



Tieslietu ministrija

Project No.JUST/2010/KPEN/AG/1546 “Possibilities of solution of topical problems of restorative justice in the European Union”

Conference „Commensurability of human rights and conception of coercive preventive measures”

March 27 2013, Riga

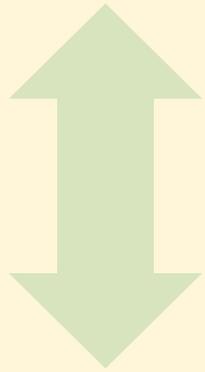
Commensurability aspects of human rights and prevention

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27.03.2013.

Society vs. asocial behaviour

Reactive approach



Proactive approach

To expect for delinquency → to resolve it → to punish the offender → measures to restore justice

Preventive measures → delinquency prevention & rehabilitational protection measures for endangered persons

Reactive & proactive
measures

The diagram features a light green oval on the left containing the text 'Reactive & proactive measures'. A large red arrow points from this oval to a light pink rectangular box on the right containing the text 'Asocial behaviour'. A blue arrow originates from the bottom of the green oval, curves downwards and then to the right, pointing towards a light blue rectangular box at the bottom of the slide. This box contains a bulleted list of five items related to the implementation of these measures.

Asocial
behaviour

- proportion in the implemented criminal policy
- types/intensity
- application preconditions
- commensurability
- human rights (especially in case of application of preventive instruments)

Repressive (restrictive of rights) instruments



After
committing
delinquency



Fair response to the
doing



Before
committing
^{eventual}
delinquency



Preventive coercive measures

ARE NOT

a penalty for not yet committed delinquency,

but rather **are** a proportionate state intervention aimed at preventing commitment of a delinquency,

thus protecting other persons' rights and interests (a), as well as helping the client to find a possibility to live in a society without breaking the law (b)

Preventive coercive measures

- **Supervision of persons**

- A duty to inform about place of residence and workplace or place of studies, as well as leaving the place of residence
- A duty to appear at a specific time in a specific place
- A prohibition to approach a specific location
- A prohibition to participate in certain public or other events
- A prohibition to approach or contact a specific person or a scope of persons
- A prohibition to use intoxicating substances

- **Preventive bail**

- **Duty to receive social rehabilitation services**

- Professional consultations
- Participation in social rehabilitation programs

* Concept of preventive coercion measures

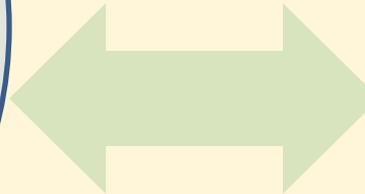
**PCM is a
coercive
instrument**

**Human rights
standards**

- PCM application preconditions: To whom? In which cases?
- PCM application procedure
- commensurability of restriction of certain rights
- Legal consequences, if a person violates an applied PCM

PCM: Conflict of interests

Legitimate purpose of PCM:
to prevent threats, to
protect interests of
persons and the society



Rights and interests of
the person the PCM
are applied to

Isn't the application of PCM in violation of human rights of persons?

Currently, we cannot answer this question

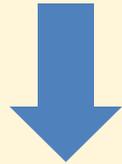
We also do not expect any general answers like "Yes" or "No" in the future

However, we can make note of individual principles to be observed when deciding on the issue of adherence to/violation of human rights

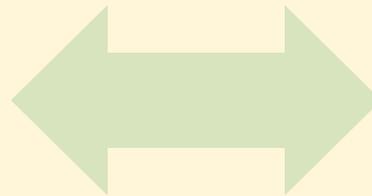
Is the implementation of a new legal institute – PCM – permissible?

- **Firstly**, both national and international laws and regulations, as well as case law highlighted the duty of a state to act to protect significant interests of a person and the society
- **Secondly**, personal rights are not absolute and may be proportionately restricted to achieve a legitimate goal

State duties

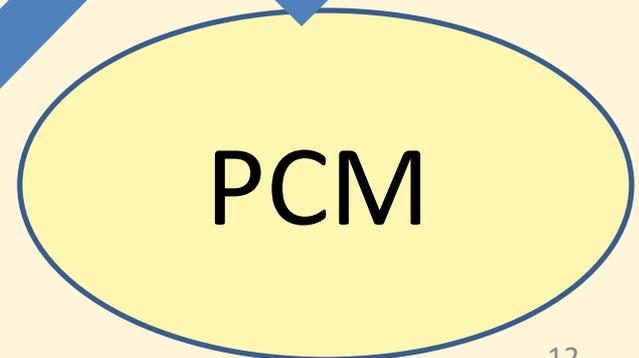
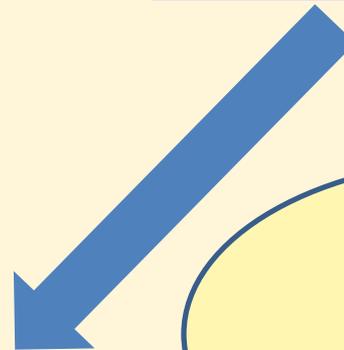


Negative (non-involvement into the life of persons; respect of privacy)



Active
(state intervention, interference)

Both national and international laws and regulations, as well as case law highlighted the duty of a state to act to protect significant interests of a person and the society



The Constitution: 89. The State shall recognise and protect fundamental human rights in accordance with this Constitution, laws and international agreements binding upon Latvia.

The Constitution: 93. The right to life of everyone shall be protected by law.

The Constitution: 94. Everyone has the right to liberty and security of person.

The Constitution: 111. The State shall protect human health

The Constitution: 116. The rights of persons set out in Articles 96, 97, 98, 100, 102, 103, 106, 108 of the Constitution may be subject to restrictions in circumstances provided for by law in order to protect the rights of other people, the democratic structure of the State, and public safety, welfare and morals.

ECHR, Article 2: No one shall be deprived of his life intentionally, however, deprivation of life shall not be regarded as inflicted when it results from the use of force which is in defence of any person from unlawful violence

OSMAN v. THE UNITED KINGDOM (87/1997/871/1083)

- 115... It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances **a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual**. The scope of this obligation is a matter of dispute between the parties.
- 116. The Court does not accept the Government's view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life (see paragraph 107 above). Such a rigid standard must be considered to be incompatible with the requirements of Article 1 of the Convention and the obligations of Contracting States under that Article to secure the practical and effective protection of the rights and freedoms laid down therein, including Article 2 (see, *mutatis mutandis*, the above-mentioned McCann and Others judgment, p. 45, § 146). For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case.
- Summary: Without challenging that Article 2 *inter alia* **may include an obligation on the State to take preventive operational measures,**

ĐORĐEVIĆ v. CROATIA JUDGMENT (Application no. 41526/10)

- 148. It is true that the police interviewed some of the children allegedly involved in certain incidents and that the school authorities discussed the problem with the pupils and their parents. However, the Court finds that no serious attempt was made to assess the true nature of the situation complained of, and to address the lack of a systematic approach which resulted in the absence of adequate and comprehensive measures. Thus, the findings of the police were not followed by any further concrete action: no policy decisions have been adopted and no monitoring mechanisms have been put in place in order to recognise and prevent further harassment. The Court is struck by the lack of any true involvement of the social services and the absence of any indication that relevant experts were consulted who could have given appropriate recommendations and worked with the children concerned. Likewise, no counselling has been provided to the first applicant in order to aid him. In fact, the Court finds that, apart from responses to specific incidents, no relevant action of a general nature to combat the underlying problem has been taken by the competent authorities despite their knowledge that the first applicant had been systematically targeted and that future abuse was very likely to follow.
- 149. In view of this, the Court considers that the **competent State authorities have not taken all reasonable measures to prevent abuse against the first applicant**, notwithstanding the fact that the continuing risk of such abuse was real and foreseeable.
- 150. There has accordingly been a violation of Article 3 of the Convention in respect of the first applicant.

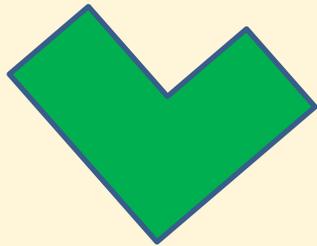
Opuz vs. Turkey

(Application no. 33401/02)

- 170. In the light of the foregoing, the Court considers that the response to the conduct of the applicant's former husband was manifestly inadequate to the gravity of the offences in question (see, *mutatis mutandis*, *Ali and Aye Duran v. Turkey* , no. 42942/02, § 54, 8 April 2008). It therefore observes that the judicial decisions in this case reveal a lack of efficacy and a certain degree of tolerance, and had no noticeable preventive or deterrent effect on the conduct of H.O.
- **176. The Court concludes that there has been a violation of Article 3 of the Convention as a result of the State authorities' failure to take protective measures in the form of effective deterrence against serious breaches of the applicant's personal integrity by her husband.**

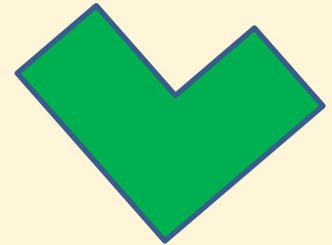
May rights of a person be restricted?

Personal rights are not absolute and may be proportionately restricted to achieve a legitimate goal.



1. Is the implementation of a new legal institute – PCM – permissible?

- **PCM may be recognized as a legal instrument**



- **PCM types, grounds for application, procedure of application, proportionality**



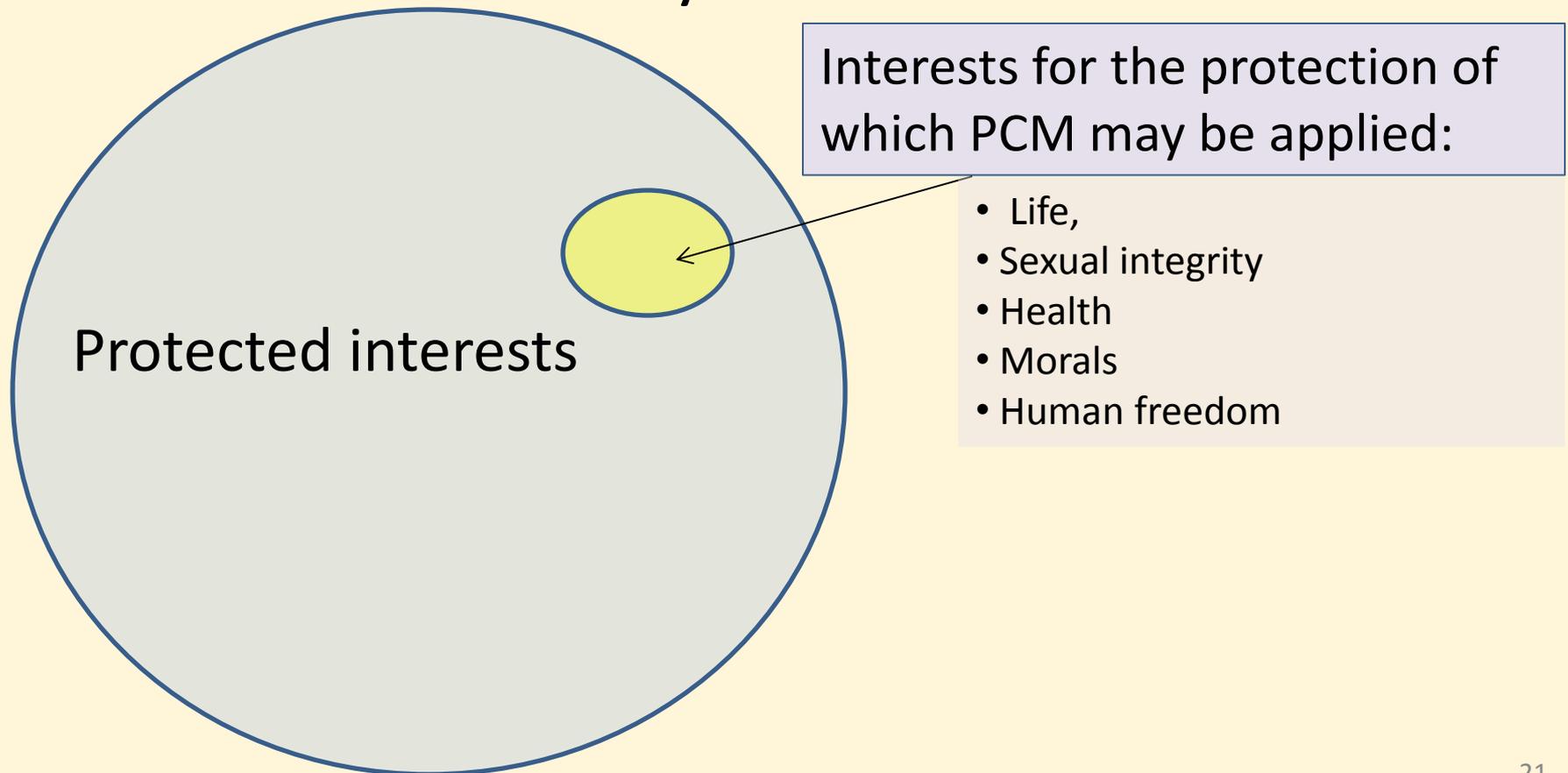
PCM concept

- Behavioral restrictions & bail & social rehabilitation programs and other events
- Inter-institutional cooperation model
- Evaluation of risks and needs



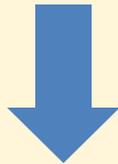
- Commensurability: risk of threat (1) + nature of threat (2).
- Involvement of the person to whom an application of PCM is decided

Prevention of any delinquency is important, however, the range of delinquencies, the prevention of which PCM are applicable to, shall be sufficiently narrow



PCM are applicable to prevent a risk. Its application for an indefinite time, without control of its justification, need, proportionality is not allowed

Version A



Application of PCM to a definite time with a possibility to extend it

Version B



Application of PCM for an indefinite time with mandatory regular control evaluating the need to apply PCM

Thank you!