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THE PROTECTION OF MENTALLY ILL PRISONERS BY THE ECHR[1]

Grazie mille for the invitation. I thank you very much prof. Gargani for the kind words that you have expressed. Indeed, I was judge at the European Court of Human Rights (from now on, the Court) until recently. I have been full professor of criminal law for many many years, and, in that capacity, I have met very frequently the colleagues from several universities in Italy and I have great friends in Italy. So, it's a pleasure always to accept these invitations from my friends from Italian Universities.

I will today address a very important issue which is the guarantees under the Convention for offenders with mental problems.

Ilnseher v. Germany is the most important case in this regard. It's a Grand Chamber judgment about *Sicherungsverwahrung*, it's about preventive detention, but a special kind of preventive detention. It's *Nachtragliche Sicherungsverwahrung*. So, we are talking about a retrospective form of preventive detention. This was created in 2001 by the government of the Chancellor Gerard Schroeder in reaction to a very violent crime and the legislator decided in Germany to remove the ten years limit for retrospective preventive detention that could be added to a prison sentence.

In Germany there was this "*doppio binario*" by which a prison sentence, a prison term, could be added with ten years more of preventive detention, in other words, this additional period of detention had a limit. The limit was removed by a decision of the legislator and, in addition to that, this decision was applied retrospectively, retroactively. Why? Because, according to the doctrine, preventive detention was a security measure (*Sicherungsmaßnahme*) and therefore the principle of *nulla poena sine lege praevia* would not apply. This, of course, was discussed in the German doctrine, but the European Court stated very clearly, in the judgment *M v. Germany*, that this doctrine could not be accepted.

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[1] The text is the transcription of the speech given during the first session of the Conference, held on the 16th of October 2020.

The principle *nulla pena sine lege praevia* was not applied, according to German doctrine, to *Sicherungsmaßnahmen*. The idea that *Sicherungsverwahrung* was not a penalty, not equivalent to a prison term, but to a *Sicherungsmaßnahme* that could be applied *nachtraglich*, meaning retroactively, was accepted by the legislator, and condonned by the Federal Constitutional Court, but not by the European Court, not by Strasbourg.

In *M. v. Germany,* the Court stated quite clearly that this additional period of ten years (or more after the removal of the limit of ten years) could not be applied retrospectively. Otherwise, there would be a violation of article 7, the principle of legality.

In fact, the Court was stating that this additional period was indeed a penalty. It could not be regarded as a mere *Sicherungsmaßnahme*. And therefore, all the guarantees of article 7 of the Convention would apply to this period of time, which means that this period of time could not be applied retroactively. The extension of this period of time could not be applied retroactively to the offenders.

Now, the Federal Constitutional Court reacted to this and, in fact, they kept in substance their previous position. In sum, the Federal Constitutional Court said quite clearly that *Sicherungsverwahrung* was in substance, in essence, a *Sicherungsmaßnahme* and therefore it could be applied retroactively. The idea was to consider this as a *Therapiemaßnahme*. So, it was a kind of *Therapieunterbringung* that could be based on a supposed mental disorder and could be applied retroactively. And that allowed for all the offenders, including Mr. Ilnseher, that were already in jail to be kept *ad aeternum* in preventive detention.

The Court was confronted with the specific case of Mr. Ilnseher and the case went up to the Grand Chamber, so it's an extremely important case. It's all about the guarantees of specially dangerous offenders with mental problems, so mentally disturbed offenders that are especially dangerous. And we cannot talk in Europe, neither in Italy nor in any other country, about mentally disturbed offenders without knowing what the Court stated in the case *Ilnseher v. Germany*. It's extremely important. We cannot disregard this decision.

What did the Court decide? I was a member of the composition in that case, I was not happy with the result, I dissented. And why did I dissent? Well, because what really happened was that the Court, the majority of the Court, in a way whitewashed the decision of the German legislator allowing for this additional period of *Sicherungsverwahrung* to be considered not as a penalty, not under article 7, not under the principle of legality, but, in essence, as an administrative measure. So, what the Court decided was, in fact, to view the *Sicherungsverwahrung*, this kind, this specific type of *Sicherungsverwahrung*, *nachtragliche Sicherungsverwahrung*, as an administrative, purely administrative measure, not a punitive measure, not a criminal measure. And, therefore, the principle *nulla poena sine lege praevia* would not apply.

This is extremely dangerous because this allows for the "administrativisation" of criminal law. This allows to take out of criminal law certain type of offenders and to treat them in terms of pure administrative law, not with the guarantees of criminal law, but with the less strong guarantees of administrative law, which is very dangerous. In fact, what we are doing, what the Court is now allowing to do, is to limit the field of security measures, so to limit the field of criminal law within which security measures must be included and to treat situations that are indeed those of criminal offenders that are very dangerous as persons who need only administrative therapeutical measures and not as offenders. So, they would be set in a *Therapieunterbringung*, meaning internment for therapeutical measures, for therapeutical purposes, and they would not be treated as criminal offenders.

The practical effect of the German policy of administrativisation of security measures is that these people be kept in jail forever. Of course, we don't call this jail, we call it *Unterbringung*, but, in fact, what it is, it's a jail, because the people are interned, they are not free to move out. And, in fact, the promise of the German government that this measure, the *Therapieunterbrigung*, would be oriented by the re-socialization purpose was, in fact, a failed promise, because in fact what happened, and this is proven in the files, was that the places were these people are interned, including Mr. Ilnseher, are not very much different from usual prisons. In practice, these people are treated no less different than normal prisoners in normal establishments for normal prisoners.

So, my point here, and this is the main point to which I would like to draw your attention, dear colleagues, is that we face very very problematic trends in Strasburg. Strasburg is taking out of criminal law measures that are intrinsically criminal sanctions and dealing with them as purely administrative measures. Why? Because this allows to apply these measures, these administrative measures, retroactively. And, in fact, in practical terms, it allows for people to be kept in jail forever. It is not called a jail, but it is a jail in fact. There is no much difference, in practical terms, as the file has shown, the file of Ilnseher. And I refer you to the facts part of the judgment of Ilnseher.

Now, what is regrettable, and I would like to add this point, is that this is a trend that it is not limited to the German constitutional order. Also, in Italy it has happened. Look at *G.I.E.M. v. Italy*, at what happened with the "*confisca urbanistica senza condanna*". *G.I.E.M.* revoked *Vàrvara*. *G.I.E.M.* it's a kind of "*truffa delle etichette*", by which a purely criminal sanction is indeed treated as not being criminal, not under article 7, just to allow for this “*confisca urbanistica*” to be applied in cases where there cannot be a formal declaration of guilt because the criminal offense is already statute-barred, is already prescribed, *prescritta*.

What we are doing here it’s the same kind of *Etikettenschwindel*, “*truffa delle etichette*”; what happened in the German case is now happening in the Italian case. Why? Because we are taking out of criminal law measures that are strictly criminal and treating these measures as administrative law just to allow for lesser guarantees to apply. This is extremely dangerous.

We have a higher level of protection in criminal law and a lower level of protection in administrative law. And we are doing this: we are lowering the level of protection and we are, in fact, dealing with these measures that are applied to dangerous people as if they were only administrative measures. Well, they are not: they are criminal in essence. The measure of *Sicherungsverwahrung* is criminal in essence. As the Court stated in *M. v. Germany*.

“*Confisca urbanistica”*, even when there is no *condanna* (*senza condanna*) is criminal in essence. What the Constitutional Court has said in Rome is that this is an administrative measure: there is no need for a formal declaration of guilt in the cases of offences that are statute-barred. And in *G.I.E.M.* the Court confirmed this part of the judgement of the Constitutional Court. Well, I dissented, then, and I wrote why, precisely because of this: because I think this is very dangerous for Europe. We are living in very dangerous times. Criminal lawyers must be very attentive to this. We are taking out of criminal law and dealing with these measures as administrative law and in fact what we are doing? We are lowering the level of protection of these people.

So, my point to you is that we should be aware of what’s going on in Strasbourg. Both *G.I.E.M. v. Italy* and *Ilnseher v. Germany* are very very worrying. Worrying signs that come from Strasbourg that lower the level of protection and in fact they contradict previous case law.

What happened is very regrettable. *G.I.E.M.* contradicted *Vàrvara* and what happened in the Italian case happened also in the German case: *Ilnseher* contradicted *M. v. Germany*. So, the Court initially took a position, favourable to a higher level of protection, placing these measures, as criminal measures, under article 7 – *nulla poena sine lege previa* would apply, *nulla poena sine culpa* would apply, – but, later on, the Court revoked this position and admitted that these measures are purely administrative and therefore they do not merit the full protection of the principle of legality in criminal law. And, therefore, all the possibilities have been admitted, like retrospective punishment in the case of *Sicherungsverwahrung* and the applicability of *confisca urbanistica senza condanna* in the cases of statute-barred offences.

So, my point, dear colleagues, is that we should be very attentive to the case-law of Strasbourg, because the signs that are coming from Strasbourg are worrying. I think that criminal lawyers and specially University Professors have a duty: it's a civic duty to react and to comment and not to ignore these signs.

Thank you very much for your attention. And, of course, I am at your disposal through the Internet or directly right now to answer your questions. Thank you very much and again it was a pleasure to be with you.