The Reception of ECtHR Decisions by German Criminal Courts – Illustrated by Means of the ECtHR Judgment of 17 December 2009 on the German Law on Preventive Detention

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A. Introduction

One of the most debated topics currently discussed in German criminal law is the law on preventive detention.[1] More than two years have passed since the Grand Chamber of the European Court of Human Rights (ECtHR or the Court)[2] pronounced its final decision on the non-compliance of Germany's preventive detention system[3] with the European Convention on Human Rights (ECHR).[4] In the meantime, its legal approach has been endorsed by numerous recent rulings of the ECtHR.[5] The German Federal Constitutional Court (BVerfG[6]) even revised its previous legal opinion and considered numerous provisions

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[1] Recent contributions on the issue of preventive detention include: Peglau, Jens, Das Gesetz zur Neuordnung des Rechts der Sicherungsverwahrung und zu begleitenden Regelungen (Teil 1) und (Teil 2), [2011] *jurisPR Strafrecht (StrafR)* 1 und 2/2011, Anm 1; Jähnke, Buckhard, Zur Erosion des Verfassungssatzes „Keine Strafe ohne Gesetz", [2010] 5 *Zeitschrift für internationale Strafrechtsdogmatik (ZIS)*, 463 ff; Henning Radtke, Schuldgrundsatz und Sicherungsverwahrung, [2011] 11 *Goltdammer's Archiv für Strafrecht*, 636 ff.;

[2] On 10 May 2010, the Grand Chamber decided according to Article 43 para 2 ECHR that the referral request submitted by the German Government was inadmissible. The judgment of 17 December 2009 thereby became final (Article 44 ECHR), see also press release of 11 May 2010 (concerning the complaint no. 19359/04) by the ECHR Chancellor, http://cmiskp.echr.coe.int/tkp197/view.asp?item=7&portal=hbkm&action=html&highlight=&sessionid=63767420&skin=hudoc-pr-en; Annotations covering that decision encompass Eisenberg, Ulrich, "Feindliche Übernahme" im Jugendstrafrecht? [2010] 21 *Neue Juristische Wochenschrift (NJW)*, 1507 ff.; Koller, Matthias, Neuordnung der Sicherungsverwahrung, [2011] 4 *Deutsche Richter Zeitung (DriZ)*, 127 ff.; Laue, Christian, Die Sicherungsverwahrung auf dem europäischen Prüfstand, [2010] 5 *Juristische Rundschau (JR)*, 198 ff.; Kreuzer, Arthur, Neuordnung der Sicherungsverwahrung: Fragmentarisch und fragwürdig trotz sinnvoller Ansätze, [2011] 2 *Strafverteidiger (StV)*, 122 ff.; Eschelbach, Ralf, [2010] 34, *Neue Juristische Wochenschrift (NJW)*, 2499 f.; Jung, Heike, Die Sicherungsverwahrung auf dem Prüfstand der EMRK, [2010] *Goltdammer's Archiv für Strafrecht, (GA)* 639 ff.

[3] For a short overview covering the development of the law on preventive detention over the last two decades, see Ullenbruch, Thomas, Sicherungsverwahrung im Reformdilemma, [2010] 11 *Strafverteidiger Forum, (StraFo)* 438 (439); for an in-depth analysis on retrospective preventive detention compare Brandt, Reinhold, *Sicherheit durch nachträgliche Sicherungsverwahrung*, (Hartung-Gorre, Konstanz, 2008).

[4] *M. v. Germany*, Judgment of 10 May 2010, Application no. 19359/04.

[5] *K. v. Germany*, Judgment of 13 January 2011, Application no. 32715/06, published in full length in [2011] 10-12 *Europäische Grundrechte Zeitschrift, (EuGRZ)* 255 ff.*; M. v. Germany*, Judgment of 13 January 2011, Application no. 20008/07; *S. v. Germany*, Judgment of 13 January 2011, Application no. 27360/04 and 42225/07; *H. v. Germany*, Judgment of 13 January 2011, Application no. 6587/04; published in [2011] 5 *Straf Rechts Report (StRR)*, 157 f. see also *J. v. Germany*, Judgment of 14 April 2011, Application no. 30060/04, see http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=30060/04&sessionid=86273705&skin=hudoc-en.

[6] BVerfG = Bundesverfassungsgericht.

governing the German law on preventive detention to be unconstitutional.[7] The BVerfG prompted the German legislature to reform the law on preventive detention until 31 May 2013. Until then, the provisions held to be unconstitutional remain applicable, but their application is subject to strict requirements spelled out by the BVerfG.[8] The continued applicability of the law on preventive detention represents an incentive to look for ways under which German criminal courts can comply with the guidelines spelled out by the ECtHR until a new law on preventive detention has entered into force and to what extent there is even an obligation to do so. In this context it will be assessed whether the approach taken by some national criminal courts can hold true. That approach claimed that it was impossible to interpret applicable German law on preventive detention in compliance with the ECtHR decision of 17 December 2009 and that it was the legislature's and not the judicature's obligation to implement the judgment.[9]

This case review aims not only to discuss the major findings of the decision, but also to assess the effectiveness of the implementation of this very decision of the ECtHR by German courts. As this case review will primarily focus on the relation between the ECHR and national law and its reception by German Courts, security challenges that could arise from the release of persons who have previously been kept in preventive detention and the potential risk that they might reoffend will not be taken into consideration.

At the heart of the ECtHR decision lies the legal classification of preventive detention as a penalty. This classification stands in contrast with the approach of the German Criminal Code which will be briefly outlined before entering into the discussion of the recent ECtHR decision. German Criminal Law distinguishes between penalties and measures of correction and prevention (*Maßregeln der Besserung und Sicherung*) that courts can impose as a response to unlawful acts. Criminal courts can impose two types of penalties, namely imprisonment (*Freiheitsstrafe*) and/or a monetary sentence (*Geldstrafe*).[10] Alongside these penal-

[7] The German Federal Constitutional Court found two main constitutional infringements. First, the German Constitutional Court held the provisions of the Criminal Code (Strafgesetzbuch) and of the Juvenile Court Act (Jugendgerichtsgesetz) that concern the imposition and duration of preventive detention to be in violation of the fundamental right to liberty of the detainees under preventive detention enshrined in Art. 2 para 2 sentence 2 GG in conjunction with Art. 104 para. 1 GG because of non-compliance with the so called "*Abstandsgebot*"- a constitutional principle which implies that the arrangement of imprisonment for ordinary detainees must differ significantly from those persons that are detained as a result of a preventive detention order – a requirement that stems from the distinct purposes of these two measures. In addition, it held that not only those provisions allowing to prolong preventive detention retrospectively beyond the previous ten-year maximum period, but also the legal basis for the retrospective imposition of preventive detention concerning adult and juvenile offenders was not in conformity with the principle on the protection of legitimate expectations (*Vertrauensgrundsatz*) stipulated in Art. 2 para 2 sentence 2 GG in conjunction with Art. 20 para 3 GG; see BVerfG. Judgment of 4 May 2011-2 BvR 2365/09 published in [2011] 38 *Europäische Grundrechte Zeitschrift, (EuGRZ)* 297 ff.; discussed by Schöch, Heinz, Das Urteil des Bundesverfassungsgerichts zur Sicherungsverwahrung, [2012] 1 *Goltdammer's Archiv für Strafrecht, (GA)* 14 ff.; Hörnle, Tatjana, "Der Streit um die Sicherungsverwahrung – Anmerkung zum Urteil des 2. Senats des BVerfG vom 04.05.2011 – NStZ 2011, 450", [2011] 9 *Neue Zeitschrift für Strafrecht (NStZ)*, 488 ff.; see also annotations by Kreuzer/Bartsch [2011] 8 *Strafverteidiger, (StV)* 472 ff.; Dessecker, Axel, Die Sicherungsverwahrung in der Rechtsprechung des Bundesverfassungsgerichts, [2011] 8-9 *Zeitschrift für Internationale Strafrechtsdogmatik, (ZIS)* 706 ff.

[8] BVerfG Judgment of 4 May 2011, para. 167.

[9] Compare decision of 16 July 2010 by the Landgericht (LG) Aachen, cited according to [2011] 10-12 Europäische Grundrechte Zeitschrift (EuGRZ), 257.

[10] These two types of sentences can be inflicted either alternatively pursuant to section 47 StGB or combined according to sections 41, 53 para 2 StGB, *see* Fischer, Thomas, *Beck'sche Kurzkommentar*, 58th edition (C.H. Beck, München, 2011), Vor § 38, para 4.

ties, they may order, pursuant to section 66 et seq. of the German Criminal Code (StGB),[11] different types of preventive detention,[12] which is one of the possible measures of correction and prevention.[13] The German law on preventive detention was reformed when the Combating of Sexual Offences and Other Dangerous Offences Act (*Gesetz zur Bekämpfung von Sexualdelikten und anderen gefährlichen Straftaten*) entered into force on 31 January 1998.[14] Since then various amendments have been adopted which relaxed the formal prerequisites for courts to order preventive detention and widened its scope of application.[15] Section 67d para 3 StGB now grants courts the opportunity to order placement in preventive detention without having to specify its exact term whereas, prior to the amendment, this measure could not exceed ten years.[16]

B. The decision of the European Court of Human Rights

The ECtHR examined the courts' practice of retrospectively ordering an indefinite placement in preventive detention pursuant to section 67d para 3 StGB and its conformity with Articles 5 and 7 ECHR as well as its respective principles: the prohibition of unlawful detention (Article 5 para 1 a) ECHR) and that no one shall be subjected to a heavier penalty than the one that was applicable at the time the criminal offence was committed (Article 7 para 1, second sentence ECHR).

I. The facts of the case

The Marburg Regional Court (LG[17] Marburg) convicted the applicant (referred to as M in the following) in 1986 to five years in prison, combined with placement in preventive detention according to section 67d para 3 StGB, for attempted murder as well as robbery. At the time, the provision stipulated that placement in preventive detention could not exceed ten years. However, when the amended section 67d para 3 StGB no longer restricted that measure to ten years, the courts responsible for the execution of sentences refused to suspend on probation M's preventive detention even though the maximum period had already expired. After having exhausted recourse to German courts to no avail, M complained be-

[11] StGB=Strafgesetzbuch.

[12] Section 66 provides for placement in preventive detention, section 66a for deferred and section 66b for retrospective preventive detention orders; for an analysis of these legal concepts, *see* e.g. Fischer, Thomas, section 66 ff.

[13] Other measures of correction and prevention consist of placement in a psychiatric hospital (section 63 StGB) or a detoxication facility (section 64 StGB).

[14] Federal Gazette, I., 1998, 160, available at: http://www.afane-jacquart.com/docs/2009/12/gesetz-zur-bekampfung-von-sexualdelikten-und-anderen-gefahrlichen-straftaten.pdf.

[15] According to the amended section 66 para. 3 StGB, courts are entitled to order preventive detention in case of a serious criminal offence even after the first repeated offence (*Wiederholungstat*) when the conditions listed in the second sentence are fulfilled and even in the absence of a prior conviction or deprivation of liberty, *see also* BVerfGE 109, 133=[2004] *Neue Juristische Wochenschrift, (NJW),* 739 (739); BVerfG Order of the Second Senate of 14 October 2004 -BvR 1481/04, A.I.3a) available at: http://www.bundesverfassungsgericht.de/entscheidungen/rs20040205_2bvr202901.html.

[16] Since the instant ECtHR decision has became final, the German legislature reformed the law on preventive detention. The amendment entered into force on 01.01.2011; compare Federal Gazette, I., 2010, 2300, available at: http://www.bmj.de/SharedDocs/Downloads/DE/pdfs/Gesetz_zur_Neuordnung_der_Sicherungsverwahrung.pdf?blob=publicationFile. This development has been critically assessed by Kreuzer, Arthur, Neuordnung der Sicherungsverwahrung: Fragmentarisch und fragwürdig trotz sinnvoller Ansätze, [2011] 2, 122 (123 ff.).

[17] LG=Landgericht.

fore the ECtHR on two grounds. First, he argued that the preventive detention order which exceeded the ten years term constituted a breach of Article 5 para 1 a) ECHR. Hence, he asserted, it deviated from the law applicable at the time when he had committed the offence and had been convicted by the sentencing court (para 79). Secondly, M brought forward that the retrospective extension of his placement in preventive detention for an unlimited period of time and after the lapse of ten years that had been ordered by the LG Marburg in its judgment of 17 November 1986 infringed upon his right under Article 7 para 1, second sentence ECHR not to be subjected to a "heavier penalty than the one applicable at the time of his offence". In its decision, the ECtHR found violations of Articles 5 and 7 ECHR and awarded the applicant 50,000 Euros for non-pecuniary damage.

II. The proceedings at issue

The ECtHR first considered whether there had been a violation of Article 5 para 1 ECHR (paras 86-105) before assessing possible infringements of Article 7 para 1 ECHR (paras 138-143).

1. Violation of Article 5 ECHR

The Court's main focus in the context of Article 5 ECHR was on whether the placement in preventive detention which had been ordered in 2001 and had exceeded ten years, could be regarded as a lawful detention in accordance with a procedure prescribed by law and pursuant to any of the grounds listed in Article 5 para 1 a)-f) ECHR. In order to answer this question, the Court applied a two-step test. It first examined whether the initial preventive detention order was justified by any of the grounds enumerated in Article 5 para 1 ECHR. Only if that was the case would the Court proceed to scrutinize whether the repeal of the ten years term for the initial placement in preventive detention had any effect on the compliance of the continued deprivation of liberty after 2001 with Article 5 para 1 ECHR (para 92).

a) Lawfulness of the initial preventive detention order

The ECtHR held that the term "conviction" in the sense of Article 5 para. 1 a) ECHR meant the "finding of guilt of an offence and the imposition of a penalty or other measures involving deprivation of liberty" (para 95). While the German government opined that preventive detention would not have to be imposed on the basis of the applicant's personal guilt, but rather according to his dangerousness to the general public, the Court disagreed. It stated that an order of preventive detention pursuant to section 66 para 1 StGB always required, and had to be imposed as a result of, the court's finding that the offender was guilty. In regard to the case at hand, the Court found that the initial preventive detention order had resulted from the conviction by the sentencing court in 1986 that had been linked to a prior finding of guilt. The ECtHR subsequently concluded in the context of the first question that the initial order for placement in preventive detention complied with Article 5 para 1 ECHR (para 96).[18]

[18] The ECtHR pointed out that the decision of the court responsible for the execution of sentences to order continued preventive detention did not entail the finding of the offender's guilt, resulting in a violation of Article 5 section 1 a) ECHR, see para 96 of the decision.

b) Sufficient causal link between the initial conviction and continued preventive detention

In accordance with the two-step test, the ECtHR then turned to the more delicate question whether the preventive detention order extending the ten year period was admissible under any of the grounds enumerated in Article 5 para. 1 a) ECHR. In this regard, it examined whether there was a sufficient causal link between the initial conviction of the sentencing court in 1986 and the continued deprivation of liberty after September 8th, 2001 (para 97). The Court repeatedly pointed out that the deprivation of liberty had to result from a conviction and needed to be based on a finding of guilt (para 88).

In order to establish whether there had been such a causal link, the ECtHR noted that the sentencing court had ordered preventive detention in 1986 without defining its exact term. Rather than to fix the duration of preventive detention, the sentencing court decided on the more general question of whether or not to order preventive detention. It was the court responsible for the execution of sentences, which adjudicated the details, such as the length of that measure. However, the court responsible for the execution of sentences could only specify its duration within the framework set up by the order of the sentencing court and in light of the law applicable at that time (para 99). The ECtHR underlined that the sentencing court had ordered preventive detention in 1986 pursuant to section 67d para 1 StGB in its old version which, at the time, spelled out that no one could be detained beyond ten years. Had this provision not been subject to the amendment in 1998, the applicant would have been released after the expiry of ten years, irrespective of whether or not he would have been perceived to pose a safety threat to the general public. These findings led the Court to conclude that there had not been a sufficient causal link between the applicant's conviction by the sentencing court in 1986 and the continued deprivation of liberty after the expiry of ten years in preventive detention. On the contrary, the continued placement in preventive detention had only been rendered possible through the amendment of section 67d para 1 StGB (para 100).

The Court went on to distinguish the case at hand from the *Kafkaris* decision.[19] In that case, the ECtHR had indeed found a causal link between the conviction of the applicant and the continued detention after twenty years of imprisonment. This finding had resulted from the fact that the continued detention beyond twenty years had been in conformity with the judgment of the sentencing court. In fact, the court had imposed a lifelong sentence and had explicitly asserted that the applicant would be convicted for the rest of his life, as prescribed by the Criminal Code applicable at the time of conviction. While, in the instant case, the sentencing court had precisely ordered preventive detention for the legally stipulated maximum term of ten years (para 101), the court responsible for the execution of sentences in 2001 decided to prolong that measure in the absence of a finding of guilt. Therefore, it did not fulfil the prerequisites for a "conviction" in the sense of Article 5 para 1 first sentence a) ECHR (para 96). Moreover, the ECtHR found that the preventive detention order exceeding the ten years term did not fall under any of the grounds listed in Article 5 para 1 c) or e) ECHR (paras 102-104). Hence, it concluded that the order imposing preventive detention beyond ten years violated Article 5 ECHR (para 105).

[19] *Kafkaris v. Cyprus*, Judgment of 12 February 2008, Application no. 21906/04.

2. Violation of Article 7 ECHR

The applicant also complained that the retrospective prolongation of his placement in preventive detention from a maximum of ten years to an indefinite period infringed his right not to be subjected to a more severe penalty than that which had been applicable at the time when he had committed the offence (para 106).

a) Infringement of the prohibition of imposing a penalty retrospectively?
The Court noted that Article 7 ECHR included the principle that a law must precisely define the offence and its related penalty. The provision prohibits retrospective application of criminal law in so far as it is detrimental to the accused (para 118). Further, it underlined that the term "penalty" in Article 7 ECHR had to be construed autonomously (paras 120, 126). Whether a given measure was characterised as a penalty according to domestic law was only one of the relevant criteria used by the Court to determine if a given measure was to be interpreted as "penalty" in terms of Article 7 para 1 ECHR (para 120). The question that the ECtHR scrutinized in the case at hand was whether the extension of preventive detention from a maximum of ten years to an indefinite period of time violated the prohibition to impose penalties retrospectively enshrined in Article 7 para 1, second sentence ECHR (para 122).
The Court observed that section 67d para 1 StGB, as applicable at the time of M's conviction, only allowed for the sentencing court to order preventive detention for a maximum of ten years. The applicant's placement in preventive detention had been extended on the basis of section 67d StGB in the version which had been in force since the amendment in 1998 after the applicant had committed the offence and had spent the following six years in preventive detention. Subsequently, the ECtHR found that the courts responsible for the execution of sentences had extended the applicant's preventive detention retrospectively (para 123).

b) Does preventive detention fall under the ambit of the term "penalty" pursuant to Article 7 para 1 second sentence ECHR?
Examining whether preventive detention could be categorised as "penalty" in the sense of Article 7 para 1 second sentence ECHR (para 124), the ECtHR paid attention to German criminal law, according to which preventive detention was not considered a penalty. By consequence, the principle prohibiting retrospective punishment was inapplicable to measures of correction and prevention. The ECtHR reiterated the jurisprudence of the BVerfG, according to which the prohibition of retrospective legislation enshrined in Article 103 para 2 German Basic Law (GG)[20] only applied to penal provisions. The BVerfG had reasoned that section 67d para 3 StGB in its amended version did not infringe upon the prohibition of retrospective effects of laws enshrined in Article 103 para 2 GG as its scope of application was restricted to measures that sanctioned illegal conduct and that were aimed at compensating guilt. In contrast, measures that were purely preventive in nature, such as preventive detention, were not covered by the prohibition on retrospective effects of laws as these measures served to prevent future rather than to avenge past offences and were aimed to protect the general public from dangerous offenders (paras 27-40 and 125).[21]

[20] GG = Grundgesetz.
[21] BVerfGE 109, 133, (167ff.), Judgment of 5 February 2004.

Concerning the question whether preventive detention was to be characterised as a penalty in the sense of Article 7 ECHR, the ECtHR held that, like a prison sentence, preventive detention included the deprivation of liberty. Even though the Court recognised that persons in preventive detention benefited from some privileges not assigned to ordinary prisoners, it found that the institutions in which they were kept did not differ significantly from those accommodating ordinary prisoners.[22] Moreover, the German Federal Execution of Sentences Act (StVollzG)[23] only contained a few provisions specifically addressing the execution of preventive detention. Apart from those, the provisions on the execution of prison sentences applied (para 127).

Moreover, the ECtHR did not agree with the government's argument that preventive detention pursued a purely preventive and no punitive purpose. It found that there were neither specific institutions nor measures that pursued the objective of diminishing the dangerousness stemming from detainees in preventive detention in order to prevent them from reoffending in the future (para 128). However, as the Court emphasised, special effort is required to support them in the process of decreasing the risk that they would reoffend (para 129). Furthermore, the objectives of penalties and measures of correction and prevention overlapped in so far as both instruments were aimed to protect the general public and at enabling the detainee to lead a socially responsible life after release. In addition, the Court underlined that preventive detention included elements of deterrence which derived from its indefinite duration and punitive nature (para 130). Finally, it took into consideration the severity of preventive detention orders and stressed that this measure implied deprivation of liberty for which no maximum period had existed since the amendment of section 67 d para 3 StGB in 1998. In fact, preventive detention on probation would only be suspended after the court found that the detainee was no longer dangerous and would not commit further offences after release, but those requirements were difficult to meet. For these reasons, preventive detention was, if not the heaviest, one of the heaviest sanctions provided for by the StGB (para 132). The ECtHR, therefore, concluded that preventive detention constituted a penalty for which the prohibition of retrospective penalties enshrined in Article 7 para 1 ECHR applied. The application of the new provision to cases that had already been decided led to a retrospective imposition of a penalty which was heavier than the one which would have been inflicted under the law applicable at the time of the offence and therefore constituted an infringement of Article 7 para 1 ECHR (paras 133-135).

C. Analysis of the decision

In the following discussion concerning the implications of the present decision, the interactions between European Human Rights Law, domestic constitutional and criminal law will be explicated. These interactions have been strongly affected by the jurisprudence of the BVerfG. Moreover, the discussion will outline the most important findings deriving from the decision at hand as well as its legal consequences with respect to the BVerfG's and the domestic criminal courts' duty to implement the ECtHR's decisions.

[22] Supportive of that finding: Köhne, Michael, Sicher verwahrt-und was dann? [2009] 7 *Juristische Rundschau (JR)*, 273 ff.; Bartsch, Tillmann/ Kreuzer, Arthur, Auswirkungen stetiger Verschärfungen der Sicherungsverwahrungsvorschriften auf den Straf- und Maßregelvollzug, [2009] 1 *Strafverteidiger (StV)*, 53 ff.; Pollähne, Helmut, Europäische Rechtssicherheit gegen Deutsches Sicherungsrecht? [2010] 3 *Kritische Justiz (KJ)* 255 (257).

[23] StVollzG = Strafvollzugsgesetz.

I. Legal reasoning pertaining to the classification of penalty

Concerning the most debatable findings of the instant decision, it will be examined what consequences derive from the fact that the ECtHR held a different view on the legal classification of preventive detention than the BVerfG did.

The BVerfG argued within the logic of the German twin-track system of sanctions when it pointed out that preventive detention does not avenge past (*schuldausgleichenden Strafen*), but rather prevents future offences (*nicht schuldausgleichende präventive Maßnahmen*). It stated that preventive detention falls under the regime of measures of correction and prevention and is, therefore, not to be classified as a penalty.[24] This finding led the BVerfG to conclude that the absolute ban on retrospective criminal laws does not apply to preventive detention. In its legal assessment, the BVerfG considered neither factual nor legal similarities between prison sentences and preventive detention. Instead, it held that the decisive factor for determining whether a measure amounted to a penalty was the legislatures' intention and if the latter considered that a given measure was aimed at compensating guilt.[25]

The ECtHR neither followed this approach nor did it agree with the BVerfG's conclusion. It generally does not consider itself bound by the classification of national law in determining whether a measure amounts to a penalty or one of prevention and correction. Instead, in the instant case and in line with its recent case-law,[26] the Court adopted an autonomous interpretation of that term. While the Court was not bound by the member states' classification of whether measures amount to penalties, it did, however, pay due regard to domestic laws by factoring them into its examination (para 120). In that context, it is vital to emphasise that the ECtHR did not consider the distinction in German criminal law between penalties and measures of correction and prevention to be contrary to the ECHR. Rather, the autonomous interpretation promoting an effective protection of Human Rights led it to conclude that, despite the German classification of preventive detention as a measure of correction and prevention, retrospective preventive detention as enshrined in section 66b StGB amounted to a penalty in the sense of Article 7 para 1 sentence 2 ECHR.[27]

The autonomous interpretation approach should be welcomed as it implies that legal terms are not subject to possibly arbitrary definitions adopted by member states' legislatures. Instead, the Court developed objective criteria which are detached from national interests and which focus on the substance of a given measure.[28] As a result, the protection granted under Article 7 ECHR is rendered more effective. Furthermore, the process of determining whether or not preventive detention falls within the ambit of a penalty in the sense of Arti-

[24] BVerfGE 109, 133, (166 ff.), Judgment of 5 February 2004; The German Federal Constitutional Court upheld and accentuated the distinction between penalty and measures of correction and prevention in its judgment of 4 May 2011. It stated that a penalty, in contrast to measures of correction and prevention, had different constitutional grounds and pursued distinct purposes. Whereas the primary purpose of a penalty was to impose a repressive measure as a reaction to „guilty conduct", which is aimed to compensate for guilt, preventive detention being a measure of correction and prevention derived from the principle of overriding interests and was only legitimate if the security interest of the general public overrode the right to liberty of the person concerned (paras 103-105).

[25] *Id.*, (173 ff.), Judgment of 5 February 2004.

[26] See for instance: *Kafkaris v. Cyprus*, Judgment of 12 February 2008, para 142.

[27] Gaede, Karsten, Rückwirkende Sicherungsverwahrung, [2010] 7-8 *Online-Zeitschrift für Höchstrichterliche Rechtsprechung im Strafrecht (HRRS)*, 329 (337).

[28] Best, Dominik, Das Rückwirkungsverbot nach Art. 103 Abs. 2 GG und die Maßregeln der Besserung und Sicherung (section 2 para. 6 StGB) [2002] 144.1 *Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW)*, 88 ff.; See also *Welch v. the United Kingdom*, Judgment of 9 February 1995, section 27, Series A no. 307-A; *Jamil v. France*, Judgment of 8 June 1995, section 30, Series A no. 317-B.

cle 7 para 1 second sentence ECHR is to be appreciated as the ECtHR assesses the substance of the law on the basis of a wide range of aspects (paras 124-133). Among others, the Court takes into account the nature of the measure concerned (para 127) and "whether the measure in question is imposed following conviction for a criminal offence" (para 120). By concentrating in particular on the nature of preventive detention, the ECtHR came to the convincing conclusion that this measure did indeed pursue a punitive purpose containing an element of deterrence (paras 128-130).

The ECtHR's finding that preventive detention does not differ sufficiently from prison sentences in order to deny its sanctioning character and that the prohibition of retrospective effects of laws was applicable is appropriate and has long been overdue.[29] The Court correctly stressed that preventive detention amounted to the most drastic and disputable measure provided for by the StGB.[30] In fact, the Court's analysis supported by the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (para 77 et seq.)[31] demonstrates how problematic the possibility to order preventive detention for an indefinite period of time really is. Difficulties for the detainee result especially from major shortages inherent to the German detention system, for instance in respect to the detainee's preparation for a life outside prison which is envisioned as one of the main objectives of sections 2 and 129 StVollzG (paras 129, 130). Indeed, preparing a detainee for a life in freedom is made more difficult by the failure to define the duration of preventive detention.[32] This consideration is supported by section 15 para 3 and 4 StVollzG, which make measures for the preparation of release dependent on the release date. If, however, the release date is unknown, the timeframe in which the measures aiming at the reintegration of the detainee are to be implemented cannot be determined sufficiently in advance.[33] By consequence, the purpose of that measure is rendered nugatory.[34]

The Court's findings are also in line with the German Basic Law. Article 2 para 2 GG requires that a person subjected to a deprivation of liberty must be informed of its duration.[35] In this regard, the legislature is called upon to set certain standards, and must determine the

[29] *See* Müller, Henning Ernst, Die Sicherungsverwahrung, das Grundgesetz und die Europäische Menschenrechtskonvention, [2010] 4 *Strafverteidiger (StV)*, 207 (210); Kinzig, Jörg, *Die Sicherungsverwahrung auf dem Prüfstand*, (Ed. Iuscrim, Max-Plank-Inst. für Ausländisches und Internat. Strafrecht, Freiburg, 1996), 588, Kühne, Hans-Heiner, *Strafprozessrecht*, 8th edition (Müller, Heidelberg, 2010) section 2, para 41.1.

[30] *See* Ullenbruch, Thomas, 438 (438); see also footnote 2 for additional sources; See also, Woynar, Ines, Sicherungsverwahrung: Zwischen Endstrafenorientierung und ultimativem Wegschließen', in: Pollähne, Helmut/ Rode, Irmgard (eds), *Probleme unbefristeter Freiheitsentziehungen*, 1st edition (LIT-Verl, Münster, 2010), 127.

[31] The CPT recommended that German authorities review the German preventive detention system, compare *Case of M. v. Germany*, Judgment of 10 May 2010, para. 100; CPT/Inf (2007) 18 of 18 April 2007.

[32] Klesczewski, Diethelm, Strafen statt Verwahren!, [2010] 9 *Online-Zeitschrift für Höchstrichterliche Rechtsprechung im Strafrecht (HRRS)*, 394 (397).

[33] Kreuzer, Arthur, Beabsichtigte bundesgesetzliche Neuordnung des Rechts der Sicherungsverwahrung, [2011] 1 *Zeitschrift für Rechtspolitik (ZRP)*, 7 (8).

[34] Klesczewski, Diethelm, 394 (398); Schulze-Fielitz, Helmuth, in: H. Dreier (ed), *Grundgesetz-Kommentar*, Volume 1, 2nd edition (Mohr Siebeck, Tübingen, 2010) Article 2 II para 107.

[35] In the context of preventive detention according to Article 67d of the German Criminal Code, as amended by the Combating of Sexual Offences and Other Dangerous Offences Act of 26 January 1998, the German Federal Constitutional Court held that the abolition of the maximum period of ten years did not infringe upon the right to freedom provided for in Article 2 para 2 sentence 2 GG because the interference with this right was justified by statute law and – conditional upon certain prerequisites laid out by this Court – proportionate. In its legal assessment the German Federal Constitutional Court balanced the right of the public to be protected from dangerous offenders against the right to freedom of those kept in preventive detention; compare BVerfGE 109, 133; C II.

kind and duration for the execution of sentences.[36] However, section 67d para 3 StGB in its current form does not fulfill the requirement of obliging sentencing courts to precisely define the duration of preventive detention in their decisions. The Court's finding that preventive detention amounts to a penalty in the sense of Article 7 para 1, second sentence ECHR and that courts are thus required to specify its exact duration is convincing.[37]

II. Implementation of ECtHR decisions into domestic law

What are the legal consequences resulting from the differing classifications of preventive detention between the ECtHR and the BVerfG on the implementation of that decision into German national law? In order to answer this question, the legal effect of ECtHR decisions within the German legal order needs to be examined. The relevance of this question originates from the diverging jurisprudence of German courts. Their different legal opinions demonstrate an inconsistent practice. While a number of courts released persons in cases comparable to that of M's,[38] the majority[39] ordered continued placement in preventive detention due to the lingering dangerousness of the detainees.[40] The Higher Regional Court (OLG)[41] Frankfurt, for instance, belonging to the first category, argued that member states to the ECHR had a duty to adhere to the final decisions of the ECtHR whenever they had been party to the proceedings. The court continued to state in a human rights friendly manner that this obligation resulted from the constitutional imperative that courts were bound by statute and law (Article 20 para 3 German Basic Law). This imperative also extended to state organs, including courts. Therefore, domestic courts were responsible for ceasing the violations found by the ECtHR.[42] In contrast, the OLG Stuttgart found that applicable German law could neither be overruled by the ECHR nor by the Court's case-law. In line with BVerfG jurisprudence[43], it emphasised that courts needed to strike a fair balance of different constitutionally guaranteed rights.[44] This obligation excluded a schematic implementa-

[36] BVerfGE 33, 1, 10; 58, 358, (366); 86, 288, (326). These requirements do not only have to be fulfilled with respect to the execution of a sentence, but also in regard to the placement in institutions for mentally-ill persons, see Schulze-Fielitz, Helmuth, Article 2 II para. 107; BVerfGE 58, 208 (224 ff.).

[37] *Kafkaris vs. Cyprus*, Judgment of 12 February 2008, paras. 137-152; *Welch v. the United Kingdom*, Judgment of 9 February 1995, section 28, Series A no. 307-A; *Jamil v. France*, Judgment of 8 June 1995, section 31, Series A no. 317-B.

[38] See for instance OLG Frankfurt/M., Order of 24 June 2010- 3 Ws 485/10 and of 1 July 2010- 3 Ws 539/10,, [2010] 3 *Recht und Psychiatrie (R&P)*, 151 ff., OLG Karlsruhe, Order of 15 July 2010- 2 Ws 458/ 10 and 2 Ws 44/10.

[39] Pollähne, Helmut, 255 (258).

[40] OLG Stuttgart, Order of 1 June 2010, 1 Ws 57/10; OLG Celle, Order of 17 December 2010, 2 Ws 169/10; OLG Koblenz, Order of 7 June 2010, 1 Ws 108/ 10, [2010] 3 *Recht und Psychiatrie (R&P)*, 154; OLG Cologne, Order of 14 July 2010, 2 Ws 431/10; see also press release of the BGH, Nr. 213/2010. In particular, these courts point out that applying section 2 para VI StGB in conjunction with Article 7 para 1 sentence 2 of the ECHR was in contravention with the clear wording of Article 1 a) para. III EGStGB and with section 67d para III StGB; compare Gaede, Karsten, 329 (331).

[41] OLG = Oberlandesgericht.

[42] OLG Frankfurt/M., Order of 24 June 2010 (3 Ws 485/10), [2010] 3 *Recht und Psychiatrie (R&P)*, 151.

[43] BVerfG, Order of the Second Senate of 14 October 2004- 2 BvR 1481/04, C.I.2.d) para. 47.

[44] Which, in the opinion of the OLG Stuttgart, includes striking a balance between the right to freedom of the detainee and the right of a victim to claim protection by the state against a potential infringement conducted by a potential offender, both of which enjoy constitutional rank; BVerfGE 109, 133. Dissenting with this opinion, the OLG Frankfurt/M. stressed in its order of 24 June 2010 that, even though the state's obligation to protect its citizens from infringements by potential offenders enjoyed constitutional rank, it did not allow for the conclusion that the former needed to be balanced against the right of the detainee and the prohibition of retrospective effects

tion of the ECtHR's decision that would result in the immediate release of highly dangerous detainees.[45] Moreover, the OLG Koblenz had previously held that in so far as national law contradicted ECHR law, the former remained applicable and binding upon domestic courts until the legislature enacted a law in compliance with public international law. It has been suggested that the OLG Koblenz thereby implied that the BVerfG order of 5 February 2004[46] prevailed over the ECtHR decision with the result that continued detention of persons in preventive detention under the same circumstances as in M's case is deemed constitutional.[47] The deviating interpretations of the ECtHR's jurisprudence bear the risk of creating legal uncertainty.[48]

1. Binding force upon the BVerfG

A starting point in answering the question if and to what extent ECtHR jurisprudence is binding on the BVerfG and on domestic courts is the *Görgülü* decision of the BVerfG.[49] According to this decision as well as German Basic Law,[50] the ECHR holds the rank of a federal statute within the hierarchy of norms:[51] "This classification means that German courts must observe and apply the Convention within the limits of methodically justifiable interpretation like other statute law of the Federal Government".[52] However, the jurisprudence of the BVerfG entails that the ECHR and its related case-law do not have binding force on the BVerfG as they do not enjoy the rank of national Basic Law and thus do not confine it in its decision-making process. Instead, the BVerfG stresses that the authoritative interpretation of the ECHR is strictly reserved to the ECtHR (Article 32 ECHR).[53] It expresses a dualist perspective when it refers to the ECHR and the German legal order as "two different legal spheres".[54] By the same token, a person cannot file a constitutional

of laws. It added that the state's obligation to protect did certainly not prevail over the latter rights, *see* order of 24 June 2010-3 Ws 485/10, [2010] 3 *Recht und Psychiatrie (R&P)*, 151 ff.

[45] OLG Stuttgart, Order of 1 June 2010 (1 Ws 57/10), [2010] 3 *Recht und Psychiatrie (R&P)*, 157 ff.; This appraoch has been endorsed by the BVerfG judgment of 4 May 2011, paras 91, 94.

[46] BVerfGE 109, 133 and 190.

[47] OLG Koblenz, Order of 30 March 2010 (1 Ws 116/10) juris, see also Pollähne, Helmut, 255 (260).

[48] Compare, Pollähne, Helmut, 255 (258 ff.).

[49] BVerfG, Order of the Second Senate of 14 October 2004-BvR 1481/04, C I, para. 30; [2005] 6 *Strafverteidiger (StV)*, 307 with annotations by Klein, Eckart= [2004] 31 *Europäische Grundrechte-Zeitschrift (EuGRZ)*, 741 and by Gaede, Karsten/ Rübenstahl, Markus, Die Effektivierung der revisionsgerichtlichen Rechtskontrolle von Urteilsabsprachen durch die Unwirksamkeit des absprachebedingten Rechtsmittelverzichts, [2004] 10 *Online-Zeitschrift für Höchstrichterliche Rechtsprechung im Strafrecht (HRRS)*, 342 (347); See also Kühne, Hans-Heiner, Europäische Methodenvielfalt und nationale Umsetzung von Entscheidungen Europäischer Gerichte, [2005] 5 *Goltdammers Archiv (GA)*, 195 ff.

[50] Article 59 para 2 GG.

[51] BVerfGE 10, 271 (274); BVerfG, Order of the Second Senate of 14 October 2004 -BvR 1481/04, C I vor 1. and 1.a), para. 32; BVerfG, Judgment of 4 May 2011, para 87; Walter, Christian, 'Nationale Durchsetzung': in Grote, Rainer/Marauhn, Thilo (eds), *EMRK/GG: Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (Mohr Siebeck, Tübingen, 2006), Chapter 31 para 7.

[52] BVerfG, Order of the Second Senate of 14 October 2004 -BvR 1481/04, C I vor 1, para 32; BVerfG, Judgment of 4 May 2011, para 87; Walter, Christian, Chapter 31 para. 7.

[53] BVerfG, Order of the Second Senate of 14 October 2004 -BvR 1481/04, C I 1b) para 34. *See also* Esser, Robert, Die Umsetzung der Urteile des Europäischen Gerichtshofs für Menschenrechte im nationalen Recht- ein Beispiel für die Dissonanz völkerrechtlicher Verpflichtungen und verfassungsrechtlicher Vorgaben? [2005] 6 *Strafverteidiger (StV)* 348 (348).

[54] Magiera, Siegfried, Geltung des Völkerrechts im staatlichen Bereich', in: Menzel, Eberhard / Ipsen, Knut (eds), *Völkerrecht*, 2nd edition (Beck, München, 1979), 49 ff.; Cremer, Hans-Joachim, Zur Bindungswirkung von EGMR-Urteilen, [2004] 31 *Europäische Grundrechte-Zeitschrift (EuGRZ)*, 683 (687).

complaint before the BVerfG solely based on an alleged infringement of rights granted by the ECHR and its related protocols.[55] Nevertheless, the BVerfG accepts that the guarantees encompassed in the ECHR do have an impact on its "interpretation of fundamental rights and constitutional principles of the Basic Law." German Basic Law as well as other domestic law should be interpreted in harmony with ECHR law in order to prevent conflict.[56] However, these rules only apply to the extent that they do not lead to a restriction or reduction of "the protection of the individual's fundamental rights under the Basic Law".[57]
It follows from these considerations that the BVerfG does not consider itself bound by the ECtHR's classification that preventive detention amounts to a penalty subject to the prohibition of retrospective effects of laws. However, as the ECtHR's classification of preventive detention as a penalty would not lead to a restriction or reduction but rather to a higher level of the protection of the individual's fundamental rights under the German Basic Law, the BVerfG should observe the jurisprudence of the ECtHR by way of interpreting the Basic Law consistent with public international law.[58] This assumption is supported by the fact that the ECtHR in some cases is more elaborate in respect to certain rights, especially in the area of judicial and procedural guarantees enshrined in Articles 5-7 ECHR.[59] Where the ECtHR grants the more specific and elaborated right, the BVerfG should consult the former so as to complement and substantiate undefined legal terms of German Basic Law.[60]

2. Binding force on domestic courts

What can be inferred from the *Görgülü* decision in so far as the duty of German criminal courts to implement ECtHR decisions is concerned and what does that mean for parallel cases? The answer is pertinent to the prevention of arbitrary court decisions concerning the decisive question of liberty or deprivation of liberty as a result of continued placement in preventive detention.

[55] However, a complaint may be based on an interpretation of the ECHR that violates the prohibition of arbitrariness (Willkürverbot; BVerfGE 64, 135 (157)= [1983] *Europäische Grundrechte-Zeitschrift (EuGRZ)*, 538 (544); 74, 102 (128). BVerfGE 10, 271 (274); 34, 384 (395); 41, 126 (149); 64, 135 (157)= [1983] *Europäische Grundrechte-Zeitschrift (EuGRZ)*, 538 (544); [1974] *Europäische Grundrechte-Zeitschrift (EuGRZ*) 102 (128); 1st Chamber of the Second Senate, B. of 1 March 2000- 2 BvR 2120/99-, [2001] *Neue Zeitschrift für Verwaltungsrecht (NVwZ)*, 67 (69); 3rd Chamber of the second Senate, B. of 20.12.2000- 2 BvR 591/00-, [2001] *Neue Juristische Wochenschrift (NJW)*, 2245 (2246 f.); 1st Chamber of the second senate, B. of 1.3.2004- 2 BvR 1570/03-, [2004] 31 *Europäische Grundrechte-Zeitschrift (EuGRZ)*, 317 (318).
[56] Meyer-Ladewig, Jens, *Europäische Menschenrechtskonvention: Nomos Kommentar*, 2nd edition (Nomos-Verl.-Ges., Baden-Baden, 2006), Article 46, para. 17; Polakiewicz, Jörg, *Die Verpflichtung der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte*, (Springer, Berlin, 1993), 232; BVerfG Order of the Second Senate of 14 October 2004 -BvR 1481/04, para 33, C.I. b).
[57] BVerfG, Order of the Second Senate of 14 October 2004 -BvR 1481/04, C I 1a; BVerfG, Judgment of 4 May 2011, para. 93.
[58] BVerfGE 63, 343, 370; BVerfG, Order of the Second Senate of 14 October 2004 -BvR 1481/04, C I 1b; BVerfG, [2010] 6 *Online-Zeitschrift für Höchstrichterliche Rechtsprechung im Strafrecht (HRRS)*, No. 461, 267 ff.
[59] Examples include the presumption of innocence and the right to an attorney. These principles are German Constitutional Law derived from the general rule of law whereas the ECHR specifically guarantees these rights in Article 6 paras 2 and 3 c) ECHR, respectively; see also: Haß, Solveig, *Die Urteile des Europäischen Gerichtshofs für Menschenrechte*, (Lang, Frankfurt am Main, 2006), 126 ff.
[60] Kühne, Hans-Heiner, *Strafprozessrecht*, 8th edition (Müller, Heidelberg, 2010), section 2 II para 29.

a) The duty to end an ongoing violation under the ECHR

In the instant case, the ECtHR found a violation of M's rights guaranteed under the ECHR stemming from a decision of a domestic court that was still ongoing at the time when the Court pronounced its judgment. Are domestic criminal courts obliged to end this violation? There is consensus that ECtHR decisions are neither directly executable by German courts nor do they have an effect of cassation. The legal nature of an ECtHR decision is that of a declaratory judgment which does not directly quash the national measure,[61] in the case at hand the placement in preventive detention.[62] However, Article 46 para 1 ECHR contains an obligation under public international law for member states to abide by the final judgments of the ECtHR, which also encompasses the ECtHR's finding of its violation. If criminal proceedings have given rise to a violation of the ECHR, the convicted member state is held "to redress as far as possible the effects".[63] The BVerfG goes even further and demands a restoration, if possible, of the "state of affairs without the declared violation of the Convention".[64] Even though member states are generally free to decide what measures to adopt in order to adhere to this obligation,[65] they must, in case the violation persists, end the circumstances leading to it.[66] More concretely, if the ECtHR holds there has been a contravention of Articles 5 para 1 and 7 para 1, second sentence ECHR, the detainee must be released.[67] Likewise, the execution of a sentence must be annulled if its enforcement has not yet begun.[68] Otherwise, member states would contravene the imperative to guarantee the rights inherent in the ECHR (Article 1 ECHR).[69] It follows from the foregoing that in case of an ongoing violation, the convicted member state has to adhere to its obligations

[61] Cremer, Hans-Joachim, ‚Entscheidung und Entscheidungswirkung' in: Grote, Rainer/Marauhn, Thilo (eds), *EMRK/GG: Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (Mohr Siebeck, Tübingen, 2006), Chapter 32, para 60.

[62] Order of the Second Senate of 14 October 2004 -BvR 1481/04, C I 2 b), para 40.

[63] ECtHR, judgment of 26 February 2004, section 64 complaint No. 74969/01 (Kazim Görgülü v. Deutschland), see also www.echr.coe.int.

[64] BVerfG, Order of the Second Senate of 14 October 2004 -BvR 1481/04, C I 2 b) para. 41.

[65] *Marckx v. Belgium*, Judgment of 13 June 1979, Série A n° 31= [1979] *Europäische Grundrechte-Zeitschrift (EuGRZ)*, 454 (469); BVerfG, Vorprüfungsausschuss, Pakelli, Order of 11 October 1985- 2 BvR 336/85= [1987] *Europäische Grundrechte-Zeitschrift (EuGRZ)*, 203 (206); Kühne, Hans-Heiner, section 2II, para 41.

[66] Meyer-Ladewig, Jens, Article 46, paras 2, 23; see also: ECHR, *Papamichalopoulosand others vs, Greece*, Judgment of 31 October 1995; GrK v. 28.11.02, 25701/94 Nr. 72, [2003] *Neue Juristische Wochenschrift (NJW)*, 1721 ff.- früherer König von Griechenland/Griechenland; Order of the Second Senate of 14 October 2004 -BvR 1481/04, C I 2 b), para 41; Grabenwarter, Christoph, Wirkungen eines Urteils des Europäischen Gerichtshofs für Menschenrechte, [2010] 18 *Juristenzeitung (JZ)*, 857 (861).

[67] Polakiewicz, Jörg, *Die Verpflichtung der Staaten aus den Urteilen des Europäischen Gerichtshofs für Menschenrechte*, (Springer, Berlin, 1993), 233; Grabenwarter, Christoph, 857 (860); Ilascu and others v. Moldova and Russia, Judgment of 8 July 2004, Application no. 48787/99, para 490; similar EGMR, GrK v. 8.4.04, 71503/01 Nr. 203, [2005] *Neue Juristische Wochenschrift (NJW)*, 2207 ff.- Assanidze/Georgien; Cremer, Hans-Joachim, *Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz*, Chapter 32, para. 66, for more sources, see footnote 105; BVerfG, Order of the Second Senate of 14 October 2004-BvR 1481/04, C.I.2 b) para. 41.

[68] Ehlers, Dirk, Die Europäische Menschenrechtskonvention, [2000] *Jura*, 372 (382); Klein, Eckart, ‚Should the binding effect of ECHR judgments of the European Court of Human Rights be extended?, in: P. Mahoney/ F. Matscher/ H. Petzold/ L. Wildhaber (eds), *Protecting Human Rights: The European Perspective-Studies in Memory of Rolv Ryssdal*, (Heymann, Köln, 2000), 705 (708); Cremer, Hans-Joachim, *EMRK/GG: Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz*, Chapter 32, para 66.

[69] Grabenwarter Christoph, 857 (859).

under Articles 1 and 46 para 1 ECHR and end the conduct violating the Convention. In M's case, it would imply that M must be released and has the right to obtain redress.[70]

b) The BVerfG's restrictive interpretation of the duty to abide by final ECtHR judgments

However, the German legal situation, as understood from the argumentation of the BVerfG in the *Görgülü* decision, does not appear so clear. The BVerfG held that domestic courts have to "observe and apply the Convention within the limits of methodically justifiable interpretation"[71] and have to "take into account"[72] ECtHR decisions.[73] In case of conflict between statute law and the ECHR, the BVerfG introduced the imperative for courts to interpret the former in conformity with public international law.[74] However, the BVerfG narrowed this concession when it pointed out that domestic courts could not rely on the jurisprudence of the ECtHR in order to circumvent their obligation under Article 20 para 3 GG to be bound by statute and law. In case the ECtHR found that Germany committed an ongoing violation of the Convention and domestic courts did or could not follow the ECtHR's interpretation, they would have to justify their deviance.[75] In other words, the BVerfG opened the floodgates for domestic courts to disregard the ECtHR's interpretation of public international law.[76]

The BVerfG weakened the binding force of ECtHR judgments by stating that there was merely an obligation to *take into account* the decisions of the ECtHR.[77] This finding is problematic in so far as it allows domestic courts to contravene the Convention repeatedly, in the present case in contravention of Article 5 ECHR, by not releasing an unlawfully detained person.[78] At the same time, the BVerfG underlined that it would amount to contraventions of fundamental rights as well as the rule of law if courts failed to take into account the decisions of the ECtHR.[79] In this case, the person concerned had the possibility to filing a complaint before the BVerfG to object to that decision.[80]

It results from the foregoing considerations that inconsistencies remain in the aftermath of the *Görgülü* decision concerning the extent to which ECtHR jurisprudence is binding on domestic criminal courts. The outcome of the analysis of the BVerfG's decision with respect to the binding force of ECtHR jurisprudence is that domestic criminal courts do have to take into account the decisions of the ECtHR, but only within the limits of methodically

[70] *Id.*, 857 (864); Pollähne, criticises the deferred release of M. which only took place six weeks after the ECtHR decision had become final according to Art. 46 I ECHR, Pollähne, Helmut, 255 (256 f.).
[71] BVerfG, Order of the Second Senate of 14 October 2004-BvR 1481/04, C I 1 a) para 32.
[72] "Take into account" means taking notice of the Convention provision as interpreted by the ECHR and applying it to the case, provided the application does not violate prior-ranking law, in particular constitutional law", compare, C I 4, para 62
[73] BVerfG, Order of the Second Senate of 14 October 2004 -BvR 1481/04, C I 2 d), para. 46.
[74] *Id.*, para 48; see also BVerfGE 74, 358 (370), Cremer, Hans-Joachim, *EMRK/GG: Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz*, Chapter 32, para 94.
[75] BVerfG, Order of the Second Senate of 14 October 2004 -BvR 1481/04, C I 3 a), para 50.
[76] Cremer, Hans-Joachim, 683 (694); Examples include OLG Stuttgart, Order of 1 June 2010 (1 Ws 57/10), [2010] 3 *Recht und Psychiatrie (R&P)*, 157 ff.
[77] BVerfG, Order of the Second Senate of 14 October 2004 -BvR 1481/04, C I 2.d). 2. Abs. para. 46.
[78] Cremer, Hans-Joachim, 683 (694); Klein, Eckart, 'Should the binding effect of ECHR judgments of the European Court of Human Rights be extended?', in: P. Mahoney/ F. Matscher/ H. Petzold/ L. Wildhaber (eds), *Protecting Human Rights: The European Perspective-Studies in Memory of Rolv Ryssdal*, (Heymann, Köln, 2000), 705 (708); Polakiewicz, Jörg, 233 ff.
[79] BVerfG, Order of the Second Senate of 14 October 2004 -BvR 1481/04, C I. 4. paras 61, 63.
[80] *Id.*, para 63.

justifiable interpretation. In addition, they must deviate from ECHR law if conflicts arise with the German Basic Law. Otherwise, German courts could only execute the ECtHR's decision contra legem.[81] In case of doubt, it is likely that domestic criminal courts will follow the caveat established by the *Görgülü* decision and will not adhere to the ECtHR's decisions.[82] This assumption holds true especially in light of section 31 para 1 Federal Constitutional Court Act (BVerfGG)[83] which binds courts by the jurisprudence of the BVerfG.[84] Moreover, it has been argued that, due to the judges' independence (Article 97 para 1 GG)[85], they are not bound by the jurisprudence of any other court including that of the ECtHR.[86] Hence, domestic criminal courts are torn whether to abide by the ECtHR's legal interpretation or that of the BVerfG with respect to preventive detention.[87] The BVerfG, in its role as scrutinizing organ of the domestic courts, should facilitate through its jurisprudence the latter's adherence to the ECHR and its related decisions so as to support the Committee of Ministers' supervision over the implementation of ECHR case-law as required by Article 46 para 2 ECHR.[88] Such an initiative would improve chances for individuals to defend the rights specifically guaranteed by the ECHR before German courts.

c) The duty to abide by ECtHR decisions from a public international law-friendly perspective

Articles 20 para 3 and 59 para 2 GG, read in conjunction with Article 19 para 4 GG, establish binding force of the ECHR and its related case-law[89] which extends to all branches including the judiciary.[90] However, the BVerfG held that courts might not circumvent their obligation under Article 20 para 3 GG to be bound by statute and law when relying on ECtHR decisions.[91] Moreover, section 31 para 2, sentence 1 BVerfGG states that, if the BVerfG, as a result of a constitutional complaint, decides that a law is consistent with the German Basic Law, that decision has legal force. It results from that provision that courts are bound by such kind of decision. Hence, the question arises whether the legal force flowing from the BVerfG's decisions of 5 February 2004 and of 4 May 2011 hamper German courts from adhering to the instant decision's legal reasoning in M's case and in parallel ones.[92]

[81] Polakiewicz, Jörg, 239; Grabenwarter, Christoph, 857 (859 ff.).
[82] This approach has been adopted in recent jurisprudence for instance by OLG Stuttgart, Order of 1 June 2010 (1 Ws 57/10), [2010] 3 *Recht und Psychiatrie (R&P)*, 157 ff. and OLG Koblenz, Order of 30 March 2010 (1 Ws 116/10) juris.
[83] BVerfGG=Bundesverfassungsgerichtsgesetz.
[84] Esser, Robert, 348 (351).
[85] Judges relied on their judicial independence in the following decisions in order to deny the direct effect and to question the general validity of ECHR jurisprudence in the national legal order: OLG Naumburg, Order of 30 June 2004, [2004] 31 *Europäische Grundrechte-Zeitung (EuGRZ)*, 749 ff.; OLG Naumburg, Order of 9 July 2004, [2004] 51.2 *Zeitschrift für das Gesamte Familienrecht (FamRZ)*, 1507 ff.
[86] Order of the Second Senate of 14 October 2004-BvR 1481/04, para 49; Kühne, Hans-Heiner, section 2II, para 41.
[87] This problem has become evident in recent decisions pronounced by various Higher Regional Courts, compare for example OLG Stuttgart, Order of 1 June 2010 (1 Ws 57/10), [2010] 3 *Recht und Psychiatrie (R&P)*, 157 ff. in contrast to OLG Frankfurt/M., Order of 24 June 2010-3 Ws 485/10, [2010] 3 *Recht und Psychiatrie (R&P)*, 151 ff.
[88] See also Kühne, Hans-Heiner, section 2, para. 41.1., who talks about the „grundsätzliches Prüfungsprimat" of the BVerfG.
[89] Meyer-Ladewig, Jens, Article 46, para 15.
[90] *Id*., para 20.
[91] BVerfG, Order of the Second Senate of 14 October 2004 -BvR 1481/04, C I 3 a), para. 50.
[92] Grabenwarter, Christoph, 857 (863).

From the outset, it should be pointed out that the BVerfG applies and interprets the German Basic Law whereas the ECtHR's legal basis is the ECHR.[93] The BVerfG's finding concerning the compliance of the German law on preventive detention with the German Basic Law is restricted to that legal document.[94] In the discussed decisions, one legal concept, namely preventive detention, has been assigned to two different legal categories (measures of correction and prevention vs. penalty) by two different courts (BVerfG and ECtHR) governed by different court organisation acts on the basis of two differently shaped sets of federal law (StGB and ECHR as having been incorporated into the German legal order).[95] However, the binding force deriving from section 31 para 2 BVerfGG does not pertain to questions regarding the conformity of domestic law with the ECHR. Therefore, the legal classification of the ECtHR that deviates from that of the BVerfG does not create a conflict in terms of subject-matter.[96]

Grabenwarter argues that the scope of the binding force of BVerfG decisions deriving from section 31 para 2 sentence 1 BVerfGG is restricted to the finding that preventive detention as provided for by sections 66, 67 para 3 StGB et seq. complies with the German Basic Law in M's case. This finding, however, does not prevent domestic courts from applying domestic law in such a way that placement in preventive detention could not exceed ten years as having been spelled out by the law prior to its amendment in 1998.[97] *Grabenwarter* continues to state that Article 20 para 3 GG needs to be understood in the sense that domestic criminal courts are bound by the ECtHR judgment concerning M's case. The same resulted from Article 20 para 3 GG and section 31 para 1 BVerfGG in respect to the BVerfG's decision of 5 February 2004 concerning M's constitutional complaint.[98] If applied to the instant case, this reasoning leads to the conclusion that domestic criminal courts could adopt the ECtHR's interpretation that preventive detention amounts to a penalty. In doing so, they would conclude that preventive detention of M and detainees in a similar situation is unlawful which would result in a release of these persons. As the BVerfG's decision is only binding on domestic courts to the extent that the current provisions on preventive detention were constitutional and now unconstitutional, but does not express a legal opinion about the constitutionality of other solutions, the courts' adherence to the ECtHR's decision would not *per se* raise constitutional concerns.[99]

A specific example is the order of the OLG Frankfurt. It released M whose detention was concluded to contravene human rights. The court's ECtHR-oriented argumentation that preventive detention amounts to a penalty and, therefore, to retrospective prolongation of

[93] Kühne, Hans-Heiner, section 2II, para 38.1; Grabenwarter, Christoph, 857 (863).

[94] Mückl, Stefan, Kooperation oder Konfrontation?- Das Verhältnis zwischen Bundesverfassungsgericht und Europäischem Gerichtshof für Menschenrecht, in: [2005] 44 *Der Staat*, 2005, 403 (428).

[95] Gaede, Karsten, 329 (337).

[96] *Grabenwarter* points out that, at European level, there was no need for the two different legal orders, (German and European) to conform to one another. Hence, the guarantees enshrined in the ECHR might be construed differently within the two legal orders; Grabenwarter, Christoph, 857 (863).

[97] The same reasoning holds true in the aftermath of the BVerfG decision of 4 May 2011 which declared numerous provisions of the German law on preventive detention unconstitutional, but upheld its classification of preventive detention as a measure of correction and prevention and not as a penalty. *Grabenwarter* convincingly argues that the BVerfG's finding that the German law on preventive detention is in conformity with Basic Law does not imply that the previous law on preventive detention was unconstitutional, Grabenwarter, Christoph, 857 (863).

[98] *Grabenwarter* refers to that situation as a double binding force ("doppelte Bindung"), *Id.*, 857 (864).

[99] *Grabenwarter* suggests that, if domestic courts were to release persons on the basis of the same set of facts as in M's case, they would not act in contradiction to German Basic Law but rather grant a further reaching protection than what the German Basic Law requires, compare *Id.*, 857 (864).

preventive detention infringed upon the prohibition of retroactivity, was not encompassed by the binding effect of the BVerfG's recent decisions on that matter. Due to the possibility that domestic courts abide by the interpretation of one court without contradicting the other, it could be concluded that the implementation of the instant ECtHR judgment into the German legal order does not necessarily encounter considerable obstacles.[100] Notwithstanding the possibility of implementing the instant decision without contradicting the German Basic Law, it does not negate the fact that Germany's OLGs adopted quite different approaches. This fact not only leads to legal uncertainty, but also bears the risk of arbitrary decision-making. However, in light of the rule of law, it should not be a matter of chance, whether a person is released from preventive detention or not. In conclusion, the current legal situation does not provide a clear answer as to whether courts must adopt the classification of preventive detention suggested by the BVerfG or that of the ECtHR. The BVerfG is called upon to shed light on the legal darkness.

d) The effect of ECtHR decisions on parallel cases

The finding of a contravention of the Convention is generally restricted to the specific case.[101] Nevertheless, if the ECtHR finds a violation of the Convention in one case, it is possible that the situation leading to this conclusion persists in parallel cases. Parallel cases are those that occur within the legal order of the member state which is party to the proceedings before the ECtHR, but concern individuals which are not subject to these proceedings.[102] Therefore, the question arises if the ECtHR's finding of a violation of the ECHR creates an obligation for member states to cease that violation in parallel cases. Article 1 ECHR could be considered as creating an indirect effect (*Orientierungswirkung*) of ECtHR decisions on other member states which abide by the decisions in order to prevent future findings of a contravention by the ECtHR.[103] This indirect effect also includes an obligation of the member state subject to the immediate proceedings before the ECtHR to cease contraventions in parallel cases on the basis of the Court's previous finding that these circumstances violate the Convention.[104] Extending the obligation of member states to terminate the contravention of the ECHR in parallel cases would be commensurate to the imperative not to repeat the violation that the member state is confronted with vis-à-vis any successful complainant in other corresponding cases.[105] Therefore, the findings of the ECtHR in M's case also extend to persons kept in preventive detention in parallel cases.[106]

[100] Id., 857 (864) (869).
[101] Cremer, Hans-Joachim, *EMRK/GG: Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz*, Chapter 32, para 85; Kinzig Jörg, 233 (238).
[102] Grabenwarter Christoph, 857 (861).
[103] *Gaede* suggests that parallel cases create an indirect effect (*praktisch bindende Orientierungswirkung*) for German courts, Gaede Karsten; 329 (330); Kinzig Jörg; 233 (238); The OLG Frankfurt stated in clear terms that, from Article 1 ECHR, there results the obligation for member states found to act in violation of the ECHR to also cease that violation in parallel cases; see OLG Frankfurt, Order of 1 July 2010- 3 Ws 539/10, [2010] 3 *Recht und Psychiatrie (R&P),* 151 (153); Grabenwarter Christoph, 857 (861).
[104] Esser, Robert, 348 (352 ff.).
[105] *Grabenwarter* argues that the obligation to end the violation also in parallel cases derived from the imperative not to repeat a violation; see Grabenwarter Christoph, 857 (861).
[106] *Id.*, 857 (868).

D. Concluding remarks

The instant judgment amounts to a landmark decision in that it has proved its potential to encourage the German legislature to initiate a reform of and the BVerfG to rethink its legal assessment on the constitutionality of the law on preventive detention.

Summing up the main findings of the decision, the ECtHR neither held that the German law on preventive detention generally infringed upon Articles 5 para 1 and 7 para 1, sentence 2 ECHR nor did it conclude that the distinction in German criminal law between penalties and measures of correction and prevention was contrary to the ECHR. Rather, adopting the approach of an autonomous interpretation which is oriented towards an effective protection of human rights, it held that, despite the German classification of preventive detention as a measure of correction and prevention, retrospective preventive detention amounted to a penalty in the sense of Article 7 para 1 sentence 2 ECHR. The analysis of the ECtHR as well as of the BVerfG decisions demonstrates how retrospective preventive detention, due to two distinct sets of federal statute law, can fall within the ambit of different legal concepts.[107] The different legal classification of one and the same term provoked a lively debate within the judiciary as well as the German federal legislature, not only on how to proceed with those persons currently placed in preventive detention, but also on how to reform the German preventive detention law in the future. It remains to be seen whether the federal legislature succeeds in making the law compliant with ECHR standards.

Even though workable approaches exist on how domestic courts in theory could in M's situation and in parallel cases effectively implement the ECtHR's final judgment without risking conflicts with German Basic Law, legal practice shows that individuals remain subject to the good will of courts in their attempts to have their ECHR guarantees implemented in the national context. In the absence of constitutional provisions explicitly obliging domestic courts to not only take into account, but to adhere unconditionally to the ECHR and its related case-law, legal uncertainty arises as domestic courts adjudicate inconsistently in regard to the extent to which they choose, if at all, to abide by them. Consequently, even though, in the instant case, the ECtHR pronounced a well-founded judgment regarding the German preventive detention system that has potential to increase the level of protection and to improve judicial rights in Germany significantly, its effective implementation might be hampered by domestic courts' refusal to adopt an interpretation that permits abiding by ECHR case-law and also covered by the German Basic Law.

In the aftermath of the *Görgülü* decision, the legal status of the domestic criminal courts' public international law-based obligation to implement ECtHR decisions into domestic law has not been clarified. Even though the BVerfG emphasised that domestic courts should take into account the decisions of the ECtHR and apply national law in harmony with the ECHR, the obligation to abide by the decisions of the ECtHR pursuant to Article 46 para 1 ECHR is weakened by the BVerfG's finding that domestic courts may deviate from ECHR law if they "discernibly consider the decision and, if necessary, justify understandably why they nevertheless do not follow the international law interpretation of the law." However, if, courts blindly adopted the BVerfG's legal interpretation, it would render the purpose of Article 46 para 1 ECHR ineffective.

The current status of the ECHR within the German legal order has potential to hamper the ECHR's effective implementation. The increasing relevance of the guarantees enshrined in

[107] Gaede, Karsten, 329 (337).

the ECHR no longer justifies the classification of the Convention as mere statute law. If Germany does not want to fall behind other ECHR member states, the legislature and the judiciary are called upon to clarify and enhance the meaning of European human rights in the German legal order, thereby increasing the individual's level of protection.[108]

[108] Haß, Solveig, 126 ff., *see also* footnote 388.