision. All in all, it is premature to adopt such a drastic penal law while the need and legitimacy have not yet been demonstrated. The call for this possibly life-long supervisory safety measure seems mainly aimed at defusing the public controversy and preventing an (alleged) dangerous (ex-)offender from recidivism, than actually investing in a true and social rehabilitation of this offender.

Nevertheless, as said, the draft law has indeed been enacted by Dutch Parliament recently and is expected to take effect in the summer of 2016. It is highly likely that the fact that new tragic events continue to occur with (conditionally) released offenders committing violent crimes not only strengthened the call from politics and society to increase the legal possibilities for life-long supervision, but also played an important part in the Democratic voting. Without any judicial legitimacy, the widely held motto seems to be ‘better safe than sorry’. In our view, this is by no means enough to justify such a severe penal sanction. Moreover, when this law will take effect, we have strong concerns that – triggered by a culture of fear and public security – pressure will be exercised upon Dutch judiciary to impose and execute the supervisory safety measure upon offenders rather for normative than scientific reasons. One can only hope that judiciary will once again demonstrate their independent and critical judgement by weighing both the public interests and the individual’s interests. Only such a judgement, especially concerning both the execution and the extension of this supervisory measure, could prevent a counterproductive effect of the measure whereby the (ex-)offender grows so socially isolated that he becomes (only more) dangerous. To ‘support’ Dutch judiciary in this, it is necessary that the ECtHR will develop the concept of social rehabilitation further, in order to be an effective legal safeguard against – at least – an overuse of the new supervision modalities.



# Legal Constraints on the Indeterminate Control of 'Dangerous' Sex Offenders in the Community: The Spanish Perspective

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## Abstract

This article presents an overview of the legal regime provided in the Spanish system of criminal sanctions regarding the control of dangerous sex offenders in the community. It focuses on the introduction, in 2010, of a post-prison safety measure named supervised release. We describe the context of its introduction in the Spanish Criminal Code, considering the influence of societal upheaval concerning dangerous sex offenders in its development, and also the historical and theoretical features of the Spanish system of criminal sanctions. We also analyse the legal framework of supervised release, the existing case law about it and how the legal doctrine has until now assessed this measure. After this analysis, the main aim of this article consists in evaluating the effectiveness and the proportionality of the measure, according to the principle of minimal constraints and the rehabilitative function of the criminal sanctions in Spanish law, stated in Article 25.2 of the Spanish Constitution.

**Keywords:** Supervised release, supervision, sex offenders, dangerousness, safety measures, societal upheaval, proportionality

## 1 Introduction

### 1.1 Context: Societal Upheaval Surrounding Dangerous Sex Offenders and Political Reaction

Attitudes towards violent sex offenders changed in Spain in the mid-2000s. Although this is a complex issue, because a broad range of political, social and structural factors shapes the control of risk groups, the influence of media controversies surrounding famous

cases of dangerous sex offenders is probably one of the most important reasons for this evolution. In this sense, some cases received an unprecedented media coverage in Spain: for example, in 2008, the well-known case of a five-year-old girl called Mari Luz, raped and murdered by an ex-convict. Also in 2008, another ex-convict, released in 2007 from a prior prison sentence for sexual crimes against young girls, was sentenced again for reoffending.<sup>1</sup> The sexual component of both crimes, and the age of the victims, created an atmosphere of societal upheaval (or 'social alarm' according to the Spanish concept), claiming for more control over dangerous sex offenders. The cases exposed provided the impetus towards the legal enactment of supervision schemes in the Spanish system of criminal sanctions.

However, the social alarm generated by these cases and its media coverage is part of a wider context in the Spanish criminal law-making during the past two decades: there has been a constant aggravation of the penalties and also of the conditions regulating their execution, which started a few years after the passing of the Spanish Criminal Code (CC) in 1995.<sup>2</sup> Sexual offences have been one of the fields where this punitive trend has manifested more clearly (some of the sexual crimes have been modified up to four times during the period 1995–2015, always with the aim of increasing penalties or punishing new conducts<sup>3</sup>). This intensification of the criminal punishment has also affected many other fields, especially the treatment of reoffenders (for example by transforming the reiteration of minor offences of theft and assault in an autonomous and more serious crime, and with the introduction of the multi-reoffence aggravation in the CC.<sup>4</sup> This whole evolution has not been a response to escalating rates of violent crimes or criminal rates in general: on the contrary, it has gone parallel to a stagnation or even decrease in the offending rates in

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1. M. Salat Paisal, *La respuesta jurídico-penal a los delincuentes imputables peligrosos: especial referencia a la libertad vigilada* (2015), at 58–63.
2. J.L. Díez Ripollés, 'Rigorismo y reforma penal. Cuatro legislaturas homógenas (1996–2011)', 142–3 *Boletín Criminológico* (2013).
3. It is possible to recognise this tendency in the following reforms done in the Spanish criminal law by the Criminal Code Reform Acts 15/2003, 5/2010 and 1/2015 (CCRA 15/2003, 5/2010 and 1/2015). Specifically about sexual crimes, Reform of Sexual Offences Act 11/1999.
4. According to Act 11/2003, about measures in citizen security, domestic violence and social integration of foreigners. Cf. S. Aguado López, *La multirreincidencia y la conversión de faltas en delito* (2008).

Spain.<sup>5</sup> In fact, Spain appears as one of the countries with the lowest criminal rates in Europe (in general, and concerning violent offences), but among the ones with a highest prison population.<sup>6</sup>

This attitude of the government, named by Spanish doctrine as *punitive populism*,<sup>7</sup> the main feature of which is the strengthening of the penal law as an electioneering option, is thought to give an answer to societal upheaval created by media controversies, but not based on serious analysis of the real problems and needs of the criminal policy.<sup>8</sup> In terms of high-risk offenders, most of the legislative changes have focused on sex offenders, particularly those who commit crimes against minors. One response to the management of convicted sex offenders has been to develop control or supervision schemes that extend governmental control over offenders after the expiration of their prison sentences.

## 1.2 Legal Responses to Dangerous Sex Offenders

What was the reaction of the public authorities to the growing alarm regarding dangerous sex offenders in 2008? After several drafts and unclear proposals,<sup>9</sup> the Criminal Code Reform Act 5/2010 (CCRA 5/2010) introduced a safety measure, specifically focusing on post-prison control of dangerous offenders, named supervised release. It is a non-custodial preventive measure, based on the offender's dangerousness, which is imposed at the time of sentencing together with the penalty for the crimes committed, but to be executed after the prison term. The period of post-prison supervision may last between one and ten years (non-indeterminate supervision). It is important to note that the supervised release was introduced both for sexual offenders and for terrorists, with a nearly identical regulation regarding its content, requisites and executing conditions. Nevertheless, for the purpose of this article, we will focus only on the case of sexual offenders.

5. Cf. E.G. España, J.L. Díez Ripollés, F.P. Jiménez, M.J.B. Jiménez and A.I.C. Domínguez, 'Evolución de la delincuencia en España: Análisis longitudinal con encuestas de victimización', 8 *Revista Española de Investigación Criminológica* (2010).
6. According to Eurostat reports, where sexual crimes are included in violent crimes, available at: <[http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Violent\\_crimes\\_recorded\\_by\\_the\\_police,\\_2002%E2%80%932012\\_YB14.png](http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Violent_crimes_recorded_by_the_police,_2002%E2%80%932012_YB14.png)>. About prison population, available at: <[http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Prison\\_population,\\_2002%E2%80%932012\\_YB14.png](http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Prison_population,_2002%E2%80%932012_YB14.png)>.
7. L. Pozuelo Pérez, *La política criminal mediática. Génesis, desarrollo y costes* (2013); A.I. Cerezo Domínguez, *El protagonismo de las víctimas en la elaboración de las leyes penales* (2011); M. García Arán, J. Botella Corral & R. Rebollo Vargas, *Malas noticias: Medios de comunicación, política criminal y garantías penales en España* (2009); M. García Arán, 'El discurso mediático sobre la delincuencia y su incidencia en las reformas penales', *Revista catalana de seguretat pública* (2008).
8. D. Varona Gómez, 'Medios de comunicación y punitivismo', *InDret* (2011); see also 'Somos los españoles punitivos? Actitudes punitivas y reforma penal', *InDret* (2009); S. Soto Navarro, 'La influencia de los medios en la percepción social de la delincuencia', 7 *Revista Electrónica de Ciencias Penales y Criminología* (2005).
9. About these previous drafts, L. Martínez Garay, 'La libertad vigilada: regulación actual, perspectivas de reforma y comparación con la Führungsaufsicht del derecho penal alemán', 22 *Revista General Derecho penal* (2014); P. Otero González, *La libertad vigilada aplicada a ¿imputables? Presente y futuro* (2015); Salat Paisal, above n. 1.

This article aims to provide a description of its nature, legal framework, and an evaluation of its proportionality according to the principle of minimal constraints and from the perspective of rehabilitation as the objective of the Spanish system of criminal sanctions.<sup>10</sup> As we will see in the following, although it was introduced with a limited scope, its introduction supposed a new paradigm in the Spanish system of criminal sanctions.

However, before going into details about the supervised release, we mention two other recent preventive measures enacted to control dangerous sex offenders in the community. The first measure is the Protection of Infancy Act 26/2015. It has stated the absence of criminal records concerning sexual crimes as a condition of acceding to labour activities related to regular contact with underage.<sup>11</sup> In order to verify this requirement, a negative certification of the Central Register of Sex Offenders shall be handed over. According to the Protection of Infancy Act 26/2015, this Register should include data related to the identity and genetic profile of people sentenced for sexual crimes. However, in accordance with Article 10 of Order 1110/2015, based on which this Register was developed, criminal records could not be cancelled for a thirty-year period. This is a stricter legal framework than the general one contained in the CC with regard to criminal records, strengthening its stigmatising nature for sexual offenders.

The second measure related to the control of sex offenders is Article 129 bis CC, created by the CCRA 1/2015, which enables the Courts to ask for a DNA sample and introduce it in a police database in case of people convicted of serious crimes, if the Court appreciates that there is a high risk of reoffending. Although this provision concerns all serious crimes that may suppose risks for life, health or physical integrity, not only sexual crimes but also the official justification for this provision comes from the perspective of its necessity according to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, 25 October 2007. This reference is introduced to show how the scope of supervision of dangerous sex offenders in the community includes different fields of social control. In this sense, sex offenders may be subject to controls imposed by a number of provisions, which do not relate directly to their criminal conduct.

## 2 Evaluation in Light of Sentencing Theory

### 2.1 Historical Approach

The Spanish system of criminal sanctions has traditionally been organised as a 'twin track' system, according to

10. According to Art. 25.2 Spanish Constitution: 'Prison sentences and safety measures shall be oriented towards re-education and social rehabilitation.'
11. J. Tamarit Sumalla, 'La prueba de no ser pederasta: ¿una medida necesaria y proporcionada?', 96 *Actualidad jurídica Aranzadi* (2016).

continental legal culture. This type of system is based on imposing different sorts of penal sanctions according to the two main different functions of the Criminal Law: penalties (prison and fines) as deserved punishments for the wrongdoings, and safety measures as preventive means for avoiding reoffending in the future. The penalties are grounded in the offender's personal responsibility for the violation of law, while the security measures depend on the concept of dangerousness.<sup>12</sup>

Along most of the twentieth century, the Spanish system was a strict twin track system, where it was possible to impose both penalties and safety measures, simultaneously, upon the same subject and sometimes because of the same conduct.<sup>13</sup> Safety measures were stated in special laws (first in the Vagrancy Act of 1933, later in the Dangerousness and Social Rehabilitation Act of 1970) that did not focus only on criminal dangerousness but were built upon the more wider concept of social dangerousness. This system was used during the years of Franco's Dictatorship not only to justify harsher punishments and discriminatory treatment without considering civil liberties or procedural rights in its application, for vagrants, prostitutes, alcoholics or homosexuals, but also as a means of controlling political dissent and social disturbance. Thus, the notion of dangerousness was misused with a moral and political purpose. By the time democracy arrived in the late 1970s, this strict twin track system was completely discredited, in part because it had proven absolutely ineffective to prevent crimes, and also because of some pronouncements of the Constitutional Court that pointed out severe objections to its legitimacy; especially regarding the complete infringement of basic principles of criminal law, such as legality or fair trial.<sup>14</sup>

The Spanish CC enacted in 1995 repealed the Dangerousness and Social Rehabilitation Act and decided not to continue with the strict twin track system. The new regulation did include some safety measures, but only as therapeutic measures applicable in cases of non-responsible persons or persons with diminished responsibility. Moreover, these safety measures were subject to strict limits of proportionality (the safety measure cannot last

longer than the prison penalty would have done if the subject had been found responsible for the crime) and shaped according to the 'vicarious system' (the security measure is executed first, and the time when the measure is executed counts as the time of the prison term). The CC did not introduce any security measures that could be imposed on a fully responsible person in addition to the penalty and serving after the prison term. This rejection of the strict twin track system in 1995 can be seen, at least in part, as a logical consequence of the excesses committed during the Dictatorship, where dangerousness had frequently been an excuse to tighten social control over social and political dissent.

## 2.2 Theoretical Evaluation

The system of criminal sanctions stated in the Spanish CC of 1995 was initially accepted by Spanish doctrine, albeit with some significant exceptions.<sup>15</sup> However, the situation has changed in the past years. There are now more authors in favour of introducing custodial or preventive measures for responsible dangerous offenders despite the fact that violent crimes have not increased in recent years.<sup>16</sup> The repeal of the Dangerousness and Social Rehabilitation Act of 1970 was necessary in 1995 because of the many violations of procedural guarantees and individual rights that it contained, but this does not mean – so they say – that any dualistic or twin track system involves the infringement of the basic principles of the constitutional state. According to this position, imprisonment is not enough in cases of dangerous sex offenders, who still pose a relevant danger of reoffending at the end of their prison terms. It is necessary to complement the retributive track of imprisonment with the preventive track of safety measures. It is within this context that the scholarly discussion regarding the supervised release has to be placed.

Part of the doctrine considers that the introduction of the supervised release is the first step to correct the mistake committed in 1995 when the Spanish CC abandoned the strict twin track system. It has been argued<sup>17</sup> that the absence of safety measures for dangerous offenders could have been one of the causes of the *punitive populism* described before: the continuous aggravations on the nature and duration of the penalties in the past fifteen or twenty years could have been hiding an

12. About this concept, see Section 3.2.

13. With regard to the evolution of the twin track system in Spanish criminal law, see, in chronological order: A. Urruela Mora, *Las medidas de seguridad y reinserción social en la actualidad. Especial consideración de las consecuencias jurídico-penales aplicables a sujetos afectados de anomalía o alteración psíquica* (2009); A.J. Sanz Morán, *Las medidas de corrección y de seguridad en el Derecho penal* (2003); C.M. Romeo Casabona, *Peligrosidad y Derecho penal* (1986); F.J. Muñoz Conde, 'Monismo y dualismo en el Derecho penal español', 6 *Estudios penales y criminológicos*, at 216-39 (1981-1982); J. Terradillos Basoco, *Peligrosidad social y Estado de Derecho* (1981); A. Jorge Barreiro, *Las medidas de seguridad en el Derecho español: un estudio de la ley de peligrosidad y rehabilitación social de 1970 y de la doctrina de la sala de apelación de peligrosidad* (1976).

14. It is remarkable about the position of the Constitutional Court, regarding the difficulties to harmonise the system of the Dangerousness and Social Rehabilitation Act of 1970 with the presumption of innocence, the principle of legality and the *ne bis in idem* rule. See Constitutional Court, 27 November 1985, no. 159/1985; Constitutional Court, 14 February 1986, no. 23/1986. See also T. Vives Antón, 'Constitución y medidas de seguridad', in *La libertad como pretexto* (1995), at 245-53.

15. J. Cerezo Mir, 'Consideraciones político-criminales sobre el nuevo Código Penal de 1995', in *Estudios jurídicos en memoria del profesor Dr. D. José Ramón Casabó Ruiz* (1998).

16. Cf. above n. 6.

17. Cf., but with important differences depending on the author, Cerezo Mir, above n. 15, at 390; L. Gracia Martín, 'Las medidas de seguridad y de reinserción social', in *Tratado de las consecuencias jurídicas del delito* (2006), at 435-37, 457, 469; J.M. Zugaldía Espinar, 'Medidas de seguridad complementarias y acumulativas para autores peligrosos tras el cumplimiento de la pena', 1 *Revista de Derecho penal y Criminología*, at 199 et seq. (2009); R.M. García Albergo, 'Ejecución de penas en el proyecto de reforma. Estudio de un problema concreto: qué hacer con los reos habituales o reincidentes en los que subsiste la peligrosidad criminal tras el licenciamiento definitivo', in F.J. García, A. Manjón-Cabeza Olmeda & A. Ventura Püschel (eds.), *La adecuación del derecho penal español al ordenamiento de la Unión Europea: la política criminal europea* (2009), at 135.



incapacitation component, which had to be accomplished through the penalties, because there were no security measures to resort to. Without preventive or custodial measures that could be added to prison sentences in cases of dangerousness, harsher punishment has been a logical consequence of a deficient system of criminal sanctions.

This is the reason why some authors consider the introduction of the supervised release as a necessary return to the twin track system in the Spanish system of criminal sanctions. Moreover, supervised release has the advantage of being a non-custodial measure, where the cost that it carries for the individual upon which it is imposed is not so intense as in the case of other possible measures, such as preventive detention. Therefore, supervised release can be legitimated more easily as a necessary measure that does not imply disproportionate sacrifices of individual rights.<sup>18</sup>

However, among supporters of supervised release, there is also criticism: some worry whether the particular legal configuration it has received will permit it to be sufficiently efficient in preventing future crimes,<sup>19</sup> and many argue that although its introduction was convenient because of the reasons stated earlier, it should have been accompanied by a relevant reduction in the prison terms existing in Spain. As we have explained earlier, the severity of criminal punishment in Spain is very high, and the long prison terms assigned to many crimes may well respond at least in part to incapacitation aims. Therefore, post-prison restrictions imposed to subjects who have been previously sentenced to long-term prison sentences, even if they are non-custodial, could suppose a disproportionate constraint of individual liberty, as well as a double sanction for dangerousness unfavourable to the subject.<sup>20</sup>

Nevertheless, supervised release has also received harsher criticism in the literature from two confronting positions. On the one hand, some authors consider that it is unnecessary given the low level of violent criminality and sexual offending rates in Spain. In addition to this, the above mentioned authors consider that the addition of safety measures to penalties are illegitimate, and even more if they are aimed, as it is in their opinion the case with supervised release, only at incapacitating and controlling the subject without offering help and guidance for a proper rehabilitation. They denounce that supervised release operates in practice as a prolongation of the penalty because it will function as a substitute for parole: by hindering the application of parole while serving the sentence and adding an extra time of penal control in the form of supervised release after the prison term.<sup>21</sup> On the other hand, some authors have criticised the introduction of supervised release for opposite reasons: they say that a non-custodial measure will be insufficient to achieve an effective control of dangerous sex offenders in the community. They consider it a *soft measure* that gives no proper answer to the most serious cases of dangerous offenders. According to this position, it is necessary to introduce more restrictive measures in the Spanish system of criminal sanctions, even for custodial ones or an indeterminate supervision of sex offenders.<sup>22</sup>

### 3 Supervised Release for Dangerous Sex Offenders in Spanish Criminal Law

#### 3.1 Legal Framework

Since its enactment in 2010, supervised release is a non-custodial safety measure impossible for terrorism crimes (Art. 579 bis 2 CC) and sexual crimes (Art. 192.1 CC). In the recent reform of the CC (CCRA 1/2015), homicide (Art. 140 bis CC) and some cases of domestic violence (Art. 156 ter and Art. 173.2 CC) have also been

18. M.A. Boldova Pasamar, 'Consideraciones político-criminales sobre la introducción de la pena de libertad vigilada', in *El Anteproyecto de modificación del Código penal de 2008. Algunos aspectos*. 6 Cuadernos penales José María Lidón (2009), at 47,51; J.M. Zugaldía Espinar, '8.7. Medidas de seguridad', in J. Álvarez García (ed.), *Estudio crítico sobre el Proyecto sobre el Anteproyecto de Reforma Penal de 2012* (2013), at 457, 481 ff; B.J. Feijoo Sánchez, 'La libertad vigilada en el Derecho penal de adultos', in J. Díaz-Maroto y Villarejo (ed.), *Estudios sobre las reformas del Código penal* (2011), at 217; I. Ortiz de Urbina Gimeno, 'La introducción de la libertad vigilada en el Derecho penal español: hay motivos para el escándalo?', *XXII Jornadas de la Abogacía General del Estado sobre 'El nuevo código penal'* (2010).

19. V. Magro Servet, 'La figura del agente de libertad vigilada en la reforma del código penal', 7318 *Diario La Ley* (2008) and J. Leal Medina, 'La pena accesoria de libertad vigilada en el anteproyecto de reforma del Código penal; una respuesta del carácter preventivo frente a los delitos sexuales graves', 7318 *Diario La Ley* (2010). In this sense, Navarro Frías is sceptic concerning the efficacy of the measure in sexual psychopath. I. Navarro Frías, 'Psicopatía y medidas de seguridad: el caso de los psicópatas sexuales y la libertad vigilada tras la última reforma del código penal', 105 *Cuadernos Política Criminal*, at 156-8 (2011).

20. A.J. Sanz Morán, 'La nueva medida de libertad vigilada: reflexión político-criminal', *Libertas-Revista de la Fundación Internacional de Ciencias Penales*, at 217 (2012); X. Etxebarria Zarrabeitia, '8.5 Medidas de seguridad y su ejecución', in J. Álvarez García (ed.), *Estudio crítico sobre el Proyecto sobre el Anteproyecto de Reforma Penal de 2012*, at 457; Feijoo Sánchez, above n. 18, at 327; García Albero, above n. 17, at 687; J. del Carpio Delgado, 'La medida de libertad vigilada para adultos', 36 *Revista de Derecho penal*, at ep. IV (2012).

21. N. García Rivas, 'La libertad vigilada y el derecho penal de la peligrosidad', 16 *Revista General de Derecho penal*, at 10-27 (2011); Huerta Tocildo, 'Esa extraña consecuencia del delito: la libertad vigilada', in J. Álvarez García (ed.), *Libro Homenaje al Profesor Luis Rodríguez Ramos* (2013), at 135 ff.; M. Acale Sánchez, *Medición de la respuesta punitiva. Tratamiento penal del delincuente peligroso* (2010), at 187-214, and '8.4 Medidas de seguridad', in J. Álvarez García (ed.), *Estudio crítico sobre el Proyecto sobre el Anteproyecto de Reforma Penal de 2012* (2013), at 433; I.F. Benítez Ortúzar, 'La nueva medida de seguridad de libertad vigilada aplicable al sujeto imputable tras el cumplimiento de la pena privativa de libertad: la admisión de los postulados del Derecho penal del enemigo por la LO 5/2010', 103 *Cuadernos Política Criminal*, at 111, 118 (2011).

22. Cf. J.M. Silva Sánchez, 'El contexto del Anteproyecto de Reforma del Código Penal de 2008', in *El Anteproyecto de modificación del Código penal de 2008. Algunos Aspectos*, 6 Cuadernos penales José María Lidón (2008), at 24. See also J.L. Manzanares Samiego, 'La libertad vigilada', 7534 *Diario La Ley* (2010).



included in this *numerus clausus*.<sup>23</sup> Its legal framework is established in Article 106 of the CC, defined as ‘submission to judicial control’. This control consists in a list of eleven rules of conduct that restrict some rights and liberties, among which the Court has the discretion to choose which ones are the most appropriate or accurate according to the situation of the offender. The rules that can be imposed, listed in Article 106.1 of the CC, are as follows: obligation to always be traceable by means of electronic devices that allow the subject to be located at all times; obligation to regularly appear at the place set by the Judge or Court; that of immediately reporting, within the term and by the means stated by the Judge or Court for that purpose, each change of residence or place or post at work; prohibition to leave the place of residence or a specific area without authorisations from the Judge or Court; prohibition to approach the victim, or his relatives or other persons determined by the Judge or Court; prohibition to communicate with the victim, or with his relatives or other persons determined by the Judge or Court; prohibition to visit specific areas, places or establishments; prohibition to reside in specific places; prohibition to carry out certain activities that may provide or afford him the chance to commit criminal offences of a similar kind; obligation to participate in educational programmes or in labour, cultural, sexual education or other similar training programmes; obligation to follow external medical treatment, or to submit to periodic medical inspection.

It is worth noticing that only the obligations to participate in educational programmes and in labour, cultural, sexual education or other similar training programmes, as well as the obligations to follow medical treatment or submit to periodical medical inspection have a therapeutic and rehabilitative orientation. The rest of the rules of conduct are all focused on the control of dangerous sex offenders in the community, be it by controlling the places where he stays or the activities he does, or by protecting the victims from further contact with the offender.

According to Article 192 of the CC, which specifies the legal provisions of supervised release in relation to sexual offences, the duration of the measure lasts between one and five years, or between five and ten years, depending on the crimes’ seriousness. The imposition of the measure in cases of sexual crimes is mandatory,<sup>24</sup> being only optional when just one crime has been com-

mitted, the crime is not serious and a first offender has committed it.<sup>25</sup>

Supervised release is imposed on the same sentence that imposes the prison penalty. However, its execution starts when the subject is released from prison, so it is a post-prison non-custodial measure. In fact, the content of the measure is not established in the sentence, but only when the person is released from prison. In this sense, the Court for Penitentiary Control (CPC),<sup>26</sup> has to submit a proposal to the Judge or Court that imposed the sentence at least two months before the prison term ends. The proposal has to be done taking into account offender’s evolution during the prison sentence, and especially the rehabilitation perspectives at the time of releasing from prison. Although the wording of Article 106 CC could lead to the conclusion that the execution of the supervised release is always mandatory, in fact it depends on the existence of dangerousness, so that if the Judge or Court considers that a positive prediction of low risk of reoffending can be observed, the measure can be left ineffective from the start (Art. 106.3(c) CC). Moreover, once imposed, the supervised release can be modified in its content according to the evolution of the subject. Its duration can also be reduced if his/her evolution is positive, and the measure can cease anytime when it appears to be no longer necessary because it is possible to ensure a positive prediction of rehabilitation. These legal provisions suppose recognition of the requirements derived from the principle of proportionality, which allows the use of security measures only when necessary. A very similar provision regarding this requirement of necessity also applies to all other security measures applicable for non-responsible subjects or persons with diminished responsibility because of insanity or drug abuse (Art. 97 CC).

Spanish doctrine has pointed out that supervised release should have been restricted to cases where the offender could not access to parole. The admission to this penitentiary regime requires the existence of a positive prediction of rehabilitation. Consequently, if the subject does not show a negative prediction of rehabilitation, one of the conditions of supervised release, and it would

23. Supervised release can also be imposed on subjects who could not be charged for their crimes, no matter what kind of crime, by reason of insanity or drug or alcohol abuse. However, in these cases, the legal nature of supervised release is different: it is not a post-prison measure, but a substitutive criminal sanction in cases where the penalty could not be imposed or should be reduced because of the diminished responsibility of the subject.

24. Supreme Court, 11 November 2014, no. 768/2014, para. 3.

25. This concept had not previously been used in Spanish criminal law, so it raised doubts about its meaning. According to García Rivas, there are different possibilities to interpret the concept of the first offender: (a) subject who has not been sentenced previously for committing a crime; (b) subject who has been sentenced previously for a crime of a different nature and (c) subject who has been sentenced previously for a sexual crime but his criminal record has been cancelled. Cf. García Rivas, above n. 21, at 4. The CCRA 1/2015 has modified this requisite for terrorist crimes (the law no longer refers to a ‘first offender’ but to a ‘person who has committed an offence for the first time’), but has not changed the wording in Art. 192.1 CC.

26. It is a Court different from the one that imposed the sentence. In the Spanish judicial system, the Courts for Penitentiary Control (*Juzgados de Vigilancia Penitenciaria*) are responsible for supervising the decisions taken by the penitentiary authorities (for example about temporary release from prison) and are responsible for granting or denying parole.

be possible to access to parole, it means that supervised release is not necessary in this case.<sup>27</sup>

Regarding the breach of the obligations or prohibitions during the execution of the supervised release, it is possible to distinguish two possibilities: if the breach is sporadic or occasional, the Judge or Court has the discretion to modify the rules of conduct imposed. On the opposite, if the breach is serious and repeated and it reveals an offender's will to not obey the rules of conduct, it is possible to prosecute the subject for the so-called crime of punishment break or non-compliance. It is worth noting that this crime of punishment break, regulated in Article 468 CC, is punished with a prison penalty of up to one year if the penal sanction breached is supervised release. Therefore, although supervised release is a non-custodial measure, it could easily turn into a deprivation of liberty if the offender breaches the obligations imposed, a circumstance that maybe could be frequent taking into account that the measure is supposed to be imposed upon especially dangerous subjects. After this description of the legal framework of the supervised release, it is noticeable that, besides the enumeration of the rules of conduct that the Judge or Court can impose as the content of the measure, there is a lack of regulation in the CC about the practical application of the measure.<sup>28</sup> It is also important to remark that the execution of the supervised release is completely oriented to the substantive criteria of dangerousness prediction. The following points are focused on when analysing these issues.

### 3.2 The Concept of Dangerousness in Spanish Criminal Law

The concept of dangerousness has been very controversial in scholarly discussion. It has been stated that it is a 'very dangerous' concept because of the lack of enough empirical knowledge to predict further offences with accuracy.<sup>29</sup> It has been pointed out that empirical studies prove the existence of a tendency to overvalue dangerousness, that is, to classify incorrectly as dangerous offenders who do not evidence violent behaviour afterwards (false positives). One reason for this tendency to overestimate dangerousness is the intrinsic limitations of any method for estimating dangerousness, be it clinical or actuarial.<sup>30</sup> Another reason would be the societal upheaval created in cases of false negatives, which would facilitate that Judges or Courts tend to presume the existence of dangerousness even if there is not

enough evidence to justify it.<sup>31</sup> In this sense, the role that public opinion has, or should have, in influencing sentencing practice is controversial. Public opinion is frequently based on mistaken assumptions about the sentences actually imposed on offenders in practice.

The problems of the notion of dangerousness and the uncertainty of the violence risk assessments affect the legitimacy of any security measure, which is aimed at preventing future crimes by determinate persons. If dangerousness cannot be stated with enough certainty, the preventive function essential to this kind of criminal sanctions is not reached because its imposition upon people who will not offend in the future (false positives) makes the security measures unnecessary and therefore illegitimate. At the same time, failure to impose them on people who will commit further crimes (false negatives) does not provide any better security for society. In this sense, there is an assumption that sex offenders are at a higher risk of reoffending than other offenders, but this may not be necessarily true. There are of course problems with estimating rates of reoffending within this group, given that many sexual offences remain undetected or unreported, but the available research does not support the premise that sex offenders inevitably reoffend or that they are more likely to reoffend than other group of offenders.<sup>32</sup>

Dangerousness is a requirement to impose any safety measures in the Spanish system of criminal sanctions, and it is defined briefly in the CC as 'prediction about the future behaviour of the subject that states that he will probably commit new crimes' (Art. 95 CC). Note that this provision does not specify the intensity of this probability, nor the seriousness of the crimes that the subject is supposed to commit in the future. Concerning supervised release, Article 106 of the CC does not demand expressly an assessment of dangerousness as a requisite for imposing or executing this particular measure, but it can be deduced from the general requirement stated in Article 95 CC and from the fact that, as we have explained before, if there exists 'a positive prediction of rehabilitation', the measure should be reduced in its duration or directly cancelled. However, requiring dangerousness as a requisite for imposing security measures does not suppose a protection for the offender if the regulation describing it is vague, and there are no clear legal provisions regulating its assessment. This is precisely the case with the legal provisions we have just referred to in these pages.

This uncertainty and the problems associated with it have not been corrected by the case law. On one side, the meaning of dangerousness or the ways to assess the risk of future reoffending or violent behaviour have not been a central issue for the courts. There can be found sentences in the Spanish Supreme Court case law that

27. See M.V. Sierra López, *La medida de libertad vigilada* (2013), at 144; Salat Paisal, above n. 1, at 349; J. Cid Moliné, 'La medida de seguridad de libertad vigilada (Art. 106 CP y concordantes)', in J.M. Silva Sánchez and N. Pastor Muñoz (eds.), *El nuevo Código Penal. Comentarios a la reforma* (2012).

28. For more details, see Section 3.3.

29. T. Vives Antón, 'Métodos de determinación de la peligrosidad', in *Peligrosidad social y medidas de seguridad (La ley de peligrosidad y rehabilitación social de 4 de agosto de 1970)* (1974). More recently, Sanz Morán, above n. 13, at 93, with some references regarding the concept, such as its stigmatising meaning or the problem of labelling.

30. L. Martínez Garay, 'La incertidumbre de los pronósticos de peligrosidad: consecuencias para la dogmática de las medidas de seguridad', *InDret* (2014).

31. *Ibid.* See also Sanz Morán, above n. 13, at 102-6, and, very detailed, G. Albrecht, 'Sinn und Unsinn der Prognose von Gewaltkriminalität', in W. Heitmeyer and H.G. Soeffner (eds.), *Gewalt. Entwicklungen, Strukturen, Analyseproblemen* (2004).

32. B. McSherry and P. Keyzer, *Sex offenders and preventive detention. Politics, policy and practice* (2009), at 24.

do not even distinguish with enough clarity between criminal dangerousness and social dangerousness.<sup>33</sup> Spanish courts usually derive the existence of dangerousness from the seriousness of previous offences and from the fact that the mental illness suffered by the accused needs a medical treatment.<sup>34</sup> To our knowledge, courts have not until now directly addressed the problem of the uncertainty of violence risk assessments, and they usually do not ask the therapeutic specialist to explain the methodology or technique used to reach their conclusion. Then, the role of mental health professionals in assessing risk is not clarified. Sometimes, the sentences do not even allow knowing whether the court demanded the opinion of therapeutic specialists about the necessity of imposing a security measure and whether their professional view was taken into consideration. As a result, the argumentation used in the case law to affirm the existence of dangerousness is very limited, and the object of the predictions of dangerousness is very indeterminate. It can be said that the assessments of dangerousness in Spanish case law are mostly founded in the Court's intuition and offer very few guarantees to act as an effective filter to orientate the imposition of safety measures.<sup>35</sup>

### 3.3 Supervised Release in Practice

A remarkable feature concerning the legal provisions governing supervised release is the lack of a legal regulation about the institutions or personnel in charge of the supervision. Nor the CC or any other law or regulation states that public agents (if any) are competent for the daily supervision and guidance of the subject, for controlling if he obeys the rules of conduct imposed in the sentence. Moreover, there is no special public agency responsible for the supervision, apart from the Judge or Court, and apart from the role played by the police. The fact that it is not known who has to assess the evolution of the offender's behaviour while the measure is being executed is a very important problem, given that in case of a positive evaluation during the execution of the measure, it should be cancelled or its duration reduced. Without clear information about it, Courts do not have enough basis to take a proper decision during the execution of the supervised release. The only legal provision regulating this matter is Article 98 CC, which states that the CPC should present to the Court, at least annually, a proposal to maintain or cancel the measure, or also to modify the rules of conduct imposed to the subject. To

do this proposal, the CPC 'should take into account all the reports delivered by the therapeutics who assess the sentenced during the execution of the supervised release'. But the problem is precisely that the legal framework does not have any provision about who are the persons who are supposed to assess the subject, nor about the pertinent institution to control the development of the measure.

The only reference to supervised release in another legal provision different to the CC is Article 23 Act 840/2011, which regulates the execution of community penalties, as well as the suspension and substitution of penalties. According to this Act, the Treatment Council of the prison in which the offender is serving his penalty has to elaborate a report about his evolution. This report is submitted to the CPC, and it constitutes the basis for the proposal that this court has to in turn address to the sentencing Judge or Court so that this report can determine the rules of conduct that will be the content of the supervised release in each case. But Act 840/2011 does not say who is in charge of the supervision once the execution of the safety measure starts. In fact, Act 840/2011 excluded non-custodial safety measures from the Penitentiary Administrations' scope of competence, but without commending their execution to another institution. Consequently, non-custodial safety measures as supervised release have been located 'in no-man's land, without any legal provision concerning its practical development',<sup>36</sup> and, as it has been said graphically, we have in Spain 'a supervised release without a supervisor'.<sup>37</sup>

In this context, the role of the case law in clarifying the practical application of the supervised release could be highly significant. Nevertheless, the brief period passed as the introduction of the supervised release in 2010 does not permit a proper analysis yet. Given that supervised release is imposed in cases where prison sentences are noteworthy, there is still not enough case law to assess the concretion of the measure by its development *in action*.

However, some conclusions can be drawn from the case law concerning the moment of the imposition of the measure, this is at the time of sentencing when the supervised release is stated as a post-prison safety measure. For example there have been doubts about the complementarity of the measure with some accessory penalties established in the CC.<sup>38</sup> In this sense, Supreme Court n. 618/2014 and n. 347/2013<sup>39</sup> have

33. In this sense, Supreme Court, 2 February 2011, no. 65/2011, where it is stated, 'the study of dangerousness is destined to anticipate the possibility that sentenced person commit *new harmful facts to society*, according to Art. 95 Criminal Code' (emphasis added).

34. It has to be noticed that, until 2010, security measures existed in Spain only for mentally ill offenders or offenders with drug or alcohol abuse, so the assessment of dangerousness always included some kind of mental disturbance.

35. A. Alonso Rimo, 'Medidas de seguridad y proporcionalidad con el hecho cometido (a propósito de la peligrosa expansión del derecho penal de la peligrosidad)', 24 *Estudios penales y criminológicos*, at 120 (2009); T. Manso Porto, 'Freiheit sentziehende Maßnahmen gegen gefährliche, strafrechtlich verantwortliche (Rückfall) Täter, Spanien', in H.-G. Koch (ed.), *Wegsperren* (2011), at 333.

36. J. Nistal Burón, 'La libertad vigilada postpenitenciaria proyectada en la reforma del código penal. La necesidad de un derecho de ejecución para esta medida de seguridad no privativa de libertad', 9 *Revista Aranzadi Doctrinal* (2014).

37. Manzanares Samaniego, above n. 22.

38. In Spanish law, accessory penalties (that consist in the deprivation of rights other than liberty or property, and usually are prohibitions to exercise certain professions or public posts) are imposed on specific offences, attending to the nature of the crime or the gravity of the penalty. For example, in cases of domestic violence, the prohibition of approaching the victim is a usual accessory penalty. See Section 4.1.

39. Supreme Court no. 618/2014, paras. 1-2 and Supreme Court no. 347/2013, para. 2.

stated the compatibility of the supervised release with the accessory penalty of ‘prohibition of approaching to the victim’, although this is one of the rules of conduct that according to Article 106 CC can be part of the content of the supervised release. The Supreme Court considers that there is no duplicity in imposing the prohibition twice because each sanction (the accessory penalty and the supervised release) is based on different foundations. Moreover, the accessory penalty is executed during the prison sentence, while supervised release is strictly a post-prison criminal sanction. Nevertheless, this does not solve the problem that arises in cases where the duration of the secondary penalty is larger than the prison sentence, so duplicity could exist if during the execution of the supervised release, the prohibition of approaching the victim is established as one of the rules of conduct.<sup>40</sup> Another problem that has been addressed by the Supreme Court case law is whether supervised release can still be imposed when the prison sentence is suspended. In this sense, Supreme Court 768/2014<sup>41</sup> states the mandatory nature of the supervised release, given that its imposition is not based on the same foundations as imprisonment, according to the twin track system. Then, it must always be executed, even in cases where the prison sentence has been suspended. Consequently, supervised release is not considered suitable for an automatic suspension, excepting the cases where, according to offender’s positive evaluation, Courts have the discretion to cancel it, according to a positive prediction of rehabilitation.

The exposed lack of legal provisions governing supervised release is an important clue to understand the very limited efficacy that can be expected of this measure from a preventive perspective. According to Sanz Morán, the success of supervised release ‘depends basically on the economic effort done to satisfy the material and personal needs required to reach a proper function of this safety measure’.<sup>42</sup> In this sense, comparative law shows how countries with post-prison measures similar to supervised release have developed an important material and human infrastructure to achieve successful results in the supervision and control of dangerous offenders in the community.<sup>43</sup> This is not the case in Spain.<sup>44</sup> Without the provision of adequate resources, there is danger in that, no matter how effective the legal framework is in theory, in practice the agencies concerned will simply be overwhelmed. If the Government

is committed to providing an effective framework to manage dangerous sex offenders, it must be prepared to ensure that adequate resources are available. In fact, there is a remarkable disparity between the theoretical arguments defended by the Government to justify the passing of supervised release, in comparison with the real effort that Public Administrations are doing to achieve a successful application of the measure.

## 4 Place of Supervised Release within the Sentencing System

### 4.1 Character of the Framework

According to the legal provisions described previously, the legal nature of supervised release is to be a safety measure. However, some scholars claim that, despite its consideration in the CC as a safety measure, its real nature is arguable. For example Mapelli Caffarena says that it is not so evident that supervised release is a safety measure and not a penalty. In his view, the legislator was interested in qualifying it as a safety measure because it made it easier to justify its existence. In current times of harsher punishment, post-prison control of dangerous offenders in the community could be seen as ‘reasonable’ in crimes that create societal upheaval. In his opinion, supervised release is closer to a sort of continued parole, an institution with which it shares many similarities.<sup>45</sup> In this sense, supervised release could be considered as a means to extend the duration of the sentence, given that the possibility of accessing parole in cases of dangerous sex offenders is so restrictive that, generally, it is possible to say that it is not admitted. Consequently, the period that the offender could have served as a parole, he continues inside prison, and when he finally comes out, he is supervised in a similar way, as it would have been the case under parole. That is why it has been said that supervised release is a parole’s simple substitute, in cases where a long-term sentence is completely executed, without any kind of reduction in its duration.<sup>46</sup>

Considering the legal provisions governing supervised release, it shows noteworthy similarities with other legal frameworks in the CC. For example the rules of conduct established in the letters (e), (f), (g) and (h) of Article 106.1 CC<sup>47</sup> are almost identical to some accessory penalties described in Article 48 CC.<sup>48</sup> According to Article 57 CC, accessory penalties can be imposed as comple-

40. Otero González, above n. 9, at 98.

41. Supreme Court no. 768/2014, para. 2.

42. Sanz Morán, above n. 20, at 217. In a similar sense, see Urruela Mora, above n. 13, at 259, and C. Vázquez González, ‘Algunas cuestiones penales y criminológicas sobre la nueva medida de libertad vigilada’, in J. Álvarez García (ed.), *Libro Homenaje al Profesor Luis Rodríguez Ramos* (2013), at 264.

43. See e.g. The German regulation of the *Führungsaufsicht*, or the offender supervision agencies in the United States.

44. According to comparative (criminal) law, even though similar measures to control dangerous sex offenders in the community are mentioned in the parliamentary discussion to justify the introduction of supervised release, such as probation service in England or *Führungsaufsicht* in Germany, its legal provisions in Spanish law are not so concrete in its statement, nor in providing means to its successful development.

45. B. Mapelli Caffarena, *Las consecuencias jurídicas del delito* (2011), at 383. In a similar sense, Nistal Burón, above n. 36; S. Camara Arroyo, ‘La libertad vigilada: De la ley penal del menor al ordenamiento penal de adultos’, 25 *Revista jurídica Universidad Autónoma de Madrid*, at 82 (2012).

46. Acale Sánchez, above n. 21, at 215.

47. Prohibition to approach or communicate to/with victims, his relatives or another person, or to visit specific areas, places or establishments.

48. See Section 3.3.



mentary penalties to prison sentence when the offender has been convicted of serious crimes such as homicide, assault, abortion, torture, sexual offences, theft and human trade. In order to impose these penalties, the Court should consider 'the seriousness of the offence or the offender's criminal dangerousness'. We have described previously the importance of dangerousness as the central criterion for imposing safety measures. It is noticeable that the CC uses the same criterion to impose both criminal sanctions. In this sense, there is some controversy in legal doctrine about the legal nature of these prohibitions and its compatibility with safety measures.<sup>49</sup> It has been pointed out that the decision of the legislative in 1995, when the CC was passed, limiting safety measures to cases of mental illness or drug abuse, could have influenced the legal regulation of the accessory penalties. As the CC did not provide safety measures for fully responsible dangerous offenders, the possibility of imposing a control on sex offenders in the community was done indirectly using accessory penalties. Therefore, according to its content, finality and nature, accessory penalties have been considered by many authors substantially as safety measures. However, with the creation of supervised release in 2010, a security measure does now exist for responsible dangerous offenders in certain crimes. Consequently, this duplicity should be avoided because it is a very problematic issue from the *ne bis in idem* perspective.

#### 4.2 Alternatives for Prevention

In Spain, penitentiary treatment for dangerous sex offenders was first implemented in Catalonia in 1996,<sup>50</sup> and afterwards extended to the rest of the country.<sup>51</sup> From 2009 onwards, it is complemented in some Catalan prisons with pharmacological treatment, which includes a modality of treatment with testosterone inhibitor. However, it is always voluntary and requires the offender's certified consent.<sup>52</sup> Its implementation in the Catalan penitentiary system has been positive, given that according to official data about 50% of the sexual offenders participate in the programme.<sup>53</sup>

The situation is different in the rest of Spain. Despite the fact that empirical research has proven that a significant percentage of sex offenders respond favourably to rehabilitation treatments received during prison sentence,<sup>54</sup> penitentiary treatment for sex offenders is not completely implemented in Spain: only about half of the prisons offer this kind of programme, and only around 10% of the inmates condemned for the commission of sexual offences participate in it.<sup>55</sup>

The offer of prison treatment programmes for sexual offenders is scarce, so are the possibilities of providing aid or guidance for these offenders once they are out of prison. A specific post-prison assistance for sexual offenders does not exist as such in Spain nowadays, except for some sporadic experiences such as the Circles of Support and Accountability, an initiative promoted by the Justice Department in Catalonia to ease the transition of offenders from institutional settings back to the community. This model has demonstrated that community volunteers, with training and professional support, can have a marked impact on the rates of reoffend-

49. E.M. Souto García, 'Las prohibiciones de residir en determinados lugares o acudir a ellos como penas privativas de (otros) derechos en el código penal de 1995', 9 *Revista de Derecho penal y Criminología*, at 182 (2013); P. Faraldo Cabana, *Las prohibiciones de residencia, aproximación y comunicación en el Derecho penal* (2008), at 53, 63. Also, with regard to authors who consider accessory penalties to be safety measures, see I. Valeije Álvarez, 'La regulación de las penas accesorias en el Código penal de 1995', 60 *Anuario de Derecho penal y ciencias penales* (2007), at 245; Sanz Morán, above n. 13, at 235.
50. Catalonia is the only region in Spain with autonomous competences in managing the penitentiary system.
51. In the website of the Secretary of Penitentiary Institutions, there is an explanatory report, available at: <[www.institucionpenitenciaria.es/web/portal/Reeducacion/ProgramasEspecificos/agresoresSexuales.html](http://www.institucionpenitenciaria.es/web/portal/Reeducacion/ProgramasEspecificos/agresoresSexuales.html)>.
52. Official information about this programme is available at: <[http://justicia.gencat.cat/web/.content/enllacos/pdf/model\\_rehabilitacio\\_presons\\_catalanes.pdf](http://justicia.gencat.cat/web/.content/enllacos/pdf/model_rehabilitacio_presons_catalanes.pdf)>, at 89.
53. The offenders participating in the programme were 332 in 2012, 315 in 2013 and 306 in 2014, from a total number of condemned sex offenders of 672, 637 and 593, respectively (data available at: <[http://justicia.gencat.cat/ca/departament/Estadistiques/serveis\\_penitenciaris/](http://justicia.gencat.cat/ca/departament/Estadistiques/serveis_penitenciaris/)>).

54. O. Herrero, '¿Por qué no reincide la mayoría de los agresores sexuales?', 23 *Anuario de Psicología Jurídica*, at 72 (2013); Redondo-Illescas, '¿Sirve el tratamiento para rehabilitar a los delincuentes sexuales?', 4 *Revista española de investigación criminológica* (2006). This study revealed that the re-offending rates of sexual offenders who had participated in the prison treatment programme was lower than that of those who had not; S. Redondo-Illescas and V. Garrido Genovés, 'Efficacy of a Psychological Treatment for Sex Offenders', 20 *Psicothema*, at 4-9 (2008). Undoubtedly, there are some profiles in sexual offences whose treatment is more difficult, and consequently, there is a higher risk to re-offend; in this sense, Navarro Frías refers to 'sexual psychopath', Cf. Navarro Frías, above n. 19, at 132, and Feijoo Sánchez, above n. 18, at 229 to 'criminals with an overpowering intern tendency'. However, this could not be an excuse to reject treatment, given that in many groups it has been effective. For a general guidance to treatment of sexual offenders (not limited to the Spanish literature), see R.K. Hanson, G. Bourgon, L. Helmus & S. Hodgson, 'The Principles of Effective Correctional Treatment also Apply to Sexual Offenders: a Meta-Analysis', 36 *Criminal Justice and Behavior*, at 865-91 (2009); M. Schmucker and F. Lösel, 'Does Sexual Offender Treatment Work? A Systematic Review of Outcome Evaluations', 20 *Psicothema*, at 10-19 (2008); L.R. Reitzel and J.L. Carbonell, 'The Effectiveness of Sexual Offender Treatment for Juveniles as Measured by Recidivism: A Meta-Analysis', 18 *Sexual Abuse: A Journal of Research and Treatment*, at 401-21 (2006); F. Lösel and M. Schmucker, 'The Effectiveness of Treatment for Sexual Offenders: A Comprehensive Meta-Analysis', 1 *Journal of Experimental Criminology* 117, at 117-46 (2005).
55. The number of sex offenders participating in the treatment programme has varied in the period 2010-2013 from a minimum of 248 to a maximum of 384 per year, among a total number of inmates condemned for the commission of sexual crimes varying from 3081 to 3758 (data extracted from the *Informes Generales de la Administración Penitenciaria* 2010 to 2013, available at: <[www.institucionpenitenciaria.es/web/portal/documentos/publicaciones.html](http://www.institucionpenitenciaria.es/web/portal/documentos/publicaciones.html)>. Gómez-Escobar offered the following data for 2009: 3.620 imprisoned in Spain for sexual offences, but only 569 were part of a treatment programme (P. Gómez-Escobar Mazuela, 'Tratamiento penal de la delincuencia habitual grave', 7094 *Diario La Ley* (2009), adding the example of a prison located in Villena (Alicante). In this prison, there were hundred persons sentenced because of sexual offences, but it was only possible to offer penitentiary treatment to ten imprisoned. Aguado López underlines (not only in sexual crimes, but in general criminality) that 'in Spain there is a lack of human and material means to develop a successful rehabilitative treatment (...) many times rehabilitative programmes are paralysed because of lack of economic resources'. S. Aguado López, 'Tratamiento penal del delincuente reincidente peligroso: ¿con medidas de seguridad o en la ejecución de la pena?', 102 *La Ley penal*, at ep. III.2. (2013).

ing by sexual offenders deemed to be at high risk of reoffending.<sup>56</sup>

Scholar discussion has stressed the point that the Spanish system of criminal sanctions is more focused on achieving prevention by means of post-prison control measures such as supervised release, instead of offering support and guidance so that people could find some help in constructing a new life as law-abiding citizens. Even if a proper application of supervised release could be considered acceptable from the point of view of its proportionality, it should not be the only option to achieve the preventive perspective of criminal sanctions. There is a lack of alternative preventive means that seems to be in deep contrast to the wording of Article 25.2 of the Spanish Constitution, which states rehabilitation as a necessary aim of the prison penalties and of the security measures.

## 5 Human Rights Perspective

An analysis of the supervised release from the perspective of the legal framework established in the European Convention of Human Rights (ECHR) would probably not lead to consider this measure as a formal violation of the rights and civil liberties of the ECHR. In contrast with the *Sicherungsverwahrung* in Germany,<sup>57</sup> supervised release is not a post-prison deprivation of liberty, but only a non-custodial safety measure. However, it is remarkable that during its passing in the Spanish system of criminal sanctions, no reference to the case *Guzzardi v. Italy*, ECtHR (1980), was done. In this sense, supervised release is a criminal sanction where the boundaries between deprivation and restriction of liberty could be quite vague in some cases, as we have exposed in the cases where a breach of the rules of conduct could lead to a crime of punishment break, regulated in Article 468 of the CC and punished with a prison penalty of up to one year if the penal sanction breached is supervised release.<sup>58</sup> As long as *Guzzardi v. Italy*, ECtHR (1980), is a common place about this discussion, it is debatable that there is a lack of attention by Spanish law to this case in the passing of supervised release, especially taking into account the content of Article 5 ECHR. In this sense, it is also remarkable that there is a lack of referen-

ces to this leading case with regard to the distinction between Articles 5 and 2 (freedom of movement) from 4th Protocol, concerning the circumstances that could justify a restriction of liberty and its distinction from the deprivation of liberty.<sup>59</sup> In this context, it could be pointed out that Spain has sometimes been reluctant to take into consideration the case law of Strasbourg's Court, especially concerning criminal sanctions. An example of this tendency is the political reactions to the case *Del Río Prada v. Spain* ECtHR (2013). In this statement, the ECtHR sentenced Spain for a violation of Article 7 ECHR, in relation to the principle of legality, because of the pronouncement by the Supreme Court of the so-called Parot Doctrine.<sup>60</sup> In order to obey the statement declared in *Del Río Prada v. Spain* ECtHR (2013), in the months following the pronouncement many offenders who were still imprisoned because of the application of the *Parot Doctrine* were released. This release generated, especially in the case of dangerous sex offenders and terrorists, a societal upheaval because of the sensationalist media coverage of the facts. In this sense, there was a special persistence in remarking the high risk of reoffending.

## 6 Conclusion

Criminal justice systems have battled with the perennial issue of what to do with dangerous offenders and their potential for reoffending. Control of dangerous sex offenders in the community is provided in Spanish law by means of supervised release. Its introduction in the Spanish system of criminal sanctions has supposed a return to the strict twin track system that had been the traditional one in our country during the twentieth century. If this measure had been accompanied by a reduction in the existing prison terms, or it had been regulated according to the requirements of the proportionality principle, and inspired by a rehabilitative perspective, it could perhaps be considered a step forward in Spanish criminal law. However, attending to the political circumstances that surrounded its passing, and the concrete shape it has been given in the current regulation, there is serious reason to doubt it.

Societal upheaval was the main reason to justify the introduction of supervised release as a way to control dangerous sex offenders. When the Government established this measure, it was not thinking about the coherence of the Spanish system of criminal sanctions, nor

56. T. Nguyen, N. Frerich, C. García, C. Soler, S. Redondo-Illescas & A. Andrés-Pueyo, 'Reinserción y gestión del riesgo de reincidencia en agresores sexuales excarcelados: el proyecto "Círculos de Apoyo y Responsabilidad" en Cataluña', 151 *Boletín Criminológico* (2014). The aim of this programme is to strengthen human and social values, from the development of abilities and personal resources to achieve welfare, as well as to ease rehabilitation and avoid re-offending. About its implementation in England, see R.J. Wilson and D.S. Prescott, 'Community-Based Management of Sexual Offender Risk: Options and Opportunities', in *Responding to sexual offending. Perceptions, risk management and public protection* (2014), at 39.

57. Regarding this measure, it is possible to remark the case *M v. Germany*, ECHR (2009), with respect to the incompatibility of the retroactive application of *Sicherungsverwahrung* in Germany, taking into account Arts. 5 and 7 ECHR.

58. See Section 3.1.

59. 'The difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance.' *Guzzardi v. Italy*, ECHR (1980), para. 93.

60. Supreme Court stated *Parot Doctrine* (the doctrine received its name because it concerned the case of Henri Parot, member of the terrorist group ETA) in 2006. The sentence established a new method to calculate reductions in sentence obtained through work and studies accomplished in prison, and its aim was to avoid reduction in prison sentences in cases of repeated commission of very serious crimes. Parot Doctrine was applied retroactively by Spanish courts, in a way that the ECHR considered contrary to the principle of legality.

about effective alternatives for preventing reoffending. In fact, supervised release represents a hurried response from the legislator based on harsher punishment and a demagogic use of dramatic cases by the mass media. In this context, it is undeniable that the introduction of the measure was not responding to a proper evolution of the Spanish system of criminal sanctions, but to the political interest in using the Criminal law as an electioneering option.

Consequently, the legitimacy of the measure is problematic when confronted with the Spanish Constitution. Article 25.2 states that, 'Prison sentences and safety measures shall be oriented towards re-education and social rehabilitation.' Supervised release has been conceived as a post-prison measure to merely control dangerous sex offenders, without a rehabilitative content in its development, as can be clearly seen from the list of rules of conduct established in the CC, the majority of which lack a re-educational or rehabilitative content. Our main argument is that legislative regimes that aim solely at removing offenders from the community or restricting their movements are resource intensive and may not succeed in reducing the rates of reoffending. Supervision schemes stretch the boundaries of the curtailment of liberty beyond the traditional criminal justice approach of state action based on the commission of a crime.

Supervised release functions as a substitute of parole in crimes, such as sexual offences, where access to parole is more restricted every time.<sup>61</sup> According to the principle of proportionality, it would be more coherent to grant parole more generously in sexual offences, albeit carefully rethinking its content and supervision, focusing on a rehabilitative perspective.<sup>62</sup> In this sense, control of dangerous sex offenders would be an undeniable feature, but it is also necessary to introduce measures that provide assistance and support to offenders in order to avoid reoffending during parole. Then, energy and resources should be spent to improve and expand sex offender penitentiary treatment programmes. This would decrease the number of people who the Courts believe should be supervised after their release from prison.

Concerning the practical application of supervised release, we stress the absolute lack of the material and human means necessary to implement the measure properly. This is the circumstance that makes the symbolic function of the measure appear more obvious. Despite its presentation as a solution to security claims in a context of societal upheaval, the authorities' indolence to develop its content correctly, as well as its economic unsustainability, emphasises its inefficacy. Therefore, we agree with the Group of Studies in Crimi-

nal Policy (*Grupo de Estudios de Política Criminal*)<sup>63</sup> when they denounce that it has been the *punitive populism dynamic* the inspiration for introducing supervised release in the Spanish system of criminal sanctions: 'to invoke rehabilitative purposes to try to justify this legal framework is just an excuse to tighten (...) punitivism'.<sup>64</sup>

61. Tendency confirmed in the CCRA 1/2015, where sexual offenders are excluded from the exceptional legal framework of parole for first offenders (Art. 90.3 CC).

62. See J. Cid Moliné and B. Tébar, 'Libertad condicional y delincuentes de alto riesgo', 8 *Revista Española de Investigación Criminológica*, at 17 (2010).

63. Legal Group formed by jurists (scholars, judges, magistrates and prosecutors) focused on developing research and making reform proposals in criminal law from a progressive perspective (<[www.gepc.es/web/](http://www.gepc.es/web/)>).

64. Grupo de Estudios de Política Criminal, *Alternativas al sistema de sanciones penales: Nuevas penas y medidas y medidas restrictivas de Derechos* (2012), at 15. In addition, Gómez-Escolar Mazuela, above n. 55, 'it is unfair to dismiss rehabilitation without having done a serious and continuous effort to keep this principle alive'. In a similar sense, Acale Sánchez for whom it is not honest to first give up the rehabilitative content of the prison penalties and then invoke rehabilitation to try to justify the addition of a new sanction that further limits the rights of the convicts. Acale Sánchez, above n. 21, at 212.