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Preventive detention of dangerous inmates: a dialogue between human rights and penal regimes

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ABSTRACT

As the terrain of this article, the term 'preventive detention' refers to the indefinite detention of serious criminal offenders for explicitly expressed preventive purposes after the expiration of a definite sentence. In order to fill the gap between human rights and penal regimes over preventive detention, this article believes that the scope of 'punishment' or 'penalty' should be emancipated from its conceptual definitions and moderately expanded in consideration of the liberty or rights at stake. It is also by taking such a step that the four legitimate penological grounds for detention could be incorporated into a sound discourse of human rights. Moreover, as the Kantian 'moral agency' being the normative basis of human rights, this article sets a limit for States to inflict both 'indefinite sentences' and 'post-sentence preventive detention' upon convicted inmates who are reasonably considered dangerous. However, even this proposal can be morally justified in accordance with current international human rights jurisprudence, its intrinsic discrimination against dangerous inmates and persons with mental disabilities from 'normal' offenders and human beings should not be ignored.

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1. Introduction

1.1. Research background

> The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country. A calm and dispassionate recognition of the rights of the accused against the State, and even those of convicted criminals against the State, a constant heart-searching by all charged with the duty of *punishment*, a desire and eagerness to *rehabilitate* in the world of industry all those who have paid their dues in the hard coinage of punishment, tireless efforts towards the discovery of curative and regenerating processes, and an unfaltering faith that there is a treasure, if you can only find it, in the heart of every man — these are the symbols which in the treatment of crime and criminals mark and measure the stored-up strength of a nation and are the sign and proof of the living virtue in it.[1]

The words of Winston Churchill are full of benevolence and wisdom, but they are not a magic formula. In reality, tackling the populist emotion against severe criminals and the

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eagerness to curb their risks of recidivism is still a challenging task for the governments of democratic and Rule-of-Law countries. The empirical phenomena of how the pursuit of provocation by bloodthirsty media can inspire the mass feeling of insecurity can not only be found in Asia but also in Western countries, such as Australia and the United Kingdom (U.K.).[2] However, such a feeling can be based on stereotypical misunderstandings of the general situation of crimes. For example, the process of 'demonising' sex offenders as 'typical' men with limited social skills and bizarre behaviour has, in turn, covered the truths that most sex offenders are acquaintances of their victims, most do not have any psychiatric illness, and most have never been convicted for their crimes.[3]

Unfortunately, the concept of 'dangerousness', which is lavished by the media, has inevitably penetrated into public policy and the criminal justice system as well, especially in countries which have already abolished capital punishment and are prudential in sentencing life imprisonment.[4] According to legal and social practitioners in Australia, tabloid journalism played a significant role in the development of 'effective' policies against post-release sex offenders by exaggerating their image as recidivists.[5] Those policies concluded the legislation of preventive detention against 'dangerous' or 'serious' sex offenders in several states of Australia from 2003 to 2009.[6]

Theoretically, legislators, who should follow the principle of legality, may convert the subjective opinion of 'dangerousness' into the objective fact of 'risk' in laws. In practice, however, the legislative or judicial decisions of whether the risk of a person is unacceptable (i.e. whether or not s/he is 'too risky'), are still subject to the social context, wherein the public at large is already fascinated by all kinds of horrible plots.[7] In other words, to respond to the fears, interests, needs, and prejudices against former offenders of a society, the legal definition of 'an unacceptable risk' has to be so elastic that it risks erosion of its Rule-of-Law foundation.

Also of significance is the 'intolerably inefficient inaccuracy' of risk assessments about future offending,[8] which can lead to grave injustice. Under the criminal standard of beyond reasonable doubt, if a conviction should be based on, for example, a 95 per cent certainty that the defendant *did* commit the *past* crime, then at the same level, the preventive detention order should also be based on a 95 per cent certainty that the offender *will* commit a *future* crime. However, in regards to their calculated risk, this is not the case when research compares those who recidivated within the observation period to those who did not recidivate.[9] According to the study and its follow-up, 29 per cent of those who did not recidivate had received a high-risk score using the HCR-20.[10] Even if one argued that criminal standards are not quantifiable as a percentage probability, when compared to the result of wrongful conviction, the false positive in regard to the prediction of a future crime is still harder to be overlooked.

However, facing the new modernity of 'risk society',[11] some claim that measures to manage the 'uncertainty' should be taken because it is better to be too early than too late. The stronger demand for security, public safety, or public protection, in a world without 'Precogs',[12] implies greater social control by the government. From a republican perspective, the ultimate goal of the government is to ensure the citizen has 'the power of enjoying freely his possessions without any anxiety, of feeling no fear for the honour of his women and his children, [and] of not being afraid for himself'.[13]

Since the 'dangerous offenders' – being excluded from the category of 'fellow citizen' – are the alienated 'Other',[14] citizens nowadays are more comfortable with the notion of a 'Preventive State', which is, of course, too far away from the Orwellian 'Police State'.[15]

It is rather a State, where punishment is certainly 'not the only, the most common, or the most effective means of crime-prevention'.[16] However, in the scenario of using the same 'hard treatment' or 'burden' (i.e. the deprivation of liberty), the transition of proportionality from the 'wrong' of an offender to the necessity of prevention from her/his 'dangerousness' or 'risk' certainly deserves a more comprehensive investigation.

1.2. Research question

Being a researcher for the rights of criminals, prisoners, and inmates, this author has a specific interest in the potential conflicts between such an expansion of traditional criminal laws and the normative constraints imposed by international human rights law. On the other hand, the author also acknowledges, as Andrew Ashworth does, that while international human rights law is 'significant in relation to criminal procedure', it is 'slightly less significant in matters of sentencing and not extensive at all in the criminal law itself', and thus has 'nothing to say on major issues'.[17] Therefore, the goal of this article is to initiate a dialogue between human rights and penal regimes, which can be demonstrated in the following research question for this article:

- Is it possible to delimitate preventive detention within a liberal criminal law to be compatible with current international human rights jurisprudence?

Both human rights and penal systems are 'public law' in the sense that they both deal with the direct relationships between the State and its people. Defined simply, people claim their human 'rights' against the State to fulfil themselves as integral human beings under the former regime, while penal theorists try to justify a State using legal punishment against people who have committed 'wrongs' under the latter regime. Within their intersection, the justice in impartially searching for the truth and then giving the detected 'act' an appropriate appraisement serves towards the human rights of both the offender, her/his (potential) victims, and even their communities.[18]

However, each of the regimes has its contours, where the core value and the perspective of how the value is reached can be very different from another. On the one hand, because the core value of a human rights regime is to display the 'moral agency' of each and every human being, the 'rationality' of a right mostly arises from a 'micro-level' perspective. On the other hand, the 'reasonableness' of a penalty is primarily based on a 'macro-level' perspective, as long as the core value of a penal regime is to protect the 'important living interests' of not only individuals, but also their society or State, through the legal means of punishing vandalisms.

Since it is still debatable whether the 'preventive' purposes of preventive detention outplay its 'punitive' character or *vice versa*, it provides a great opportunity for both regimes to re-examine the plausibility of their delineations of punishment. Accordingly, to further develop creative inputs to current literature on preventive detention, which often belongs to either a discourse of human rights or one of penal theory, this article as an independent craft obliges itself to investigate the current research gap between the two regimes and strives to bridge it methodically. That is to say, within an interdisciplinary framework, by reconciling the discussions of preventive detention under both human rights and penal regimes, this article struggles to yield a proposal of a legitimate *as well*

as a justifiable framework to not only support but also limit the 'Preventive State' in implementing preventive detention.

The reason to expect that micro-level rights and macro-level theories can fulfil each other stems from the argument of Jürgen Habermas that the relationship between human rights and popular sovereignty is based on their reciprocal recognition.[19] Following this rationale, the strength to advocate the 'bottom-up' rights of criminals, prisoners, or inmates would be generated faithfully from a sound discourse recognising the 'top-down' penal authority of State and its liberal limitations. With this faith in mind, this article now comes to its method and structure that should be supportive and correspondent.

1.3. Methodology and framework

Described broadly, 'preventive detention' can be referred to as the arrest or detention of an accused pending trial or conviction to prevent her/his escape or to protect the evidence, the other person, or the community at large. As with traditional criminal offences, prevention also forms at least part of the rationale for most sentences.[20] However, for the *terrain* of this article, the term specifically refers to *the **indefinite** detention of serious criminal offenders for **explicitly** expressed preventive purposes **after** the expiration of a definite sentence*. This definition includes an *initial* sentence that an indeterminate period should be served, usually after a minimum punitive 'tariff', due to the dangerousness of the offender.[21] In many countries, such preventive detention could even be subjected to serious criminal offenders by *reserved* or *subsequent* judicial orders after they were originally sentenced. Therefore, if a distinction were required, this article would respectively invoke 'indefinite sentence' and 'post-sentence preventive detention' to refer to the two different legal contexts of preventive detention.

The reason for this article to focus on 'convicted' inmates is due to an observation that the characteristic of preventive detention in the above social context is so obscure that it needs to be critically theorised like the formal punitive institutions and practices.[22] As mentioned, regardless of a 'punitive' ground or for 'preventive' purposes, the deprivation of liberty as 'hard treatment' or 'burden' remains the same.[23] However, as an extreme mode of State coercion, under the name of 'prevention', the scheme could easily escape the constraints of parsimony, proportionality, and culpability to which 'punishment' is always subject. Not to mention that, while the scheme aims at the prevention of 'future' crimes, the reasonable grounds for it to target serious criminal offenders are still based on their 'past' criminal records.

The overall method of this article can be more concretely displayed in its framework that is divided into three steps. First, by exploring the definitions of legal punishment in penal theories and decisions from the United Nations Human Rights Committee ('CCPR') and the European Court of Human Rights ('ECtHR'), this article identifies the 'definitional stop' that is susceptible to political abuse due to the very different requirements in punitive and non-punitive proceedings. Second, to construct the bridge between human rights and penal regimes, the case law regarding the legitimate penological grounds (i.e. retribution, deterrence, incapacitation, and rehabilitation) is also recognised and interpreted in a liberal sense. Finally, this article intends to use the Kantian 'moral agency' as the foundation for both penal and human rights philosophy to cross through the research gap within current literature on preventive detention.

These steps allow this article to engage the proposal of a 'liberal' framework for the 'Preventive States' to structure their preventive detention schemes that are compatible with current international human rights jurisprudence. It is expected that the commitment of this article would speak for international human rights law in matters of sentencing and in the criminal law itself when the dangerous inmates are in the hands of popular sovereignty.

2. Definitions of legal punishment

2.1. In penal theories

Although there are many definitions of 'legal punishment', there is no agreement on a precise definition by penal theorists. For instance, H.L.A. Hart, drawing on Anthony Flew and Stanley Benn, defines 'the standard or central case of "punishment"' in terms of five elements,[24] which is summarised by Igor Primoratz as a '*hard treatment* intentionally inflicted on a person who has offended against a legal rule, by an authority constituted by the relevant legal system'.[25] However, Primoratz also criticises this definition for missing the 'symbolic significance' of punishment as distinguished from a mere penalty, such as a parking ticket.[26] As a result, a more restrictive definition, as provided by Ashworth and Lucia Zedner, is that in addition to 'the intentional imposition of hard treatment on the offender for the offence', a punitive measure must also involve 'the *censure* of an offender for an offence'.[27] Namely, this reprobate or condemnatory character of punishment, by expressing the censure for the offender's crime through its imposition, distinguishes it from taxes or mere penalties.[28]

Furthermore, some penal theorists stress that what distinguishes punishment from other kinds of coercive imposition is that it is precisely *intended* to be burdensome.[29] In other words, the 'aim' or 'intention' of the authorities to burden the offender is also an indispensable element of punishment. According to the observation of Jan de Keijser, all authoritative definitions of punishment include this 'intended infliction of suffering for an offen[c]e'.[30] However, whether the intention should also cover the element of 'censure' is not so obvious.

Douglas Husak, who uses the terms 'deprivation' and 'stigma' to describe the two elements of 'burden' and 'reprobation', is among those who require both to be brought about intentionally.[31] According to him, the situations that State sanctions *happen to* impose deprivations and stigmatise their recipients are out of the scope of punishments. Therefore, although some State practices, such as involuntary confinement of the dangerous mentally ill, *knowingly* cause a stigmatising deprivation, these sanctions differ from punishments because they lack a punitive *intention*.[32] If this even more restrictive requirement is considered, a conclusive definition of punishment could be made as 'the imposition of something that is intended to be *both* burdensome *and* reprobative, on a supposed offender for a supposed crime, by a person or body who claims the authority to do so'.[33]

2.2. The 'definitional stops'

With these dazzling definitions in mind, what Hart terms as the 'definitional stop' may remind some penal theorists to ponder if there is an abuse of the definition of punishment in discussions of preventive detention. According to Hart:

> it would prevent us from investigating the very thing which modern scepticism most calls into question: namely the rational and moral status of our preference for a system of punishment under which measures painful to individuals are to be taken against them only when they have committed an offense.[34]

At that time, Hart was arguing against the 'definitional stop' being used to prevent utilitarian rationales from answering the question of why the innocent should not be punished if beneficial consequences justify her/his punishment. In other words, he blames some consequentialists for stopping at the 'conceptual' reply, according to which punishing the innocent is not an issue simply because punishment 'is' only for an offence. According to Hart, such an argument is not persuasive at all, so long as it is based on a fallacy of defining punishment that excludes '[p]unishment of persons … who neither are in fact nor supposed to be offenders', which is one of his four 'secondary cases' of punishment.[35]

If penal theorists cannot make the imprisonment of the innocent acceptable just by calling it 'regulation' instead of 'punishment',[36] they cannot make the imprisonment of inmates who have already served their deserts acceptable just by calling it 'preventive detention' instead of 'punishment', either. Nevertheless, de Keijser notices that in discussions on the latter, there is another version of the 'definitional stop'. That is, due to the definitional division based on the intentionality of punishment, penal theorists are reluctant to examine 'the rational and moral status' of preventive detention. As long as the preventive detention being discussed does not 'intentionally' inflict burden and reprobation above commonly accepted notions of the desert, and thus does not constitute punishment, its broader issues about punishment are sidestepped.[37] Such a conceptual defence dispenses preventive detention too quickly, not only with the deficiencies of its consequentialist justifications on normative grounds,[38] but also with the procedural safeguards for punishment, such as the principle of legality, the prohibition of double jeopardy, and the presumption of innocence.

Furthermore, even if such a conceptual defence could be accepted, it is notoriously difficult to identify the content of intentions, especially when a collective entity like the State is involved.[39] For example, de Keijser argues that the hard treatment of preventive detention – at least to the level of suffering associated with ordinary imprisonment – is not at all accidental or unforeseen, so long as it is the exact result of a deliberate decision by the court.[40] Moreover, if punishment is defined neutrally as a 'deprivation', it is even harder to argue that preventive 'detention' is not an intentional deprivation of physical liberty. In other words, although preventive detention may have a purpose other than burden or deprivation, the infliction of burden or deprivation must be intentional to reach that purpose.[41] Not to mention that the mental suffering of preventive detainees could be more serious than that of the other prisoners because of the 'indefinite' character of preventive detention and the difficulties associated with offering them material alleviation or compensation due to practical reasons.[42]

Then, the only way to hide behind the 'definitional stop' is probably to insist that preventive detention has no intention of 'reprobation' or 'censure'. Nevertheless, this element is a dubious legacy of the penal debate between retribution and deterrence, so long as it excludes the possibility of a purely 'incapacitative' punishment or a purely 'reformative' punishment. Moreover, even with the strictest definition in mind, some penal theorists already demonstrate that it is possible to conceptualise preventive detention as a punishment either under retributivism or consequentialism.[43] Therefore, punishment and preventive detention are

not as conceptually distinguishable as many other penal theorists believe. Briefly speaking, as long as the preventive detention is a mode of State coercion aimed precisely at the prevention of future crimes, the philosophical controversies over the definition of punishment should not exclude it from the same normative field as punishment.[44]

2.3. Decisions from the CCPR and the ECtHR

Under the human rights regime, the 'legal' definition of punishment is not only 'conceptual' but also 'normative'. It is because relevant issues often happen in cases where applications of procedural safeguards for criminal proceedings were seriously debated. For example, the principle of legality, the prohibition of double jeopardy, and the right to a fair trial require either that State coercion be *penal* in its characters or that more protections be provided in *criminal* trials. Therefore, whether and how a case could resort to these procedural rights is dependent on the interpretations of the statutory terms, such as 'punishment', 'penalty', and 'criminal'.

Of course, when answering the question of whether preventive detention is a punishment or not, different schemes of preventive detention may have very different conditions, and thus no single answer can suffice for all cases. Still, the jurisprudence for human rights can provide us with some useful guidance to discern between in which circumstances preventive detention would fall into the category of punishment and in which it would not. Instead of being preoccupied with the ambiguous intentions of States, human rights authorities have comprehensively evaluated the qualification of preventive detention schemes according to multiple factors, such as their purpose, character, nature, procedure, and severity.

At the level of the International Covenant on Civil and Political Rights ('ICCPR'), questions of whether a preventive detention scheme amounts to a 'punitive' sanction exist mostly in cases concerning 'post-sentence preventive detention'. For example, in *Fardon v. Australia* and *Tillman v. Australia*, the Australian government argued that

> the *purpose* of these schemes is not to indefinitely detain serious sex offenders, but rather to ensure as far as possible that their release into the community occurs in a way that is safe and respectful of the needs of both the community, and the offenders themselves.[45]

Nevertheless, the CCPR still found both Fardon's and Tillman's 'continued incarceration[s] under the same prison regime[s] as [preventive] detention … amounted, in substance, to a fresh term of imprisonment',[46] which 'is penal in *character*', and 'can only be imposed on conviction for an offence in the same proceedings in which the offence is tried'.[47] In other words, based on the mere fact that the preventive detentions at issue took place consecutively in the same prison premises, the CCPR confirmed that the 'character' of those schemes was still 'penal imprisonment', which already overwhelmed their preventive 'purpose'.

Under the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), although preventive detention was not considered a 'punishment' but rather a 'measure' under Germany's twin-track system of criminal law,[48] the ECtHR still concluded in *M. v. Germany* that it was to be qualified as a 'penalty' for Article 7.1. Like the views of the CCPR in *Fardon* and *Tillman*, the ECtHR also noted that persons subjected to preventive detention were held in prison, albeit in separate wings.[49] In addition, the ECtHR observed that the measure against M. appeared to 'be among the most *severe* – if not the

most severe – which may be imposed under the German Criminal Code', as a court had to find that there was no danger that a preventive detainee would commit further offences before s/he could be released.[50] This condition is virtually difficult to fulfil, as the case of M., his continued preventive detention had been more than three times the length of his original prison sentence. Even though the 'severity' of preventive detention 'is not … in itself decisive',[51] its importance in relation to Article 7.1 ECHR has been reaffirmed in *Glien v. Germany*,[52] another case regarding German preventive detention.

By interpreting the Basic Law in accordance with the above jurisprudence of the ECtHR,[53] Germany's Federal Constitutional Court (the Bundesverfassungsgericht or 'BVG') later ruled in 2011 that the German Criminal Code was in breach of the German constitution. Because of this ruling, a new amendment that limits the power of German courts to impose preventive detention became in force in 2013. Under this amendment, preventive detention could be prolonged or ordered retrospectively, but only if the individual suffered a mental disorder and thus fell within the categories of 'unsound mind' set out in Article 5.1(e) ECHR. Such preventive detention should also be provided in a therapeutic environment.[54]

However, in *Bergmann v. Germany*, the ECtHR found that preventive detention under this new legislative framework, *as a rule*, still constituted a 'penalty'.[55] It is because '[w]hen a trial court orders preventive detention together with punishment for an offence, the person concerned may well understand it as an additional punishment'.[56] Furthermore, since this measure

> can be imposed only if the person concerned was found guilty of several intentional criminal offences of certain gravity … [i]t clearly entails also a deterrent element, which is not eclipsed by the additional treatment measures in better material conditions of detention.[57]

Not to mention preventive detention 'remains among the most *severe* measures which may be imposed under the Criminal Code'.[58] As a result, the ECtHR concluded that:

> the more preventive *nature* and *purpose* of the revised form of preventive detention [does] not suffice to eclipse the fact that the measure, which entails deprivation of liberty without a maximum duration, was imposed *following* conviction for a criminal offence and it is still determined by courts belonging to the criminal justice system.[59]

However, the ECtHR's final application of Article 7.1 ECHR to Bergmann was such that

> both the nature and the purpose of his preventive detention substantially changed and that the punitive element, and its connection with his criminal conviction, is eclipsed to such an extent that the measure is no longer to be classified as a penalty.[60]

Such a diversion in 'the present case' from its judgment of 'the rule itself' is briefly explained by stating that Bergmann's preventive detention was '*extended* because of, and with a view to the need to treat his mental disorder'.[61] Considering that the new German criminal law of preventive detention as 'the rule itself' also requires medical treatment, this reasoning by the ECtHR is not so clear.

Nevertheless, it seems plausible to presume that such rationale may be based on the relationship between the preventive detention *at stake* and the offence for which it was ordered. Because the causal link between Bergmann's initial imprisonment and his preventive detention was broken, his status as a 'mentally ill detainee' was no longer a result of his conviction for a 'criminal offence'. This distinction, on the other hand,

may also imply that 'indefinite sentences', including those *following* extra orders made at the stage of sentencing, cannot easily shake off their nature as 'punishment' by simply turning their focus to 'treatment' at the stage of its implementation when their primary justification is still under Article 5.1(a) ECHR.

3. The four legitimate penological grounds for detention under the human rights regime

As stated by the Grand Chamber of the ECtHR in *Vinter and Others v. the U.K.*, '[i]t is axiomatic that a prisoner cannot be detained unless there are legitimate penological grounds for that detention'.[62] Here, the intended usage of 'detention' instead of 'imprisonment' may imply a broader application than that within the scope of (a strictly defined) 'punishment'. Another statement in the same decision further supports this implication. Namely, 'even if the requirements of *punishment* and *deterrence* were to be fulfilled, it would still be possible that [the prisoners] could continue to be detained on [the] grounds of *dangerousness*'.[63] In other words, the 'legitimate penological grounds' can be invoked to serve towards 'indefinite sentences', even when their punitive 'tariffs' were over. Furthermore, since this 'judicial' decision reaffirms the ability of consequentialist rationales to justify not only punitive but also non-punitive detention in 'theory', there is no reason why they cannot become grounds for 'post-sentence preventive detention' as well.

In the jurisprudence of the ECtHR, these penological grounds have been recognised as retribution, deterrence, incapacitation, and rehabilitation. Each allows for or even supports the full recognition of detainees' rights at the stages of sentencing and its implementation.[64]

3.1. Retribution and deterrence

As the first legitimate penological ground for detention, retribution refers to the punishment of a person who is guilty in accordance with her/his offence. This 'desert-based' punishment must be proportionate to the seriousness of the offence and the culpability of the offender assessed at the stage of sentencing.[65] While some serious offences are under scrutiny, the only 'proportionate' disposition for the offenders is to take away their 'liberty' as a punishment instead of other relatively minor deprivations.[66] Thus, at the stage of implementation, retribution should be entirely fulfilled by the denial of liberty *in and of itself*, so long as people 'come to prison *as* a punishment, not *for* punishment'.[67] In the famous words of Michel Foucault, the essence of the prison is primarily based on the simple form of 'deprivation of liberty' in a society where 'liberty is a good that belongs to all in the same way and to which each is attached by a "universal and constant" feeling'.[68] Apart from this, no additional pains may be imposed on the prisoner, and only minimal interference with the fundamental rights and freedoms of the prisoners is legitimate.[69]

As for the rationale of deterrence, it is instead from a consequentialist theory that the majority of people, as *homo economicus*, would 'rationally' base their decisions on foreseeable consequences in their daily lives. In other words, they would be deterred from doing something simply because they have evaluated and foreseen that the adverse outcomes would be (much) greater than the beneficial ones. Following this logic, the best way to

deter people from committing a crime is to make the punishment as 'adverse' as necessary. In the context of detention, this conclusion presumes that a person who attempts to commit an offence should be able to foresee a future of imprisonment for a period that is long enough to deter her/him from committing that offence (again). Such a penological ground can be part of the special preventive objective when it is to deter crime offenders from recidivism or of the general preventive objective when it is targeting those 'potential' offenders. Nevertheless, empirical research has shown that deterrence is irrelevant to many 'irrational' or 'impulsive' offences.[70] As for other crimes, it is more the reiteration of legal norms themselves, as well as the certainty and the speed of reactions, rather than the length or the condition of imprisonments that reduce offending rates.[71]

Under the human rights regime, 'deterrence', as a legitimate penological ground for 'punitive detention', is usually connected to the ground of 'retribution'. For example, in *V. v. the U.K.*, like *Vinter and Others*, the Grand Chamber of the ECtHR confirmed that '[a]ccording to English law and practice, juveniles sentenced to detention during Her Majesty's pleasure must initially serve a period of detention, "the tariff", to satisfy the requirements of *retribution and deterrence*'.[72] Although in this case, the House of Lords had quashed the initial decision of a fifteen-year tariff and had not yet set new tariff,[73] the ECtHR nevertheless assumed V.'s six-year detention after his conviction served for both purposes. This assumption is because V. had 'not yet reached the stage in his sentence where he is able to have the continued lawfulness of his detention reviewed with regard to the question of *dangerousness*'.[74] The ECtHR did not convey its reason for such judgment and thus left 'the length of punitive detention', justified by retribution and deterrence, to be determined by the domestic courts.

The attitude of the ECtHR towards the relationship between retribution and deterrence may indicate its position as a limited consequentialist who insists that punishment, as a cost-effective means, must be side-constrained by proportionate desert.[75] To the ECtHR, *both* retribution *and* deterrence are legitimate penological grounds for the punitive 'tariff' of 'indefinite detention', even though it did not move forward to illustrate their meanings and functions.

Regardless, at the stage of sentence *implementation*, by detaining the perpetrator as a *fait accompli* to deter her/him from committing another crime after release, the deterrence mentioned in *V.* is more significant to its special preventive objective. As for the objective of general deterrence, the ECtHR recognised it in other decisions, when such an objective began to be effective as early as the stage of *sentencing* or *legislation*. Since *X and Y v. the Netherlands*, 'criminal-law provisions' have constantly been invoked by the ECtHR as a 'positive obligation' of States to effectively deter threats against the right to life under Article 2 or the right to respect for private life under Article 8.[76]

3.2. Incapacitation and rehabilitation

How does detention achieve the purpose of 'public protection'? The most straightforward and popular answer might be sending people who are considered 'dangerous' to isolated places where they cannot harm anyone outside the walls.[77] In the short words of Ruth Morris, '[m]any people go to sleep at night *imagining* that prisons are protecting them'.[78] The fact that imprisonment can decrease the public fear of potential harm also reflects that incapacitation is not only a 'ground' for detention but also a 'practice' of detention. However, in an extreme rationale for incapacitation, there is an implication

that the more dangerous people are imprisoned, and the longer their terms of imprisonment are, the more protected the public feels.[79] This rationale may result to overcrowding prisons and institutions for detention, especially when detention is dependent on the problematic delimitation of 'dangerousness' or 'risk', which at present or for the immediate future cannot be solved by any scientific measure. Not to mention that under such a regime, prolonged detention further enhances the 'prisonisation' or 'institutionalisation' of detainees, which makes their reintegration into the society even more arduous.[80]

However, the ECtHR accepted incapacitation of dangerous offenders as a legitimate penological ground for detention in cases of 'indefinite sentence', as long as periodic access to a court to review the necessity of continued detention is provided.[81] Such detention for 'social protection' 'public protection' would become illegitimate only if the release were made impossible because of the effects of the way in which it is implemented.[82] In other words, the ground of 'incapacitation' should always be accompanied by the ground of 'rehabilitation', which is seen as a reintegration process that must help prisoners reduce their dangerousness. The ECtHR confirmed this connection between the two grounds in *James, Wells, and Lee v. the U.K.* – a prominent case concerning the Imprisonment for Public Protection ('IPP') in England and Wales.

The IPP came into force in 2005 as a typical 'indefinite sentence', where the potentially dangerous offenders were held until the Parole Board determined that their risks were sufficiently reduced and that their post-tariff detentions were 'no longer necessary for the protection of the public'.[83] In only seven years, the number of IPP prisoners had become more than 6500, while less than 4 per cent of post-tariff detainees had been released.[84] Apart from the controversies over its attachment to low-tariff sentences, its reliance on actuarial risk-assessment instruments, and its obscurity about the gravity of prospective harm required, the most critical failing of the IPP was its lack of resources for rehabilitative programmes.[85]

In *James, Wells, and Lee*, the ECtHR concluded that '*rehabilitation* is a necessary element of any part of the detention which is to be justified solely by reference to *public protection*',[86] because 'any review of dangerousness which took place in the absence of the completion of relevant treatment courses was likely to be an empty exercise'.[87] As a result, since the applicants 'had no realistic chance of making objective progress towards a real reduction or elimination of the risk they posed', the ECtHR found that the period of post-tariff detention served by the applicants was '*arbitrary* and therefore *unlawful* within the meaning of Article 5 § 1 ECHR'.[88] This judgment pressed the U.K. government to utterly abolish the IPP under the Legal Aid, Sentencing, and Punishment of Offenders Act (LASPO) in 2012.[89]

Under the ICCPR, 'arbitrary' detention means more than 'unlawful' detention and imposes an additional higher requirement above unlawfulness. By exploring the travaux préparatoires of the ICCPR, Claire Macken reveals that the drafters give the word itself a distinct meaning.[90] In the Report of the Third Committee, the majority in the committee stated that an 'arbitrary' act was one 'which violated justice, reason *or* legislation, or was done according to someone's will or discretion or which was capricious, despotic, imperious, tyrannical or uncontrolled'.[91] The CCPR later also confirmed that according to '[t]he drafting history of article 9, paragraph 1 … "arbitrariness" must be interpreted broadly to proscribe detention that is inappropriate, unjust and *unpredictable*'.[92] As a body monitoring the implementation of the ICCPR by States Parties, the CCPR has further indicated in

multiple decisions that, to avoid being characterised as arbitrary, detention must be (1) reasonable, (2) necessary in all the circumstances of the case, and (3) proportionate to achieving the legitimate ends of the State Party.[93] Accordingly, if a State could achieve its legitimate purposes by less invasive means than detention, the detention would be considered arbitrary.[94]

In both *Fardon* and *Tillman*, the CCPR pointed out that due to the problematic nature of the concept of feared or predicted dangerousness, 'the [Australian] Courts must make a finding of fact on the suspected future behavio[u]r of a past offender which may or may not materialise'.[95] In order to avoid 'arbitrariness', the onus was on the State to demonstrate that

> rehabilitation could not have been achieved by means less intrusive than continued imprisonment or even detention, *particularly as the State Party had a continuing obligation under Article 10 paragraph 3 of the Covenant to adopt meaningful measures for the reformation*.[96]

Therefore, along with the procedural factors as double jeopardy,[97] retrospective punishment,[98] and undue process,[99] eleven of the thirteen members of the CCPR who participated in the examination of the communications agreed on both schemes in Queensland and New South Wales were in violation of Article 9.1 ICCPR.[100] It is noteworthy that to the majority of the CCPR, the 'less invasive means' principle, in the case of 'post-sentence preventive detention', was referred to 'rehabilitation' instead of 'incapacitation'.[101]

As a legitimate penological ground for detention, the meaning of 'rehabilitation' does not include using disproportionate and invasive treatments to 'reform' them or to 'cure' their criminal propensities. Originally, according to its Latin and French roots, rehabilitation denoted 'return to competence';[102] here, it is preferably used as a concept of 'social reintegration'. This concept is best defined as 'the opportunities to participate in all aspects of social life which are necessary to enable persons to lead a life in accordance with human dignity'.[103] Edgardo Rotman goes even further to argue that, in its most advanced formulations, rehabilitation has attained the status of a 'right' for the prisoners to have those opportunities.[104] In this regard, rehabilitation is not an excuse for the extension of detention or for exceeding the limitations of the Rule of Law. Instead, it should be provided as an improved environment that is conducive to social reintegration, or even within a non-institutional background that allows these former offenders to be a part of the society. In fact, it is only in the community that their rehabilitation is most fully realised.[105]

Such conception of rehabilitation is not only in line with Article 10.3 ICCPR but has also been referred to by European human rights authorities since the 1990s. By considering the scope of Article 8 ECHR, the European Commission of Human Rights ('EComHR') first expressed that the right to respect for prisoners' private life 'requires [States] to assist prisoners as far as possible to create and sustain ties with people outside prison in order to promote prisoners' social rehabilitation'.[106] In several reports, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ('CPT') further described the importance of having reasonably good contact with the outside world and, more specifically, of relationships with family and close friends, for the social rehabilitation of prisoners.[107]

The Grand Chamber of the ECtHR, in *Dickson v. the U.K.*, also noticed such increasing emphasis on 'rehabilitation' in European penal policy, which is positively based on 'the idea of re-socialisation through the fostering of personal responsibility'.[108] Moreover, even in 'the early days of a sentence, when the emphasis may be on punishment and retribution', the 'progression principle' should be followed. By following this principle, a prisoner can move progressively through the prison system 'to the latter stages, when the emphasis should be on preparation for release'.[109] This principle implies that 'rehabilitation' should function throughout serving a sentence, even though the need for it at a later stage will be even more imperative.[110]

4. Moral agency as an essential core of liberty

4.1. From the Kantian means principle

> So act that you use humanity, whether in your person or another, always at the same time as an end, never merely as a means.[111]

The moral objections to consequentialist accounts of punishment argue that crime-preventive efficiency (if it is to be reached at all) not suffice to justify a system of punishment. For example, punishments for those known to be innocent or excessively harsh punishments for the guilty are, in principle, justified by purely consequentialist theories if they efficiently serve the aim of crime-prevention.[112] However, their retributivist opponents contend that such punishments would be normatively 'wrong' simply because they are unjust.[113] Even though such 'unjust' punishments would produce the best consequences, the punishment system should not put aside the moral significance of injustice. In other words, the wrongness of punishing a known innocent is not contingent on its instrumental contribution to the system's aims but is rather intrinsic to the punishment itself. From a deontological point of view, to generate suitable protection against unjust punishments, even resorting to a richer or subtler account of the 'ends' that the criminal law should serve cannot solve the consequentialist problem of contingency.[114]

The most familiar response to such objection is to replace pure consequentialism with 'limited' or 'qualified' consequentialism. That is to say, although insisting that the positive 'general justifying aim' of a system of punishment must lie in its beneficial effects,[115] some consequentialists consent that non-consequentialist principles must constrain the pursuit of that aim by a system of punishment. However, it is not clear whether such 'side-constraints' (i.e. the constraints that forbid the deliberate punishment of the innocent or the excessively harsh punishment of the guilty) can be justified without appealing to negative retributivism, which insists that punishment is justified only if it is a deserved retribution. Furthermore, since punishment is used to serve consequentialist ends, including but not limited to the end of crime-prevention, the use of punishment is to use the punished 'merely as a means' to further those ends. This kind of punishment is to deny them the respect and moral standing that is their due as rational and responsible agents.[116]

In other words, even the side-constrained consequentialism, which explicitly protects the 'innocent', has to answer the question of why the rights or moral standing of the 'guilty', as 'rational and responsible agents', are dismissed when they are punished 'merely as a means' to further the ends, such as deterrence, incapacitation, or rehabilitation. Even if this question could be plausibly answered, whether the answers can directly

apply to preventive detention is still questionable, especially when preventive detention is constructed as an extra burden, if not a punishment, beyond the desert. This orthodox doubt is based on the Kantian normative principle that treating another merely as a means (or just using another) is typically wrong.[117]

Though this principle is admittedly unclear in its implications, Victor Tadros is among those who comprehensively formulate it as a negative rule of moral philosophy. He further explains that while

> it may be permissible to pursue the good where this will have, as one of its side effects, some lesser harm to others, it is not permissible to pursue the good where others will be used as a means to achieve that good.[118]

Based on this general idea, he illustrates two versions of the means principle – i.e. the Doctrine of Double Effect and the Doctrine of Productive Purity.

The difference between these two views is that the first doctrine claims the permissibility of an act depends on the 'intention' with which it is done, while the second doctrine claims 'causal relations' as mind-independent facts are all that matter to permissibility.[119] In the famous Trolley Problem, the Doctrine of Double Effect alleges that it is wrong to *intend* to kill one person to save five, but it is not wrong to save five, *foreseeing* that the act of saving the five will result in the death of the one. Rather, the Doctrine of Productive Purity holds that we should focus on the causal relations between the death of the one person and the death of the five.[120] That is, it is wrong to push a fat man onto the track, because 'the causal path by which the saving of lives is brought about runs through the unconsented-to use of a person's body',[121] and thus the fat man's body is the means by which the five are saved. On the other hand, changing the direction of the trolley or lowering the drawbridge are not ways of 'using' the one trapped or passing by, as long as the result of her/his death is irrelevant to the causal path of the saving of five.

In determining whether preventive detention uses convicted inmates as a mere means to pursue consequentialist ends, this article seconds the opinion of Larry Alexander that '[a]ctors' mental states can affect their culpability but not whether their acts are morally permissible'.[122] This agreement is not only due to that the identification of the 'mental states' of States, as argued in Chapter 2, is problematic, but also because the true 'intention', even of an individual actor, is nearly impossible to be discerned when s/he has 'foreseen' the harmful result.[123] As Professor Huang states:

> in fact, many factors are taken into account when one does something. There may be some factors that will prompt her/him to do one thing (or choose to do something), and some other factors may cause her/him not to do one thing (or make other choices). Nonetheless, body language can help us understand the true intention of the agent, even her/his own intention that s/he did not realise. What an agent finally put into action is the choice s/he makes after her/his overall consideration. […] That is, the so-called 'contrary to her/his intention' only refers to a single aspect of emotional contradiction to her/his intention, rather than the final contradiction to her/his intention.[124]

Therefore, an actor cannot give a defence that her/his pushing of the fat man was not intended to kill him, or that it was 'contrary to her/his intention' to save five and thus does not violate the means principle. This defence, based on the intention-focused doctrine, is also intuitively implausible. Of course, one could plausibly conceptualise the Doctrine of Double Effect to include the Doctrine of Productive Purity, by claiming its

expression to 'intend to kill one person to save five' already presupposes that the killing of the fat man is a causally necessary means for saving the five. Then, an argument from a State that its intention is not to 'indefinitely detain' the dangerous inmates but rather to 'protect the society' is invalid under both doctrines, so long as its use of their humanity must lie on the causal path to reach an end that is external to the humanity itself. Like the death of the fat man, it is hard to imagine that the indefinite detention authorised by 'preventive detention' is only a side effect of its causal path to crime-prevention.

4.2. The relationships between the responsibility, control, and prediction of preventive detainees

Under such a formulation of the Kantian means principle, purely deterrent imprisonment and purely incapacitative detention of dangerous inmates beyond their deserts are both impermissible. The aims of these confinements, to *merely* cow them into obedience to authorities and to *merely* segregate them from the public in case they commit further crimes, are not the ends of the inmates themselves. To reach these aims, the deprivation of their liberty is indispensable from the causal paths, and thus the inmates are treated as *a mere means* that are apathetic to their dignity or worth as *a person*.[125] On the contrary, if a State were treating the inmates 'as an end', with the respect due to them as rational and responsible agents, it must seek to modify their conduct by only offering them good and relevant reasons to change their behaviour for themselves.[126]

The response that a deterrent punishment is given to offer 'prudential reasons' to refrain from crime is no longer valid in the context of preventive detention because its 'indefinite' character would pierce its rational veil and reveal its essence as a 'brute language of self-interest'.[127] If a State could indefinitely detain the inmates until they are reflectively deterred, it is not 'offering' or 'appealing to' them prudential reasons but is 'threatening', or even 'forcing', them to accept any reasons that the State claims are prudential. It is also invalid to portray preventive detention as a species of 'societal self-defence' that does not use the threats 'merely as a means', as long as the element of 'imminence' is not satisfied. As argued by R. A. Duff, although '[d]efensive force can be an appropriate response to another's attempted wrongdoing', it cannot 'incapacitate her [or him] from future wrongdoing'.[128] As purely incapacitative detention, preventive detention 'deprives her [or him] of the ability to determine her [or his] own conduct in the light of her [or his] grasp of reasons of action – an ability that is crucial to [the] autonomous agency'.[129]

Some consequentialists may then argue that because inmates who are dangerous enough to be preventively detained are not truly 'rational and responsible agents', they have lost the status of 'humanity', which guarantees that they will not be used as a mere means. In other words, their 'autonomous agency' as normal human beings no longer exists once they are identified as dangerous 'animals', or what Michael Corrado terms 'wild beasts of prey'.[130]

However, apart from those who were not responsible for their actions because of mental illness, the inmates subjected to preventive detention are 'convicted' offenders who were considered by the court to be, at least partially, responsible. Since the convictions entail that they can be justly held responsible for past criminal conduct, any denial of their moral standing as a 'rational and responsible agent' is hardly compatible. As criticised by Stephen Morse:

> [i]t is utterly paradoxical to claim that a sexually violent predator is sufficiently responsible to deserve the stigma and punishment of criminal incarceration, but that the predator is not sufficiently responsible to be permitted the usual freedom from involuntary civil commitment that even very predictably dangerous but responsible agents retain because our society wishes to maximise the liberty and dignity of all citizens. Even if the standards for responsibility in the two systems need not be symmetrical, it is difficult to imagine what adequate conception of justice would justify blaming and punishing an agent too irresponsible to be left at large. Our society must decide whether sexually violent predators are mad or bad and respond accordingly.[131]

Despite this, the consequentialists can still argue that the 'standards for responsibility' in criminal and civil systems are nevertheless asymmetrical. Though preventive detainees are legally competent people who were held responsible for their acts or omissions *at the time of commission*, they do not reach the moral standing as a 'rational and responsible agent', so long as they are incapable of controlling their dangerous violent or sexual impulses *at the time of risk assessment*.

Richard Lippke further illustrates how the different 'standards for responsibility' can be distinguished by resorting to two different 'moral controls' of 'rational and responsible agents'.[132] On the one hand, the primary moral control requires agents to be able to discern and adequately weigh moral considerations in the myriad-choice situations they confront and guide their conduct according to their judgments of what such considerations require of them. On the other hand, the secondary moral control requires agents to be capable of understanding the importance of primary moral control and taking the steps necessary to acquire or maintain that control over their actions. In line with this illustration, it is suggested that preventive detainees may have only secondary moral control over their conduct, which already makes them responsible offenders who are not eligible for involuntary civil commitment.[133]

However, Lippke also doubts whether many of those dangerous offenders (e.g. terrorists, psychopaths, sexual predators, or hardened criminals) even have secondary moral control at all. Unlike drunk drivers who can recognise themselves as dangerous and concede that their danger is indefensible when they are sober, these offenders are more likely to keep rationalising their dangerousness, blaming others for it, or attempting to pass it off as not reprehensible at all.[134] Even worse, 'it seems more plausible to believe that most dangerous offenders were never very accomplished moral beings to begin with'.[135] If this were the case, then the State should deem them as 'mad' rather than 'bad' promptly at the trial; otherwise, there is a violation of the principle of culpability. Preventive detention should *only* be reserved for those who, *at one point in their lives*, were robustly motivated by moral considerations but were not moved by them at the time of commission *as well as* assessment. Namely, they are only *presumed* to have secondary moral control when being convicted, but they do not *actually* regain control during the period of punishment, according to a robust prediction of them harming others.

If such a portrayal of preventive detainees is correct, the risk assessment should be positioned as an auxiliary tool for the State to detect whether they require *treatment or management* as a more suitable alternative to *imprisonment*. While the latter is a proven failure, the former is better designed to help them retrieve their moral standing as 'rational and responsible agents'. The assessment should never be constructed as a decisive machine that dictates their liberty to purely deter or incapacitate them from committing further

crimes against others. As Morse argues, though perfect or almost perfect predictability is not necessarily inconsistent with responsibility, purely preventive detention threatens to dehumanise the detainees. It treats them as if they were simply dangerous animals, rather than 'autonomous moral agent[s]'.[136]

Such conflicts between the behavioural prediction and the moral standing of inmates can become more serious when the accuracy of the former is unavoidably pursued by considering many static factors that the inmates cannot 'control'. That is, apart from the doubt whether risk assessments can truly draw 'clear lines between the dangerous and non-dangerous',[137] they require many characteristics that the offenders have little to no control over. Such characteristics, including but not limited to their race, gender, age, childhood history, psychopathy, ideology, and 'moral' emotion,[138] make preventive detention not only 'unjust' but directly against the principle of legal certainty.[139] Therefore, if the behavioural prediction from forensic mental health professionals is to be used for the further imprisonment of an offender without a criminal trial, providing such evidence would involve complicity in a system that breaches human rights, and is thus unethical.[140] In any case, the 'moral agency' of a human being should be recognised as an essential core of her/his liberty and should be thoroughly *respected*, or otherwise *cultivated* if it could no longer be found.

4.3. An individualised spectrum from retribution to rehabilitation

In at least twenty states in the United States of America (U.S.), preventive detention can be found in sexually violent predator ('SVP') laws that allow for the indefinite civil commitment of sexually violent offenders after they have served their desert-based sentences.[141] Different from the Australian schemes, the U.S. Supreme Court ('SCOTUS') has established a limitation that might prohibit such intervention even when the government can demonstrate the necessary risk of the offenders since its holding of *Kansas v. Hendricks*. To sustain the constitutionality of the SVP statute in Kansas, the SCOTUS interpreted the law restrictively by stating that it requires the government to show the person is 'dangerous beyond [her/his] control'.[142] Strictly speaking, such interpretation still expanded the traditional role of civil detention that had been reserved for people with psychosis and similar mental problems. Nevertheless, the expansion was more implicitly than the Australian schemes, since it still required people with less severe 'mental abnormalities' or even 'personality disorders'.[143] Later, in *Kansas v. Crane*, although the SCOTUS reconfirmed this paradoxical limitation for expansion,[144] it remains unclear whether a formal psychiatric diagnosis and follow-up treatment programmes are necessary.

Morse later characterises SVP provisions in the U.S. as being reliant upon 'a strange hybrid of desert/disease jurisprudence'.[145] Even though the offenders have a mental disorder that can cause them to be dangerous, they are responsible enough to be held liable for an offence because their capacity does not reduce to the extent of being held criminally insane. Inspired by such characterisation of the deposition of those dangerous inmates, this article develops its theory of their indefinite detention. Namely, to treat dangerous inmates as *an end* rather than *a mere means*, their detention can only be grounded on 'an individualised spectrum from retribution to rehabilitation' throughout the implementation of their punishment *and* preventive detention. This requirement

persists even when the latter can no longer be considered punitive. Since 'desert' is reserved for 'rational and responsible agents', criminal punishment is restricted to those who not only committed crimes but who were also culpable for their crimes. Nevertheless, the importance of rehabilitative programmes will progressively increase during the implementation of a retributive sentence because the existence of their secondary moral control is merely a presumption made at trial and such a presumption will gradually dilute if they continue to be deemed dangerous.

One might doubt that if rehabilitation is a consequentialist rationale, then in what way it can avoid violating the Kantian means principle. However, as defined in Chapter 3, rehabilitation does not include those purely 'reformative' punishments that aim to modify offenders' dispositions so that they will obey the law in the future or those treatments of them as objects to be re-formed by whatever efficient techniques a State can find.[146] Rather, as a 'right' to social reintegration, rehabilitation is meant to treat dangerous inmates as either presumed or potential 'rational and responsible agents' through punishment or treatment, respectively. In order to appeal to such agents, rehabilitation can offer not only prudential reasons but also incentives for them to autonomously refrain from crime when the law's moral appeal does not sufficiently move them. In other words, its aim is an internal end of the inmates' humanity or moral agency, even though the external public can share the end as a follow-up effect. Thus, their spectra, from retribution to rehabilitation, must be 'individualised' or 'tailored' according to their different mental situations and needs for psychiatric services.

What is more, as long as their imprisonment or detention is considered punitive, the main ground to deprive the inmates' liberty is still retribution (and possibly deterrence). After all, a rehabilitation-oriented punishment does not use or treat dangerous inmates merely as a means, as long as it is still within the desert. Therefore, after a proportionate punishment is exhausted, a purely 'rehabilitative' system can only support necessary 'treatment' or 'management' for the sake of the inmates' reintegration into the society. In the point of view of this article, this is also the inherent reason why the ECtHR has been insisting that 'post-sentence preventive detention' must be subject to those of 'unsound mind' and carried out in a therapeutic environment. Putting aside the 'inherent problem' of discrimination against persons with disabilities in Article 5.1(e) ECHR, such a system should nevertheless bear in mind that the longer 'institutionalised' treatment or management strictly deprives the detainees' liberty, the more difficult it will be for them to fulfil the end of rehabilitation.

4.4. Prohibition of preventive detention based solely on deterrence or incapacitation as an absolute right

As James Griffin states, human rights should be understood as 'resistant to trade-offs, but not too resistant'.[147] Even though the right to liberty is not absolute, this article still argues that the (potential of) moral agency, as an essential core of liberty, is what Kant referred to as 'humanity' that cannot be traded off by any cost-effective means. This argument is also in accordance with the role of 'human rights', which Griffin defines as – to protect people's ability to form, revise, and pursue conceptions of a worthwhile life – a capacity that he variously refers to as 'autonomy', 'normative agency', and 'personhood'.[148] Since human beings 'are not only intentional animals [but] also reflective animals', it is their 'whole

activity, the unstopping succession of desire and fulfilment, to be itself sometimes leading to what is neither trivial nor a mere means' that characterises their ends.[149] Such characterisation of the Kantian 'humanity' or 'moral agency' is put forward, not so much as a description but as a proposal, as the best way of giving human rights unity, coherence, and even limits.[150]

To the extent that Griffin sees human rights as fundamentally moral rights, this article believes that preventive detention for the sole purposes of deterrence or incapacitation is a violation of the Kantian means principle, and thus interferes the core of their right to liberty. Such interference cannot be plausibly justified without resorting to self-ends desert or social-reintegration. When compared to the case law demonstrated in the last chapter, such theorisation of their punitive and preventive detention based on an 'individualised spectrum from retribution to rehabilitation' is, at least in Europe, in line with current human rights jurisprudence. Although deterrence and incapacitation are also recognised as legitimate penological grounds for detention by the ECtHR – presumably to offset the drawbacks from the institution of criminal justice in a real world[151] – they are approved with the condition of either retribution or rehabilitation. As a result, this article further argues that under the human rights regime, the prohibition of preventive detention based solely on deterrence or incapacitation has already been (implicitly) recognised as an absolute (legal) right. Thus, without the grounds of retribution or rehabilitation, preventive detention would become arbitrary.

4.4.1. Desert as a 'justification' as well as a 'limitation' of indefinite sentences

Based on this theory and the interpretation of relevant human rights jurisprudence, in cases of 'indefinite sentence', including those following extra orders made at the time of sentencing, retribution (and possibly deterrence) should be the main justification(s) for the imposition of a 'punitive' tariff. However, since dangerous inmates who are subject to 'indefinite' detention are only presumed to be 'rational and responsible agents' at the time of sentencing, the rehabilitative efforts are indispensable during this period.[152] When the tariff is ending, and the post-tariff detention that is dependent on the risk assessment is about to be served, the requirement of rehabilitation becomes even more pressing. It is not only because the initial presumption of the dangerous inmates as 'rational and responsible agents' is getting weaker, but is also to offer them a 'realistic chance of making objective progress' towards parole or release.[153] Thus, the original focus on retribution and deterrence should be gradually shifted to their reintegration into the society, which will last for the whole imposition of 'post-tariff detention'.[154]

However, different from 'post-sentence preventive detention', the period of 'post-tariff detention', though no longer being 'positively' justified by retribution, should be 'negatively' limited to the proportionate desert, so long as it is still considered as a punishment or penalty.[155] In other words, as a penal 'sentence' or measure ordered 'at the time of sentencing', the only appropriate condition to warrant making it 'indefinite' is one that the offender deserves to be detained indefinitely as a proportionate response to her/his crime and guilt. This condition would require its attachment to the most serious offences, which preclude the legislation and imposition of 'low-tariff indefinite sentences' that have less offence gravity and blameworthiness. In the latter situation, the period of their 'post-tariff detention', even with a forward-looking aim of 'incapacitation' or 'social protection', should be determinate rather than indeterminate according to the

'negative' constraint of the backwards-looking desert. It is definitely 'arbitrary' to claim that a minor offender is just as dangerous as a major one and thus deserves the same indefinite disposition.[156]

4.4.2. A 'treatment-oriented' post-sentence preventive detention

In cases of 'post-sentence preventive detention', including those have been retrospectively ordered or prolonged, the only way to sustain their legitimacy is to transform their nature into a non-punitive measure or civil commitment.[157] This transformation could be done only when dangerous inmates are no longer presumed as 'rational and responsible agents' to have secondary moral control. The 'standard for responsibility' of such detention should have no difference with the imposition of those of 'unsound mind',[158] as long as both of them are *purely* justified by rehabilitation *as well as* incapacitation.

Therefore, the State should provide the dangerous inmates with a therapeutic environment. This provision will help ensure that the 'prolonged detention' will not diminish their human dignity.[159] Along with such provision, a fair and constant review procedure should also be granted. This procedure will help ensure that any 'compulsory treatment' is proportionate to the conditions and risks presented by the inmates. Moreover, such 'treatment-oriented' detention should be based on the consideration that the detainees are nevertheless potential 'rational and responsible agents'. As a result, the State should strictly prohibit disproportionate and invasive treatments that defy their autonomy or moral agency. In any case, when there are conflicts between their social reintegration and the public protection, the former should always prevail over the latter.

5. Conclusion

5.1. Equal protection of dangerous inmates and persons with mental disabilities

In order to fill the gap between human rights law and penal theories, the scope of legal punishment or penalty should be emancipated from its conceptual definitions and moderately expanded in consideration of the liberty or rights at stake. It is also by taking such a step that the four legitimate penological grounds for detention could be incorporated in a sound discourse of human rights. Moreover, as the 'moral agency' derivative from the Kantian means principle being the normative basis of human rights, this article sets a limit for the 'Preventive State' to inflict 'indefinite sentences' and 'post-sentence preventive detention'. This framework has demonstrated its potential for developing into practical preventive detention schemes because it can be morally justified in accordance with current international human rights jurisprudence. In other words, based on the Kantian 'moral agency', the interdisciplinary justification proposed by this article is comprehensive enough to bridge the research gap between legal and philosophical analyses of preventive detention.

However, although this proposal of a preventive detention regime is somewhat 'liberal', it is still provided for a 'Preventive State', where 'practicalities' being compromised with 'the nature of society' is still at large.[160] In this 'liberal' proposal, one could still recognise discrimination against dangerous inmates and persons with mental disabilities from 'normal' offenders and human beings. After all, within a 'Preventive State', we have to admit that a real world composed of 'human nature' cannot assume a perfect practice

of the Kantian means principle.[161] In an ideal world, or within a 'Liberal State', on the other hand, there should be no gap between deserts as a 'justification' and a 'limitation'. Once a retributive punishment is expired, there should be no room for such *punishment* to serve any other external ends. There should be no room for the *detention* of persons with mental disabilities, either. To single out 'presumed' and 'potential' moral agents from others is an undeniable 'trick' based on *proportional rights*. Even only to a limited extent, the egalitarian dimensions of human rights, such as their universality and their character as equal rights to be enjoyed without discrimination, are traded off for the sake of what Anthony Giddens calls the 'ontological security' of citizenship.[162]

Nevertheless, under the latest human rights development, especially at the universal level, the importance of these dimensions has gradually increased as new human rights conventions serve to provide *equal protection* for those 'defective agents', such as the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities ('CRPD'). For example, regarding the right to liberty, Article 14.1(b) CRPD provides that:

> States Parties shall ensure that persons with disabilities, on an equal basis with others […] are not deprived of their liberty unlawfully or arbitrarily […] and that *the existence of a disability shall in no case justify a deprivation of liberty* (my italics).

During its drafting, some States advocated for clarity in that any deprivation of liberty should not be 'solely' based on disability,[163] yet the word was ultimately not included in that article. As a result, the Office of the United Nations High Commissioner of Human Rights later confirmed that the legal grounds for detention 'must be de-linked from the disability and neutrally defined to apply to *all persons* on an equal basis'.[164] This point of view is reaffirmed in the Guidelines on Article 14 CRPD, which is adopted by the United Nations Committee on the Rights of Persons with Disabilities ('CmRPD') in September 2015.

According to Paragraph 13 of the Guidelines:

> [t]he involuntary detention of persons with disabilities based on risk or dangerousness, [the] alleged need of care or treatment or other reasons tied to impairment or health diagnosis is contrary to the right to liberty and amounts to [an] arbitrary deprivation of liberty.

Such a contradiction is precisely because:

> [p]ersons with intellectual or psychosocial impairments are frequently considered dangerous to themselves and others when they do not consent to and/or resist medical or therapeutic treatment. All persons, including those with disabilities, have a duty to do no harm. Legal systems based on the rule of law have criminal and other laws in place to deal with the breach of this obligation. Persons with disabilities are frequently denied equal protection under these laws by being diverted to a separate track of law, including through mental health laws. These laws and procedures commonly have a lower standard when it comes to human rights protection, particularly the right to due process and fair trial, and are incompatible with article 13 in conjunction with article 14 of the Convention.[165]

Namely, neither incapacitation nor rehabilitation could positively justify the involuntary detention of persons with mental disabilities under the jurisprudence of the CmRPD. This is due to its 'absolute prohibition of detention on the basis of impairment'.[166] This approach is different from Article 5.1(e) ECHR, which allows for the detention of an 'unsound mind' when other criteria such as 'dangerousness' or 'the need for treatment'

coexist.[167] If discrimination against dangerous inmates and persons with mental disabilities is to be recognised and eliminated, it could lead this article to conclude that the total abolishment of preventive detention is necessary.

5.2. Concluding remarks

The public may readily agree with whatever harsh sanctions the State inflicts on offenders, as long as the offences they committed are considered 'serious'. Different from the death-row inmates and those subjected to a life sentence without the possibility of parole, preventive detainees do not 'deserve' to be executed (physically or socially), but are indefinitely isolated from the society under the name of 'security'. Although their offences might have very different degrees of seriousness and blameworthiness, the same or even worse imposition applies to them in a social context where the fear of 'good men' could trump whatever rights belong to a 'bad guy'. In fact, even after these convicted inmates have already served what they deserve, the targeting of them in a preventive detention regime is still implicitly accentuated by the intense emotion against what they have done in the past.

However, by claiming that preventive detention is not part of the defined punishment or penalty, relevant political agendas no longer need to be restricted by the penal principles, such as culpability, proportionality, and parsimony, as well as the procedural guarantees provided for criminal offenders, or at least to the same level. Therefore, conspired by the media and popular culture, politicians can efficiently use them as a powerful tool to gain political currency from the populist demand of controlling insecurity. Furthermore, covered by a scientific cloak of 'risk assessment', the implementation of such populism no longer appears 'capricious, despotic, imperious, tyrannical or uncontrolled',[168] while all the false positives who sacrifice their liberty and social lives for the sake of public security are necessary 'evils'. That is to say, as long as the public 'illusion' of security is sustained by using inmates merely as a means, any punitive or rehabilitative system is just a disguise for social exclusion and thus doomed to failure.

Notes

1. Winston Churchill, 'Parliamentary Debates', (House of Commons, London, June 20, 1910).
2. Patrick Keyzer and Bernadette McSherry, 'The Prevention of "Dangerous" Sex Offenders in Australia: Perspectives at the Coalface', *International Journal of Criminology and Sociology* 2 (2013): 296–305; and Karen Harrison, 'Dangerous Offenders, Indeterminate Sentencing, and the Rehabilitation Revolution', *Journal of Social Welfare and Family Law* 32, no. 4 (2010): 423–33.
3. Karen Gelb, *Recidivism of Sex Offenders: Research Paper* (Melbourne: Sentencing Advisory Council, 2007). Sex offenders also have a very low reoffending rate in Scotland. Lindsay Thomson, 'The Role of Forensic Mental Health Services in Managing High-Risk Offenders', in *Dangerous People: Policy, Prediction, and Practice*, chap. 13, *International Perspectives on Forensic Mental Health*, eds. Bernadette McSherry and Patrick Keyzer (New York: Routledge, 2011), 169.
4. Since the prevention of the criminals' 'future' dangerousness can no longer be hidden under the retribution against their 'past' atrocity, preventive detention is easier to be discerned as a human rights problem in those countries.
5. Keyzer and McSherry, '"Dangerous" Sex Offenders', 302–04.
6. In chronological order, they are: Dangerous Prisoners (Sexual Offenders) Act 2003 of Queensland, Crime (Serious Sex Offenders) Act 2006 of New South Wales, Dangerous

Sexual Offenders Act 2006 of Western Australia, and Serious Sex Offenders (Detention and Supervision) Act 2009 of Victoria.

7. Harrison, 'Dangerous Offenders', 425.
8. R.A. Duff, 'Dangerousness and Citizenship', in *Fundamentals of Sentencing Theory: Essays in Honour of Andrew Von Hirsch*, chap. 6, eds. Andrew Ashworth and Martin Wasik (Oxford: Clarendon Press, 1998), 143. In the next sentence he also implies this problem 'might (at present, or for the foreseeable future) be insoluble'.
9. Jan De Keijser, 'Never Mind the Pain, It's a Measure! Justifying Measures as Part of the Dutch Bifurcated System of Sanctions', in *Retributivism Has a Past: Has It a Future?*, chap. 10, *Studies in Penal Theory and Philosophy*, ed. Michael H. Tonry (New York: Oxford University Press, 2011), 204.
10. Historical, Clinical, Risk Management-20 is an internationally popular assessment tool that helps mental health professionals estimate a person's probability of violence.
11. Ulrich Beck, *Risk Society: Towards a New Modernity*, trans. Mark Ritter (London: Sage, 1992).
12. In the movie, Minority Report, Precogs are individuals that possess a psychic ability to see events in the future, primarily premeditated murders. Minority Report Wiki, 'Precogs', http://minorityreport.wikia.com/wiki/Precogs (accessed September 15, 2018).
13. Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon Press, 1997), 28.
14. Michel Foucault, *Madness and Civilization: A History of Insanity in the Age of Reason*, trans. Richard Howard (New York: Pantheon Books, 1965).
15. The Senior Officials to the Committee of Ministers nevertheless referred to it in the Preparatory Work on Article 5 ECHR as a warning: 'where authorised arrest or detention is [affected] on reasonable suspicion of preventing the commission of a crime, it should not lead to the introduction of a régime of a Police State'. Council of Europe, doc. DH (56) 10, 19.
16. Carol S. Steiker, 'The Limits of the Preventive State', *Journal of Criminal Law and Criminology* 88, no. 3 (1998): 774.
17. Andrew Ashworth, 'Criminal Law, Human Rights and Preventative Justice', in *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law*, chap. 5, eds. Bernadette McSherry, Alan Norrie, and Simon Bronitt (Oxford: Hart, 2009), 93.
18. It could also be an 'omission' in exceptional circumstances, e.g. when a parent, as the only caretaker, neglects her/his baby by failing to feed it, thus causing its death. The culpable requirement is that the person has 'control' over any state of affairs for which s/he is punished. Douglas N. Husak, 'Preventive Detention as Punishment? Some Possible Obstacles', in *Prevention and the Limits of the Criminal Law*, chap. 9, eds. Andrew Ashworth, Lucia Zedner, and Patrick Tomlin (Oxford Scholarship Online, 2013), 189–90.
19. Jürgen Habermas, 'Human Rights and Popular Sovereignty: The Liberal and Republican Versions', *Ratio Juris* 7, no. 1 (1994): 1–13.
20. Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press, 2014), 4.
21. However, this definition excludes determinate life sentences which are mainly based on the retribution of their crimes and thus still within 'deserts'. It is noteworthy that, in Germany, preventive detention is considered as a 'correction and prevention' measure, which is separate from the track of punishments, so the lifers are possible to subject to this kind of measure at the same time. In this case, preventive detention is out of the terrain of this article since it happens *before* the expiration of a definite sentence.
22. R.A. Duff and Zachary Hoskins, 'Legal Punishment', in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Fall 2017 ed. (Metaphysics Research Lab, Stanford University, 2017), s. 8.
23. To some penal theorists, the 'indefinite character' of preventive detention could make it even harsher than a life sentence. Richard L. Lippke, 'No Easy Way Out: Dangerous Offenders and Preventive Detention', *Law and Philosophy* 27, no. 4 (2008): 410.
24. '(i) It must involve pain or other consequences normally considered unpleasant. (ii) It must be for an offence against legal rules. (iii) It must be of an actual or supposed offender for his offence. (iv) It must be intentionally administered by human beings other than the offender.

(v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed'. H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd ed. (Oxford: Oxford University Press, 2008), 4–5.

25. Igor Primoratz, 'Punishment as Language', *Philosophy* 64, no. 248 (1989): 187 (my italics).
26. Primoratz, 'Punishment as Language'.
27. Ashworth and Zedner, *Preventive Justice*, 14 (my italics).
28. Duff and Hoskins, 'Legal Punishment', s. 1.
29. Ibid. One can notice that 'burden' is used as a more neutral term here instead of 'hard treatment' as pain or suffering, in case some penal theorists argue that punishment does not need to be 'intrinsically bad'.
30. De Keijser, 'Never Mind the Pain', 200. See also notes 24 and 27 above.
31. Douglas N. Husak, 'Lifting the Cloak: Preventive Detention as Punishment', *San Diego Law Review* 48, no. 4 (2011): 1189.
32. Husak, 'Lifting the Cloak'.
33. See note 28 above (my italics).
34. Hart, *Punishment and Responsibility*, 5–6.
35. Ibid.
36. Michael Corrado, 'Punishment and the Wild Beast of Prey: The Problem of Preventive Detention', *Journal of Criminal Law and Criminology* 86, no. 3 (1996): 781.
37. De Keijser, 'Never Mind the Pain', 200.
38. Husak, 'Lifting the Cloak', 1186.
39. Ibid., 1189–60. Whether a State or a collective entity could have 'mental states' such as intention is another philosophical question that should be dealt with by those who insist punishment must be intended.
40. See note 37 above.
41. Ibid.
42. Lippke, 'No Easy Way Out', 410–13.
43. Husak, 'Lifting the Cloak', 1173–204; and Christopher Slobogin, 'Prevention as the Primary Goal of Sentencing: The Modern Case for Indeterminate Dispositions in Criminal Cases', *San Diego Law Review* 48, no. 4 (2011): 1127–71.
44. See note 22 above.
45. Bernadette McSherry, *Managing Fear: The Law and Ethics of Preventive Detention and Risk Assessment, International Perspectives on Forensic Mental Health* (New York: Routledge, 2014), 182 (my italics).
46. *Fardon v. Australia*, CCPR, Appl. no. 1629/2007 (18 March 2010); and *Tillman v. Australia*, CCPR, Appl. no. 1635/2007 (18 March 2010), both para. 7.4(1).
47. Ibid., both para. 7.4(2) (my italics).
48. Such a characterisation under domestic law was a factor to be weighed, but the ECtHR had to look 'behind appearances'. *M. v. Germany*, Appl. no. 19359/04 (Judgment, 17 December 2009), para. 133. The ECtHR has insisted that legislative labels alone are not determinative of whether a 'measure' is in substance criminal or not since *Engel and Others v. the Netherlands*, Appl. nos. 5100/71, 5101/71, 5102/71, 5354/72, and 5370/72 (Plenary Judgment, 8 June 1976), para. 58.
49. *M.*, para. 127. In the same paragraph, the ECtHR sternly added that

> [m]inor alterations to the detention regime compared to that of an ordinary prisoner serving his sentence, including privileges such as detainees' right to wear their own clothes and to further equip their more comfortable prison cells, cannot mask the fact that there is no substantial difference between the execution of a prison sentence and that of a preventive detention order.

50. Ibid., para. 132 (my italics).
51. Ibid.
52. *Glien v. Germany*, ECtHR, Appl. no. 7345/12 (Judgment, 28 November 2013), para. 129.

53. BVG, Appl. nos. 2 BvR 2365/09, 2 BvR 740/10, 2 BvR 2333/08, 2 BvR 1152/10, and 2 BvR 571/10 (4 May 2011), para. 68.
54. Criminal Code 1998 (last amended 24 September 2013), s. 66c.
55. *Bergmann v. Germany*, ECtHR, Appl. no. 23279/14 (Judgment, 7 January 2016), para. 181.
56. Ibid., para. 175.
57. Ibid.
58. Ibid., para. 180 (my italics).
59. Ibid., para. 181 (my italics).
60. Ibid., para. 182.
61. Ibid. (my italics).
62. *Vinter and Others v. the U.K.*, ECtHR, Appl. nos. 66069/09, 130/10, and 3896/10 (Grand Chamber Judgment, 9 July 2013), para. 111.
63. Ibid., para. 131 (my italics).
64. Dirk van Zyl Smit and Sonja Snacken, *Principles of European Prison Law and Policy: Penology and Human Rights* (Oxford: Oxford University Press, 2009), 80.
65. van Zyl Smit and Snacken, *Principles of European Prison*, 81. The language of 'desert' in penal theories conveys that those who commit criminal offenses 'deserve' to be punished. In other words, it is from a backward-looking viewpoint that the penal system should punish the guilty to the extent they deserve. The punishment is thus positively justified by its intrinsic character as a deserved response to past crime. Duff and Hoskins, 'Legal Punishment', s. 4.
66. Andrew Coyle, *Understanding Prisons: Key Issues in Policy and Practice, Crime and Justice*, ed. Mike Maguire (Maidenhead: Open University Press, 2005), 12.
67. S.K. Ruck, ed., *Paterson on Prisons: The Collected Papers of Sir Alexander Paterson*, 1st ed. (London: Frederick Muller, 1951), 13 (my italics).
68. Michel Foucault, *Discipline and Punish: The Birth of the Prison, Social Theory*, trans. Alan Sheridan (New York: Vintage Books, 1979), 232.
69. Van Zyl Smit and Snacken, *Principles of European Prison*, 81; and *Dickson v. the U.K.*, ECtHR, Appl. no. 44362/04 (Grand Chamber Judgment, 4 December 2007), the separate concurring opinion of Judge Bratza.
70. Van Zyl Smit and Snacken, *Principles of European Prison*, 82; and Paul H. Robinson and John M. Darley, 'The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best', *Georgetown Law Journal* 91, no. 5 (2003): 976–89.
71. Deryck Beyleveld, 'Deterrence Research and Deterrence Policies', in *Principled Sentencing*, chap. 2.4, eds. Andrew von Hirsch and Andrew Ashworth (Boston: Northeastern University Press, 1992); and Andrew von Hirsch, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (Oxford: Hart, 1999).
72. *V. v. the U.K.*, ECtHR, Appl. no. 24888/94 (Grand Chamber Judgment, 16 December 1999), para. 96 (my italics).
73. Ibid., para. 93.
74. Ibid., para. 99 (my italics).
75. The limited consequentialism is further illustrated in Chapter 4.
76. *X and Y v. the Netherlands*, ECtHR, Appl. no. 8978/80 (Judgment, 26 March 1985), para. 26; *Osman v. the U.K.*, ECtHR, Appl. no. 23452/94 (Grand Chamber Judgment, 28 October 1998), para. 115; and *M.C. v. Bulgaria*, ECtHR, Appl. no. 39272/98 (Judgment, 4 December 2003), para. 150.
77. Coyle, *Understanding Prisons*, 17.
78. Ruth Morris, *Penal Abolition, the Practical Choice: A Practical Manual on Penal Abolition* (Canadian Scholars' Press, 1995), 27 (my italics).
79. This is merely an issue of 'feeling' or 'imagination', so long as empirical evidence does not support that higher incarceration rates provide higher safety for or a lower crime rate against the public.
80. Thomas Mathiesen, *Prison on Trial* (Waterside Press, 2008), 47–48. The term 'prisonisation' is coined by Donald Clemmer as 'the taking on, in greater or lesser degree, of the folkways,

mores, customs, and general culture of the penitentiary' by inmates. Donald Clemmer, *The Prison Community* (New York: Holt, Rinehart and Winston, 1958), 299.

81. *Weeks v. the U.K.*, ECtHR, Appl. no. 9787/82 (Plenary Judgment, 2 March 1987), paras. 58–59. Although the ECtHR did not use the term 'incapacitation' directly, it cannot not disguise that the purpose of such detention is to segregate the dangerous offenders from the public, so that the former becomes harmless to the latter.
82. Van Zyl Smit and Snacken, *Principles of European Prison*, 83.
83. Crime (Sentences) Act 1997 of the U.K., s. 28(6).
84. Ashworth and Zedner, *Preventive Justice*, 158–59.
85. Ibid.
86. *James, Wells, and Lee v. the U.K.*, ECtHR, Appl. nos. 25119/09, 57715/09, and 57877/09 (Judgment, 18 September 2012), para. 209 (my italics).
87. Ibid., para. 212.
88. Ibid., para. 220–21 (my italics).
89. Ashworth and Zedner, *Preventive Justice*, 160. The authors nevertheless criticise that the continuing plight of those already held was not addressed by this new act.
90. Claire Macken, 'Preventive Detention and the Right of Personal Liberty and Security under the International Covenant on Civil and Political Rights, 1966', *Adelaide Law Review* 26, no. 1 (2005).
91. Draft International Covenants on Human Rights, para. 49 (my italics).
92. *Van Alphen v. the Netherland*s, CCPR, Appl. no. 305/1988 (23 July 1990), para. 5.8 (my italics).
93. *A. v. Australia*, CCPR, Appl. no. 560/1993 (3 April 1997), para. 9.2; *de Morais v. Angola*, CCPR, Appl. no. 1128/2002 (18 April 2005), para. 6.1; *Shafiq v. Australia*, CCPR, Appl. no. 1324/2004 (13 November 2006), para. 7.2; and *Tarighat et al. v. Algeria*, CCPR, Appl. no. 1085/2002 (20 March 2008), para. 8.3.
94. *C. v. Australia*, CCPR, Appl. no. 900/1999 (11 July 2006), para. 8.2. See also Patrick Keyzer, 'The "Preventive Detention" of Serious Sex Offenders: Further Consideration of the International Human Rights Dimensions', *Psychiatry, Psychology and Law* 16, no. 2 (2009): 265.
95. *Fardon* and *Tillman*, para. 7.4(4).
96. Ibid. (my italics).
97. Ibid., para. 7.4(1).
98. Ibid., para. 7.4(2).
99. Ibid., para. 7.4(3).
100. Ibid., para. 8.
101. See also General Comment no. 8: Article 9 (Right to Liberty and Security of Persons), CCPR (30 June 1982), para. 4.
102. Mathiesen, *Prison on Trial*, 27.
103. See note 82 above.
104. Edgardo Rotman, 'Beyond Punishment', in *A Reader on Punishment*, Oxford Readings in Socio-Legal Studies, eds. R.A. Duff and David Garland (Oxford: Oxford University Press, 1994), 286.
105. Rotman, 'Beyond Punishment'.
106. *Wakefield v. the U.K.*, EComHR, Appl. no. 15817/89 (Decision, 1 October 1990).
107. *Armenia: Visit 2002*, Appl. no. CPT/Inf (2004) 25 (28 April 2003), para. 145; and *Czech Republic: Visit 2006*, Appl. no. CPT/Inf (2007) 32 (2 August 2006), para. 87.
108. *Dickson*, para. 28.
109. Ibid.
110. See note 88 above.
111. Immanuel Kant, *Groundwork of the Metaphysics of Morals, Cambridge Texts in the History of Philosophy*, trans. Mary J. Gregor (Cambridge: Cambridge University Press, 1998), 429.
112. As presented in Chapter 2, for a defence that it is conceptually incoherent to punish the innocent under the definition of punishment, such a defence is exactly what Hart referred as a 'definitional stop'. See note 34 above.

113. Duff and Hoskins, 'Legal Punishment', s. 3.
114. Ibid.
115. Hart, *Punishment and Responsibility*, 8–11.
116. Jeffrie G. Murphy, 'Marxism and Retribution', *Philosophy and Public Affairs* 2, no. 3 (1973): 218–19.
117. Samuel J. Kerstein, *How to Treat Persons* (Oxford: Oxford University Press, 2013), 53.
118. Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law, Oxford Legal Philosophy* (Oxford: Oxford University Press, 2011), 114.
119. Tadros, *The Ends of Harm*, 116.
120. Ibid.
121. Larry Alexander, 'The Means Principle', in *Legal, Moral, and Metaphysical Truths: The Philosophy of Michael S. Moore*, chap. 17, eds. Kimberly Kessler Ferzan and Stephen J. Morse (Oxford University Press, 2016), 253.
122. Alexander, 'The Means Principle', 251.
123. Jung-Chien Huang, *The Basis of Criminal Law*, vol. I, 3rd ed. (Taipei: Angle, 2006), 477.
124. Huang, *The Basis of Criminal Law*, 476. The original text in Mandarin is translated by this author.
125. See note 116 above.
126. Duff and Hoskins, 'Legal Punishment', s. 6.
127. R.A. Duff, *Punishment, Communication, and Community, Studies in Crime and Public Policy* (Oxford: Oxford University Press, 2001), 79.
128. Duff, *Punishment, Communication, and Community, Studies*, 78.
129. Ibid.
130. Michael Corrado, 'Punishment and the Wild Beast of Prey: The Problem of Preventive Detention', *Journal of Criminal Law and Criminology* 86, no. 3 (1996): 778.
131. Stephen J. Morse, 'Fear of Danger, Flight from Culpability', *Psychology, Public Policy, and Law* 4, nos. 1–2 (1998): 258–59.
132. Lippke, 'No Easy Way Out', 395.
133. Ibid., 400.
134. Ibid., 401.
135. Ibid., 399.
136. Stephen J. Morse, 'Blame and Danger: An Essay on Preventive Detention', *Boston University Law Review* 76, nos. 1–2 (1996): 151.
137. P.D. Scott, 'Assessing Dangerousness in Criminals', *The British Journal of Psychiatry: The Journal of Mental Science* 131(1977): 140.
138. See note 18 above; and Slobogin, 'Prevention as Primary Goal', 1159.
139. In *Hashman and Harrup v. the U.K.*, the ECtHR held that '[a] norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct'. Appl. no. 25594/94 (Grand Chamber Judgment, 25 November 1999), para. 31.
140. See also Ian Freckelton and Patrick Keyzer, 'Indefinite Detention of Sex Offenders and Human Rights: The Intervention of the Human Rights Committee of the United Nations', *Psychiatry, Psychology and Law* 17, no. 3 (2010).
141. De Keijser, 'Never Mind the Pain', 201.
142. *Kansas v. Hendricks*, SCOTUS, 521 U.S. 346 (23 June 1997), paras. 357–58.
143. Ibid.
144. *Kansas v. Crane*, SCOTUS, 534 U.S. 407 (22 January 2002), para. 413.
145. Stephen J. Morse, 'Protecting Liberty and Autonomy: Desert/Disease Jurisprudence', *San Diego Law Review* 48, no. 4 (2011): 1096.
146. See note 126 above.
147. James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2010), 30.
148. James W. Nickel, 'Human Rights', in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta Spring 2017 ed. (Metaphysics Research Lab, Stanford University, 2017), s. 2.2.
149. Griffin, *On Human Rights*, 116–17.
150. See note 148 above.

151. Husak, 'Lifting the Cloak', 1201. They are also what Griffin views as 'practicalities' as 'a second ground' of human rights, which give the rights safety margins and consulting facts about human nature and the nature of society. *On Human Rights*, 37–39.
152. See note 88 above.
153. Ibid.
154. See note 86 above.
155. *M.*, para. 130.
156. Of course, if one only considers the risk of future harm, it is possible to find that, for example, a terrorist who bombed a car without harming anyone is as dangerous as a terrorist who blew up ten people. However, such consideration should be limited to their different deserts, otherwise it becomes arbitrary.
157. *Bergmann v. Germany*, paras. 103–34.
158. In its leading case of *Winterwerp v. the Netherlands*, the ECtHR held that

> [t]he very nature of what has to be established before the competent national authority — that is, a true mental disorder — calls for objective medical expertise. Further, the mental disorder must be of a kind or degree warranting compulsory confinement. What is more, the validity of continued confinement depends upon the persistence of such a disorder. Appl. no. 6301/73 (Judgment, 24 October 1979), para. 39.

159. *M.S. v. the U.K.*, ECtHR, Appl. no. 24527/08 (Judgment, 3 May 2012), paras. 44–45.
160. See note 151 above.
161. Huang, *Basis of Criminal Law*, 16.
162. Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Cambridge: Polity Press, 1991), 40.
163. Report of the Third Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities.
164. Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, para 49 (my italics).
165. Guidelines on Article 14 CRPD, para. 14.
166. Ibid., the heading of Section III.
167. *Stanev v. Bulgaria*, ECtHR, Appl. no. 36760/06 (Grand Chamber Judgment, 17 January 2012), para. 146.
168. See note 91 above.

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