UNIVERSITÀ
DEGLI STUDI
DI TRIESTE

La definizione sostanziale di pena

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Insegnamento di «Diritto penale», A.A. 2023-24
Corso di Laurea magistrale in Giurisprudenza

DEFINIZIONI FORMALI E SOSTANZIALI

Cos’è un illecito penale/un reato?

Cos’è una sanzione penale/una pena?

Cos’è un’imputazione penale?

Cos’è un processo penale?

Cos’è la materia penale?

LA RATIO DELLE DEFINIZIONI SOSTANZIALI

Art. 25 – Costituzione italiana

Nessuno può essere distolto dal giudice naturale precostituito per legge.
Nessuno può essere punito se non in forza di una legge che sia entrata in vigore prima del fatto commesso.
Nessuno può essere sottoposto a misure di sicurezza se non nei casi previsti dalla legge.

LA RATIO DELLE DEFINIZIONI SOSTANZIALI

Art. 27 – Costituzione italiana

La responsabilità penale è personale.
L'imputato non è considerato colpevole sino alla condanna definitiva.
Le pene non possono consistere in trattamenti contrari al senso di umanità e devono tendere alla rieducazione del condannato.
Non è ammessa la pena di morte.

LA RATIO DELLE DEFINIZIONI SOSTANZIALI

Art. 111 – Costituzione italiana

…
Nel processo penale, la legge assicura che la persona accusata di un reato sia, nel più breve tempo possibile, informata riservatamente della natura e dei motivi dell'accusa elevata a suo carico; disponga del tempo e delle condizioni necessari per preparare la sua difesa; abbia la facoltà, davanti al giudice, di interrogare o di far interrogare le persone che rendono dichiarazioni a suo carico, di ottenere la convocazione e l'interrogatorio di persone a sua difesa nelle stesse condizioni dell'accusa e l'acquisizione di ogni altro mezzo di prova a suo favore; sia assistita da un interprete se non comprende o non parla la lingua impiegata nel processo.
Il processo penale è regolato dal principio del contraddittorio nella formazione della prova. …

LA RATIO DELLE DEFINIZIONI SOSTANZIALI

Art. 112 – Costituzione italiana

Il pubblico ministero ha l'obbligo di esercitare l'azione penale.

LA RATIO DELLE DEFINIZIONI SOSTANZIALI

Art. 6 CEDU – Diritto a un equo processo

1. Ogni persona ha diritto a che la sua causa sia esaminata equamente, pubblicamente ed entro un termine ragionevole da un tribunale indipendente e imparziale, costituito per legge, il quale sia chiamato a pronunciarsi sulle controversie sui suoi diritti e doveri di carattere civile o sulla fondatezza di ogni accusa penale formulata nei suoi confronti. La sentenza deve essere resa pubblicamente, ma l'accesso alla sala d'udienza può essere vietato alla stampa e al pubblico durante tutto o parte del processo nell'interesse della morale, dell'ordine pubblico o della sicurezza nazionale in una società democratica, quando lo esigono gli interessi dei minori o la protezione della vita privata delle parti in causa, o, nella misura giudicata strettamente necessaria dal tribunale, quando in circostanze speciali la pubblicità possa portare pregiudizio agli interessi della giustizia.

2. Ogni persona accusata di un reato è presunta innocente fino a quando la sua colpevolezza non sia stata legalmente accertata.

LA RATIO DELLE DEFINIZIONI SOSTANZIALI

Art. 6 CEDU – Diritto a un equo processo

3. In particolare, ogni accusato ha diritto di:
(a) essere informato, nel più breve tempo possibile, in una lingua a lui comprensibile e in modo dettagliato, della natura e dei motivi dell'accusa formulata a suo carico;
(b) disporre del tempo e delle facilitazioni necessarie a preparare la sua difesa;
(c) difendersi personalmente o avere l'assistenza di un difensore di sua scelta e, se non ha i mezzi per retribuire un difensore, poter essere assistito gratuitamente da un avvocato d'ufficio, quando lo esigono gli interessi della giustizia;
(d) esaminare o far esaminare i testimoni a carico e ottenere la convocazione e l'esame dei testimoni a discarico nelle stesse condizioni dei testimoni a carico;
(e) farsi assistere gratuitamente da un interprete se non comprende o non parla la lingua usata in udienza.

LA RATIO DELLE DEFINIZIONI SOSTANZIALI

Art. 7 CEDU – Nulla poena sine lege

1. Nessuno può essere condannato per una azione o una omissione che, al momento in cui è stata commessa, non costituiva reato secondo il diritto interno o internazionale. Parimenti, non può essere inflitta una pena più grave di quella applicabile al momento in cui il reato è stato commesso.

2. Il presente articolo non ostacolerà il giudizio e la condanna di una persona colpevole di una azione o di una omissione che, al momento in cui è stata commessa, costituiva un crimine secondo i principi generali di diritto riconosciuti dalle nazioni civili.

LA RATIO DELLE DEFINIZIONI SOSTANZIALI

Art. 2 Protocollo 7 CEDU – Diritto a un doppio grado di giudizio in materia penale

1. Ogni persona dichiarata colpevole da un tribunale ha il diritto di far esaminare la dichiarazione di colpevolezza o la condanna da una giurisdizione superiore. L'esercizio di tale diritto, ivi compresi i motivi per cui esso può essere esercitato, è disciplinato dalla legge.

2. Tale diritto può essere oggetto di eccezioni per reati minori, quali sono definiti dalla legge, o quando l'interessato è stato giudicato in prima istanza da un tribunale della giurisdizione più elevata o è stato dichiarato colpevole e condannato a seguito di un ricorso avverso il suo proscioglimento.

LA RATIO DELLE DEFINIZIONI SOSTANZIALI

Art. 3 Protocollo 7 CEDU – Diritto di risarcimento in caso di errore giudiziario

Qualora una condanna penale definitiva sia successivamente annullata o qualora la grazia sia concessa perché un fatto sopravvenuto o nuove rivelazioni comprovano che vi è stato un errore giudiziario, la persona che ha scontato una pena in seguito a tale condanna sarà risarcita, conformemente alla legge o agli usi in vigore nello Stato interessato, a meno che non sia provato che la mancata rivelazione in tempo utile del fatto non conosciuto le sia interamente o parzialmente imputabile.

LA RATIO DELLE DEFINIZIONI SOSTANZIALI

Art. 4 Protocollo 7 CEDU – Diritto di non essere giudicato o punito due volte

1. Nessuno può essere perseguito o condannato penalmente dalla giurisdizione dello stesso Stato per un reato per il quale è già stato assolto o condannato a seguito di una sentenza definitiva conformemente alla legge e alla procedura penale di tale Stato.
2. Le disposizioni del paragrafo precedente non impediscono la riapertura del processo, conformemente alla legge e alla procedura penale dello Stato interessato, se fatti sopravvenuti o nuove rivelazioni o un vizio fondamentale nella procedura antecedente sono in grado di inficiare la sentenza intervenuta.
3. Non è autorizzata alcuna deroga al presente articolo ai sensi dell'articolo 15 della Convenzione.

LA RATIO DELLE DEFINIZIONI SOSTANZIALI

Art. 48 CDFUE – Presunzione di innocenza e diritti della difesa

1. Ogni imputato è considerato innocente fino a quando la sua colpevolezza non sia stata legalmente provata.
2. Il rispetto dei diritti della difesa è garantito ad ogni imputato.

LA RATIO DELLE DEFINIZIONI SOSTANZIALI

Art. 49 CDFUE – Principi della legalità e della proporzionalità dei reati e delle pene

1. Nessuno può essere condannato per un'azione o un'omissione che, al momento in cui è stata commessa, non costituiva reato secondo il diritto interno o il diritto internazionale. Parimenti, non può essere inflitta una pena più grave di quella applicabile al momento in cui il reato è stato commesso. Se, successivamente alla commissione del reato, la legge prevede l'applicazione di una pena più lieve, occorre applicare quest'ultima.

2. Il presente articolo non osta al giudizio e alla condanna di una persona colpevole di un'azione o di un'omissione che, al momento in cui è stata commessa, costituiva un crimine secondo i principi generali riconosciuti da tutte le nazioni.

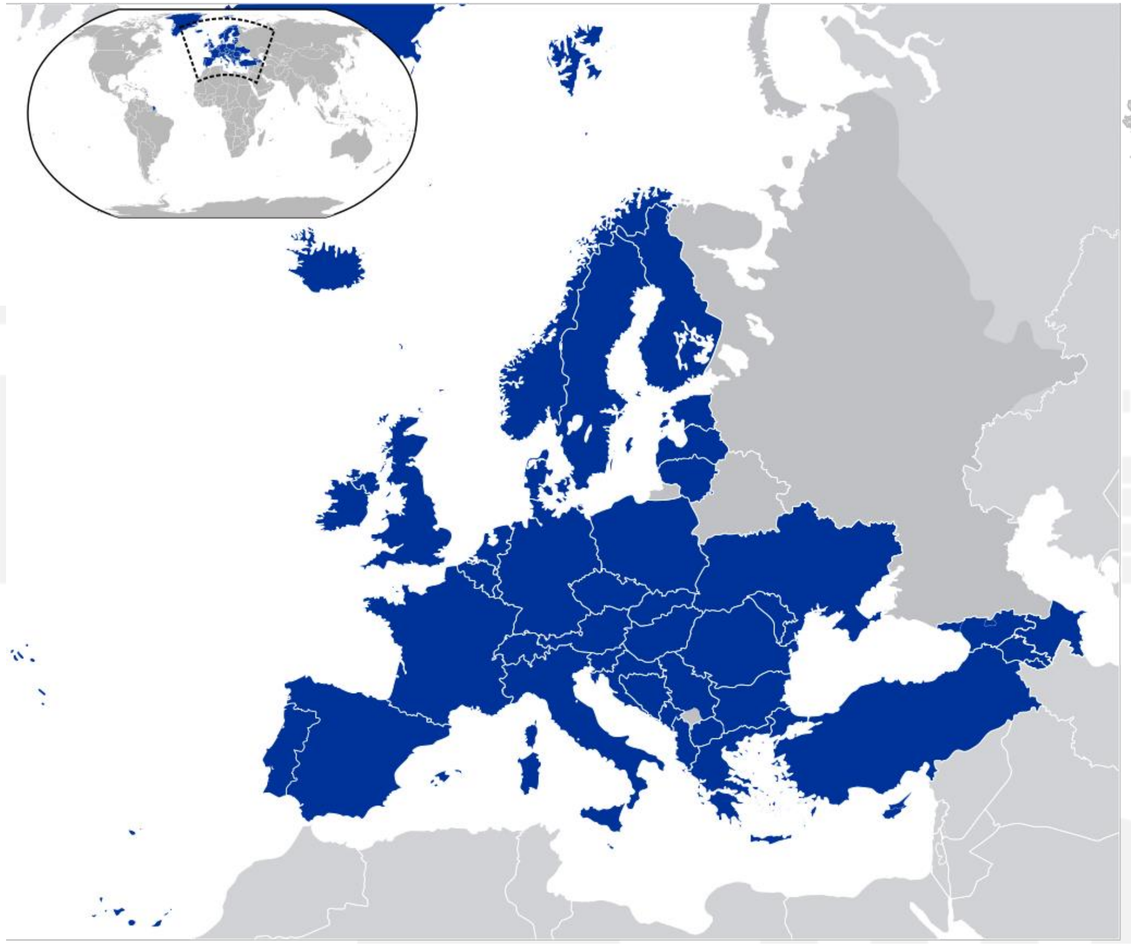
3. Le pene inflitte non devono essere sproporzionate rispetto al reato.

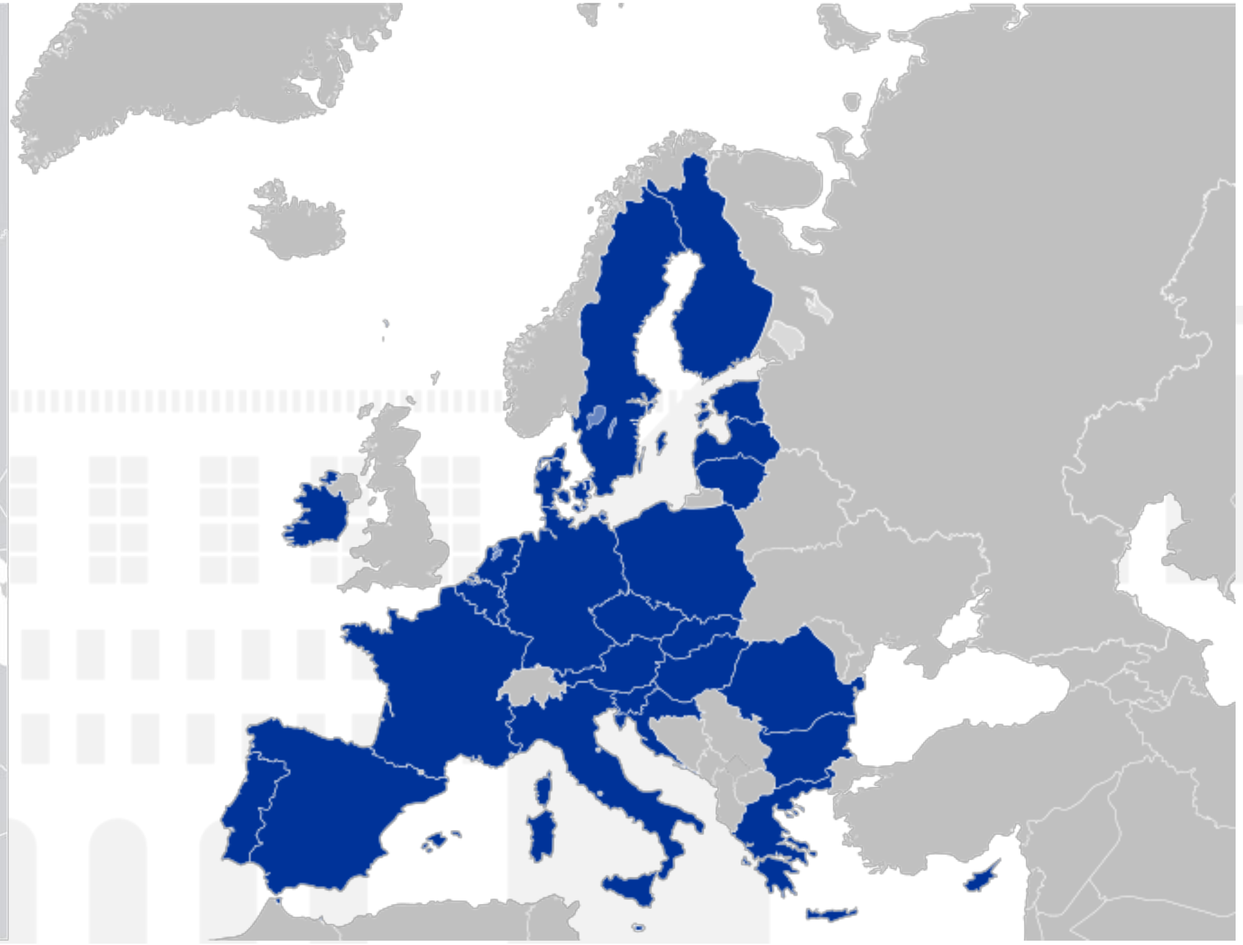
LA RATIO DELLE DEFINIZIONI SOSTANZIALI

Art. 50 CDFUE – Diritto di non essere giudicato o punito due volte per lo stesso reato

Nessuno può essere perseguito o condannato per un reato per il quale è già stato assolto o condannato nell'Unione a seguito di una sentenza penale definitiva conformemente alla legge.

LA RATIO DELLE DEFINIZIONI SOSTANZIALI





LA RATIO DELLE DEFINIZIONI SOSTANZIALI

ECtHR, Case of Engel and others v. The Netherlands, 8 June 1976

80. … It must thus be asked whether or not the solution adopted in this connection at the national level is decisive from the standpoint of the Convention. Does Article 6 (art. 6) cease to be applicable just because the competent organs of a Contracting State classify as disciplinary an act or omission and the proceedings it takes against the author, or does it, on the contrary, apply in certain cases notwithstanding this classification?

81. … If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 (art. 6, art. 7) would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction, under Article 6 (art. 6) and even without reference to Articles 17 and 18 (art. 17, art. 18), to satisfy itself that the disciplinary does not improperly encroach upon the criminal.

LA RATIO DELLE DEFINIZIONI SOSTANZIALI

ECtHR, Case of Welch v. The United Kingdom, 9 February 1995

27. … To render the protection offered by Article 7 effective, the Court must remain free to go behind appearances and asses for itself whether a particular measure amounts in substance to a «penalty» within the meaning of this provision.

LA RATIO DELLE DEFINIZIONI SOSTANZIALI

LA DEFINIZIONE SOSTANZIALE DI PENA

ECtHR, Case of Engel and others v. The Netherlands, 8 June 1976

82. … it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States.
… the very nature of the offence is a factor of greater import.
… the degree of severity of the penalty that the person concerned risks incurring.

CRITERI ENGEL (ENGEL CRITERIA)

LA DEFINIZIONE SOSTANZIALE DI PENA

ECtHR, GC, Case of Öztürk v. Germany, 21 February 1984

54. … The relative lack of seriousness of the penalty at stake cannot divest an offence of its inherently criminal character.

ECtHR, GC, Case of Ezeh and Connors v. The United Kingdom, 9 October 2003

86. … it is the Court's established jurisprudence that the second and third criteria laid down in Engel are alternative and not necessarily cumulative: for Article 6 to be held applicable, it suffices that the offence in question is by its nature to be regarded as “criminal” from the point of view of the Convention, or that the offence made the person liable to a sanction which, by its nature and degree of severity, belongs in general to the “criminal” sphere.

LA DEFINIZIONE SOSTANZIALE DI PENA

ECtHR, GC, Case of Sergey Zolotukhin v. Russia, 10 February 2009

56. As to the degree of severity of the measure, it is determined by reference to the maximum potential penalty for which the relevant law provides. The actual penalty imposed is relevant to the determination but it cannot diminish the importance of what was initially at stake. As the Court has confirmed on many occasions, in a society subscribing to the rule of law, where the penalty liable to be and actually imposed on an applicant involves the loss of liberty, there is a presumption that the charges against the applicant are “criminal”, a presumption which can be rebutted entirely exceptionally, and only if the deprivation of liberty cannot be considered “appreciably detrimental” given their nature, duration or manner of execution.

LA DEFINIZIONE SOSTANZIALE DI PENA

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LA DEFINIZIONE SOSTANZIALE DI PENA

ECtHR, GC, Case of Del Río Prada v. Spain, 21 October 2013

82. … The severity of the order is not in itself decisive, however, since many non-penal measures of a preventive nature may have a substantial impact on the person concerned.

ECtHR, GC, Case of G.I.E.M. and others v. Italy, 28 June 2018

211. The wording of Article 7 § 1, second sentence, indicates that the starting-point in any assessment of the existence of a "penalty" is whether the measure in question is imposed following a decision that a person is guilty of a criminal offence. However, other factors may also be taken into account as relevant in this connection, namely the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity.

LA DEFINIZIONE SOSTANZIALE DI PENA

CJEU, Judgment 5 June 2012, C-489/10, Bonda

37. According to that case-law, three criteria are relevant in this respect. The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the nature and degree of severity of the penalty that the person concerned is liable to incur (see, inter alia, ECHR, Engel and Others v. the Netherlands, 8 June 1976, §§ 80 to 82, Series A no. 22, and Sergey Zolotukhin v. Russia, no. 14939/03, §§ 52 and 53, 10 February 2009).

LA DEFINIZIONE SOSTANZIALE DI PENA

Corte cost., sent. n. 196 del 4 giugno 2010

3.1.4. Una preoccupazione analoga – e cioè quella di evitare che singole scelte compiute da taluni degli Stati aderenti alla CEDU, nell'escludere che un determinato illecito ovvero una determinata sanzione o misura restrittiva appartengano all'ambito penale, possano determinare un surrettizio aggiramento delle garanzie individuali che gli artt. 6 e 7 riservano alla materia penale – è, del resto, alla base dell'indirizzo interpretativo che ha portato la Corte di Strasburgo all'elaborazione di propri criteri, in aggiunta a quello della qualificazione giuridico-formale attribuita nel diritto nazionale, al fine di stabilire la natura penale o meno di un illecito e della relativa sanzione.
In particolare, la Corte europea ha attribuito alternativamente rilievo, a tal fine, o alla natura stessa dell'illecito – da determinare, a propria volta, sulla base di due sottocriteri, costituiti dall'ambito di applicazione della norma che lo preveda e dallo scopo della sanzione – ovvero alla gravità, o meglio al grado di severità, della sanzione irrogata.

LA DEFINIZIONE SOSTANZIALE DI PENA

Corte cost., sent. n. 196 del 4 giugno 2010

3.1.5. Dalla giurisprudenza della Corte di Strasburgo, formatasi in particolare sull'interpretazione degli artt. 6 e 7 della CEDU, si ricava, pertanto, il principio secondo il quale tutte le misure di carattere punitivo-afflittivo devono essere soggette alla medesima disciplina della sanzione penale in senso stretto.
Principio questo, del resto, desumibile dall'art. 25, secondo comma, Cost., il quale – data l'ampiezza della sua formulazione («Nessuno può essere punito…») – può essere interpretato nel senso che ogni intervento sanzionatorio, il quale non abbia prevalentemente la funzione di prevenzione criminale (e quindi non sia riconducibile – in senso stretto – a vere e proprie misure di sicurezza), è applicabile soltanto se la legge che lo prevede risulti già vigente al momento della commissione del fatto sanzionato.

LA DEFINIZIONE SOSTANZIALE DI PENA

Corte cost., sent. n. 196 del 4 giugno 2010

3.2. Orbene, alla luce delle suindicate premesse, occorre verificare se l'ipotesi di confisca prevista dall'art. 186 del codice della strada – secondo la prospettiva indicata dal giudice remittente – costituisca una misura di carattere sanzionatorio e, dunque, se la sua applicazione retroattiva, ponendosi in contrasto con la descritta interpretazione che dell'art. 7 della CEDU ha fornito la Corte dei diritti dell'uomo, integri una violazione dell'art. 117, primo comma, Cost.

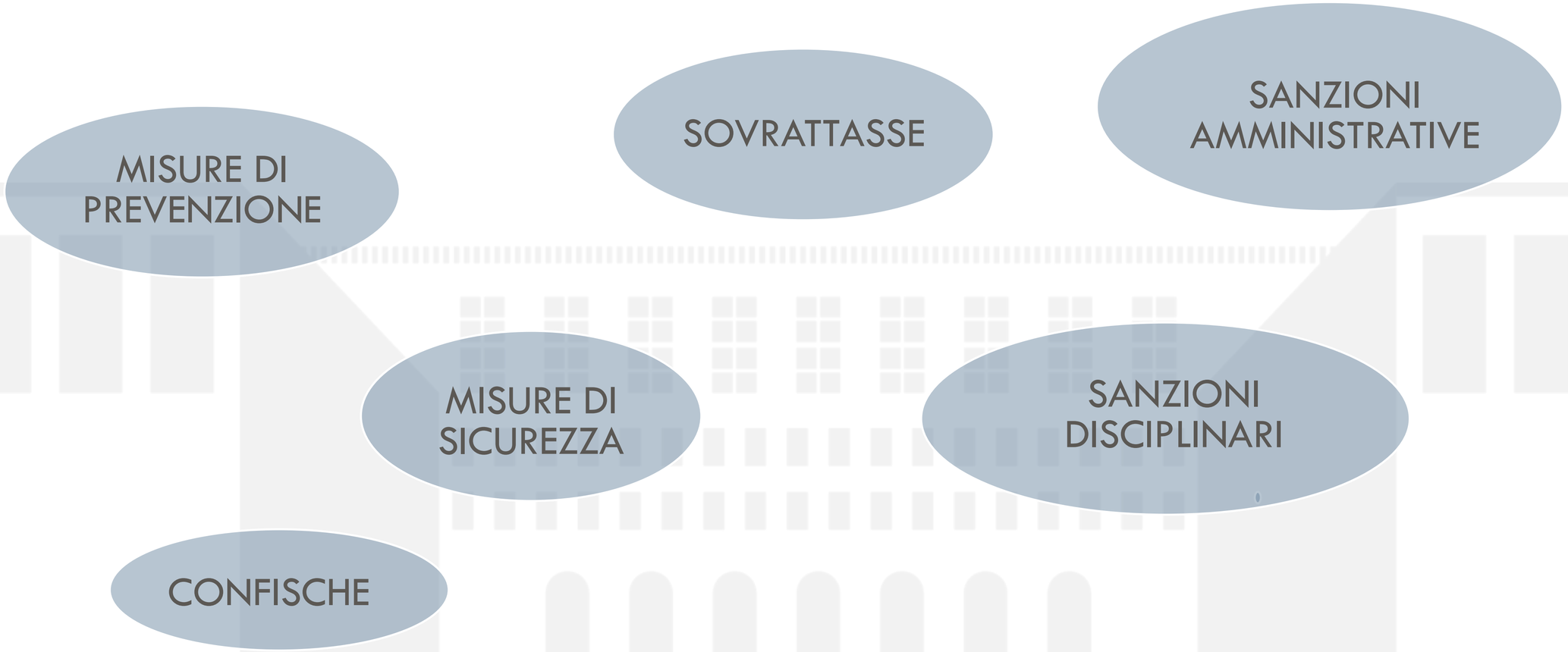
LA DEFINIZIONE SOSTANZIALE DI PENA

Corte cost., sent. n. 196 del 4 giugno 2010

5. La natura essenzialmente sanzionatoria della confisca – prevista dall'art. 186 del codice della strada – deve essere affermata, innanzitutto, sulla base degli esatti rilievi formulati dal giudice remittente.

5.1. Questi, difatti, sottolinea come la confisca che dovrebbe essere applicata nel giudizio a quo, al di là della sua qualificazione formale, presenti «una funzione sanzionatoria e meramente repressiva» e non invece preventiva. A tale conclusione il remittente perviene sulla base della duplice considerazione che tale «misura è applicabile anche quando il veicolo dovesse risultare incidentato e temporaneamente inutilizzabile» (e, dunque, «privo di attuale pericolosità oggettiva») e che la sua operatività «non impedisce in sé l'impiego di altri mezzi da parte dell'imputato, dunque un rischio di recidiva», sicché la misura della confisca si presenta non idonea a neutralizzare la situazione di pericolo per la cui prevenzione è stata concepita.

LA DEFINIZIONE SOSTANZIALE DI PENA



CEDU, 17 DICEMBRE 2009, M. C. GERMANIA

Alleged Violation

2. The applicant alleged a breach of Article 5 § 1 of the Convention on account of his continued preventive detention beyond the ten-year period which had been the maximum for such detention under the legal provisions applicable at the time of his offence and conviction. He further claimed that the retrospective extension of his preventive detention to an unlimited period of time had breached his right under Article 7 § 1 of the Convention not to have a heavier penalty imposed on him than the one applicable at the time of his offence.

CEDU, 17 DICEMBRE 2009, M. C. GERMANIA

Relevant Provisions

Article 5 – Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

Article 7 – No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

CEDU, 17 DICEMBRE 2009, M. C. GERMANIA

German Law and Practice

45. The German Criminal Code distinguishes between penalties (Strafen) and so-called measures of correction and prevention (Maßregeln der Besserung und Sicherung) to deal with unlawful acts. This twin-track system of sanctions, the introduction of which had been considered and discussed since the end of the nineteenth century, was incorporated into the Criminal Code by the Law on dealing with dangerous habitual offenders and on measures of correction and prevention (Gesetz gegen gefährliche Gewohnheitsverbrecher und über Maßregeln der Besserung und Sicherung) of 24 November 1933. The rules on preventive detention remained in force, essentially unchanged, after 1945 and underwent several reforms enacted by the legislator from 1969 onwards.

CEDU, 17 DICEMBRE 2009, M. C. GERMANIA

46. Penalties (see Articles 38 et seq. of the Criminal Code) consist mainly of prison sentences and fines. The penalty is fixed according to the defendant's guilt (Article 46 § 1 of the Criminal Code).

47. Measures of correction and prevention (see Articles 61 et seq. of the Criminal Code) consist mainly of placement in a psychiatric hospital (Article 63 of the Criminal Code) or a detoxification facility (Article 64 of the Criminal Code) or in preventive detention (Article 66 of the Criminal Code). The purpose of these measures is to rehabilitate dangerous offenders or to protect the public from them. They may be ordered for offenders in addition to their punishment (compare Articles 63 et seq.). They must, however, be proportionate to the gravity of the offences committed by, or to be expected from, the defendants as well as to their dangerousness (Article 62 of the Criminal Code).

CEDU, 17 DICEMBRE 2009, M. C. GERMANIA

48. The temporal applicability of provisions of the Criminal Code depends on whether they relate to penalties or measures of correction and prevention. The penalty is determined by the law which is in force at the time of the act (Article 2 § 1 of the Criminal Code); if the law in force on completion of the act is amended before the court's judgment, the more lenient law applies (Article 2 § 3). On the other hand, decisions on measures of correction and prevention are based on the law in force at the time of the decision unless the law provides otherwise (Article 2 § 6).

49. The sentencing court may, at the time of the offender's conviction, order his preventive detention under certain circumstances in addition to his prison sentence if the offender has been shown to be dangerous to the public (Article 66 of the Criminal Code).

CEDU, 17 DICEMBRE 2009, M. C. GERMANIA

The facts

12. On 17 November 1986 the Marburg Regional Court convicted the applicant of attempted murder and robbery and sentenced him to five years' imprisonment. It further ordered his placement in preventive detention (Sicherungsverwahrung) under Article 66 § 1 of the Criminal Code.

13. Since 18 August 1991 the applicant, having served his full prison sentence, has been in preventive detention in Schwalmstadt Prison.

17. On 10 April 2001 the Marburg Regional Court dismissed the applicant's requests to suspend on probation his preventive detention ...

19. The Regional Court stated that it was ordering the applicant's preventive detention also for the period after 8 September 2001, when (after a period during which the applicant had escaped from detention had been deducted) he would have served ten years in preventive detention. There were no constitutional obstacles to such a decision. According to the court, the applicant's continued preventive detention was authorised by Article 67d § 3 of the Criminal Code as amended in 1998. In section 1a(3) of the Introductory Act to the Criminal Code, as amended in 1998, the Article in question had been declared applicable also to prisoners whose preventive detention had been ordered prior to the change in the law.

CEDU, 17 DICEMBRE 2009, M. C. GERMANIA

21. On 26 October 2001 the Frankfurt am Main Court of Appeal decided not to suspend on probation the applicant's preventive detention as ordered by the Marburg Regional Court's judgment of 17 November 1986, and ordered his continued detention also after the expiry of ten years of detention on 8 September 2001.

27. On 5 February 2004 a panel of eight judges of the Federal Constitutional Court, having held a hearing at which it also consulted psychiatric experts and several prison governors, dismissed the applicant's constitutional complaint (no. 2 BvR 2029/01) as ill-founded. In its thoroughly reasoned leading judgment (running to 84 pages), it held that Article 67d § 3 of the Criminal Code, read in conjunction with section 1a(3) of the Introductory Act to the Criminal Code, as amended in 1998, was compatible with the Basic Law.

CEDU, 17 DICEMBRE 2009, M. C. GERMANIA

The Position of the German Constitutional Court

31. The Federal Constitutional Court further held that Article 67d § 3 of the Criminal Code, taken in conjunction with section 1a(3) of the Introductory Act to the Criminal Code, did not violate Article 103 § 2 of the Basic Law. The absolute ban on the retrospective application of criminal laws imposed by that Article did not cover the measures of correction and prevention, such as preventive detention, provided for in the Criminal Code.

32. Interpreting the notions of “punished” and “punishable act” in Article 103 § 2 of the Basic Law, the Federal Constitutional Court found that the Article applied only to State measures which expressed sovereign censure of illegal and culpable conduct and involved the imposition of a penalty to compensate for guilt. Having regard to the genesis of the Basic Law and the purpose of Article 103 § 2, it did not apply to other State measures interfering with a person’s rights.

CEDU, 17 DICEMBRE 2009, M. C. GERMANIA

33. In particular, Article 103 § 2 of the Basic Law did not extend to measures of correction and prevention, which had always been understood as differing from penalties under the Criminal Code's twin-track system of penalties and measures of correction and prevention. The fact that a measure was connected with unlawful conduct or entailed considerable interference with the right to liberty was not enough. Unlike a penalty, preventive detention was not aimed at punishing criminal guilt, but was a purely preventive measure aimed at protecting the public from a dangerous offender. Therefore, preventive detention was not covered by Article 103 § 2, even though it was directly connected with the qualifying offence.

CEDU, 17 DICEMBRE 2009, M. C. GERMANIA

Permissible Grounds for Deprivation of Liberty

86. Article 5 § 1 sub-paragraphs (a) to (f) contain an exhaustive list of permissible grounds for deprivation of liberty, and no deprivation of liberty will be lawful unless it falls within one of those grounds .

96. The Court is satisfied that the applicant's initial preventive detention resulted from his "conviction" by the sentencing court in 1986.

97. In order to determine whether the applicant's preventive detention beyond the ten-year period was justified under Article 5 § 1 (a), the Court needs to examine whether that detention still occurred "after conviction", in other words whether there was still a sufficient causal connection between the applicant's conviction by the sentencing court in 1986 and his continuing deprivation of liberty after 8 September 2001.

CEDU, 17 DICEMBRE 2009, M. C. GERMANIA

100. … Thus, had it not been for the amendment of Article 67d of the Criminal Code in 1998 (see paragraph 53 above), which was declared applicable also to preventive detention orders which had been made – as had the order against the applicant – prior to the entry into force of that amended provision (section 1a(3) of the Introductory Act to the Criminal Code; see paragraph 54 above), the applicant would have been released when ten years of preventive detention had expired, irrespective of whether he was still considered dangerous to the public. Without that change in the law, the courts responsible for the execution of sentences would not have had jurisdiction to extend the duration of the applicant's preventive detention. Therefore, the Court finds that there was not a sufficient causal connection between the applicant's conviction by the sentencing court in 1986 and his continued deprivation of liberty beyond the period of ten years in preventive detention, which was made possible only by the subsequent change in the law in 1998.

102. The Court shall further examine whether the applicant's preventive detention beyond the ten-year point was justified under any of the other sub-paragraphs of Article 5 § 1.

105. Consequently, there has been a violation of Article 5 § 1 of the Convention.

CEDU, 17 DICEMBRE 2009, M. C. GERMANIA

The Concept of Penalty under Art. 7 ECHR

120. The concept of “penalty” in Article 7 is autonomous in scope. To render the protection afforded by Article 7 effective the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a “penalty” within the meaning of this provision (see Welch v. the United Kingdom, 9 February 1995, § 27, Series A no. 307-A; Jamil v. France, 8 June 1995, § 30, Series A no. 317-B; and Uttley, cited above). The wording of the second sentence of Article 7 § 1 indicates that the starting-point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a “criminal offence”. Other relevant factors are the characterisation of the measure under domestic law, its nature and purpose, the procedures involved in its making and implementation, and its severity (see Welch, cited above, § 28; Jamil, cited above, § 31; Adamson v. the United Kingdom (dec.), no. 42293/98, 26 January 1999; Van der Velden v. the Netherlands (dec.), no. 29514/05, ECHR 2006-XV; and Kafkaris, cited above, § 142). The severity of the measure is not, however, in itself decisive, since, for instance, many non-penal measures of a preventive nature may have a substantial impact on the person concerned (see Welch, cited above, § 32; compare also Van der Velden, cited above).

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The Court, having regard to the criteria established in its case-law, therefore needs to determine whether the applicant's preventive detention constitutes a "penalty" within the meaning of the second sentence of Article 7 § 1.

- the applicant's preventive detention was imposed by the Marburg Regional Court in 1986 following his conviction for a "criminal offence"
- as to the characterisation of preventive detention under domestic law, the Court observes that in Germany, such a measure is not considered as a penalty to which the absolute ban on retrospective punishment applies.
- the same type of measure may be and has been qualified as a penalty in one State and as a preventive measure to which the principle of nulla poena sine lege does not apply in another
- just like a prison sentence, preventive detention entails a deprivation of liberty
- persons subject to preventive detention are detained in ordinary prisons, albeit in separate wings
- there is no substantial difference between the execution of a prison sentence and that of a preventive detention order.
- there are very few provisions in the Execution of Sentences Act dealing specifically with the execution of preventive detention orders and that, apart from these, the provisions on the execution of prison sentences apply mutatis mutandis

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The Court, having regard to the criteria established in its case-law, therefore needs to determine whether the applicant's preventive detention constitutes a "penalty" within the meaning of the second sentence of Article 7 § 1.

- the Court cannot subscribe to the Government's argument that preventive detention served a purely preventive, and no punitive, purpose
- persons subject to preventive detention orders must be afforded such support and care as part of a genuine attempt to reduce the risk that they will reoffend, thus serving the purpose of crime prevention and making their release possible
- the Court observes that preventive detention is ordered by the (criminal) sentencing courts
- Its execution is determined by the courts responsible for the execution of sentences, that is, courts also belonging to the criminal justice system
- this measure entails detention which, following the change in the law in 1998, no longer has any maximum duration

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133. In view of the foregoing the Court, looking behind appearances and making its own assessment, concludes that preventive detention under the German Criminal Code is to be qualified as a “penalty” for the purposes of Article 7 § 1 of the Convention.

135. … It constitutes an additional penalty which was imposed on the applicant retrospectively, under a law enacted after the applicant had committed his offence.

137. In view of the foregoing, the Court concludes that there has been a violation of Article 7 § 1 of the Convention.

CEDU, GIURISPRUDENZA SUCCESSIVA

Kallweit v. Germany, 13 January 2011, Apllication no. 17792/07

Mautes v. Germany, 13 January 2011, Apllication no. 20008/07

Schummer v. Germany, 13 January 2011, Apllication nos. 27360/04 and 42225/07

Haidn v. Germany, 13 January 2011, Apllication no. 6587/04

H.W. v. Germany, 19 September 2013, Apllication no. 17167/11

CEDU, 7 GENNAIO 2016, BERGMANN C. GERMANIA

The New Position of the German Constitutional Court

66. On 4 May 2011 the Federal Constitutional Court delivered a leading judgment concerning the retrospective prolongation of the complainants' preventive detention beyond the former ten-year maximum period and also concerning the retrospective order for a complainant's preventive detention under Article 66b § 2 of the Criminal Code (file nos. 2 BvR 2365/09, 2BvR740/10, 2 BvR 2333/08, 2 BvR 1152/10 and 2 BvR 571/10). Reversing its previous position, the Federal Constitutional Court held that all provisions concerned, both on the retrospective prolongation of preventive detention and on the retrospective ordering of such detention, were incompatible with the Basic Law as they failed to comply with the constitutional protection of legitimate expectations guaranteed in a State governed by the rule of law, read in conjunction with the constitutional right to liberty.

67. The Federal Constitutional Court further held that all the relevant provisions of the Criminal Code on the imposition and duration of preventive detention were incompatible with the fundamental right to liberty of persons in preventive detention. It found that those provisions did not satisfy the constitutional requirement of differentiating between preventive detention and imprisonment (Abstandsgebot).

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68. The Federal Constitutional Court held that all provisions declared incompatible with the Basic Law remained applicable until the entry into force of new legislation and until 31 May 2013 at the latest. In relation to detainees whose preventive detention had been prolonged retrospectively, or ordered retrospectively under Article 66b § 2 of the Criminal Code, the courts responsible for the execution of sentences had to examine without delay whether the persons concerned, owing to specific circumstances relating to their personality or their conduct, were highly likely to commit the most serious crimes of violence or sexual offences and if, additionally, they suffered from a mental disorder within the meaning of section 1(1) of the newly enacted Therapy Detention Act. As regards the notion of mental disorder, the Federal Constitutional Court explicitly referred to the interpretation of the notion of "persons of unsound mind" in Article 5 § 1 sub-paragraph (e) of the Convention made in this Court's case-law. If the above pre-conditions were not met, those detainees had to be released no later than 31 December 2011. The other provisions on the imposition and duration of preventive detention could only be applied in the transitional period subject to a strict review of proportionality; as a general rule, proportionality was respected where there was a danger of the person concerned committing serious crimes of violence or sexual offences if released.

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The New Position of the German Constitutional Court

69. In its judgment, the Federal Constitutional Court stressed that the fact that the Constitution stood above the Convention in the domestic hierarchy of norms was not an obstacle to an international and European dialogue between the courts, but was, on the contrary, its normative basis in view of the fact that the Constitution was to be interpreted in a manner that was open to public international law (völkerrechtsfreundliche Auslegung; ibid., § 89). It stressed that, in line with that openness of the Constitution to public international law, it attempted to avoid breaches of the Convention in the interpretation of the Constitution (ibid., §§ 82 and 89).

70. In its reasoning, the Federal Constitutional Court relied on the interpretation of Article 5 and Article 7 of the Convention made by this Court in its judgment in the case of M. v. Germany.

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German Law and Practice

43. The provisions on preventive detention, notably in the Criminal Code, have been amended since then (i.e. since the case M. v. Germany), in particular, by the Act on establishment, at federal level, of a difference between the provisions on preventive detention and those on prison sentences (Gesetz zur bundesrechtlichen Umsetzung des Abstandsgebotes im Recht der Sicherungsverwahrung, hereinafter the "Preventive Detention (Distinction) Act") of 5 December 2012, which entered into force on 1 June 2013. In that Act, the legislator adopted new rules on the enforcement of preventive detention orders and on the execution of prior prison sentences, having regard to the requirements laid down in the Federal Constitutional Court's leading judgment on preventive detention of 4 May 2011.

52. Section 316f of the Introductory Act to the Criminal Code, which entered into force on 1 June 2013, contains a transitional provision introduced by the Preventive Detention (Distinction) Act.

53. … the imposition of, or order for the continuation of preventive detention on the basis of a legislative provision which had not yet entered into force at the time of the last offence at issue, or the imposition of, or order for the continuation of retrospective preventive detention is only authorised in the following circumstances. The person concerned must be suffering from a mental disorder and, owing to specific circumstances relating to his personality or conduct, it must be highly likely that he will commit a serious crime of violence or sexual offence as a result of his mental disorder.

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New Article 66c Criminal Code

Detainees held in preventive detention are placed in institutions which

(1) offer the detainee, on the basis of a comprehensive examination and a personal treatment plan which is to be updated regularly, care that is
(a) individual and intensive as well as suitable for raising and furthering his readiness to participate in particular psychiatric, psychotherapeutic or sociotherapeutic treatment, tailored to the detainee's needs if standardised offers do not have prospects of success, and
(b) aimed at reducing the threat he poses to the public to such an extent that the measure may be suspended and probation granted or that it may be terminated as soon as possible,

(2) guarantee a form of detention that
(a) places as small a burden as possible on the detainee, complies with the requirements for care under sub-paragraph 1 and is assimilated to general living conditions in so far as security concerns allow, and
(b) is separate from detainees serving terms of imprisonment in special buildings or departments in so far as the treatment within the meaning of sub-paragraph 1 does not exceptionally require otherwise, and

(3) in order to attain the aim laid down in sub-paragraph 1 (b)
(a) grant relaxations in the enforcement of the detention and make preparations for release unless there are compelling reasons not to do so, in particular if there are concrete facts constituting a risk that the detainee might abscond or abuse the measures in order to commit considerable offences, and
(b) allow for follow-up care once at liberty in close cooperation with public or private institutions.

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Alleged Violation

3. The applicant alleged that the retrospective prolongation of his preventive detention, in the Rosdorf centre for persons in preventive detention, beyond the former statutory ten-year maximum duration breached his right to liberty under Article 5 § 1 of the Convention and the prohibition on retrospective punishment under Article 7 § 1 of the Convention.

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Relevant Provisions

Article 5 – Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

Article 7 – No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

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The Facts

12. The applicant served his full term of imprisonment, and on 12 June 2001 he was placed for the first time in preventive detention, for which he was held in a wing of Celle prison. By 11 June 2011 he had served ten years in preventive detention.

13. The courts responsible for the execution of sentences ordered the continuation of the applicant's preventive detention at regular intervals. In particular, the Lüneburg Regional Court ordered the continuation of his detention on 13 May 2011 and 5 October 2012.

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Permissible Grounds for Deprivation of Liberty

96. The Court further reiterates that the term “persons of unsound mind” in sub-paragraph (e) of Article 5 § 1 does not lend itself to precise definition since its meaning is continually evolving as research in psychiatry progresses (see Winterwerp, cited above, § 37, and Rakevich v. Russia, no. 58973/00, § 26, 28 October 2003). An individual cannot be deprived of his liberty as being of “unsound mind” unless the following three minimum conditions are satisfied: firstly, he must reliably be shown to be of unsound mind, that is, a true mental disorder must be established before a competent authority on the basis of objective medical expertise; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, the validity of continued confinement depends upon the persistence of such a disorder (see Winterwerp, cited above, § 39, and Stanev v. Bulgaria [GC], no. 36760/06, § 145, ECHR 2012).

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97. A mental disorder may be considered as being of a degree warranting compulsory confinement if it is found that the confinement of the person concerned is necessary as the person needs therapy, medication or other clinical treatment to cure or alleviate his condition, but also where the person needs control and supervision to prevent him from, for example, causing harm to himself or other persons (compare, for example, Witold Litwa v. Poland, no. 26629/95, § 60, ECHR 2000-III, and Hutchison Reid v. the United Kingdom, no.50272/99, § 52, ECHR 2003-IV).

99. Furthermore, there must be some relationship between the grounds of permitted deprivation of liberty relied on and the place and conditions of detention. In principle, the “detention” of a person as a mental-health patient will only be “lawful” for the purposes of sub-paragraph(e) of Article 5 § 1 if effected in a hospital, clinic or other appropriate institution.

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The Application to the Case

110. The Court is therefore satisfied that the domestic courts in the proceedings at issue were competent authorities which established that the applicant had a mental disorder at least as defined by the applicable domestic law. The courts' conclusion was based on a recent report of 8 June 2013 drawn up by the external psychiatric expert consulted by them and thus on objective medical expertise.

114. However, the Court considers in the present case that the mental disorder the domestic courts found the applicant to suffer from was sufficiently serious as to amount to a true mental disorder for the purposes of Article 5 § 1 (e).

116. It follows that the applicant was a person "of unsound mind" for the purposes of Article 5 § 1 (e).

133. In view of the foregoing, the Court concludes that the applicant's preventive detention at issue was justified under sub-paragraph (e) of Article 5 § 1 as lawful detention, ordered in accordance with a procedure prescribed by law, of a person "of unsound mind".

134. There has accordingly been no violation of Article 5 § 1 of the Convention.

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155. In determining whether the applicant's preventive detention at issue, which was effected in accordance with the new legislative framework of the Preventive Detention (Distinction) Act, was a "penalty", the Court notes that the starting-point, and a very weighty factor, in the assessment of the existence of a penalty is whether the measure in question was imposed following conviction for a "criminal offence".

161. As regards the characterisation of preventive detention under domestic law, the Court notes that in Germany such detention is not, and has never been, considered as a penalty to which the constitutional absolute ban on retrospective punishment applies. … In its leading judgment of 4 May 2011, the Federal Constitutional Court again confirmed that preventive detention, contrary to this Court's findings in respect of Article 7 of the Convention, was not a penalty for the purposes of the absolute prohibition on the retrospective application of criminal law under the Basic Law.

162. … the legislative amendments to the Criminal Code introduced by the Preventive Detention (Distinction) Act serve to clarify and extend the differences between the way in which preventive detention and prison sentences are enforced (see in particular the new Article 66c of the Criminal Code). They thus confirm and expand the differences between measures of correction and prevention, such as preventive detention, under the provisions of the Criminal Code and measures which are classified as penalties under the long-established twin-track system of sanctions in German criminal law

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169. The Court observes that, in accordance with the new concept of preventive detention as regulated from 2013 onwards, the applicant in the present case was offered, and partly accepted, treatment with a view to addressing his mental disorder. The treatment comprised, in particular, medication, a treatment programme for offenders, regular meetings with a psychologist, and treatment aimed at preventing detainees from relapsing into excessive alcohol consumption. The Court therefore considers that there was a substantial change in the medical and therapeutic care offered to the applicant after his transfer to the Rosdorf centre. The nature of the preventive detention thus changed in the case of the applicant, whose detention was extended because he was considered to pose a particular danger to the public as a result of his mental disorder.

181. In view of the foregoing, the Court, having assessed in their entirety the relevant factors to determine whether the measure constitutes a penalty and making its own assessment, considers that preventive detention implemented in accordance with the new legislative framework as a rule still constitutes a “penalty” for the purposes of Article 7 § 1.

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182. However, in cases such as that of the applicant, where preventive detention is extended because of, and with a view to the need to treat his mental disorder, the Court accepts 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 within the meaning of Article 7 § 1.

183. There has accordingly been no violation of Article 7 § 1 of the Convention.

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