



The Role of Forensics Psychiatry During the Criminal Trial and Execution

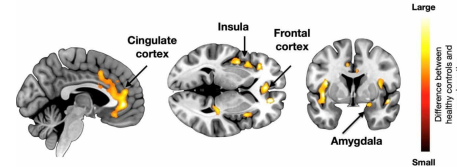
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How to Determine the “Social Dangerousness”?



Lauri Nummenmaa, Turku PET Centre, Finland



1* *The intellectual and psychic life of man*

- a vague, nebulous realm, elusive in itself
- of immaterial content → even the most modern methods of introspection cannot give concrete answers about the psychic life of man
 - an increasing amount of scientific research in the field of neurology

- neurological processes that lead to changes in the psychic sphere of man
- psychopathic offenders
 - whether their mental construction defers from the mental processes of a normal person
 - if so, whether they can be considered the cause of their frequent criminal behavior

2* *Tempore Criminis*

- Cognitive and voluntative capacities have to be determined with certainty
 - Mental capacity and possible dangerousness are just a fragment of a criminal, unlawful act
 - Srnec case → time period between the trial and the offence exceeds 19 years

- A judgement of conviction +
- Standard of proof = beyond doubt (Art. 455, Para. 1 of the CCP)



Antisocial personality disorder + full mental capacity

3* *Risk of future reoffending*

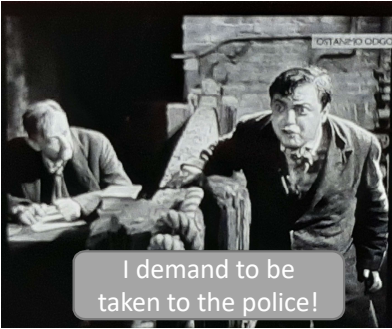
- What kind of tests? With what degree of certainty?
- The right to a fair trial

Constitutional appeal pending

On an unspecified day in 2000, Smiljana Srnec (46) killed her then 21-year-old sister Jasmina with at least five hits with a blunt and heavy object and hid her body in a freezer in the family home to cover up the crime. The mystery of the disappearance was solved **after almost 19 years** when a body was discovered in the chest on the winter afternoon of February 16, 2019.



The Evidence of the “Social Dangerousness” on the Cinema Screen - M (1931), Fritz Lang & Peter Lorre



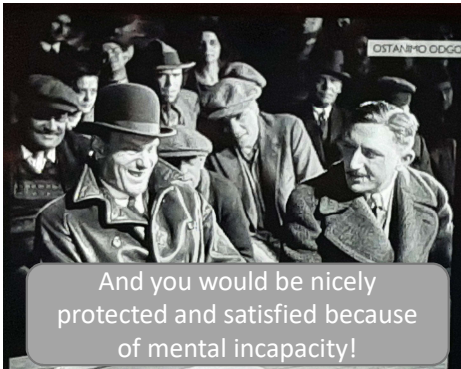
I demand to be taken to the police!



Look at him! And that is what you want!



And to live on state expenses your whole life!



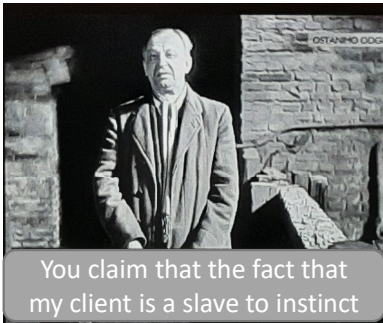
And you would be nicely protected and satisfied because of mental incapacity!



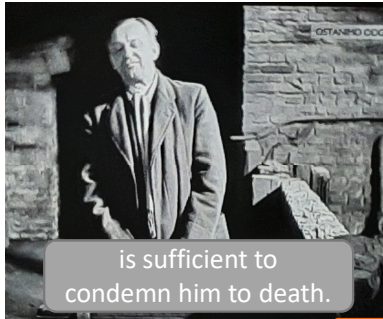
We just want to render you harmless.



May I address the court? - The defense counsel has the floor.

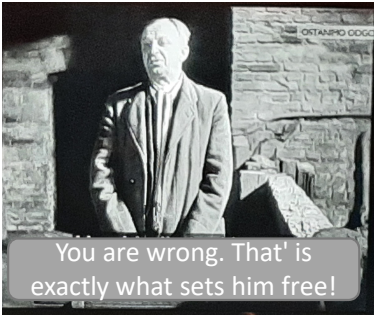


You claim that the fact that my client is a slave to instinct

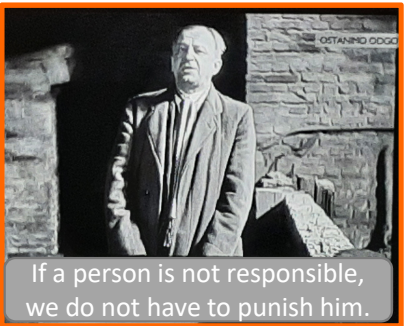


is sufficient to condemn him to death.

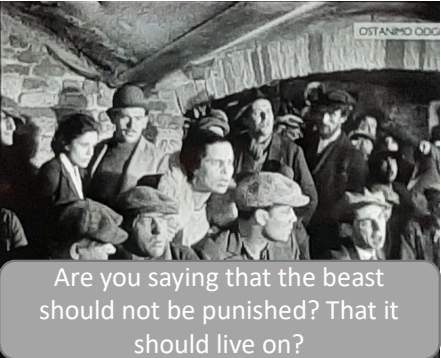
M (1931), 1:37,50 min.
<https://www.youtube.com/watch?v=TdSL9FvCv0U>



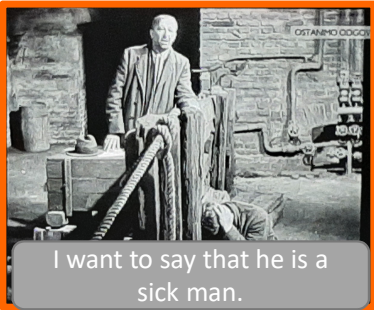
You are wrong. That' is exactly what sets him free!



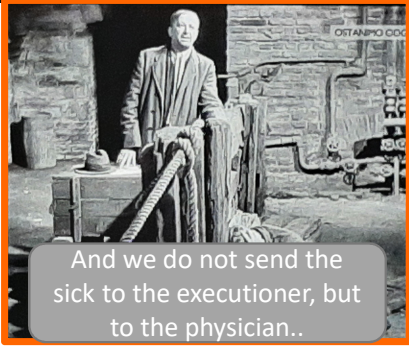
If a person is not responsible, we do not have to punish him.



Are you saying that the beast should not be punished? That it should live on?



I want to say that he is a sick man.



And we do not send the sick to the executioner, but to the physician..



The Evidence of the “Social Dangerousness” in Historical Perspective

- Who determines mental capacity and social dangerousness



- Assessment Methods

- Psychological method

- Contrary to the conclusions of psychiatric science
 - Legal uncertainty

The perpetrator of the criminal act is not criminally liable if *tempore criminis* he could not understand the meaning of his act or control his will.

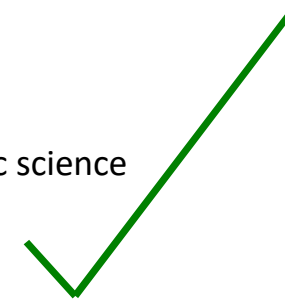
- Biological method

- The diagnosis of the disease itself automatically leads to the exclusion of countability —→ “Psychiatrisation” of the criminal law
 - Persons suffering from mental disorders may be guilty of a criminal offense

The perpetrator of the criminal act is not criminally liable if *tempore criminis* he suffered from mental disorder.

- Psychological - Biological method / Mixed method

- In accordance with the conclusions of psychiatric science
 - Comparative perspective
 - More reliable conclusions
 - More active role of the judge



The Evidence of the “Social Dangerousness” in Historical Perspective

- Who determines mental capacity and social dangerousness



The psychiatric witness is a product of the 19th century. Before that time, judges set the standards. After 1825, the independent medical witnesses began to fulfill a specific role at the court.

- Discussions related to **the 1889 Zanardelli Criminal Code**

- ❖ The victory of the Classical School affirming a monistic vision of punishment based on the seriousness of crime and guilt of the offender, however
- ❖ Zanardelli's **proposal of Art. 46** of the draft Code prescribed the possibility of empowering the criminal court judge to order hospitalization in already established civil or judicial institutions of defendants who, because of a "defect or morbid change of mind," were deemed not to be criminally liable.
- ❖ The commission of **the Chamber of Deputies**, tasked with examining the project, however, flatly rejected the proposal
 - ❖ *the power to confine a person to a judicial or civil institution has never been, and should not be, within the competence of the criminal judge, especially*
 - ❖ *if the confinement is permanent, as the phrase "to remain there for as long as the competent authority deems necessary" suggests*
 - ❖ *„It is not a task for men in togas to make judgments about the pathology of their fellow citizens. This is a task of these who work at the sanitary.”, a congressman Pellegrini stressed.*
 - ❖ *A criminal sanction should not be used as a means of neutralizing a dangerous offender.*
 - ❖ *The Criminal Law is not a social therapy and should not contain arbitrary sanctions. (Sannini, 2014)*

- **The 1930 Rocco Criminal Code**

- ❖ The victory of the Positivist School proposing that a criminal offence is a symptomatic datum of a disease.
- ❖ The judge has a power to issue **an administrative order based on the expert opinion and evaluation of the psychiatrist** who gives a "privileged judicial testimony".
- ❖ The **presumptions iuris et de iure of dangerousness** and the role of judge and the psychiatric expert witness?



The Evidence of the “Social Dangerousness” in Current Criminal Procedural Law?

- Psychiatric expert witnessing → basic tendencies



The Crime Control and Due Process Models
(Damaška, 1973)

The effectiveness of the criminal procedure

v.

The principles of fair procedure / Due process rights

Expert testimony is a piece of evidence, a source of knowledge about the facts on which the judgment is based, which makes the expert opinion an instrument that decides the future of the individual and, indirectly, of society.



Psychiatric expertise v. scientific research

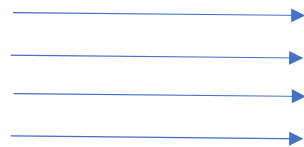
Medical

Psychological

Social

F A C T S

Process of “translation”



Legal notion of

- mental capacity and its variants
- social / individual dangerousness

The Evidence of the “Social Dangerousness” in Croatian Criminal Procedural Law?

- Psychiatric expert witnessing, Art. 325 of the CCP

It is mandatory



- If suspicion arises that the defendant’s *mental capacity is excluded or diminished*, that the defendant has committed a criminal offence *due to the defendant’s addiction to alcohol or drugs* or that the defendant is *unfit to stand trial due to mental health difficulties*, the expert witness testimony on the basis of the psychiatric examination of the defendant **shall be ordered**. (Art. 325, Para. 1)

- Otherwise, breach of
- the principle of legality
 - seeking the objective truth, and
 - the separation of procedural rules of experts and judges



- Current jurisprudence criteria on the suspicion in focus

- ❖ documentation of the defendant's treatment in a mental institution,
- ❖ knowledge of the state body conducting the criminal proceedings that a close relative of the defendant' suffers from mental illness,
- ❖ proven fact that the defendant is unfit for military service or certain job due to mental illness,
- ❖ chronic alcoholism or drug addiction of the defendant,
- ❖ recidivism,
- ❖ cruel or reckless and unmotivated commission of the crime,
- ❖ behavior of the defendant that is unusual for a mentally healthy person, etc.

The Evidence of the “Social Dangerousness” in Croatian Criminal Procedural Law?

- Psychiatric expert witnessing, Art. 325 of the CCP

- ethical issues related to partiality of expert witness
- lack of medical documentation
- no examination of the defendant

Vitium artis

Art. 285 of the CCP

(1) The following persons are exempted from the duty to testify:

(...)

5) attorneys, physicians, dentists, psychologists, probation officers and social workers regarding information disclosed to them by the defendant while performing their respective professions

(2) Persons stated in paragraph 1 subparagraphs 4 to 6 of this Article cannot refuse to give a statement if a legal ground exists exempting them from their duty to keep information confidential.

Private
psychiatric
expertise?



Therapist
(psychiatrist) as
an expert?

Physician as medical examiner (whose priority is patient protection) and as expert witness who is an assistant to the court, acting in the interest of society?

The tripartite relationship replaces the bilateral relationship, the relationship of trust, with the risk of

- abuse,
- violation of human rights and freedoms
- objectivity and
- having the expert as "investigator in white robe."

The therapist's testimony is limited to providing only the information relevant to resolving a legal issue!!!

The Evidence of the “Social Dangerousness” in Croatian Criminal Procedural Law?

- Psychiatric expert witnessing, Art. 325 of the CCP
 - By a court ruling, the defendant may be **committed to a relevant medical institution by force** if it is in the opinion of the expert witness ***necessary*** for the purpose of the expert witness testimony referred to in paragraph 1 of this Article. In proceedings prior to the confirmed indictment, the ruling on the commitment shall be rendered by the investigating judge, whereas after the indictment has been confirmed it shall be rendered by the court conducting the trial. The commitment **cannot exceed the period of one month**. In the case that a new expert witness testimony is needed, the commitment may be repeatedly ordered only once. (Art. 325, Para. 2)

- Expert witnessing of a team of specialists
- Cumulation and interaction of psychological, psychopathological, social and other criteria (psychiatrists, psychologists, neurologists etc.)
- The defendant is observed for the certain period of time
- The need to respond to complex cases
- The need for increasing expert witness objectivity

Control of the validity of the expert testimony

- Even if they hold a "unified opinion", every expert is independently and fully responsible for the findings made and the opinion, and this maximizes the responsibility and self-criticism of the expert from the perspective of his or her own profession.



University Psychiatric Hospital Vrapče,
Department of Forensic Psychiatry;

The Evidence of the “Social Dangerousness” in Croatian Criminal Procedural Law?

- Psychiatric expert witnessing, Art. 325 of the CCP

Is the deprivation of liberty of 30 alias 60 days from Art. 325, Para. 2 in accordance with the principle of proportionality



The Constitutional Court of the RC, U-I-448/2009 from July 19, 2012.

Attorneys-at-law Jasna Novak and Višnja Drenški Lasan

- ❖ This detention is essentially a deprivation of liberty of the accused, and the right to liberty is protected by the provisions of Art. 22 of the Constitution of the Republic of Croatia.
- ❖ According to the provisions of Art. 16, Para. 2 of the Constitution of the Republic of Croatia, any limitation of freedom or rights must be proportionate to the nature of the necessity of the restriction in the individual case.
- ❖ A period of 30 and especially 60 days does not meet the criterion of proportionality of restrictions on the right to freedom, since freedom is one of the fundamental rights of every person and a prerequisite for the exercise of all other rights. Only the right to life is stronger than the right to freedom.

Ministry of Justice

- ❖ Placement in a health care facility must be necessary on the basis of Art. 325, Para. 2 of the CPC.
- ❖ This shall be decided by the court. Pursuant to Art. 491, Para. 1 of the CPC, an appeal against such decision is admissible.



The Evidence of the “Social Dangerousness” in Croatian Criminal Procedural Law?

• Psychiatric expert witnessing, Art. 325 of the CCP

Is the deprivation of liberty of 30 alias 60 days from Art. 325, Para. 2 in accordance with the principle of proportionality



The Constitutional Court of the RC, U-I-448/2009 from July 19, 2012.

- ❖ Freedom of movement is a basic constitutional right.
- ❖ A period of up to 30 / 60 days for the preparation of a psychiatric expert opinion may be reasonable if the opinion is **complex**.
- ❖ Although such situations are the **exception**, they must be provided for in the law.
- ❖ The accused shall be **released immediately** after the purpose of deprivation of liberty has been achieved, i.e. after the completion of the expert assessment.
- ❖ **Art. 5, Para 1 (e) of the ECHR** allows deprivation of liberty of *persons of unsound mind* for the purpose of psychiatric expertise in criminal proceedings.

Considering the fact that complex expert opinions may be involved, which may take a long time to determine the nature of the defendant's mental disorders, a period of detention of one month, which may be repeated only once and lasts for two months, **does not seem** disproportionate. The principle of proportionality is not infringed.

I. The aim in accordance with the law?

II. Rational relationship between the restrictions and the aim?

III. Are the restrictions necessary? Is there any other less restrictive measure?

IV. Balancing test between the interest of the society and of the individual?



The Evidence of the “Social Dangerousness” in Croatian Criminal Procedural Law?



- Psychiatric expert witnessing, Art. 325 of the CCP

- The expert witness’s duty when assessing the defendant’s mental capacity (Para. 3)

- ❖ to establish whether the defendant had any mental illness, temporary mental disorder, insufficient mental development or *some other graver mental disorder* at the time the offence was committed
- ❖ to determine the **nature**, **type**, **degree** and **duration** of the mental health disorder
- ❖ to give his opinion on **what effect** such a mental condition had on the defendant’s ability to understand the meaning of his acts and / or to control his own will

- The conduct of the court in believing or disbelieving the findings and opinion of the expert witness

The court gives credence to the expert’s findings and opinion

Legal, not psychiatric terms



The court decides on mental competence, (significantly) diminished mental competence or mental incompetence.

The court disagrees with the expert’s findings and opinion

In dubio pro reo!

General principles of logic!

- ❖ **If the findings** are ambiguous, incomplete, or contradict themselves or the circumstances found, and if these anomalies cannot be removed by a re-examination of the expert, *the same or other expert witnesses shall provide new expert witness testimony.*
- ❖ **If the opinion** of the expert witness contains contradictions or other anomalies, or if grounds for suspicion exist that the opinion is inaccurate, and these drawbacks or suspicion may not be removed by a re-examination of the expert witness, *the opinion of other expert witnesses shall be requested.*



The Evidence of the “Social Dangerousness” in Croatian Criminal Procedural Law?

- Psychiatric expert witnessing, Art. 325 of the CCP
 - According to research studies, the criminal court judges accept psychiatric expert opinions and findings in almost 100 % of cases
 - Possible causes for this procedural outcome?
 - a sense of inferiority in a particular professional field
 - being impressed by the authority and reputation of the expert, and
 - acting out of sheer convenience
 - Possible negative effects?
 - passivisation of the court
 - putting an expert in the position of a judge, which may lead to
 - an abuse of the defendant's rights

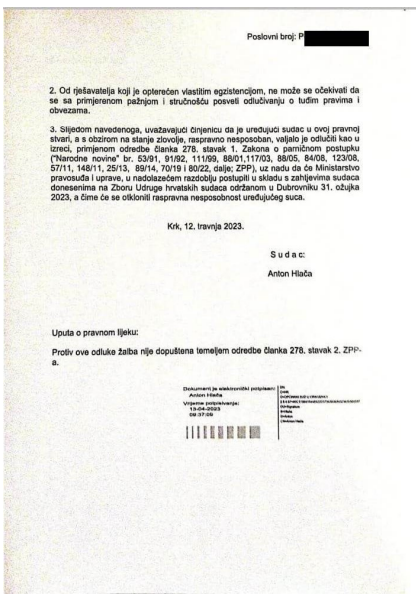
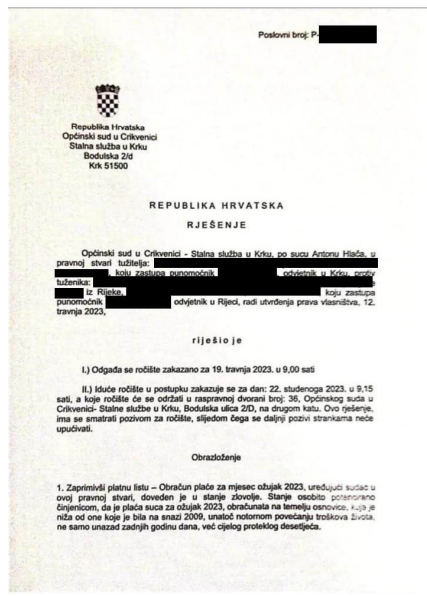


- ❖ The law must evolve.
- ❖ Continuous education is required of judges.
- ❖ By thinking logically through the existing procedural and substantive rules, judges are able to cope with this nebulous field, with the help of expert witnesses.
- ❖ Multidisciplinarity, necessary professionalism, training and expertise of the members of each profession.

The Issue of Being Fit to Stand Trial, Standard of Proof and Unity of the Legal System

- The most recent developments in Croatian court practice

A defendant who is competent to stand trial is able to understand the charges against him, to follow the course of the proceedings, and to exercise his procedural rights.



Municipal Court in Crikvenica, April 12, 2023

- The hearing scheduled for April 19, 2023 at 9:00 a.m. is postponed.
- After receiving the salary statement - the salary calculation for the month of March 2023 - **the judge who settles this legal matter** was put in a **state of displeasure**. The situation is particularly exacerbated by the fact that the judge's salary for March 2023 was calculated on a basis lower than that in effect in 2009, despite the notorious increase in the cost of living, not only in the last year, but in the entire last decade. A decision-maker burdened with his own existence cannot be expected to devote adequate attention and expertise to deciding the rights and obligations of others.



The County Court of Split, K 5/21 from 19 March 2021

- Around 1 a.m., a 50-year-old defendant in Split entered a bar in her neighborhood, approached the waitress and asked for a pack of cigarettes. The defendant had no money, and when the waitress asked her to pay for the cigarettes so she could be served, she pulled out the kitchen knife she had already brought with her and pointed it at the waitress and yelled, "Give me the cigarettes, you rotten bitch. I'll kill you, I'll kill all of you!". Fearing for her life, the witness handed over the cigarettes, which the defendant took, and then left the bar in an unknown direction. The defendant acted with the aim of unlawfully appropriating the cigarettes, and by this conduct she fulfilled all the elements of robbery and caused damage to the company that owns the bar in the amount of 29 HRK / 3.86 €.
- Before the start of the trial, the defendant was questioned by a permanent court expert in the field of psychiatry to determine whether she was fit to stand trial, i.e., whether she was capable of understanding the nature and purpose of the criminal proceedings, procedural actions and their consequences, as well as her legal counsel and to give him instructions. The defendant's fitness was confirmed and the trial was opened. During the proceedings, the same court expert gave her expert opinion, in which she stated that the defendant was a long-term mentally ill person suffering from unspecified psychosis (F29), resulting in personality deterioration, disorganization and complete dysfunction. Despite the treatment, the defendant neither developed critical faculties nor accepted the need to undergo the prescribed therapy. Therefore, there was a risk that she would commit a more serious crime again due to her psychotic state. The unlawful act that is the subject of these proceedings is due to the mental state of the defendant when she was in a state of acute psychosis and was under the influence of persecutory delusions that motivated her to commit the crime.



The County Court of Split, K 5/21 from 19 March 2021

- The court concluded that the defendant, in a state of psychotic disorder with paranoid ideas, due to which she was unable to understand the meaning of her actions and control them, had realized all the elements of robbery pursuant to Art. 230, Para. 2 of the 2011 Criminal Code.



- Biological or mixed assessment method?
- Who determines mental (in)capacity?
- Do we have a direct link between mental illness and mental capacity, i.e. delusions and cognitive and voluntative capacities?
- Is defendant's social dangerousness predicted with sufficient certainty?

*As far as the defendant's mental competence was concerned, it was obvious from the beginning of the proceedings that **she had significant mental disorders**. This was already apparent from the expert psychiatric report. Suffice it to say that in the conclusion of the psychiatric expert report, it is pointed out that the information about the defendant indicates that **she is a mentally ill person who has characteristics of a psychotic disorder for which she has been treated for years, and that in such a state she was neither able to understand the meaning of her actions nor to control her will during the commission of the unlawful act with which she was charged**. Therefore, the defendant was **mentally incompetent at the time of the commission of the unlawful act**... In addition, the **permanent court expert stated** in her expert opinion that there was a **possibility that the defendant would commit an even more serious crime, given her state of health, which is why she suggested compulsory psychiatric treatment in a custody and treatment facility**... After it was determined that the defendant had committed the unlawful act in a state of mental incompetence, her **placement in a psychiatric facility was ordered for a period of six months**.*

Professional Standards of Expert Witnesses when Conducting Expertise and Producing Expert Opinion?

- Psychiatric expert witnessing and ethical standards

- Thomas Percival's *Medical Ethics, 1803* —————> a milestone in the development of modern codes of medical ethics

When it becomes [medical practitioners'] painful office to deliver evidence, on such occasions, **justice and humanity** require that they should scrutinize **the whole truth** *and nothing extenuate nor set down aught in malice.*

- American Academy of Psychiatry and the Law —————> Ethics Guidelines for the Practice of Forensic Psychiatry, 2005

*verified v. nonverified information *facts v. impressions *personal examination *contingency fees v. retainer fees *treating psychiatrist

IV. Honesty and Striving for Objectivity

When psychiatrists function as experts within the legal process, they should adhere to the **principle of honesty** and should **strive for objectivity**. Although they may be retained by one party to a civil or criminal matter, psychiatrists should adhere to these principles when conducting evaluations, applying clinical data to legal criteria, and expressing opinions.

The Standards and Mechanisms of Ensuring the Rights of Psychiatric Patients within the Convention for the Protection of Human Rights and Fundamental Freedoms



ARTICLE 5

Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty **save in the following cases** and **in accordance with a procedure prescribed by law**:
(...)
(c) the lawful arrest or **detention** of a person effected for the purpose of **bringing him before the competent legal authority on reasonable suspicion of having committed an offence** or when it is **reasonably considered necessary to prevent his committing an offence or fleeing** after having done so;
(...)
(e) **the lawful detention of persons** for the prevention of the spreading of infectious diseases, of **persons of unsound mind**, alcoholics or drug addicts or vagrants;
3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be **brought promptly before a judge or other officer authorized by law to exercise judicial power** and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

The Standards and Mechanisms of Ensuring the Rights of Psychiatric Patients within the Convention for the Protection of Human Rights and Fundamental Freedoms



ARTICLE 6

Right to a fair trial

1. In the determination of his civil rights and obligations or of **any criminal charge** against him, everyone is entitled to a **fair and public hearing** within a **reasonable time** by an **independent and impartial tribunal established by law**. Judgment shall be pronounced *publicly* but the press and public *may be excluded* from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
(...)
3. Everyone charged with a criminal offence has the following minimum rights:
(...)
(c) to defend himself **in person** or **through legal assistance of his own choosing** or, if he has not sufficient means to pay for legal assistance, to be given it **free when the interests of justice so require**;

ARTICLE 7

No punishment without law

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

Romanov v. Russia, Application no. 63993/00, 20 October 2005

- On 13 October 1998, the applicant, Ilya Romanov, he was charged with the illegal acquisition and possession of drugs (marijuana) and detained. The grounds given were crime prevention and the risk of his absconding.
- On 15 October 1998 the investigator ordered his detention on remand, referring to the applicant's personality, **the danger he posed to the public** and the **risk of his escaping**. He was confined mostly in the psychiatric ward of the detention facility IZ 48/2 "Butyrskiy" in Moscow until 23 May 2000 .
- By a decision of the investigating authority **the applicant was required to undergo a psychiatric examination**. He was examined by experts at Serbskiy Forensic Psychiatry Institute in Moscow, who found he was suffering from **profound dissociative personality disorder (innate psychopathy)**, such that he **could not be held responsible for the offence with which he had been charged**. It was recommended that he undergo psychiatric treatment on an out patient basis at his place of residence.
- The applicant's case was heard by Gagarinskiy District Court of Moscow, which dismissed his requests for release on the ground that ill detainees were not transported to court from the detention facility IZ-48/2 and later, that the statement of a person who had been legally established as mentally disturbed could not be accepted as evidence. The court also adjourned the proceedings on a number of occasions because witnesses failed to appear.
- On 28 June 1999 the court ordered an additional psychiatric examination. The commission of experts from Serbskiy Forensic Psychiatry Institute on 25 August 1999 **were uncertain as to the state of the applicant's mental health**. A second examination carried out by the psychiatry institute from 24 November 1999 to 24 December 1999 found that the applicant suffered from a **psychological disorder in the form of profound dissociative psychopathy** and that he had **committed the offence in a deranged state of mind**. It was concluded that he was in need of placement in a mental hospital for compulsory treatment.
- On 9 July 2003 the district court held that the applicant had unlawfully acquired and possessed drugs but that he **should not be held criminally responsible** since he had been in a deranged state of mind and that **no compulsory medical measures should be imposed** on the applicant, who had already undergone treatment following the court's decision of 4 April 2000.
- On 4 September 2003 Moscow City Court **quashed the decision** of 9 July 2003 and **discontinued the criminal proceedings** against the applicant, under an Amnesty Act of 26 May 2000.



Romanov v. Russia, Application no. 63993/00, 20 October 2005

- The reasons given for the applicant's detention on 13 October 1998 were
 - crime prevention,
 - the risk of his escaping,
 - his personality and
 - the danger he posed to the public.

The investigating authority failed to mention any factual circumstances capable of showing the existence of a danger of the applicant's escaping

No explanation on peculiarities of the applicant's personality

The crime, namely the acquisition of drugs for personal consumption and possession, even assuming that there was a risk of prejudice to public order at the beginning, it must have disappeared over time. That reason did not suffice to justify the applicant's pre-trial detention for a year, three months and 13 days.

A violation of
Art. 5 § 3
Right to liberty
and security
(habeas corpus)

- The length of the proceedings was attributable neither to the complexity of the case nor to the conduct of the applicant, but to the lack of diligence and expedition on the part of Gagarinskiy District Court of Moscow.
- The Court recalled that States which had ratified the European Convention on Human Rights were under an obligation to secure the attendance of an accused in custody. *Where proceedings involved an assessment of the personality and character of the accused and his state of mind at the time of the offence, and where their outcome could be of major detriment to him, it was essential to the fairness of the proceedings that he be present at the hearing and afforded the opportunity to participate in it together with his counsel.*
- The district court's argument that the applicant's presence at the hearing was not required in that the testimony of the applicant as a mentally-disturbed person could not be accepted as evidence was striking, given that it was for the district court to determine whether the applicant had committed the offence in a deranged state of mind and assess whether his mental condition required any compulsory medical care. *Two psychiatric opinions* drawn up by the same forensic institution concurred on the applicant's diagnosis but differed on the measures it necessitated. Such an *inconsistency*, which had an impact on the outcome of the proceedings and, ultimately, on the applicant's liberty, made the question of his participation in the hearing particularly important.

A violation of
Art. 6 § 1 and 3 (c)
Right to a fair trial



M. v. Germany, Application no. 19359/04, 12 December 2009

- In 1986 the applicant was convicted of attempted murder and robbery and sentenced to five years' imprisonment. In addition, the trial court ordered his **placement in preventive detention**, a measure considered necessary in view of the applicant's strong propensity to commit offences which seriously damaged his victims' physical integrity. He had already been convicted and imprisoned on numerous occasions, notably for attempted murder, theft, assault and blackmail. In the court's opinion, **he was liable to commit spontaneous acts of violence** and was **a danger to the public**.
- The applicant **finished serving his prison sentence in August 1991** and has been **in preventive detention ever since**. In April 2001 **a court** refused to release him on licence and ordered that he be kept in **preventive detention beyond 8 September 2001**, the date the maximum ten-year period previously authorized for such detention was due to expire. The court applied the Criminal Code as amended by a law which had entered into force in January 1998, and stated that the amended provision was applicable also to prisoners who had been placed in preventive detention prior to the law's entry into force. According to the court on account of **the gravity of the applicant's criminal record and the likelihood of his committing further offences**, his continued placement in preventive detention was not disproportionate.
- **The court of appeal** confirmed that **the applicant's dangerousness** necessitated his continued preventive detention and added that such detention was not contrary to the **prohibition of retrospective provisions** in the criminal law.
- The applicant lodged an unsuccessful constitutional complaint. **The Federal Constitutional Court** held, in particular, that the abolition of the maximum period of detention, and the application of this measure to criminals who had been placed in preventive detention prior to the entry into force of the new legislation and had not yet finished serving their sentences, were **compatible with the Constitution**. It also considered that the **retrospective application of the amended provision of the Criminal Code was not disproportionate**.



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- The applicant's preventive detention before the expiry of the ten-year period had resulted from his "conviction" by the sentencing court in 1986 and was therefore covered by Article 5 § 1 (a).
 - There was no sufficient causal connection between his conviction and his continued deprivation of liberty beyond the period of ten years in preventive detention, which had been made possible only by the subsequent change in the law in 1998.
- The applicant's continued detention had been justified by the courts responsible for the execution of sentences with reference to the risk that the applicant might commit further serious offences – similar to those of which he had previously been convicted – if released.
 - The potential further offences were not, however, sufficiently concrete and specific, as required by the Court's case-law as regards the place and time of their commission and the victims, and did not, therefore, fall within the ambit of Article 5 § 1 (c).
- The domestic courts had not based their decisions to further detain the applicant on the ground that he was of unsound mind.
 - Applicant's detention could not be justified under Article 5 § 1 (e) either.

A violation of
Art. 5 § 1
Right to liberty
and security

In sum, the applicant's preventive detention beyond the ten-year period had not been justified under any of the sub-paragraphs of Article 5 § 1.

- Under German law, the preventive detention was not considered a penalty to which the absolute ban on retrospective punishment applied, but rather a measure of correction and prevention aimed at protecting the public from a dangerous offender. However,
 - a preventive detention as well as a prison sentence entailed a deprivation of liberty
 - preventive detention was executed in a separate prison wing with slightly modified, additional privileges
 - no sufficient psychological support to prevent preventive detainees from committing criminal offences in the future
 - punitive purpose
 - unlimited duration
 - hard to prove that there was no danger that the detainee would commit further serious offences to obtain the suspension of preventive detention on probation issued by the court

A violation of
Art. 7 § 1
No punishment
without law

A preventive detention is probably the most severe, additional penalty under the German law, and it is a "penalty" for the purposes of Article 7 § 1 of the Convention. The extension of it was imposed retrospectively.





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Forensis psychopathology / Pericolosità sociale e accertamento penale

