Headnotes

to the judgment of the Second Senate of 4 May 2011

- 2 BvR 2365/09 -

- 2 BvR 740/10 -

- 2 BvR 2333/08 -

- 2 BvR 1152/10 -

- 2 BvR 571/10 -

1. Decisions of the European Court of Human Rights which contain new aspects on the interpretation of the Basic Law (*Grundgesetz* - GG) are equivalent to legally relevant changes which may lead to the final and non-appealable effect of a Federal Constitutional Court decision being transcended.

2. a) It is true that in national law the European Convention on Human Rights is subordinate to the Basic Law. However, the provisions of the Basic Law are to be interpreted in a manner that is open to international law. At the level of constitutional law, the text of the Convention and the case-law of the European Court of Human Rights function as interpretation aids to determine the contents and scope of fundamental rights and of rule-of-law principles of the Basic Law (Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* - BVerfGE) 74, 358 <370>; established case-law).

b) An interpretation that is open to international law does not require the statements of the Basic Law to be schematically parallel to those of the European Convention on Human Rights (see BVerfGE 111, 307 <323 et seq.>).

c) Limits to an interpretation that is open to international law follow from the Basic Law. Taking account of the European Convention on Human Rights may not result in the protection of fundamental rights under the Basic Law being restricted; this is also excluded by the European Convention on Human Rights itself (see Article 53 of the European Convention on Human Rights). This obstacle to the reception of law may become relevant above all in multi-polar fundamental rights relationships in which the increase of liberty for one subject of a fundamental right at the same time means a decrease of liberty for the other. The possibilities of interpretation in a manner open to international law end where it no longer appears justifiable according to the recognised methods of interpretation of statutes and of the constitution.

3. a) Preventive detention constitutes a serious encroachment upon the right to liberty (Article 2.2 sentence 2 of the Basic Law), and this can only be justified in compliance with a strict review of proportionality and if the decisions on which it is based and the organisation of its execution satisfy strict requirements. In this connection, the principles of Article 7.1 of the European Convention on Human Rights must also be taken into account.

b) Preventive detention is only justifiable if the legislature, in designing it, takes due account of the special character of the encroachment that it constitutes and ensures that further burdens beyond the indispensable deprivation of "external" liberty are avoided. This must be taken account of by a liberty-oriented execution aimed at therapy which makes the purely preventive character of the measure plain both to the detainee under preventive detention and to the general public. The deprivation of liberty must be designed in such a way – at a marked distance from the execution of a custodial sentence ("distance requirement", see BVerfGE 109, 133 <166>) – that the prospect of regaining freedom visibly determines the practice of confinement.

c) The constitutional distance requirement is binding on all powers of the state and is directed initially at the legislature, which has a duty to develop an overall concept of preventive detention in line with this requirement and to lay it down in law. The central importance of this concept for the realisation of the detainee's fundamental right to liberty requires the legislation to have a regulatory density which leaves no significant questions to be decided by the executive or the judiciary, but instead governs their actions in all material areas.

d) The distance requirement must be designed in compliance with particular minimum constitutional requirements (for details, see C. I. 2. a) ee).

4. Retrospective extension of preventive detention beyond the former ten-year maximum period and the retrospective imposition of preventive detention constitute serious encroachments upon the reliance of the persons affected; in view of the serious encroachment on the fundamental right to liberty involved (Article 2.2 sentence 2 of the Basic Law), this is constitutionally permissible only in compliance with a strict review of proportionality and to protect the highest constitutional interests. The weight of the affected concerns regarding the protection of legitimate expectations is reinforced by the principles of the European Convention on Human Rights in Article 5.1 and Article 7.1 of the European Convention on Human Rights.

FEDERAL CONSTITUTIONAL COURT

- 2 BvR 2365/09 -

- 2 BvR 740/10 -

- 2 BvR 2333/08 -

- 2 BvR 1152/10 -

- 2 BvR 571/10 -

Pronounced
on 4 May 2011
Rieger
Government Official
as clerk
of the Court Office

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaints

I. of Mr. G ...,

- authorised representatives: 1. Rechtsanwalt Sebastian Scharmer,
of the law firm Rechtsanwälte Hummel, Kaleck,
Immanuelkirchstraße 3-4, 10405 Berlin,

2. Prof. Dr. Jörg Kinzig,
University of Tübingen,
Geschwister-Scholl-Platz, 72074 Tübingen -

1. directly against

a) the order of Nuremberg Higher Regional Court (*Oberlandesgericht*) of 13 July 2009 - 1 Ws 304/09 -,

b) the order of the external Chamber for the Execution of Sentences of Regensburg Regional Court (*Landgericht*) with its seat in Straubing of 22 May 2009 - StVK 17/1998 -,

2. indirectly against

§ 67d.3 sentence 1 and § 2.6 of the Criminal Code (*Strafgesetzbuch* -- StGB) where they relate to preventive detention exceeding ten years for originating criminal offences committed before the Act to Combat Sexual Offences and Other Dangerous Criminal Offences (*Gesetz zur Bekämpfung von Sexualdelikten und anderen gefährlichen Straftaten*, Federal Law Gazette (*Bundesgesetzblatt* – BGBl*)* I p. 160) of 26 January 1998 entered into force

- 2 BvR 2365/09 -,

II. of Mr. B ...,

- authorised representative: Rechtsanwältin Maria Bürger-Frings, Theaterstraße 15, 52062 Aachen -

1. directly against

a) the order of Cologne Higher Regional Court of 1 March 2010 - 2 Ws 120/10 -,

b) the order of the Chamber for the Execution of Sentences of Aachen Regional Court of 23 November 2009 - 33 StVK 269/09 K -,

2. indirectly against

§ 67d.3 sentence 1 and § 2.6 of the Criminal Code, where they relate to preventive detention exceeding ten years for originating criminal offences committed before the Act to Combat Sexual Offences and Other Dangerous Criminal Offences of 26 January 1998 (Federal Law Gazette I p. 160) entered into force

- 2 BvR 740/10 -,

III. of Mr. I ...,

- authorised representative: Rechtsanwalt Dr. Adam Ahmed, Schäfflerstraße 3, 80333 Munich -

1. directly against

a) the order of Regensburg Regional Court of 18 March 2009 - KLs 121 Js 17270/1998 jug. -,

b) the order of Nuremberg Higher Regional Court of 22 October 2008 - 2 Ws 499/08 -,

c) the order of Regensburg Regional Court of 14 July 2008 - KLs 121 Js 17270/1998 jug. -,

2. indirectly against

§ 7.2 of the Juvenile Court Act (*Jugendgerichtsgesetz* - JGG)

- 2 BvR 2333/08 -,

of Mr. I ...,

- authorised representatives: 1. Rechtsanwalt Prof. Dr. Gunter Widmaier, Herrenstraße 23, 76133 Karlsruhe,

2. Rechtsanwalt Dr. Adam Ahmed, Schäfflerstraße 3, 80333 Munich,

3. Rechtsanwältin Eva Gareis, Zieglhaus 2, 83737 Irschenberg -

1. directly against

a) the judgment of the Federal Court of Justice (*Bundesgerichtshof*) of 9 March 2010 - 1 StR 554/09 -,

b) the judgment of Regensburg Regional Court of 22 June 2009 - NSV 121 Js 17270/1998 jug. -,

2. indirectly against

§ 7.2 of the Juvenile Court Act

- 2 BvR 1152/10 -,

IV. of Mr. G ...,

- authorised representative: Rechtsanwalt Rolf-Reiner Stanke, Boddinstraße 65, 12053 Berlin -

1. directly against

a) the order of the Federal Court of Justice of 14 January 2010 - 1 StR 595/09 -,

b) the judgment of Baden-Baden Regional Court of 18 August 2009 - 1 Ks 401 VRs 400/09 -,

2. indirectly against

§ 66b.2 of the Criminal Code

- 2 BvR 571/10 -

the Federal Constitutional Court - Second Senate -

sitting with the justices

President Voßkuhle,

Di Fabio,

Mellinghoff,

Lübbe-Wolff,

Gerhardt,

Landau,

Huber,

Hermanns

on the basis of the oral hearing of 8 February 2011 by

Judgment

holds as follows:

I. The proceedings are dealt with together for a joint decision.

II. 1. a) § 67d.3 sentence 1 of the Criminal Code (*Strafgesetzbuch* StGB) as amended by the Act to Combat Sexual Offences and Other Dangerous Criminal Offences (*Gesetz zur Bekämpfung von Sexualdelikten und anderen gefährlichen Straftaten*) of 26 January 1998 (Federal Law Gazette - *Bundesgesetzblatt*, BGBl I page 160) – where it authorises the continuance of preventive detention beyond a period of ten years even in the case of detainees whose originating criminal offences were committed before Article 1 of the Act to Combat Sexual Offences and Other Dangerous Criminal Offences of 26 January 1998 (Federal Law Gazette I page 160) entered into force –, § 66b.2 of the Criminal Code as amended by the Act on the Reform of Supervision of Conduct and to Amend the Provisions on Retrospective Preventive Detention (*Gesetz zur Reform der Führungsaufsicht und zur Änderung der Vorschriften über die nachträgliche Sicherungsverwahrung*) of 13 April 2007 (Federal Law Gazette I page 513), § 7.2 of the Juvenile Court Act (*Jugendgerichtsgesetz* – JGG) as amended by the Act to Introduce Retrospective Preventive Detention on Convictions under the Criminal Law Relating to Juvenile Offenders (*Gesetz zur Einführung der nachträglichen Sicherungsverwahrung bei Verurteilungen nach Jugendstrafrecht*) of 8 July 2008 (Federal Law Gazette I page 1212) and

b) § 66 of the Criminal Code as amended by the Act to Reform the Law of Preventive Detention and on Accompanying Provisions (*Gesetz zur Neuordnung des Rechts der Sicherungsverwahrung und zu begleitenden Regelungen*) of 22 December 2010 (Federal Law Gazette I page 2300), § 66 of the Criminal Code as amended by the Act on the Amendment of the Provisions on Criminal Offences Against Sexual Self-Determination and on the Amendment of Other Provisions (*Gesetz zur Änderung der Vorschriften über die Straftaten gegen die sexuelle Selbstbestimmung und zur Änderung anderer Vorschriften*) of 27 December 2003 (Federal Law Gazette I page 3007), § 66a of the Criminal Code as amended by the Act to Reform the Law of Preventive Detention and on Accompanying Provisions of 22 December 2010 (Federal Law Gazette I page 2300), § 66a.1 and 66a.2 of the Criminal Code as amended by the Act on the Introduction of Reserved Preventive Detention (*Gesetz zur Einführung der vorbehaltenen Sicherungsverwahrung*) of 21 August 2002 (Federal Law Gazette I page 3344), § 66b of the Criminal Code as amended by the Act to Reform the Law of Preventive Detention and on Accompanying Provisions of 22 December 2010 (Federal Law Gazette I page 2300), § 66b.1 of the Criminal Code as amended by the Act on the Reform of Supervision of Conduct and to Amend the Provisions on Retrospective Preventive Detention of 13 April 2007 (Federal Law Gazette I page 513), § 66b.3 of the Criminal Code as amended by the Act to Introduce Retrospective Preventive Detention (*Gesetz zur Einführung der nachträglichen Sicherungsverwahrung*) of 23 July 2004 (Federal Law Gazette I page 1838), § 67d.2 sentence 1 of the Criminal Code as amended by the Act to Combat Sexual Offences and Other Dangerous Criminal Offences of 26 January 1998 (Federal Law Gazette I page 160) – where it authorises the continuance of preventive detention for up to ten years –, § 67d.3 sentence 1 of the Criminal Code as amended by the Act to Combat Sexual Offences and Other Dangerous Criminal Offences of 26 January 1998 (Federal Law Gazette I page 160), § 67d.3 sentence 1 of the Criminal Code as amended by the Act to Reform the Law of Preventive Detention and on Accompanying Provisions of 22 December 2010 (Federal Law Gazette I page 2300), § 7.3 of the Juvenile Court Act as amended by the Act to Reform the Law of Preventive Detention and on Accompanying Provisions of 22 December 2010 (Federal Law Gazette I page 2300), § 7.3 of the Juvenile Court Act as amended by the Act to Introduce Retrospective Preventive Detention on Convictions under the Criminal Law Relating to Juvenile Offenders of 8 July 2008 (Federal Law Gazette I page 1212), § 106.3 sentences 2 and 3, 106.5 and 106.6 of the Juvenile Court Act as amended by the Act to Reform the Law of Preventive Detention and on Accompanying Provisions of 22 Decem-

ber 2010 (Federal Law Gazette I page 2300), § 106.3 sentences 2 and 3 of the Juvenile Court Act as amended by the Act on the Amendment of the Provisions on Criminal Offences Against Sexual Self-Determination and on the Amendment of Other Provisions of 27 December 2003 (Federal Law Gazette I page 3007), § 106.5 of the Juvenile Court Act as amended by the Act on the Reform of Supervision of Conduct and to Amend the Provisions on Retrospective Preventive Detention of 13 April 2007 (Federal Law Gazette I page 513) and § 106.6 of the Juvenile Court Act as amended by the Act to Introduce Retrospective Preventive Detention of 23 July 2004 (Federal Law Gazette I page 1838)

are incompatible with Article 2.2 sentence 2 in conjunction with Article 104.1 of the Basic Law.

2. § 67d.3 sentence 1 of the Criminal Code as amended by the Act to Combat Sexual Offences and Other Dangerous Criminal Offences of 26 January 1998 (Federal Law Gazette I page 160) in conjunction with § 2.6 of the Criminal Code – where it authorises the continuance of preventive detention beyond a period of ten years even in the case of detainees whose originating criminal offences were committed before Article 1 of the Act to Combat Sexual Offences and Other Dangerous Criminal Offences of 26 January 1998 (Federal Law Gazette I page 160) entered into force –, § 66b.2 of the Criminal Code as amended by the Act on the Reform of Supervision of Conduct and to Amend the Provisions on Retrospective Preventive Detention of 13 April 2007 (Federal Law Gazette I page 513) and § 7.2 of the Juvenile Court Act as amended by the Act to Introduce Retrospective Preventive Detention on Convictions under the Criminal Law Relating to Juvenile Offenders of 8 July 2008 (Federal Law Gazette I page 1212)

are in addition incompatible with Article 2.2 sentence 2 in conjunction with Article 20.3 of the Basic Law.

III. Under § 35 of the Federal Constitutional Court Act (*Gesetz über das Bundesverfassungsgericht*), it is ordered as follows:

1. The provisions set out under number II.1. shall remain in application, subject to the provisos contained in the Grounds, until the legislature reforms the law, but until 31 May 2013 at the latest.

2. The provisions set out under number II.2. shall also remain in application until the legislature reforms the law, until 31 May 2013 at the latest, but subject to the following provisos.

a) In the cases covered by § 67d.3 sentence 1 in conjunction with § 2.6 of the Criminal Code in which the duration of preventive detention beyond a period of ten years applies to detainees whose originating criminal offences were committed before Article 1 of the Act to Combat Sexual Offences and Other Dangerous Criminal Offences of 26 January 1998 (Federal Law Gazette I page 160) entered into force, and in the cases of retrospective preventive detention under § 66b.2 of the Criminal Code and of § 7.2 of the Juvenile Court Act, committal to preventive detention or its continuance may only be ordered if a high risk of the most serious offences of violence or sexual offences can be inferred from specific circumstances in the person or the conduct of the detainee and the detainee suffers from a mental disorder within the meaning of § 1.1 number 1 of the Act on the Therapy and Committal of Mentally Disordered Violent Criminals (*Gesetz zur Therapierung und Unterbringung psychisch gestörter Gewalttäter - Therapieunterbringungsgesetz* – ThUG - Therapeutic Committal Act) – Article 5 of the Act to Reform the Law of Preventive Detention and on Accompanying Provisions of 22 December 2010 (Federal Law Gazette I page 2300).

b) The competent courts for the execution of sentences shall review without delay after the pronouncement of this judgment, whether the requirements for the continuance of preventive detention under a) are satisfied. If the requirements are not satisfied, the competent courts for the execution of sentences shall order the detainees to be released with effect from 31 December 2011 at the latest.

c) In the cases of § 7.2 of the Juvenile Court Act, notwithstanding § 7.4 of the Juvenile Court Act, the review period for the suspension or termination of preventive detention is six months; in the other cases of letter a), notwithstanding § 67e.2 of the Criminal Code, it is one year.

IV. 1. The order of Nuremberg Higher Regional Court of 13 July 2009 – 1 Ws 304/09 – and the order of the external Chamber for the Execution of Sentences of Regensburg Regional Court with its seat in Straubing of 22 May 2009 – StVK 17/1998 – violate the first complainant's fundamental rights under Article 2.2 sentence 2 in conjunction with Article 104.1 sentence 1 of the Basic Law and Article 2.2 sentence 2 in conjunction with Article 20.3 of the Basic Law. The orders are reversed. The matter is referred back to Regensburg Regional Court.

2. The order of Cologne Higher Regional Court of 1 March 2010 – 2 Ws 120/10 – and the order of the Chamber for the Execution of Sentences of Aachen Regional Court of 23 November 2009 – 33 StVK 269/09 K – violate the second complainant's fundamental rights under Article 2.2 sentence 2 in conjunction with Article 104.1 sentence 1 of the Basic Law and Article 2.2 sentence 2 in conjunction with Article 20.3 of the Basic Law. The orders are reversed. The matter is referred back to Aachen Regional Court.

3. a) The order of Nuremberg Higher Regional Court of 22 October 2008 – 2 Ws 499/08 – and the order of Regensburg Regional Court of 14 July 2008 – KLs 121 Js 17270/1998 jug. – violate the third complainant's fundamental rights under Article 2.2 sentence 2 in conjunction with Article 104.1 sentence 1 of the Basic Law and Article 2.2 sentence 2 in conjunction with Article 20.3 of the Basic Law. The matter is referred back to Nuremberg Higher Regional Court for a decision on the costs and the necessary expenses of the third complainant.

Where the constitutional complaint is directed against the order of Regensburg Regional Court of 18 March 2009 – KLs 121 Js 17270/1998 jug. –, it is dismissed as inadmissible.

b) The judgment of the Federal Court of Justice of 9 March 2010 – 1 StR 554/09 – and the judgment of Regensburg Regional Court of 22 June 2009 – NSV 121 Js 17270/1998 jug. – violate the third complainant's fundamental rights under Article 2.2 sentence 2 in conjunction with Article 104.1 sentence 1 of the Basic Law and Article 2.2 sentence 2 in conjunction with Article 20.3 of the Basic Law. The judgments are reversed. The matter is referred back to Regensburg Regional Court.

4. The order of the Federal Court of Justice of 14 January 2010 – 1 StR 595/09 – and the judgment of Baden-Baden Regional Court of 18 August 2009 – 1 Ks 401 VRs 400/09 – violate the fourth complainant's fundamental rights under Article 2.2 sentence 2 in conjunction with Article 104.1 sentence 1 of the Basic Law and Article 2.2 sentence 2 in conjunction with Article 20.3 of the Basic Law. The decisions are reversed. The matter is referred back to Baden-Baden Regional Court.

V. 1. The Federal Republic of Germany and the Free State of Bavaria are ordered to reimburse the first complainant his necessary costs, each to bear one half.

2. The Federal Republic of Germany and the *Land* (state) North-Rhine Westphalia are ordered to reimburse the second complainant his necessary costs, each to bear one half.

3. The Federal Republic of Germany and the Free State of Bavaria are ordered to reimburse the third complainant his necessary costs, each to bear one half.

4. The Federal Republic of Germany and the *Land* Baden-Württemberg are ordered to reimburse the fourth complainant his necessary costs, each to bear one half.

Reasons:

A.

The complainants challenge the continuance of their committal to preventive detention or the retrospective imposition of preventive detention. Indirectly, the constitutional complaints are directed against the provisions on which each of the challenged decisions is based and which relate to the continuance of preventive detention beyond a period of ten years (§ 67d.3 sentence 1 of the Criminal Code), the retrospective imposition of preventive detention in adult and juvenile criminal law (§ 66b.2 of the Criminal Code, § 7.2 of the Juvenile Court Act) and the extension of the temporal period of application of the provisions to cases in which the originating offences were committed even before the provisions entered into force (§ 2.6 of the Criminal Code). 1

I.

1. a) Preventive detention was introduced by the Act against Dangerous Habitual Criminals and on Measures of Correction and Prevention (*Gesetz gegen gefährliche Gewohnheitsverbrecher und über Maßregeln der Sicherung und Besserung*) of 24 November 1933 (Reich Law Gazette (*Reichsgesetzblatt*, RGBl) I p. 995). § 20a of the Reich Criminal Code (*Reichsstrafgesetzbuch*, RStGB) provided for aggravated punishment for “dangerous habitual criminals” who had already been twice sentenced to a minimum of six months' imprisonment for a major offence or an intentional minor offence and who had incurred a sentence of imprisonment by a new intentional offence, or – regardless of any prior sentences – had committed at least three intentional offences. If a person was “convicted as a dangerous habitual criminal”, then under § 42e of the Reich Criminal Code it was mandatory that in addition to the sentence there was an order of preventive detention if public safety required it. The period in which the newly introduced law was to apply was defined in § 2a of the Reich Criminal Code as follows: decisions on measures of correction and prevention should be made on the basis of the law which applied to the decision. For a transitional period, offenders who had already been finally and non-appealably convicted and were serving their sentences at the date when the Act entered into force, retrospective imposition of preventive detention was permitted (Article 5 of the Act against Dangerous Habitual Criminals and on Measures of Correction and Prevention). In the case of sentences under the criminal law relating to juvenile offenders, it was initially not permitted to impose preventive detention (Article 3 of the Implementing Statute for the Act against Dangerous Habitual Criminals and on Measures of Correction and Pre- 2

vention (*Ausführungsgesetz zum Gewohnheitsverbrechergesetz*) of 24 November 1933, RGBl I p. 1000).

b) The Order on Protection against Dangerous Juvenile Criminals (*Verordnung zum Schutz gegen jugendliche Schwerverbrecher*) of 4 October 1939 (RGBl I p. 2000) and the Order on the Simplification and Harmonisation of the Criminal Law relating to Juvenile Offenders (*Verordnung über die Vereinfachung und Vereinheitlichung des Jugendstrafrechts*) of 6 November 1943 (RGBl I p. 635) made it possible in many circumstances to apply the general criminal law to juvenile offenders and therefore also to impose preventive detention (§ 20 of the Reich Juvenile Court Act (*Reichsjugendgerichtsgesetz*)). 3

2. a) After the introduction of the Basic Law, the Juvenile Court Act of 4 August 1953 again prohibited the imposition of preventive detention on juveniles (§ 7 of the Juvenile Court Act) and on young adults who were dealt with under the criminal law relating to juvenile offenders (§ 105.1 of the Juvenile Court Act); it was now only permitted – optionally – on the conviction of young adults who were dealt with under the general criminal law (§ 106.2 of the Juvenile Court Act). 4

b) In other respects, the provisions on preventive detention remained largely unchanged until they were fundamentally reorganised by the First Act to Reform Criminal Law (*Erstes Gesetz zur Reform des Strafrechts*) of 25 June 1969 (Federal Law Gazette I p. 645). The aggravation of punishment for “dangerous habitual criminals” in § 20a of the Criminal Code was repealed. Instead, § 42e of the Criminal Code contained a requirement that an offender was dangerous to the public “as a result of a tendency to commit serious criminal offences” for preventive detention to be imposed. At the same time, the procedural requirements for the originating conviction and criminal record were tightened, a requirement was introduced that the mandatory imposition of preventive detention was possible only where the custodial sentence was served first, the period for review of confinement was shortened and it was made possible for confinement in preventive detention to be suspended on probation. In addition, the imposition of preventive detention on young adults was prohibited even if they were convicted under the general criminal law. 5

3. The Second Act to Reform Criminal Law (*Zweites Gesetz zur Reform des Strafrechts*) of 4 July 1969 (Federal Law Gazette I p. 717) moved the provisions on preventive detention to §§ 66 et seq. of the Criminal Code and in § 67d.1 of the Criminal Code limited the duration of preventive detention when first ordered to a maximum of ten years. The principle that decisions on measures of correction and prevention were to be decided according to the law applicable at the time of the decision was supplemented by the words “unless otherwise provided by law” and became § 2.6 of the Criminal Code. The provision, which has remained unchanged, reads as follows: 6

> “(6) Unless otherwise provided by law, measures of correction and prevention shall be determined according to the law in force at the time of the decision.” 7

4. The Act to Combat Sexual Offences and Other Dangerous Criminal Offences of 26 January 1998 (Federal Law Gazette I p. 160) created the possibility in § 66.3 of the Criminal Code in the case of particular offences to impose preventive detention after only one repeat offence of the same nature. In addition, the ten-year maximum period for the first order of preventive detention was repealed. At the same time, a duty to review preventive detention after it had been served for ten years was introduced in § 67d.3 sentence 1 of the Criminal Code. From this date, the provision indirectly challenged by the constitutional complaints of the first and second complainants read as follows, until the words “as a result of a propensity” were deleted, which was done from 1 January 2011: 8

> “(3) If ten years of confinement in preventive detention have been served, the court shall declare the measure terminated unless there is a danger that the detainee, as a result of a propensity, will commit serious criminal offences as a result of which the victims will suffer serious mental or physical injury.” 9

Under Article 1a.2 of the Introductory Act to the Criminal Code (*Einführungsgesetz zum Strafgesetzbuch*, EGStGB), the revised version of § 66.3 of the Criminal Code was only to apply if one of the criminal offences listed there was committed after the Act entered into force on 31 January 1998, whereas under Article 1a.3 of the Introductory Act to the Criminal Code the revised version of § 67d.3 sentence 1 of the Criminal Code was to apply without temporal restriction, even in old cases. 10

5. The Act on the Introduction of Reserved Preventive Detention of 21 August 2002 (Federal Law Gazette I p. 3344) amended § 66 of the Criminal Code to the effect that preventive detention could now be ordered not only together with a prison sentence for a term of years, but also together with a sentence of life imprisonment. In addition, a new § 66a of the Criminal Code was added, which provided that in the cases of § 66.3 of the Criminal Code preventive detention could initially be reserved and a decision to impose it could be deferred to subsequent proceedings after the custodial sentence had been served. This was intended to shift the prognosis of dangerousness to a later point of time and to make it on a broader basis as a result of including information from the period of execution of the custodial sentence (see *Bundestag* printed paper (*Bundestagsdrucksache*, BTDrucks) 14/8586, p. 5). The provision was supplemented by a procedural provision in § 275a of the Code of Criminal Procedure (*Strafprozessordnung*, StPO) which provided that the court of first instance should conduct a trial to decide on the preventive detention reserved in the judgment. 11

6. The Act on the Amendment of the Provisions on Criminal Offences Against Sexual Self-Determination and on the Amendment of Other Provisions of 27 December 2003 (Federal Law Gazette I p. 3007) introduced an amendment of § 106 of the Juvenile Court Act which extended the area of application of reserved preventive detention to young adults who are sentenced under the general criminal law. Article 1a of the Introductory Act to the Criminal Code restricted the temporal application of this re- 12

vised provision to the effect that one of the originating criminal offences must have been committed after the Act entered into force on 1 April 2004.

7. In its judgment of 5 February 2004 – 2 BvR 2029/01 – (Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts*, BVerfGE) 109, 133), the Second Senate of the Federal Constitutional Court held that § 67d.3 of the Criminal Code and Article 1a.3 of the Introductory Act to the Criminal Code as amended by the Act to Combat Sexual Offences and Other Dangerous Criminal Offences of 26 January 1998 was compatible with the Basic Law and rejected as unfounded the constitutional complaint of a detainee – Mr. M. –, on whom preventive detention had first been imposed before the above Act entered into force and who had been subject to preventive detention for a period longer than ten years under the new provisions. The Court held that the removal of the ten-year maximum period violated neither human dignity (Article 1.1 of the Basic Law) nor the fundamental right to liberty (Article 2.2 sentence 2 of the Basic Law), the prohibition of retroactive criminal law (Article 103.2 of the Basic Law) or the rule-of-law requirement of the protection of legitimate expectations (Article 2.2 in conjunction with Article 20.3 of the Basic Law). 13

8. From 2001 on, some *Bundesländer* (federal states) had passed statutes on criminal confinement under which offenders who had been finally and non-appealably convicted and whose dangerousness became apparent only when they were serving their custodial sentences could subsequently be committed to confinement in a penal institution. Two of these *Land* statutes, the Bavarian Act on the Committal of Highly Dangerous Offenders Particularly Likely to Commit Repeat Offences (*Bayerisches Gesetz zur Unterbringung von besonders rückfallgefährdeten hochgefährlichen Straftätern)* of 24 December 2001 (Legal Gazette (*Gesetz- und Verordnungsblatt*, GVBl) p. 978) and the Act of the Land Saxony-Anhalt on the Committal of Persons Particularly Likely to Commit Repeat Offences to Avert Serious Dangers to Public Safety and Order (*Gesetz des Landes Sachsen-Anhalt über die Unterbringung besonders rückfallgefährdeter Personen zur Abwehr erheblicher Gefahren für die öffentliche Sicherheit und Ordnung*) of 6 March 2002 (GVBl p. 80) were held to be incompatible with the Basic Law by the judgment of the Second Senate of the Federal Constitutional Court of 10 February 2004 – 2 BvR 834/02, 1588/02 – (BVerfGE 109, 190) because the subject-matter of the legislation was criminal law within the meaning of Article 74.1 no. 1 of the Basic Law and the Federal legislature had completely and permissibly exercised its legislative competence when it legislated on preventive detention in the Criminal Code. 14

9. In the Act to Introduce Retrospective Preventive Detention of 23 July 2004 (Federal Law Gazette I p. 1838), the Federal legislature exercised its legislative competence as clarified in the decision of the Second Senate. The newly introduced § 66b of the Criminal Code governed three fundamental configurations of the subsequent imposition of preventive detention. § 66b.1 of the Criminal Code – as was clarified by a reference to the requirements of § 66 of the Criminal Code – exclusively governed multiple offenders, whereas § 66b.2 of the Criminal Code also applied to first offend- 15

ers, although it required a sentence of imprisonment of a minimum of five years. In all cases, the retrospective imposition of preventive detention required new facts which had become known before the custodial sentence had been fully served and which indicated that the prisoner was extremely dangerous to the public. Finally, § 66b.3 of the Criminal Code governed the case where confinement in a psychiatric hospital was terminated because the condition which excluded or reduced the defendant's criminal responsibility and on which the confinement was based did not exist or no longer existed. The list of possible originating offences was drawn up differently for each of the three configurations. § 66b.3 of the Criminal Code referred to the offences set out in § 66.3 sentence 1 of the Criminal Code, which included the minor offences set out there and all major offences (§ 12.1 of the Criminal Code). § 66b.1 of the Criminal Code restricted the list of originating offences to the minor offences set out in § 66.3 sentence 1 of the Criminal Code and specific major offences. Retrospective imposition of preventive detention under § 66b.2 of the Criminal Code was possible only following particular major offences, but not in the case of minor offences. All three configurations required a high probability of serious criminal offences which cause serious mental or physical injury to the victims. In drafting these requirements of the prognosis of dangerousness which are stricter than those for primary and reserved preventive detention, the legislature intended to emphasise the exceptional nature of the provision (see Bundestag printed paper 15/2887, p. 13).

§ 106 of the Juvenile Court Act was also extended to include the possibility of retrospective imposition of preventive detention where young adults were sentenced under the general criminal law and where confinement in a psychiatric hospital was terminated. 16

10. In the Act on the Reform of Supervision of Conduct and to Amend the Provisions on Retrospective Preventive Detention of 13 April 2007 (Federal Law Gazette I p. 513), the legislature reacted to a restrictive interpretation of § 66b.1 of the Criminal Code by the courts (see Bundestag printed paper 16/4740, p. 22). The Federal Court of Justice had not regarded it as a new fact – that is, a fact that became known only after conviction – if the dangerousness of the offender was already known or could have been known at the date of conviction for the last originating offence but the trial court, for legal reasons, was unable to impose preventive detention because at the time there was no legal basis for this (see Decisions of the Federal Court of Justice in Criminal Matters (*Entscheidungen des Bundesgerichtshofes in Strafsachen*, BGHSt) 50, 284 <293 et seq.>; Federal Court of Justice, Order of 25 July 2006 – 1 StR 274/06 –, *Neue Juristische Wochenschrift* – NJW 2006, pp. 3154-3155). A sentence was therefore added to § 66b.1 of the Criminal Code providing that cases where at the date of conviction it was not possible to impose preventive detention on the basis of the old version of Article 1a of the Introductory Act to the Criminal Code or in which the possibility of imposition subject to the requirements of § 66.3 of the Criminal Code, which was passed in the year 1998, was not yet available were included in the area of application of § 66b of the Criminal Code (see Bundestag printed paper 16/ 17

4740, p. 1). § 106 of the Juvenile Court Act and § 66b.2 of the Criminal Code were adapted as necessary. The provision of § 66b.2 of the Criminal Code, which is indirectly challenged by the constitutional complaint of the fourth complainant, thereafter read as follows until its latest amendment, which entered into force on 1 January 2011:

> “(2) If facts of the kind listed in subsection 1 sentence 1 above become known after a sentence of imprisonment for a minimum of five years for one or more major offences against life, physical integrity, personal liberty or sexual self-determination or under §§ 250 or 251, also in conjunction with § 252 or § 255, the court may subsequently order confinement in preventive detention if the overall assessment of the convicted person, the convicted person's offence or offences and in addition his development while serving the custodial sentence indicate that he is highly likely to commit serious offences resulting in serious mental or physical injury to the victims.” 18

11. The Act to Introduce Retrospective Preventive Detention on Convictions under the Criminal Law Relating to Juvenile Offenders of 8 July 2008 (Federal Law Gazette I p. 1212), which entered into force on 12 July 2008, extended the area of application of retrospectively ordered preventive detention to the criminal law relating to juvenile offenders. The provision of § 7.2 of the Juvenile Court Act, which is indirectly challenged by the constitutional complaint of the third complainant, reads as follows: 19

> “(2) If after sentencing to at least seven years' youth penalty because or also because of a major offence 20
>
> 1.against life, physical integrity or sexual self-determination or 21
>
> 2.under § 251 of the Criminal Code, also in conjunction with § 252 or § 255 of the Criminal Code, 22
>
> as a result of which the victim suffered severe mental or physical injury or was exposed to such a danger, facts become known before the end of this youth penalty which indicate a substantial dangerousness of the convicted person for the public, the court may subsequently order committal to preventive detention if the overall assessment of the person convicted, the convicted person's offence or offences and in addition his development while serving the youth penalty indicate that the convicted person is highly likely to commit criminal offences of the above nature again.” 23

§ 7.4 of the Juvenile Court Act (in the wording in force until 31 December 2010) also provided that a number of procedural provisions, including § 275a.5 sentence 1 of the Code of Criminal Procedure, should apply with the necessary modifications. Accordingly, until the judgment was final and non-appealable, the court was permitted to issue a committal order if there were urgent reasons to assume that a retrospective or- 24

der of preventive detention would be made.

12. a) In a judgment of 17 December 2009 (Application no. 19359/04, *M. v. Germany*), a Chamber of the Fifth Section of the European Court of Human Rights granted the individual application of Mr. M. – the complainant in the proceedings in which the decision of the Federal Constitutional Court of 5 February 2004 – 2 BvR 2029/01 – (BVerfGE 109, 133) was pronounced – and held that Article 5.1 of the European Convention on Human Rights (right to liberty and security) and Article 7.1 of the European Convention on Human Rights (nulla poena sine lege: no criminal penalty without a law) had been violated. At the same time it ordered the Federal Republic of Germany to pay EUR 50,000 to the individual applicant. The judgment became final and non-appealable on 10 May 2010 upon the rejection of the Federal Government's application for referral to the seven-judge chamber under Article 43 of the European Convention on Human Rights. The individual applicant M. was released. 25

b) In the following period, in similar cases, the Chamber of the Fifth Section of the European Court of Human Rights also held that there had been a violation of the European Convention on Human Rights [...]. 26

c) With reference to the decision of the chamber of the European Court of Human Rights of 17 December 2009, some courts competent for the execution of sentences, in cases in which the originating offences had similarly been committed before the repeal of the former maximum period in the year 1998, held that committal to preventive detention was terminated or continuance of preventive detention was impermissible when it had lasted for more than ten years. Other courts competent for the execution of sentences refused to release the persons affected. The case-law of the competent Higher Regional Courts was also inconsistent [...]. 27

Consequently, the Fourth Act to Amend the Courts Constitution Act (*Viertes Gesetz zur Änderung des Gerichtsverfassungsgesetzes*) of 24 July 2010 (Federal Law Gazette I p. 976), containing an addition to § 121.2 of the Courts Constitution Act (*Gerichtsverfassungsgesetz*, introduced an obligation for the higher regional courts (*Divergenzvorlagepflicht*), if they wished to deviate from certain decisions of another higher regional court or of the Federal Court of Justice when deciding on the termination of confinement in preventive detention or on the permissibility of its continuance, to submit the matter to the Federal Court of Justice. However, the case-law of the criminal senates of the Federal Court of Justice also developed inconsistently [...]. 28

13. The Act to Reform the Law of Preventive Detention and on Accompanying Provisions of 22 December 2010 (Federal Law Gazette I p. 2300), which entered into force on 1 January 2011, made far-reaching changes to preventive detention. The area of application of primary preventive detention under § 66 of the Criminal Code was substantially narrowed, reserved preventive detention under § 66a of the Criminal Code was extended and the retrospective imposition of preventive detention under § 66b of the Criminal Code and § 106 of the Juvenile Court Act was removed, with the exception of cases where committal to a psychiatric hospital was terminated. § 67d.3 sen- 29

tence 1 of the Criminal Code was also revised. However, Article 316e.1 of the Introductory Act to the Criminal Code provides that the new provisions are to apply only if the offence or at least one of the offences for the commission of which preventive detention is to be imposed or reserved was committed after the Act entered into force on 1 January 2011; offences committed before this time are still subject to the earlier law.

In addition, on 1 January 2011 the Act on the Therapy and Committal of Mentally Disordered Violent Criminals (*Therapieunterbringungsgesetz* – ThUG Therapy Committal Act) entered into force as Article 5 of the Act of 22 December 2010. Under § 1 of the Therapy Committal Act, the committal of a person to a suitable closed institution may be ordered if the person can no longer be committed to preventive detention because a prohibition of retrospective aggravation of treatment in the law of preventive detention applies. A further requirement for therapeutic committal is that the person suffers from a mental disorder, is highly likely to substantially injure the life, the physical integrity, the personal liberty or the sexual self-determination of another person and the committal is necessary for this reason to protect the public. § 2 of the Therapy Committal Act provides that the committal shall be executed in an institution which is physically and organisationally separated from imprisonment, which must have a medical and therapeutic orientation and guarantee appropriate treatment of the mental disorder on the basis of an individual treatment plan and with the goal of keeping the period of committal as short as possible. 30

II.

The original proceedings are based on the following facts: 31

1. The first complainant was born in 1955 and since the age of twenty he has only been in freedom for short periods of time. Some of his repeated prison sentences were imposed for convictions for theft, which he committed by breaking and entering the homes of single women. 32

a) In the year 1978 he was convicted of theft concurrently with rape and sexual assault and sentenced to four years and six months' imprisonment. At the same time committal to a psychiatric hospital was ordered under § 63 of the Criminal Code. This order too was based on the fact that he had broken into the home of a single woman; in the case in question, he had found the woman at home and – after threatening her with a knife and undertaking several sexual acts on her – raped her. In 1985 he escaped from confinement and committed another offence of theft with breaking and entering a home. His confinement was suspended on probation in June 1986, and he was sentenced in November 1986 to one year and six months' imprisonment for this offence, which he served until January 1988. In April 1988 he committed three further offences of theft with breaking and entering a home; in July 1988 he was given a compound sentence of one year and three months' imprisonment for these offences, which he served until July 1989. At the beginning of August 1989 he again committed attempted theft and was sentenced to eight months' imprisonment for this, which he 33

served until early summer 1991. In June 1991 he was also sentenced to two years and six months' imprisonment for sexual assault. He served this sentence until the end of December 1993.

b) In the period from March to August 1994, he committed four more offences of theft with breaking and entering a home [...]. In August 1994 he was initially sentenced to one year's imprisonment for one of these offences. Augsburg Regional Court then took this sentence into account when on 9 November 1995 it awarded him a three-year compound sentence and a further compound sentence of one year and four months for the other three offences and under § 66 of the Criminal Code ordered him to be committed to preventive detention. [...] 34

c) The first complainant has been held in preventive detention [...] since December 1998. [...] On 23 May 2009 he had been in preventive detention for ten years. 35

d) In the order of 22 May 2009 challenged in the present proceedings, the external Chamber for the Execution of Sentences of Regensburg Regional Court with its seat in Straubing ordered the continuance of preventive detention. 36

aa) In the preparation of this order, the Chamber for the Execution of Sentences obtained a report from an external judicially appointed independent expert. In essence, the expert stated that with regard to the complainant's risk of committing a repeat offence there was “a development with some positive signs, but as yet insufficient”. He found that unfavourable prognostic factors outweighed the anti-recidivist factors. 37

bb) [...] 38

e) The complainant filed an immediate appeal [...]. 39

f) Nuremberg Higher Regional Court dismissed the immediate appeal as inadmissible in an [...] order of 13 July 2009 [...]. 40

g) The first complainant then filed a complaint alleging a violation of the right to a court hearing; this was rejected in September 2009. 41

h) An order of the external Chamber for the Execution of Sentences of Regensburg Regional Court with its seat in Straubing – final and non-appealable from 1 April 2011 – declared that the committal to preventive detention was terminated from 17 May 2011. 42

2. a) The second complainant, who was born in 1957, – who has not been at liberty since October 1990 – committed his first offences, property offences, at the beginning of the 1970s, and was first given a custodial sentence, of six years' imprisonment, in the year 1984, for two cases of rape, in each case concurrently with sexual assault and bodily harm, and in one case also concurrently with abduction against the will of the victim and unlawful imprisonment. In August 1989 he was released after serving the full six-year sentence. 43

b) Just under a year after his release, in late summer 1990, he committed three fur- 44

ther offences of rape [...]. On 6 March 1991, he was given a compound sentence of nine years' imprisonment by judgment of Cologne Regional Court for rape committed together with aggravated robbery and sexual assault, for rape committed together with sexual assault and for sexual assault. At the same time he was committed to preventive detention under § 66.2 of the Criminal Code. [...]

c) Following the execution of the custodial sentence, the complainant has been held in preventive detention since 16 October 1999. Since then, it has always been decided to continue this, essentially on the grounds that he has failed to process the criminal offences in therapy. On 15 October 2009, he had completed ten years of preventive detention. 45

d) In the order of 23 November 2009 challenged in the present proceedings, the Chamber for the Execution of Sentences of Aachen Regional Court refused to suspend on probation or declare terminated the continuance of the complainant's preventive detention under the Regional Court's judgment of March 1991. 46

[...] 47-48

e) The complainant filed an immediate appeal, relying on the judgment of the Chamber of the Fifth Section of the European Court of Human Rights of 17 December 2009 (Application no. 19359/04, *M. v. Germany*) [...]. 49

f) Cologne Higher Regional Court dismissed the immediate appeal in its order of 1 March 2010, which is also challenged in the present proceedings [...]. 50

3. a) The third complainant was born in 1978; on 29 October 1999 he was sentenced to ten years' youth penalty for murder by Regensburg Regional Court. In June 1997 – as a young adult aged 19 – he attacked and strangled a woman jogger in a wooded area. [...] On 17 July 2008, the youth penalty had been completed. 51

b) [...] 52-53

c) […] 54

d) By a judgment of 22 June 2009 – which is also challenged by the third complainant in his constitutional complaint – Regensburg Regional Court made a retrospective order of preventive detention under § 7.2 of the Juvenile Court Act. After consultation of a judicially appointed independent expert, it was determined that the complainant still had a multiple disorder of sexual preference (ICD-10 F65.6) and an emotionally unstable personality disorder of an impulsive type (ICD-10 F60.30). These mental disorders were said to have triggered the commission of the originating offence. [...] His mental disorders had not yet been sufficiently treated. [...] Particularly in areas of his social environment he had to expect negative, frustrating and humiliating experiences. Just as in the case of the originating offence, there was then a high probability that his violent fantasies would again intensely increase and be discharged in the form of the commission of the most serious sexual offences, as serious as sex murder committed to satisfy his sex drive. 55

e) The complainant's appeal on points of law was rejected as unfounded by judgment of the Federal Court of Justice of 9 March 2010. [...] 56

The court held that § 7.2 of the Juvenile Court Art was compatible with the constitution. The provision violated neither the prohibition of retroactive effect of criminal law (Article 103.2 of the Basic Law) nor the prohibition of double jeopardy (Article 103.3 of the Basic Law) or the rule-of-law requirement of the protection of legitimate expectations (Article 2.2, Article 20.3 of the Basic Law). Nor was there a violation of the European Convention on Human Rights. [...] 57

4. The fourth complainant was born in 1947; he has many previous convictions and since June 1973 – apart from a few months at liberty – he has continuously been in custody or subject to measures of correction and prevention. 58

a) His first conviction was in the year 1968, when he was sentenced to a fine for theft; in the year 1970 he was convicted of aiding and abetting the leaving of the scene of a traffic accident and sentenced to a fine, and also to a compound sentence of one year and six months, suspended on probation, for several offences of theft, some of them aggravated. 59

b) In the period from October 1970 to June 1973, in a total of twelve cases he attacked and overpowered young girls in isolated locations, subjected them to fear of death by threatening them with a knife, and forced them to have vaginal or oral sex or to other sexual acts. For these offences, on 14 December 1973 Berlin Regional Court sentenced him to a compound sentence of twelve years' imprisonment for five cases of rape, two of these committed together with the sexual abuse of children, and in seven further cases to the sexual abuse of children committed together with sexual assault. The suspension of his previous sentence on probation was revoked. He completed serving the custodial sentences imposed in December 1986. 60

c) In March 1987 he was again arrested and on 8 March 1988 Hannover Regional Court sentenced him to seven years and six months' imprisonment for one offence of rape – committed on an eight-year-old girl three months after his release from custody – committed together with sexual assault, the sexual abuse of children and abduction against the will of the victim. At the same time his committal to a psychiatric hospital was ordered under § 63 of the Criminal Code. 61

d) In June 1988 he escaped from his confinement and assaulted a young woman, threatened her with a knife or another dangerous object, attempted to rape her and then strangled her. At the end of June 1988 he was again arrested, and on 2 February 1990 Baden-Baden Regional Court sentenced him to a compound sentence of fifteen years' imprisonment for attempted rape and murder, and he was again ordered to be committed to a psychiatric hospital under § 63 of the Criminal Code. 62

[...] 63

e) In the following period, the complainant was confined in psychiatric hospitals un- 64

der measures of correction and prevention. In April 1993, the competent chamber for the execution of sentences declared that the confinement was terminated and ordered the remainder of the custodial sentences to be executed, on the grounds that the complainant was unamenable to therapy. Following this, the remaining custodial sentences were served from June 1993 on. [...] The sentences had been served in full on 5 August 2009. The complainant was then provisionally held in preventive detention.

f) On the basis of the sentencing of 2 February 1990 for attempted rape and for murder, Baden-Baden Regional Court in its judgment – challenged in the present proceedings – of 18 August 2009 under § 66b.2 of the Criminal Code retrospectively ordered the complainant to be committed to preventive detention. [...] The court stated that at the date of the originating decision it had neither been known nor discernible that his submissions had been based not on authentic conduct but on a strategy. 65

The court also stated that the complainant had a propensity to commit serious criminal offences, must still be classified as extremely dangerous and if he was released would shortly be drawn to commit serious sexual offences such as the sexual abuse of children or rape. [...] 66

g) The complainant's appeal on points of law, on the application of the Federal Public Prosecutor General, was rejected as unfounded in the order – also challenged in the present proceedings – of the Federal Court of Justice of 14 January 2010 [...] Whether the complainant was covered by the judgment of the European Court of Human Rights of 17 December 2009 (Application no. 19359/04, *M. v. Germany*) did not need to be decided, since this judgment was not yet final. 67

III.

In essence, the complainants assert a violation of their rights under Article 2.2 sentence 2 in conjunction with Article 104.1 sentence 1 of the Basic Law (personal liberty) and Article 103.2 of the Basic Law and Article 2.2 in conjunction with Article 20.3 of the Basic Law (protection of legitimate expectations). In this connection, they rely *inter alia* on the judgment of the Chamber of the Fifth Section of the European Court of Human Rights of 17 December 2009 (Application no. 19359/04, *M. v. Germany*). They state that according to this judgment, the German courts including the Federal Court of Justice have a duty, when applying German fundamental rights, to give precedence to an interpretation in compliance with the European Convention on Human Rights, insofar as there is latitude for interpretation and weighing of interests. The fundamental rights and rights that are equivalent to fundamental rights named, they state, must therefore be interpreted in compliance with the Convention. Article 103.2 of the Basic Law is to be interpreted, in conformity with the holdings of the European Court of Human Rights, to the effect that preventive detention is a “punishment”. 68

In addition, the first complainant submits that despite his motivation to undergo ther- 69

apy he was removed from the psychiatric hospital against his will. Apart from prison work, which he is engaged in, no further specific forms of treatment have been offered, although he is still willing to work on himself and his future.

The second complainant submits in addition that the prison in which he is confined does not comply with the distance requirement introduced by the Federal Constitutional Court in its decision pronounced on 5 February 2004 and the measure of rehabilitation and prevention is being executed in the same way as a punishment. [...] 70

IV.

[...] 71-74

V.

[...] 75

VI.

In the oral hearing, the Senate heard the judicially appointed independent expert Prof. Dr. Dittmann, senior consultant of the Forensic and Psychiatric Clinic at the Universitäre Psychiatrische Kliniken in Basel, on the possibilities and limits of forensic and psychiatric prognosis of offenders and the treatment of violent and sexual offenders. The independent experts Prof. Dr. Dessecker, Deputy Director of the Kriminologische Zentralstelle in Wiesbaden, and Leitender Regierungsdirektor Rösch, Director of Freiburg prison, described the statistical development and practical design of preventive detention. The independent expert Prof. Dr. Radtke, Director of the Criminological Institute of Hannover University, spoke on the principle of blameworthiness and the two-track system of sanctions of German criminal law, and the independent expert Prof. Dr. Tak, emeritus professor of law at Nijmegen university, explained the treatment of dangerous offenders in the Netherlands. The authorised representatives of the complainants and representatives of the Federal Government and the *Länder* (states) involved made submissions on the constitutionality of preventive detention, on the compatibility of this measure with the European Convention on Human Rights and on the most recent reform of the law. 76

B.

The constitutional complaints are largely admissible. 77

I.

[…] 78

II.

[…] 79

1. [...] 80

2. Where the constitutional complaints in the proceedings 2 BvR 2365/09 and 2 BvR 740/10 indirectly challenge § 67d.3 sentence 1 of the Criminal Code as amended by the Act to Combat Sexual Offences and Other Dangerous Criminal Offences of 26 January 1998 (Federal Law Gazette I p. 160) in conjunction with § 2.6 of the Criminal Code, they do not cease to be admissible simply because the constitutionality of § 67d.3 of the Criminal Code and Article 1a.3 of the Introductory Act to the Criminal Code – to which § 2.6 of the Criminal Code corresponds in substance in this respect – was already upheld in the operative part of the judgment of the Federal Constitutional Court of 5 February 2004 (BVerfGE 109, 133). 81

It is true that the finality and non-appealability of a statement of compatibility in the operative part of the decision of the Federal Constitutional Court is in principle a procedural bar to a new judicial review of a statutes (with specific reference to the similar inadmissibility of a new judicial review of a statute at the same time, see BVerfGE 69, 92 <102-103>; 109, 64 <84>). However, according to the established case-law of the Federal Constitutional Court, the procedural bar arising from finality and non-appealability and force of law is not applicable if there are later legally relevant changes to the factual and legal situation (see BVerfGE 82, 198 <207-208>; 87, 341 <346>; 109, 64 <84>). Even if decisions of the European Court of Human Rights, as declaratory case-law, do not lead to a direct change of the legal position, particularly on the level of constitutional law, they may nevertheless have legal significance for the interpretation of the Basic Law. Where constitutional law gives latitude for such interpretation, the Federal Constitutional Court, on the basis of the principle that the Basic Law is open to international law, attempts to avoid violations of the Convention (see BVerfGE 74, 358 <370>; 83, 119 <128>; 111, 307 <317>; 120, 180 <200-201>; Chamber Decisions of the Federal Constitutional Court (*Kammerentscheidungen des Bundesverfassungsgerichts* - BVerfGK) 3, 4 <7-8>; 9, 174 <190>; 10, 66 <77-78.>; 10, 234 <239>; 11, 153 <159 et seq.>). Against this background, decisions of the European Court of Human Rights may be equivalent to a legally relevant change. 82

C.

To the extent that they are admissible, the constitutional complaints are well-founded. 83

The provisions on which the challenged decisions are based are incompatible with Article 2.2 sentence 2, Article 104.1 sentence 1 and Article 2.2 sentence 2 in conjunction with Article 20.3 of the Basic Law (I.). The incompatibility with Article 2.2 sentence 2, 104.1 sentence 1 of the Basic Law is extended by § 78 sentence 2 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* - BVerfGG) to all the statutory provisions on the imposition and duration of preventive detention and corresponding subsequent provisions which are set out under number II.1. b) of the operative part of the judgment (II.). The provisions affected by incompatibility with the Basic Law will continue in force until the legislature reforms the law, and at the latest until 31 May 2013. Until then, however, they are to apply only in accordance with 84

number III of the operative part of the judgment (III.). The permissibly challenged decisions violate the rights of the first to fourth complainants under Article 2.2 sentence 2, Article 104.1 sentence 1 and Article 2.2 in conjunction with Article 20.3 of the Basic Law. They are therefore reversed and the matters are referred back for a new decision (§ 95.2 of the Federal Constitutional Court Act); insofar as the third complainant also challenges the temporary injunction committing him to preventive detention, which was terminated when the retrospective imposition of preventive detention became final and non-appealable, it is confirmed that fundamental rights were violated and the matter is referred back for a decision on the complainant's costs and necessary expenses (IV.).

I.

The indirectly challenged provisions on which the challenged decisions are based are incompatible with Article 2.2 sentence 2 in conjunction with Article 104.1 sentence 1 and Article 2.2 sentence 2 in conjunction with Article 20.3 of the Basic Law. 85

1. The fundamental rights in Article 2.2 sentence 2 in conjunction with Article 104.1 sentence 1 of the Basic Law and Article 2.2 sentence 2 in conjunction with Article 20.3 of the Basic Law which are relevant in the present case are to be interpreted in a manner that is open to international law. It is true that in national law the European Convention on Human Rights has the status of a Federal statute and is therefore subordinate to the Basic Law (a). However, it must be relied on as an interpretation aid in the interpretation of the fundamental rights and rule-of-law principles of the Basic Law (b). This also applies to the interpretation of the European Convention on Human Rights by the European Court of Human Rights (c). This constitutional significance of the European Convention on Human Rights and thus also of the case-law of the European Court of Human Rights is based on the openness of the Basic Law to international law and its substantive orientation towards human rights (d). However, relying on this as an aid to interpretation does not require the statements of the Basic Law to be schematically parallel to those of the European Convention on Human Rights; instead, there must be a reception of the provisions of the European Convention on Human Rights (e), where this is methodically justifiable and compatible with the terms of reference of the Basic Law (f). 86

a) In national law, the European Convention on Human Rights has the status of a Federal statute. The European Convention on Human Rights and its protocols are agreements under international law. The Convention leaves it to the States parties to decide in what way they comply with their duty to observe the provisions of the Convention (see BVerfGE 111, 307 <316> with further references). The Federal legislature consented to the above agreements in each case by passing a formal statute under Article 59.2 of the Basic Law (Act on the Convention for the Protection of Human Rights and Fundamental Freedoms (*Gesetz über die Konvention zum Schutze der Menschenrechte und Grundfreiheiten*) of 7 August 1952, Federal Law Gazette II p. 685; by the proclamation of 15 December 1953, Federal Law Gazette II 1954 p. 14, 87

the Convention entered into force for the Federal Republic of Germany on 3 September 1953; there was a new proclamation of the Convention as amended by the 11th protocol in the Federal Law Gazette II 2002 p. 1054). In doing this, the legislature made an order on the application of the law to this effect. Within the German legal system, the European Convention on Human Rights and its protocols – insofar as they have entered into force for the Federal Republic of Germany – have the status of a Federal statute (see BVerfGE 74, 358 <370>; 82, 106 <120>; 111, 307 <316-317>). A complainant may therefore not directly challenge the violation of a human right contained in the European Convention on Human Rights by a constitutional complaint to the Federal Constitutional Court (see BVerfGE 74, 102 <128> with further references; 111, 307 <317>; BVerfGK 3, 4 <8>).

b) Nevertheless, the guarantees of the European Convention on Human Rights have constitutional significance in that they influence the interpretation of the fundamental rights and rule-of-law principles of the Basic Law. According to the established case-law of the Federal Constitutional Court, the text of the Convention and the case-law of the European Court of Human Rights serve, on the level of constitutional law, as interpretation aids to determine the contents and scope of fundamental rights and of rule-of-law principles of the Basic Law, provided that this does not lead to a restriction or reduction – which the Convention itself does not intend (see Article 53 of the European Convention on Human Rights) – of protection of fundamental rights under the Basic Law (see BVerfGE 74, 358 <370>; 83, 119 <128>; 111, 307 <317>; 120, 180 <200-201>; BVerfGK 3, 4 <7-8>; 9, 174 <190-191>; 10, 66 <77-78>; 10, 234 <239>; 11, 153 <159 et seq.>; 12, 37 <40>; Federal Constitutional Court, Order of the Third Chamber of the Second Senate of 20 December 2000 – 2 BvR 591/00 –, *Neue Juristische Wochenschrift* 2001, pp. 2245 et seq.; Order of the Second Chamber of the First Senate of 21 November 2002 – 1 BvR 1965/02 –, *Neue Juristische Wochenschrift* 2003, p. 344 <345>; Order of the Third Chamber of the First Senate of 2 July 2008 – 1 BvR 3006/07 –, *Neue Juristische Wochenschrift* 2008, p. 2978 <2981>; Order of the Second Chamber of the First Senate of 18 December 2008 – 1 BvR 2604/06 –, *Neue Juristische Wochenschrift* 2009, pp. 1133-1134; Order of the Second Chamber of the Second Senate of 4 February 2010 – 2 BvR 2307/06 –, *Europäische Grundrechte-Zeitschrift* – EUGRZ 2010, p. 145 <147>). 88

c) When invoking the European Convention on Human Rights as an interpretation aid, the Federal Constitutional Court takes account of decisions of the European Court of Human Rights even if they do not relate to the same subject matter. This is based on the fact that the case-law of the European Court of Human Rights has at all events a de facto function of orientation and guidance for the interpretation of the European Convention on Human Rights, even beyond the specific individual case in a decision (for earlier decisions on the orientation effect of the case-law of the European Court of Human Rights see BVerfGE 111, 307 <320>; BVerfGK 10, 66 <77-78>; 10, 234 <239>; in each case with further references). The effects in national law of the decisions of the European Court of Human Rights are therefore not restricted to a 89

duty to take them into consideration, derived from Article 20.3 of the Basic Law in conjunction with Article 59.2 of the Basic Law and limited to the real-world fact situations on which the specific decisions are based, for against the background that the decisions of international courts have at least a de facto effect as precedents, the Basic Law is intended, where possible, to avoid conflicts between the obligations of the Federal Republic of Germany under international law and national law (see BVerfGE 109, 13 <23-24>; 109, 38 <50>; 111, 307 <318; 328>; 112, 1 <25>; 123, 267 <344 et seq., 347>; BVerfGK 9, 174 <193>). The openness to international law of the Basic Law is thus the expression of an understanding of sovereignty which is not only not in conflict with an integration into international and supranational contexts and their further development, but actively presumes and expects them. Against this background, even the “last word” of the German constitution is not opposed to an international and European dialogue of courts, but is the normative basis for this.

d) Invoking the European Convention on Human Rights and the case-law of the European Court of Human Rights as an interpretation aid on the level of constitutional law beyond the individual case serves to give the guarantees of the European Convention on Human Rights as extensive an application in the Federal Republic of Germany as possible, and in addition it may help to avoid the Federal Republic of Germany being held in violation. The substantive orientation of the Basic Law to human rights is expressed in particular in the German people's profession of inviolable and inalienable human rights in Article 1.2 of the Basic Law. In Article 1.2 of the Basic Law, the Basic Law accords particular protection to the central stock of human rights. This protection, in conjunction with Article 59.2 of the Basic Law, is the basis for the constitutional duty to invoke the European Convention on Human Rights in its specific manifestation as an interpretation aid even when applying German fundamental rights. Article 1.2 of the Basic Law is therefore admittedly not a gateway to give the European Convention on Human Rights direct constitutional status, but the provision is more than a non-binding programmatic statement, in that it specifies a maxim for the interpretation of the Basic Law and makes it clear that the fundamental rights are also to be understood as a manifestation of human rights and have incorporated the latter as a minimum standard (see BVerfGE 74, 358 <370>; 111, 307 <329>; Sommermann, *Archiv des öffentlichen Rechts* 114 <1989>, p. 391 <406-407>; Häberle, *Europäische Verfassungslehre*, 7th ed. 2011, p. 259; Dreier, *GG*, vol. 1, 2nd ed. 2004, *Art. 1 Abs. 2*, marginal no. 20; Herdegen, in: Maunz/Dürig, *GG*, *Art. 1 Abs. 2*, marginal no. 47 with further references (2004); Giegerich, in: Grote/Marauhn, *EMRK/GG, Konkordanzkommentar*, 2006, ch. 2, marginal nos. 67 et seq.; Grabenwarter, *Europäische Menschenrechtskonvention*, 4th ed. 2009, *§ 3*, marginal no. 6). 90

e) Invoking the European Convention on Human Rights as an interpretation aid for the provisions of the Basic Law is results-oriented, as is the European Convention on Human Rights itself with regard to its enforcement in national law. It does not aim at a schematic parallelisation of individual constitutional concepts, but serves to avoid violations of international law. It is true that the removal or avoidance of a violation of in- 91

ternational law will often be easier to achieve if national law is harmonised with the Convention. However, from the point of view of international law this is not imperative: the Convention leaves it to the States parties to decide in what way they comply with their duty to observe the provisions of the Convention (see BVerfGE 111, 307 <316> with further references and <322>; see also, on the principle that a State party which has been found in violation remains free in its choice of means to comply with its obligations under Article 46 of the European Convention on Human Rights: European Court of Human Rights (ECtHR), judgment of 13 July 2000, Application no. 39221/98 and no. 41963/98, *Scozzari and Giunta v. Italy*, marginal no. 249; Tomuschat, *German Law Journal*, Volume 5 (2011), p. 513 <517-518>).

Against this background something similar is true of an interpretation of the concepts of the Basic Law that is open to international law as of an interpretation based on a comparison of constitutions: similarities in the text of the norm may not be permitted to hide differences which follow from the context of the legal systems: the human rights content of the agreement under international law under consideration must be “reconceived” in an active process (of reception) in the context of the receiving constitutional system (see Häberle, *Europäische Verfassungslehre*, 7th ed. 2011, pp. 255-256; see also Dreier, *GG*, vol. 1, 2nd ed. 2004, *Art. 1 Abs. 2*, marginal no. 20). 92

f) Limits to an interpretation that is open to international law follow from the Basic Law. In the first instance, such an interpretation may not result in the protection of fundamental rights under the Basic Law being restricted; this is also excluded by the European Convention on Human Rights itself (see Article 53 of the European Convention on Human Rights, see BVerfGE 111, 307 <317> with further references). This obstacle to the reception of law may become relevant above all in multi-polar fundamental rights relationships in which the increase of liberty for one subject of a fundamental right at the same time means a decrease of liberty for the other (see Wahl/Masing, *Juristenzeitung* – JZ 1990, pp. 553 et seq.; Hoffmann-Riem, *Europäische Grundrechte-Zeitschrift* 2006, p. 492; Calliess, in: Merten/Papier, *HGR*, vol. II, 2006, *§ 44*, marginal nos. 18 et seq. with further references). The possibilities of interpretation in a manner open to the Convention end where it no longer appears justifiable according to the recognised methods of interpretation of statutes and of the constitution (see BVerfGE 111, 307 <329>; see also Bernhardt, in: *Festschrift für Helmut Steinberger*, 2002, p. 391 <397>; Müller/Christensen, *Juristische Methodik*, vol. II, 2nd ed. 2007, p. 148, marginal no. 184; on the absolute limit on the core content of the constitutional identity of the Basic Law under Article 79.3 of the Basic Law, see BVerfGE 123, 267 <344>; see also A. Peters, *Zeitschrift für öffentliches Recht* – ZÖR 65 (2010), p. 3 <59 et seq.>). 93

Furthermore, even where the Basic Law is interpreted in a manner open to the Convention – just as when the case-law of the European Court of Human Rights is taken into account on the level of ordinary law – the case-law of the European Court of Human Rights must be integrated as carefully as possible into the existing, dogmatically 94

differentiated national legal system (see BVerfGE 111, 307 <327>), and therefore an unreflected adaptation of international-law concepts must be ruled out. With regard to the Basic Law – especially if a concept of the European Court of Human Rights which has developed autonomously differs in textually similar guarantees from the corresponding Basic Law concept – the principle of proportionality, a principle inherent to the Basic Law, is particularly relevant in taking account of assessments of the European Court of Human Rights: against this background, “invoking external texts as an interpretation aid” may mean also including the aspects considered by the European Court of Human Rights in its weighing of interests in the constitutional review of proportionality (see BVerfGE 111, 307 <324>; BVerfGK 3, 4 <8 et seq.>).

2. Taking these criteria into account, § 66b.2, § 67d.3 sentence 1 of the Criminal Code and § 7.2 of the Juvenile Court Act are incompatible with Article 2.2 sentence 2 and Article 104.1 sentence 1 of the Basic Law. 95

It is true that the provisions do not encroach upon the essence of this fundamental right (see BVerfGE 109, 133 <156>). However, they do not comply with the principle of proportionality. Preventive detention constitutes a serious encroachment upon the right to liberty, and this can only be justified in compliance with a strict review of proportionality and if the decisions on which it is based and the organisation of its execution satisfy strict requirements (a). The existing provisions on preventive detention do not structurally guarantee that the (minimum) constitutional requirements of the design of the execution of preventive detention are satisfied (b). 96

a) Preventive detention constitutes a serious encroachment upon the right to liberty, and this can only be justified in compliance with a strict review of proportionality and if the decisions on which it is based and the organisation of its execution satisfy strict requirements. 97

aa) Personal liberty – as the basis of and requirement for the citizen's possibilities of development – has a high status among the fundamental rights. This is shown in the fact that Article 2.2 sentence 2 of the Basic Law describes it as “inviolable”, Article 104.1 sentence 1 of the Basic Law permits it to be restricted only by a formal statute and Article 104.2 to 104.4 of the Basic Law lays down particular procedural guarantees (see BVerfGE 35, 185 <190>; 109, 133 <157>). Preventive encroachments upon the fundamental right to liberty which – like preventive detention – do not serve as compensation for wrongdoing are permissible only if the protection of legal interests of high value requires this under strict compliance with the principle of proportionality. The personal liberty rights of the detainee must be set against the public's right to safety; both must be weighed in the individual case (see BVerfGE 109, 133 <157>). In this connection, the limits of reasonableness must be observed; the fundamental right to liberty of the person affected must be ensured in both procedural and substantive law (BVerfGE 70, 297 <311>; 109, 133 <159>). In this respect, the Senate follows the constitutional requirements of preventive detention within the meaning of §§ 66 et seq. of the Criminal Code, as set out in the judgment of 5 February (BVerfGE 98

109, 133 <157 et seq.>).

bb) The procedural and substantive requirements of the principle of proportionality (see BVerfGE 109, 133 <157 et seq.>) apply in the same way to preventive detention in the criminal law relating to juvenile offenders under § 7.2 of the Juvenile Court Act. In this regard too, the prognosis on the basis of which preventive detention is ordered holds uncertainties which remove neither the suitability nor the necessity of the encroachment upon liberty, but which have effects on the minimum requirements placed on prognosis reports and on their evaluation in connection with the prohibition of disproportionate measures (see BVerfGE 109, 133 <158 et seq.; 164 et seq.>). As the oral hearing showed, in determining the usefulness of prognoses of dangerousness for juveniles and young adults it is impossible to determine a definite age limit below which a prognostic decision could be ruled out from the outset. Instead, the usefulness of a prognosis – which the court must make independently on the basis of a medical report which shows special expertise with regard to the youth of the person involved (see BVerfGE 109, 133 <164>) – depends on the individual development of the person in question, to which particular attention must be paid. Despite the particular difficulties entailed, therefore, it is in principle possible to prepare prognoses of dangerousness which constitute a useful basis for the decision on the (retrospective) imposition of preventive detention for juvenile and young adult offenders too, taking account of their development potential; in particular, specific mental disorders can be diagnosed at a relatively young age. Thus in the oral hearing, the expert Prof. Dr. Dittmann set out that in particular serious sexual deviances can be diagnosed even at a comparatively young age. 99

cc) In addition, the principles of Article 7.1 of the European Convention on Human Rights call for the constitutional requirements of the design of a preventive deprivation of liberty independent of criminal liability which is qualitatively different from a “punishment” to be defined more precisely (known as the distance requirement). 100

In its judgment of 5 February 2004, the Senate stated that it is not the criminal liability but the dangerousness revealed in the offence that determines the imposition, duration and above all the design of the measure of preventive detention (BVerfGE 109, 133 <174>). The originating offence is merely the point of contact for the characteristic of “dangerousness” within the meaning of the requirements for the imposition of preventive detention, not their basis. Under the scheme on which the two-track sanctions system of the Criminal Code is based, the deprivation of liberty of the detainee in preventive detention does not serve retribution for past violations of legal interests, but the prevention of future offences, which may be seen as likely to occur, but which cannot generally be predicted with certainty. The encroachment upon the fundamental right to liberty constituted by preventive detention is therefore extremely serious in part because it has exclusively preventive purposes and, in the interest of the general public, as it were imposes a special sacrifice on the person affected – since deprivation of liberty is always based only on a prognosis of dangerousness, but not on the evidence of past offences. Therefore, preventive detention is only justifiable at all if 101

the legislature, in designing it, takes due account of the special character of the encroachment that it constitutes and ensures that further burdens beyond the indispensable deprivation of “external” liberty are avoided. This must be taken account of by a liberty-oriented execution aimed at therapy which makes the purely preventive character of the measure plain both to the detainee under preventive detention and to the general public. The deprivation of liberty must be designed in such a way – at a marked distance from the execution of a custodial sentence (“distance requirement”, see BVerfGE 109, 133 <166>) – that the prospect of regaining freedom visibly determines the practice of confinement. What is required for this is a freedom-oriented overall concept of preventive detention with a clear therapeutic orientation towards the objective of minimising the danger emanating from the detainee and of thus reducing the duration of deprivation of liberty to what is absolutely necessary.

Under Article 7.1 of the European Convention on Human Rights, 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”. On the basis of the judgment of the Chamber of the Fifth Section of the European Court of Human Rights of 17 December 2009 (Application no. 19359/04, *M. v. Germany*), the subsequent extension of the earlier ten-year maximum period of § 67d.3 sentence 1 of the Criminal Code violates Article 7.1 of the European Convention on Human Rights because preventive detention is a penalty within the meaning of Article 7 of the European Convention on Human Rights (European Court of Human Rights, loc. cit., marginal no. 133), and therefore the retrospective extension is also the imposition of an additional “penalty” which was imposed retrospectively on the detainee under a statute that only entered into force after he had committed his offence (European Court of Human Rights, loc. cit., marginal no. 135). To justify the finding that preventive detention has the character of a penalty, the Chamber of the Fifth Section of the European Court of Human Rights refers *inter alia* to the fact that preventive detention, like a custodial sentence, results in deprivation of liberty and is executed in regular prisons. In addition, with regard to the de facto situation of the detainee under preventive detention the Chamber states that it is not apparent that preventive detention has merely a preventive function and serves no punitive purpose. It is established in particular that apparently there are no particular measures, instruments or facilities aimed at detainees in preventive detention which have the purpose of making them less dangerous and thus restricting their confinement to the period absolutely necessary to deter them from committing further offences. The Chamber also refers to further criteria, for example the procedure for imposing confinement and the severity of the measure, although this severity, it holds, is not the sole deciding factor (European Court of Human Rights, loc. cit., marginal nos. 127 et seq.). This assessment influences not only the interpretation of the requirement of the protection of legitimate expectations (on this, see (3) below) but also the general constitutional requirements placed on the proportionality of a deprivation of liberty by preventive detention. 102

dd) The distance requirement is based on the different constitutional objectives and bases of legitimation of prison sentences and preventive detention: 103

(1) Prison sentences and preventive detention are fundamentally different in their constitutional legitimation. The authorisation for the state to impose and execute prison sentences is essentially based on the culpable commission of the criminal offence. The offender may only be sentenced to imprisonment and subjected to its execution for the culpable commission of a wrong. This is based on the Basic Law's image of humanity, which is of a person capable of free self-determination; consideration is to be given to this image in the principle of blameworthiness rooted in human dignity (see BVerfGE 123, 267 <413>). In its function of controlling the determination of penalties, the principle of blameworthiness restricts the duration of imprisonment to what is appropriate to the blameworthiness of the offence. Blameworthiness is one of the legitimating factors and the extreme limit of the imposition and execution of prison sentences. The authorisation to impose and to execute custodial measures such as preventive detention, on the other hand, follows from the principle of predominant interest (see Radtke, in: *Münchener Kommentar zum StGB*, vol. 1, 1st ed. 2003, *Vor §§ 38 ff.*, marginal no. 68). The imposition and execution of preventive detention are only legitimate if the general public's interest in safety outweighs the right to liberty of the person involved in the individual case (see BVerfGE 109, 133 <159>). 104

(2) The purpose of imprisonment, therefore, is primarily repressively to impose harm as a reaction to blameworthy conduct, with the objective – in addition to other conceivable additional punitive purposes, which are not ruled out by the constitution – of compensating for wrongdoing (BVerfGE 109, 133 <173>). In contrast, the purpose of preventive detention is solely the future protection of society and its members against individual offenders who on the basis of their previous conduct are assessed as highly dangerous. 105

(3) The categorically different objectives and bases of legitimation of the execution of imprisonment and the execution of preventive detention result in particular in differentiations on two levels: 106

Since detention under measures of correction and prevention is justified solely on the principle of predominant interest, it must immediately be terminated if the interests of protection of the general public no longer outweigh the detainee’s right to liberty. In this connection, the state has the duty to provide suitable concepts in the execution of preventive detention from the outset to remove the dangerousness of the detainee if possible. 107

The modalities of execution must also be oriented to the guideline that life in preventive detention may be subject only to such restrictions as are necessary to reduce dangerousness. The precept of resocialisation, which is based on the Basic Law's image of a person capable of free self-determination (BVerfGE 98, 169 <200>), applies equally to the execution of a prison sentence and to the execution of preventive de- 108

tention (BVerfGE 109, 133 <151>). This may impose certain de facto limits on the details of the distance requirement, but it does not alter the fact that imprisonment and preventive detention have different objectives. The whole system of preventive detention must be designed in such a way that the practice of confinement is clearly determined by the prospect of regaining liberty.

(4) A liberty-oriented compliance with the distance requirement also takes account of the assessments made by the case-law of the European Court of Human Rights on Article 7.1 of the European Convention on Human Rights. In this connection, the Court has pointed out that in view of the indeterminate length of preventive detention particular exertions are necessary to support the detainees, who are generally not in a position to achieve progress towards release by their own efforts. The Court stated the need for a high degree of support by a multidisciplinary team and intensive and individual work with the detainees on the basis of individual plans which must be prepared without delay. This must take place within a coherent framework which facilitates progress towards release, and release should be a realistic possibility (European Court of Human Rights, judgment of 17 December 2009, Application no. 19359/04, *M. v. Germany*, marginal no. 129). 109

(5) The constitutional distance requirement is binding on all powers of the state and is directed initially to the legislature, which has a duty to develop an overall concept of preventive detention in line with this requirement and to lay it down in law (on the requirements of a statutory resocialisation concept for imprisonment, see BVerfGE 98, 169 <201>; 116, 69 <89>). In this connection, the legislature is not constitutionally bound to follow a particular legislative concept; instead, it has legislative discretion, which it must exercise by using all the knowledge at its disposal (see Federal Constitutional Court, loc. cit.). The central importance of this concept for the realisation of the detainee's fundamental right to liberty, however, requires the legislation to have a regulatory density which leaves no significant questions to be decided by the executive or the judiciary, but instead effectively governs their actions in all material areas (see BVerfGE 83, 130 <142>). 110

ee) The legislative concept to be fleshed out by the legislature must therefore be structured comprehensively as a total concept and must cover at least the following aspects: 111

(1) Preventive detention may be imposed only as a last resort, if other, less burdensome means are insufficient to take account of the general public's safety interest. This principle of the imposition of preventive detention as a last resort leads to the consideration that its execution must satisfy this principle too. If preventive detention comes into consideration, then during the execution of the custodial sentence all possibilities must already be exhausted to reduce the dangerousness of the detainee. In particular it must be guaranteed that any necessary psychiatric, psychotherapeutic or socio-therapeutic treatments, which often last for several years even if they are successful, begin at an early date, are carried out with the necessary high intensity, and 112

are if possible completed before the end of punishment (last resort principle).

(2) At the beginning of the execution of preventive detention at the latest, there must without delay be a comprehensive examination of treatment possibilities which satisfies state-of-the-art scientific requirements. This must analyse in detail the individual factors which determine the dangerousness of the detainee. On this basis, an execution plan is to be drawn up showing in detail whether and if so what measures are capable of minimising risk factors, or of compensating them by reinforcing antirecidivist factors, in order to reduce the detainee's dangerousness, as a result to enable progress towards release and to give the detainee a realistic prospect of regaining liberty. Consideration should be given to any measures of vocational training and advanced training, psychiatric, psychotherapeutic or socio-therapeutic treatment and measures for the organisation of the detainee's financial and family circumstances and for the preparation of a suitable social environment after detention. The execution plan must be continuously updated and adapted to the detainee's development. The measures required under the plan are to be promptly and systematically implemented. For this purpose, the detainee must be individually and intensively supported by a multidisciplinary team of qualified personnel (thus held also by the European Court of Human Rights, judgment of 17 December 2009, Application no. 19359/04, *M. v. Germany*, marginal no. 129). In particular in the therapeutic area, all possibilities must be exhausted. If standardised therapy methods are found to be unpromising, an individually tailored therapy programme must be developed. In this connection – especially as the duration of the execution increases – it must be ensured that possible therapies are not dispensed with merely because they entail more effort and expense than the institutions' standardised programme (requirement of individualisation and intensification). 113

(3) The indeterminate length of preventive detention may have serious mental effects, demotivate the detainee and make the detainee lethargic and passive. This must in the first instance be prevented by offering a range of treatment and support which, as far as possible, gives a realistic prospect of release (thus held also by the European Court of Human Rights, loc. cit., marginal no. 77 and marginal no. 129). In addition, the detainee must be encouraged and assisted to cooperate in treatment by targeted motivational work. A possible supporting element could be a system of incentives which rewards active cooperation with particular privileges or liberties or removes these in order to achieve motivation and cooperation (requirement of motivation). 114

(4) The design of the objective parameters of confinement must take account of the special anti-recidivist character of preventive detention and must show a clear distance from regular imprisonment. Life in detention under measures of correction and prevention must be adapted to general living conditions, provided security concerns do not prevent this. Admittedly, this requires detainees to be accommodated separately from the prison regime in special buildings or wards, but not a complete spatial detachment from the execution of custodial sentences (requirement of separation). 115

As the expert Mr. Rösch explained in the oral hearing, it may be advisable for these to be connected to large institutions, in order to make use of their infrastructure and safety management and to guarantee a varied range of work and leisure opportunities which takes account of the detainees' individual abilities and inclinations. The circumstances inside the facility must satisfy the therapeutic requirements and offer sufficient possibilities for visits in order to maintain family and social contacts. It must also be ensured that sufficient personnel are available to satisfy in practice the demands of a liberty-oriented overall concept of preventive detention that is aimed at therapy.

(5) Relaxations of execution on a trial basis are particularly important for the prognosis, because they broaden and stabilise its basis; they may prepare for a termination of preventive detention. The preventive detention scheme must provide for relaxations of execution and contain requirements to prepare for release; account should be taken as extensively as possible of an orientation to liberty. Thus it must be ensured that relaxations of execution may not be refused without a compelling reason – for example on the basis of indiscriminate assessments or with reference to a danger of flight or abuse that is merely abstract (see BVerfGE 109, 133 <166>; 117, 71 <108>). If unsupervised relaxations such as work release, short leave or leave are nevertheless impossible, escorted leave must be granted; this may only be refused if despite the supervision of the detainee it leads to dangers which it would plainly be irresponsible to risk. To ensure that decisions on the relaxation of execution are made on the basis of objective, realistic risk assessments and to forestall the danger of over-cautious or prejudiced evaluations, the establishment of independent bodies of experts with experience of execution may, for example, be valuable; these can provide advice and make recommendations – possibly modelled on the Swiss expert commissions for the review of the public danger of offenders (see Article 62d.2, Article 64b.2, Article 75a of the Swiss Criminal Code (*Strafgesetzbuch*)). The preparation for release must be interlinked with systematic assistance for the post-release phase. In particular, a sufficient variety of institutions (forensic outpatient clinics, institutions for assisted living and so on) must be guaranteed which take in detainees after release, and ensure the necessary care and thus a suitable social environment after detention (minimisation requirement). 116

(6) Furthermore, the detainee must be granted an effectively enforceable legal claim to the measures necessary to reduce the detainee's dangerousness being implemented. The detainee must be offered a suitable legal advisor or other assistance to give support in exercising rights and interests (requirement of legal protection and assistance). 117

(7) It must be guaranteed under procedural law that the continuance of preventive detention is judicially reviewed at least once a year. The execution authority must provide the competent chamber for the execution of sentences with a regular status report. If there are indications that the preventive detention is ready to be terminated, then ex officio a special review must be carried out without delay (requirement of 118

monitoring). The stricter supervision by the courts takes account of the purely preventive nature of the measure. It must be intensified as the execution proceeds. This applies both to the length of the intervals between the judicial reviews and also to the ex officio necessary monitoring of the executing authorities and the qualitative criteria for establishing the facts with regard to the substantiation of their content (see BVerfGE 109, 133 <162>).

b) The present provisions on preventive detention do not satisfy these requirements. 119

Since 1998, the legislature, in the Act on the Introduction of Reserved Preventive Detention of 21 August 2002 (Federal Law Gazette, BGBl I p. 3344), the Act on the Amendment of the Provisions on Criminal Offences Against Sexual Self-Determination and on the Amendment of Other Provisions of 27 December 2003 (BGBl I p. 3007), the Act to Introduce Retrospective Preventive Detention of 23 July 2004 (BGBl I p. 1838), the Act on the Reform of Supervision of Conduct and to Amend the Provisions on Retrospective Preventive Detention of 13 April 2007 (BGBl I p. 513) and the Act to Introduce Retrospective Preventive Detention on Convictions under the Criminal Law Relating to Juvenile Offenders of 8 July 2008 (BGBl I p. 1212), has increasingly expanded preventive detention, but without – contrary to the instructions of the Senate in its judgment of 5 February 2004 (BVerfGE 109, 133 <166-167>) – developing a liberty-oriented overall concept for preventive detention aimed at therapy that would do justice to the distance requirement. The Act to Reform the Law of Preventive Detention and on Accompanying Provisions of 22 December 2010 (BGBl I p. 2300) begins to revise this development in § 2 of the Therapeutic Committal Act. But the old legal position continues to apply if the originating offence in question was committed before 1 January 2011 (Article 316e.1 of the Introductory Act to the Criminal Code). 120

aa) Following the end of the Federal legislature's concurrent legislative competence on imprisonment in the federalism reform in the year 2006 (Article 1 no. 7 a of the Act Amending the Basic Law (*Gesetz zur Änderung des Grundgesetzes*) of 28 August 2006, BGBl I p. 2034), the Federal Prison Act (*Strafvollzugsgesetz,* StVollzG) still applies in most *Länder* under Article 125a.1 of the Basic Law; just like the prison Acts (*Strafvollzugsgesetze*) of the *Länder* Bavaria, Hamburg and Hesse, the Baden-Württemberg Prison Code (*Justizvollzugsgesetzbuch*) and the Lower Saxony Prison Act (*Justizvollzugsgesetz*), the Federal Prison Act contains only rudimentary provisions on the execution of preventive detention, relating to marginal areas such as the furnishing of the cells, clothing and pocket money, and apart from this lays down that the provisions on the execution of custodial sentences are to apply with the necessary alterations (§§ 129 et seq. of the Federal Prison Act). These provisions are unsuitable to satisfy the criteria of the constitutional distance requirement. Essentially, they provide excessively broad scope for assessment and discretion in fundamental core areas – with regard to treatment, care and motivation of the detainee and granting of relaxations of execution – without effectively obliging the prisons by clear legislative conditions to pursue a liberty-oriented execution of preventive detention 121

aimed at therapy. With regard to the preceding execution of a custodial sentence, there are no provisions to avoid preventive detention. Above all, removing the detainee to a socio-therapeutic institution is mandatorily laid down only in the case of specific sexual offences (§ 9.1 of the Federal Prison Act); apart from this – even where preventive detention is imposed – it is at the discretion of the prison and also requires the consent of the head of the socio-therapeutic institution (§ 9.2 of the Federal Prison Act). Neither a spatial separation of confinement in preventive detention from imprisonment nor the appointment of a legal adviser is laid down. In addition there are other normative shortcomings. The overall normative concept must contain qualitative standards for the personnel and the material equipment for the execution of preventive detention; these standards must be respected by the *Land* legislature in the budget and do not leave any substantial room for interpretation to the executive. In addition, the statutory maximum period for the review of preventive detention – apart from preventive detention in convictions under the criminal law relating to juvenile offenders, for which annual reviews are provided as the standard (§ 7.4 of the Juvenile Court Act) – in § 67e.2 of the Criminal Code, which is two years, is too long.

bb) The shortcomings of the legislation are another reason why the actual execution of preventive detention takes insufficient account of the requirements following from the distance requirement, as recent scientific findings show and as the hearing of the experts Mr. Rösch and Prof. Dr. Dessecker in the oral hearing confirmed. There are shortcomings not only during preventive detention as such. Even in the custodial sentence which precedes preventive detention there are considerable defects which have effects on the execution and duration of preventive detention and thus on the chance of regaining liberty. In addition, in many places there is neither adequate preparation for release nor creation of a suitable social environment to receive the detainee after release. 122

The psychological or psychiatric support of the detainees is inadequate in practice. According to studies, an average of only approximately 30% of detainees in preventive detention receive therapy, although the proportion of detainees with characteristics which appear to need treatment is markedly higher, at 79.3% (see Bartsch, *Sicherungsverwahrung*, 2010, p. 228; Habermeyer, *Die Maßregel der Sicherungsverwahrung*, 2008, p. 54). The cause of this may only to a limited extent be attributed to the sphere of the persons affected. The small number of detainees under preventive detention who are in therapeutic treatment is also specifically attributable to insufficient staff and equipment of the institutions. In this connection it should be taken into account that successful liberty-oriented therapeutic treatment will generally require a greater number of personnel, for example also to motivate those unwilling to undergo therapy (Bartsch, loc. cit., pp. 228 et seq.). 123

Although prison service practitioners see great potential in the therapy possibilities of socio-therapeutic institutions to give detainees under preventive detention the opportunity to regain their freedom and to prevent life detention, there are considerable problems in accommodating these detainees in socio-therapeutic institutions. One 124

reason for this is that the socio-therapeutic institutions often do not have enough places for preventive detention detainees. At the same time, in many places socio-therapeutic institutions are extremely unwilling to take in such detainees (Bartsch, loc. cit., pp. 232 et seq.). This is particularly clearly shown by the small number of persons affected who are in a socio-therapeutic institution: in March 2010, of a total of 536 persons who were ordered to be placed in preventive detention, only 83 were in social therapy (Niemz, Kriminologische Zentralstelle e.V., *Sozialtherapie im Strafvollzug*, 2010, p. 13). In addition, joint socio-therapeutic treatment of detainees in preventive detention and prisoners is often not tailored to the special needs of the former and therefore frequently results in undesirable developments (Bartsch, loc. cit., pp. 232 et seq.).

125 What is more, during the period of imprisonment of those who were given an order of subsequent preventive detention when they were convicted there is insufficient work towards a suspension of the detention on probation. § 67c.1 of the Criminal Code provides that if a measure of correction and prevention begins after a custodial sentence is served, there must be a new review as to whether the purpose of the measure still requires detention; but despite this, the period of the custodial sentence often passes without being put to use for prisoners with subsequent preventive detention. Thus, for example, the persons affected are on the one hand generally not permitted relaxations of execution such as short leave and leave or detention in an open institution. At the same time, the prisoners whose custodial sentences are followed by preventive detention are often not given access to the necessary therapy, or only given access in a secondary capacity, by the institutions (Bartsch, loc. cit., pp. 245 et seq.). But early commencement of therapy – during the custodial sentence – is the crucial deciding factor to avoid subsequent preventive detention or at least to make it as short as possible.

126 In addition, the possibility of granting relaxations of execution is used only extremely restrictively, although these relaxations serve particularly to prepare the detainee for release and are in addition of special importance with regard to the prognosis of the detainee's dangerousness (see BVerfGE 109, 133 <165-166> with further references). Above all, only in the rarest cases are unescorted measures such as short leave, work release and leave granted (Bartsch, loc. cit., pp. 220 et seq.).

127 Finally, another obstacle to the release of the detainee under preventive detention is the frequent lack of structured cooperation between the institutions and institutions of post-detention care, and the failure to create a secured social environment to receive the detainee after release from preventive detention. Thus, for example, there is a particular lack of places in facilities for assisted living which are able to accept the detainee after release (Bartsch, loc. cit., pp. 242 et seq.). In addition, there are problems in the transition of treatment from detention to later outpatient therapies. As the oral hearing showed, therefore, there is a particular need for the creation of networks and suitable organisational structures in order to ensure consistent post-detention care of the detainee released after preventive detention.

cc) The lack of an overall statutory concept of preventive detention satisfying the constitutional distance requirement means that the indirectly challenged provisions are unconstitutional. The legislature may constitutionally draft provisions on the imposition and duration of this measure only as integral parts of a liberty-oriented overall concept aimed at therapy. In particular, justice is not done to the high status of the right to liberty if the imposition of preventive detention is granted in isolation, although the constitutional requirements of the design of this measure are not structurally guaranteed because of normative shortcomings. The persons affected are as it were subjected to an unconstitutional deprivation of liberty in full awareness of the situation. 128

From the perspective of the protection of liberty, it is irrelevant in this connection that since the federalism reform in the year 2006 the Federal legislature has no longer been competent to legislate on imprisonment. If, under its legislative competence for criminal law under Article 74.1 no. 1 of the Basic Law, it decides in favour of a two-track system of sanctions and the use of such a drastic custodial measure as preventive detention, it must itself legislate on the essential guidelines of the liberty-oriented overall concept aimed at therapy which is constitutionally required to be the basis of this detention and ensure that this conceptual orientation of preventive detention cannot be undermined by provisions of *Land* law. 129

The Federal and *Land* legislatures have a joint duty to create a legislative concept which satisfies the requirements set out above. It is their task, taking account of the constitutional system of competences, to develop a liberty-oriented overall concept of preventive detention aimed at therapy. In this process, the Federal legislature, in view of its concurrent legislative competence for criminal law under § 74.1 no. 1 of the Basic Law, is restricted to laying down the essential guidelines – but, if it in principle wishes to retain the institution of preventive detention, it is at the same time obliged to do so. Requirements of this nature are found, for example, in § 2 of the Therapeutic Committal Act. In addition, the Federal legislature is competent for the provisions on judicial review of the continuance of preventive detention and for procedural provisions. The *Land* legislatures, in turn, must in the exercise of their legislative competence draft provisions for the execution of preventive detention which ensure compliance with the distance requirement and are effective, and which guarantee liberty-oriented execution aimed at therapy. Here, it is necessary above all to ensure that the requirements set out above cannot be circumvented in practice as a result of granting too much latitude, and that the distance requirement thus de facto comes to nothing. Without complying with the distance requirement, the institution of preventive detention is incompatible with the fundamental right to liberty of detainees under preventive detention. 130

3. § 67d.3 sentence 1 in conjunction with § 2.6 of the Criminal Code – where it authorises the continuance of preventive detention beyond a period of ten years even in the case of detainees whose originating criminal offences were committed before Article 1 of the Act to Combat Sexual Offences and Other Dangerous Criminal Offences of 26 January 1998 (Federal Law Gazette I p. 160) entered into force – and § 66b.2 of 131

the Criminal Code and § 7.2 of the Juvenile Court Act are in addition also incompatible with Article 2.2 sentence 2 in conjunction with Article 20.3 of the Basic Law.

The provisions on review entail an encroachment upon the reliance of the persons concerned that preventive detention will end after a period of ten years (§ 67d.3 of the Criminal Code) or upon the reliance that no preventive detention will be imposed (§ 66b of the Criminal Code; § 7.2 of the Juvenile Court Act); in view of the associated encroachment upon the right to liberty of this group of persons (Article 2.2 sentence 2 of the Basic Law), this is constitutionally permitted only in compliance with a strict review of proportionality and to protect the highest constitutional interests (a). The weight of the affected concerns regarding the protection of legitimate expectations is also reinforced by the principles of the European Convention on Human Rights (b) with the result that a deprivation of liberty which is ordered or prolonged retrospectively can only be regarded as permissible if the required distance from punishment is preserved, if a high risk of the most serious offences of violence or sexual offences can be inferred from specific circumstances in the person or conduct of the detainee and if the requirements of Article 5.1 sentence 2 of the European Convention on Human Rights are satisfied (c). 132

a) The provisions constitute an encroachment upon the reliance of the persons affected; in view of the associated encroachment upon the fundamental right to liberty (Article 2.2 sentence 2 of the Basic Law), this is constitutionally permissible only in compliance with a strict review of proportionality and to protect the highest legal interests. 133

Each of the provisions constitutes a considerable encroachment on the fundamental right to liberty on Article 2.2 sentence 2 of the Basic Law, which for a particular group of persons – which also includes the first to fourth complainants – is additionally aggravated in that preventive detention, contrary to the earlier legal position which applied at the date of the originating offences, can retrospectively be extended beyond a period of ten years without a time-limit (thus in the configuration of § 67d.3 sentence 1 of the Criminal Code in conjunction with § 2.6 of the Criminal Code), or in that an order of preventive detention may retrospectively be imposed on them even though the judgment of the trial court did not do so and did not reserve the power to do so (thus in the configuration of § 66b.2 of the Criminal Code and § 7.2 of the Juvenile Court Act). This constitutes an encroachment upon the reliance of the subjects of fundamental rights whose right to liberty is affected, irrespective of whether there is assumed to be “genuine” or “false” retroactive effect or a retroactive effect of legal consequences or a retroactive criminalisation of earlier acts (*tatbestandliche Rückanknüpfung*) (for an earlier decision on this, with regard to § 67d.3 sentence 1 in conjunction with Article 1a.3 of the Introductory Act to the Criminal Code old, see BVerfGE 109, 133 <182-183>). 134

Subject to the requirement of the protection of legitimate expectations – which takes effect in connection with the matters guaranteed by the fundamental right under Arti- 135

cle 2.2 sentence 2 of the Basic Law, whose area of protection is affected (see BVerfGE 72, 200 <242>) – the limits of legislative competence follow from weighing the concerns of the protection of legitimate expectations affected and the importance of the legislative concern for the public interest (see BVerfGE 14, 288 <300>; 25, 142 <154>; 43, 242 <286>; 43, 291 <391>; 75, 246 <280>; 109, 133 <182>). Here, the importance of the concerns of the protection of legitimate expectations increases depending on the severity of the encroachment upon the objectively affected fundamental right (for an earlier decision, see BVerfGE 109, 133 <186-187>).

On this basis, a particularly great weight may be attributed to the concerns of the protection of legitimate expectations, for the provisions in question, in that they authorise the imposition or extension of an indeterminate deprivation of liberty by preventive detention, contain a serious – and possibly the most serious conceivable – encroachment upon the objectively affected fundamental right to liberty (Article 2.2 sentence 2 of the Basic Law) and thus upon a right which already in itself has particular weight among the rights guaranteed as fundamental rights (see BVerfGE 65, 317 <322>). The encroachment made by preventive detention upon the fundamental right under Article 2.2 sentence 2, Article 104.1 sentence 1 of the Basic Law, even if the distance requirement is complied with, is comparable to a custodial sentence with regard to the permanent deprivation of external liberty which is unavoidably entailed by preventive detention. As a result, the detainee's expectation of regaining freedom at a particular point in time acquires particular significance (for an early decision, see BVerfGE 109, 133 <185>). 136

b) The weight of the affected concerns regarding the protection of legitimate expectations is also reinforced by the principles of the European Convention on Human Rights. 137

In this respect it should be taken into account that the violation of the distance requirement (see 2 above), according to the principles of Article 7.1 of the European Convention on Human Rights, gives the reliance of the persons involved a weight approaching that of an absolute protection of legitimate expectations (aa). It must in addition be taken into account that under Article 5 of the European Convention on Human Rights the deprivation of liberty in the cases under discussion here of § 67d.3 in conjunction with § 2.6 of the Criminal Code and of § 66b.2 of the Criminal Code and of § 7.2 of the Juvenile Court Act may be justified only subject to the requirements of Article 5.1 sentence 2 (e) of the European Convention on Human Rights (bb). 138

aa) According to the principles of Article 7.1 of the European Convention on Human Rights, the result of the insufficient distance of the execution of preventive detention from that of prison sentences is that the weight of the reliance of the persons affected approaches an absolute protection of legitimate expectations. 139

(1) On the basis of the judgment of the Chamber of the Fifth Section of the European Court of Human Rights of 17 December 2009 (Application no. 19359/04, *M. v. Germany*) the retrospective extension of the earlier ten-year maximum period of § 67d.3 140

sentence 1 of the Criminal Code violates Article 7.1 of the European Convention on Human Rights because preventive detention is a penalty within the meaning of Article 7 of the European Convention on Human Rights (European Court of Human Rights, loc. cit., marginal no. 133); see 2. a) cc) above). The constitutional classification of preventive detention is based *inter alia* on the fact that, like a custodial sentence, it results in deprivation of liberty and is served in regular prisons. In addition, according to the Chamber of the Fifth Section of the European Court of Human Rights, with regard to the de facto situation of the detainee under preventive detention it is not apparent that preventive detention has merely a preventive function and serves no punitive purpose. In this regard, the Chamber points out that there are no particular measures, instruments or facilities aimed at detainees in preventive detention which have the purpose of making them less dangerous and thus restricting their confinement to the period absolutely necessary to deter them from committing further offences. The Chamber also refers to further criteria, for example the procedure for imposing detention and the severity of the measure, although this severity, it holds, is not the sole deciding factor (European Court of Human Rights, loc. cit., marginal nos. 127 et seq.).

(2) This interpretation of Article 7.1 of the European Convention on Human Rights 141
suggests that the distance requirement should be given even clearer contours, but it does not create an obligation to completely adapt the interpretation of Article 103.2 of the Basic Law to that of Article 7.1 of the European Convention on Human Rights. As long ago as 2004, the Federal Constitutional Court, in its decision of 4 February 2004, discussed the aspect of the de facto effect of a measure of correction and prevention; although it did not find this to be conceptually relevant for the element of punishment in Article 103.2 of the Basic Law, it did find a possibility of taking it into account in connection with Article 2.2 sentence 2 in conjunction with Article 20.3 of the Basic Law (see BVerfGE 109, 133 <185>). This also applies to the aspect of the severity of the measure – in the present case an indeterminate deprivation of liberty –; although it is not a suitable element to define the concept of punishment within the meaning of Article 103 of the Basic Law (see BVerfGE 109, 133 <175>), in the review of the fundamental right to liberty the Federal Constitutional Court has nevertheless consistently held that it is an element that should be taken into account (see BVerfGE 109, 133 <160-161>; 70, 297 <314-315>). It is true that similarities in this respect do not justify subsuming preventive detention to the concept of punishment within the meaning of Article 103 of the Basic Law (BVerfGE 109, 133 <176>). However, according to the Senate's case-law, even the Basic Law itself, in connection with a review of a violation of Article 2.2 in conjunction with Article 20.3 of the Basic Law in the case of measures of correction and prevention lasting many years and involving deprivation of liberty, contains the requirement to take into account whether or that “the detainee is likely to experience preventive detention [...] as comparable to punishment, *inter alia* with regard to its actual execution” (see BVerfGE 109, 133 <185>). In this connection, the requirement of the protection of legitimate expectations is closely related and structurally similar to the “nulla poena” principle (see BVerfGE 109, 133 <171-172>).

There is therefore no occasion to adapt the constitutional concept of punishment in Article 103.2 of the Basic Law – and thus at the same time that of Article 103.3 of the Basic Law – to the concept of punishment of Article 7.1 of the European Convention on Human Rights. The European Court of Human Rights itself states in this connection that the concept of "punishment" within the meaning of Article 7 of the European Convention on Human Rights is to be interpreted "autonomously"; it – the Court – is not bound by the classification of a measure under national law (European Court of Human Rights, judgment of 17 December 2009, Application no. 19359/04, *M. v. Germany*, marginal no. 126). This method followed by the European Court of Human Rights in creating concepts has its justification for the purposes of the European Convention on Human Rights. The independence of the concept formation of the European Court of Human Rights and the necessarily entailed flexibility and lack of precision take account of the legal, linguistic and cultural variety of the Member States of the Council of Europe (see Grabenwarter, *Europäische Menschenrechtskonvention*, 4th ed. 2009, *§ 5*, marginal nos. 9 et seq.). In contrast, for the constitutional system of the Basic Law, which has developed over the years, the concept of punishment in Article 103 of the Basic Law, as it was expressed in the decision of 5 February 2004 (BVerfGE 109, 133 <167 et seq.>), must be adhered to. 142

bb) Furthermore, the principles of Article 5 of the European Convention on Human Rights are to be taken into account on the part of the detainees committed to preventive detention. From this aspect, a justification of the deprivation of liberty in the cases covered by the indirectly challenged provisions of § 67d.3 sentence 1 of the Criminal Code as amended by the Act to Combat Sexual Offences and Other Dangerous Criminal Offences of 26 January 1998 (Federal Law Gazette I p. 160) in conjunction with § 2.6 of the Criminal Code and of § 66b.2 of the Criminal Code as amended by the Act on the Reform of Supervision of Conduct and to Amend the Provisions on Retrospective Preventive Detention of 13 April 2007 (Federal Law Gazette I p. 513) and of § 7.2 of the Juvenile Court Act as amended by the Act to Introduce Retrospective Preventive Detention on Convictions under the Criminal Law Relating to Juvenile Offenders of 8 July 2008 (Federal Law Gazette I p. 1212) comes into consideration virtually only subject to the requirements of an unsound mind within the meaning of Article 5.1 sentence 2 (e) of the European Convention on Human Rights. 143

Article 5.1 of the European Convention on Human Rights contains an exhaustive list of permissible grounds for deprivation of liberty (see European Court of Human Rights, judgment of 17 December 2009, Application no. 19359/04, *M. v. Germany*, marginal no. 86). To justify the configurations in the present case, Article 5.1 sentence 2 (a) of the European Convention on Human Rights is not applicable as a ground of detention (1). Article 5.1 sentence 2 (c) of the European Convention on Human Rights is also generally not applicable (2), and therefore preventive detention in the configurations in the present case may be brought into line with Article 5 of the European Convention on Human Rights, if at all, only subject to Article 5.1 sentence 2 (e) of the European Convention on Human Rights (3). 144

(1) With regard to Article 5.1 sentence 2 (a) of the European Convention on Human Rights, it must first be taken into account that a justification of the deprivation of liberty under this provision in the configurations in question here is no longer applicable in view of the recent case-law of the Chamber of the Fifth Section of the European Court of Human Rights (see in particular the judgment of 17 December 2009, Application no. 19359/04, *M. v. Germany* and the judgments of 13 January 2011, Application no. 17792/07, *Kallweit v. Germany* and Applications nos. 27360/04, 42225/07, *Schummer v. Germany*). 145

In the case of the individual applicants in question, the preventive detention retrospectively extended beyond a period of ten years was not justified under Article 5.1 sentence 2 (a) of the European Convention on Human Rights as “the lawful detention of a person after conviction by a competent court” because – according to the Chamber of the Fifth Section of the European Court of Human Rights in its judgments – there was no sufficient causal connection between the conviction and the continued deprivation of liberty beyond a period of ten years, since this was only possibly on the basis of the reform of the law in 1998 (see European Court of Human Rights, judgment of 17 December 2009, Application no. 19359/04, *M. v. Germany*, marginal nos. 97 et seq., marginal no. 100). 146

In addition, the Chamber of the Fifth Section, in a further judgment of 13 January 2011 (Application no. 6587/04, *Haidn v. Germany*), found there was no justification under Article 5.1 sentence 2 (a) of the European Convention on Human Rights in the case of an individual applicant who after serving his prison sentence on the basis of the Bavarian Committal of Offenders Act (*Bayerisches Straftäterunterbringungsgesetz*, BayStrUGB) was subsequently confined in a prison by reason of his dangerousness. On this occasion, the Chamber again pointed out that the decision of a special court for the execution of sentences to continue to deprive the person involved of liberty does not satisfy the requirement of “conviction” within the meaning of Article 5.1 sentence 2 (a) because it no longer contains an element of a “finding that the person is guilty of an offence” (European Court of Human Rights, judgment of 13 January 2011, Application no. 6587/04, *Haidn v. Germany*, marginal no. 84). 147

The Senate therefore proceeds on the basis than in all the cases known as old cases in which the persons involved were convicted of their originating offences before the relevant revised statutes entered into force – that is, in all the cases affected by the retrospective application of the extension of the ten-year period under § 67d.3 sentence 1 in conjunction with § 2.6 of the Criminal Code and in all cases of retrospective subsequent imposition of preventive detention under § 66b.2 of the Criminal Code and § 7.2 of the Juvenile Court Act – justification of preventive detention under Article 5.1 sentence 2 (a) of the European Convention on Human Rights will generally be out of the question. 148

This additionally applies to subsequent preventive detention under § 66b.2 of the Criminal Code and § 7.2 of the Juvenile Court Act irrespective of the retrospective pe- 149

riod of application of the provisions, that is, also in what are known as new cases, for these provisions permit a subsequent deprivation of liberty in the definitions of the offences themselves. Admittedly – unlike in the "old cases" decided by the European Court of Human Rights to date – this is done in the form of an independent (second) judgment and not merely by the order of a chamber for the execution of sentences. The (second) judgment, however, contains no new finding of criminal responsibility, but presupposes one.

(2) The principles of Article 5.1 sentence 2 (c) of the European Convention on Human Rights are also to be taken into account in the weighing of interests. This provides that deprivation of liberty for the purpose of bringing a person "before the competent legal authority" is justifiable "when it is reasonably considered necessary to prevent his committing an offence". It is true that this ground of detention, as interpreted by the European Court of Human Rights, is merely "a means of preventing a concrete and specific offence" (see European Court of Human Rights, judgment of 17 December 2009, Application no. 19359/04, *M. v. Germany*, marginal no. 89) and is subject to formal requirements ("for the purpose of bringing him before the competent legal authority") which will not in general apply in connection with preventive detention – at all events in normal circumstances. Nevertheless, the existence of Article 5.1 sentence 2 (c) of the European Convention on Human Rights among the principles confirms that the European Convention on Human Rights permits preventive deprivation of liberty if a danger is concrete and specific enough. However, in the cases under consideration here such a danger is likely to be found only in quite exceptional circumstances. 150

(3) In consequence of all the above, a justification of deprivation of liberty under the Convention in the cases under consideration here may apply virtually only subject to the requirements of Article 5.1 sentence 2 (e) of the European Convention on Human Rights (on the relationship of Article 5.1 sentence 2 (a) to Article 5.1 sentence 2 (e) of the European Convention on Human Rights see *inter alia* European Court of Human Rights, judgment of 5 November 1981, Application no. 7215/75, *X. v. United Kingdom*, marginal no. 39 and marginal nos. 46-47; judgment of 22 October 2009, Application no. 1431/03, *Stojanovski v. Former Yugoslav Republic of Macedonia*, marginal no. 30; judgment of 17 December 2009, Application no. 19359/04, *M. v. Germany*, marginal no. 103). 151

For this guarantee, insofar as it applies in the present case, the central element is "unsound mind"; according to the case-law of the European Court of Human Rights this presumes that it is a case of a "true mental disorder", "warranting compulsory confinement" and which is continuing ("the validity of continued confinement must depend upon the persistence of such a disorder") (for a basic analysis, see European Court of Human Rights, judgment of 24 October 1979, Application no. 6301/73, *Winterwerp v. Netherlands*, marginal no. 39; see most recently European Court of Human Rights, judgment of 21 June 2005, Application no. 517/02, *Kolanis v. United Kingdom,* marginal no. 67). There is no conclusive definition of the term "true mental disor- 152

der" (see European Court of Human Rights, judgment of 24 October 1979, Application no. 6301/73, *Winterwerp v. Netherlands*, marginal no. 37). Conduct which is merely socially deviant, however, is not a disorder within the meaning of this provision (see European Court of Human Rights, loc. cit., marginal no. 37). An anti-social personality or a psychopathic disorder may be included, however (see European Court of Human Rights, judgment of 20 February 2003, Application no. 50272/99, *Hutchison Reid v. United Kingdom*, marginal no. 19; see also Prior, Mentally disordered offenders and the European Court of Human Rights, *International Journal of Law and Psychiatry* 30 (2007), p. 546 <548>; Bartlett/Lewis/Thorold, *Mental Disability and the European Convention on Human Rights*, 2007, p. 43). In the consideration of the question as to whether the requirement of mental disorder within the meaning of Article 5.1 sentence 2 (e) of the European Convention on Human Rights and its continuation is satisfied, the Member States also have a margin of appreciation (see most recently European Court of Human Rights, judgment of 22 October 2009, Application no. 1431/03, *Stojanovski v. Former Yugoslav Republic of Macedonia*, marginal no. 34 with further references). The provision refers to national law (see Frowein/Peukert, *Europäische Menschenrechtskonvention*, 3rd ed. 2009, *Art. 5*, marginal no. 76).

153 Article 5.1 sentence 2 (e) of the European Convention on Human Rights also requires that the statutory provisions of the relevant proceedings of imposition or review provide that a mental disorder be required as an express element of the offence (see European Court of Human Rights, judgment of the Fifth Section of 13 January 2011, Application no. 17792/07, *Kallweit v. Germany*, marginal no. 56).

154 Furthermore, the additional requirement of lawfulness of the deprivation of liberty contained in Article 5.1 sentence 2 (e) of the European Convention on Human Rights (on this, see most recently the detailed judgment of the seven-judge chamber of the European Court of Human Rights of 9 July 2009, Application no. 11364/03, *Mooren v. Germany*, marginal no. 72 with further references) must be taken into account; this serves to avoid arbitrariness and therefore in particular requires the deprivation of liberty to be foreseeable. The requirements of the prohibition of arbitrariness depend on the nature of the deprivation of liberty or the relevant ground of justification within the system of Article 5.1 of the European Convention on Human Rights (see European Court of Human Rights, loc. cit., marginal nos. 76-77; judgment of the seven-judge chamber of 29 January 2008, Application no. 13229/03, *Saadi v. United Kingdom*, *Neue Zeitschrift für Verwaltungsrecht,* NVwZ 2009, p. 375 <377>, marginal nos. 67 et seq.). According to this, the authoritative date to be considered for the foreseeability of deprivation of liberty under Article 5.1 sentence 2 (a) of the European Convention on Human Rights is in particular the date when the offence is committed, since the offence is the basis of the deprivation of liberty. In contrast, under Article 5.1 sentence 2 (e) of the European Convention on Human Rights – unlike, for example, in the case of Article 7 and Article 5.1 sentence 2 (a) of the European Convention on Human Rights – it is not a question of deprivation of liberty on account of an *act* committed in the past and a consequent conviction, but of deprivation of liberty on account of a present

state (in this case a mental disorder, and the ensuing dangerousness for the general public) (see also Frowein/Peukert, *Europäische Menschenrechtskonvention*, 3rd ed. 2009, *Art. 5*, marginal no. 76).

155 The requirement that the deprivation of liberty should be lawful also leads to the need for a connection between the purpose of the deprivation of liberty and the institution in which the person involved is accommodated (see, most recently, European Court of Human Rights, judgment of the seven-judge chamber of 29 January 2008, Application no. 13229/03, *Saadi v. United Kingdom*, marginal no. 69, end; European Court of Human Rights, judgment of 30 July 1998, Application no. 61/1997/845/1051, *Aerts v. Belgium*, marginal no. 46). The justification of deprivation of liberty under Article 5.1 sentence 2 (e) of the European Convention on Human Rights, therefore, requires not least that the person concerned is detained in a location and in circumstances which take account of the fact that the detainee is (*inter alia*) detained by reason of a mental disorder (see, most recently, European Court of Human Rights, judgment of 13 January 2011, Application no. 17792/07, *Kallweit v. Germany*, marginal no. 46: “a hospital, clinic or other appropriate institution”).

156 c) Taking account of these principles and in consideration of the substantial encroachment upon the reliance of the detainees in preventive detention whose fundamental right under Article 2.2 sentence 2, Article 104.1 sentence 1 of the Basic Law is affected, the legitimate legislative purpose of the challenged provisions, protecting the general public against dangerous offenders, is largely outweighed by the constitutionally protected reliance on an end of preventive detention after a period of ten years (as in the old cases in the area of application of § 67d.3 sentence 1 in conjunction with § 2.6 of the Criminal Code) or on no order of preventive detention being made (as in the cases of retrospective preventive detention under § 66b.2 of the Criminal Code and § 7.2 of the Juvenile Court Act). A deprivation of liberty through preventive detention which is ordered or extended retrospectively can therefore only be regarded as proportionate if the required distance from punishment is observed, if a high risk of the most serious offences of violence or sexual offences can be inferred from specific circumstances in the person or conduct of the detainee (see also Federal Court of Justice, Order of 9 November 2010 – 5 StR 394/10, 440/10, 474/10 –, *Neue Juristische Wochenschrift* 2011, p. 240 <243>) and if the requirements of Article 5.1 sentence 2 (e) of the European Convention on Human Rights in the interpretation relied on here are satisfied. Only in such exceptional cases can a predominance of public safety interests still be assumed.

157 d) By this standard, § 67d.3 sentence 1 in conjunction with § 2.6 of the Criminal Code and § 66b.2 of the Criminal Code and § 7.2 of the Juvenile Court Act are incompatible with the rule-of-law requirement of the protection of legitimate expectations (aa). The provisions cannot be interpreted in such a way that they are still constitutional (bb).

158 aa) The provisions are incompatible with the rule-of-law requirement of the protec-

tion of legitimate expectations because the distance from punishment is not in general guaranteed (on the violation of the distance requirement, see under C.I.2. above) and the influence of Article 7 of the European Convention on Human Rights therefore reaches a degree which prohibits every retrospective application of the provisions. In addition, in their current versions the provisions do not ensure that only highly dangerous offenders, the deprivation of whose liberty is justified under Article 5.1 sentence 2 (e) of the European Convention on Human Rights, are covered.

bb) The provisions cannot be interpreted in such a way that they are still constitutional. 159

(1) In an interpretation in conformity with the Basic Law, the legislative content of a provision may not be redefined (see BVerfGE 8, 71 <78-79>). If an interpretation is to escape the provision being found void, therefore, it must be an interpretation based on generally accepted principles of interpretation (BVerfGE 69, 1 <55>). The limits of an interpretation in conformity with the Basic Law follow in principle from the correct use of the generally accepted methods of interpretation. In this process, respect of the legislative power makes it necessary, within the limits of the constitution, to uphold the maximum possible of what the legislature intended. This respect therefore requires an interpretation of the provision which is covered by the text of the statute and preserves the legislature's fundamental objective (BVerfGE 86, 288 <320>). The interpretation may not lead to an essential point of the legislative purpose being missed or distorted (see BVerfGE 8, 28 <34>; 54, 277 <299-300> with further references; 78, 20 <24> with further references; 119, 247 <274>). 160

(2) Against this background, none of the provisions submitted for review can be interpreted in conformity with the Basic Law. 161

This applies not only to § 67d.3 sentence 1 of the Criminal Code, which in its very wording gives no points of reference for such an interpretation, but also to § 66b.2 of the Criminal Code and § 7.2 of the Juvenile Court Act. The latter provisions do, it is true, give the non-constitutional courts a scope of discretion with regard to the legal consequences, which is expressed in the formulation “may*” (“kann*”). However, this discretion exists only within the purpose of the authorisation for discretion. This means that the non-constitutional courts may in the individual case, even if the requirements are satisfied, refrain from a retrospective order of preventive detention if there are good reasons, but they may not in general fail to use the legal consequence intended by the legislature, that is, allow the provisions to have no effect whatsoever and in this way usurp the role of the legislature in making the fundamental decision as to whether retrospective preventive detention is to be completely abolished. It is for the legislature alone to lay down whether all detainees affected by the retrospectiveness problem are to be released or only those in whose case this is constitutionally imperative. 162

It is equally impossible, by interpreting the authority of discretion in conformity with the Basic Law, to reduce the existing statutory provisions to the part of them which is 163

in conformity with the Basic Law. For at present the non-constitutional courts do not have the normative machinery necessary to create a situation in the law of preventive detention which is in conformity with the Basic Law. The constitutionality of retrospective preventive detention (§ 66b.2 of the Criminal Code and § 7.2 of the Juvenile Court Act) and of retrospective extension of preventive detention beyond the former ten-year maximum period (§ 67d.3 sentence 1 of the Criminal Code) requires extensive additional provisions to be passed – in particular the codification of the requirements to observe the distance requirement and of the requirements to establish the mental disorder within the meaning of Article 5.1 sentence 2 (e) of the European Convention on Human Rights – provisions which to date do not exist in the law of preventive detention. Only the legislature is in the position to legislate on the requirements subject to which further preventive detention is constitutionally permissible, and to do so exhausting its possibilities of drafting and in the necessary detail. In this connection, the legislature is in particular also free to replace preventive detention in whole or in part by committal to therapy, but it must interlink the area of application of this with the law of preventive detention in a way that leaves no doubt as to whether an area of application of the provisions under discussion in the present case is to remain or the provisions should be repealed.

For similar reasons, an interpretation of § 2.6 of the Criminal Code is also out of the question if it finds that Article 5 und Article 7 of the European Convention on Human Rights satisfy the requirement of “otherwise provided by law” within the meaning of this provision (see Federal Court of Justice, Order of 12 May 2010 – 4 StR 577/09 –, *Neue Zeitschrift für Strafrecht,* NStZ 2010, p. 567; Order of 18 January 2011 – 4 ARs 27/10 –, juris; Order of 17 February 2011 – 3 ARs 35/10 –; Frankfurt am Main Higher Regional Court, Order of 24 June 2010 – 3 Ws 485/10 –, NStZ 2010, p. 573; Hamm Higher Regional Court, Order of 6 July 2010 – 4 Ws 157/10 –, juris; Schleswig-Holstein Higher Regional Court , Order of 15 July 2010 – 1 OJs 3/10 and other nos. –, juris; Karlsruhe Higher Regional Court, Order of 15 July 2010 – 2 Ws 458/09 –, juris; Hamm Higher Regional Court, Order of 22 July 2010 – 4 Ws 180/10 –, juris; a different view is advanced in Federal Court of Justice, Order of 9 November 2010 – 5 StR 394/10, 440/10, 474/10 –, *Neue Juristische Wochenschrift* 2011, p. 240). It would be fundamentally contrary to the legislative concept to give priority, when interpreting § 2.6 of the Criminal Code, to the general provisions of Article 5 and Article 7 of the European Convention on Human Rights over the narrower provisions of the Criminal Code on preventive detention, which are unambiguous with regard to the question of retrospective effect. It was precisely these narrower provisions that the legislature had in mind when passing the legislation. The parliamentary background material to § 2.6 of the Criminal Code shows that the legislature from the outset saw no violation of Article 7 of the European Convention on Human Rights in § 2.6 of the Criminal Code (Bundestag printed paper IV/650, p. 108; a similar conclusion is reached by Stuttgart Higher Regional Court, Order of 1 June 2010 – 1 Ws 57/10 –, *Recht und Politik*, RuP 2010, p. 157). The legislature intended to “put into immediate force with unlimited retrospective effect” the revisions of § 67d of the Criminal Code introduced by the Act to 164

Combat Sexual Offences and Other Dangerous Criminal Offences of 26 January 1998 (Federal Law Gazette I p. 160); this is shown by Article 1a.3 of the Introductory Act to the Criminal Code (see also Bundestag printed paper 13/9062, p. 12). In addition, the fiction that the decision of the European Court of Human Rights in an individual case is a national (parliamentary) statute violates the manner in which the European Convention on Human Rights takes effect nationally, which is laid down by the Basic Law, and also the principle of the separation of powers. The European Convention on Human Rights is not a statute, but an agreement under international law, which as such cannot directly intervene in the state legal system (see BVerfGE 111, 307 <322>). Even after the Act of assent is passed, it is still by its legal nature an agreement under international law whose national validity is effected only by the order of execution (see BVerfGE 90, 286 <364> and BVerfGE 104, 151 <209>; see also Federal Constitutional Court, Order of the Second Chamber of the Second Senate of 8 June 2010 – 2 BvR 432/07, 2 BvR 507/08 –, juris, marginal no. 27). The decisions of the European Court of Human Rights in turn do not have the status of statute either; on the contrary, Article 46.1 of the European Convention on Human Rights only provides that the Contracting Party involved is bound by the final judgment with regard to a particular subject matter in dispute (“res judicata“, see BVerfGE 111, 307 <320>).

Nor do other provisions of the Convention support the view that it has an effect of binding precedent, extending beyond the individual case, on the courts of the Member States. In the European civil law tradition – unless an express provision such as § 31 of the Federal Constitutional Court Act provides otherwise – every court, within the limits of arbitrariness, is free at any time to interpret a provision differently than other courts have previously done (see only BVerfGE 78, 123 <126>; 84, 212 <227>; 87, 273 <278>; Müller/Christensen, *Juristische Methodik*, vol. I, 10th ed. 2009, marginal nos. 539-540; Alexy, *Theorie der juristischen Argumentation*, 1991, p. 334; Röhl/Röhl, *Allgemeine Rechtslehre*, 3rd ed. 2008, pp. 565 et seq.; see also Ress, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht,* ZaöRV 2009, p. 289 <293>). The same applies to the interpretation of the European Convention on Human Rights, even though the case-law of the European Court of Human Rights has particular importance in this connection, because it reflects the current state of development of the Convention and its Protocols (see BVerfGE 111, 307 <319>; see also Cremer, in: Grote/Marauhn, *EMRK/GG, Konkordanzkommentar*, 2006, ch. 32, marginal no. 90). 165

II.

If, after all these considerations, the challenged provisions are incompatible with Article 2.2 sentence 2 in conjunction with Article 104.1 sentence 1 of the Basic Law for violation of the distance requirement, the same applies to all provisions on the imposition and duration of preventive detention and corresponding subsequent provisions, which are set out under number II.1. b) of the operative part of the judgment. In this respect, the requirements are satisfied for the Federal Constitutional Court under § 166

78 sentence 2 of the Federal Constitutional Court Act to extend its judicial pronouncement to further provisions of the same Act. The provision named is to be applied in the constitutional complaint proceedings with the necessary alterations (BVerfGE 18, 288 <300>; 40, 296 <328-329>; 91, 1 <25>; 92, 53 <73>; 94, 241 <265-266>; 98, 365 <401>; 104, 126 <150>; 110, 94 <140>).

III.

All provisions affected by incompatibility with the Basic Law will continue in force, despite being unconstitutional, until the legislature reforms the law, and at the latest until 31 May 2013 (1.). Until then, however, they are to apply only in accordance with number III of the operative part of the judgment (2). 167

1. If a provision is not consistent with the Basic Law, it must as a matter of principle be declared void (§ 95.3 sentence 1, § 78 sentence 1 of the Federal Constitutional Court Act). But the situation is different in the cases in which declaring a provision void leads to a situation “which would be even less consistent with the constitutional order” (BVerfGE 116, 69 <93>), because a “legal vacuum” would be created (BVerfGE 37, 217 <260-261>) or gaps in the law would result in “chaos" (BVerfGE 73, 40 <42, 101-102>). Here, the Federal Constitutional Court generally declares the provisions incompatible and at the same time orders that the provisions in question are to continue in effect for a particular period of time. 168

In the present case, if the relevant provisions were declared void, this would mean that further preventive detention would lack a legal basis and the functioning of the existing two-track German system of measures of correction and prevention and penalties under criminal law would be disrupted with lasting effect. All persons committed to preventive detention would have to be released immediately, which would cause almost insoluble problems for the courts, the administration and the police. The consideration of consequences must also include all potential detainees under preventive detention in the case of whom committal to preventive detention has been ordered, but who are still serving custodial sentences and who could not begin preventive detention despite the fact that they may be highly dangerous. 169

With regard to the extent of the measures which are necessary to put the distance requirement into practice (see under C.I.2. above), the order that the legislation is to continue in effect must apply for two years, in order that the necessary overall concept may be developed, the necessary additional personnel provided and the measures necessary for spatial separation of the execution of measures of correction and prevention and the execution of prison sentences can be carried out. 170

2. In view of the encroachment upon fundamental rights associated with preventive detention – which is unconstitutional – it is necessary to create a transitional arrangement for the period until there is a detailed statutory reform; this transitional arrangement must admittedly permit the existing provisions to continue in effect, to avoid a legal vacuum, and the pending review proceedings to be continued (see BVerfGE 73, 171

40 <101-102> with further references), but must ensure that minimum constitutional requirements are complied with. During the period when the current provisions continue in effect, therefore, the existing provisions must be applied subject to the conditions set out under number III of the operative part of the judgment (§ 35 of the Federal Constitutional Court Act).

a) With regard to the provisions which are incompatible with the Basic Law only by reason of a violation of the distance requirement (see number II.1. and number III.1. of the operative part of the judgment), during the period while they continue in application the law must be applied taking into account the fact that preventive detention in its present form is an unconstitutional encroachment upon the fundamental right to liberty under Article 2.2 sentence 2 in conjunction with Article 104.1 of the Basic Law. The high value of the fundamental right to liberty limits the spectrum of encroachment permitted in the transitional period. During the transitional period, encroachments may extend only as far as they are indispensable in order to uphold the order of the area of life affected. Here, if applicable, care should be taken to interpret the content of the legislation in conformity with the Basic Law (see BVerfGE 109, 190 <239> with further references). The provisions may only be applied in compliance with a strict review of proportionality (see BVerfGE 109, 190 <240>). This applies in particular with regard to the requirements of the prognosis of dangerousness and the legal interests endangered. In general, the principle of proportionality will only be satisfied on condition that a high risk of the most serious offences of violence or sexual offences can be inferred from specific circumstances in the person or the conduct of the detainee. 172

b) With regard to the provisions which are incompatible with the requirement of the protection of legitimate expectations (number II.2. of the operative part of the judgment), the provisions which temporarily continue in effect must be applied in a manner that is modified in accordance with number III.2. of the operative part of the judgment. In view of the fact that it is primarily for the legislature to determine the conditions of a mental disorder within the meaning of Article 5.1 sentence 2 (e) of the European Convention on Human Rights (see most recently European Court of Human Rights, judgment of 13 January 2011, Application no. 17792/07, *Kallweit v. Germany*, marginal no. 55), in this connection recourse must be made to the Act on the Therapy and Committal of Mentally Disordered Violent Criminals, which entered into force on 1 January 2011. In this Act, the legislature, deviating from the previous legal position, in which the only distinction was between committing dangerous offenders to a prison for the purpose of prevention on the one hand and committing mentally disordered persons who had committed offences in a state of lack of criminal responsibility or reduced criminal responsibility (§§ 20, 21, 63 of the Criminal Code) on the other hand, for the first time put into concrete terms the requirements of Article 5.1 sentence 2 (e) of the European Convention on Human Rights and created a further form of confinement for mentally disordered persons who are dangerous to the general public, who are found in the course of the proceedings to have a mental disorder and whose detention is then executed not in a prison but in a therapeutic institution. In 173

the present context, the Therapeutic Committal Act is not to be subjected to a constitutional review. However, with regard to the conception developed in the Act, it may be assumed that the German legislature in this Act intended to create a further category for the confinement of mentally disordered persons with a danger potential indicated by their offences which is not based on criminal responsibility at the past date when the offences were committed, but to the present (permanent) mental state of the persons in question and their future dangerousness resulting from this (see also the statement in support of the bill of the CDU/CSU parliamentary group, Bundestag printed paper 17/3403, pp. 53-54). The transitional arrangement in number III of the operative part of the judgment takes account, as far as is possible and necessary, of this concern of the legislature.

IV.

The various decisions challenged violate the rights of the complainants under Article 2.2 sentence 2, Article 104 and Article 2.2 in conjunction with Article 20.3 of the Basic Law. They are therefore reversed and the matters are referred back for a new decision (§ 95.2 of the Federal Constitutional Court Act) […]. 174

1. The challenged decisions are based on the unconstitutional provisions. [...] 175

2. In their new decisions, the competent courts will have to give consideration in particular to the degree of dangerousness of the complainant in each case and to decide whether against this background the review of a relevant mental disorder appears at all necessary. Only as a last step will it be necessary to ask whether such a mental disorder exists. In particular in the case of the first complainant, there are considerable doubts from the outset as to the existence of a relevant mental disorder, in view of the possibilities of recidivism mentioned in the expert report of Prof. N., the triviality of the originating offences (thefts) and the long period of time that has passed since the originating offence of rape, which indicated the complainant's symptoms, in the year 1978. [...] In other respects, the non-constitutional courts will also have to fathom the possibilities of supervision of conduct and to consider whether and to what extent the degree of dangerousness of the respective complainant may be reduced through this. 176

D.

The decision on the reimbursement of expenses is based on § 34a.2 and 34a.3 of the Federal Constitutional Court Act (see BVerfGE 101, 106 <132>; 104, 357 <358>; 105, 135 <136>). 177

E.

The decision was unanimous with regard to the operative part on II.2 and IV., and passed by seven votes to one apart from this. 178

Voßkuhle Di Fabio Mellinghoff

Lübbe-Wolff Gerhardt Landau

Huber Hermanns

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