Preventive Justice – An Oxymoron

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Why the concept of dangerousness is a danger to justice

Hearing the term preventive justice for the first time may well sound both interesting and attractive. Preventive justice is an irresistible concept. But is preventive justice possible?

Prevention in this context is the aim to prevent crimes. This concept stands in contrast to the retrospective approach to punish crimes that have been committed. Preventive aims have been the basis for establishing a variety of measures aiming to prevent individuals from committing certain acts as well as several changes in criminal law.

Adding the term justice should outline that all preventive measures should be subject to restraining principles. One of those principles frequently mentioned in this context is the presumption of innocence. With this, the concept of preventive justice combines the preventive approach with principles that have been established within the structures of criminal law.

This paper aims to show that a combination of these two concepts is not possible. It will do so by analysing the logic behind preventive measures as well as the logic behind criminal law and the concept of the presumption of innocence.

I. Prevention and its Characteristics

Increasingly, criminal law is not just applied to deeds that have already been committed, but also, actions yet to be committed become the focus of so-called preventive measures. The qualification of several measures as criminal sanctions is debatable (for the question whether criminal law can be defined by a criminal accusation: Niggli, Strafrecht & Strafrechtliche Anklage, Contralegem 2018/2, in this issue). This paper does not focus on the different measures (for examples and a detailed examination: A. Ashworth/L. Zedner, Preventive Justice, Oxford 2014) and the question of whether or not they fall under criminal law. The importance is that by shifting from a retrospective sanction to a preventive goal, the trigger for those measures to be applicable is no longer a specific action but rather certain characteristics of a person such as dangerousness.

Consider the following example of a preventive measure with regard to the Sexual Risk Orders (SRO; Anti Social Crime and Policing Act 2014 as amendment of the Sexual Offences Act 2003 of the United Kingdom, Section 122A [6]): The court

> *«… may make a sexual risk order if it is satisfied that the defendant has, whether before or after the commencement of this [Part of the Act], done an act of a sexual nature as a result of which it is necessary to make such an order for the purpose of—*
>
> *(a) protecting the public or any particular members of the public from harm from the defendant, or*
>
> *(b) protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from harm from the defendant outside the United Kingdom.»*

For issuing a SRO, no criminal offence has to be committed. The only thing that has to be done as an act is an «act of a sexual nature». This act in return must make an order «necessary to protect» the public or any member of the public. This criterion of necessity refers to danger and implies a risk assessment. Because someone could get hurt, the likelihood of that event is what the decision of issuing a SRO is based on. For assessing the risk, the Home Office, in its guidelines, suggests that «behaviour that is not wrong by itself but may become so because of the intentions» should be considered (Home Office, Guidance on Part 2 of the Sexual Offences Act 2003, March 2015, 43).

> Dangerous people are innocent and guilty at the same time.

Instead of relying on a certain act, the measures are then based on the level of dangerousness; it is based on a risk assessment (for a criminological approach on the question of dangerous offenders see: M. Brown/J. Pratt, Dangerous Offenders – Punishment & Social Order, London 2000). The change of this basis may sound as though it is only a slight difference, but it is a trick used to combine two incompatible systems. The slight change in the formulation changes everything. By changing the perspective into the future one cannot refer to a certain act but rather has to use other criteria for applying criminal law. The criminal action no longer needs to be defined; the risk of something that might happen is sufficient.

The problem is, that no one can predict the future. With this, the possibility of different results is included in the option to punish a dangerous offender. Dangerousness as well as the description of someone as an offender are unclear categories. All they say is that an individual may pose a certain risk to someone or something. A statement about risk is, however, only true in its abstraction. No specific result can be drawn from it whatsoever. One example showing this is the rolling of dice. The probability of throwing a 4 with a true dice is 1/6. The argument is, that indeed probability can be calculated, if the possible cases and options are never ending. Taking the example of the dice, when I throw it once, I cannot make any prediction of whether or not I throw a 4. Also I can throw the dice six times and not get a 4 at all. Only hypothetically, with a never-ending number of throws, would I get the result that one out of six times I would throw a 4. This is what happens in an experiment where only six options exist. Human behaviour has even more possibilities, which makes the prediction of what someone will do impossible. Calculating the future by a risk analysis is simply not possible.

Therefore, if the mere possibility of an event is sufficient ground for a sanction, a system with no limitations whatsoever is created.

II. The Presumption of Innocence and its Characteristics

In order to define the presumption of innocence, one first has to understand the nature of the presumption in question. The Oxford dictionary defines a presumption as «an idea that is taken to be true on the basis of probability» (Oxford Dictionary). In the Cambridge dictionary it is defined as «the act of believing that something is true without having any proof» (Cambridge Dictionary). What these definitions have in common is an intellectual conclusion that has its basis in either a feeling or at least not proven facts. With this, one might think, using the word presumption implies an intellectual process. A process which implies that there are facts from which a certain conclusion can be drawn. That is why one could easily be misled to the assumption that whether or not a presumption is correct depends on the question of facts. In general that could be the case,

however, in questions of law, especially in regard to the presumption of innocence, it is not. The presumption of innocence is not a presumption at all.

The presumption of innocence applies from the first accusation until the final conviction (E. Tophinke, in: M. A. Niggli/M. Heer/H. Wiprächtiger (eds.), Basler Kommentar zur Schweizerischen Strafprozessordnung, 2nd edition, Basle 2014, Art. 10 N 12), the final conviction being the decision of the judge. Art. 6 (2) of the European Convention on Human Rights states: «Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. » Decisive with regard to this wording is the time element. The presumption of innocence applies during a legal proceeding. This needs to be emphasised: innocent until proven guilty or more precisely until found guilty by a judge. The presumption of innocence is not an intellectual conclusion; it does not rely on a factual situation. Rather, it constitutes a decision, according to which no one will be treated as guilty of having committed a specific crime, unless a judge decides otherwise. Therefore, the presumption of innocence constitutes something like a timeline. Figuratively speaking, we need an accusation as a starting point. Since an accusation by and in itself cannot constitute a judgement, the accused – *although* he/she is accused – must be regarded as innocent, until a judge decides to the contrary. The wording is crucial. The accused is not *presumably* innocent. He is innocent, full stop. Presumed innocence does not exist, it is either innocence or guilt. The presumption of innocence means that someone is innocent.

Therefore, the presumption of innocence describes the dividing line between two different options; innocence and guilt. Both of these options must be possible and it must be possible to decide between them.

Referring to the presumption of innocence, the decision of guilt vs. innocence is decided by a judge based on the necessity of proof. Prosecution brings forward an accusation, which it must prove to be correct. If it is proven beyond reasonable doubt that the criminal offence has been committed, the judge will decide that the alleged act was indeed committed. One could say that the judge's decision then contains the truth. It is a procedural truth, testifying what happened. The necessity of proof beyond reasonable doubt is the necessity of a valid criterion on which the decision is based.

Differentiability as the possibility to decide between two options as well as the necessity of a valid criterion are both reflected in the conception of the presumption of innocence.

III. Criminal Law and its Characteristics

The developed logic of the presumption of innocence matches the classical logic and conception of criminal law. Someone is punished for something he or she did in the past. An accusation targets a specific person suspected of having committed a specific action. Such an accusation is characterised by the possibility of verification or falsification. Each of those scientific methods guarantees that a hypothesis can either be proved false or true. Additionally, it must be possible to make a decision which one of these two options is true.

In order to achieve this decidability an accusation must be phrased in such a precise manner that there is a clear distinction between the two options. This precision is what characterises criminal law as it is based on the criminalisation of certain types of behaviour. It is a specific action that is subject to sanctions.

There are certain rules of logic behind this emphasis of precision. Criminal law works on the logic that statements can be either true or not. There is neither room for opinion in between nor for probability. If someone is accused of having stolen a painting, then he/she either did steel it or did not. What we do in law is that we define terms, for example we define the act of theft. Then we look at the facts of the case and subsume them under the provisions. This

leads to a certain result, which is then, in the logic of the system, a true statement. This procedural truth is achieved, referring back to the example above, if a judge decides that someone did in fact steal the painting. The system that is established is one of internal coherence. Statements outside the scope of this logic cannot be answered by applying this logic. For example, the statement «I like you» cannot be decided. It can neither be verified nor falsified as the law does not give us any criteria or defined terms to prove this statement correct or false.

Precision gives us the possibility of distinction. Instead of speaking about precision one could also name the necessary requirement as being one of discretion. The meaning of discretion in this context has to be defined. What is meant is not, for example, the discretion of a judge when making a decision. Discretion, as used in the following, describes the possibility of a clear distinction, a separation between options. The contrast to a discrete structure is that of a continuum. In a continuous structure the borders are blurred.

IV. Incompatibility of Prevention and the Presumption of Innocence

Within the preventive discourse it is always emphasised that the rule of law and other important principles need to be respected. The presumption of innocence is always mentioned as being one of these principles (A. Ashworth/L. Zedner, Preventive Justice, Oxford 2014, 254).

As shown, the logic of prevention is that of a risk-assessment, of probability calculation. In this logic, dangerousness can neither be falsified nor verified. In this logic, dangerous people are innocent and guilty at the same time.

Nonetheless, not only politicians try to integrate the presumption of innocence into a preventive system. Through this endeavour, the principle suffers, due to its incompatibility. It becomes only one of many arguments in a vague weighing of rights, for example, by referring to the ten-to-one rule. The ten-to-one rule says, «better that ten guilty persons escape, than that one innocent person suffers» (attributed to Blackstone, Commentaries on the Laws of England, 358 by E. van Sliedregt, A Contemporary Reflection on the Presumption of Innocence, Revue international de droit pénal, 1/2009, vol. 80, 247). In the current discussion, however, the emphasis on the protection of the innocent is shifted to an argument of protecting the public.

The best example for showing this possibility of reversing the ten-to-one rule is the discussion of countering terrorism. The German interior minister at the time asked whether it would be vital to state, that «we would rather allow ten attacks to take place than restrain one person who might not want to carry out an attack» (Citation of W. Schäuble, in: «Schäuble will die Unschuldsvermutung aufweichen», Handelsblatt online, 18.04.2007). The argument of the British prime minister Tony Blair went in the same direction: «The whole of our system starts from the proposition that its duty is to protect the innocent from being wrongly convicted. Don't misunderstand me. That must be the duty of any criminal justice system. But surely our primary duty should be to allow law-abiding people to live in safety. It means a complete change of thinking. It doesn't mean abandoning human rights. It means deciding whose come first. » (Citation of Tony Blair, in: «Blair laid bare: the article that may get you arrested», Independent, 28.06.2006).

This rhetoric and logic has a convincing effect. Its main problem is that it opens the door for discussion. We find ourselves in an argumentation weighing fundamental rights against each other. It seems to us like preventive justice is indeed possible. However, this weighing of rights against each other creates the problem. It results from the mingling of categories. Criminal law, in the classical sense, does not know the weighing-up of rights. There are clear rules with clear consequences.

Two different logics that need to be separated are mixed into one. Criminal law with its retrospective approach is mixed with a prospective administrative approach.

The use of the wording is also indicative for the fading away of distinctions. One example is the use of «presumably innocent» (A. Oehmichen, UN-EU-Terrorist Listings – Legal Foundations and Impacts, ZIS 9/2014, 412–420, 412) as a term to describe those that have not yet been convicted. This statement is interesting because it implies the contrary of what it is explicitly stating. If the accused is innocent, why not just say so instead of adding the word presumed, which not only weakens the statement, but undermines it. The relativizing wording is symptomatic for a time in which the commitment to clear statements is in constant decrease. Yet, worse than just relativizing, this wording indicates a wrong conception of the presumption of innocence.

V. Conclusion

The presumption of innocence is a reflection of the classical concept of criminal law (for a definition of the EU rule of law, see C. Murphy, EU Counter Terrorism Law- Pre-emption and The Rule of Law, 34 et seq.). It is characterised by its precision and by its differentiating effect.

Precision is what characterises law and criminal law in particular. Precision is necessary on a logical and a linguistical level. Furthermore, a valid criterion is required for the specific decision. For the presumption of innocence, this criterion is proof beyond reasonable doubt.

Differentiability is the other necessity. It has to be possible to draw distinctive lines. As seen in the example of the presumption of innocence, someone cannot at the same time be innocent and guilty or a little guilty or presumably innocent. It is not only a precondition to distinguish between the two options but rather a core-element of the principle itself. It is those precise criteria that constitute the logic of the presumption of innocence as well as the rule of law. With the shift of criminal law towards focussing on the future, the criteria become imprecise and, with this, there is no valid hypotheses that can be verified or falsified. Differentiability is only possible in a retrospective approach. As the future cannot be foreseen, every statement in regard to what will happen is necessarily based on irrationality or probability. Those criteria in turn are not able to provide a discriminatory effect, as they are not sharp or concrete but rather fluent and continuous.

Implementing preventive measures leads to the result that the presumption of innocence cannot be applied. In essence this means that we pay with the rule of law and justice. As a consequence, there is no such thing as preventive justice.