EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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# The security measures imposed on a person found to lack criminal responsibility did not constitute penalties within the meaning of the Convention

In today's **Chamber judgment**[1] in the case of Berland v. France (application no. 42875/10) the European Court of Human Rights held, unanimously, that there had been:

**no violation of Article 7 § 1 (no punishment without law)** of the European Convention on Human Rights.

The case concerned the security measures imposed under a Law of 25 February 2008 on Mr Berland, who had been found to lack criminal responsibility, in connection with a murder committed prior to the entry into force of the Law. Mr Berland complained of the imposition of "penalties" which, on account of his mental state, he would not have incurred under the earlier legislation applicable on the date on which the acts had been committed.

The Court observed that the security measures had not been ordered following Mr Berland's conviction of an offence, but following a finding that he lacked criminal responsibility. The measures in question (a 20-year ban on contact with the civil parties and on possessing a weapon) were to be regarded as preventive rather than punitive measures and as such not covered by the principle of non-retroactivity set forth in Article 7 § 1.

The present case was to be distinguished from the case of *M. v. Germany* in several respects, and in particular because:

- it did not concern security measures imposed on persons sentenced to imprisonment who presented a particular danger on completion of their sentence. This aspect was dealt with by the first part of the Law of 25 February 2008, whereas the *Berland* case concerned the second part of the Law.

- in *M. v. Germany* the Court had found that the applicant's preventive detention amounted to a "penalty" and that Article 7 § 1 was therefore applicable. The Court had considered that the measure in question, which had been ordered following the applicant's conviction for attempted murder and robbery and was one of the most severe penalties that could be imposed under the German Criminal Code, should be classified as a penalty[2]. It had also taken account of the fact that Mr M. was detained in an ordinary prison. This was not the case with Mr Berland, who had been placed in a specialised hospital.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

[2] In *M. v. Germany* (no. 19359/04, 17.12.2009) the Court held that preventive detention constituted a penalty, observing in particular that it had been ordered following the applicant's conviction for attempted murder and robbery and served a punitive rather than a preventive purpose. This was attested to by the fact that it was executed in an ordinary prison, the lack of specialised care aimed at reducing the danger presented by the person concerned, the indefinite duration of detention, and the fact that it was ordered by the courts and that its execution was determined by the courts responsible for the execution of sentences, which formed part of the criminal justice system (*M. v. Germany* judgment, §§ 124 to 131).

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## Principal facts

The applicant, Daniel Berland, is a French national who was born in 1987. He is currently in Sevrey specialised hospital.

On 14 September 2007 Mr Berland was charged with murdering his former girlfriend and assaulting two other people, and was remanded in custody. Two days previously he had stabbed his former girlfriend repeatedly and killed her at his place of work, after she had told him she no longer wished to see him.

In November 2008 the public prosecutor at the Dijon Court of Appeal lodged an application for the Investigation Division of the Dijon *tribunal de grande instance* to rule on whether Mr Berland lacked criminal responsibility on account of mental illness, in accordance with the procedure under the Law of 25 February 2008 on preventive detention and diminished responsibility because of mental illness. That Law had introduced a new procedure for finding that individuals lacked criminal responsibility on account of mental illness. Previously, the investigating judicial authority or trial court would have issued a decision discontinuing the proceedings or discharging or acquitting such persons, on the basis that, since they lacked criminal responsibility, they were to be treated in the same way as persons against whom there was insufficient or no evidence. However, since the enactment of the Law of 25 February 2008, such persons appeared before the investigating judicial authority or trial court, which ruled on whether the acts had been committed, found that the person lacked criminal responsibility and ordered compulsory hospitalisation and/or security measures, as applicable.

In a judgment of 18 February 2009 the Investigation Division found that Mr Berland lacked criminal responsibility on the ground that he suffered from a psychiatric disorder which deprived him of his discernment and his ability to control his actions. It ordered his compulsory hospitalisation and also barred him for a 20-year period from making contact with the civil parties or possessing a weapon. Mr Berland argued in the Court of Cassation that the effect of the immediate application of the Law of 25 February 2008 had been to make him subject to penalties which, on account of his mental state, he would not have incurred under the earlier legislation applicable at the time the acts had been committed. His appeal on points of law was dismissed in a judgment of 14 April 2010. The Court of Cassation dismissed Mr Berland's arguments on the ground that the principle that only the law could prescribe a penalty did not apply to the security measures imposed in relation to persons found to lack criminal responsibility because of mental illness.

At the request of the advocate-general, the word "wilfully" was deleted from the following sentence in the Investigation Division's judgment: "There is sufficient evidence that [the applicant] (wilfully) committed the acts of which he is accused." The advocate-general argued that, where a person had been found to lack criminal responsibility, the courts could not rule on the mental element of the offence and accordingly on whether the actions in question constituted a criminal offence under the law.

## Complaints, procedure and composition of the Court

Relying on Article 7 § 1 (no punishment without law), Mr Berland complained of the retroactive application of the Law of 25 February 2008.

The application was lodged with the European Court of Human Rights on 21 July 2010.

Judgment was given by a Chamber of seven judges, composed as follows:

Mark **Villiger** (Liechtenstein), *President*,
Angelika **Nußberger** (Germany),
Boštjan M. **Zupančič** (Slovenia),
Ganna **Yudkivska** (Ukraine),

Vincent A. **de Gaetano** (Malta),
André **Potocki** (France),
Helena **Jäderblom** (Sweden),

and also Claudia **Westerdiek**, *Section Registrar.*

## Decision of the Court

### Article 7 § 1

The Law of 25 February 2008 on preventive detention and diminished responsibility because of mental illness comprised two parts[3]. The present case concerned the second part of the Law, which introduced a new procedure for finding that individuals lacked criminal responsibility because of mental illness.

Mr Berland complained of the retroactive application of that Law and relied on Article 7 § 1, which reads as follows: "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." The Court therefore had to ascertain whether the measures imposed on Mr Berland had been adopted following his conviction of a criminal offence and thus amounted to "penalties" to which the principle of non-retroactivity set forth in Article 7 § 1 applied. The Court reiterated in that regard the autonomous meaning of the notion of "penalty" in the Convention, irrespective of how it was defined in national legal systems. It further noted that member States' criminal legislation aimed at protecting society against dangerous criminals differed widely and that the same type of measure could be classified as a penalty in one State and as a security measure in another. Hence, there was a need for caution in applying the distinction made by the European Court of Human Rights in its case-law between a penalty, such as the preventive detention provided for under German law[4], and a security measure not covered by Article 7 of the Convention, such as an individual's placement on a judicial register of perpetrators of sexual or violent offences[5].

The Court noted at the outset that the measures in question had been ordered by the Investigation Division of the Dijon *tribunal de grande instance*, which had delivered a judgment in which it found, firstly, that there was sufficient evidence that Mr Berland had committed the acts of which he was accused and, secondly, that he lacked criminal responsibility on account of a mental disorder which deprived him of his discernment and his ability to control his actions. The *tribunal de grande instance* had been careful to point out that "... the finding that there is sufficient evidence that [the applicant] committed the acts of which he was accused in no sense amounts to a conviction but rather establishes the existence of a state which may have legal consequences ... ." The Court also observed that the Court of Cassation had deemed it necessary to delete the word "wilfully" from the Investigation Division's judgment, so that the mental element normally required as one of the constituent elements of an offence could not be taken into consideration.

[3] The first part of the Law introduced preventive detention in a socio-medico-legal centre for persons sentenced to prison terms of 15 years or more who posed a particular risk on completion of their sentence. This bears some resemblance to the preventive detention scheme examined by the Court in *M. V. Germany* (no. 19359/04), in which it observed that the French Constitutional Council had found that the French preventive detention scheme did not constitute a penalty or a sanction but could not be ordered retroactively against persons convicted of offences committed prior to the entry into force of the Law or convicted after that date of offences committed previously, in view of "its custodial nature, the time it may last, the fact that it is indefinitely renewable and the fact that it is ordered after conviction by a court …" (§ 75 of the judgment in *M. v. Germany*).
[4] *M. v. Germany* judgment (no. 19359/04)
[5] *Gardel v. France* judgment (no. 16428/05)

Accordingly, the Court considered that the measures imposed on Mr Berland, who had been found to lack criminal responsibility because of mental illness, had not been ordered following his conviction of an "offence".

It further noted that in France the measures imposed on Mr Berland were not regarded as penalties to which the principle of non-retroactivity applied[6].

As to the nature and purpose of Mr Berland's compulsory hospitalisation, the Court observed that the aim had been firstly to allow him to receive treatment by placing him a specialised hospital rather than an ordinary prison[7], and secondly to prevent a repetition of his actions. It also noted that an application could be made to the liberties and detention judge at any time for the compulsory hospitalisation order to be lifted. Hence, compulsory hospitalisation, the duration of which was not determined in advance, served a preventive and curative purpose rather than a punitive one, and did not constitute a penalty.

As to the two other security measures imposed on Mr Berland, namely the twenty-year ban on making contact with the civil parties and possessing a weapon, the Court noted that these could only be ordered if they were necessary in order to prevent a repetition of the actions committed by the person found to lack criminal responsibility, to protect that person, the victim or the victim's family or to put an end to the disturbance of public order. Furthermore, while these measures were of limited duration – a fact which, in the applicant's view, meant that they constituted penalties – it was open to Mr Berland to apply to the liberties and detention judge to have them lifted or varied. Accordingly, the Court considered that the ordering of the measures in question and the review of their application by the judge served a preventive purpose.

Lastly, the Court noted that, while it was true that Mr Berland risked a two-year prison sentence and a fine if he failed to comply with the measures complained of, this could only arise if he was found to be criminally responsible for his actions at that time. Moreover, a new set of proceedings would be opened in such a case.

The Court held that the finding that Mr Berland lacked criminal responsibility and the accompanying security measures did not constitute a "penalty" within the meaning of Article 7 § 1 of the Convention and were to be regarded as preventive measures to which the principle of non-retroactivity under that Article was not applicable. There had therefore been no violation of that provision.

*The judgment is available only in French.*



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[6] The circular of 8 July 2010 specified that the measures provided for in Article 706-136 of the Code of Criminal Procedure could not be ordered by way of punishment (§ 20 of the Berland judgment). The Court of Cassation has held since its judgment of 16 December 2009 that these measures do not constitute penalties (§ 23 of the Berland judgment).

[7] See, conversely, the judgment in *M. v. Germany,* in which the Court held that achieving the aim of preventing crime entailed the provision of special care in specialised facilities (§§ 127-129).

**The European Court of Human Rights** was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.