
Original Paper

From Exception to Normality: Preventive Governance and the Transformation of Liberty under Article 5 ECHR

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Abstract

Contemporary democratic systems increasingly rely on preventive and risk-based forms of governance designed to anticipate and neutralize potential threats before harm occurs. Preventive detention, surveillance regimes, administrative restrictions, electronic monitoring, and other anticipatory measures have expanded beyond exceptional contexts and now function as ordinary mechanisms of state regulation. This development reflects a broader transformation within criminal justice systems, shifting from retrospective punishment based on proven conduct toward preventive intervention grounded in perceived dangerousness, risk assessment, and security rationality. Against this background, the paper examines the growing tension between preventive governance and the right to liberty protected under Article 5 of the European Convention on Human Rights (ECHR).

The study adopts a doctrinal and analytical legal approach based on the examination of Article 5 ECHR, relevant ECtHR jurisprudence, and contemporary scholarship on preventive justice, risk governance, and constitutional limitations on state power. It combines doctrinal legal analysis with conceptual constitutional critique to evaluate the implications of normalized preventive intervention within democratic systems.

The article argues that preventive governance increasingly transforms liberty from a safeguard against arbitrary state power into a conditional status dependent on assessments of future risk and security considerations. Through an analysis of Article 5 ECHR, ECtHR jurisprudence, and broader preventive governance practices, the paper critically examines how anticipatory state intervention challenges principles such as legality, proportionality, foreseeability, and individual culpability. Ultimately, the article questions whether Article 5 ECHR can continue to function effectively as a safeguard against arbitrariness within systems increasingly governed through preventive state rationality.

Keywords: preventive governance; Article 5 ECHR; right to liberty; preventive justice; risk-based governance; preventive intervention

1. Introduction

Contemporary democratic societies increasingly operate within a climate shaped by security concerns, risk management, and preventive intervention. Over the past decades, criminal justice systems have gradually expanded beyond their traditional reactive function of punishing unlawful conduct after its commission and have increasingly adopted anticipatory mechanisms designed to prevent perceived future threats before harm materializes. Preventive detention, surveillance regimes, administrative restrictions, movement control measures, electronic monitoring, and other forms of preventive intervention are now frequently justified through the language of public protection, national security, counterterrorism, migration control, and organized crime prevention (De Hert, 2005; Ventura, 2013). This evolution reflects a broader transformation in the relationship between liberty and state power within modern democratic governance.

Traditionally, liberal criminal justice systems were grounded upon principles such as legality, individual culpability, presumption of innocence, and punishment based on proven conduct. State

intervention was generally justified only after the commission of a criminal offence and subject to procedural safeguards intended to protect individuals against arbitrary exercises of public authority. However, contemporary preventive governance progressively challenges this classical model by legitimizing restrictions on liberty not primarily because unlawful acts have already occurred, but because individuals are perceived as potential potential future harms (Slobogin, 2012; Klein & Wittes, 2011). In this context, criminal justice progressively shifts from a retrospective system centered on responsibility for past conduct toward an anticipatory model focused on perceived dangerousness, prediction, and risk prevention.

This preventive turn generates significant tensions with the right to liberty guaranteed under Article 5 of the European Convention on Human Rights (ECHR). As one of the fundamental protections within the Convention system, Article 5 seeks to protect individuals against arbitrary deprivation of liberty by requiring legality, proportionality, foreseeability, and effective judicial oversight (European Court of Human Rights [ECtHR], 2026). Yet the growing normalization of preventive intervention increasingly places pressure on these safeguards. Measures initially associated with exceptional contexts such as terrorism or emergency governance now appear with increasing frequency within ordinary criminal justice systems and administrative governance (Cassel, 2009). Consequently, the boundary between exceptional preventive intervention and ordinary state practice becomes progressively blurred.

Existing scholarship has extensively examined preventive detention, counterterrorism legislation, surveillance practices, and procedural safeguards under Article 5 ECHR. Much of the literature focuses on balancing security and liberty or assessing the legality of particular preventive measures (Bradley, 2020; Rao & Manikyam, 2025). However, comparatively less attention has been devoted to the broader conceptual transformation produced by preventive governance itself. In particular, limited scholarship critically examines how the normalization of anticipatory state intervention reshapes the traditional liberal understanding of liberty as a safeguard against arbitrary state power.

Against this background, this paper argues that contemporary democratic systems increasingly normalize preventive governance as an ordinary model of state intervention, thereby transforming the conceptual foundations of liberty protected under Article 5 ECHR. The paper suggests that liberty increasingly risks becoming a conditional status dependent upon assessments of perceived dangerousness, potential future harm, and security rationality rather than a fundamental guarantee grounded in legality and individual culpability. Through a doctrinal and analytical examination of Article 5 ECHR, relevant European Court of Human Rights jurisprudence, and broader preventive governance practices, the paper explores the growing tension between preventive state rationality and the liberal foundations of the right to liberty.

2. The Preventive Turn in Democratic Governance

Contemporary criminal justice systems increasingly reflect a broader transformation from reactive punishment toward preventive governance. Traditionally, liberal criminal law was primarily retrospective in nature: state intervention was justified after the commission of a criminal offence and based upon principles such as legality, culpability, individual responsibility, and judicial determination of guilt. Within this classical framework, deprivation of liberty constituted an exceptional measure subject to strict procedural guarantees intended to protect individuals against arbitrary exercises of state power (Ashworth & Zedner, 2014).

However, contemporary democratic systems have progressively embraced a preventive logic centered not exclusively on punishing unlawful conduct already committed, but on identifying, managing, and neutralizing perceived potential future harms before harm occurs. This transformation has been particularly visible in areas such as counterterrorism, organized crime prevention, immigration control, surveillance practices, and preventive detention regimes (De Hert, 2005; Slobogin, 2012). As a result, the logic of criminal justice increasingly shifts from retrospective adjudication toward preventive intervention.

The emergence of preventive governance is closely connected to the broader rise of risk-oriented state practices within modern societies. Ulrich Beck's theory of the "risk society" explains how contemporary governance increasingly focuses on the anticipation and management of future threats

rather than solely responding to past events (Beck, 1992). Within this framework, security policies are progressively justified through precautionary reasoning, where uncertainty itself becomes sufficient to legitimate state intervention. Consequently, perceived dangerousness, suspicion, and predictive assessments acquire growing importance within legal and political decision-making processes.

This preventive logic has significantly expanded state discretion in restricting liberty. Preventive detention, electronic monitoring, surveillance measures, movement restrictions, administrative supervision, and other preventive mechanisms increasingly operate on the basis of perceived risk rather than proven criminal responsibility (Klein & Wittes, 2011). In many cases, the objective is no longer merely to sanction unlawful conduct retrospectively, but to prevent hypothetical future harm prospectively. As several scholars observe, modern criminal justice systems increasingly intervene not because individuals have committed crimes, but because they are considered capable of committing them in the future (Ashworth & Zedner, 2014; Slobogin, 2012).

Importantly, preventive governance is no longer confined to exceptional contexts traditionally associated with emergency powers or counterterrorism responses. Measures initially justified as extraordinary responses to terrorism, organized crime, or national emergencies increasingly appear within ordinary criminal justice systems and administrative governance structures (Ventura, 2013). This normalization of preventive intervention represents one of the most significant transformations of contemporary democratic governance. Preventive rationality progressively permeates everyday legal practices, blurring the distinction between exceptional security measures and ordinary state regulation.

The expansion of preventive governance generates profound tensions with the liberal foundations of the right to liberty. Classical liberal constitutionalism traditionally conceived liberty as a safeguard against arbitrary state interference, requiring clear legal limits, individualized suspicion, procedural guarantees, and judicial oversight. Preventive governance, by contrast, increasingly legitimizes restrictions based upon future-oriented assessments of perceived dangerousness and security risk. In this context, liberty risks being transformed from a fundamental protection against state power into a conditional status dependent upon preventive security considerations.

Consequently, the preventive turn raises broader constitutional and human rights questions extending beyond the legality of individual preventive measures. The central issue is not simply whether specific forms of preventive detention or surveillance comply with procedural safeguards, but whether the normalization of preventive intervention fundamentally alters the relationship between liberty, legality, and state authority within democratic societies governed by the rule of law.

3. Article 5 ECHR and the Crisis of Preventive Liberty

The right to liberty constitutes one of the central guarantees within the European human rights system. Article 5 of the European Convention on Human Rights (ECHR) protects individuals against arbitrary deprivation of liberty by establishing both substantive and procedural safeguards designed to limit the exercise of state coercive power. Within the liberal constitutional tradition, liberty has historically functioned as a fundamental protection against unjustified state interference, requiring legality, foreseeability, proportionality, and effective judicial supervision (European Court of Human Rights [ECtHR], 2026).

Article 5 ECHR reflects this classical understanding by providing that no individual may be deprived of liberty except in strictly defined circumstances and in accordance with procedures prescribed by law. The provision seeks not only to ensure formal legality, but also to protect individuals against arbitrariness, which the European Court of Human Rights consistently considers one of the central objectives of Article 5 protection (ECtHR, 2026). Consequently, even measures formally authorized under domestic law may violate Article 5 where they lack proportionality, legal certainty, or adequate procedural safeguards.

At the same time, contemporary preventive governance progressively places pressure on the traditional liberal foundations of Article 5. Preventive detention regimes, security-based restrictions, surveillance measures, and movement control mechanisms frequently operate through anticipatory assessments of perceived dangerousness and potential future harm rather than established criminal responsibility. As preventive intervention becomes normalized within democratic governance, the distinction between

punishment for unlawful conduct and precautionary restriction aimed at preventing hypothetical future harm becomes progressively blurred.

The jurisprudence of the European Court of Human Rights illustrates the growing tension between preventive state rationality and the protection of liberty under Article 5. In *Guzzardi v. Italy*, the Court emphasized that the difference between deprivation of liberty and mere restriction of movement is one of degree and intensity rather than nature alone (*Guzzardi v. Italy*, 1980). The case demonstrated that preventive supervision measures, even when formally presented as movement restrictions, may reach a level of severity capable of engaging Article 5 protections. Similarly, in *De Tommaso v. Italy*, the Court expressed concern regarding vague preventive measures imposed on the basis of perceived dangerousness without sufficient legal foreseeability or precise statutory safeguards (*De Tommaso v. Italy*, 2017).

Preventive detention jurisprudence further demonstrates the challenges posed by anticipatory state intervention. In *M. v. Germany*, the Court examined post-sentence preventive detention measures justified on the basis of future perceived dangerousness and held that indefinite extensions of preventive detention violated Article 5 protections (*M. v. Germany*, 2010). The judgment reflected judicial concern regarding preventive deprivation of liberty detached from traditional principles of criminal culpability and fixed punishment. Likewise, in *A. and Others v. the United Kingdom*, the Court addressed indefinite detention measures introduced in the context of counterterrorism policies and reaffirmed that national security concerns cannot entirely displace Convention safeguards protecting liberty (*A. and Others v. United Kingdom*, 2009).

These cases reveal a broader structural tension within contemporary democratic systems. Article 5 ECHR was primarily developed within a legal framework centered upon retrospective criminal justice, individualized suspicion, and procedural limitation of state power. Preventive governance, by contrast, increasingly legitimizes intervention before unlawful conduct occurs and often relies upon flexible concepts such as perceived dangerousness, suspicion, or security risk. Consequently, liberty is progressively assessed through predictive and preventive criteria rather than exclusively through proven criminal responsibility.

The growing normalization of preventive intervention therefore raises questions extending beyond the legality of specific measures. The central challenge concerns whether Article 5 ECHR can continue to function effectively as a safeguard against arbitrary state power within systems increasingly governed through anticipatory security rationality. As preventive logic expands within contemporary democratic governance, the protection of liberty risks becoming increasingly conditional upon security-oriented assessments of potential future harm rather than grounded in the traditional liberal principles of legality, culpability, and judicial restraint.

4. When Prevention Becomes Normality

One of the most significant developments within contemporary democratic governance is the gradual normalization of preventive intervention as an ordinary mechanism of state regulation. Measures once associated primarily with exceptional circumstances such as terrorism, war, or national emergencies increasingly operate within the routine functioning of criminal justice and administrative governance. As a result, preventive logic progressively shifts from the margins of legal systems toward the center of contemporary state practice.

Traditionally, preventive measures were justified as temporary or extraordinary responses to exceptional threats. Liberal constitutional systems generally accepted certain restrictions on liberty during periods of emergency on the assumption that such measures remained limited in duration, narrowly tailored, and subject to strict safeguards. However, over the past decades, preventive governance has expanded well beyond exceptional contexts. Preventive detention, surveillance practices, electronic monitoring, administrative restrictions, immigration detention, movement control measures, and organized crime prevention mechanisms increasingly function within ordinary legal frameworks rather than emergency regimes alone (*De Hert*, 2005; *Ventura*, 2013).

This transformation reflects a broader shift in the logic of governance itself. Contemporary democratic systems increasingly prioritize the management of potential future harms rather than solely reacting to

completed unlawful conduct. Within this framework, uncertainty and potential perceived dangerousness become sufficient to justify preventive intervention. Consequently, the role of state power evolves from retrospective adjudication toward continuous preventive supervision aimed at neutralizing perceived threats before harm materializes (Beck, 1992).

The normalization of preventive governance is particularly visible in the expansion of preventive restrictions that operate outside traditional criminal punishment. Surveillance technologies, electronic monitoring systems, movement restrictions, preventive supervision measures, immigration detention regimes, and administrative control mechanisms increasingly allow states to regulate individuals through forms of anticipatory oversight that may not always fit within classical understandings of criminal sanction or deprivation of liberty. Although many of these measures are formally justified through administrative, security, or preventive objectives, their cumulative effect may substantially restrict individual autonomy and freedom (Wilsher, 2017).

At the same time, preventive governance significantly expands discretionary state power. Traditional liberal criminal justice generally required individualized suspicion, established criminal conduct, and judicial determination of guilt before imposing serious restrictions on liberty. Preventive rationality, by contrast, increasingly legitimizes intervention through flexible concepts such as perceived dangerousness, risk assessment, public security, or precautionary necessity. These standards often operate through predictive evaluations rather than clearly established factual responsibility, thereby weakening the traditional connection between liberty restriction and proven unlawful conduct (Ashworth & Zedner, 2014).

Importantly, the normalization of preventive governance also risks altering the relationship between citizens and democratic institutions. When preventive intervention becomes an ordinary technique of governance, liberty may progressively cease to function primarily as a protection against arbitrary state power and instead become increasingly conditional upon compliance with preventive security rationalities. In this context, individuals are not restricted solely because of what they have done, but because of what authorities believe they might potentially do in the future.

This development creates profound tensions for democratic systems governed by the rule of law. Preventive governance undoubtedly responds to genuine contemporary security concerns, including terrorism, organized crime, transnational violence, and irregular migration. Nevertheless, the expansion of preventive intervention raises fundamental questions regarding proportionality, legal certainty, judicial oversight, and the preservation of individual liberty within democratic societies. The central challenge therefore lies not merely in evaluating isolated preventive measures, but in assessing the broader constitutional implications of transforming prevention into a normalized and permanent model of governance.

5. Conclusion

The expansion of preventive governance represents one of the most significant transformations within contemporary democratic systems. Measures initially justified as exceptional responses to terrorism, organized crime, migration pressures, or national emergencies increasingly operate as ordinary instruments of governance within criminal justice and administrative systems. As a result, preventive logic progressively shifts from the margins of democratic governance toward its institutional center.

This paper has argued that the most important transformation generated by preventive governance does not lie solely in the expansion of preventive detention or other security measures themselves, but in the gradual reconfiguration of the relationship between liberty and state power. Contemporary systems increasingly justify restrictions on liberty through anticipatory assessments of perceived dangerousness, suspicion, and potential future harm rather than exclusively through established criminal responsibility and proven unlawful conduct. In this context, criminal justice progressively evolves from a retrospective model based on punishment after wrongdoing toward a preventive model centered on risk management and future-oriented intervention.

The analysis of Article 5 ECHR and the jurisprudence of the European Court of Human Rights demonstrates that this preventive turn creates profound tensions with the liberal foundations of the right to liberty. Article 5 was historically designed to protect individuals against arbitrary state interference

by requiring legality, proportionality, foreseeability, and effective judicial safeguards. However, preventive governance progressively stretches these guarantees by legitimizing intervention before harm occurs and by expanding discretionary state power through flexible concepts such as perceived dangerousness, security risk, and precautionary necessity.

The examined jurisprudence further reveals that the European Court of Human Rights attempts to preserve the anti-arbitrariness function of Article 5 while simultaneously confronting evolving forms of preventive intervention. Cases such as *Guzzardi v. Italy*, *De Tommaso v. Italy*, *M. v. Germany*, and *A. and Others v. United Kingdom* illustrate the Court's growing concern regarding vague preventive measures, indefinite preventive detention, and restrictions imposed through anticipatory security rationality. At the same time, the jurisprudence also demonstrates the increasing difficulty of maintaining traditional liberal safeguards within governance systems progressively structured around prevention and risk management.

The paper therefore suggests that the central contemporary challenge is no longer limited to determining whether individual preventive measures are formally lawful. Rather, the deeper constitutional concern lies in the normalization of preventive intervention itself. As preventive logic becomes embedded within contemporary democratic governance, liberty risks being transformed from a fundamental protection against arbitrary state power into a conditional status increasingly dependent upon compliance with preventive security rationalities and state assessments of potential future harm.

Ultimately, democratic societies undoubtedly possess legitimate obligations to protect public security and prevent serious harm. Nevertheless, the preservation of the rule of law requires that preventive governance remain subject to meaningful legal limits, proportionality requirements, judicial oversight, and effective human rights safeguards. Otherwise, the expansion of preventive logic risks fundamentally altering the liberal constitutional foundations upon which the right to liberty under Article 5 ECHR was originally constructed.

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