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INDIVIDUAL PREVENTION IN CRIMINAL PROCEDURE

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ABSTRACT

This article explores the possibility of using criminal procedure and its measures for individual prevention of crime. The author tries to look at criminal procedure in an abstract way, not focusing on any concrete legal system. It is argued that the criminal process is traditionally reactive and this should not change. However, some measures of criminal procedure (arrest, pretrial detention, house arrest, suspension of driving licence, suspension at work) may be used as instruments of individual prevention when they are the best or only measures available and their application will not prejudice the case against the accused. Their use must be accompanied by relevant safeguards and allowed only if necessary and proportional.

KEYWORDS

Prevention, criminal procedure, preventive measures, risk, human rights

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INTRODUCTION

The preventive turn in the criminal justice systems has been the subject of many publications. However, this issue has not been duly explored in the context of criminal procedure, but in an abstract way, not focusing on a particular legal system.

The criminal process is traditionally reactive: it is initiated when there is a suspicion that crime has been already committed. Taking this view, it cannot be therefore initiated purely in order to prevent commission of a potential future crime. As Kitai–Sangero points out "the trial process is inadequate for dealing with future offenses"[1]. The vision of conducting criminal proceedings in order to prevent commission of crime and punish for crimes which have yet not happened, shown in the novel and movie *Minority report*[2], is pure fiction. Prevention of crime is generally the role of police forces and distinct from criminal proceedings. The operational activities of the police are conducted in this respect. Nowadays we witness some attempts to blur the line between the criminal process and police proactive activities. One example is the Netherlands where the grounds for starting criminal proceedings is suspicion of crime (past or future), not only suspicion that a crime was committed. Therefore, this stage of criminal proceedings is called anticipative criminal investigation.[3] Such regulations are however rare and not persuasive. The reactive character of the criminal process is one of its key features. The suspicion that a criminal act was committed has historically triggered the criminal process. If the main goal of the criminal process is to decide on the question of the criminal responsibility of the accused, it is hard to accept that the question may arise in other contexts than past behaviour. Despite the fact that the criminal process is generally reactive, some of its measures may be used also for preventive purposes. As Vervaele observed "Investigation techniques and coercive measures are also used in a proactive way to investigate, ante-delictum, the existence and behaviour of potentially dangerous persons and organizations in order to prevent serious crimes"[4]. This is possible because the role of criminal process is not only to decide on guilt and punish for the past, but also, as in the case of substantive criminal law, to have a preventive effect on society and the suspect or accused. It is also argued that prevention is one of the values or goals of criminal procedure.[5] The extent, to which criminal procedure

[1] Rinat Kitai–Sangero, "The Limits of Preventive Detention," *McGeorge Law Review* 40 (2009): 924.
[2] Philip K. Dick, "The minority report," *Fantastic Universe* (January 1956), adapted into a film by Steven Spielberg in 2002.
[3] Marianne F. H. Hirsch Ballin, *Anticipative Criminal Investigation. Theory and Counterterrorism Practice in the Netherlands and in the United States* (The Hague: T. M. C. Asser Press, 2012).
[4] John A. E. Vervaele, "Special Procedural Measures and Respect of Human Rights. General Report," *Revue Internationale de Droit Pénal* 80 (2009): 89.
[5] Hirsch Ballin, *supra* note 3, 28; Jean Pradel, *Procédure pénale* (Paris: Cujas, 2015), 17.

realizes preventive goals, is different in different legal systems and depends on many factors. Some of them will be discussed below.

1. THE CONCEPT OF THE POSITIVE OBLIGATIONS OF STATES AND OTHER REASONS FOR USING PREVENTIVE MEASURES

The most important reason for the use of procedural preventive measures are the positive obligations of states to prevent the commission of crime. According to the ECtHR,

> It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression, and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.[6]

The positive obligations are related especially to the rights enshrined in article 2[7], 3[8] and 8[9] of the ECHR. In the context of domestic violence against women, article 14 of the ECHR may sometimes apply.[10] Also, article 2 (3) of the Fourth Protocol to the ECHR is quoted in the judgments of the ECtHR.[11]

The positive obligations of states to prevent crime are also declared on the basis of provisions of ICCPR. As was indicated by the UN Human Rights Committee:

> The positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise

[6] *Osman v the United Kingdom*, judgment of the ECtHR of 28 October 1998, application 23452/94, par. 115.
[7] *Ibid*.
[8] *Eremia v Moldova*, judgment of the ECtHR of 28 May 2013, application 3564/11.
[9] *Đorđević v Croatia*, judgment of the ECtHR of 24 June 2012, application 41526/10.
[10] *Opuz v Turkey*, judgment of the ECtHR of 9 June 2009, application 33401/02.
[11] *Austin and others v the United Kingdom*, judgment of the ECtHR of 15 March 2012, applications 39692/09, 40713/09 and 41008/09.

> due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.[12]

The positive obligations to prevent crime may be fulfilled in many ways: criminalization of certain behaviour, increasing penalties, effective investigation and prosecution of criminal acts, introduction of protection programmes for victims, training of law enforcement to deal with a particular type of risk,[13] etc. The actions are complementary and the importance of particular action depends on the nature of certain criminal behaviour and the *modus operandi* of perpetrators.

Effective investigation and prosecution are very important as, without an adequate tool to enforce the law, it will be a dead letter, allowing perpetrators to escape justice and lowering the deterrent effect of the criminal law provisions and their preventive role.[14] Trying a case in reasonable time makes possible the application of the criminal law sanctions, including a penalty or preventive measures provided by the criminal law (for example placing an offender in a psychiatric hospital), or other measures provided by the legal system (for example civil commitment) after the verdict in the case is final. However, criminal proceedings take some time during which the suspect or the accused may continue criminal activity, complete the crime prepared or attempted, or commit another crime. It is the duty of the state to prevent that. As the person is a participant in criminal proceedings, sometimes already subjected to some of its coercive measures, the task of preventing eventual future criminal activities is the responsibility of the authorities conducting criminal proceedings, and the criminal procedure must provide them with adequate measures to react and fulfil their duty to prevent.

Also, it may be argued, that when a certain person has entered the area of criminal procedure by becoming a suspect or an accused and, besides that, the person poses a risk of future misbehaviour, then there is a reason to subject that person to a uniform regime of legal rules both in relation to alleged past and possible future behaviour. Otherwise, the criminal procedure and police operations must be applied in parallel which may cause confusion, lead to contradictory decisions, double the work of the public authorities, and have a negative impact on the rights of the person concerned.

Changes in the perception of criminal procedure are the next factor for the increase of its preventive role. Criminal procedure is a dynamic instrument and must

[12] UN Human Rights Committee (HRC), "General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant" (26 May 2004, CCPR/C/21/Rev.1/Add.13) // https://www.refworld.org/docid/478b26ae2.html, par. 8.
[13] Liora Lazarus, "Positive Obligations and Criminal Justice: Duties to Protect and Care?": 147; in: Lucia Zedner and Julian V. Roberts, eds., *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford: Oxford University Press, 2012).
[14] See *K. U. v Finland*, judgment of the ECtHR of 2 December 2008, application 2872/02.

also take into account the actual needs and interests of society.[15] If crime prevention and public safety are one of the main expectations of society, criminal procedure may have a role in the fulfilling of those tasks by the state. It is indicated that the "criminal process is becoming a procedure in which the pretrial investigation is not about truth-finding related to committed crime, but about construction and de-construction of social dangerousness"[16] and "the perception of the *ultimum remedium* character of the criminal justice system has changed, because the criminal justice system, according to the current view, is not only considered to deal exclusively with apprehending, prosecuting and punishing criminals, but has also obtained a function in contributing to security, investigating risks, and preventing their realization"[17]. It might be observed that the criminal process is taking a course towards a risk control model, which has many similarities to Herbert Packer's crime control model but is concerned with potential future crime.

There are opponents of the use of criminal procedure for preventive purposes. It is argued that the aim of criminal procedure is to ensure a fair trial for crimes already committed, while the prevention of future crimes is a task of other authorities.[18] Using the criminal procedure for preventive purposes may interfere with the aims and values of criminal procedure, lower procedural guarantees, and decrease the legitimization of the penalty inflicted. Besides, criminal procedure could be used instrumentally, for political aims and because of populistic demands for a tough reaction on crime.[19] These are threats to the requirement of fairness of criminal proceedings, which the state has a duty to preserve. The threats are undoubtedly serious and reasonable, and therefore must be duly taken into consideration.

The sceptics also ask why the use of preventive measures is to be connected with criminal procedure.[20] One issue is criminal responsibility for past acts, different is the probability that the person will commit a crime in the future. This probability may appear not only in the case of persons suspected or accused of crime, but also in the case of persons who are not involved in criminal proceedings. Subjecting only the first category to preventive measures may raise objections. This leads to the question, as to whether the application of a preventive measure must not be

[15] Tyron Kirchengast, *The Criminal Trial in Law and Discourse* (Houndmills, Basingstoke: Palgrave Macmillan, 2010), 220.
[16] John A.E. Vervaele, *supra* note 4: 91.
[17] Marianne F.H. Hirsch Ballin, *supra* note 3, 584.
[18] Louis Blom–Cooper, "Crime and Justice: A Shift in Perspective"; in: David Cornwell, John Blad, and Martin Wright, eds., *Civilising Criminal Justice: An International Restorative Agenda for Penal Reform* (Hook: Waterside Press, 2013).
[19] Antony Duff, Lindsay Farmer, Sandra Marshall, and Victor Tadros, *The Trial on Trial: Volume 3: Towards a Normative Theory of the Criminal Trial* (London: Hart Publishing, 2007), 292.
[20] Andrew von Hirsch, "Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons," *Buffalo Law Review* 21 (1972): 745.

regulated for all persons posing risk in the same procedure and not related to criminal proceedings. There are arguments for and against such a solution. Equality before the law[21] and the above-mentioned potential limitation or breach of procedural guarantees call for putting preventive measures aside from criminal procedure. On the other hand, evidence gathered in criminal proceedings may also be relevant to assess the risk of the commission of a crime, if the suspect or accused had attracted the attention of the state by being suspected of a crime already committed. The application of preventive measures is sometimes based also on procedural grounds (for example avoidance of harm to key witness). It is also argued that general or random risk tests of citizens are forbidden, therefore the status of being a suspect or accused justifies the analysis of the risk of future criminal behaviour.[22]

2. THE DEVELOPMENT OF INDIVIDUAL PREVENTION IN CRIMINAL PROCEDURE

Although the preventive role of substantive criminal law has been recognized for centuries, the use of criminal procedure directly for individual prevention purposes is a relatively new idea. In many legal systems it was introduced in the 70s[23], 80s[24], or 90s[25] of the XX century. Other systems introduced it few decades earlier. One visible exception was Austria, which regulated preventive arrest and detention in criminal procedure as early as in 1873.[26] It does not mean of course, that individual prevention was not present in the criminal process before the introduction of preventive grounds for the application of procedural measures. Practice shows that before the explicit regulation of preventive grounds, other grounds, like the risk of absconding or putting pressure on a witness or witnesses were more or less convincingly invoked as justifications for not leaving the suspect or accused at liberty.[27] Moreover, strictly procedural and preventive grounds are sometimes interrelated, for example arrest applied because of the risk of tampering with evidence may at the same time prevent crime (ex. threats to witnesses, theft, destruction of property). It must also be observed that in some countries regulations which might be applied in relation to persons suspected or accused of crime existed formally outside the criminal procedure. Examples are the English concept of the

[21] Sandra G. Mayson, "Dangerous Defendants," *Yale Law Journal* 127 (2017): 520 and 557-564.
[22] Andrew Ashworth and Lucia Zedner, *Preventive justice* (Oxford: Oxford University Press, 2014), 147.
[23] See *Bail Act* 1976 (UK), schedule 1, part I, s. 2 (c).
[24] See *Bail Act* 1984 (US), 18 U.S.C. § 3142. Before that, in the US federal law the preventive ground for refusal of bail was applicable only in capital cases.
[25] See *Bail Act* 1997 (IR), s. 2 (1).
[26] See *Strafprozeßordnung* 1873, s. 175 and 180.
[27] Lawrence H. Tribe, "An Ounce of Detention: Preventive Justice in the World of John Mitchell," *Virginia Law Review* 56 (1970).

king's peace[28] and the Italian regulations allowing for internment of persons posing a risk of breaching public order[29].

The increase in using criminal procedure measures for preventive purposes may be observed in the XXI century. The threat of terrorist attacks is one of the factors. The others are the growing importance of providing protection for victims of sexual abuse and victims of domestic violence. Crime started to be treated as one of the risks to be managed. In the political debate criminal law and criminal procedure have become an important argument and instrument of crime prevention. There is a visible shift from the concept of positive prevention by treatment and resocialization, to negative prevention, based on deterrence and incapacitation, where repression is equalled with prevention.[30] This is the culture of control phenomenon.[31] Risk-based theories were developed, which were before that criticized as unacceptable interference with rights of the individual.[32] In the concepts of risk management[33] criminal procedure is one of the instruments of managing the risk of commission of crime. Another important concept is pre-crime, where traditional prevention is replaced by pre-emption.[34] New Penology is based on identification, classification, and management of groups posing a risk. It does not aim to punish or rehabilitate the perpetrator, but to manage the risk, mainly by preventive detention.[35]

Another factor of the increased use of procedural measures for preventive purposes is extension of criminalization of preparatory acts in many jurisdictions in the last decades, especially in the area of terrorism-related offences and child abuse offences. As substantive and procedural criminal law are strictly interrelated,[36] detection of criminal preparation gives the possibility of starting criminal proceedings and using procedural preventive measures.

Also, the phenomenon called "culture of risk aversion" must be mentioned. It is observed[37] that in the criminal justice system there is a higher probability of arrest

[28] See *Justice of the Peace Act* 1361 and William Blackstone, *The Commentaries on the Laws of England*, Vol. IV (London, 1825), 251.
[29] Daniela Cardamone, "Criminal Prevention in Italy. From the 'Pica Act' to the 'Anti-Mafia Code'" (2016): 2 // http://www.europeanrights.eu/public/commenti/bronzini1-Cardamone_Criminal_prevention_in_Italy_2.0.pdf.
[30] Jacques Claessen, "Theories of Punishment": 28-29; in: Johannes Keiler and David Roef, eds., *Comparative Concepts of Criminal Law* (Cambridge – Antwerp – Portland: Intersentia, 2016).
[31] David Garland, *The Culture of Control* (Oxford: Oxford University Press, 2001), 62.
[32] Nigel Walker, "Ethical and other Problems": 2; in: Nigel Walker, ed. *Dangerous People* (London: Blackstone, 1996).
[33] Malcolm Feeley and Jonathan Simon, "Actuarial Justice: The Emerging New Criminal Law"; in: David Nelken, ed., *The Futures of Criminology* (London: Sage Publications, 1994).
[34] Lucia Zedner, "Pre-crime and post-criminology?" *Theoretical Criminology* 11 (2007).
[35] Susan Dimock, "Criminalizing Dangerousness: How to Preventively Detain Dangerous Offenders," *Criminal Law and Philoshophy* 9 (2015): 540.
[36] Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford: Oxford University Press, 2007), 14.
[37] Aaron Doyle and Laura McKendy, "Risk Aversion and the Remand Population Explosion in Ontario": 200-201; in: Stacey Hannem et al., eds., *Security and Risk Technologies in Criminal Justice. Critical Perspectives* (Ontario: Canadian Scholars' Press, 2019).

or refusal of bail due to the fears of the police, the prosecution service, and the judiciary caused by the risk to be taken in letting the suspect or accused be free. This fear is visible in the decreased use of police bail, more motions sent to courts and the reduced eagerness of the courts to grant bail. If bail is granted, more obligations are put on the suspect or accused.

There are many models of prevention, one of them is the criminal justice crime prevention model, with criminal sanctions as a main tool.[38] Criminal procedure may be regarded as one of the elements of the model.

3. TYPES OF PREVENTION IN CRIMINAL PROCEDURE

Prevention by means of criminal procedure may be divided into:

a. General (positive and negative).

b. Individual (positive and negative).

General prevention is targeted on society or some groups of society. General positive prevention is realised by convincing members of society who are obeying the law that their behaviour is proper and must be continued. In the criminal process it is done mainly by allowing the press to attend trials and to inform the public about pending criminal cases, and persons prosecuted and sentenced. General negative prevention is focused on potential perpetrators in order to discourage them from the commission of crime, which could be done also by revealing to the media information about crime detected, prosecuted, and punished. This shows that crime does not pay. Also the mere existence of some procedural measures, limiting the rights of the persons concerned, especially pre-trial detention, may have general deterrent effect.

Individual prevention in criminal procedure focuses on a suspect, accused, or other persons who may commit a crime related to pending criminal proceedings. Individual positive prevention aims at the education, resocialization, or therapy of a certain person. This kind of prevention is rather rare, because the suspect or accused benefits from the presumption of innocence. Therefore, the application of procedural measures during pending criminal proceedings in order to change the suspect's or the accused's behaviour is problematic, because we cannot assume the guilt of the person and necessity of action before the guilt is declared according to law. However, we must have in mind, that such a person may have health, professional, or social problems, for example drug addiction or mental illness, which increase the likelihood of offending. In this situation the measures of criminal procedure may contribute to the preventive tasks if they are not based on the presumption that a crime has been committed. Usually, the initiative or consent of the person concerned must also be

[38] Tore Bjørgo, *Preventing Crime. A Holistic Approach* (London: Palgrave Macmillan, 2016), 9-14.

required. Examples of such measures are the possibility of temporary suspension of criminal proceedings for a period needed for drug therapy or programmes prepared for persons on bail, giving them the possibility of therapy, support, or education.[39]

Individual negative prevention plays a much bigger role in criminal procedure than individual positive prevention, so it will be analysed more widely. It may take the form of physical incapacitation, limitation of possibilities, and discouragement.

Incapacitation is achieved especially by deprivation of liberty, which takes the form of arrest or pretrial detention. Depending on the legal system, it may be done on the basis of preventive grounds for deprivation of liberty (for example in Germany, France, Poland) or on the base of refusal of bail due to the risk of committing a crime (for example UK, Ireland, US).

Limitation of possibilities to commit a crime may be achieved by such procedural measures as a restriction on contact with the victim, an order to leave premises occupied with the victim, or suspension of a driving licence. Also, the use of anonymous witnesses limits the possibility of revenge, being a kind of situational prevention.

Discouragement may be affected mainly by showing the suspect or accused an increased possibility of being detected in the future, which could be done for example by electronic monitoring or putting his DNA profile or fingerprints in a police database.

In criminology, a distinction is made between primary, secondary, and tertiary prevention[40]. In the context of criminal procedure all three types of prevention are possible. Primary prevention will be done by deterrence owing to the possibility of opening criminal proceedings and the application of coercive measures. Secondary prevention may take place for example in order to prevent potential attacks on witnesses by persons others than the accused (ex. members of the same criminal group). The most important in criminal procedure is tertiary prevention, of which an example is the pretrial detention of the accused in order to prevent commission of new offences.

Prevention in criminal procedure may be understood, not only as a pre-emption of a commission of a criminal act which may take place in the future, but also as the stopping of an ongoing criminal activity or avoidance of further harm from a crime already committed (for example deterioration of health or death of person kidnapped).

[39] Mark Drakeford, et al., *Pre-trial Services and the Future of Probation* (Cardiff: University of Wales Press, 2001), 29-40.
[40] Paul J. Brantingham and Frederic L. Faust, "A Conceptual Model of Crime Prevention," *Crime and Delinquency* 22 (1976).

4. TWO CONTEXTS OF INDIVIDUAL PREVENTION

The issue of individual prevention in criminal procedure may be analysed in the legislative context (adoption of new regulations) and in the context of application of measures already provided by law.

The preventive ground for application of procedural measures may be regulated in legislation *expressis verbis* as prevention of crime, prevention of reoffending, or stopping criminal activity, or it may be one of the aspects of another ground (e.g., protection of public order, protection of victims or witnesses, prevention of obstruction of justice). The introduction of such measures must be based on empirical studies, statistics, and legal analysis,[41] not only on populist political arguments and one-off cases.

An analysis of criminal procedures in various countries leads to the observation, that they vary concerning the number of preventive measures provided. Some of the measures are applied in most of the countries (especially pre-trial detention), while others can be applied in order to prevent crime only in some countries (for example preventive confiscation of property, search of premises, interception of communications).

Most of the preventive measures in criminal procedure may be applied also for procedural purposes, to ensure the proper conduct of the proceedings, especially in the case of the risk of absconding, hiding by the suspect or the accused, or tampering with evidence. Examples are pre-trial detention, arrest or ban on contacting the victim. However, some of them are of a strictly preventive nature like the suspension of a driving licence.

It must be underlined, that procedural preventive measures must not have a repressive aim. This distinguishes procedural measures from penalties and other measures regulated by substantive criminal law which also means, that they are not subjected to guarantees of substantive criminal law, for example *lex retro non agit*.[42] Of course, it is unavoidable that most of the measures will limit the rights of the persons concerned and their nature may be similar to that of penalty (e.g. in the case of deprivation of liberty). But repression cannot be a direct or indirect purpose of use of procedural preventive measures. Otherwise, application of the measures may infringe human rights, especially personal freedom, the right not to be punished twice for the same act, the right to privacy, and the right to a fair trial.

[41] See for example the discussion in the US Senate in 1983 in relation to refusal of bail due to preventive reasons (Senate Report 98 – 225 // https://www.fd.org/sites/default/files/criminal_defense_topics/essential_topics/sentencing_resources/deconstructing_the_guidelines/legislative-history-of-the-comprehensive-crime-control-act-of-1983.pdf).
[42] Andrew Ashworth, "Criminal Law, Human Rights and Preventative Justice": 107-108; in: Bernadette McSherry, Alan Norrie, and Simon Bronitt, eds., *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (London: Hart Publishing, 2009).

The fulfilment of the positive obligations of the state in the area of crime prevention also cannot lead to infringement of rights guaranteed by the ECHR and domestic law. Therefore, procedural preventive measures constituting torture, inhuman or degrading treatment, unlawful deprivation or limitation of liberty, or infringement of the right to privacy cannot be accepted. On the other hand, if all requirements for interference with rights are met, the rights cannot be invoked as an obstacle for fulfilment of the positive obligation to prevent crime by a state.[43]

One important question which must be posed, is whether criminal procedure is a proper instrument for crime prevention. There are at least three other alternatives: police law, administrative law, and civil law. Each of the branches of law offers some preventive measures. In police law, which is in most European countries distinguished from criminal procedure, stops, frisks and the interception of communications may usually be used to prevent crime. In administrative law, detention, travel bans and freezing orders may be found. Civil law usually regulates the detention of mentally ill persons, and injunctions are also used. Sometimes the measures are similar, so it might be said that in the pre-crime model of prevention the borders between criminal, civil, and administrative law are blurred.[44] The above-mentioned alternatives are often attractive for the state. For example. the evidential standard may be lower, the presumption of innocence does not apply, evidence inadmissible in criminal proceedings may be used, and judicial control may be limited in comparison with criminal procedure. Therefore, one may observe that many countries have chosen to use the alternatives, especially in situations when stringently set requirements of criminal procedure make its measures hard to apply or ineffective for crime prevention. A good example is the United States, which applies so called Special Administrative Measures in relations to persons suspected of terrorism.[45] The United Kingdom developed the concept of hybrid measures, when a measure is applied as civil, but breach of the measure is punished as a crime.[46] However, such measures must not deprive the persons concerned of their rights under art. 6 of the ECHR. The ECtHR rightly adopts the Engel criteria[47] in order to check if the measures and proceedings challenged are not really criminal and changing the label is not fictitious and superficial with the aim of lowering procedural guarantees. An example of this analysis is the case Welsh v. the United Kingdom, where the ECtHR decided that a

[43] *Austin and others. v United Kingdom*, *supra* note 11.
[44] Jude McCulloch, Dean Wilson, *Pre-crime. Pre-emption, precaution and the future* (New York: Routledge, 2016), 6.
[45] Andrew Dalack, "Special Administrative Measures and the War on Terror: When Do Extreme Pretrial Detention Measures Offend the Constitution?" *Michigan Journal of Race and Law* 19 (2014): 435-436.
[46] Jennifer Hendry and Colin King, "Expediency, Legitimacy and the Rule of Law: A Systems Perspective on Civil/Criminal Procedural Hybrids," *Criminal Law and Philosophy* 11 (2017).
[47] *Engel and others v the Netherlands*, judgment of the ECtHR of 8 June 1976, applications 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72.

confiscation order is of a penal rather than a preventive nature, therefore its retroactive application was not possible.[48]

The application of preventive measures in the framework of criminal procedure has both positive and negative aspects.

The first positive aspect is the possibility of fulfilling positive obligations in relation to persons who somehow have contact with the criminal process, especially victims. Besides, criminal procedure is very formal and with many guarantees, and the application of a preventive measure within the criminal procedure may give more rights than in the case of police activities or other procedures. Using one regime instead of two allows for better assessment of the need for application of coercive measures and gives the person deprived of liberty the benefit of full judicial control.

The negative aspects are also numerous. First of all, the application of preventive measures may have a negative impact on the accuracy of fact–finding in relation to the fact at issue, which is the question of criminal responsibility of the accused. The use of preventive measures can prejudice the case, suggesting to the court that the person is so dangerous that he must be isolated from society. It may be observed that using propensity character evidence was traditionally limited in common law in order not to prejudice the case, and the same reason can be given in the case of preventive measures. Of course, in some systems it is possible not to reveal the fact, especially in the case of a jury trial, but in most legal systems the judge or the judicial panel are aware of that before giving a verdict, even if the measure was applied before the trial by another authority. Moreover, custodial measures limit the accused's ability to defend himself by making the gathering of evidence or access to the case files more difficult.[49]

Having in mind the negative aspects of the use of preventive measures within criminal procedure, it must be ensured that adequate guarantees are put in place. The ECtHR reminds us of "the need to ensure that powers to control, prevent, and investigate crime are exercised in a manner which fully respects the due process and other guarantees which legitimately place restraints on criminal investigations and bringing offenders to justice"[50]. It must be observed, that in the case of preventive measures, criminal responsibility is not decided, and therefore not all of the procedural safeguards are applicable. However, similar guarantees as those in the case of the application of measures for strictly procedural purposes must be provided, for example the right to appeal against the decision to apply the measure. Besides, some non-applicable guarantees must be replaced by others, giving adequate

[48] *Welsh v the United Kingdom*, judgment of the ECtHR of 9 February 1995, application 17440/90.
[49] Compare the judgment of the ECtHR of 15 June 2010 in the case *Ashot Harutyunyan v Armenia*, application 34334/04.
[50] *K. U. v Finland*, *supra* note 14, par. 48.

protection. This is especially important in the case of the presumption of innocence. As the presumption applies to alleged past acts, generally it is not applicable to future behaviour, because if the crime has not yet been committed, the potential perpetrator is certainly innocent.[51] Instead, presumption of harmlessness,[52] the right to be presumed harmless[53] or the right to be presumed free from harmful intentions[54] are proposed. It is however doubtful if in most countries such presumption may be inferred from existing constitutional or civil law. Therefore, more convincing is the view that the application of preventive measures must be governed by constitutional guarantees, including the proportionality test and the necessity requirement.[55] This will give an assurance that preventive measures are not applied arbitrarily. Otherwise, the possibility of limiting rights, not for what the person did, but for what the person may do or for who the person is, may become an instrument of oppression.[56] Therefore, it must be shown that intervention by measure of criminal procedure is necessary to achieve a legitimate goal, that there is no less intrusive measure able to realize the same aim, and that the measure used is proportional in relation to the interference with the rights and freedoms of the suspect or accused (especially personal freedom). The requirements apply both to the legislative process, before a certain preventive measure is adopted and to the application of preventive measures by the authorities.

The presumption of innocence requires however that the grounds for preventive measures do not suggest that the suspect or accused committed a crime for which he has not yet been found guilty. Therefore, expressions like "risk of commission of new crime", "risk of reoffending" must be avoided in legislative acts. Also, in the decisions applying preventive measures, presumptions of innocence must be observed by not indicating any certainty that the accused is guilty of the crime charged.[57]

It is very hard to argue that the risk of offending does not exist as it is not an argument about facts or an act which took place, but about future uncertain behaviour, which may occur or not and is a matter of fear, prognosis, and perception

[51] Warren Young, "The Justification for Taking Measures to Predict Offending and Reoffending and to Manage Risk": 148; in: Piet H. van Kempen and Warren Young, eds., *Prevention of Reoffending* (Antwerp: Intersentia, 2014); Hadassa Noorda, "Preventive Deprivations of Liberty: Assets Freezes and Travel Bans," *Criminal Law and Philosophy* 9 (2015): 531.
[52] Nigel Walker, *supra* note 32: 2.
[53] Jean Floud and Warren Young, *Dangerousness and Criminal Justice* (London: Heinemann, 1981), 33.
[54] Lucia Zedner, "Erring on the Side of Safety: Risk Assessment, Expert Knowledge and the Criminal Court": 221-222; in: Robert Sullivan and Ian Dennis, eds., *Seeking Security. Pre-empting the Commission of Criminal Harms* (Oxford: Hart Publishing, 2012).
[55] Thomas Weigend, "There is Only One Presumption of Innocence," *Netherlands Journal of Legal Philosophy* 42 (2013): 202-203.
[56] Bernadette McSherry, "Pretrial and Civil Detention of "Dangerous" Individuals in Common Law Jurisdictions": 540; in: Darryl K. Brown, Jenia I Turner, and Bettina Weisser, eds., *The Oxford Handbook of Criminal Process* (Oxford: Oxford University Press, 2019).
[57] See for example the judgment of the ECtHR of 6 February 2007 in the case *Garycki v Poland*, application 14348/02.

open to mistake.[58] Therefore, it is very important to regulate the use of procedural measures for preventive purposes in a proper way. The risk must be serious, realistic, and based on evidence. The accused must have access to the evidence which is indicated by the authorities as showing the risk. Adequate and precise grounds for the decision must be given, enabling the person concerned to challenge the decision.[59] Sometimes an open court session must be held in order to properly assess the grounds for application of preventive measures, the risk existing, and to give the suspect or accused the opportunity to present his or her arguments.[60]

Preventive measures must be applied only for the period necessary to prevent the commission of a crime. If a measure is applied afterwards, it ceases to be legal. This is particularly important in the case of deprivation of liberty. In the case of procedural measures applied for preventive purposes, the problem of a necessary period is more difficult to solve than when the measures are applied for strictly procedural purposes. In the latter situation there are certain points like the interrogation of the suspect, hearing witnesses, issuing an indictment, the end of evidential proceedings, the final verdict in the case, which may be declared as the end of the application of the measure. It is much more difficult in many situations to declare that the risk of offending has disappeared or significantly decreased, unless the circumstances giving occasion to commit a crime no longer exist (e.g., the end of the football match in the case of the arrest of potential troublemakers[61]). The proportionality principle must also be taken into consideration, which requires, among other matters, the constant monitoring of the risk posed and in case the risk has decreased, and is now acceptable, ending the use of preventive measures.[62]

The use of preventive measures must be precisely regulated in law, otherwise the ECHR requirement of limiting of human rights "according to law" will not be fulfilled.[63]

Another important consideration is the authority applying the preventive measures. From one side there could often be a need to act quickly which may tempt the powers to apply preventive measures for use by the police. Indeed, in the case of such measures as arrest, when the risk of crime is imminent, the police cannot wait for the decision of another authority. On the other hand, according to domestic

[58] Michele Caianiello, "Detention as Punishment and Detention as Regulation": xxx; in: Michele Caianiello and Michael Corrado, eds., *Preventing Danger: New Paradigms in Criminal Justice* (Durham: Carolina Academic Press, 2013).
[59] *Suominen v Finland*, judgment of the ECtHR of 1 July 2003, application 37801/97.
[60] *De Tomasso v Italy*, judgment of the ECtHR of 23 February 2017, application 43395/09.
[61] *S., V. i A. v Denmark*, judgment of the ECtHR of 22 October 2018, applications 35553/12, 36678/12 and 36711/12.
[62] Carol S. Steiker, "Proportionality as a Limit on Preventive Justice. Promises and Pitfalls": 197-199; in: Andrew Ashworth, Lucia Zedner, and Patrick Tomlin, eds., *Prevention and the Limits of the Criminal Law* (Oxford: Oxford University Press, 2013).
[63] *Hashman and Harrup v the United Kingdom*, judgment of the ECtHR of 25 November 1999, application 25594/94.

or international standards, some measures must be applied by the court only (for example pre-trial detention) or should be applied by a court or public prosecutor (for example suspension at work or suspension of driving licence). One solution is to enable the police to act when there are exigent circumstances with the requirement of post-factum control and eventually the prolongation of a measure by a court or public prosecutor.

CONCLUSIONS

The positive obligation of states to prevent crime requires them to act if there is a real and concrete risk of the commission of a crime. Not acting in such a situation may result in a breach of the ECHR rights. There are a number of various measures which could be applied, including measures of criminal procedure. The application of procedural measures for preventive purposes is relatively new in most legal systems. Most of the procedural instruments of individual prevention are concerned with negative prevention, nevertheless examples of positive individual prevention may be found as well. Criminal procedure is reactive and its measures, especially coercive measures, have been traditionally applied on strict procedural grounds, in order to enable the authorities to decide the guilt of the accused. Preventive measures were regarded rather as matter of public order protection and police work. The situation has changed significantly in the last four decades. Prevention is more and more perceived as the main task of the criminal justice system and criminal procedure plays also a role in that. We cannot negate or ignore the fact. If seeing an imminent risk of commission of crime posed by the suspect or accused, the public prosecutor or court is not able to use procedural measures on the basis of preventive grounds, he will probably in many situations use other grounds, even if they are not adequate. Therefore, introducing prevention into criminal procedure, not only protects society and individuals (especially victims and witnesses), but may also limit the unlawful application of procedural measures. The implementation of preventive tasks by measures of criminal procedure may be also positive for the person concerned, because in comparison with other instruments, criminal procedure provides more guarantees. Therefore, if we negate the possibility of using criminal procedure measures for crime prevention, we must be ready to accept other, probably even more controversial, instruments of police or administrative law.

At the same time there is however a risk that the use of criminal procedure and its measures for preventive purposes may prejudice the criminal case, making the defence more difficult. Therefore, preventive measures must never be regulated or applied in practice as repressive, must be used only if strictly necessary and

proportional, and adequate safeguards must be provided to balance the limitations of the rights of the suspect or the accused.

The criminal process is a living instrument, developing over time. Its values and goals reflect development in society and the needs of society. That is why adopting new goals, like prevention, must be duly taken into consideration. Nevertheless, it is important that the criminal process preserves its inherent values, ensuring material and procedural fairness. The criminal process and values must not be thoughtlessly changed by actual politics, often populistic and not based on empirical evidence.

Certainly, criminal procedure must not be regarded as a main instrument of crime prevention. Its objectives, values, and instruments are concerned with deciding on the guilt of the accused for past acts and this is how criminal procedure must continue to be perceived in the future. However, if criminal procedure is the only or the best framework to prevent crime, its measures can be used for preventive purposes, with a condition that it must not deprive the suspect or the accused of the right to a fair trial and core procedural guarantees. In this context the application of procedural preventive measures is not intended to realize or achieve the main aim of criminal procedure: the determination of the question of guilt or innocence, but it is a sui generis separate procedure or action, only attached to criminal procedure. This is similar to the concept of adhesion (or adhesive) procedure known in some civil law countries (for example in Germany and Austria – *Adhäsionsverfahren*), when the victim pursues civil claims not in separate proceedings before a civil court, but through criminal process. The regulation of the adhesive preventive action of a state in a criminal process, based on the above-mentioned arguments, especially the availability of evidence, better protection of procedural guarantees, and the positive obligation of the state to prevent crime, seems acceptable.

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