LIBER AMICORUM

KÁROLY BÁRD

VOL. II.

CONSTRAINTS ON GOVERNMENT AND CRIMINAL JUSTICE

EDITED BY

PETRA BÁRD

L'Harmattan

Liber Amicorum Károly Bárd, II. Constraints on Government and Criminal Justice

Edited by Petra Bárd

https://orcid.org/0000-0003-4992-5082

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PREFACE

Petra Bárd[1]

This book was compiled for the 70th birthday of Károly Bárd, lawyer, professor and professional legislator, in recognition of his scientific work, by almost 70 colleagues, friends and students. The acclaimed professor is a very special person. Of course, the editor of this two-part anniversary volume and author of this preface may be accused of bias, but the book itself testifies to the fact that Károly Bárd is recognized and respected by legal scholars and practitioners, attorneys, human rights groups, former and incumbent dignitaries both in Hungary and abroad, irrespective of their specialization. His professional competence is uniformly recognized by his peers, regardless of their views on criminal policy or political issues in a broader sense. Evidence for this is that, exceptionally, he held high government positions throughout four governments of various political orientations. General recognition for his professional competency across borders, professions and worldviews is also palpable from the pages of this anniversary volume. The studies were written during the COVID-19 pandemic and several authors were forced to withdraw due to long COVID syndrome. Even so, owing to the great number of studies we received, we could only fit them into two volumes. The first volume comprises the studies written in Hungarian, while the second volume contains those written in English and German languages. The anniversary volume was modeled on the genre of the German *Festschrift,* with the authors presenting their latest and most original ideas in their contributions. The volume spans the work of several generations of lawyers: from the greetings to the reader by professor Tibor Király, who had just turned 101 years old this year, to Károly Bárd's doctoral students who not only successfully completed their SJDs, but have since shown considerable professional success.

[1] Qualified associate professor, Eötvös Loránd University, Faculty of Law, Department of Criminology; Researcher, CEU Department of Legal Studies and CEU Democracy Institute.

The main topics discussed in the anniversary volume

Following the introductory contributions presenting the professional work of Károly Bárd, the studies in the first, Hungarian language volume, center on four major topics. The studies in *interdisciplinary legal theory, criminal policy and criminology* refer back to Károly Bárd's work of 8 years in the government beginning with the transition after the fall of the Hungarian socialist system, where he played a significant role in developing criminal policy at the Ministry of Justice. His professional goals included the gradual modernization of criminal law, including the reform of the rules on juvenile offenders. In academic circles, Károly Bárd is considered one of the first[2] to have formulated the goal of establishing a reasonable and humane criminal policy in Hungary following the change of political system and to curb excessive criminalization.[3] In his first book, a groundbreaking work in procedural dogmatics, he explored, among other things, the possible application of social sciences to criminal justice.[4]

The chapter comprising studies from the area of *substantive criminal law* are also a reference to Károly Bárd's codification work, since he played a major role in both the amendment of the Criminal Code in 1993 and the codification of the Criminal Code at the time of the Gönczöl Committee. He also participated in the preparation of foreign penal codes, such as the Russian and the Albanian criminal codes. In the United Nations Office on Drugs and Crime (UNODC) he took stock of, and analysed the signatory states' crime prevention strategies.

The most important work of Károly Bárd lies at the intersection of *criminal procedure law* and human rights. As co-chair of the codification committee, he took part in the drafting of the 1998 Code of Criminal Procedure, took the lead in drafting an amendment to the Penitentiary Decree, participating also in the preparation of foreign criminal procedure codes, such as the relevant Albanian law. At the European Institute for Crime Prevention and Control affiliated with the United Nations (HEUNI), he authored a discussion guide on non-prosecution

[2] Karsai Krisztina, *Az európai büntetőjogi integráció alapkérdései (Basic issues of European criminal law integration)*, Budapest, KJK-KERSZÖV Jogi és Üzleti Kiadó Kft., 2004, 42.

[3] Bárd Károly, European Criminal Law?, in Lahti, Raimo (ed.), *Towards a Rational and Humane Criminal Policy = Kohti rationaalista ja humaania kriminaalipolitiikkaa: Dedicated to Inkeri Anttila = omistettu Inkeri Anttilalle*, Helsinki, European Institute for Crime Prevention and Control (HEUNI), 1996, 241–253; Bárd Károly, Európai büntetőpolitika, in Erdei, Árpád (szerk.), *Tények és kilátások: tanulmányok Király Tibor tiszteletére*, Budapest, KJK-KERSZÖV Jogi és Üzleti Kiadó Kft., 1995, 149–158.

[4] Bárd Károly, *A büntető hatalom megosztásának buktatói: Értekezés a bírósági tárgyalás jövőjéről. (Failures inherent in the division of penal power: Disseration on the future of court hearings)*, Budapest, Közgazdasági és Jogi Könyvkiadó, 1987.

in Europe.[5] Both his second and third monograph are dedicated to the subject of criminal procedure: his thesis on the right to a fair trial was published in Hungarian[6] and English[7] in 2007, as was his doctoral dissertation discussing the conflict between victims' dignity and defendants' rights from a comparative perspective.[8]

The part of the anniversary volume dedicated to *human rights* recalls the fundamental rights work of Károly Bárd. In UNODC, he also dealt with the broad topic of judicial independence; served as the Hungarian member of the European Commission against Racism and Intolerance (ECRI)[9] and worked as an expert of the Organization for Security and Co-operation in Europe (OSCE). In Hungary, together with Tamás Bán he examined the compatibility of Hungarian law with Strasbourg case-law, ensuring compliance through specific proposals,[10] later working as an agent for Hungary before the European Court of Human Rights and the UN Human Rights Committee. For many years he worked as director of research at the Budapest Constitutional and Legal Policy Institute (COLPI), later, he headed the human rights program of the CEU's Department of Legal Studies.

Studies on two other major topics were also included in the foreign language volume: *international criminal law and processing of the past*. As early as 1988, as a Humboldt scholar in Germany, Károly Bárd began working on the subject at the Freiburg Max Planck Institute for Foreign and International Criminal Law, before turning his attention to the European Convention on Human Rights and fair trial.

5 Bárd Károly, Discussion Guide, in Yhdistyneiden, kansakuntien yhteydessä toimiva Helsingin kriminaalipoliittinen instituutti (ed.) *Non-prosecution in Europe: Report of the European Seminar held in Helsinki; Finland, 22-24 March 1986*, Helsinki, Helsinki Institute for Crime Prevention and Control, 1986, 35–46.

6 Bárd Károly, *Emberi jogok és büntető igazságszolgáltatás Európában: A tisztességes eljárás büntetőügyekben – emberijog-dogmatikai értekezés (Human rights and criminal justice in Europe: Fair trial in criminal cases – a human rights dogmatics disserations)*, Budapest, Magyar Hivatalos Közlönykiadó, 2007.

7 Bárd Károly, *Fairness in Criminal Proceedings: Article Six of the European Human Rights Convention in a Comparative Perspective*, Budapest, Magyar Hivatalos Közlönykiadó, 2008.

8 Bárd Károly, *Az áldozatok méltósága és a vádlottak jogai: összehasonlító jogi tanulmány (The victims' dignity and the rights of the accused: a comparative study)*, Budapest, HVG-ORAC Lap- és Könyvkiadó Kft., 2021.

9 The main idea behind the expert opinion delivered to ECRI has also been published in an academic paper: Bárd Károly, Actions de la police, poursuites judiciaires, condamnations, role des parties civiles, aides aux victimes, in Commission, nationale consultative des Droits de l Homme France (ed.) *Ce racisme qui menace l'Europe: actes du colloque sur la lutte contre le racisme et la xénophobie en Europe*, Paris, La Documentation Française, 1996, 180 –183.

10 Bán Tamás – Bárd Károly, Az Európai Emberi Jogok Egyezménye és a magyar jog: 5., 6. és 7. cikkek (The European Convention on Human Rights and Hungarian law: Articles 5, 6 and 7), *Acta Humana: Hungarian Centre for Human Rights Publications* 3 (1992), 3 –162.

In 1998, he participated in the Rome Diplomatic Conference, which resulted in the adoption of the Rome Statute and then in New York in the codification of the ICC rules of procedure and evidence. He assisted several countries in preparing the constitutional and legislative steps necessary for the ratification of the Rome Statute. Attempts at the processing of the past appear in the Zétényi-Takács draft bill on delivering historic justice, as well as his writings on the 'firing squad law', his scholarly work on retroactivity and more recently, his articles published in the quarterly Múlt és Jövő (Past and Future).

The final major topic of the foreign language volume is *rule of law*. As a long-standing external expert of the OSCE, Károly Bárd was recently consulted on the Polish judicial 'reform'. The subject of his two expert opinions: the restructuring of the Polish Supreme Court and the Disciplinary Council have since come before the Court of Justice of the EU.[11] He also contributed to several judicial reforms abroad, such as the restructuring of the judiciary in Georgia, Kazakhstan, Italy and Tunisia.

Brief overview of the first volume

Both the Hungarian and foreign language volumes open with a *retrospective interview* by Viktor Zoltán Kazai. The Hungarian-language volume then begins with the greeting of the reader by Tibor Király, followed by two writings authored in a more *personal tone* by two esteemed members of the academic community who had followed the career of Károly Bárd from the very beginning: László Kéri and István Kukorelli.

Next, we organized the studies into three main parts. The chapter on *legal theory, criminal policy and legal history* comprises writings of legal scholars and criminology professors discussing fundamental and comprehensive topics. Balázs Gellér shares his thoughts on Nietzsche, power, the state and the merits and pitfalls of democracy. Katalin Gönczöl examines a marked, global phenomenon: the criminal populism of late modernity, emerging as a political response to universal economic and social changes. Departing from rational choice theory, in his ruminations on legal philosophy and criminology, László Korinek tackles circumstances promoting crime. In his piece entitled "Confinement and captivity" Barna Mezey explores terminological elements of Hungarian criminal law development. Finally, Tibor Várady in his essay on *"Law and Heat"*, discusses

[11] CJ, C-619/18 *Commission v Poland (Independence of the Supreme Court),* 24 June 2019, ECLI:EU:C:2019:531; C-791/19 *Commission v Poland (Régime disciplinaire des juges)*, 8 April 2020, ECLI:EU:C:2020:277.

punishable behaviours, and punishments guided by ideological fervor, and other, such as statistical considerations.

The chapter on *substantive criminal law* opens with a study by Ervin Belovics, who, based on the work of Ferenc Finkey, examines cumulative offenses, cumulative sentences and aggregate sentences. Csongor Herke takes a look at the effect of modern forensic methods featured in the media on criminal proceedings. Miklós Hollán's work is located at the intersection of substantive and procedural law, analysing the role of the *nulla poena sine lege* principle beyond the auspices of criminal law. Discussing international criminal law challenges, Tamás Hoffmann focuses on problems faced by the Hungarian legal practitioner when applying international criminal law. Eszter Kirs' study is also on the intersection of international and national law: she investigates the effects of the Universal Periodic Review (UPR) on combatting hate crimes on the national plane.

The most prominent part of Károly Bárd's life work is in the field of criminal procedure law, well reflected by the fact that studies embracing this subject make up the majority of the volume. János Bánáti and Dénes Mátyás discuss the challenges faced by defence attorneys during the investigative phase under the effective Code of Criminal Procedure. The victim-focused study authored by Tünde A. Barabás was inspired by Károly Bárd's 1984 article *'Applied' Victimology in North America* and his doctoral dissertation submitted to the Hungarian Academy of Sciences. Ákos Farkas sketches the main structural changes made to the English jury system from its beginnings to the present day. Erzsébet Kadlót discusses the inseparable principles, safeguards and guarantees enshrined in the law, and their combinations, decisive for the quality of criminal proceedings. Krisztina Karsai's study on the statute of limitations in Europe appears to echo Károly Bárd's interest in the theoretical questions of historical justice. Based on Reginald Rose's drama *12 angry men*, Anna Kiss examines the role of group dynamics in her study entitled *Criminal jurors*. Péter Polt's paper revolves around the principle of *ne bis in idem* and the respective role of the prosecution in the context of a historical, 2017 amendment to the Code of Criminal Procedure. Finally, in his study András Turi looks into how the truth may be unfolded through the evidentiary procedure of criminal proceedings.

Several authors honour the *human rights* scholarship of Károly Bárd with writings on this topic. While all studies were oriented towards human rights, it was this chapter that papers unrelated to or only marginally touching upon criminal proceedings were collected. The piece authored by Zoltán Fleck rethinks the relevant concept, theory and institutions of human rights in our 'post-human rights' era. Based on the judgments of the European Court of Human Rights rendered in respect of hate speech targeting specific communities, András Kristóf Kádár evaluates Hungarian legislation protecting the dignity of communities. János

Kiss looks back at the inception of the Hungarian human rights movement. Based on a school massacre case before the Strasbourg court, Miklós Lévay examines the state's positive obligation of fundamental rights protection in respect of the right to life. László Majtényi discusses the joint responsibility of the Constitutional Court and the Council of Europe in the systemic restriction of free speech and freedom of the press. In his paper, Péter Szigeti tries to answer the provocative question: how is it that we have human rights, writing about the difficulty of laying the theoretical foundations for human rights and reflecting on the findings emerging in Hungarian literature. Finally, in his paper *No comment*, György Virág summarizes the constitutional aspects of what is commonly referred to as trolling on the Internet, providing also a psychological explanation for this phenomenon.

Brief overview of the second volume

The second, English and German language volume follows a similar composition, aligned with the topics of the studies received, with the book structured around six major topics.

The chapter on *international criminal law* starts with Marjan Ajevski's paper "on the banality of good"– in clear reference to Hannah Arendt's *Banality of Evil* and the faceless perpetrators of the Nazi machinery. He addresses another bureaucratic machinery, this time at the opposite side of the spectrum, i.e. the ICC Report of Experts in the context of the study of international courts. Violeta Beširević sheds some light on the questions related to listing peacebuilding and reconciliation in the mandate of *ad hoc* international criminal tribunals and hybrid courts. To argue against this practice, she brings two different legacies, the Nuremberg's and the ICTY's, into perspective. Javid Gadirov explores the interpretation of lawfulness of action in crimes against humanity, with special regard to the limits of determining shared intentions and joint plans of perpetrators. Elspeth Guild explains the importance of the International Criminal Court in Europe and argues that the investigation into allegations of crimes against humanity planned and executed by individuals at the highest levels of EU institutions is revelatory of the importance of international justice. Richard Soyer and Stefan Schumann discuss the role of transnational corporations in global economic life and their responsibility in serious human rights violations having cross-border effects. They offer alternative routes for the expansion of international criminal law to incorporate these offences.

The chapter on *substantive criminal law, crime statistics and prison affairs* starts with Hans-Jörg Albrecht's paper on the expansion of criminal law due to international conventions' obligations, which drive states to introducing criminal law as a remedy against old problems reframed as human rights violations and in

particular against hatred and hostility. Jan Van Dijk presents comparative statistics on victimization by common crime, homicide and organized crime/corruption in Northern, Western, Eastern and Southern Europe for the period 2006-2019. With the exception of organized crime, whose levels remain significantly higher in Eastern and Southern Europe than elsewhere, levels of crime have declined and somewhat converged. These data are critically analyzed and explained. Frieder Dünkel discusses the European Prison Rules as revised in 2020 to provide guidance to prison services on humane treatment of inmates. George P. Fletcher offers a personal account of the criminal law related aspects of the Hungarian regime change in 1989/90 and during the early 90s, with a special focus on the Hungarian Constitutional Court decision abolishing the death penalty. Mordechai Kremnitzer and Khalid Ghanayim assess a new law on homicide offenses adopted by the Knesset in 2019. John Shattuck gives an account of human rights violations in U.S. immigration and criminal justice practices and offers reform ideas of the US criminal justice system to comply with due process requirements and to eliminate racial discrimination. Tibor Tajti gives a comparative analysis of the criminal contempt – bankruptcy proceedings nexus. Uglješa Ugi Zvekić argues that a comprehensive and effective global anti-crime governance presupposes the development of a clear strategic approach, which recognizes the manifold linkages among global anti-crime types and their relationship with sustainable development.

Péter Csonka kicks off the discussions on *criminal procedural law and international criminal cooperation* with his views on the future of European criminal law. Mirjan Damaška explores the future of free proof in criminal cases. Csaba Fenyvesi gives an interdisciplinary account of the findings, conclusions and proposals of the research on confrontation in criminal proceedings. Artem Galushko discusses political justice in Russia via an exploration of a series of criminal proceedings against Ukrainian citizens after the annexation of Crimea by the Russian Federation in 2014. Katalin Holé moves the discussion to Europe explaining the procedural autonomy of the Member States and the principles of equivalence and effectiveness. Zsolt Szomora in his paper on covert online entrapment in transnational criminal cases addresses a delicate issue of evidentiary law in the matrix of domestic law, EU law and European human rights standards. Last, but not least in this chapter Mihály Tóth discusses a number of issues in relation to the use of disguised identification tools from the viewpoint of criminal procedural guarantees.

The chapter on *human rights* starts with a topical writing by Alexander Blankenagel on the inconsistency of COVID-19 measures and the related erosion of fundamental rights and the principle of proportionality. Herbert Hanreich's starting point is that positive foundations of human rights fail due to the vagueness of the concept of 'humanity' in such rights. Immanuel Kant's philosophical theory

underlining the vagueness in principle when trying to define what human beings are, can have, according to the Author, positive consequences for politics. Ferenc Irk addresses the uncomfortable tension between the exploitation of labor and European values. Wilma Moraa Isaboke in her essay discusses education as a human security issue and advocates for girls' education. Csilla Lehoczky-Kollonay brings in another aspect of labor law in her writing on the broadening concept of dignity at the workplace, and the role of the state in bridging the public-private divide in ensuring labor rights. Eszter Polgári revisited the European consensus under the ECHR in light of the Vienna rules on treaty interpretation. András Sajó in his essay with the telling title *Reflections on the Construction of Speech Norms in the Kardashians' Republic* describes a transformation of the concept of harm and its impact on the generation of new social and even legal speech standards, narrowing the idea of permissible and protected speech. Judit Sándor's paper is particularly topical with mRNA-based vaccines in most of the readers' arms. But the technical possibility of curing diseases via genome editing, she argues, also makes science and society, inventors of emerging biotechnologies and human rights lawyers more dependent on each other than ever.

The English and German language volume closes with a chapter on *the rule of law, constitutional democracy*, or their erosion respectively. Oswaldo Ruiz-Chiriboga discusses the 2018 constitutional referendum in Ecuador and the Transitory Council of Citizen's participation and social control. Gábor Halmai illuminates the impact of the spread of 'illiberal democracy' in Europe on the *status quo* of human dignity in times of crises. Dimitry Vladimirovich Kochenov provides a concise tour d'horizon of EU law development in the field of the rule of law over the last years, which have significantly reinforced the powers of the supranational institutions in domains, which have previously never been considered part of supranational competence. Raimo Lahti revisits the Finnish approach to the rule of law, in the broader European context. Andrea Pető in her chapter on the *Simulacrum of progressive politics* puts an emphasis on social democracy in Hungary. She argues that the concept of "fear" is a useful mobilizational force together with historical analogies based on analyzing the gendered history of the Hungarian progressive tradition. Finally, István Stumpf closes the volume with his paper on the role of the Constitutional Court in the constitutional control of legislation.

As the editor of this volume, I am grateful to the authors for their valuable contributions, to Viktor Zoltán Kazai and Veronika Szontagh for their careful editing, to Petra Lea Láncos for translating the retrospective interview, to Bence Juhász and Erik Uszkiewicz for their for his research assistance and to the CEU Department of Legal Studies for contributing to the volume.

*

Károly Bárd has not only built and continues to build a lasting foundation for our profession, but always writes in a comprehensible, smooth and interesting way. As he put it in the retrospective interview: "I truly believe that it is possible to write plainly about complex professional issues without lowering the standards of the text. To me, the highest form of recognition is when the layperson enjoys reading my work, even though he doesn't quite understand it." I hope that both the wider readership will enjoy and understand, or not fully understand but read this book, and the professionals will rifle through the pages of these two volumes with great satisfaction. But above all, I hope that our most important reader, Károly Bárd will receive this volume with as much pleasure as it gave us putting it together for him.

Frankfurt am Main, 7 May 2021

"THE 'ETERNAL CANDIDATE' – THAT WAS ME": INTERVIEW WITH KÁROLY BÁRD

Viktor Zoltán Kazai[1]

The university years: the student and young teacher

The student years

Viktor Zoltán Kazai: Your name as a researcher, teacher, and politician is eponymous with criminal law, but even more so with criminal procedural law. What drew you to this area of law? What sparked your interest in criminal procedure?

Károly Bárd: Honestly, I stumbled into criminal law by pure chance. As a student, I frequented quite a few students' associations. For example, I regularly attended the civil law students' association, because it was headed by Gyula Eörsi, who made the whole enterprise really entertaining. I think I was more interested in civil law at first. But then one evening Kriszta Palánkai (neé Kriszta Kratochwill) called and asked if I wanted to be a student assistant at the Department of Criminal Procedure. This is how I became a student assistant, then came the National Conference of Scientific Students' Associations and when I graduated, I was asked if I would like to stay and teach at the Department. So at the very beginning, I was not particularly intrigued by criminal law at all. Perhaps after all these years, I can finally confess that I didn't get an excellent on my criminal law final exam either. But there is no doubt that over time, I have gradually grown to like this area of law.

V. Z. K.: You graduated as a lawyer in 1975, which means you were a university student in the first half of the 1970s. What was the Law Faculty of ELTE like back then? Can you mention some specific examples of student life at the time that may be surprising for those born after the change of political regime?

K. B.: One likes to refer to this era as the Brezhnevian Stagnation. Yet university life was not so bleak. Students made up a kind of binary demography. There was this group who prepared for the exams but were otherwise more interested in having a beer and playing football. Meanwhile, there was also a vibrant cultural life at the university. I remember we had three filmclubs, a jazzclub and much more. This is no coincidence: there were many in our year, who never wanted to become lawyers, for example, Miklós Vámos, János Szikora or János Kőbányai. I was

[1] Zoltán Kazai Viktor, doctoral candidate, Central European University. Translation by Petra Lea Láncos.

somewhere caught up in between these two groups. I attended clubs, participated in the cultural life of the university, but I must admit, I also had friends with whom we preferred to just play football and go out for a beer.

As for the lectures, I can say that most of them were simply boring. And I don't think much has changed since then. But I did discover some professors from whom much could be learned, even if they didn't have much in the way of lecturing talent. These were, among others, Kálmán Kulcsár and Miklós Világhy. I also specifically remember Zoltán Péteri and his excellent legal theory seminars. The other professors were largely forgettable.

A few years on, as a young teacher, I co-authored a study with László Kéri on small group education. What we wrote in that study on the enormous potential of this form of education, which is largely left unexploited, we gleaned in part from our own teaching experience. Unfortunately, seminars were generally also quite uneventful. It was not by chance that we attended lectures at the Arts Faculty and the Faculty of Medicine. But truth be told, students from those faculties also came to listen to Róbert Brósz teach Roman law.

V. Z. K.: When I started university in 2009, there were around 400 students in each year. By then, we were long into the era of mass education. There were so many of us and our schedules were so different that it was hard to forge lasting friendships. Do you have relationships that were formed during the university years and outlasted graduation?

K. B.: In my time it was much easier to get to know your fellow students, since there were roughly 120-130 of us in each year. The headcount clearly mattered. But it was the military that had a decisive influence on our relationship. Early friendships were forged in the military and groups of friends were formed, later joined by girlfriends during the university years. By contrast, learning groups were less of a catalyst in building new relationships. We hardly made friends with those who hadn't served in the military. I was lucky to have belonged to several groups of friends already during the military, and these relationships persisted throughout the university years. It even caused some friction when I met with other groups.

A fellowship of young teachers

V. Z. K.: Following graduation, you stayed on at your alma mater to teach. To what degree was university teaching enmeshed with ideology at the time? Was there any palpable political pressure on lecturers? In other words: to what level was freedom of education guaranteed?

K. B.: What's certain is that there was no central political control over university education. Nor did I ever have the feeling that anyone interfered with education

on a political basis. And I say this, having taught a subject which occasionally touched upon politically sensitive issues, such as the subject of coercive measures. Sometimes it was the students themselves who raised these questions. I remember, for example, that Gyuri Antall, son of the later prime minister, repeatedly raised fundamental rights issues. But in truth, we were lucky to have started teaching at a very opportune time. Yet I do recall when an older colleague warned us not to discuss certain topics in front of the head of department. By this time, however, the central political leadership was no longer concerned with university lecturers. They let us be. Even so, I don't have a single paper from that time that I would be ashamed to publish today. Unfortunately, the generation before us was not so lucky.

V. Z. K.: As far as I can tell from the different accounts, young teachers formed an active and close-knit group. For example, they regularly used the university's Visegrád resort for further training. Preparing for this interview, I chanced upon your study co-authored with László Kéri entitled 'Teaching and Small Groups'. In your paper, you argue against the frontal, lecture-centered teaching method focusing on lexical knowledge, and emphasize the importance of transferring skills, attitudes and points of view instead. Did this paper garner attention at the university? How were these novel approaches received by the older generation?

K. B.: The study received no response at the university. We expected that department heads would be outraged, for lectures at the time were their monopoly. Instead, the paper failed to trigger a harsh or seething reaction. This was most likely down to the fact that most of the teachers who were barred from giving lectures agreed with our findings. Meanwhile, those who did hold lectures were confident that this writing will not strip them of their position. I reread the text the other day to check whether we were frustrated or jealous of the older generation. I don't think we were. It is a fairly objective paper.

But the fact that university leadership did not take note of the paper is not particularly relevant. We wrote this paper mainly for ourselves. Young Teachers operated as a sort of self-development course. It was just us talking to each other. And sometimes we invited an external speaker with whom we'd otherwise not have had the chance to meet, becasue they were barred from entering the university for some reason or other: Tamás Sárközy, for example. This wasn't about competing with senior lecturers. We much rather wanted to show that we are different from the previous generation. The older generation was higher up on the faculty career ladder and they were typically immersed in departmental politics and office infighting, without much energy left for teaching. We wanted to prove that we are better trained and more savvy for teaching. We were the first ones to acquire multiple degrees, albeit this was still the exception when it comes to colleagues teaching positive law. I was an outlier in this respect, because I taught criminal procedure, but studied sociology as well.

Something that was a valuable resource for me was my internship at the beginning of my career. I began my internship with the police, where I worked in several positions at the Hungarian Institute of Forensic Sciences, accompanied on call officers to murder scenes in the middle of the night and attended interrogations of juvenile delinquents. This is when I moved on to the prosecutor's office, which gave me the opportunity to work with criminal law experts, well versed in legal dogmatics. I did not have the chance to intern at a court, because I was called in for reserve service. Lucky for me though, I spent my service as a military prosecutor, involved in investigating corruption cases among police and prison staff, for example. Finally, shortly before I left the military when it no longer made sense to assign to me criminal cases , I was entrusted with working with suicide attempts. I must say that those whose file I got to work on could call themselves lucky, since I closed all investigations with the note that there was a serious intent to commit suicide, the person concerned had not wanted to evade military service.

'Jogtatók'[2]

V. Z. K.: I hear that you were not only an active member, but a particularly talented player of the Jogtatók football team, made up of young ELTE teachers. Tell us a little about this team. To me it seems that it was the main socialization milieu for early career teachers.

K. B.: I don't quite remember when we established Jogtatók. What is certain, is that right after graduation we started playing football on a regular basis and later, when we became a permanent item in the faculty championship, we organized our teams. There was 'Jogtatók 1" and 'Jogtatók fakó'. ('Fakó' the popular term for the reserve team) Of course we were convinced that Jogtatók 1 was the elit league, the only one that can really play. In fact, we didn't have much of a fluctuation, this was a real team. The team included István Kukorelli, Róbert Pethő, Péter Szigeti, László Kéri, Tamás Földesi and György Jutasi. Sometimes Lajos Pál stepped in as goalie, and once in a while Boldizsár Nagy and Péter Szalay also played with us. Later, István Stumpf joined us. I liked to play with Kukorelli and Stumpf best, because they returned the ball. A few days ago, István Kukorelli sent me his latest book with the dedication: "thanks for the great passes".

This really was more than just a football team. For example, we held team meetings every month, to which we occasionally invited famous people from high places. László Kéri always organized these meetings at his flat. The Jogtatók

[2] A pun made up of the combination of the words *jog* (law) and *oktatók* (teachers).

team also had honorary members, who did not play and women: Kéri's wife, Zita Petschnig and Zsófi Mihancsik. The hard core of the team was also a group of friends. Sometimes we celebrated New Year's Eve together. Indeed, we always helped out when Kéri moved house, I was the driver.

V. Z. K.: You have already mentioned some members of Jogtatók. We could also add Barnabás Lenkovics or Béla Pokol to the list. These are all people who have become leading members of the Hungarian legal and political elite, as researchers, lawyers, ombudsmen or constitutional court judges. In hindsight, one could even say that Jogtatók was a sort of incubator for the elite. How did you see this group at the time: was it more about the joy of football or a chance for networking?

K. B.: This was a closed group, not everyone was a member of the team who later acquired some high ranking position. And for sure, it wasn't just about football. If that had been the case, I don't think everyone would have stayed a member of Jogtatók. Like I said, we were also a group of friends, who knew they were free to talk to each other about everything. There were some young teachers with whom I was careful about what I said. But this was never the case with Jogtatók. Plus, the group was made up of really witty people. So much so, that the team was invited to perform at a New Year's Eve standup comedy show. Unfortunately, I couldn't take part in that performance because I was in Helsinki at the time of the recording. To this day, I don't know how we caught the organizers' attention.

As for visions for our future careers, I remember we were toying with the idea at team practice who would get which portfolio if we were to form a government. We unanimously selected Jutasi for prime minister as the most suitable candidate. As for me, I got the ministry of justice every time. Of course, this was just fun and jokes. I don't think any of us foresaw the career he would make. It was Kukorelli and I who stayed loyal to the university for the longest time. The rest went off to work at the Institute of Social Sciences, the Prime Minister's Office and so on. Of course, they continued to teach in their spare time, but they felt that world of higher education could no longer contain them.

Early research career

V. Z. K.: Football, however, did not throw you off the scholarly path. Indeed, in a way, the two were even connected. I heard that you organized an 'exchange program' between the young teachers from the University of Vienna and ELTE, which ran for many years. You visited Vienna and next year, the Austrian colleagues came to Budapest. To me it seems as though this initiative was just as much about football, as scientific exchange. What was the purpose of this 'exchange program' and how exactly did the two universities cooperate?

K. B.: The whole thing started with a telegram I received in 1984, yes, indeed, we used the telegraph at the time. I was offered a short-term consultancy gig at the UN headquarters in Vienna. It was a remarkable opportunity at the time. As it turned out, they wanted me to help prepare the UN Secretary-General's report that he presented at the 1985 Milan Congress on Crime Prevention. I think they picked me for the job because I had met the sender of the telegram a year earlier in Helsinki, he had probably heard my presentation.

Of course, at the time, it wasn't easy to get to Vienna. I had to make an appointment at the Department of International Organizations of the Ministry of Foreign Affairs (aka the UN Department). To my utter surprise they were very pleased at the ministry that I had received this assignment. I asked if I had to turn in the salary I was to receive in Vienna. I was told to take this as a scholarship of sorts. The point is: I got the permit and went to Vienna.

Even though I had two assistants at the UN headquarters, I worked hard. One of my assistants was a lady from Costa Rica and the other, a young man from Austria. This self-styled Austrian philosopher was into Heidegger and completely useless for the task at hand. However, he was a wonderful football player, so we got on really well and played regularly. It turned out we were both members of a team. We immediately decided to bring our two teams together for a friendly match.

We figured we'd ask the university for an official letter of invitation for scientific research that would allow us to travel abroad. Tamás Földesi was dean at the time and also our right back player, so it wasn't difficult to obtain the letter. Thirty years on I think I can admit that the program had no scientific goal whatsoever, instead, we played football, went to the cinema, shopping and out for a glass of wine together.

This Austrian team was a mixed bag. They had a doctor, a philosopher, and even Friedrich Koncilia, the goalie of the Austrian national team, who was so nice as to take on the position of field player. We played each other for about four or five years. When we organized a meeting in Budapest, some of the Austrian players slept at my place, while the rest of the team were housed in the university dorm.

V. Z. K.: Having mentioned the Viennese 'exchange program', I read somewhere in your CV that you went abroad several times in the eighties for longer and shorter stretches of time for research and work. For example, you went on a study trip to London, worked for the UN in Vienna and the HEUNI in Helsinki. It's surprising that one could build an international career at a time when the borders were still closed. To what degree could Hungarian lecturers and researchers join the world of international research, and under what conditions did the state allow them outside the Iron Curtain?

K. B.: It wasn't typical for lecturers or researchers to go abroad back then. I was lucky, because my grandmother was an English teacher and had taught me and my

friends the language, otherwise she only taught people involved in foreign trade at her home. When I started teaching at the university, I took on every conceivable translation gig because the salary was so meagre. If I got stuck with the translation, I just hopped over to my grandmother and got all the translation done in two or three hours that I had been struggling over the past week. Later on, I also worked as a conference interpreter with awesome, accomplished colleagues. I had learnt German as a child in Frankfurt, but it was my knowledge of English that gave me an edge. Consequently, I had an exceptional position at the university.

On my first study trip abroad in 1976, I went to Finland for two months. There was a scholarship for this study trip that was quite easy to get. Finland was an "almost Western country". Also, the location was especially attractive for me, since there was an excellent institute of criminology in Helsinki. Yet I didn't go to the institute but the university instead, where I worked with a very kind, elderly professor of procedural law, from whom, alas, I didn't get to learn too much. However, I somehow got involved with the Legal Policy Institute, which was headed by one of the most renowned criminologists of the time: Inkeri Anttila. She organized a lecture for me in Turku. Actually, this was my first step to join the international academic world.

I got on really well with the Finns. It was at this time that the HEUNI, the European Institute for Crime Prevention and Control was established, where Inkeri became director. I was invited to multiple conferences, I worked there as an advisor for three months, preparing conferences and seminars. This was particularly attractive, since the Helsinki institute was a sort of bridge between the East and the West. Here, I got into contact with Western professionals, offering me various opportunities. Like I said, it was one of my Helsinki presentations that got me my job at the UN Headquarters in Vienna.

I also had the chance to attend the American Studies Salzburg Seminar where the most notable researchers of the field lectured. I chose the course given by Mirjan Damaška, a star lecturer of Yale University. Then there was the Hungarian-British Round Table exchange program, launched by the British Council. The Hungarian team was put together by Katalin Gönczöl. I also gave a lecture there, upon which the Brits invited me to London the next year for a short study trip.

I even went to Vancouver one time. Tibor Király was invited to a conference on victimology. However, he kindly offered that I go in his stead, saying his English was not good enough.

V. Z. K.: Reading the articles you had written in the eighties, what strikes me is that you often refer to constitutional principles. What's more, István Kukorelli claims that it is your articles that laid the foundations of constitutional criminal law. I must admit, it seems strange for members of my generation that any requirement should flow from the constitution under an authoritarian regime. Were constitutional and

fundamental rights considerations a part of scientific thinking at the time? Or was your approach inspired by the international scholarly discourse instead?

K. B.: My interest in constitutional law and human rights was sparked when István Kukorelli entrusted me with a column in the magazine Élet és Tudomány (Life and Science). It was somewhat of a challenge: I had to write short summaries about constitutional rights every two weeks, constrained in length and by a deadline which was quite unusual for me, the university man. There was no particular response from academia. However, documents released since reveal that my writings were followed by the U.S. embassy. And once I got into a pretty strange situation. I don't even remember why, but a policeman stopped me, checked my license, looked at me and said, "Yeah, you're the one who writes those articles in Élet és Tudomány." Well, he didn't say it in an appreciative tone, still, I was glad that my articles had at least some effect.

The magazine itself was pretty free-spirited. I was only called in once to the editorial office and asked to revise one of my articles. I categorically rejected this and declared that if they don't publish the original piece, I will cancel the column. This would have been an embarassment for the editors, since they had already announced the column in advance. Finally, they published the original article.

Candidate's dissertation

V. Z. K.: You defended your candidate's dissertation [candidatus scientiarum, coming close to a PhD disseration, although much fewer instructors were awarded the title as is the case today with the PhD that is practically a must for university positions.] in 1986 with the title: Pitfalls of dividing penal power. Treatise on the future of the criminal trial. In this work you discuss the question whether it is worth dividing the court hearing into two parts, by separating the sentencing phase from the finding of guilt. You arrive at the conclusion that no such reform would be commendable, in fact, designing such a system would require ample knowledge of social siences, disrupting the criminal justice system. Your colleagues, including Kálmán Györgyi, András Sajó or Péter Hack have praised this work. Indeed, a review on your dissertation was also published in Magyar Pszichológai Szemle (Hungarian Psychology Digest). Based on the reviews it seems to me that the main source of your disseration's success was the special approach you applied: by this time you had joined the international scholarly discourse, and were therefore familiar with foreign academic literature, in addition, you could rely on the findings of social sciences, since you had also studied sociology. Was this a conciously chosen approach on your part? Am I correct in thinking you expressly wanted to overhaul the traditional methodology of legal sciences?

K. B.: I cannot recall the precise chain of events anymore, but what is certain is that sociology had a great effect on my thinking. I read a lot of Simmel and Tönnies for example, and I spent a lot of time on Weber. However, I did not learn the precise methodology, this I regret now in retrospect. But the fact that I keep asking back, to check my train of thoughts, most probably comes from my training in sociology.

What was clear to me, was that the Hungarian academic environment was quite narrow-minded. Naturally, there were notable exceptions, in my field for example, László Visky and Tibor Király. Should one open books on criminal law of that time, one would find that the authors repeatedly summarized the views of the different scholars and finally, without any explanation whatsoever, declared that they agreed with this or that school of thought. After reading three such books, one would think, right then, that is enough. I yearned for a more inquisitive approach, one that discussed the different ideas.

Thankfully, I chanced on American and German critical criminology and interactionism, which drew me in. I had the huge advantage that my father had acquaintances who were willing to get me almost any book I needed to satisfy my scholarly interests. Then I tried to incorporate this new body of knowledge into the Hungarian science of criminal procedure. This was my 'sociology of justice' period. During these years I doubtlessly acquired knowledge which could be considered exceptional in Hungary at the time.

At the end of the day, perhaps the book's success was down to the fact that it read well. It's very important to me to write clearly and accurately. When I first started out, Tibor Király said, before you sit down to write, read some Kosztolányi.

V. Z. K.: We know that the dissertation was well received, indeed, the academic committee recommended that it be published, but we also know that at the time, the political leadership was closely monitoring what scientific works are published and with what content. Did you receive some unsolicited 'advice' before publishing the book?

K. B.: Nobody tried to convince me to make substantive changes to the book for political reasons. Maybe I would have been proud even, if there had been something politically objectionable in the dissertation, but there wasn't. Nobody wanted to cut or have me rewrite anything.

Of course this does not mean that the system was completely liberal. Let me give you an example. Péter Kende, László Kéri and I (we were in the same year) were invited one time to participate in a discussion at the Institute of Social Sciences on show trials. The discussion was organized because a disrict party secretary was accused of being too reform-minded. Before the discussion started, György Aczél's deputy summoned us and told us to pay attention to what was being said. By the way, the topic of my presentation was totally harmless. I just wanted to talk about the selection processes in the criminal procedure. The point is that following the

discussion at the Institute of Social Sciences we were guests at Zsófia Mihancsik's late night radio show. At the time the show aired, I was in Finland. I remember telling a Finnish friend of mine while listening to Radio Kossuth that perhaps I should not return to Hungary. But in the end, nothing came out of it.

V. Z. K.: In your dissertation you formulate your credo as follows: "In my work I try to stick with what a scholar is intended to do, and I am careful not to step into the shoes of the politician. This is why I also refrained from the otherwise typical trait of legal scholarship, namely to self-confidently formulate categorical, authoritative proposals to amend the law. Instead, I outlined available solutions and sought to explore their preconditions and possible outcomes." To me this seems to say that at the time, you refrained from assuming a political role. In 1989 however, you broke off your research at the Max Planck Institute in Freiburg to take on the role of deputy minister at the Ministry of Justice. What made you change your mind? Or is there no contradiction here?

K. B.: I think we all carry this dichotomy within us. It's really great when we can put our ideas into practice. Long before I was called to the ministry, I thought it would be worthwhile to explore the Strasbourg case-law, an area nobody dealt with in Hungary at the time. When I was offered this position, I started out with the ambition to prepare Hungary for joining the European Convention on Human Rights.

In Freiburg, I was contemplating getting a job at a Western university. Quite honestly, I felt that Hungarian academia was much too confined. Yet I was perhaps the first teacher at the university to be called to such a high position. At the time, the position of deputy minister carried great prestige. Meanwhile, as a scholar, I have always kept to the Weberian approach that it is not my job to tell others what to do, but to outline the various opportunities that are available, including the factors necessary for their realization.

Governmental work between 1989 and 1997

Role change: from researcher to politician

V. Z. K.: You served as Deputy Secretary of State in the Ministry of Justice under the Antall, Boros, and Horn governments. Your job description was of considerable breadth: including the development of criminal law legislation, clemency cases, the preparation and implementation of international treaties, the representation of Hungary in human rights complaints against the state, and for a short period even the harmonization of EU law, etc. Let us begin perhaps with the criminal law legislation tasks that covered both substantive, procedural, and penitentiary law. I

have read some of your writings from that time, where you considered the reforms implemented as well as their critique. I sensed a sort of pragmatism emanating from your writings, in two ways: on the one hand, you seemed to reject the view that everything that had been adopted before the change of regime should be repealed, and as such, you were not a stickler for radical, ideologically driven change. On the other hand, you warned against the misconception that law is a sort of panacea, a solution to complex social problems. Is this a more or less accurate rendering of the spirit in which you guided the codification work?

K. B.: Yes, you are right on mark, especially with your first observation. Around the time of the regime change a lot of laypeople brought me their strange ideas on how to reform criminal law. Their ignorance and the total lack of knowledge of foreign academic literature was disappointing. From Damaška, one of the most renowned experts on criminal justice however, I had learnt that reforms presuppose certain conditions. Knowing this, I could distinguish between feasible plans and mere lipservice. But even so, I sometimes implemented ideas that tested the Hungarian mindset. For example, even though we had tried to very cautiously balance the rights of prosecution and defence, we eventually failed.

Basically, I wanted to correct the flaws of the criminal law in effect at the time. The government agreed, because they were aware that parliament would not accept any radical change. Take for example the rules governing drug abuse, this was a field of law where Miklós Lévay was also involved in the drafting. I remember we received a lot of criticism from human rights activists, even though it later turned out that ours were the most progressive rules conceivable. Then, when I left the ministry, measures were tightened. Nevertheless, I am very proud to have pushed the amendments governing juvenile delinquents through parliament. It's also the reason why I was awarded the Ferenczi prize, for which I was really grateful.

Some had expected me to come up with something unprecedented. But I have to admit I had no far-reaching idea that would have put Hungarian criminal law on a completely new footing. There were only a few people around me on whom I could rely. In fact, Tibor Király was the only one to provide substantial assistance in drafting the Code of Criminal Procedure. I really enjoyed legislative drafting, however, it turned out that it is really hard to come up with new solutions. During my travels abroad I made the experience that the preparation of legislative bills was normally not entrusted to people in academia. Instead, it is customary for governments to set up policy institutes to develop a criminal justice policy, which is then translated into norms through codification.

Criminal law codificatio

V. Z. K.: Criminal law reform was slow, taking shape in several stages, and was only partially implemented while you were secretary of state. In your writings and interviews you named several reasons for this. For example, you suggested that the time was not exactly right for criminal law legislation, since other issues took priority at the time of the regime change. You also mentioned that certain amendments failed because of the solid resistance from courts and law enforcement. Was there any specific reform idea you could not bring to fruition that you regretted?

K. B.: I don't really remember. What is certain, is that we were often forced to change our ideas in the course of preparing the bills. It was customary to send out regulatory concepts for preliminary consultation. Most of our conflicts arose with the Supreme Court and the General Prosecutor's Office, even though lower level authorities were mostly for our reform approach. They retained their pre-transition influence and stubbornly resisted any change. It is true that I had it easier during the MDF (Magyar Demokrata Fórum, Hungarian Democratic Forum) government, when higher courts and the general prosceutor's office were full of old cadres who were trying to keep a low profile. But later on, they started threatening us that they would jump ship from the preparatory team if we kept a certain solution and that the whole law would come to nothing. Of course, criminal procedure is typically an area of law that is hard to externally dictate, since it is largely shaped through the routines of those who implement the law. Still, I can't resist the idea that they were being unduly osbstinate for the sole reason that they were used to the old rules.

There was a fundamental problem with the Supreme Court. Namely, they couldn't quite decide what role the judges should play in the procedure. On the one hand, they wanted to control the case, but on the other hand, they wanted to delegate a significant part of the workload to others. This is why to this day we have an appeals system where every court of appeal basically restarts the entire procedure and then sends it back for a retrial. For some reason we cannot get into the mindset where an appeals court confines itself to the plea at hand.

European Convention on Human Rights

V. Z. K.: Hungary signed the European Convention on Human Rights in 1990, but we dragged out ratification over a number of years. You and Tamás Bán were entrusted with a comprehensive study of the legislative changes necessary to comply with the Convention. You published a study summarizing the results of the analysis in 1992, proposing amendments to merely twelve laws and recommending that the

legislator make one reservation to the Convention. Wasn't this overly optimistic a mere two years after the change of political system? Was our legal system really in such good shape? Were your findings disproved later on?

K. B.: We had written this study on our own initiative. Nobody had tasked us to do so. Our main goal was to explore what legislative amendments would be necessary before the ratification of the Convention. As a result we indeed recommended that twelve amendments be made. The reason we suggested so few amendments was that we were looking to find those provisions that could not be applied in conformity with the Convention. As for the reservation, this regarded the Act on misdemeanors, since we hade inside knowledge that the Ministry of the Interior would not rectify it in the foreseeable future. In addition, a political declaration was made on compensation for expropriation and nationalization during the Communist regime. In fact, this was completely obsolete, since the Convention was not applicable to fundamental rights violations perpetrated before its entry into force in Hungary.

Was our conclusion overly optimistic? Perhaps you're right. But this was very thorough work and we looked very closely at the Strasbourg case-law. I stayed in Freiburg for a while after my appointment and commuted to Bern every week to meet with my good friend Stefan Trechsel (a member of the European Commission of Human Rights). Over fondue and wine, we went through all the possible scenarios that Hungarian law could come into conflict with the Convention and we looked at every single rule that I found suspicious. All of what we wrote, followed from the case-law of the time. Of course, Hungary had been condemned on occasion for how the law was applied, but never for the wording of legislation.

V. Z. K.: In an article published in 1992 you wrote: "It seems that the slogan 'Return to Europe' repeated ad nauseam had done its work: provincialism that elevates ignorance to a virtue and self-importance considering all external criticism to be an 'interference in internal affairs' has seeped away from our political culture faster than expected." By contrast, in a 2017 article co-authored with Petra Bárd you summarize the 25 year application of the Convention in Hungary as follows: "[Since ratification] the Hungarian legislature has primarily just responded to judgments rendered against Hungary, while no systemic, proactive assessment of the legal system to prevent a breach of the Convention has taken place and no comprehensive 'legal package' with the express ambition to achieve conformity with the Convention was brought before the Parliament. The Hungarian judiciary's knowledge of Strasbourg case-law is acceptable and the decisions of the European Court of Human Rights occasionally appear in the judgments of the courts. Yet there is a view that courts have no competence to directly apply Strasbourg case-law and sometimes we see instances of a conscious misinterpretation of Strasbourg judgments. At times, political considerations stand in the way of the enforcement

of European Court of Human Rights judgments." Was it your earlier view that was overly optimistic, or did something change since then? What is it, do you think, that prevents the European human rights perspective from taking root in Hungary?

K. B.: The Hungarian context has changed dramatically over the period between these two quotes. In 1992 Hungarian intellectuals would have thought it provincial to reject Strasbourg. Members of the political elite of the time had not forgotten what they rose up against and why they had criticized the previous system. But now the situation is completely different. It is no longer considered unacceptable for a country to vocally deviate from the European mainstream.

As far as the criticism geared towards the legislature is concerned, there was certain resentment on my part. Our comprehensive study in 1992 and the ensuing legislative amendment package was such a success that the Council of Europe actually directed all successive candidate countries to us. We were the role model for how to prepare the ratification of the Convention. However, afterwards, the government and the Parliament never took the effort to systematically evaluate what legislative amendments would be necessary in light of Strasbourg jurisprudence. The ambition to be a model country quickly lapsed.

Coming to those applying the law, I can only say that the main responsibility for all ails lies with the leadership. While I was secretary of state, I spoke with a lot of judges and prosecutors and most of them were open towards applying Strasbourg case-law. However, the Supreme Court unwaveringly stated that no one should think of applying the Strasbourg jurisprudence, because that is the Constitutional Court's competence. Truth be told: the lower court judges were discouraged from this kind of openness.

Farewell to a political career

V. Z. K.: You were a senior civil servant for seven years, then, in 1997 you changed careers. In an interview you said: "One comes to enjoy and get used to deciding certain things. It is wonderful to experience that things are done the way you want them to be done. It's not easy to return to science from this position." Nevertheless you still decided to leave the Ministry. Apart from the many years you had spent there, you justified this decision saying that petty interests within the Ministry had made your work difficult, the prestige of the Ministry of Justice had declined and a kind of hysteria enveloped criminal law in both politics and within the government. Had the circumstances been better, would you have continued to work at the Ministry or were you keen on returning to academia?

K. B.: I did not have nearly as much work under the MDF (Hungarian Democratic Forum) led government, as I did under the MSZP-SZDSZ (Hungarian

Socialist Party and Alliance of Free Democrats) government. On the one hand, I was thankful for the trust vested in me. On the other hand, with time I was burdened with so much work that I couldn't cope anymore. In the end, they dumped almost all of these tasks on me, from the codification of criminal law, through the administration of pardons to the implementation of international treaties and finally, also the legislative compliance with EU law. At the same time, the Minister wanted me to accompany him on his trips abroad, so I was constantly on the road. To make matters worse, instead of the politicians it was me, who was sent to take part in all criminal law related debates in parliamentary committees and in the media. Of course, my staff enjoyed the attention, and that we were the elite within the ministry that got everything done. But it came to a point where I felt that the way things were going was unfair.

Plus, I got tired of the endless consultations with the other ministries, the Supreme Court and the Office of the Prosecutor General, who always wanted to have their say in the codification work. It was just like before the change of political system, the only difference being that at the time, the Supreme Court has less clout. Meanwhile, the opposition kept admonishing us, claiming that criminal law legislation was not making progress. We had a lot of work to do, but I didn't have enough people and soon I was physically worn out. In the end, it got to the point where my stomach burned every time I passed the Parliament on my way to the Ministry.

There was a specific case whenI was deeply hurt and I cannot forget, perhaps out of vanity. The MDF government rushed the lustration law (called Agent Act) through Parliament and wanted to elect lustration judges before the end of their mandate. I was called in by the National Security Committee to talk to the candidate judges about the law that annulled politically motivated judgments rendered in the former regime and the lustration law. I wasn't told, however, what questions they wanted to discuss. I thought that they were thinking of discussing one or two complex paragraphs that make candidates for the position non-eligible. It turned out, they wanted me to elaborate on things even a fourth grader knows. I would never have thought I would have to explain these issues to a group of elderly lawyers.

With the exception of a few older judges, nobody wanted to be a lustration judge. And it turned out that those who had applied could not fill these positions because of the judgments they had rendered in the previous regime. Yet the government did not want to end its mandate without appointing lustration judges. And this is whenI was called in to talk about exclusion rules in general, instead of rejecting the applicants outright. In 1995 a scandal broke out that the lustration judges were appointed unlawfully and they wanted the President of the Supreme Court, who had sat through this whole farce, and myself, to take the blame. They even

organized a parliamentary committee hearing with the purpose of establishing that Pál Solt and I were to blame. I was accused of having purportedly deceived the poor candidates with my tremendous expertise and authority. It was a farce and every single participant in this hearing knew that I was not to blame. Needless to say, I was pretty hurt by all this.

In light of these events I took the decision to resign. I knew that Pál Vastagh wouldn't accept my resignation. So I told him that I wished to resign when we were sitting on a plane back from Paris and I knew he would be forced to listen to me. We had to keep my resignation a secret for a while because we knew that the opposition would have a field day with it. Eventually it came out and it caused a minor scandal in Parliament.

All in all I can say that had I been able to work under more favourable conditions, I probably would have stayed on at the Minsitry. But in fact, the change wasn't all that drastic, since I continued with the codification work as an external expert.

V. Z. K.: You were state secretary between 1990 and 1997 and personal advisor of the Minister of Justice from 1999 to 2007. Is it only our present perspective, that it is surprising that so many governments had trusted your expertise, irrespective of political affiliation?

K. B.: I believe I was the only state secretary who did not receive any awards from any government. In my view, this is testimony to my professional integrity.

The personal advisor position, however, is another story. Ibolya Dávid contacted me after the 1998 election and asked me to return as state secretary for the administration. I told her that I would be happy to provide expertise, but I did not want to work as a state secretary anymore. This is how I became the personal advisor to the Minister of Justice. This meant traveling to Vienna with the Minister to the anti-corruption events of the UN where Ibolya Dávid held her speech, then quietly left the room and I took questions. I was well versed in the subject because of my work at the Constitutional and Legal Policy Institute. Then when the MSZP-SZDSZ government came to power, I automatically kept my title of advisor.

V. Z. K.: Not only were you responsible for the codification work to achieve compliance with the ECHR, but you also represented the government in complaint procedures initiated against Hungary. Moreover, your book entitled Human rights and criminal justice in Europe was published a few years later, discussing the fair trial jurisprudence of the ECtHR. In light of all this, I would have thought that sooner or later you would end up at the Strasbourg court as a judge. Did your name ever emerge among those of the nominees?

K. B.: Of course it did. Every time. The 'eternal candidate', that was me. Already in the nineties there were aspirations to send me to the Commission, but József Antall said they needed me here. The job went to Imre Békés. Then from time to time someone suggested that I should be sent to serve at the Court, which was

duly reported in the press. But I was never close enough to any of the parties in power to have them nominate me.

V. Z. K.: You were nominated as a member of the International Criminal Court in 2006, however. Why weren't you elected?

K. B.: It was pretty clear from the beginning that I as a European male candidate stood little chance. And quite soon I regretted saying yes to the nomination. Nevertheless, the election procedure commenced and I had to leave for New York and the Hague to start campaigning. What was truly surprising to me was that the Ministry for Foreign Affairs was so underprepared and disinterested in the election. There were three or four Hungarian winemakers in the Hague at the time and the Ambassador was more interested in advertising them, while the others were ecstatic about the tulip exhibition and found no time to help. In New York, every nominee was accompanied by their ambassador, I on the other hand, was assisted by a nice young woman who, however, was barely above the rank of a doorman at the embassy. But all in all, it wasn't a big deal. I got over it quite quickly. I thought of the hussle of moving to the Hague and the kind of cases I would have had to deal with…

Career as an 'attorney'

V. Z. K.: Before getting back to your academic career, allow me a small detour: I must admit, I was a little surprised to learn that you also worked as an attorney.

K. B.: Well, yes. Look, when I left the Ministry I only had a part time job at the Department for Criminal Procedure. You know, this all goes back to the eighties when János Németh somehow arranged for the amendment of the Act on higher education. This is how teaching communities were able to form law offices. For example, the members of the 1st working community of lawyers were János Németh, Imre Békés, Lajos Vékás, Gábor Faludi, Ferenc Kratochwill and myself, later, we were joined by Péter Polt. I started working in this community of lawyers in 1987 because at the time a succesful defence of one's candidate of the Academcy thesis was acknowledged in lieu of the bar exam. I actually had some very interesting criminal cases and the pay was really good compared to what I made as a lecturer. However, I left this community in 1990.

Then later I got back into the profession when I left the Ministry and a childhood friend asked me to join his law firm. He worked on civil law and commercial law cases, but sometimes a few criminal cases also cropped up. Think: corruption cases of foreign companies or where an Austrian CEO had inadvertently shot the beater during a hunt in Hungary. However, besides COLPI (Constitutional and Legal Policy Institute) I hardly had time for my work as an attorney. After a while, I only assisted from time to time when the case had an international dimension.

Diving back into the research and teaching career

Constitutional and Legal Policy Institute (COLPI)

V. Z. K.: Following your position as state secretary, you became the director of the COLPI. Yet you left this job quite soon, after a mere three and a half years. Does this mean you couldn't really find your place in the world of academia at the time?

K. B.: To be honest, I wasn't quite sure what I was taking on. The whole thing began way back, when I was approached by members of COLPI, offering me a job. They tried to sweeten the deal by claiming that I would be able to participate in legislative reforms all over the world. To which I replied: I am already involved in preparing legislative reforms. And not just in Hungary: I had many foreign gigs, starting with the Russian criminal code to the Albanian code of criminal procedure, since I was quite popular at the Council of Europe at the time.

Then, when I resigned from the Ministry, András Sajó and István Rév approached me yet again to ask whether I would switch to the COLPI. I was very happy to get this offer, since I didn't really want to work as an attorney full time. I actually thought that the Department for Criminal Procedural Law of ELTE University would be breaking their back to hire me but they didn't offer me a full time position. (This is how I later transferred to the Department of Criminal Law as department head, in a full time position). So I decided to seriously consider the COLPI offer and travel to New York to talk to George Soros and Ariyeh Neier. I had to keep the whole trip a secret, for although I had effectively resigned, my mandate as state secretary had not yet ended and I didn't want to create the impression that I was leaving my government position for the Soros payroll. I think Soros liked me. With Neier, however, I had the feeling he was looking for a different type of person, not a scholar, but a militant activist type to head the COLPI. Nevertheless, I got the job.

I have to admit, I didn't really like COLPI, because it wasn't geared towards scientific work. When I sat down with Soros at the Grand Hotel on Margaret Island in Budapest to discuss my job, he said I should forget science for a few years. On top of that, I had to travel a great deal again, to the point that I didn't even know in which country I was half the time. When it became apparent that this position was not built for me, they appointed an executive director above me, and I was made director of research in an institute where I was banned from doing research. Obviously, I still felt out of place; for the first time (and thankfully the last) I looked down on my boss. With every trip abroad I had the feeling following the negotiations with government representatives that the reforms we promoted would not be implemented. This much I knew by that time. And what really bothered me was that the Institute spent so much money on projects where

it was clear from the outset that they would amount to nothing. Basically, the quality of our work was assessed on the basis of how much money we wasted. It was Soros' money, and I felt really bad about this.

Central European University (CEU)

V. Z. K.: You have been teaching at the Central European University since 2001, moreover, during these years you were programme director, head of department and pro-rector. How did your relationship with the university begin?

K. B.: András Sajó and Yehuda Elkana, the rector of CEU at the time witnessed what was going on in COLPI and that I was feeling out of place there. Meanwhile, at the CEU Department of Legal Studies they were looking for someone to take over the development of the human rights programme from Gábor Halmai. So COLPI and CEU reached an agreement and step by step, I transferred to the university full time.

From the first moment on, I felt at home at the Legal Studies Department. Of course, at the time I started working at the university as a guest lecturer, it was still based at the Hüvösvölgy campus and things were really different. For example, not all students were proficient in English. At the same time, the university was equipped with cutting edge technologies.

You know, for the longest time I felt committed to ELTE out of a sense of loyalty to the university. I also felt it was important to publish articles in Hungarian. I helped build the Department of Criminal Procedure in Győr, which gradually grew out of ELTE. All in all, I tried to stay close to ELTE.

No matter how much I liked working at CEU, for a long time I felt I couldn't fully integrate into the fabric of the university. This must have been in part down to the fact that the Council of Europe and the OSCE kept sending me on trips abroad to help prepare or consult on other countries' criminal legislation. And ELTE also remained a part of my life. Moreover, the Department for Legal Studies has always been a little different and thus stood slightly apart from the rest of the CEU departments. That's why it came as a surprise when I was asked to become the pro-rector for Hungarian and European affairs.

V. Z. K.: Perhaps it's no overstatement to say that over the last twenty years, your life has been intertwined with the fate of CEU. How did you take the political conflict that erupted between the Hungarian government and CEU and led to the adoption of a legislative amendment which virtually made the Budapest operation of the university impossible?

K. B.: For a week or two after the news broke, I thought, maybe something good can come out of this predicament, so that it can be an opportunity for renewal and

expansion. But my enthusiasm quickly subsided as I soon became aware that I have no ambition or strength to see this through. Teaching is what I like, the students are great. I realized that the renewal of this university is not my job. And I must admit I am not overly optimistic when it comes to the future of CEU. I fear this exile from Budapest has halted a process of development. But I sincerely hope I'm not right on this. It would be nice if the mission would remain and CEU would not turn into a small, less significant US private university, fishing for paying students.

Nonetheless, I didn't fall into a depression. I'm glad that I could continue teaching. This turn of events was not the end of the world for me.

Past, present and future

V. Z. K.: If one takes a look at your list of publications, it is clear that you consistently write about criminal procedural law, international criminal law and their human rights aspects. While not alien to these fields of research, your work on confronting the past, namely, the criminal law aspects of the communist and Nazi dictatorship nevertheless stand out. I wonder why you are so interested in this topic. Is this just another field of interest for you, or is there something more personal behind it?

K. B.: I have no idea if there is a specific reason. This was actually the topic, more specifically national socialism and the lawyer's responsibility, that I wanted to research in Freiburg at the end of the eighties. I already knew the international literature on the topic by that time, however, in Hungary nobody was working on it. At the time of the change of political system I was thinking that the Hungarian legal system should be taken in a different direction. One of my goals was to implement the Strasbourg case-law, the other was the legal clarification of what we will be rejecting from the past in this new political system. Meanwhile I realized that in and of itself, Nazi or communist criminal law is not all that interesting. I was much rather interested in understanding the logic underlying totalitarian regimes. Yet it was during these months in Freiburg that the offer from the Ministry came in, so nothing came of this research.

At the same time, this topic never quite left me. József Antall aked me to consult on the draft Zétényi-Takács bill on the extension of the statute of limitation for crimes committed in the previous regime that went unpunished. It was there that the materials compiled in Freiburg were put to good use, for I knew more about this topic, namely the problem of retroactivity, than others at the time.

But as to why this topic re-emerged: maybe it's just a coincidence. A few years earlier when my friend János Kőbányai returned from Israel, as the editor of Múlt és Jövő (Past and Future) he approached me to write a piece for the magazine. That was when I started to get back into the literature on these topics. I now really

regret I did not study history. I truly believe that you can only do good science if you are well versed in things historic. So there is a simple answer: I'm interested in this topic and I had never dealt with it in depth before. And perhaps I needed a new area of research, having already written too much on criminal procedural law.

V. Z. K.: You defended your doctoral dissertation at the Hungarian Academy of Sciences last year, entitled Victims' dignity and defendants' rights. Reading the reviews I was struck by the impression that I think radiates beyond your dissertation and perhaps characterizes your entire career. Let me tell you my impression and correct me if I'm wrong. The disputants say that while your familiarity with international literature is impressive, you did not reflect on the Hungarian scholarship or the domestic legal practice to the degree expected. (This criticism is also voiced in respect of your earlier works). I jotted this down and then took another look at your CV and came to the conclusion that you really liked living in Budapest, but on an intellectual level, you were more at home in the international scholarly community. You never left Hungary for too long, but your scientific work took you to the most renowned international institutions, such as the UN, the HEUNI or the OSCE. Am I correct?

K. B.: The disputants were right: I should have reflected more on Hungarian scholarly findings. As far as your conclusions are concerned, I can only say, I really liked travelling abroad before the change of political regime. It's true that I couldn't stand conferences and the small talk between presentations, and instead of going to the conference reception and dinner I usually retreated to my room to read. But I loved real academic work. I was often abroad and worked for several international organizations and thus had a considerable international network. Alas, my foreign colleagues are getting older and going into retirement, so this network is starting to wane.

In Hungary, however, I dropped out of academic life in 1990 with my position at the Ministry. Next came COLPI, where I spent half of the week abroad and although I was quite frequently at ELTE, I lost touch with a lot of Hungarian colleagues. I didn't have particularly strong ties to the Hungarian Academy of Sciences, either, I was not present in Hungarian academic life, for at CEU it is basically only the publications in English that count. This is why I submitted my doctoral dissertation this late. Still, I don't think I could ever leave Hungary.

V. Z. K.: Speaking of the criticism your work received, let me ask one last question on this point. Your colleagues routinely stress that your writing is extremely clear, smooth and exciting. It is not uncommon for lawyers to nurture literary ambitions that are clearly discernable from their writings. Does this apply to you? How do you see yourself: as a lawyer with a writing gift, or a writer who chose law as his muse?

K. B.: I'm a slow writer and I never wanted to write literature. It's just that I truly believe that it is possible to write plainly about complex professional issues without

lowering the standards of the text. To me, the highest form of recognition is when the layperson enjoys reading my work, even though he doesn't quite understand it.

V. Z. K.: Your reply to my request for an interview started like this: "Dear Viktor, thank you, that is most kind. Although such a retrospective interview is the anteroom of the obituary, I am happy to oblige". I admit, I laughed out loud reading this. I suspect this was meant as a joke and you have lots plans you look forward to. Can you tell us about some of these plans?

K. B.: I would like to spend more time in Spain. I became enchanted with Andalusia and I bought a flat there. As far as the writing is concerned, my most productive period was the time I spent in Spain two years ago. In fact, I wouldn't really be doing anything different there, than at home. But I could learn proper Spanish at last, and be among friendly, smiling people from time to time.

I would like to dive deeper into the topic of dealing with the past, it is actually something that would be useful for my teaching as well. I think I may be able to publish something that is different from the type of work that historians do. After all, there comes a time when one can afford to write about things that they are truly interested in.

INTERNATIONAL CRIMINAL LAW

THE BANALITY OF GOOD – THE ICC REPORT OF EXPERTS AND THE STUDY OF INTERNATIONAL COURTS

Marjan Ajevski[1]

"That such remoteness from reality and such thoughtlessness can wreck more havoc than all the evil instincts taken together which, perhaps, are inherent in man – that was, in fact, the lesson one could learn in Jerusalem."[2]

With these words, Arendt summarised was so off-putting to her by Eichmann's self-depiction: "He was not stupid. It was sheer thoughtlessness – something by no means identical with stupidity – that predisposed him to become one of the greatest criminals of that period."[3] He was "banal", ordinary, and in his words, a cog in a giant bureaucratic death machine that could easily be replaced by any other Nazi without a stutter in the machine.

Of course, Eichmann was evil, as the countless written and other accounts of his time as an SS officer show.[4] Arendt's image of Eichmann was very much influenced by her thoughts on Totalitarianism,[5] and what she saw as the transformation of thinking human beings into the willing executioners of their superiors' orders. However, the picture that Arendt portrayed of Eichmann as someone banal and ordinary is still alive today.

Sixty years later, we have another account of a bureaucracy,[6] but this one dedicated to investigating and punishing contemporary Eichmanns. It is a

[1] Research Fellow in Law, Open University Law School, The Open University, UK.

I wish to thank the editors for their invitation to contribute to Károly's Liber Amicorum. As this piece shows, the books that he got me to read, like Arendt's *Eichmann in Jerusalem*, Damaska's *The Faces of Justice and State Authority*, and Foucault's *Discipline and Punish* have stayed with me throughout my academic life and I still draw inspiration from them. Thank you, Professor Bárd Károly, for your influence.

[2] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, New York, Penguin, 2006, Postscript.

[3] Arendt, *Eichmann in Jerusalem.*

[4] Antonio Cassese, Eichmann: Is Evil So Banal?, *Journal of International Criminal Justice* 7 (2009), 645–652.

[5] Cassesse, Is Evil so Banal?, 646.

[6] Independent Expert Review of the International Criminal Court and the Rome Statute System, Final Report, (hereafter the Report) 30 September 2020, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf.

thorough account of the workings of the International Criminal Court (ICC) and it has many things to say about how the ICC can be reformed to better carry out its mandate. However, it is also an account that leaves one with the impression that one the most noble of pursuits is being carried out by such an ordinary, dare I say it, "banal" organization.

On the following pages, I will give a short summary of the report, put it in the context of the field that I research, the study of international courts, and argue that the "ordinariness" of the ICC is not as much of a failure as it appears, but something that can allow the ICC to move from the loftiness of its expectations and discourse and into a more level headed analysis of what makes a well-functioning international court.

The Report in brief

The Report is a product of the ICC's review mechanism, a process that was started by the ICC's Assembly of State Parties (ASP) in 2019[7] with the overall objective of "to identify ways to strengthen the [ICC] and the Rome Statute system […]" and "enhance their overall functioning, while upholding the key principles enshrined in the Statute […]" chiefly, "complementarity, integrity and judicial and prosecutorial independence."[8] The experts produced their report in remarkable time (10 months) for such an exhaustive and detailed review. Their mandate was to review the "complex technical issues"[9] arising out of three topics: governance, judiciary, and investigations and prosecutions.

It is also quite exhaustive. It covers more than 330 pages of findings and recommendations on such varied issues as the court budget process, performance indicators, external relations, victim protection, procedural issues regarding the trial process, issues of employee management, bullying, promotions, sexual harassment, human resources policy, and many more. It makes a total of 384 recommendations.

The commissioning of the Report was itself a result of the strained relations between the Court proper and the ASP. As the report noted, "[t]here is widespread distrust of the ASP within all Organs of the Court. There is a sense in the Court that States Parties do not recognise […] that its role is to administer justice, not

[7] ICC, Assembly of State Parties, Review of the International Criminal Court and the Rome Statute System, Resolution ICC-ASP/18/Res.7, 6 December 2019, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-Res7-ENG.pdf.

[8] Ibid, Annex I, para. 1.

[9] Ibid, para. 2.

to achieve policy ends."[10] On the other hand the State Parties themselves were "frustrated with the Court, which they consider does not deliver full value for the funding their taxpayers provide, in terms of reducing the incidence of the crimes set out in the Rome Statute, through convictions and deterrence."[11] Bringing the discussion down a level from principles to technical issues and putting it in the hands of independent experts would create space to have a more productive dialogue between the Court proper and the ASP on the ICC's path forward. To the experts' credit, they managed to gain the trust of the ICC's staff, which shows in the candor of the report.

The Report in context of the study of international courts

To say that the field of international court's research is a growing field is a little bit of an understatement. There are currently two main centres of excellence in Europe dedicated to researching all types of international courts,[12] as well as several individual or institutional projects focusing on the subject in the past and present.[13] As international courts have grown in maturity so has the field. Moreover, it is not just that international courts proper are the object of study, the UN human rights bodies, the WTO dispute settlement mechanism, as well as investor-state arbitrations are also commonly studied.

In addition, various aspects of these courts and tribunals have been and are under study, from their independence, accountability, transparency, the election of judges/arbitrators, their effectiveness, the relationship with states as well as specific branches of government within a state, the dialogue between international courts, their democratic deficit and legitimacy and the possible ways that they could be addressed. Moreover, it is also safe to say that the courts based in Europe are overstudied, while those based in other regions of the world, especially in Africa, are understudied.

But more importantly than what topics have been studied is the way that international courts (ICs) have been studied. To illustrate, I will present a discussion

[10] The Report, para. 948.

[11] Ibid para. 949.

[12] PluriCourts Centre for the Study of the Legitimate Roles of the International Judiciary in the Global Order, based at the University of Oslo, Norway, and iCourts, based at the University of Copenhagen, Denmark.

[13] *See* for instance Yuval Shany (ed.), *Assessing the Effectiveness of International Courts*, Oxford, OUP, 2014, a result of a ERC grant at the Hebrew university of Tel Aviv, as well as the Project on International Courts and Tribunals (PICT) coordinating the research of several European universities under which the Selecting International Judges study was conducted.

on the issue of whether ICs are Agents or Trusties of states. As the name suggest in the relationship between ICs and states, the states are the Principals who delegate dispute resolution or law enforcement functions to ICs, for various reasons. In its condensed form the P-A theory argues that 'States are actually controlling what merely appear to be independent International Courts'[14] due to the fact that states have in their hands tools of political control. They write the mandate of ICs – i.e. the starting point, as well as re-write it at subsequent dates, and they also control the budgeting of the institutions and the appointments and re-appointments of the Agents. Consequently, as the P-A theory goes, they have sufficient leverage to use against stray Agents. While there may be some agency slack on the side of courts, mostly due to the fact the courts are difficult to manage and not easy to staff, all in all, the re-contracting tools provide significant influence over the decision-making of ICs.[15]

Alter has argued convincingly in the past against the P-A theory, introducing a modification to the state – IC relationship by conceptualising ICs not as Agents but as Trustees. In this view, ICs are inherently different than other international organizations due to the "distinct logic of delegation"[16] which posits that states delegate functions to ICs for reasons that are specific to ICs either to harness "the Trustee's decision-making authority"[17], or the notion that adjudication inherently requires an independent third party which incentivises states to reduce the possibilities of any single state having overwhelming control over the court.

This logic of delegation makes the various control mechanisms in the P-A theory largely ineffectual or unavailable "rendering member-state principals, *qua* principals, essentially irrelevant to international judicial behavior, which is instead guided primarily by rhetorical and legitimacy politics."[18] The debate is still ongoing and Elsig and Pollack have critiqued the P-T framework as incorrect, offering the appointment system at the WTO as an example of a single state, let alone a group of states, using heavy-handed mechanisms available to it to attempt to control or scare the WTO Applet Body members to accept its views on international trade policy.[19]

Regardless of who wins this debate, the terms of reference for viewing the relationship between states and international courts will not change as a result. The

[14] Karen J. Alter, Agents or Trustees? International Courts in Their Political Context, *European Journal of International Relations* 14 (2008), 33–63, 34.

[15] Alter, Agents or Trustees?, 34–35.

[16] Manfred Elsig – Mark A Pollack, Agents, Trustees, and International Courts: The Politics of Judicial Appointment at the World Trade Organization, *European Journal of International* Relations 20 (2012), 391–415, 395.

[17] Alter, Agents or Trustees?, 40.

[18] Elsig – Pollack, Agents, Trustees, and International Courts, 392.

[19] Ibid.

states will still be the principles exerting more or less control over ICs depending on whether one views courts as agents or trusties.

On the other hand, the Report takes a completely different approach when reviewing the ICC one that is more appropriate to studying national court systems. What this means is that rather than seeing IC as single unified entities that perform a function and interact with other actors, both national and international, the Report sees the ICC as a complex organization complete with a complex internal bureaucracy staffed by fallible human beings.

Part of the reason for this is due to the nature of the ICC itself, which distinguishes it from other IC. For one, the Report distinguishes between the ICC as an international organization, and ICC as a Court, and within ICC as a Court, it distinguishes between the Court in the narrow sense, the Office of the Prosecutor (OTP) and the Registrar. Consequently, it has no other choice but to look at the ICC in a disaggregated manner if it wants carry out its mandate.[20] Once this step has been made, there really is no good argument to be put forward against the idea of why disaggregating it further and seeing how the sub-units within these separate branches operate.

This of course has further consequences as to how we see ICs. Let us continue the A-P argument from above. Notice that that argument is about courts as a whole. Either the states are the Principals (i.e. in charge) and the courts are the Agents, or the courts are Trusties, working for the benefit of the entire system, not just the Agents. The only avenue from where the independence of the court can be threatened is from the states – the Principals. But once we disaggregate a court and see that it is made up of a complex structure of organs and departments, we can continue to ask questions like: how do the operations and practices of these organs and departments impact the independence of the court? Who has power within that organization or department, and how does it affect the independence of the court?

We know from studies of domestic courts that in those systems where there is a separate judicial council isolating the judiciary from the political branches, an overly powerful president of either the judicial council or of a specific court can have an outsized influence on the organization impacting the independence of the courts.[21] Similarly, the Report picks up on this very same issue when discussing the election of the Presidency of the Court. The Presidency, comprised of the President and the First and Second Vice-Presidents, has the power to call judges to full time service as well as assign them into Chambers once they are selected

[20] Paragraphs 26-31 of the Report.

[21] David Kosař, *Perils of Judicial Self-Government in Transitional Societies*, Cambridge, CUP, 2016.

to be judges at the ICC.[22] Consequently, "the actions of the Presidency can have a significant impact on the immediate future of newly-elected Judges."[23] The Report noted that the "practice of candidates campaigning and offering inducements to vote for them, such as the exercise of these responsibilities in a particular way, has been a feature of recent elections for posts in the Presidency."[24] This is a good avenue for the senior judges to influence the incoming judges and, consequently, compromising their impartiality and independence by giving them more resources or more prestigious cases or job titles, or assigning them to easier workloads.

Furthermore, looking at issues of the independence of an international court is not just about looking at whether the individual judges are independent.[25] The working environment for the administrative staff assisting the judges is also important. For example, the group of experts received information that "acts of bullying and harassment by a slender number of Judges, past and present"[26] have occurred. Conversely, "[t]here have also been a number of incidents involving staff members' inappropriate behaviour towards Judges."[27] Moreover, "there is a perception from staff that individuals who officially complain may still bear a personal risk and the repercussions, including possible reprisals for a staff member, if publicly known, stand very high."[28] Furthermore, there is this damning paragraph in the Report

> *The Experts heard many accounts of bullying behavior amounting to harassment in all Organs of the Court, though particularly in the OTP. They also heard frequent complaints that the culture of the Court's workplace was adversarial and implicitly discriminatory against women. They heard a number of accounts of sexual harassment, notably uninvited and unwanted sexual advances from more senior male staff to their female subordinates. Female interns seemed to be particularly vulnerable to such approaches [...].*[29]

It is easy to see how this type of an environment can impact a court's independence. If the staff assisting the work of the judges is in a vulnerable position, if legitimate

[22] The Report, para. 404.
[23] Ibid.
[24] Ibid para. 405.
[25] For e.g. in 2017, documents surfaced that the former Chief Prosecutor of the ICC was a paid consultant of a Libyan businessman that was connected to a militia group that may have committed war crimes, Barney Thompson, Former ICC Prosecutor in Row Over Lucrative Consultancy Work, *Financial Times* (6 October 2017), https://www.ft.com/content/313526a8-a9d8-11e7-ab55-27219df83c97.
[26] The Report, para. 298.
[27] Ibid.
[28] Ibid, para. 287.
[29] Ibid, para. 209.

issues are not redressed, if there is an atmosphere of fear to speak out against bullying then that puts into question the impartiality of the work and advice that the court's staff may give to judges. In situations of complex litigation,[30] judges rely heavily on their staff to assist them in preparing a complex opinion that can go into the hundreds of pages of reviewing evidence and legal precedent. It is a type of work that requires trust between the judge and their staff, and if that trust is broken by the bad behavior of some judges or some staff members then the work of the court suffers, measured in delays of trials and judgments, but also in the reputation of the court.

What next for international judicial studies

The Report shows that we, the scholars that study ICs, need to expand our research to encompass the study of IC as complex organizations if we are to capture the complex phenomenon of IC. It is not that the studies that have been carried out so far are bad or useless, but that they are inadequate to capture the phenomenon of ICs. The more we know about how ICs operate, the more we become aware of the unknown unknows that could have a major impact on the subject that we study. This is normal and it shows that our field of study is maturing.

However, we do have to recognize that we need to change our perceptions of what ICs are. We have moved away from the, now trite, view that ICs are mere dispute resolution mechanisms. Alter has already given a good starting point into the way that we might want to classify the different ICs, depending on their primary function within their respective systems.[31] We should also continue studying the interactions that ICs have with their outside.

However, we should, just like Slaughter's[32] insight regarding states, see ICs as disaggregated entities with several departments, each with their own areas of responsibility, interacting with different, but sometimes, overlapping actors who themselves might be disaggregated. For example, while we have studied how ICs interact with national parliaments or national courts, we should also be aware that different departments of an international court have different types of contact with these national entities. The judges might enter into a dialogue with national courts or national parliaments through their written opinions, but court registrars come

[30] Stuart Ford, Complexity and Efficiency at International Criminal Courts, *Emory International Law Review* 29 (2014), 1–69, 1.

[31] Karen J. Alter, *The New Terrain of International Law: Courts, Politics, Rights*, Princeton, NJ, Princeton University Press, 2014.

[32] Anne-Marie Slaughter, *A New World Order*, Princeton, NJ, Princeton University Press, 2004.

into contact with national judicial administrations, or national foreign ministries in a completely different way and for completely different reasons. The same is true for individuals or non-governmental entities, different organs of the court come into contact with these actors in a different way – the judges through their case law and decisions, or through the various public lectures that they give or prizes that they receive. The registrars, on the other hand, have a more formal or service oriented contact, either through field offices for the ICC, or through information dissemination and outreach, or through managing the administrative part of an application process (e.g. the ECtHR).

These different types of relationships can have different effects on the various aspects of an international court's operation. For example, while it is obvious that interactions with the foreign ministries of states can have a negative impact on the independence of the judges, it is not so obvious why this should be the case for the administrative organs of the registrar. Quite the contrary, some of these contacts are necessary, for example, when the ICC needs to ask and lobby for support from governments so it can carry out its functions successfully.

On the other hand, interactions with NGO's or academia can call into question the independence of the judges if they receive compensation for their lectures or receive public awards for their work on the bench, or if they are members of the boards on some NGOs or even companies. Conversely, judges' interactions with national parliaments or courts can both be seen as an intimidation, or a legitimacy enhancing exercises depending on the setting or the tone of the exercise. It is only when we see courts as complex bureaucracies, rather than unified entities can we understand the full extent of a court's operations. The Report clearly demonstrates the benefits of this approach.

The banality of good

In *Representing Justice*[33] Resnik and Curtis portray how representations of justice in architecture and the art found in court buildings demonstrate the image of justice that a state or an international organization, wants to project. In their chapter devoted to ICs, they discuss the Peace Palace (the home of the ICJ) and the art housed within it, noting that the image that the funders and the designers wanted to project was one of grandeur and gravitas in the pursuit of international law, a shiny city atop a hill, a beacon for peace through law. When the ICC was created and a design competition was announced, it proclaimed the vision of the Court as

[33] Judith Resnik – Dennis E. Curtis, *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms*, New Haven, CT, Yale University Press, 2011.

"a prestigious institution on the world stage" one that would "add a visual dimension to the perception of the Court by the outside world" as "the public face of the institution – an emblem of fairness and dignity and a symbol of justice and hope."[34]

The Report paints a different, mixed, picture. It has stated that the "working environment at the headquarters in The Hague too often does not live up to the spectacular office accommodation provided"[35], and that there is a mixed satisfaction score of the Court's staff, as well as stagnation in their respective career progression and development. On the other hand, the Report also concludes that "[w]hile the fact that the instances mentioned have occurred since the Court's establishment and at a variety of different times signals a non-collegial working environment, the whole picture is more complex."[36] Moreover, they noted that "it is certainly not the case that lack of collegiality was or is the custom or a systemic pattern of conduct and occurrence in *all* the Chambers and at *all* times,"[37] and that "collegial relations, as well as a collegiate atmosphere, fully prevail in the Presidency and in a majority of the Chambers."[38] The picture that the Report paints is one of a complex organization that is having troubles. It is in no way a perfect organization, and the people working for it, while dedicated, can at times be uncollegial, at others disrespectful, and at others still, abusive. But they can also be dedicated, helpful, mindful of others, perform quite complex tasks under difficult circumstances, with mixed results.

And this is where I welcome the Report's honesty and approach. The Report paints a picture not of a shining city atop a hill bringing peace through justice, but of a bureaucratic institution with some noticeable cracks. Afterall, the Report does give 384 recommendations for the improvement of the ICC. But what it does well is to bring the Court from the realm of the imaginary, from a monument on a high pedestal, to the realm of the real, the everyday, the ordinary. In Arendt's words, a bit banal, but working towards one of the most noble of pursuits, bringing justice where previously there was none. And while we want our villains to be struggling, and ordinary, and bumbling, we want our heroes to be the opposite: shiny, dedicated, competent and succeeding. Unfortunately, given the constraints of international bureaucracies, what we oftentimes get is something like the ICC.

Finally, the Report also gives me hope. Hope that the ICC (the organization) will take the recommendations to heart and will act on them with all deliberate speed. At the end I am left with a quote from the Report itself, speaking of collegiality:

[34] Report on the Future Permanent Premises of the International Criminal Court, ASP, ICC-ASP/5/16, 31 October 2006; also see Resnik – Curtis, *Representing Justice,* 275–281.

[35] The Report para 205.

[36] The Report para. 466

[37] Ibid para 467 (emphasis in the original).

[38] Ibid (footnotes removed).

> *Neither is there a magic formula for attaining optimal collegiality, nor is it appropriate for mandatory legislation. It is essentially a combination of many undertakings, institutional and others – a process, procedure, method, custom, practice, behaviour, culture and mindset.*[39]

It is complex and it is difficult, but it is worth pursuing.

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[39] Ibid para. 471.

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THE FORA FOR JUSTICE: SOME REFLECTIONS ON PEACEBUILDING AND RECONCILIATION FROM THE PERSPECTIVE OF THE NUREMBERG AND THE ICTY TRIALS

Violeta Beširević[1]

> *The purpose of a trial is to render justice, and nothing else[...]Hence, to the question that is commonly asked about the Eichmann trial: What good does it do? There is but one possible answer: It will do justice.*[2]

This short essay, written to honor professor Károly Bárd, is aimed to shed light on the underlying questions related to listing peacebuilding and reconciliation in the mandate of ad hoc international criminal tribunals and hybrid courts. To argue against this practice, two different legacies, the Nuremberg's and the ICTY's, are brought into perspective.

Introductory remarks

Károly Bárd was my professor and, for a while, my dear colleague with whom I worked together at the Constitutional and Legislative Policy Institute, affiliated with the Open Society Institute and Central European University in Budapest. While we were working together back in the 1990s, the former Yugoslavia, where I came from, suffered from the tragic civil war, while Serbia, my domicile country, was exposed to the NATO intervention, which was not grounded in international law. This is an opportunity to thank Károly for knowing how to make me smile during that challenging time.

Among many tasks we accomplished together, Károly and I worked to promote the establishment of the International Criminal Court; therefore, to honor him, I have chosen the criminal justice topic, although constitutional and human rights law have been predominant fields of my teaching and research.

[1] Professor of Law, Union University Law School Belgrade; S.J.D. Central European University.

[2] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, New York, Penguin Books, 1994, 253–254.

Accountability or Accountability in the Name of Peacebuilding and Reconciliation?

It has been a common understanding that the international justice system has its roots in the 1474 Breisach trial, conducted in the aftermath of the atrocities committed during the siege of the city of Breisach in the Upper Rhine region. The punishment for committing "crimes against the laws of nature and God" was imposed by the *ad hoc* tribunal composed of 26 judges from various regional city-states on Peter Von Hagenbach, Burgundy's Alsatian military commander.[3] This historical precedent signaled that bringing preparators of grave breaches amounting to international crimes to prosecution and punishment would become a key mandate of the modern, twenty-century established international courts and tribunals. Moreover, the unprecedented atrocities committed during World War II paved the way for establishing the duality of the state and individual responsibility for international crimes. The Nuremberg judgment and the Genocide Convention are cases at the point. [4]

However, the late1990s and the early 2000s attempts to connect international trials with restoring peace and achieving reconciliation between divided nations or ethnic groups have shown that the modern international criminal justice system has become more ambitious than the Nuremberg trial, on whose legacy it was built. Along with the legal, the non-legal purposes prominently figured in the missions of the International Tribunal for the Former Yugoslavia (ICTY), the International Tribunal for Rwanda (ICTR), and Special Court for Sierra Leone. What was put in their mandates, now mostly over, was not retribution itself, but an aim of holding individuals to account in an effort to promote peacebuilding and reconciliation.[5]

There is a further twist here. Even though the ICTY and ICTR became revolutionary milestones of the international criminal justice, which speeded up the establishment of the International Criminal Court (ICC), the Rome Statute spells out that the ICC is established to secure the punishment for the most serious crimes of concern to the international community, to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such

[3] Gregory S. Gordon, The Trial of Peter von Hagenbach: Reconciling History, Historiography and International Criminal Law, in Kevin Heller – Gerry Simpson (ed.), *The Hidden Histories of War Crimes Trials*, Oxford, OUP, 2013, 13–49.

[4] The Judgment is rendered on 1 October 1946; The UN Convention on the Prevention and Punishment of the Crime of Genocide was approved by General Assembly Resolution 260 A (III) of 9 December 1948; it entered into force on 12 January 1951.

[5] Ruti Teitel, The Law and Politics of Contemporary Transitional Justice, *Cornell International Law Journal* 38 (2005), 837–862, 857.

crimes.[6] All other non-legal aspirations are notably missing. Was that the sign that lessons were learned and that associating non-legal purposes, like peacebuilding or reconciliation, with international justice mechanisms impeded international criminal justice rather than advanced it?

To explore the issue, I will pit the Nurnberg "International" Military Tribunal (IMT) mandate against the ICTY mandate. I have deliberately decided to compare the two legacies, not only because I am emotionally attached to the region of the former Yugoslavia, but also because the ICTY was the first modern tribunal established after the Nuremberg. An additional reason also urges parallel assessment of their mandates – the criticisms leveled against the IMT and the ICTY were to some extent the same, in the sense that they were *ad hoc* bodies designed to administer justice selectively.[7]

Accomplished Missions: International Criminalization of Atrocities

Much ink has been spilled in regards to the Nuremberg trail. On many occasions, the Nuremberg legacy has been subjected to methodical evaluation that resulted in divided opinions on almost every aspect of the trial.[8] For some, Nuremberg was a great success, a milestone in international criminal law. To its critics, Nuremberg was a failure, a mere victor's justice in which *ex post facto* substantive rules were applied under novel jurisdictional theories.[9] There are conflicting views on whether the trial was procedurally fair.[10] There is much to be said about the Nuremberg trial, but this chapter's space and purpose do not allow me to assess all aspects of the trial deeply. Instead, I will focus on the predominant concern of this chapter – the IMT mandate and the issue of what Nuremberg was about.

[6] See the Preamble of the Rome Statute.

[7] Claus Kress, The International Criminal Court as a Turning Point in the History of International Criminal Justice, in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford, Oxford University Press, 2009, 143-159.

[8] The scholarship on the Nuremberg trial and the IMT is immense. I would like to draw attention to the 1995 New York Law School Journal of Human Rights symposium: Panel I: Telford Taylor Panel: Critical Perspectives on the Nuremberg Trials, *New York Law School Journal of Human Rights* 12 (1995), 453–544; Donna E. Arzt, Nuremberg, Denazification and Democracy: The Hate Speech Problem at the International Military Tribunal, *New York Law School Journal of Human Rights* 12 (1995), 689–758.

[9] See discussion of Jonathan Bush in Panel I: Telford Taylor Panel: Critical Perspectives on the Nuremberg Trials, 461.

[10] Arzt, Nuremberg, Denazification and Democracy, 702.

An extract from the opening statement of Justice Robert Jackson, then Chief Prosecutor for the United States, is quite telling:

"The privilege of opening the first trial in the history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, so devastating that civilization cannot tolerate their being ignored because it cannot survive their being repeated."[11]

Put simply, the IMT mandate was reduced to retribution and punishment of Nazi leaders. With the impressive record, the Nuremberg judgment is "the defining moment in international criminal law."[12]

Now, in the legal sense, Nuremberg's legacy was of major significance for doing justice in the region of the former Yugoslavia. The establishment of ICTY would have hardly be possible without the Nuremberg precedent: despite some obvious differences between the IMT and the ICTY, taking into account the legal purposes of international criminal proceedings, there is no doubt that the ICTY was a Nuremberg-like tribunal. The ICTY was built on the fundamental principles of international criminal law set up in Nuremberg: individual criminal responsibility for committed crimes, no immunity for state representatives, and denial of any possibility to rely on official position or superior orders as defenses. Nuremberg Charter also served as a normative basis for the ICTY Statute regarding the definition of crimes and, in particular, for crimes against humanity, which after Nuremberg, gained both in clarity and number. The rudiments of fair trial standards followed in Nuremberg have been accepted, further developed, and applied in the proceedings run before the ICTY.[13]

Although both the IMT and the ICTY suffered from certain legal imperfections, one can confidently say that both tribunals successfully served a fundamental legal purpose of the international criminal proceedings – determination upon proof of individual criminal responsibility for committed crimes. Generally, the worst nightmare closely connected to conducting any criminal proceedings is a fear of punishing an innocent person. Neither of the tribunals, either the IMT or the

[11] The Opening Statement is available at https://www.nationalww2museum.org/war/articles/robert-jackson-opening-statement-nuremberg. For more see Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, Boston, MA, Back Bay Book, 1992.

[12] Robert Cryer, Nuremberg International Military Tribunal, in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford, OUP, 2009, 441-443.

[13] For more see, e.g., Gerhard Werle, *Principles of International Criminal Law*, The Hague, TMC Asser Press, 2005, 16–17; Vladimir Đ. Degan – Berislav Pavišić – Violeta Beširević, *Međunarodno i transnacionalno krivično pravo*, Beograd, Službeni glasnik & PFUUB, 2011, 165–166.

ICTY, can be blamed for making such a mistake. Acquittals did happen both in Nuremberg and in The Hague.[14]

It is a different issue whether all the responsible for grave crimes were brought to justice, either before the IMT or the ICTY. As to Nuremberg, particular attention is often drawn to the fact that war crimes committed by the Allies were not subject to trial. The slogan "victor's justice" associated with the IMT well explains this flaw. Whether "victors' justice" could be true and complete justice is an enduring question which, in my opinion, should be answered negatively. But leaving this question for some other discussion, important here to emphasize is that neither moving from the victor's justice to *ad hoc* justice before the ICTY did bring *all* responsible for international crimes to justice, although the ICTY had jurisdiction over all parties included in the conflict. Thus, the guilt of none of the leading state representatives involved in the conflict at the territory of the former Yugoslavia has not been determined in the Hague. True is, unfortunate developments, mostly connected with their death either during the trial or before the indictment was confirmed, prevented the establishment of the guilt. Thus, death prevented the proceeding against Slobodan Milosevic, the former president of Serbia, from being closed with a judgment, while Franjo Tudjman, the former Croatian president, died right before the indictment against him was to be issued.[15] Nevertheless, one cannot resist the impression that the Hague Prosecutor too quickly and too easily decided not to press charges against those most responsible for crimes committed during NATO intervention in Serbia, such as the bombing of the major TV station in Belgrade, which resulted in civilian casualties.

All things considered, it can be argued that selective justice, however incomprehensively pursued, did not manage to blur the fact that the trials before the IMT and ICTY succussed in the international criminalization of internal atrocities. On this point, lessons from Nuremberg were crucial for international prosecutions in The Hague. But in early 1990s it was perceived that it was time to do justice differently from what was done in 1946: retributive justice, that included trials, punishment and reparations was not enough. When doing justice in the region of the former Yugoslavia became urgent, the politics of international criminal justice was enriched with relational approaches to justice, *i.e.* combined with peacebuilding and reconciliation.[16]

[14] For the acquittals in Nuremberg, see Cryer, Nuremberg, 442; for the persons acquitted of all charges before the ICTY, see https://www.icty.org/en/about/chambers/acquittals.

[15] AFP, UN Court Exposes Uneasy Legacy of Croatia's 'father' Tudjman, *France 24* (17 December 2017), https://www.france24.com/en/20171217-un-court-exposes-uneasy-legacy-croatias-father-tudjman.

[16] For more on relational approaches to justice, see Jennifer J. Llewellyn – Daniel Philpott (eds.), *Restorative Justice, Reconciliation, and Peacebuilding*, Oxford, OUP, 2014.

Doing Justice Outside the Orthodoxy: What Good the ICTY Did?

As was initially noted, the establishment of the ICTY, besides legal, also had non-legal aspirations – the restoration of peace and reconciliation – being the two most important. While the restoration of peace is often seen to be achieved by the tribunal's adherence to the rule of law, justice, and human rights promotion, it is not well-defined what the tribunals should do to impact reconciliation. The term reconciliation has been exploited in many ways as it means a different thing for different people. Most often, reconciliation in the context of international criminal justice is reduced to the belief that the truth-seeking and promotion of individual rather than collective guilt will end an intense polarization between the parties in the war.[17]

Aspirations like peacebuilding and reconciliation were notably missing in the IMT mandate. Thus, there is no record of the IMT contribution to peace for an apparent reason – World War II ended, and the peace was established before the trial commenced in Nuremberg. Regrettably, the unprecedented emphasis on peacebuilding in the ICTY's mission did not add much to further clarification of international criminal justice raison d'être. Here I am not alluding to ineffectiveness of the different peacebuilding strategies to address massive injustice, but to the failure to prevent the massive atrocities and stop the war, in the first place. Immediately in the founding document, the 827 UN Security Council Resolution, the Tribunal was closely connected with the restoration of peace – the link served as a legal justification for the UN intervention.[18] At that time, it was perceived that the ICTY would contribute to the peace process by creating conditions for a less difficult return to normality. It is well known that it did not happen: the ICTY failed to achieve this objective on any account. Recall here that in Bosnia and Herzegovina, the war's worst massacre at Srebrenica, the genocide, took place at the time when the ICTY Trial Chamber confirmed its initial indictment against Radovan Karadžić and Ratko Mladić.[19] Furthermore, although the ICTY was fully operational by 1999, it was equally incapable of preventing armed conflict in Kosovo that exploded that year.

[17] For more see, e.g., David Mendeloff, Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?, *International Studies Review* 6 (2004), 355–380.

[18] See the Preamble of the Resolution, http://www.ohr.int/other-doc/un-res-bih/pdf/827e.pdf.

[19] The initial indictment was announced on July 24, 1995. In the ICTY Karadžić judgment, it is established that "the Prosecution characterizes the killing of Bosnian Muslims from Srebrenica during July and August 1995 as an underlying act of genocide under Count 2." The judgment is available at https://www.icty.org/x/cases/karadzic/tjug/en/160324_judgement.pdf.

At first sight, there is not much in the IMT legacy that could have advanced the ICTY contribution to reconciliation either. Not only that such word never figured during the Nuremberg trial, but also the idea was at odds with the circumstances. Reconciliation between Germans and Jews was not a chief concern of the Allies because of the massiveness of the crimes that offended everyone's conscience. Given the large scale of atrocities, to list reconciliation among the goals of the Nuremberg trials were morally absolutely unacceptable. Reconciliation between the victorious powers and Germany was neither a priority because the Allies' focus was to punish those responsible for crimes and not to restore broken relations with Germany. Moreover, if the Nuremberg trial had been about reconciliation between Germans and the victors, the victors would have not excluded from the IMT's jurisdiction their own grave wrongdoings, such as the massive bombing of cities with extremely high civilian casualties. Reconciliation between them did happen, but it was mainly achieved with the help of the Marshall Plan, the European integrations based on political messianism, and moving individual gestures, like Willey Brand's in Warsaw at the Ghetto memorial, and the Duke of Kent's in the Lutheran Cathedral in Dresden in the year of 2000.

However, if reconciliation is associated with the truth-seeking and promotion of individual rather than collective guilt within the course of international criminal proceedings, then in that sense, the IMT, without having been explicitly mandated to contribute to reconciliation, served this aspiration well, much better than the ICTY.

The IMT's legacy related to establishing the truth is impressive. In the words of Justice Jackson, the Tribunal managed to establish "a well-documented history of what we are convinced was a grand, concerted pattern to incite the aggressions and barbarities which have shocked the world."[20] Despite being perceived as an extension of military victory, the Nuremberg model was a perfect, ideal setting for clarifying historical record. Thus, a total victory enabled the Allies to have direct access to the secret archives of the defeated enemy, while the Nazi obsession of keeping records of everything enabled the IMT to establish historical facts beyond those necessary to clarify the guilt of the defenders.[21] For example, a documentary film entitled *Nazi Concentration Camps*, which explicitly illustrated the results of the horrifying crimes with which the defenders were charged, although of little help in establishing individual guilt of the defenders, contributed a lot to creating a full record of Nazi atrocities and secured that no one ever doubts the meaning of 'the crimes against humanity.'

Note that the trials organized by Allies in their occupational zones in post-war Germany rendered a strong historical record of horrifying Nazi policy, too. The

[20] Taylor, *The Anatomy of the Nuremberg Trial,* 54.

[21] See discussion of Robert Wolfe in Panel I: Telford Taylor Panel: Critical Perspectives on the Nuremberg Trials, 472.

Americans particularly insisted on clarifying circumstances in which the crimes were committed. Those who have not yet watched it, should see a brilliant Istvan Sabo's movie *Taking Sides*, based on the actual interrogation in the US occupation zone of Wilhelm Furtwangler, then-conductor of the Berlin Philharmonic charged with serving the Nazi regime, as it includes fascinating scenes of the fact-finding during the interrogation.

Now, it is often perceived that the ICTY had a similar mission and that reconciliation in the region of the former Yugoslavia could not be possible without setting a clear historical record. Note that the ICTY founding document was silent on reconciliation, but it was soon recognized in the ICTY annual report of 1994: "Far from being a vehicle for revenge, it [ICTY] is a tool for promoting reconciliation and restoring true peace."[22] Reconciliation later prominently figured in the ICTY practice, as well.

Despite difficulties in measuring, one cannot but to conclude that the ICTY failed to facilitate reconciliation among divided nations in the region of the former Yugoslavia partly because it failed to establish historical facts beyond those necessary to determine the defenders' guilt. A lack of clear victor in the ex-Yugoslav case, which made the ICTY completely dependable of conflicting parties in providing evidence of any kind, was a major source of frustration. On each occasion when the prosecution introduced evidence to establish historical facts beyond those proving the charges against the defendant, the trial went on a wrong track. This was the case, for example, when the Milošević trial commenced by the testimony of Mahmud Bakali, a politician from Kosovo that came from the same ex-Yugoslav communist milieu as Milošević. At the trial, Bakali (like Milošević) used the opportunity to build a political case, which damaged the ICTY's credibility in Serbia by all accounts. Unlike Bakali's testimony (which anyhow had little to add to Milošević's potential guilt for the crimes committed in Kosovo), a videotape, used in the course of a prosecutor's cross-examination of a witness, showing the members of paramilitary formation Scorpions killing 6 Muslims from Srebrenica, chilled Serbia.[23] Although for procedural reasons it was not formally admitted into the evidence in the Milošević trial, in Serbia, the wall of denial began to crack with this videotape. What I want to say is that legalist approach to truth-establishing had broader impact on the conflicting parties than other truth-establishing strategies in building the case against Milošević.

[22] See the first ICTY Annual Report, A/49/342 S/1994/1007, para.16.

[23] See Coalition for International Justice, Chilling Video Footage Shown of Purported Execution of Srebrenica Muslims By 'Scorpions' Paramilitary Unit – Allegedly Under Serbian MUP Command, *Institute for War & Peace Reporting* (31 May 2005), https://iwpr.net/global-voices/chilling-video-footage-shown-purported-execution-srebrenica-muslims-scorpions.

Finally, the ICTY had neither managed to contribute to reconciliation by blaming specific individuals rather than nations or ethnic groups.[24] Among many reasons causing this failure, plea barging practice figures prominently. Before the ICTY, many guilty pleas, induced through plea bargains, were accepted on the ground, inter alia, that they could aid reconciliation by helping truth-establishing.[25] However, plea agreements do not bring truth – they are traded compromises that might obscure rather than reveal the truth and freeze the healing process. Besides, for promoting reconciliation, it is not enough that defendants only express remorse, but also they should show effectively, through their actions, that they are genuinely sorry for what they have done.[26] That pure acknowledgment of guilt is not enough, testifies the plea agreement between the ICTY Prosecutor and Biljana Plavšić, charged with crimes against humanity. After being released from prison (without serving a complete sentence), she did nothing to demonstrate her willingness to help reconciliation in the region.

The "why" question attached to the ICTY's little effect on reconciliation between the divided nations in the ex-Yugoslav region has many additional answers.[27] However, the bottom line here is that all conflicting parties in the region of the former Yugoslavia still see themselves as victims of crimes for which the members of other nations or ethnic groups are collectively responsible. Virtually, each judgment rendered by ICTY was comprehended as an attack on the whole nation rather than as a product of justice. In other words, the ICTY did not manage to contribute to reconciliation by breaking down what Stuart Ford termed "inaccurate and self-serving narratives of victimization."[28]

Larger Lessons

In a normative sense, Nuremberg's legacy was crucial for doing justice in the region of the former Yugoslavia. Beyond the promotion of justice, the Nuremberg model may or may not apply to the conflict in the former Yugoslavia, as the trial

[24] For a detailed discussion see Marko Milanović, The Impact of the ICTY on the Former Yugoslavia: An Anticipatory Postmortem, *American Journal of International Law* 110 (2016), 233–259.

[25] For more see, Janine Natalya Clark, Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation, *The European Journal of International Law* 20 (2009), 415–436.

[26] Clark, Plea Bargaining, 433.

[27] For a detailed discussion see Diane Orentlicher, *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia.* Oxford, OUP, 2018.

[28] Stuart K. Ford, A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms, *Vanderbilt Journal of Transnational Law* 45 (2012), 405–476, 476.

in Nuremberg were neither about the restoration and maintenance of peace nor about reconciliation, enthusiastically assigned to the ICTY mandate.

Although not associated with restorative justice and reconciliation, the IMT served some non-legal purposes, the most important being the truth-seeking and establishing a valid historical record, which later did help in achieving reconciliation. On the other hand, the ICTY legacy on peacebuilding and reconciliation adds little to the prospect of international criminal justice. Nevertheless, if it made little steps in promoting restorative justice and reconciliation in the region of the former Yugoslavia, it does not mean that the ICTY has not made any step at all. By determining the guilt of a defender in each particular judgment, the ICTY, to borrow from Diane Orentlicher, has shrunk the space for denial of crimes, which, together with other tools, can move closer towards reconciliation.[29] But, unlike the IMT, which due to its imperfections, smashed the space for denial, the ICTY, due to its imperfections, has only managed to shrink it.

What is then to learn from the ICTY legacy regarding the relational approaches to international criminal justice? The former ICTY president Justice Fausto Pocar sent a strong message: "[…]when judging a particular defendant, the Tribunal's imperative is to apply and be guided by neutral principles of justice. We shouldn't have a second agenda, such as considering how or whether this judgment 'may help or not help reconciliation.'"[30] However, this is not to deny that restorative justice and reconciliation are more than extended tool box in building post-war societies. On the contrary, restorative justice and reconciliation are important implications of justice claims, but how to frame them is an issue for a new discussion.

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[29] For more see Diane Orentlicher, *Shrinking the Space for Denial The Impact of the ICTY in Serbia*, New York, NY, Open Society Justice Initiative, 2008.

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INTENT TO DO RIGHT? INTERPRETATION OF LAWFULNESS OF ACTION IN CRIMES AGAINST HUMANITY

Javid Gadirov[1]

Crimes against humanity are not organized crime writ large. Using examples of a Nazi official, a communist judge, and a Taliban executioner, this essay shows that such crimes entail a 'pro' attitude of perpetrators towards a parochial conception of law and right, and shared social reinterpretation of rightness and lawfulness of their acts. International criminal law dismisses relevance of such reinterpretation and focuses on shared intentions and joint plans of perpetrators. However, there are limits on in what sense an intention or plan may be shared, and disregard of these limits overstretches boundaries of individual liability and may put into question legitimacy of trials. This essay concludes with emphasizing the need for courts to instead engage in social reinterpretation of what is law.

Introduction

Interpretation by a perpetrator of the rightfulness and lawfulness of intended acts is a primary feature of crimes against humanity. International criminal law downplays the issue of whether perpetrators of crimes against humanity have an "intent to do wrong" and replaces it with the focus on the shared character of such intention. I argue that perpetrators of such crimes confabulate or interpret their acts as being right or lawful in a special sense, and that such interpretation is among primary motives for commission of crimes against humanity.

While the perpetrator's interpretation of his or her acts as being the right thing to do is associated with the *mens rea* of crimes against humanity and is a social activity in a broader sense of this word, it does not amount to a shared intention and cannot replace individual foresight. Whereas international criminal law emphasizes shared intent or mutual awareness and commitment of co-perpetrators to account for their multitude and organized commission of such crimes, intention understood as foresight, cannot be shared after being attributed to an agent.

[1] Assistant Professor of Law, School of Public and International Affairs, ADA University.

In international criminal law, a reverse sequence is proposed – intention of a perpetrator is first confabulated, and only then, an attributed intention is said to be shared by a multitude of agents.

When suggesting that crimes in question involve interpretation by a perpetrator of the lawfulness of imputed acts, I do not propose any general concept of law, or that an inhuman or immoral conception of a normative order can count as a concept of law. Perpetrator's explanation of his or her acts would only suit a parochial, immoral, and depraved conception of reality supplied by a totalitarian ideology and could hardly be acceptable as a conventional or even common-sense account of law or legal system.

Nor do I suggest that perpetrators are committing an ordinary mistake of law. A perpetrator may be wrong or right about actual legal provisions in force that apply to his or her acts. Neither is such reinterpretation a sufficient condition for a crime to constitute a crime against humanity. If that were a case, a disturbed murderer with an individual, or private, conception of justice could qualify as having committed a 'core crime' under international law. Rather the understanding of the rectitude of acts that motivate a perpetrator would be part of a social practice.

Let me briefly refer to three examples that I will use to illustrate the case in point. First one involves Oskar Gröning, who was convicted in 2015 for being an accessory to murder of more than 300,000 Jews at Auschwitz death camp.[2] The 'Auschwitz bookkeeper' agreed with genocide, considering it a part of the ongoing war and calling it "a tool of waging war. A war with advanced methods".[3] According to him, it did not really matter exactly how the killing takes places, as an extermination is something that does happen in a war.[4]

Another example is that of a communist judge, who sentences an opponent of the totalitarian regime to death penalty. As Supreme Court of Czech Republic explained in a 1999 decision[5], conviction and death penalty of a knowingly innocent person for opposing communist regime, even when imposed by a judge, amounts to a murder. Czech Court arrives to this view by explaining that there are "fundamental ethical requirements…applicable to the notions of justice and fair judgement that are not subject to…temporal conditions".[6]

[2] BBC News, 'Auschwitz book-keeper' Oskar Groening sentenced to four years, *BBC News* (15 July 2015), www.bbc.com/news/world-europe-33533264.

[3] Matthias Geyer, An SS Officer Remembers: The Bookkeeper from Auschwitz, *Der Spiegel* (09 May 2005), www.spiegel.de/international/spiegel/an-ss-officer-remembers-the-bookkeeper-from-auschwitz-a-355188-2.html.

[4] Laurence Rees, *Auschwitz: A New History*, New York, NY, Public Affairs, 2006, 139.

[5] Supreme Court decision no. 7 Tz 179/99 of 7 December 1999, quoted from Polednová v. Czech Republic, Admissibility Decision of 21/06/2011, European Court of Human Rights, Application no. 2615/10, http://hudoc.echr.coe.int/eng?i=001-105985.

[6] Id., page 16.

Third example is taken from reports of executions ordered by Taliban kangaroo courts in Afghanistan. In 2019, for example, news reported that in an area of Afghanistan controlled by Taliban two men were accused of robbery and extortion, and in a sham trial shot to death. Afghanistan Independent Human Rights Commission noted that such executions are a part of a recurring pattern, constitute a breach of Afghan law, and are conducted without fair trial.[7]

In each such example of collective wrongdoing perpetrators do not consider their actions to be wrong (and at least in cases of communist judge and Taliban executioner neither unlawful) and share this interpretation with other participants of criminal practice. It may be objected that neither Taliban executioner, nor communist judge, nor Auschwitz bookkeeper consider their motivation as a legal obligation, because no concept of law could be extended to cover such sickening practices. Or that neither of them perceives their actions as being pursuant to law in any usual sense of the word.

This is only partly true, that is in part that a conception of law motivating crimes against humanity in these cases may well fall outside conventional one to the point of being unrecognizable. Consider, for example, Krylenko, a prosecutor and judge, and one of the organizers of Soviet mass repression of political enemies, explaining the role of revolutionary tribunals:[8]

> *"The Tribunal is not a court in which legal subtleties and intricacies should be revived; The Tribunal is an instrument of political struggle against counter-revolution and against any counter-revolutionary actions. In the Tribunal we are creating a new law, because in the bourgeois codes it is not possible to find a definition of those crimes that are committed against the revolution. We are creating new law and new ethical norms, and our norms are not the ones that guided the representatives of the previous government."*

Perhaps a similar argument could be made by Taliban executioner, communist judge, and Auschwitz bookkeeper to the extent that the law enforced by them is new (or old) law and has little to do with agreed criteria for law. I postpone implications of 'semantic sting'[9] argument intrinsic to such objection to one the following sections.

[7] SalaamTimes, Execution of civilians by Taliban kangaroo court outrages Afghans, *SalaamTimes* (09 May 2019), https://afghanistan.asia-news.com/en_GB/articles/cnmi_st/features/2019/05/09/feature-02. *See also* e.g., SalaamTimes, Taliban brutality takes center stage with couple's execution in Ghor, *SalaamTimes* (28 April 2020), https://afghanistan.asia-news.com/en_GB/articles/cnmi_st/features/2020/04/28/feature-02.

[8] Nikolaj Krylenko, *Za pjat' let 1918 – 1922 gg. Obvinitel'nye rechi po naibolee krupnym protsessam, zaslushannym v Moskovskom i Verhovnom revoljucionnyh tribunalah*, Petrograd, Gosizdat, 1923, 22.

[9] *See* Ronald Dworkin, *Law's Empire*, Cambridge, MA, Belknap Press, 1986, 45.

First, I will discuss whether an interpretation of lawfulness and rightness of actions by perpetrators is a variety of shared intent used in imposing individual liability by international criminal law. I will then address in what sense such interpretation could be considered as a conception of law. In doing so, I will also consider how such interpretation is not private, and how it is not a simple mistake of law either.

In what sense intention is shared?

Crimes against humanity are rarely, if ever, committed by individuals acting alone. While criminal law typically accounts for organized activities, in the cases of crimes against humanity collective or joint action is paradigmatic. Liability tests acknowledge this by requiring that individual perpetrators are "mutually aware and mutually accept"[10] common objectives or share common intent.[11] But what is meant by notions of shared or joint intentions that are part of the *mens rea* requirements of the crimes in question?

Intention itself is one of the most puzzling notions – as Anscombe notes, "we are in fact pretty much in the dark about it".[12] In ordinary language, it may refer to foresight, knowledge, reason for action, belief, desire, action, consciousness of action, plan, decision, being embarked on intentional action etc. As Duff observes, we can assume neither that the notion of intention has an agreed use in ordinary language, nor that for purposes of criminal liability it should have the same meaning as in ordinary language.[13]

Regarding collective criminality, there is additionally a question whether there is an irreducible shared or collective intention, and what role it could play in assigning individual criminal responsibility. There are various non-summative accounts of collective intentions, including Bratman (shared intentions),[14] Gilbert (plural subjects),[15] Kutz (participatory intentions),[16] Searle ("simple,

[10] Prosecutor v. Thomas Lubanga Dyilo (14 March 2012), International Criminal Court, Judgment pursuant to Article 74 (Trial Judgment), ICC-01/04-01/06-2842, para. 1008.

[11] Prosecutor v. Duško Tadić (15 July 1999), International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber Judgment, IT-94-1-A, para 228.

[12] G.E.M. Anscombe, *Intention*, Cambridge, MA, Harvard University Press, 2000, 1.

[13] Antony R. Duff, *Intention, Agency and Criminal Liability*, Oxford, Basil Blackwell, 1990, 32–33.

[14] Michael E. Bratman, Shared Intention, *Ethics* 104 (1993), 97–113.

[15] Margaret Gilbert, Reconsidering the "Actual Contract" Theory of Political Obligation, *Ethics* 109 (1999), 242.

[16] Christopher Kutz, *Complicity: Ethics and Law for a Collective Age*, Cambridge, CUP, 2000, 81.

irreducible and primitive intention"),[17] Toumella and Miller (we-intention)[18] among others.

In a limited sense sharing an intention has a neural basis in "mirror-matching systems" of the brain.[19] Such mirroring mechanisms allow an agent to distinguish one's own actions from those of other agents and acquire a "sense of agency".[20] Georgieff and Jeannerod note that there is a partial overlap between self-produced and observed action in cortical activation of respondents, which means that representation of action could be shared among individuals. Non-overlapping zones of representation allow subjects to attribute action to themselves or others.[21] According to Becchio and Bertone sharing a representation of an action is possible when a "neural representation of the executed action tends to overlap the representation of the observed action".[22]

However, as Jeannerod notes, not all intentions are action representations, but only what Searle calls "intention in action", and what Jeannerod calls "motor intentions".[23] That is, intentions of the sort that Wittgenstein mentions when asking "what is left over if I subtract that my arm goes up from the fact that I raise my arm?"[24]. Therefore, sharing is also applicable only to such "intention-in-action" ("I am doing A"), but not to more complex "prior intentions" ("I will do A" or "I am going to do A").[25]

Prior intentions, that is, long-term and complex, premeditated plans and foresight, cannot be shared in the same sense that unattributed 'intentions in action' can, and remain strictly individual. The intentions that are shared in joint criminal enterprise, criminal conspiracy, or joint and indirect perpetration under the Rome Statute, cannot by any measure be considered as simple motor intentions. When saying "we intend to do A" the notion of intention is completely different than in "I raise my arm minus my arm goes up". Whereas individuals act socially, collectively, cooperatively and competitively, and often actions are

[17] John Searle, *Consciousness and Language,* Cambridge, CUP, 2010, 90–105.

[18] Raimo Toumela – Kaarlo Miller, We-intentions, *Philosophical Studies* 53 (1988).

[19] Cristina Becchio – Cesare Bertone, Wittgenstein running: Neural mechanisms of collective intentionality and we-mode, *Consciousness and Cognition* 13 (2004).

[20] Marc Jeannerod et al., Action recognition in normal and schizophrenic subjects, in T. Kircher – A. David (eds.), *The Self in Neuroscience and Psychiatry*, Cambridge, CUP, 2003, 380–406.

[21] Nicolas Georgieff – Marc Jeannerod, Beyond Consciousness of External Reality: A "Who" System for Consciousness of Action and Self-Consciousness, *Consciousness and Cognition* 7 (1998), 465–477.

[22] Bechio – Bertone, Wittgenstein running, 131.

[23] Marc Jeannerod, *Motor cognition: What actions tell the self,* Oxford, OUP, 2006, 3–4.

[24] Ludwig Wittgenstein, *Philosophical Investigations*, trans. G.E.M. Anscombe, Oxford, Basil Blackwell, 1958, para. 621.

[25] John Searle, *Intentionality: An Essay in the Philosophy of Mind*, New York, NY, CUP, 1983, 84.

intended by considering perceived intentions of other individuals, or events, and facts, their prior intentions nevertheless remain individual.

Following parochial law

Crimes against humanity are not a mafia situation writ large. International criminal law replaces the issue of whether there is an "intent to do wrong" with focus on shared or collective intent. However, multitude of perpetrators and coordinated or even organized nature of their activity is also a feature or 'ordinary' crime. What makes crimes in question distinct, is that perpetrators, such as the communist judge, Auschwitz bookkeeper or Taliban executioner reinterpret their acts as lawful and right in an unusual sense of these words.

For a communist judge may perceive that he is acting according to "new law and new ethical norms". Just as an Auschwitz bookkeeper who though that his actions were part of war, to such judge an execution of political opponent or even terrorism could be an act of civil war or revolution.[26] Needless to say, for Taliban executioner enforcement of divine eternal moral order and law could be a primary reason or explanation of executions.

Of course, we need not agree as to whether what they mean as law is an acceptable account or a concept of law. The possibility of fundamental disagreement about what amounts to law is elucidated by Dworkin, who points that "lawyers and judges do disagree… about what the law really is…", that is they have theoretical disagreement about "grounds of law".[27] Dworkin furthermore argues that we do not follow shared rules and criteria for the word "law", and that accounts which presuppose existence of such criteria are "semantic theories of law".[28] Semantic theories may disagree about content of such criteria, but they "hold a certain picture of what disagreement is like and when it is possible", and condition arguments about what is law on accepting and following "the same criteria for deciding when our claims are sound".[29]

Raz disagrees with Dworkin as to whether it is impossible to provide a semantic account of law,[30] and indicates that 'criterial explanations' of law "are

[26] Consider e.g., Trotsky, who explains that "under conditions of civil war, the assassination of individual oppressors ceases to be an act of individual terror" and that "Moral evaluations, together with those political, flow from the inner needs of struggle…", Leon Trotsky, Their Morals and Ours *The New International* (1938), www.marxists.org/archive/trotsky/1938/morals/morals.htm.

[27] Ronald Dworkin, *Law's Empire*, Cambridge, MA, Harvard University Press, 1986, 4.

[28] Dworkin, *Law's Empire*, 31–32.

[29] Dworkin, *Law's Empire*, 33, 35, 45.

[30] Joseph Raz, Two Views of the Nature of the Theory of Law: A Partial Comparison *Legal Theory* 4 (1998), 258.

consistent with the fact that people who use the rules setting out these criteria may make mistakes about which criteria are set by the rules",[31] as the "correct criteria are those that people who think they understand the concept or term generally share".[32]

A reservation is due. I do not suggest that law or morality could be reduced to an emanation of a totalitarian ideology, but the argument here does not require it. This issue could become relevant if one were to argue whether what a Taliban executioner or Nazi official consider as the ground for their acts is an acceptable conception of law, or whether they consider such grounds as law using a generally acceptable criteria for law. Suffice it to propose, in words of Arendt, that "ideological thinking [that] becomes emancipated from the reality that we perceive with our five senses, and [that] insists on a "truer" reality concealed behind all perceptible things"[33] can provide what is required for a parochial concept of law and right.

Following Raz[34], I will refer to a perpetrator's reinterpretation of grounds for his or her actions as to a parochial understanding of law and argue that such an interpretation is typically among primary reasons for perpetration of crimes against humanity. Such interpretation is a rationalization in the sense of what Davidson calls a reason for action:

> *"Whenever someone does something for a reason, therefore, he can be characterized as (a) having some sort of pro attitude toward actions of a certain kind, and (b) believing (or knowing, perceiving, noticing, remembering) that his action is of that kind."*

Such pro-attitude is directed towards "some feature, consequence, or aspect of the action the agent wanted, desired, prized, held dear, thought dutiful, beneficial, obligatory, or agreeable".[35] If one were to use such rationalization as the meaning for the word intention, then it can be said that enforcing or following a parochial understanding of law is a part of shared 'prior' intention that is characteristic of crimes against humanity.

[31] Raz, Two Views of the Nature of the Theory of Law, 265.

[32] Raz, Two Views of the Nature of the Theory of Law, 263.

[33] Hannah Arendt, *The Origins of Totalitarianism*, New York, NY, Harcourt Brace and Company, 1973, 470–471.

[34] Joseph Raz, Can There Be a Theory of Law?, in Martin Golding – William Edmundson (eds.) *Blackwell Guide to Philosophy of Law and Legal Theory*, Oxford, Blackwell Publishing, 2004 (2007), https://scholarship.law.columbia.edu/faculty_scholarship/1498.

[35] Donald Davidson, Actions, Reasons and Causes *The Journal of Philosophy* 60 (1963), 685.

Reinterpretation is social but not joint

Reinterpretation of lawfulness of action by perpetrators is not individual or private. It is social, and not merely in the sense that for example language is social and not private.[36] An idiosyncratic view of 'higher law' held by a psychopathic individual would not be sufficient to characterize a murder done in its pursuance as a crime against humanity. It is rather a shared set of criteria for validity of rules and orders that is maintained by committed participants of the actions that is referred to as a part of intention here.

Requirements for sharing intention in this sense are less demanding than in, for example, Bratman's account of meshed or interlocked plans. Bratman proposes a definition of shared intention as "a state of affairs that consists primarily in attitudes (none of which are themselves the shared intention) of the participants and interrelations between those attitudes", or else a "web of attitudes of individual participants".[37] Thus in a joint action *J*:

> *"We intend to J if and only if*
> *1. (a) I intend that we J and (b) you intend that we J*
> *2. I intend that we J in accordance with and because of 1a, 1b, and meshing subplans of 1a and 1b; you intend that we J in accordance with and because of 1a, 1b, and meshing subplans of 1a and 1b.*
> *3. 1 and 2 are common knowledge between us."*[38]

Firstly, such an account would leave out non-joint individual actions done pursuant to a shared commitment to enforce a parochial understanding of law. Furthermore, extending the number of perpetrators and scale of atrocity would make meshing of subplans less significant. Other things being equal, the ratio, or rather marginal share of meshed section of a common plan would decrease with each perpetrator and individual episode of a crime.

Moreover, joint plan account is also over-inclusive with regards to crimes against humanity, as it applies to 'ordinary' organized or joint crime in the same way as to crimes in question. The concern about limited reach of strict requirements of shared intent is not just about excusing too many participants.

[36] As Wittgenstein puts it is not possible to 'privately' follow rules or obey orders, because obeying rules and following orders is a practice (Wittgenstein, *Investigations*, 199, 202). Hence, even a complete stranger would be able to learn a strange language since "The common behaviour of mankind is the system of reference by means of which we interpret an unknown language." (Wittgenstein, *Investigations*, 206).

[37] Bratman, Shared Intention, 107–108.

[38] Bratman, Shared Intention, 106.

It is primarily about acknowledging that something more is involved in crimes against humanity than mere joint action, namely the adoption of a 'pro attitude' towards obeying a parochial understanding of law.

Finally, the disagreement or reinterpretation of lawfulness of action does not constitute a mistake about what law says, of a sort mentioned in the Rome Statute, that is a mistake "as to whether a particular type of conduct is a crime".[39] Such an approach does not address the possibility of a deeper disagreement as to what is 'law', or as Dworkin puts it, amounts to a "plain-fact view of law". According to such view "law is only a matter of what legal institutions, like legislatures and city councils and courts, have decided in the past" and "questions of law can always be answered by looking in the books where the records of institutional decisions are kept".[40] A communist judge, Nazi official or Taliban executioner may well be aware that according to criminal codes of their respective countries what they do is an intentional homicide. Rather they really disagree about what 'real' or 'right' law is, and about what it should be.

Exploding limits of criminal trial?

Some conclusions may be made from foregoing observations. Firstly, reinterpretation of lawfulness of action by perpetrators should not be dismissed by international criminal law, at least because of the role such reinterpretation may have in making it easier for perpetrators to commit crimes against humanity. It may well be easier for an ordinary person to become a part of 'right' or 'lawful' (albeit in a distorted sense) project, than of an openly criminal endeavor. There is no reason to underestimate innate propensity of human beings to justify their actions.

Another conclusion is that reductionism of a sort exposed here, puts unusual burdens on limits of individual liability. For one, it could end up in imposing liability without blame, akin to vicarious one.[41] Substitution of causal agency with 'legal' attribution[42] would then be achieved by overstretching individual responsibility based on non-factual shared intentionality.

Trials of crimes against humanity should not shun away from interpretation of what constitutes 'law'. Hart H.L.A. argues that a "frankly retrospective law" would

[39] Article 32.2 of the Rome Statute of the International Criminal Court.

[40] Dworkin, *Law's Empire*, 6–7.

[41] *See e.g.*, p. 326, Decision on the confirmation of charges, Lubanga, ICC-01/04-01/06-803, PTC I, ICC, 29 January 2007.

[42] Marjolein Cupido, Causation in International Crimes Cases: (Re)Conceptualizing the Causal Linkage, 2020, https://ssrn.com/abstract=3641283.

have better preserved fidelity to the rule of law than denying the name of 'law' to a Nazi statute.[43] Perhaps, as Fuller and Dworkin suggest,[44] fidelity to law requires instead to disagree about what law is, and from the courts to be more articulate about and attentive to interpretation by perpetrators of the lawfulness of their acts. Social reinterpretation of what is law will not explode trials, but overstretching limits of individual liability may well do so.

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[43] H. L. A. Hart, Positivism and the Separation of Law and Morals, *Harvard Law Review* 71 (1958), 619.

[44] Lon L. Fuller, Positivism and Fidelity to Law--A Reply to Professor Hart, *Harvard Law Review* 71 (1958), 630–672; Dworkin, *Law's Empire*, in general.

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INTERNATIONAL CRIMINAL LAW AND EUROPE. LIBER AMICORUM FOR PROFESSOR KÁROLY BÁRD

Elspeth Guild[1]

Introduction

Professor Károly Bárd is one of Europe's most outstanding jurists in the field of criminal law. He is among the trail blazing legal voices regarding the intersection of international and European human rights law and criminal justice with seminal publications on fair trial in the context of states of emergency and the criminal justice consequences of states' human rights obligations.[2]

Professor Bárd is also an exceptional jurist on account of his engagement with regional and international institutions such as the Council of Europe, the European Union, OECD and many others providing leadership and guidance on human rights in particular in criminal justice. He has also been a key figure at the CEU, helping to craft the institution into an intellectual academic leader. I first had the pleasure of meeting Professor Bárd in the early 1990s in the context of a meeting of the European section of the International Commission of Jurists. As a British jurist and, at the time, a practicing lawyer I was fascinated to meet fellow jurists from our eastern neighbours with whom our contacts had been weak before the events of 1989. It was a revelation to me just how enriching the legal traditions of Hungary and other CEE states would be for me and western European legal systems. The first point of discussion was of course the European Convention on Human Rights and not only its impact in the CEE region but the impact of the CEE states on it. Some of my colleagues were anxious that this impact might be problematic after the post WWII period. Some worried that the independence of the legal systems had been fatally weakened in some countries. But to the contrary, we discovered colleagues and friends like Professor Bárd who confirmed the opposite to us. They have enriched the institutions of Europe and strengthened respect for human rights as an inherent component of rule of law. Of course, we have seen some set backs but the courage and academic

[1] Jean Monnet Professor ad personam, Queen Mary University of London and Radboud University Netherlands.

[2] Bárd, Károly, Menschenrechte und richterliche Unabhängigkeit in den Ländern des Donauraumes, Discussion Paper, *Europa-Kolleg Hamburg, Institute for European Integration* 3 (2012).

rigour of Professor Bárd and his colleagues have been tremendously important to maintaining standards and ensuring that as certain political trends which have shown disrespect for those standards have sought to undermine these traditions, their legacy will be short lived.

International Criminal Law and Europe

The International Criminal Court, established by the Rome Convention in 1998, was also a development arising, inter alia, from the concern of impunity for war crimes, genocide and crimes against humanity. The International Criminal Court (ICC), established by the Rome Convention in 1998 was, inter alia, a response to war crimes, crimes against humanity and genocide in Europe in the 1990s. The wars in the Former Yugoslavia had given rise to a specific criminal tribunal to deal with the risk of impunity of the leaders and the weakness of national judiciaries. The International Criminal Tribunal for the Former Yugoslavia which existed between 1993-2017 laid the groundwork for public acceptance of the principle of international criminal justice for leaders engaging in international crimes. The 1994 genocide in Rwanda was of course the other key event which pushed the international community to set up the ICC. It is worth bearing in mind that when the Rome Convention was being drawn up, it was also with Europe in mind. Sometimes commentators at 20 years distance express surprise that European states and institutions might be in the ICC prosecutor's spotlight as the debate has frequently revolved around leaders of African states.[3] However, Europe has been a continent where international criminal justice is necessary to complement national systems and ensure that leaders are unable to give themselves immunity from their participation in international crimes. This continues to be the case. The case study I will examine below highlights the importance of international criminal justice systems, a subject on which Professor Bárd was most influential.

EU Border Controls, Libya and Crimes against Humanity

On 2 June 2019, two law professors at Sciences-Po, Paris, Omer Schatz and Juan Branco, submitted a 244 page communication to the Prosecutor of the International Criminal Court (ICC) requesting that she investigate crimes against

[3] Lucrecia García Iommi, Whose justice? The ICC 'Africa problem', *International Relations* 34 (2020), 105–129.Brendon Cannon – Dominic Pkalya – Bosire Maragia, The international criminal court and Africa: Contextualizing the anti-ICC narrative, *African Journal of International Criminal Justice* 2 (2016), 6–28.

humanity committed by European Union and EU Member State officials in the context of the death, torture and other treatment of migrants seeking to flee Libya to go to the EU.[4] The communication which is the result of two years of research, presents evidence implicating European Union and Member States' officials and agents in crimes against humanity committed as part of a premeditated policy to stem the flows of persons from Africa to the EU from 2014 to the present time. The communication is specific about the engagement of officials of the EU and Member States in the commission of crimes within the jurisdiction of the ICC.

The ICC is no stranger to the situation in Libya and has had an investigation open in respect of crimes against humanity and war crimes committed in Libya since 2011.[5] However, the ICC investigation has been mainly focused on international crimes committed within Libya by Libyan authorities. The allegation that European authorities had been profiting from the chaotic political situation and civil war in Libya to plan and put into effect a border crossing deterrence policy in full knowledge of the murderous effects in terms of death in the Mediterranean which would ensure was new to the file. However, concern in international institutions particularly at the UN and Council of Europe regarding the impacts of EU non-entre policies on death in the Mediterranean was increasingly widely disseminated. The ICC prosecutor gave a statement to the Security Council on the situation in Libya in which she described it as "a marketplace for the trafficking of human beings".[6] Two UN Special Rapporteurs, Callamard,[7] and Melzer,[8] in 2017 called on the ICC to consider a preliminary investigation into atrocity crimes against refugees and migrants. What Schatz and Branco do, is they tie the treatment of refugees and migrants in Libya directly to specific EU policies to prevent people from getting to the EU from Libya. These policies were based on the fight against trafficking and human smuggling but had the direct consequence, according to Schatz and Branco, of creating the conditions for trafficking and smuggling and did so in a premeditated way. According to them this result was not a mistake but the acknowledged outcome of EU policies between 2014 and the present.

4 Submission to ICC condemns EU for 'crimes against humanity', https://www.youtube.com/watch?v=AMGaKDNxcDg. Statewatch: monitoring the state and civil liberties in Europe, https://www.statewatch.org/eu-med-crisis-archive-19-06-jun.htm.

5 International Criminal Court, https://www.icc-cpi.int/libya.

6 Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011), https://www.icc-cpi.int/Pages/item.aspx?name=180508-otp-statement-libya-UNSC.

7 UN Special Rapporteur on extrajudicial, summary or arbitrary executions, https://undocs.org/A/72/335.

8 UN Special Rapporteur on torture, cruel, inhuman or degrading treatment or punishment, interviewed in https://www.ejiltalk.org/time-to-investigate-european-agents-for-crimes-against-migrants-in-libya/.

According to them, EU officials were fully aware that these policies would result in death by drowning in the Mediterranean.

The communication divides the EU policy into first and second policies. The first policy they date from 1 January 2014 until the end of July 2017. This period covers the two incidents in one week in April 2015 when over 1,200 people died trying to cross the Mediterranean from Libya to Italy. It follows the fall of the Libyan leader Gaddafi in 2011 and the end of the rather murky period of bilateral arrangements between the Italian authorities and the Gaddafi regime during which many people were 'pushed back' from international waters to Libya through the cooperation between Italy and Libyan authorities. These push-backs were found to be contrary to the prohibition on collective expulsion[9] by the European Court of Human Rights in February 2012.[10] The fall of the Gaddafi regime resulted in a prolonged period of civil war and political instability which is ongoing. The Libyan Coast Guard which had received substantial funding and assets from the Italian authorities before the toppling of the regime, was categorised as part of the enemy during the NATO military action which resulted in the end of the Gaddafi regime. As a result, many of those assets were destroyed in the bombing campaign (the details are set out in the communication). It also post-dates the Italian search and rescue programme, Mare Nostrum, designed to rescue those in need at sea which ran from October 2013 to October 2014.[11] The communication shows how the refusal of EU authorities to take over the Mare Nostrum programme, replacing it with a much more limited Frontex (the EU Border Agency) programme, Triton, also coincided with the very high number of drownings in April 2015.

According to extensive research carried out by the Council of Europe's Parliamentary Assembly,[12] which examined in great depth a specific case where neither the Italian authorities under their search and rescue duties in international law, nor NATO ships in the region around Libya assisted in search and rescue. In the specific case around which the report is structured, neither made any effort to rescue a little boat containing 72 'migrants' who were, according to the report, left

[9] Article 4 Protocol 4 European Convention on Human Rights.

[10] *Hirsi Jamaa* App No 27765/09 – HEJUD, [2012] ECHR 1845.

[11] Martina Tazzioli, Border displacements. Challenging the politics of rescue between Mare Nostrum and Triton, *Migration Studies* 4 (2016), 1–19; Glenda Garelli – Martina Tazzioli, The biopolitical warfare on migrants: EU Naval Force and NATO operations of migration government in the Mediterranean, *Critical Military Studies* 4 (2018), 181–200.

[12] Council of Europe Parliamentary *Assembly debate* on 24 June 2014 (21st Sitting) (see Doc. 13532, report of the Committee on Migration, Refugees and Displaced Persons, rapporteur: Ms Tineke Strik). *Text adopted by the Assembly* on 24 June 2014 (21st Sitting); Jack Shenker, Migrants left to die after catalogue of failures, says report into boat tragedy, *The Guardian* (28 March 2012), https://www.theguardian.com/world/2012/mar/28/left-to-die-migrants-boat-inquiry.

to die. The communication calls the EU policy of this period one of deterrence as an organisational policy. The policy was to stop saving lives in the Mediterranean and thereby 'deter' people from leaving Libya in unsafe conditions. By failing to replace the Mare Nostrum programme and providing only very inadequate search and rescue coverage, the EU policy according to the communication, EU and Member State officials were knowingly engaging in a policy which would result in more deaths at sea, which indeed was what happened (communication section 1.3.1). The communication cites statements of ministers, EU officials and the Frontex Tactical Focused Assessment (January 2015) justifying their actions, in full knowledge of the consequences in terms of risk to lives.[13] All ships have a duty to carry out search and rescue operations in accordance with international law.[14] But as Italy, Malta and the EU generally withdrew from state organised search and rescue, the private sector also drew back for the responsibility on account of the financial consequences. The communication cites public statements by the European Community Shipowners Association and the International Chamber of Shipping (para 88).

After the tragic week in April 2015 when 1,200 people drowned between Libya and Italy, the EU moved to a new approach establishing a military operation in the Southern Central Mediterranean (EUNAVFOR) with the mission of "disruption of the business model of human smuggling and trafficking networks in the Southern Central Mediterranean."(Operation Sophia).[15] The operation was planned to take place in three stages – first support in the detection and monitoring of migration networks and patrolling the high seas; secondly, boarding, searching, seizing and diverting on the high seas vessels suspected of being used for human smuggling. The extension of these operations to the territorial waters of Libya was foreseen, depending on a UN Security Council Resolution authorising this (which was not forthcoming see below) or with the consent of the Libyan authorities (also not forthcoming). The third stage (which has never been made operational) was intended to consist of taking all necessary measures against a vessel or related

[13] Para 77 Communication: cited from Frontex 2015: Tactical Focused Assessment: "The end of Operation Mare Nostrum on 31 December 2014 will have a direct impact on the JO Triton 2014. The fact that most interceptions and rescue missions will only take place inside the operational area could become a deterrence for the facilitation networks and migrants that can only depart from the Libyan or Egyptian coast with favourable weather conditions and taking into account that the boat must now navigate for several days before being rescued or intercepted."

[14] Violeta Moreno-Lax, Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea, *International Journal of Refugee Law* 23 (2011), 174–220.

[15] Council Decision (CFSP) 2015/778 of 18 May 2015, Article 2.

assets in the territory of the state (i.e., Libya). This permission was also not forthcoming either from the Security Council or the Libyan authorities.

Consistent with the EU measure establishing the military Operation Sophia aspects of which depended on a UN Security Council Resolution, the EU High Representative for Foreign Affairs and Security Policy sought international approval of the military venture from the UN Security Council. This was forthcoming in the form of Security Council Resolution 2240(2015) of 9 October 2015. The resolution, however, did not authorise the EU military to operate within the territorial waters of Libya, only on the high seas as is foreseen by international law.[16] Nonetheless, the mandate of the military operation was not to save lives in the Mediterranean but to pursue criminals. In the communication to the ICC, this history is briefly covered in paragraphs 123 et seq.

The next development, directly consequent on the EU's 1st policy of non-assistance was that the search and rescue gap which had been opened by intentional EU policies, began to be filled by the non-governmental sector. This resulted in what the communication calls the second policy. The communication calls this second policy a move from one of omission to one of crimes committed by proxy (para 138). The EU and Member States accepted that they were prohibited from pushing back small boats into Libyan waters to avoid responsibility for rescuing their passengers and taking them to a port of safety. In light of the situation in Libya, it was clear that disembarkation carried out by EU and Member State boats of migrants in that country would not be consistent with their obligations in international law.[17] Libya was not a place of safety.[18] According to the communication, the 2nd policy has two prongs, on the one hand delegitimising, criminalising and ousting NGOs from carrying out rescue in the Mediterranean which would result in disembarkation in Italy or elsewhere on the northern coast of the sea (paras 156 et seq). On the other hand, the EU and Member States needed a third party that would agree to replace rescue with interception and return to Libya. This third party, according to the communication would be the Libyan

[16] Para 5: "Call upon Member States acting nationally or through regional organisations that are engaged in the fight against migrant smuggling and human trafficking to inspect, as permitted under international law, on the high seas off the coast of Libya, any unflagged vessels that they have reasonable grounds to believe have been, are being, or imminently will be used by organised criminal enterprises for migrant smuggling or human trafficking from Libya, including inflatable boats, rafts and dinghies".

[17] International Maritime Organization (IMO), *International Convention on Maritime Search and Rescue*, 27 April 1979, 1403 UNTS, https://www.refworld.org/docid/469224c82.html.

[18] Human Rights Watch, *Italy: Navy Support for Libya May Endanger Migrants*, 2 August 2017, https://www.refworld.org/docid/598337b44.html; Statement of the ICC Prosecutor to the UN Security Council, 9 May 2017, https://www.icc-cpi.int/Pages/item.aspx?name=170509-otp-stat-lib.

Coast Guard which would be funded and supported by the EU and Member States on condition of carrying out this role for them (paras 157 et seq.).

The communication evidences the first prong of the 2nd policy in great depth. It includes tables of the NGO boats which were deployed in the Mediterranean and the strategy used, primarily in Italy, to prevent them from carrying out search and rescue. The first NGO boats to start search and rescue were operated by the Migrant Offshore Aid Station and Medecins sans Frontieres (MSF). They commenced their activities in 2015 and were joined by 10 other NGO boats by the peak in 2017. These boats accounted for at first a quarter, then a third of all rescues at sea by the beginning of 2017 (paras 164). However, by 2017, according to the communication, EU authorities sought to discredit the NGOs in the media and popular press. Specific examples are provided from official documents (paras 167-176). This approach was accompanied by Italian prosecutors commencing a series of criminal charges against captains and crew of the NGO ships accompanied by seizure of the assets (paras 185 et seq). These efforts were followed by a series of similar actions commenced in Spain and Malta in 2018 – most of which would be discontinued or dismissed by the courts. The communication includes a schedule of 13 criminal procedures commenced against NGOs carrying out search and rescue at sea (para 201). It notes that 89 people were investigated or prosecuted in 2018 for assisting people seeking to cross borders compared to 20 such prosecutions in 2017 (para 202). Gradually, all of the NGO ships carrying our search and rescue in the Mediterranean were put out of commission, seized by EU state authorities or their operations otherwise made impossible.

According to the communication, the second prong would consist of installing the Libyan Coast Guard (LYCG) as the dominant actor in the Central Mediterranean (para 208). Here the allegations against EU and Member State officials are particularly severe. The (recognised) Libyan authorities, as noted above, did not give carte blanche to the EU military operation to carry out its own actions in Libyan waters (also see para 209). The LYCG carried out EU policy, also by preventing NGO search and rescue ships from entering Libyan waters while failing to take on the task of search and rescue themselves (paras 210 et seq). Already by January 2016, according to public documents referenced in the communication, Operation Sophia's political leaders were pushing to find a way to encourage the LYCG to take responsibility for preventing people from leaving their country in search of international protection on the other side of the Mediterranean. The strategy which was followed included funding the LYCG both in terms of assets, including non-lethal military equipment, training, technical and financial assistance (para 244). Yet, the LYCG was only nominally under the authority of the recognised government of Libya and some EU states (like Italy) were also in discussions with the Libyan rebels (under the control of Khalifa Haftar) about

preventing migrant movements (para 250). The UN Libya Sanctions Committee issued a report in June 2017 stating that the beneficiaries (apparently including the LYCG) of EU training did not come within the scope of the exceptions to the arms embargo which the UN had placed on the country (para 253).

The situation in Libya for migrants was appalling and had been the subject of many reports by UN bodies, most importantly UNHCR.[19] Even EU and Member State officials acknowledged that the conditions in Libyan detention centres for migrants were appalling including executions, torture and systematic human rights abuses (para 259). By collaborating and empowering the LYCG to stop boats leaving Libya and taking back to Libya those who had managed to depart, the EU and Member State authorities participated in the return of these migrants to these detention centres. The torture and human rights abuses of these migrants, according to the communication, was the direct result of the actions of the EU and Member State authorities. Not only were they the consequence of the EU and Member States actions, but the officials responsible for the policy knew what the consequences were and proceeded, nonetheless, to implement the policy.

Among the most original parts of the research carried out for the communication is the evidence that the LYCG is itself involved in the smuggling, detention and trafficking of human beings (para 1001). In the absence of an effective national authority in Libya, the LYCG has no effective supervision. With very considerable funding from EU and Member State sources, it is also fairly autonomous from the recognised Libyan state. The LYCG relations with the networks of smugglers and traffickers are revealed as close. The solution for the LYCG of what to do with migrants that the European authorities wanted them to take back was to hand them over to these networks which are also heavily infiltrated in the detention camps (paras 974 et seq). The communication goes very carefully through the elements of the offence of crimes against humanity under the Rome Statute of the ICC.[20] It is not the point of this chapter to examine each of the elements. Rather it is to chart how this communication came about as the direct result of the political choice of EU leaders to pursue a policy of finding and punishing smugglers and traffickers of human beings as a way to end the irregular entry of asylum seekers (and other migrants) into the EU. The focus on the ill of irregular migration (and behind that term also the irregular arrival of refugees into the EU) and the need to address it is completely out of proportion to the size of the issue (according to Frontex there were fewer than 142,000 irregular border crossings into the EU in 2019 in comparison

[19] UN High Commissioner for Refugees (UNHCR), *UNHCR Position on Returns to Libya – Update II*, September 2018, https://www.refworld.org/docid/5b8d02314.html.

[20] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, https://www.refworld.org/docid/3ae6b3a84.html.

with over 362 million entries of third country nationals into the EU in the same year).[21] Yet the consequences of investing so much political capital in addressing the issue has led the EU to the point where very serious and well documented allegations of crimes against humanity have been levelled against its officials for their actions alleged to lead to the torture and abuse of migrants in Libya.

Conclusions

The international criminal investigation and prosecution against named officials in Europe did not begin with the Nuremburg trials in 1945-46 nor end there.[22] The International Criminal Tribunal for the Former Yugoslavia between 1993-2017 brought international criminal justice back to Europe[23] and the investigation by the prosecutor to the International Criminal Court into allegations of crimes against humanity planned and executed by individuals at the highest levels of the EU institutions is revelatory of the importance of international justice.[24] The work of eminent jurists such as Professor Bárd in the field of criminal justice has been seminal to these developments. Impunity is contrary to the principle of rule of law of equality before the law. Throughout his career, Professor Bárd has championed rule of law for all in the field of criminal law and in doing so contributed to justice in Europe.

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[21] Frontex, *Annual Risk Assessment,* 2020, 22, https://frontex.europa.eu/publications/frontex-releases-risk-analysis-for-2020-vp0TZ7.

[22] Telford Taylor, The Nuremberg Trials, *Columbia Law Review,* 55 (1955), 488-525; Robert E. Conot, *Justice at Nuremberg*, New York, NY, Harper & Row, 1983, 14; William A. Schabas, *The trial of the Kaiser*, Oxford, OUP, 2018.

[23] Sandra Ristovska, *International Criminal Tribunal for the Former Yugoslavia*, The Routledge Companion to Media and Human Rights, London, New York, NY, Routledge, 2017.

[24] Paolo Cuttitta, Repoliticization through search and rescue? Humanitarian NGOs and migration management in the Central Mediterranean, *Geopolitics* 23 (2018), 632–660.

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UNTERNEHMENSSTRAFRECHT, GLOBALER WETTBEWERB UND MENSCHENRECHTSSCHUTZ – EIN WERKSTATTBERICHT ZU INTERNATIONALER STRAFGERICHTSBARKEIT IM 21. JAHRHUNDERT

Richard Soyer / Stefan Schumann[1]

Es ist den Verfassern eine große Ehre, mit diesem Beitrag an der mit dieser Festschrift zum Ausdruck gebrachten Wertschätzung des Jubilars, Prof. Dr. Károly Bárd, mitwirken zu dürfen. Sein herausragendes fachliches Können und Wirken durfte der Erstautor bei einem gemeinsam organisierten Ungarisch-Österreichischen Seminar im April 2005 in Budapest kennenlernen. Auch die sehr freundliche Art des Umgangs und der Kommunikation im Kollegenkreis war tief beeindruckend. Der wissenschaftliche Berührungspunkt war seinerzeit die internationale Strafgerichtsbarkeit, dabei insbesondere auch die Erfahrungen und Entwicklungsperspektiven aus Sicht der Strafverfolgung und Strafverteidigung.[2]

Derart wurde auch ein erster Grundbaustein gelegt, auf den ein laufendes Forschungsprojekt zur Rolle des Unternehmensstrafrechts im globalen Wettbewerb und beim Menschenrechtsschutz (UWM) an der Johannes Kepler Universität (JKU) Linz aufsetzt. Es nimmt neben anderem die Leistungsfähigkeit und mögliche Rolle des Völkerstrafrechts und von internationaler Strafgerichtsbarkeit in den Blick.[3] Diese Überlegungen sollen im vorliegenden Festschriftbeitrag reflektiert und weitergedacht werden. Vorab ist es aber den Verfassern ein großes Anliegen,

[1] Richard Soyer: Abteilungsleiter am Institut für Strafrechtswissenschaften, Johannes Kepler Universität; Stefan Schumann: Universtitätprofessor und Rechtsanwalt, Institut für Strafrechtswissenschaften, Johannes Kepler Universität und Universtät Regensburg (Winter 2021/22).

[2] Die im Seminar am 22.04.2005 gehaltenen Vorträge von Frank Höpfel, Károly Bárd, Otto Lagodny, Wolfgang Schomburg und Richard Soyer – Roland Kier wurden in dem beim NWV Verlag (Wien – Graz – Berlin, 2005) erschienen Band *„Internationale Strafgerichtsbarkeit – Status quo und Perspektiven"*, herausgegeben von Károly Bárd – Richard Soyer, veröffentlicht.

[3] Zur Grundlegung des UWM-Projekts siehe Richard Soyer, Unternehmensstrafrecht, Schutz von Menschenrechten und Strafzwecktheorien, in Robert Kert – Andrea Lehner (ed.), *Festschrift für Frank Höpfel zum 65. Geburtstag*, Wien, NWV Verlag, 2018, 131. Grundsätzlich zur Diskussion eines Wirtschaftsvölkerstrafrechts vgl. Florian Jeßberger – Wolfgang Kaleck – Tobias Singelnstein (ed.), *Wirtschaftsvölkerstrafrecht*, Baden-Baden, Nomos Verlag, 2015, und Kai Ambos, *Wirtschaftsvölkerstrafrecht*, Berlin, Duncker & Humblot, 2018.

dem Jubilar an dieser Stelle ganz besonders herzlich zu gratulieren und das Beste vom Besten für die Zukunft zu wünschen.

*

Die Rolle transnationaler Unternehmen im globalen Wirtschaftsleben und ihre Verantwortung im Zusammenhang mit dem Postulat der Universalität und Unteilbarkeit der Menschenrechte gerät zunehmend in den Blickpunkt weltweit stattfindender gesellschaftlicher Diskurse. Schwere Menschenrechtsverletzungen wirken sich oftmals grenzüberschreitend aus und könnten über den Bereich von Kriegsverbrechen und Verbrechen gegen die Menschlichkeit hinaus strafrechtlich abgesichert werden. Ein solcher Weg, die Erweiterung des Völkerstrafrechts um ein Wirtschaftsvölkerstrafrecht, steht seit längerer Zeit zur Diskussion. Aber auch soft law approaches, die strafbewehrte Einführung von Transparenzvorschriften oder so genannte Lieferkettengesetze könnten ein alternatives oder ergänzendes Instrument wirksamer Prävention sein.

Im Beitrag werden die Entstehung, erste Zwischenergebnisse und Forschungsansätze als Werkstattbericht aus dem Projekt an der JKU Linz vorgestellt.

Der Trend zur Unternehmenshaftung: Menschenrechte und transnationale Wirtschaft als Problemstellung

Spät, aber doch, hat sich der österreichische Gesetzgeber entschlossen, ein gerichtliches Unternehmensstrafrecht mit In-Kraft-Treten am 1.1.2006 zu schaffen.[4]

Vor allem internationale Verpflichtungen[5] und europäische Vorgaben haben den Anstoß gegeben, auch die Verantwortlichkeit von Verbänden für Delikte wie Korruption oder Menschenhandel zu verfolgen. Der Kampf gegen Auslandskorruption mit strafrechtlichen Mitteln, beginnend namentlich mit dem U.S. amerikanischen Foreign Corrupt Practices Act 1977 (FCPA) in Zeiten des Kalten Krieges, war durch originär außenpolitische Interessen mindestens ebenso geprägt wie durch wirtschaftliche Ziele wie einem besseren Schutz amerikanischer Unternehmen vor Korruptionsforderungen generell.[6] Ein Paradigmenwechsel,

[4] Verbandsverantwortlichkeitsgesetz (VbVG) BGBl I 2005/151 idF BGBl I 2016/26. Näher dazu Richard Soyer (ed.), *Handbuch Unternehmensstrafrecht*, Wien, Manz Verlag, 2020.

[5] Siehe etwa Art. 26 UNCAC.

[6] Ausführliche Materialanalyse bei Mike Koehler, The Story of the Foreign Corrupt Practices Act *Ohio State Law Journal* 73 (2012), 929 ff., https://ssrn.com/abstract=2185406; Ferner Hartmut Berghoff, From the Watergate scandal to the compliance revolution: The fight

hatte doch gegenteilig der Einsatz korrumpierender Mittel als Werkzeug zur Durchsetzung außenpolitischer Interessen ebenso Tradition wie gerade auch die Auslandskorruption als ein Mittel zur Durchsetzung singulärer oder partikulärer Wirtschaftsinteressen eine lange Geschichte hat. Und war, solange es außerhalb der eigenen Landesgrenzen blieb, teils sogar rechtlich akzeptiert. So war zum Beispiel in Deutschland bis zur Neuregelung des § 299 dStGB die Auslandsbestechung im privaten Sektor nicht strafrechtlich erfasst und konnten die entsprechenden „nützlichen Aufwendungen" steuerlich als Betriebsausgabe geltend gemacht werden.[7]

Die Kriminalisierung der Auslandskorruption rief in der deutschen Wirtschaft massive Befürchtungen einer verschlechterten Position im internationalen Wettbewerb hervor. Eine Erweiterung der Strafbarkeit auf Taten im Ausland könne, so wird eine Stellungnahme der Spitzenverbände der Wirtschaft zitiert, nur hingenommen werden, „wenn entsprechende Verpflichtungen auch der Konkurrenz-Staaten sichergestellt" würden.[8] Geschichte, genauer: Diskussion und Argumente wiederholen sich. Man werfe nur einen Blick auf die jüngste Debatte[9] in Deutschland um die Einführung eines Verbandssanktionengesetzes als Teil des „Entwurf eines Gesetzes zur Stärkung der Integrität in der Wirtschaft".[10]

Bei der Forderung nach Unternehmenssanktionierung im Zuge der Bekämpfung des Menschenhandels mag der Bezug zur globalen (Legal-)Wirtschaft nicht in gleicher Weise deutlich sein, stand doch im Mittelpunkt der allgemeinöffentlichen Diskussion zunächst primär der Menschenhandel im Kontext sexueller Ausbeutung. Die Arbeitsausbeutung schien nur im Kontext von illegaler Migration und Schattenwirtschaft betroffen zu sein. Zunehmend verlagert sich jedoch der Fokus der Debatte um Menschenhandel (auch) in Richtung der Arbeitsausbeutung. Der Kon-

against corporate corruption in the United States and Germany, 1972-2012, in Richard F. Wetzell (ed.), *Bulletin of the German Historical Institute*, Washington DC, German Historical Institute 2013, 7 ff., https://www.ghi-dc.org/publication/bulletin-53-fall-2013 (abgerufen 08.10.2021).

7 Vgl auch § 309 öStGB.

8 Siehe Jan Keuchel, Schmiergeldzahlungen ins Ausland nicht mehr absetzbar. Aufseher nehmen Exportwirtschaft ins Visier, *Handelsblatt* (14.10.2002), https://www.handelsblatt.com/archiv/schmiergeldzahlungen-ins-ausland-nicht-mehr-absetzbar-aufseher-nehmen-exportwirtschaft-ins-visier/2203170.html?ticket=ST-1038523-ZwE2bfEiiT1QfY9nJBYz-ap3 (abgerufen 08.10.2021).

9 Siehe Bundesverband der Unternehmensjuristen e.V., Stellungnahme zum Gesetzesentwurf zur Stärkung der Integrität in der Wirtschaft, 8, https://www.buj-verband.de/wp-content/uploads/BUJ-Stellungnahme-Entwurf-eines-Gesetzes-zur-staerkung-der-Integritaet-in-der-Wirtschaft-Juni-2020.pdf (abgerufen 08.10.2021).

10 http://dipbt.bundestag.de/extrakt/ba/WP19/2656/265689.html (abgerufen 08.10.2021).

text zu grenzüberschreitenden Migrationsbewegungen ist nicht (mehr) zwingend. Gerade im Zuge der aktuellen Lieferkettendebatten wird die Verantwortlichkeit von Unternehmen der westlichen Hemisphäre für menschenrechtsverletzende[11] Zustände in den verlängerten Werkbänken in Entwicklungsländern auch unter dem Aspekt des Menschenhandels durch Arbeitsausbeutung diskutiert.[12]

Die aktuellen Bestrebungen um die mit Lieferkettengesetzen angestrebte gesetzliche Verankerung von Verantwortung und Verantwortlichkeit fußen scheinbar logisch und folgerichtig auf solchen Entwicklungen. Dabei meinen wir mit dem Begriff der *Verantwortung* von Unternehmen die global-ethische Perspektive, aufgegriffen mit völkerrechtlichem soft law, etwa den Corporate Social Responsibility Rules der UN und der OECD, während mit dem Begriff der *Verantwortlichkeit* die Frage (auch strafrechtlicher) Haftungsregimes aufgegriffen wird.

Solche Haftungsregimes scheinen uns (in den Grenzen des strafrechtlichen Gesetzlichkeitsprinzips, Art. 7 Abs. 1 EMRK und Art. 4 Abs. 2 IPBPR) nicht nur durch die Vordertür im Wege ausdrücklicher gesetzlicher oder völkervertraglicher Anordnung, sondern evolutiv auch durch die Hintertür geltenden Strafrechts, über den Einfluss etwa von CSR auf die Auslegung bestehenden zwingenden Rechts, etwa strafrechtlicher Bilanzdelikte, entstehen zu können.

Forschungsobjekt inter- bzw. transnationales Unternehmensstrafrecht: Eine Vision und ihr Werden

Mit Blick auf das österreichische Strafrecht hat das umfassend anwendbare, nicht auf bestimmte Straftatbestände beschränkte Verbandsverantwortlichkeitsgesetz (VbVG) einen innerstaatlichen Paradigmenwechsel bewirkt. Unternehmen sind sensibilisiert.[13] Compliancemaßnahmen als Kriminalitätsprävention lassen

[11] Zum Menschenhandel als Verletzung des durch Art. 4 EMRK verankerten Verbots der Sklaverei und der Zwangsarbeit siehe EGMR, 07.01.2010, *Rantsev v. Cyprus and Russia*, Nr. 25965/04, Tz. 282. Zu weiteren internationalen Schutzgewährleistungen Karin Bruckmüller – Stefan Schumann, Chapter 5: Crime Control vs. Social Work Approaches in the context of the "3P" Paradigm: Prevention, Protection, Prosecution, in John Winterdyk – Benjamin Perrin – Philip Reichel (eds.), *Human trafficking: Exploring the International Nature, Concerns, and Complexities*, Boca Raton – London – New York, NY, CRC Press, 2012, 103 (104).

[12] Siehe die rechtsvergleichende Analyse von Stefan Schumann, Corporate Criminal Liability on Human Trafficking, in John Winterdyk – Jackie Jones (eds.), *The Palgrave International Handbook of Human Trafficking*, London, Palgrave Macmillan – Springer International, 2019, 1–20, https://link.springer.com/referenceworkentry/10.1007/978-3-319-63192-9_10-1.

[13] Stefan Schumann – Richard Soyer, The Role Of Corporate Criminal Compliance For The Protection Of Public Financial Interests, in Farkas, Ákos – Gerhardt Dannecker –Jacsó, Judit (eds.), *Criminal Law Protection of the Financial Interests of the European Union*, Budapest, Wolters Kluwer Hungary, 2019, 401.

Lenkungseffekte erkennen. Auch in der Strafrechtspflege ist seither manches neu zu denken. In Zeiten des Umbruchs werden neue Perspektiven entdeckt, neue Entwicklungen bahnen sich an. Im Jahr 2016, zehn Jahre nach Inkrafttreten des VbVG, konnten die Veranstalter des Europäischen Forum Alpbach, das seit 1945 alljährlich im August im Tiroler Bergdorf Alpbach stattfindet, davon überzeugt werden, Rechtsgespräche über Menschenrechte und Unternehmensstrafrecht stattfinden zu lassen. Alpbach war der fruchtbare Boden, um sich diesem aufkommenden Thema zuzuwenden, ganz in der Tradition dieses wohl bedeutendsten österreichischen Forums mit internationaler Ausrichtung, das sich wissenschaftlichen und künstlerischen Disziplinen widmet und brennende Themen der Gegenwart und Zukunft immer wieder mutig aufgreift.[14]

Es kam, wie es kommen musste. Das Unternehmensstrafrecht als Herausforderung nicht bloß der innerstaatlichen Rechtsordnung für Unternehmen und für die österreichische Strafrechts"community" – von Ermittlungs- und Strafverfolgungsbehörden über die Strafgerichtsbarkeit und Anwaltschaft wie auch die Strafrechtswissenschaft – hat sich in den Köpfen der Verfasser immer breiter gemacht, verankert. Die klassische Perspektive der Sanktionierung von unmittelbar wettbewerbsverletzenden Verhaltensweisen, ob Kartellabsprachen oder Korruption, greift zu kurz. Verletzungen von Sozial- und Umweltstandards, die mittelbar auch Wettbewerbsverzerrungen bilden, geraten immer stärker in den Fokus. Sie machen nicht an den Landesgrenzen halt. Die Untersuchung von Problemen des internationalen Menschenrechtsschutzes drängte sich den Verfassern immer stärker auf. Die Idee verdichtete sich zu dem UWM-Forschungskonzept, das sich auf Menschenrechtsschutz und Unternehmensstrafrecht als Zukunftsagenda im globalen Wettbewerb fokussiert.

Oftmals kann man sich des Eindrucks nicht erwehren, Unternehmensstrafrecht werde traditionell entweder so konzipiert, dass es den jeweiligen Wirtschaftsstandort durch drohende Verfolgungsintensität nicht belasten soll, oder es wird protektionistisch-selektiv eingesetzt und beinhaltet daher eine Benachteiligung ausländischer zu Gunsten einheimischer Unternehmen. Auch der Einsatz des Unternehmensstrafrechts als Mittel zur Austragung wirtschaftlicher Konflikte ist in der aktuellen Phase einer Renaissance der Nationalstaaten und Partikulargewalten vorstellbar. Es beanspruchen z.B. die USA oft weltweit Jurisdiktion wegen Verstößen gegen US-amerikanisches Recht. Europa hingegen sieht zu, wie europäische Unternehmen von amerikanischen Gerichten und Behörden zu Millionen-, ja Milliardenbußen, verurteilt werden. In diesem Lichte erweisen sich Defizite des

[14] Die Vorträge und Diskussionsbeiträge der Rechtsgespräche über Menschenrechte und Unternehmensstrafrecht sind dokumentiert im österreichischen Anwaltsblatt 11/2016, abrufbar unter www.rechtsanwaelte.at.

in der EU praktizierten partikular zersplitterten Unternehmensstrafrechts als potenzieller Wettbewerbsnachteil nicht nur für die europäische Marktordnung, sondern auch und gerade für europäische Unternehmen im globalen Wettbewerb. Ähnliche Nachteile könnten für aufstrebende globalwirtschaftlich bedeutsame Märkte wie China und Indien in Betracht kommen.

Damit resultiert – zunächst wohl als Vision – die Idee, ein international harmonisiertes Unternehmensstrafrecht könnte ein wirksames Instrument zur globalen Ächtung und Verfolgung von schweren Menschenrechtsverletzungen sein, werden doch Menschenrechte und deren wirksamer weltweiter Schutz bei wirtschaftsbezogenen Verhaltensweisen (Erzeugung, Bearbeitung und Absatz von Produkten sowie Dienstleistungen) erst allmählich adressiert. Die Verzahnung wirtschaftlicher Verhaltensweisen von Unternehmen mit anderen schweren Menschenrechtsverletzungen wie Kinderarbeit, ausbeuterische Arbeitsbedingungen, illegale Rohstoffförderung und Umweltzerstörung wird gegenwärtig hingegen tendenziell als „neutrale" Beteiligung angesehen.

Was tun? Notwendig erschien uns eine fundierte Untersuchung, die nicht nur rechtliche, sondern auch rechtstatsächlich-empirische Ergebnisse in eine Analyse der Ausgestaltung und Anwendung des Unternehmensstrafrechts in führenden und aufstrebenden Märkten weltweit erfasst. Es gelang, ein drittmittelfinanziertes Forschungsprojekt, das auch Advocacy und Dissemination beinhaltet, an der Johannes Kepler Universität (JKU) Linz zu implementieren.[15]

Als forschungsübergreifende Problemstellung und Ausgangspunkt wurden „Governance Gaps", Regelungslücken, identifiziert, in welchen räumliche, ökonomische und rechtliche Phänomene ineinander greifen. Transnationale Unternehmen agieren entsprechend der globalen Arbeitsteilung in rechtlich defizitären bzw durchsetzungsschwachen Staaten des globalen Südens und in Schwellenländern in Ostasien, um ihre Produktionskosten zu senken und Wertschöpfung zu generieren. Nationale Strafrechtsordnungen wie auch das Völkerrecht vermögen es in ihrer derzeitigen Verfasstheit nicht, die evidenten Regelungsdefizite, das latente Verletzungsrisiko für Menschenrechte sowie damit einhergehende wettbewerbsrechtliche Verzerrungen wirksam zu handhaben. Das Völkerrecht erscheint in seiner Rechtsschöpfung zu träge und in seiner Durchsetzung zu schwach, das nationale Strafrecht weist hingegen nur limitierte extraterritoriale Steuerungskapazitäten auf. Ein Grenzgang zwischen strafrechtlicher und völkerrechtlicher Ebene sowie zwischen den Wissenschaftsdisziplinen ist Voraussetzung, um die Haftung von transnationalen Unternehmen für Menschenrechtsverletzungen, ihre Steuerung, die Bedingungen für wettbewerbsrechtliche Fairness und einen Ordnungsrahmen zu er- und begründen.

[15] Das UWM-Forschungsprojekt wird von der B & C Privatstiftung, Wien, drittmittelfinanziert.

Im Lichte dieser Überlegung wurde die Bearbeitung folgender Werkstücke (zugleich Dissertationsvorhaben von Projektmitarbeitern) in Arbeit genommen:

Transnationale Unternehmen und völkerrechtliche Verantwortlichkeit

Die Begründung eines verbindlichen Rahmens für verantwortungsvolles Wirtschaften wird entlang mehrerer Stränge verfolgt. Ein Werkstück fokussiert die völkerrechtliche Verantwortlichkeit von transnationalen Unternehmen.[16] Hierbei wird auf die (partielle/partikulare) Völkerrechtssubjektivität von transnationalen Unternehmen eingegangen. Damit steht die Fähigkeit des transnationalen Unternehmens als Träger von Rechten und Pflichten (Menschenrechtsschutz) im Brennpunkt. In einem weiteren Teilbereich der Arbeit wird versucht, die völkerrechtliche Verantwortlichkeit von transnationalen Unternehmen (rechtstheoretisch) zu begründen. IdZ spielen freilich „Handlungsfähigkeit" von transnationalen Unternehmen und in einem zweiten Schritt die Frage einer „Verbandsschuld" eine entscheidende Rolle. Ebenso wird in dieser Untersuchung der Versuch unternommen, herkömmliche Straftheorien auf ein Unternehmen und in der Folge auch auf das Völkerrecht zu übertragen. Im letzten Teil der Untersuchung wird das vorherrschende völkerstrafrechtliche Beteiligungssystem mit besonderer Berücksichtigung von Lieferketten unter die Lupe genommen.

Corporate Social Responsibility (CSR) und Soft Law

Ein weiteres Werkstück ist das Thema „Strafrechtliche Implikationen von CSR" und Soft-law-Phänomenen.[17] Längst hat das (Straf-)Recht auf transnationaler Ebene kein Steuerungsmonopol mehr. Ein globalisierungsinduziertes Normengeflecht für Unternehmen hat sich unter dem Dad Corporate Social Responsibility (CSR) und soft law gebildet. CSR transformiert Soft-Law-Regularien in den Unternehmensalltag und die Unternehmensverfassungen. Der Projektbeitrag soll ein Versuch sein, auch die Strafrechtswissenschaft für CSR zu sensibilisieren sowie Potentiale und Schranken aufzuzeigen. Erkenntnisleitend ist die bereits vertretene Einschätzung,

[16] Dabei handelt es sich um das Dissertationsvorhaben unter dem Titel „Die völkerrechtliche Verantwortlichkeit von transnationalen Unternehmen" von Mag. *Sergio Pollak*. Die nachstehende Darlegung wurde vom Dissertanten konzipiert.

[17] Die dazugehörige Dissertation „Strafrechtliche Implikationen von CSR" verfasst Mag. *Nihad Amara,* BA. Die nachstehende Darlegung wurde vom Dissertanten konzipiert.

dass es sich bei CSR um hybride Regelungsmechanismen handelt, die weiches und hartes Recht miteinander verschränken und unterhalb der Normenebene durch Sorgfaltsmaßstäbe sowie auf der Sachverhaltsebene durch faktische Entsprechung wirken. Zwangsläufig ist auch die Frage damit verbunden, ob sich das durch CSR geformte Verantwortungskorsett für transnationale Unternehmen durch strafrechtliche Anknüpfung (wenn auch nur ansatzweise) effektiver gestalten lässt. Strafrechtliche Implikationen von CSR sind in den Bereichen der unternehmerischen Sorgfaltsmaßstäbe (Verbandsverantwortlichkeit), im Einfluss auf täuschungsbedingte Straftatbestände (Betrug, Lauterkeitsstrafrecht), in kartellstrafrechtlichen Anwendungsfällen sowie im Bereich des Bilanzstrafrechts mit Bezügen auf die nichtfinanzielle Berichterstattung zu suchen.

Political and Administrative Judgement Rule

Ein sowohl auf die Gast- als auch auf die Herkunftsstaaten transnationaler Unternehmen bezogener Ansatz verfolgt hingegen die Rolle von Politik(ern) und ihres steuernden Einflusses auf wirtschaftliche Entwicklungen. Die strafrechtlichen Grenzen politischer Gestaltung in Regierungsämtern sollen im Kontext einer neuen „Political and Administrative Judgement Rule" evaluiert und gegebenenfalls neu vermessen werden.[18] Ein konzeptionell an die Business Judgement Rule für unternehmerisches Handeln angelehnter Maßstab könnte die Grenze zur strafrechtlichen Haftung politischen Handelns markieren.

Transnationale Regulierung und transnationale Rechtsdurchsetzung

Die innerstaatlichen, supranationalen und völkerrechtlichen Bemühungen rechtlicher Regulierung globalisierter Unternehmenstätigkeit und deren (in Teilen unerwünschter) Begleiterscheinungen haben, so meint man spüren zu können, in den letzten Jahren zugenommen.

Solche Maßnahmen reichen von einem im ureigensten staatlichen Interesse liegenden Vorgehen insbesondere gegen Steuervermeidungsmodelle des Profit Shifting durch transnationale Unternehmenskonstruktionen eines „Double Irish with a Dutch Sandwich" über Einführung von Registern der wirtschaftlichen

[18] Der Beitrag „Political and Administrative Judgement Rule" wird von Mag. *Philip Marsch* im Rahmen einer Dissertation ausgearbeitet. Die nachstehende Darlegung wurde vom Dissertanten konzipiert.

Eigentümer[19] (mit der Zielsetzung der Bekämpfung von Geldwäscherei und Terrorismusfinanzierung, aber auch der Steuerhinterziehung) bis hin zu geopolitisch und wirtschaftsstrategisch bedeutsamen Maßnahmen zur Investitionskontrolle – wie der 2019 beschlossen EU-Verordnung zur Schaffung eines Rahmens für die Überprüfung ausländischer Direktinvestitionen in der Union.[20]

Menschenrechtsverletzungen in der Lieferkette, also in Drittstaaten, standen bislang eher im Fokus des soft law. Hier lässt sich eine erstaunlich dynamische Veränderung beobachten. Während etwa Frankreich bereits seit 2017 über ein Lieferkettengesetz verfügt, hat die deutsche Bundesregierung, quasi im Windschatten der Diskussion um ein Verbandssanktionengesetz (ergänzend, nicht ersetzend, gleichwohl vorrangig gegenüber dem bereits seit 1968 geltenden Bußgeldregime des Ordnungswidrigkeitenrechts) im März 2020 den Entwurf eines Gesetzes über die unternehmerischen Sorgfaltspflichten in Lieferketten vorgelegt und der Gesetzgeber hat es mittlerweile verabschiedet. Er enthält auch aus strafrechtlicher Sicht Beachtliches: Formal im Regime eines Ordnungswidrigkeitenrechts verhaftet, lehnt sich § 24 Abs. 3 des Entwurfs – abweichend vom auf 10 Mio. € (zuzüglich etwaiger Einziehungsbeträge) beschränkten Bußgeldrahmen des Ordnungswidrigkeitengesetzes – am Vorschlag des Regierungsentwurfs zum Verbandssanktionen an und eröffnet gegenüber juristischen Personen oder Personenvereinigungen mit einem durchschnittlichen Jahresumsatz von mehr als 400 Millionen Euro die Möglichkeit einer umsatzbezogenen Sanktionierung mit bis zu 2% des Jahresumsatzes. Für alle anderen Unternehmen soll der Sanktionsrahmen hingegen, je nach Tatvorwurf, gestaffelt bis max. 800 Tsd. € betragen.

Nationale Regelungen entsprechen dem weithin anerkannten Subsidiariätsgedanken. Sie greifen (erst) dann zu kurz, wenn sie sich als ungeeignet erweisen, das erstrebte Ziel, die transnationale Gewährleistung der Menschen-, Sozial- und Umweltrechte im Rahmen transnationaler Unternehmenstätigkeit, zu sichern. Dann nämlich, wenn auch mit transformationsbedürftigen transnationalen unionsrechtlichen Richtlinien oder völkerrechtlichen Verträgen als erster Steigerungsform kein Auslangen mehr zu finden ist, und, in zweiter Steigerung, eine transnationale institutionalisierte Rechtsdurchsetzung notwendig erscheint. Diesem Strukturprinzip ist – in der Ausprägung einer Komplementarität – etwa die Tätigkeit des Internationalen Strafgerichtshofs verhaftet (vgl. Art.1 zweiter Satz, Art. 17 IStGH-Statut).

Reichen nationale Maßnahmen nicht, so muss – so besagt es der Subsidiaritätsgedanke – die transnationale Ebene handeln aber auch besser handlungsfähig sein. Mindestvoraussetzung transnationaler Maßnahmen sowohl der ersten als

[19] Für Österreich: Bundesgesetz über die Einrichtung eines Registers der wirtschaftlichen Eigentümer von Gesellschaften, anderen juristischen Personen und Trusts (Wirtschaftliche Eigentümer Registergesetz – WiEReG), BGBl. I Nr. 136/2017.

[20] VO (EU) 2019/452.

auch der zweiten Steigerungsform ist daher ein regionaler oder – idealiter – globaler common sense der beteiligten Staaten. Dies gilt grundsätzlich auch für die Europäische Union, die zwar in Abkehr vom völkerrechtlichen Einstimmigkeitsprinzip auch Rechtsetzung gegen den Willen einzelner Mitgliedstaaten betreiben kann, der aber im materiellen Strafrecht (jenseits der Diskussion um PIF-Delikte) nur eine Anweisungs- bzw. Assimilierungskompetenz, nicht aber eine originäre Strafrechtssetzungskompetenz zukommt.

Daher ist es aus unserer Sicht zunächst angezeigt, die Leistungsfähigkeit bestehender materieller transnationaler Regelungen – Stichwort: CSR rules – als Maßstab bei der Auslegung nationalen Rechts zu prüfen, wie dies das oben vorgestellte Dissertationsvorhaben zu strafrechtlichen Implikationen von CSR unternimmt. Die EU hat mit ihrer RL 2014/95 den Versuch gestartet, aufbauend auf ihrem CSR-Verständnis Unternehmen mit Berichtspflichten zu steuern. Das Bemühen, diese Ansätze im Blianzstrafrecht fruchtbar zu machen, steckt noch in den Kinderschuhen – die Konturen der Anknüpfung über ein zeitgemäßes Verständnis von Bilanzstrafrecht zeichnen sich aber bereits ab.[21]

Zweifel bzw. Kritik an der Sachgerechtigkeit eines innerstaatlichen Lösungsansatzes könnten aus zumindest zwei Richtungen kommen: Einerseits der Verdacht mangelnder materieller Einheitlichkeit des Verständnisses transnationaler Standards in den nationalen Rechtsordnungen. Andererseits der Vorwurf ungleicher, gar gezielt selektiver prozessualer Umsetzung. Beides lässt sich als Gerechtigkeitsproblem und, profaner, als Wettbewerbsverzerrung verstehen. Dieses schon aus dem Individualstrafrecht bekannte Problem verstärkt sich im Kontext der Diskussion um Unternehmenssanktionierung. Zwar ist die Möglichkeit einer (im weitverstandenen Sinne) strafrechtlichen Sanktionierung von Unternehmen zunehmend verbreitet, aber keineswegs in allen Rechtsordnungen anerkannt. Zugleich ist aber auch das sanktionierende Recht nicht in allen Rechtsordnungen gleichermaßen klar dem Strafrecht zugeordnet. So entfalten bei der Unternehmenssanktionierung, die (als Sanktion im engeren Sinne) notwendigerweise maßgeblich durch Geldbußen geprägt ist, etwa *punitive damages* ähnliche Wirkung. Gleichwohl liegt aber gerade bei der Verfolgung von Unternehmenskriminalität der Schwerpunkt oftmals nicht oder nicht allein in der sühnenden Sanktionierung, sondern in der spezialpräventiven Besserung durch Maßnahmen zur Unternehmenscompliance bis hin etwa zur Bewährungsaufsicht durch Monitore.

[21] Vgl dazu näher Nihad Amara – Richard Soyer, Soft law, CSR und Unternehmensstrafrecht, *Zeitschrift für Kultur und Kollektivwissenschaft* Jg. 7, Heft 1/2021, 309.

Quo vadis

Bietet die Ebene des Völkerstrafrechts Abhilfe? Das materielle Völkerstrafrecht fokussiert Verbrechen im Rahmen militärischer, zumindest aber gewaltsamer ethnischer Konflikte. Es hat seine Geburtsstunde in den Nürnberger Kriegsverbrecherprozessen, fußt aber zugleich auf dem Genfer humanitären Völkerrecht und der Haager Landkriegsordnung und steht auch vor dem als Misserfolg angesehenen innerstaatlichen Ansatz der strafrechtlichen Aufarbeitung der Vorwürfe von deutschen Kriegsverbrechen nach dem Ersten Weltkrieg in den sogenannten Leipziger Prozessen. Folgten noch die ad hoc-Tribunale für Jugoslawien und Ruanda dem zentralistischen Ansatz, legten schon der Special Court for Sierra Leone und die Khmer Rouge-Kammern als hybride Formen einen starken Fokus auf die innerstaatliche Aufarbeitung. Für die Befriedungsfunktion der strafrechtlichen Aufarbeitung gesellschaftlicher Konflikte erweist sich die innerstaatliche Perspektive als ganz wesentlich. Diesem Gedanken folgten im Übrigen ja auch die Wahrheitskommissionen, die in den 90er Jahren des 20. Jahrhunderts die strafrechtliche Aufarbeitung von diktatorischen Regimes ergänzten, teils substituierten. Eine Probe für die Leistungsfähigkeit des innerstaatlichen Rechts bildete auch die (im Detail auch umstrittene) Aufarbeitung von DDR-Unrecht durch Gerichte der Bundesrepublik Deutschland.

Was bedeutet all dies für die Möglichkeit einer Sanktionierung der Verletzung von Sozial-, Umwelt- und Menschenrechtsstandards durch transnationale Unternehmen? Zunächst einmal die Feststellung, dass die Erfassung von Verletzungen der Sozial- und Umweltstandards eine Erweiterung des Fokus eines materiellen Völkerstrafrechts darstellen könnte. Einen denkbaren gemeinsamen Ausgangspunkt des traditionellen wie eines solcherart potentiell erweiterten (Wirtschaftts-)Völkerstrafrechts würde dessen Einordnung als zentrales Menschenrechtsschutz-Regulativ bieten. Die Forderungen nach einer Einführung eines expliziten internationalen Straftatbestandes des „Ökozids“[22] reichen schon vor das Inkrafttreten des Römischen Statuts zurück, haben es seit dessen Entwicklung[23] und Inkrafttreten begleitet und in den letzten Jahren weiter an Fahrt aufgenommen. Insbesondere durch den Klimawandel bedrohte Inselstaaten[24]

[22] Siehe Mark A. Gray, The International Crime of Ecocide, *California Western International Law Journal* 26 (1996), 215 (258, Fn. 261).

[23] Siehe Art. 22 Abs. 2 lit. d des von der International Law Commission 1994 vorgelegten Draft Statute for an International Criminal Court, *Yearbook of the International Law Commission*, vol. II, Part Two, 1994, 39.

[24] Siehe die Erklärungen Vanatus, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/GD.VAN.2.12.pdf (abgerufen 08.10.2021), und der Malediven, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/GD.MDV.3.12.pdf (abgerufen 08.10.2021), auf der 18. Sitzung der Vertragsstaaten des Römischen Statuts 2019.

ebenso wie private Initiativen,[25] politische[26] und gesellschaftliche[27] Akteure setzen sich dafür ein. Bislang wurden diese Forderungen aber nicht umgesetzt. Als erste Herausforderung lässt sich die Notwendigkeit der Herstellung eines Konsensus der Staatengemeinschaft zu einem solchen völkerstrafrechtlichen Tatbestand losgelöst vom Kontext eines bewaffneten Konfliktes konstatieren.

Eine zweite Herausforderung würde in einer möglichen Erweiterung des Adressatenkreises liegen. Denn das Völkerstrafrecht kennt als Täter bislang nur Individuen. So standen auch im IG Farben-Prozess in Nürnberg Individualbeschuldigte, obzwar aufgrund ihrer herausgehobenen Rolle im Unternehmen, nicht aber das Unternehmen selbst als Angeklagter vor Gericht. Interessant in diesem Kontext mag erscheinen, dass es im neueren Unternehmensverantwortlichkeitsrecht, namentlich im U.S. Federal Law mit dem sogenannten Yates-Memorandum von 2015,[28] starke Tendenzen gibt, die individuelle Verantwortung des Einzelnen im Unternehmen wieder zu betonen.

Auch die Einordnung führender Organisationen des Dritten Reiches als „verbrecherische Organisation" durch das Nürnberger Tribunal nach Art. 9, 10 dessen Statuts bewirkte nicht die formelle Rolle der Organisation als Angeklagter, sondern hatte Feststellungswirkung für Folgeverfahren gegen andere Angehörige dieser Organisationen auf Basis des Kontrollratsgesetzes Nr. 10.[29] Unternehmen sind de lege lata keine anerkannten Subjekte des Völkerstrafrechts. Die Diskussion einer Völkerrechtsubjektivität, spezieller: einer Völkerstrafrechtssubjektivität von Unternehmen ist zu führen, mag sich auch bei manchen transnationalen Unternehmen die (rechtspolitische) Frage einer Staaten ähnlichen (aber wirtschaftlich, nicht durch völkerrechtliche Souveränität begründeten) Machtstellung aufdrängen.

Es zeigt sich, dass das eingangs angesprochene Forschungsprojekt vielfältige Fragen aufwirft, die dogmatisch und rechtspolitisch belastbare Antworten verlangen. Derart gerät ein neuer globaler Ordnungsrahmen für Unternehmen und Menschenrechtsschutz, der transnationale wirtschaftsbezogene Sachverhalte

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[25] Siehe z.B. https://www.stopecocide.de (abgerufen 08.10.2021).

[26] Siehe Entschließung des Europäischen Parlamentes vom 20. Januar 2021, P9 TA(2021)0014, Menschenrechte und Demokratie in der Welt und die Politik der Europäischen Union in diesem Bereich – Jahresbericht 2019, Pkt. 12 (5. April 2021).

[27] Siehe den Bericht des Catholic News Service über die Rede von Papst Franziskus vor Teilnehmern des AIDP Weltkongresses im November 2019 in Rom, https://chatolicnews.com/2019/11/15/catechism-will-be-updated-to-include-ecological-sins-pope-says/ (abgerufen 08.10.2021).

[28] Siehe https://www.justice.gov/archives/dag/file/769036/download, ausführlich dazu Stefan Schumann, Of Corporations and Individuals, *Revue Internationale de Droit Pénal* (2018), 25 (27 ff).

[29] Siehe Art. II Abs. 1 lit. d Kontrollratsgesetz Nr. 10.

jenseits des klassischen Verständnisses von Tatbeständen des Völkerstrafrechts adressiert, in den Fokus. Rational betrachtet wird immer klarer, dass es sich dabei um eine zentrale Herausforderung der Weltgesellschaft im 21. Jahrhundert handelt.

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SUBSTANTIVE CRIMINAL LAW, CRIME STATISTICS AND PRISON AFFAIRS

CRIMINAL LAW, HUMAN RIGHTS AND A PARADOX

Hans-Jörg Albrecht[1]

A paradox was discovered in the 1980s when protection of human rights by criminal punishment was raised as an issue. However, a closer look at the course of invoking criminal law to respond to human rights violations reveals that criminal law in fact has gained in importance not only in the form of genuine international criminal law. International conventions tend to strengthen obligations to introduce criminal law as an effective remedy against old problems reframed as human rights violations and in particular against hatred and hostility emerging in the wake of growing cultural and religious diversity and fueled by social media. Growing reliance on criminal law here results in conflicts which are not outweighed by positive effects.

A Paradox?

Sometime in the 1980s, it seems, a paradox emerged when criminal law and punishment were discovered as an effective tool in the enterprise of protecting human rights.[2] Indeed, others proclaimed a "paradigmatic change" and held that criminal punishment is accepted and acceptable as a decisive device in containing oppression and violence, and implementing justice and peace.[3] Criminal law thus appeared to be both, a protection and a threat for fundamental

[1] Emeritierter Direktor am Max-Planck-Institut zur Erforschung von Kriminalität, Sicherheit und Recht in Freiburg i.Br. sowie Honorarprofessor und Mitglied der Rechtswissenschaftlichen Fakultät der Albert-Ludwigs-Universität Freiburg.

[2] Françoise Tulkens – Michel van de Kerchove, Les droits de l' homme: bonne ou mauvaise conscience du droit pénal?, in Frank Verbruggen et al. (eds.), *Strafrecht als roeping. Liber amicorum Lieven Dupont*, Leuven, Universitaire Pers Leuven, 2005, 949-968; Mireille Delmas-Marty, Le paradoxe penal, in Mireille Delmas-Marty, Claude Lucas de Leyssac (eds.), *Libertés et droits fondamentaux*, Paris, Seuil, 1996, 368–392.

[3] Mattia Pinto, Awakening the Leviathan through Human Rights Law – How Human Rights Bodies Trigger the Application of Criminal Law, *Utrecht Journal of International and European Law* 2 (2018), 161–184.

rights and freedoms, creating a double bind in face of defensive and offensive roles of human rights.[4] And, in fact, human rights traditionally had been invoked to restrain criminal law and punishment through providing various layers of shields which effectively guide the process of making criminal law and defining criminal offences, restrain sentencing and punishment and establish protective standards of criminal proceedings. Strong shields are considered to be of particular importance in this field as criminal law and punishment (and here in its most serious forms of the death penalty and life imprisonment) have been held to present significant sources of human rights violations. The first layer of these shields places restraints on the creation of criminal law through implementing well-known and well-established leading principles which request strict subsidiarity and the use of the threat of criminal punishment as a last resort. These principles reflect what Hans-Heinrich Jescheck has called the "fragmentary character" of criminal law.[5] Penal theory and doctrine insisting on a "last resort" approach have been backed up by criminological research and theory which in the 1960s and 1970s emphasized risks of overcriminalization, adverse effects of criminal punishment and advised adoption of alternatives to criminal law and diversion from criminal proceedings.

Also, today, it is assumed that the punitive approach to crime control (and adversarial processing of offenders) has failed. The diagnosis of failure is grounded on the view that the current system of criminal punishment in some regions has spiraled out of control. The tremendous increase in the number of prisoners in the United States and a lesser though still significant rise in prison populations in many other countries in fact come with a heavy burden for society. The consequences are felt in the prison systems with overcrowding affecting the conditions under which prison sentences are served and in societies (and communities) which have to deal with re-entry problems and accommodate scores of hardened ex-prisoners. High rates of recidivism and the revolving door syndrome are perceived to be signs of the ineffectiveness of criminal punishment and to indicate that criminal punishment is not the solution of crime problems but is a substantial part of these problems. The root cause of ineffectiveness is seen in the strong stigma coming with criminal punishment (in particular imprisonment) and its exclusionary power which may result in defiance, facilitates entering criminal careers and makes it difficult to quit a life in crime. The finding of failure is also based upon the conclusion that the conventional criminal justice system does not cater to the needs of crime victims nor to the needs of the communities where victims and offender live.

[4] Françoise Tulkens, The Paradoxical Relationship between Criminal Law and Human Rights, *Journal of International Criminal Justice* 9 (2011), 577–595, 579.

[5] Hans-Heinrich Jescheck – Thomas Weigend, *Lehrbuch des Strafrechts. Allgemeiner Teil*, Berlin, Duncker & Humblot, 1996, 52.

However, partisans of widening and strengthening criminal law to protect human rights do not seem to be impressed by the evidence of failure of punitive approaches. An explanation can certainly be found in new (or rightly deserving) targets of criminal law. The sword is now drawn to protect the weak, the oppressed and the "structurally" disadvantaged and to punish powerful perpetrators (persons wielding political power and large corporations). In particular the Rome Statute has been hailed as an effective instrument to put an end to impunity of powerful perpetrators of atrocities and to respond effectively to crimes against humanity. While evidence of successful prevention and containment of large-scale atrocities through international criminal law and justice is still lacking, the appetite for unleashing criminal law and punishment in fact is growing.

Drawing the Sword

The emergence of such a paradox or paradigmatic change overlaps with the spread of what has been called the new punitiveness located also in the 1980s. [6] And, these changes parallel a significant trend of creating on supranational levels (and below the level of genuine international criminal law) obligations to introduce criminal law to control and contain new (or newly problematized) international and organized criminal activities which are considered as serious threats on the one hand to the social fabric at large and on the other hand to human rights. These obligations go beyond those established by the jurisprudence of the European Court of Human Rights on the basis of Art. 2, 3 and 4 ECHR.[7] The 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the Palermo Convention on Transnational Organized Crime 2000 (and its additional protocols against trafficking of women and children), the UN Convention against Corruption as well as the UN Anti-Torture Convention (and corresponding conventions concluded within the framework of the Council of Europe) bear witness to a changed perspective on the role of criminal law and punishment. However, already the Convention on the Elimination of All Forms of Racial Discrimination 1965 carries in Art. 4 the obligation to penalize dissemination of ideas based on racial superiority or hatred as well as incitement to racial discrimination and Art. 20 of the International Covenant on Civil and Political Rights introduced the obligation to prohibit any advocacy of national,

[6] John Pratt – David Brown – Mark Brown – Simon Hallsworth – Wayne Morrison (eds.), *The New Punitiveness: Trends, Theories, Perspectives,* Cullompton, Willan Publishing, 2005.

[7] See for example European Court of Human Rights, Rantsev v. Cyprus and Russia, (Application no. 25965/04), Judgment, 7 January 2010.

racial or religious hatred that constitutes incitement to discrimination, hostility or violence by law (though not necessarily by criminal law [8]).

The view that criminal law is a significant source of human rights violations is gradually replaced by the view that criminal punishment is an essential instrument in controlling global bads and protecting effectively victims of human rights violations and ultimately victims of serious crime. In turn, the fragmentary character of criminal law and the last resort principle sometimes tend to be seen as obstacles on the way of closing loopholes and avoiding gaps in criminal liability.

Not least the 2011 Istanbul Convention on preventing and combating violence against women and domestic violence[9] and a growing willingness to combat ethnic, religious and racial hatred (and hate motivated acts) by means of criminal law (backed up by CEDAW and ICCPR), stand for an approach interested in creating a dense web of criminal offence statutes geared towards closing gaps in criminal liability. However, a policy as adopted in the Istanbul Convention and apparent in a growing interest in penalization of hatred is navigating dangerous waters. It is not only the ambitious goal of "aspiring to create a Europe free from violence against women and domestic violence", as voiced in the preamble of the Convention which carries a significant potential of escalation and evokes memories of wars against drugs and terror. The penalization program unfolding in the Istanbul Convention and criminal law invoked in responses to hatred demonstrate an enormous potential of conflicts which evidently may amount to another adverse fallout of the paradox of protecting human rights through criminal law and punishment.

Protecting Human Rights and Protecting Cultural Diversity

The Istanbul Convention condemns all forms of "negative social control" and targets under this umbrella in particular honor killings, forced marriages and genital mutilation (Art. 37, 38, 42, in addition to ruling out so-called cultural defenses) and calls for penalization of all forms of gender-based violence against women and children (Art. 33, 35, 36). Although the aim of protecting particularly vulnerable groups is certainly legitimate, critics of penalization point to the problem of stigmatizing immigrant and minority groups as well as the mere symbolic nature of criminal law that targets "harmful cultural practices"[10]. However, as

[8] Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, United Nations General Assembly A/74/486, 9 October 2019, 6.

[9] Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11. 5. 2011.

[10] Renée Kool, Step Forward, or Forever Hold Your Peace: Penalizing Forced Marriages in The Netherlands, *Netherlands Quarterly of Human Rights* 30 (2012), 446–471, 447.

most European countries have signed and ratified the Istanbul Convention[11] and introduced corresponding criminal offence statutes, it is fair to say that there is evidently widespread support in Europe for the use of criminal law to respond to cultural traditions considered to violate human rights (in particular rights of women and children), support that is backed up by international human rights documents (see for example Art. 24 §3 Child Convention requesting effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children).[12]

Questions of penalization pertain to whether and how cultural and religious minorities should be protected by specific criminal law, whether criminal law should restrain itself when confronted with conflicting values and norms and whether and to what extent criminal law should be invoked to contain certain culturally motivated (or rooted) practices through punishment.

Honor related violence, forced and under-age marriages, female genital mutilation (and not least the burqa) stand also for public discourses on social integration (or the failure of integration) related primarily to Muslim communities and reflect perceptions of otherness and differences also when (female) immigrants` victimization is placed on the agenda.[13] Such acts are labelled "imported foreign cultural practices" and "a threat to fundamental European or Western values" and human rights.[14] In turn, critics argue that penalizing approaches instrumentalize women's rights and gender equality in ways that foster stigmatization of immigrant communities and, moreover, serve policies that aim at restricting immigration.[15] Conflicts and a clash of interests become also visible when 2005 the Special Rapporteur on Traditional Practices affecting the Health of Women and Children noted attempts to initiate a semantic shift with the aim of avoiding the term "genital mutilation", not least because of its alleged pejorative (and stigmatizing) connotations[16], and adopting neutral language instead which – the Special

[11] www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures.

[12] Katja Luopajärvi, International Accountability for Honour Killings as Human Rights Violations, *Nordisk Tidsskrift For Menneskerettigheter* 22 (2004), 2–21.

[13] Katherine Pratt Ewing, *Stolen Honor: Stigmatizing Muslim Men in Berlin*, Stanford, CA, Stanford University Press, 2008; Aisha Gill – Trishima Mitra-Kahn, Modernising the other: assessing the ideological underpinnings of the policy discourse on forced marriage in the UK, *Policy & Politics* 40 (2012), 107–122; Leti Volpp, Framing Cultural Difference: Immigrant Women and Discourses of Tradition, *Differences: A Journal of Feminist Cultural Studies* 22 (2012), 90–110.

[14] Alexia Sabbe, et al., Forced marriage: an analysis of legislation and political measures in Europe, *Crime, Law & Social Change* 62 (2014), 171–189, 172.

[15] Anna Korteweg – Gökçe Yurdakul, *Religion, Culture and the Politicization of Honour-Related Violence. A Critical Analysis of Media and Policy Debates in Western Europe and North America*, Geneva, United Nations 2010, 33.

[16] Georgios Sotiriadis, Der neue Straftatbestand der weiblichen Genitalverstümmelung, § 226a

Rapporteur insisted – would dwarf seriousness of such practices[17] and moving them closer to male circumcision, a phenomenon evidently not raising necessarily human rights issues.[18]

Stripping the issue of "harmful traditional practices" of its cultural dimensions and framing it exclusively as a form of violence against women and a violation of their human rights[19] are futile attempts to escape problems coming with cultural and religious diversity.[20] Supposing that harmful traditional practice "needs to be understood not as a "cultural" or "religious" problem that afflicts particular immigrant communities … but as a specific manifestation of the larger problem of violence against women which concerns all communities, whether immigrant or not" will not neutralize the politically mobilizing effect carried by various types of honor related violence. Also, Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime (17) speaks about "harmful practices, such as forced marriages, female genital mutilation and so-called 'honor crimes'" which result in women victims of gender-based violence requiring special support and protection because of the high risk of intimidation and retaliation". However, the opinion that certain cultural norms and beliefs are in fact the causal factors for harmful practices resulting in violence against women evidently prevails.[21]

Invoking criminal law-based control in this field – whether prohibiting or exempting, mitigating or aggravating – comes with significant problems as criminal law must navigate challenges of fundamental rights like freedom of expression, freedom of religion, (gender) equality as well as "respect for equal dignity and pluralism" considered the very foundation of pluralistic and democratic societies.[22] Criminal law and criminal policy in this field are also confronted with different interest groups and coalitions lobbying for or opposing criminalization

StGB: Wirkungen und Nebenwirkungen, *Zeitschrift für Internationale Strafrechtsdogmatik* 9 (2014), 320–339, 324.

17 Ninth report and final report on the situation regarding the elimination of traditional practices affecting the health of women and the girl child, prepared by Ms. Halima Embarek Warzazi, Economic and Social Council, E/CN.4/Sub.2/2005/36, 11 July 2005, 10.

18 For the complete history of precursor vocabulary of "mutilation" see Armelle Andro – Marie Lesclingand, Les Mutilations Génitales Féminines. État des Lieux et des Connaissances, *Population* 71 (2016), 224–311.

19 GREVIO, *Baseline Evaluation Report Italy*, Strasbourg, Council of Europe, 2020, 63.

20 Mathilde Sengoelge, *Guide de l'Union européenne sur les Mariages forcés/précoces (MFP): Dispositifs d'orientation pour les professionnel/les de première ligne*, Brussels, Centre Hubertine Auclert, 2016, 4.

21 Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo. Human Rights Council, United Nations A/HRC/20/16, 23 May 2012, 19.

22 European Court of Human Rights, Erbakan v. Turkey, Judgment of 6 July 2006, § 56.

or depenalization including watchdogs institutionalized by international treaties, for example the Committee on the Elimination of Racial Discrimination.

Penalizing Hatred and Protecting Feelings

In the explanatory notes of the European Union's Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law multicultural and multi-ethnic diversity of European societies is hailed as a positive and enriching factor[23] to be protected against racist and xenophobic forms of conduct. Hate and discrimination as an object of criminal law had been already raised as an issue in CEDAW in the 1960s before hatred moved back to policy arenas from the 1990s on.

Three strands of debates on (various forms of) hatred and criminal law may be noted. These strands pertain to incitement of hatred, blasphemy and sentencing enhancements for hate motivated crimes.

German criminal law (and other European criminal code books) has adopted the offence statute of "incitement to hatred or violence" against a national, racial, ethnic or religious group suited to disrupt social (public) peace (§130 Criminal Code). The roots of the offence of incitement to hatred are located in the 19th century when it was created to respond to political movements inspired by Marxist thought (class struggle). This offence statute received in Germany a new field of application in the wake of the holocaust and other crimes against humanity and it was adjusted to respond to neo-fascist propaganda, denial of the holocaust, display of swastikas and the like. §130 German Criminal Code penalizes also attacks on human dignity of others (individual or groups) through defamation or insult if social peace is at risk of disruption.[24] Criminalization extends then to trivialization, condonement or denial of the holocaust (and other crimes against humanity carried out under the Nazi regime). The latter must also be suited to disturb social peace. German criminal law partially has served as a blueprint for the 2008 European Union framework decision.[25] But, some European legislators have opted for widening offence statutes in this field with declaring denial etc. of genocide and other crimes against humanity in general a criminal offence (see Art.

[23] European Commission: Proposal for a Council Framework Decision on combating racism and xenophobia. Brussels, 28.11.2001, COM (2001) 664 final, 2.

[24] See in this respect the decision of the German Federal Constitutional Court (1 BvR 2083/15 – 22. June 2018) which held that incitement to hatred must be suited to provoke on the side of those incited willingness to act or to intimidate those against whom hatred is expressed.

[25] European Commission: Proposal for a Council Framework Decision on combating racism and xenophobia. Brussels, 28.11.2001, COM (2001) 664 final, 8.

261 §4 Swiss Criminal Code; §283 §1, No. 3 Austrian Criminal Code; France: Art. 24 bis Loi du 29 juillet 1881 sur la liberté de la presse) and let public provocation of or calls for discrimination or hate suffice as a condition of establishing a criminal offence.[26] The European Court of Human Rights when balancing Art. 8 (dignity and identity) and 10 ECHR points to thresholds in terms of calls for hatred or intolerance, a context marked by heightened tensions or special historical overtones and interference with the dignity of the members of affected communities [27].

The second strand concerns successors of conventional blasphemy laws which after extensive criticism have been abolished now in most European countries. In principle it is (perhaps better: it was) uncontested that blasphemy laws are in breach of Art. 19 of the ICCPR.[28] However, some European countries have retained or newly enacted criminal offence statutes which penalize insult/defamation of religion, again sometimes placed under the condition that insult is suited to disturb social peace or arouse justified indignation (see for example §166 German Criminal Code; Art. 261 Swiss Criminal Code; §188 Austrian Criminal Code[29]). On the other hand, Denmark, Norway and Sweden have removed religious insult offence statutes completely from their criminal code books; in Norway this move was in part motivated by the 2015 attack on Charlie Hebdo in Paris and the wish to avoid perceptions that religion is entitled to special protection (compared to other ideologies).[30] The problematization of hate speech gaining momentum through emphasizing the internet and social media and increasingly placed under regulatory restrictions below the threshold of criminal law as well as "counter defamation discourses" spreading rapidly through international arenas have resulted in tests of the meaning and scope of freedom of expression in face of

[26] In line with Art. 6 of the Additional Protocol to the Council of Europe Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, the Policy Recommendation No. 7 of the European Commission against Racism and Intolerance on national legislation to combat racism and racial discrimination of 13 December 2002 and Art. 1 §1c Framework Decision 2008/913/JHA.

[27] European Court of Human Rights Perincek v. Switzerland, Judgment 15 October 2015, No. 280.

[28] Human Rights Committee: General comment No. 34. Article 19: Freedoms of opinion and expression. CCPR/C/GC/34, 12 September 2011, No. 48; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression Promotion and protection of the right to freedom of opinion and expression. United Nations General Assembly, A/74/486, 9 October 2019, 10.

[29] For a complete overview of European criminal code books in this respect see Venice Commission, *Blasphemy, insult and hatred: finding answers in a democratic society*, Strasbourg, Council of Europe, 2010, 149–228.

[30] Representantforslag 59 L (2014–2015) fra stortingsrepresentantene Anders B. Werp og Jan Arild Ellingsen, Dokument 8:59 L (2014–2015).

religious sensitivities.[31] Jurisprudence of the European Court of Human Rights in the last decades has dealt on various occasions with the relationship between freedom of expression and insulting or otherwise offensive public statements targeting religions and religious groups.[32] High profile cases (Muhammad cartoons in the Danish newspaper Jyllands-Posten and sometimes violent responses) have provoked ongoing debates on whether preference should be given to freedom of expression or to religious feelings (and their potential to raise conflicts).[33] These debates will likely persist as long as pluralism extends to the co-existence of social groups that differ significantly with respect to religiousness. Concepts of "rights of others" or "public order" will continue to serve as vehicles which accommodate religious feelings dependent on local religious sensitivities and perceptions whether religious peace is at stake.[34] Jurisprudence of the European Court of Human Rights, while insisting that "a religious group must tolerate the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith" at the same time requests that such statements do not incite to hatred or religious intolerance.[35] It is certainly difficult to draw a clear line between hostility on the one hand and hatred on the other, in particular when boiling down hatred to "statements … likely to arouse justified indignation" and conceding legislators wide margins of appreciation when interfering with freedom of expression which aims at "ensuring an atmosphere of mutual tolerance" and religious peace in societies.[36] And, it is also difficult to claim that free speech which offends, shocks and disturbs the State or any sector of the population must be protected [37] while holding that criminal law-based restrictions of speech are in order if someone is ridiculing religious beliefs.[38]

[31] Jeroen Temperman, Freedom of Expression and Religious Sensitivities in Pluralist Societies: Facing the Challenge of Extreme Speech, *Brigham Young University Law Review* 3 (2011), https://digitalcommons.law.byu.edu/lawreview/vol2011/iss3/7.

[32] European Court of Human Rights, İ.A. v. Turkey, Judgment,13 September 2005; Décision sur la Recevabilité de la requête no 18788/09 présentée par Jean-Marie Le Pen contre la France, 20 avril 2010; Belkacem v. Belgium, Application no. 34367/14, Judgment, 27 June 2017; E.S. v. Austria, Application no. 38450/12), Judgment, 25 October 2018.

[33] Paul Billingham – Matteo Bonotti, Introduction: Hate, Offence and Free Speech in a Changing World, *Ethical Theory and Moral Practice* 22 (2019), 531–537.

[34] European Court of Human Rights, Otto-Preminger-Institut v. Austria, Judgment, 20 September 1994, No. 56.

[35] E.S. v. Austria, Application no. 38450/12, Judgment, 25 October 2018, No. 52.

[36] E.S. v. Austria, Application no. 38450/12, Judgment, 25 October 2018, No. 53, 54.

[37] European Court of Human Rights Handyside v. The United Kingdom, Application no. 5493/72, Judgment, 7 December 1976, No. 49.

[38] Dominika Bychawska-Siniarska, *Protecting the Right to Freedom of Expression Under the European Convention on Human Rights*, Strasbourg, Council of Europe, 2017, 60.

Below a threshold of inciting hatred suited to disrupt social peace there should be no room for criminal law.[39]

Framework Decision 2008/913/JHA of the European Council of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law states that "Member States shall take the necessary measures to ensure that, in respect of offences other than those referred to in Articles 1 and 2 (incitement to violence etc.), racist and xenophobic motivation is either regarded as an aggravating circumstance or that such motivation may be taken into account when the courts determine the level of penalties". The issue of sentencing enhancements for hate motives (and the hate crime topic at large) was driven by hate crime debates and legislation spreading in the US since the early 1980s as well as reports on rapidly increasing numbers of hate crimes affecting in particular Western European countries after the collapse of the Iron curtain and at the beginning of the 1990s. Although the German sentencing statute (§46 Criminal Code) requests consideration of motives and motivation (in general) when imposing punishment, the statute was amended and racist, xenophobic motives are now explicitly mentioned (see also §33 No. 5 Austrian Criminal Code or Chapter 6, Section 5 No. 4 Finnish Criminal Code).

It is essentially the use of the offenders' motive which defines either the (hate) offence or serves as an aggravating factor enhancing the penalty provided for the generic crime. Hate crimes are set apart from other crime because they are perceived to have a special disruptive impact on the entire community (the victim belongs to) and society at large. This approach has triggered criticism pointing towards possible infringements of the basic right of "free speech" but also to serious conflicts with a harm-based theory of criminal punishment and the particular problem of grading motives with respect to their aggravating nature.[40] Furthermore, it has been convincingly argued that hate criminal law amounts to identity politics and that enforcement of such laws will rather raise intergroup tensions than reduce discrimination and hate.[41] Notorious problems are then associated with attempts of establishing hate motives and computing related hate crime statistics.[42]

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[39] Parliamentary Assembly Council of Europe: Blasphemy, religious insults and hate speech against persons on grounds of their religion. Recommendation 1805 (2007), No. 15, "national law should only penalise expressions about religious matters which intentionally and severely disturb public order and call for public violence".

[40] George Fletcher, Strafverschärfung bei aus Hass begangenen Verbrechen, zu einem problematischen Urteil des amerikanischen Supreme Court, *Strafverteidiger* 14 (1994), 105–106.

[41] James Jacobs – Kimberly Potter, *Hate Crimes. Criminal Law and Identity Politics*, New York, NY, OUP, 1998.

[42] Anke Glet, *Sozialkonstruktion und strafrechtliche Verfolgung von Hasskriminalität in*

Conclusions

Protection of human rights by means of criminal law is not just a paradox. Human rights are increasingly called upon when criminal law is lobbied for. And, criminal law justified with the goal of protecting human rights tends recently to interfere with sensitive issues, among them immigration, minorities, religion and gender. This lends the relationship between criminal law and human rights to politicization and intensive lobbying by various and diverse interest groups.

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EAST IS EAST, AND WEST IS WEST; AND NEVER THE TWO WILL MEET? A COMPARISON OF VALIDATED CRIME STATISTICS ACROSS EUROPE

Jan Van Dijk[1]

This paper presents comparative statistics on victimisation by common crime (thefts and assaults/muggings), homicide and organised crime/corruption in the four geographical regions of Europe (Northern, Western, Eastern and Southern) for the period 2006-2019. Results indicate that levels of common crime and homicide in the four regions have declined and somewhat converged between 2006 and 2019 but levels of organised crime have not, and remain significantly higher in Eastern and Southern Europe than elsewhere. The declining rates of common crime are interpreted as a bonus for increased economic integration and growth and improved private and public security across the regions. The findings on organised crime are interpreted as resulting from enduring deficits in the institutional capacities of several countries in the Southern and Eastern parts of Europe.

Introduction

My first encounter with Prof Károly Bárd was in the elevator of a hotel in Helsinki during one of the first international conferences organised by HEUNI in the 1970s. Somewhat patronizingly I complimented him with his contribution to the debate in impeccable English. He retorted that his proficiency in English was not so surprising since his mother was an English teacher. Over the years we have met at several HEUNI-based and other international conferences where he was for many years one of the few outstanding criminological scholars from the formerly socialist part of Europe. A suitable topic of my contribution to his Festschrift seems therefore a review of trends in various types of crime across Europe, the old continent. The key question to be addressed is whether trends in crime in the Western and Eastern parts of Europe have been converging or diverging over the past fifteen years.

[1] Fellow of the Netherlands Institute for the Study of Crime and Law Enforcement in Amsterdam. Emeritus professor in victimology, Tilburg University.

Measuring levels and trends of common crime

One the best ways to illustrate the limited value of statistics on police-recorded crime for comparative purposes are comparisons of levels of crime across Europe, such as those published in the European Sourcebook or by Eurostat. Overviews of such statistics invariably show that levels of crime are the highest in North-Western countries such as the Scandinavian countries, The United Kingdom and the Netherlands and the lowest in Central and Eastern Europe. Arguably the best indicator of recorded crime is the number of any type of crime (all offences) per capita since this rate is somewhat less compromised by differences in legal definitions in national criminal codes than rates of special categories of crime. According to the sourcebook the mean of all recorded offences was around 4.500 in 2016.[2] In England and Wales the rate was 8.000 and in Belgium, Denmark Finland, Germany and Sweden the rates were around 7.000. Also, Austria and the Netherlands scored above the mean with 6.000. In contrast, all larger, formerly socialist countries show rates far below the European mean (Bulgaria: 1450; Czech Rep: 2.000; Hungary: 3.000; Poland: 3.000; Russia: 1300; Ukraine: 1.400). Rates in Armenia, Azerbaijan and Georgia are all below 1.000.

As has been demonstrated by the latest round of surveys of the International Crime Victims Survey from around 2000 (ICVS), the true level of victimization by common crime does not differ much across Europe.[3] The relatively low levels of police-recorded crime in the East are largely due to low rates of reporting of crimes by the public related to reduced levels of trust between the public and the police and to less effective recording of such reports by the police.[4] The relative under-recording of crime in the East can perhaps partly be explained by relatively low rates of insurance of households in the East. However, it seems largely due to the enduring effects of the soviet style of policing prevailing in the East up till the collapse of the soviet empire. Higher rates of recorded crimes appear to be a valid indicator of post -soviet police reforms. From this perspective, Hungary and Poland with their rates of 3.000 emerge as the most successful early adopters of service-oriented policing in the former soviet bloc

It goes without saying that a proper assessment of levels and trends of crime requires the regular conduct of a standardized EU-wide victimization survey,

[2] Marcelo Aebi et al., *European Sourcebook of Crime and Criminal Justice Statistics*, Strasbourg, Lausanne, Council of Europe, University of Lausanne, 2017.

[3] Jan Van Dijk, *The world of crime: breaking the silence on problems of security, justice and development across the world,* Thousand Oaks, CA, Sage Publication, 2008.

[4] Jan Van Dijk, Procedural Justice for Victims in an International Perspective, in Gorazd Meško – Justice Tankebe (eds.), *Trust and Legitimacy in Criminal Justice; European perspectives,* New York, NY, Springer, 2015, 53–64.

modelled after the International Crime Victims Survey (ICVS)[5]. Unfortunately, draft legislation for such survey, named the EU Safety Survey (SASU), prepared by Eurostat in consultation with a group of European criminologists and statisticians, and duly pilot tested in several member states, was vetoed by the European Parliament in 2014 at the advice of a conservative party British EMP who inter alia argued, rather illogically, that no European survey was needed since the British Crime Survey (BCS) sufficed.

On the positive side, Gallup International has since 2005 included two rough items on experiences with crime in its annual World Poll[6]. These two items were: "Within the past twelve months, have you had money or property stolen from you or another household member (household theft) and "Within the past 12 months, have you been assaulted or mugged"? (Assault and street robbery). Although these two, partly overlapping, items fail to meet the international standards of a full-fledged victimization survey, the Gallup Poll is unprecedented in its coverage (160 countries worldwide) and periodicity (samples of one 1.000 per year per country). Within Europe alone half a million of persons have so far been interviewed.

Encouragingly, the combined rates of the two items were found to be fairly strongly correlated to the overall victimization rates of ten different types of crime of the ICVS in the 70 countries where both surveys had been conducted in recent years (P coefficient = + .62; n= 69)[7].

A second type of validated statistics on crime are the numbers of standardised homicide cases as collected by international organizations such as UNODC and WHO. As our source, we have taken the Global Study on Homicide of UNODC which covers the largest number of countries for the full period 2006-2019.[8]

Finally, we have constructed a three-item composite index measuring the extent of organised crime and corruption in a country which includes the item on experiences with racketeering and extortion of business executives from the Business Executives Surveys annually commissioned by the Davos World Economic Forum[9]. The other two items measure the extent of grand corruption as measured by GWP and Transparency International[10]. This index, modelled

5 Van Dijk, *The world of crime.*

6 Gallup, *Gallup World Poll Methodology*, 2020, www.fao.org/fileadmin/templates/ess/voh/Gallup_world_poll_methodology.pdf.

7 Jan Van Dijk – Paul Nieuwbeerta – Jacqueline Joudo Larssen, Global crime patterns: an analysis of survey data from 166 countries around the world, 2006-2019, *Journal of Quantitative Criminology* (2021).

8 UNODC, *Global Study on Homicide*, Vienna, UNODC, 2019.

9 WEF (World Economic Forum), *Executive Opinion Survey*, Geneva, World Economic Forum, 2020.

10 Transparency International, *Corruption Perceptions Index 2015: Data and Methodology*, 2015, https://www.transparency.org/cpi2015.

after the Composite Organized Crime Index[11] covers app. 150 countries for the period 2006-2019.

Results

Table 1 presents the results from the GWP surveys in the years 2006-2019 for the two items just described separately and combined for four European regions following the common UN classification (see table 2 for number of countries per region).

Table 1. Prevalence of victimization by Theft, Violence (Assault/Muggings) and Theft and/or Violence combined per European region[12]

Region	Theft (%)				Violence (Assault/muggings) (%)				Theft and/or Violence (%)			
	2006-2010	2011-2014	2015-2019	2006-2019	2006-2010	2011-2014	2015-2019	2006-2019	2006-2010	2011-2014	2015-2019	2006-2019
Europe	**11**	**12**	**9**	**11**	**4**	**3**	**3**	**4**	**16**	**10**	**12**	**14**
Northern Europe	13	11	9	11	3	--	3	3	16	--	11	13
Western Europe	11	13	11	12	4	--	4	4	15	--	15	15
Eastern Europe	13	11	8	11	4	3	2	3	17	10	11	13
Southern Europe	9	12	10	10	5	--	4	4	15	--	13	14

Over the full period the level of victimization by common crime has not differed much across the four regions, with the highest rate in Western Europe (15). Table 2 presents the estimated linear change in percentage point changes between 2006 and 2019.

[11] Jan Van Dijk, Mafia markers: Assessing organized crime and its impact upon societies, *Trends in organized crime* 10 (2007), 39–56; Van Dijk, *The world of crime.*

[12] Gallup, Gallup World Poll 2006-2019, https://www.gallup.com/analytics/318875/global-research.aspx; Van Dijk et al., Global crime patterns.

Table 2. Estimated linear change in Theft and/or Violence 2006-2019 – per European region[13]

	Theft (%)		Violence (%)		Theft and/or Violence (%)	
	Change	N. of	Change	N. of	Change	N. of
	2006-2019	countries	2006-2019	countries	2006-2019	countries
Region	%p.	N.	%p.	N.	%p.	N.
Europe	**-2,8**	**40**	**-0,02**	**40**	**-4,2**	**40**
Northern Europe	-5,3	10	-0,01	10	-6,1	10
Western Europe	-0,2	7	0,00	7	-0,3	7
Eastern Europe	-6,6	10	-0,02	10	-8,8	10
Southern Europe	0,6	13	-0,03	13	-1,3	13

For both items combined the European rate shows a decrease of 4,2 percentage point. The four regions show considerable variation in the movement of the rates. Eastern Europe and Northern Europe have experienced the most significant falls in the level of crime. In Western and Southern Europe the downward movement has been much smaller. Since the rates were the highest in the early period of 2006-2010 in Eastern and Northern Europe the volumes of overall crime in the four regions have been converging somewhat over the past fifteen years.

Homicide and Organised Crime

Table 3 presents the numbers of recorded homicide cases per capita and the scores of the new index for organised crime/corruption for Europe and the for regions for the period 2006-2017.

[13] Gallup World Poll 2006-2019; Van Dijk et al., Global crime pattern.

Table 3 Homicides per 100.000 inhabitants and scores on the index for organised crime/corruption and estimated linear changes over time[14]

	Homicide (per 100.000 inh.)						Organised Crime (Scale: 0-100)					
	Prevalence				Change	N. of	Prevalence				Change	N. of
	2006-2010	2011-2014	2015-2017	2006-2017	2006-2017	countries	2007-2010	2011-2014	2015-2017	2007-2017	2007-2017	countries
Region	Rate	Rate	Rate	Rate	%p.	N.	0-100	0-100	0-100	0-100	%p.	N.
Europe	**2**	**2**	**2**	**2**	**-1,1**	**40**	**46**	**48**	**47**	**47**	**1,1**	**40**
Northern Europe	3	2	2	2	-1,2	10	28	29	28	28	0,5	10
Western Europe	1	1	1	1	-0,3	7	26	27	29	27	3,6	7
Eastern Europe	4	3	3	3	-2,0	10	65	64	63	64	-2,4	10
Southern Europe	2	2	1	2	-0,7	13	58	60	61	60	3,0	13

Table 3 shows that homicide rates are higher in Northern and Eastern Europe. This distribution does not mirror the one of victimisation by assaults/muggings presented in table 1. The trends show the largest decreases in just these two regions, indicating once again convergence over time.

The results on organised crime/corruption present a strikingly different picture. The level of organised crime/corruption is twice as high in Eastern and Southern Europe than in the two other regions. The estimated linear change shows an increase of 1 percentage point. This type of crime does not follow the general downward trends of common crime reflected in tables 1 and 2. Only in Eastern Europe a slight decrease has been measured. The variation in change over time does not point at convergence between the North West and the South East parts of Europe.

Finally, we have put together an overview of the results on the three types of crime investigated, common crime, homicides and organised crime for the world (159 countries) and for Europe (40 countries) and its four regions separately.

[14] Van Dijk et al., Global crime pattern.

Table 4 Victimisation by common crime, homicide rates and scores on an index for organised crime/corruption worldwide, in Europe and four European regions[15]

	Common crime	Homicide	Organized crime/corruption
Europe	**15,4**	**2,2**	**43,7**
Northern Europe	15	2,4	26,8
Western Europe	16,4	0,9	24,9
Eastern Europe	14,9	3,9	63,6
Southern Europe	15,3	1,6	59,4
World	21,1	6,1	47,8

Table 4 shows that the European level of common crime lies somewhat below the global mean. The global homicide rate is three times higher than the European mean. The European mean score on the index for organised crime/corruption is close to the global mean. The mean scores of Eastern and Southern Europe lie above the global mean.

Discussion

The results on victimisation by common crime and homicide indicate a fairly uniform pattern for Europe with modest decreases in all regions. Due to relatively large falls in Eastern Europe existing variation in these types of crime have been reduced. From a global perspective, the European means are unremarkable. It goes beyond the scope of this paper to aim at a comprehensive interpretation of these results. Two factors are likely to have driven the European downward trends and further harmonization: increased socio-economic growth and integration and improvements in both private and public security measures.[16]

As said, the results on organised crime/corruption present a different picture. Globally, the mean score of Europe is closer to the world average than for the other forms of criminality. In this domain no downward trend can be observed in Europe and neither are there any signs of convergence between the Northern and Western countries and those in the South and East. According to our analysis of the global data, the most powerful driver of levels of organised crime/

[15] Van Dijk et al., Global crime pattern.

[16] Jan Van Dijk – Andromachi Tseloni – Graham Farrell (eds.), *The International Crime Drop: new directions in research,* London, Palgrave MacMillan, 2012.

corruption is institutional capacity. Organised crime/corruption is more prevalent in countries where state institutions and the rule of law are comparatively weak.[17] This institutionalist perspective goes some way in explaining the existing diagonal divide in Europe in mafia-type activities between the less affected North-West and more affected South East. For a discussion of the implications of security problems for sustainable development see Van Dijk[18] (2008) and World Bank[19] (2011).

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[17] Daron Acemoglu – Giuseppe De Feo – Giacomo De Luca, Weak States: Causes and Consequences of the Sicilian Mafia, *MIT Department of Economics Working Paper* 10 (2017); Van Dijk et al., Global crime patterns.

[18] Van Dijk, *The world of crime.*

[19] World Bank, World Development Report 2011: Conflict, Security and Development, Washington, DC, World Bank, 2011.

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DIE EUROPÄISCHEN STRAFVOLLZUGSGRUNDSÄTZE IN DER 2020 ÜBERARBEITETEN FASSUNG

Frieder Dünkel[1]

Vorbemerkung

Károly Bárd habe ich in den 1980er Jahren in verschiedenen Gremien des Europarats, ferner bei kriminologisch-strafrechtlichen Konferenzen in meiner Freiburger Zeit am MPI kennen- und schätzen gelernt. 1991 waren wir beide in Straßburg Berichterstatter bei der Konferenz zur Behandlung Heranwachsender im (Jugend-) Strafrecht in Europa,[2] ein Thema, das inzwischen durch neue soziologische, entwicklungspsychologische und nicht zuletzt neurowissenschaftliche Erkenntnisse erheblich an Brisanz gewonnen hat.[3] Er repräsentierte stets die aufgeklärte, menschenrechtsorientierte Wissenschaft in Ungarn und hatte zugleich das Geschick, seine wissenschaftlich fundierten Überzeugungen national wie international in die Kriminalpolitik erfolgreich einzubringen. Dafür und generell für sein herausragendes Engagement für die Menschenrechte im Bereich des Straf- und Strafverfahrensrechts sei ihm gerade in der heutigen nicht immer evidenz- und faktenbasierten Zeit gedankt und zugleich zu seinem Jubiläum gratuliert.

Zur Geschichte und dem internationalen Menschenrechtskontext der Europäischen Strafvollzugsgrundsätze (European Prison Rules, EPR)

Die Europäischen Strafvollzugsgrundsätze wurden 2006 vom Ministerkomitee des Europarates verabschiedet.[4] Sie sind das Kernstück strafvollzugsrechtlicher Men-

[1] Emeritierter Professor, Forschungsstelle Kriminologie, Rechts- und Staatswissenschaftliche Fakultät, Universität Greifswald.

[2] Council of Europe, *Young adult offenders and crime policy. Proceedings.Reports presented to the 10th Criminological Colloquy (1991),* Strasbourg, Council of Europe, 1994.

[3] Frieder Dünkel – Bernd Geng – Daniel Passow, Erkenntnisse der Neurowissenschaften zur Gehirnreifung („brain maturation") – Argumente für ein Jungtäterstrafrecht, *Zeitschrift für Jugendkriminalrecht und Jugendhilfe* 28 (2017), 123–129.

[4] Vgl. Council of Europe, *European Prison Rules*, Strasbourg, Council of Europe Publishing, 2006; hierzu die Kommentierungen von Frieder Dünkel – Christine Morgenstern – Juliane Zolondek, Europäische Strafvollzugsgrundsätze verabschiedet!, *Neue Kriminalpolitik* 3

schenrechtsstandards des Europarats, der in zahlreichen weiteren Empfehlungen Grundsätze zu Detailfragen des Strafvollzugs und von ambulanten Sanktionen oder Maßnahmen entwickelt hat. Dabei ging es häufig um bestimmte Problemgruppen oder aktuelle Problemlagen wie zuletzt „gefährliche" Gefangene, die Situation von Kindern inhaftierter Eltern und Fragen einer familienfreundlichen Vollzugsgestaltung, Ausländer im Vollzug, den übermäßigen Gebrauch der Untersuchungshaft oder die Überbelegung im Strafvollzug und Wege der Reduzierung von Gefangenenraten.[5]

Die Veröffentlichung des „Compendiums" zu den bisherigen Empfehlungen[6] erfolgte aus Anlass der zum 1.7.2020 vom Ministerkomitee verabschiedeten revidierten Fassung der Europäischen Strafvollzugsgrundsätze, die allerdings nur eine teilweise Überarbeitung darstellt, insbesondere mit Konkretisierungen bzw. Einschränkungen zum Bereich der Absonderung und Einzelhaft.[7] Dies bedeutet aber zugleich, dass der Europarat hinsichtlich der überwiegend beibehaltenen bzw. übernommenen Grundsätze keinen Überarbeitungsbedarf gesehen hat.

Die Europäischen Strafvollzugsgrundsätze haben keinen Gesetzescharakter, aus ihnen können die Gefangenen keine subjektiven Rechte und Pflichte ableiten.[8] Vielmehr haben sie den Charakter einer Empfehlung (sog. soft-law). Sie berücksichtigen vor allem die Ergebnisse und Erkenntnisse der Inspektionen des Anti-Folter-Komitees und die daraus entwickelten CPT-Standards,[9] die Rechtsprechung

(2006), 86–88.; Dirk van Zyl Smit, Humanising Imprisonment: A European Project, *European Journal on Criminal Policy and Research* 12 (2006), 107–120.; Frieder Dünkel, Die Europäischen Strafvollzugsgrundsätze von 2006 und die deutsche Strafvollzugsgesetzgebung, *Forum Strafvollzug* 61 (2012), 141–149.

5 Die entsprechenden Empfehlungen sind auf der Internetseite des Europarats zugänglich (www.coe.int) und in dem „Compendium of conventions, recommendations and resolutions relating to prisons and community sanctions and measures" (Council of Europe, *Compendium of conventions, recommendations and resolutions relating to prisons and community sanctions and measures*, Strasbourg, Council of Europe Publishing, 2020) übersichtlich zusammengestellt.

6 Council of Europe, *Compendium of conventions.*

7 Vgl. Council of Europe, *Recommendation Rec(2006)2-rev of the Committee of Ministers to member States on the European Prison Rules*, Strasbourg, Council of Europe, 2020; hierzu Dirk van Zyl Smit, Separation and solitary confinement in the revised 2020 European Prison Rules – First thoughts, *Penal Reform Blog* (10.07.2020), https://www.penalreform.org/blog/separation-and-solitary-confinement-in-the-revised-2020/; Eva K. Debus, *Konzeptionen ausgewählter deutscher Bundesländer zum Umgang mit besonders sicherungsbedürftigen Gefangenen*, Mönchengladbach, Forum Verlag Godesberg, 2020, 75 f.; zu weiteren Änderungen in einzelnen Detailbereichen s. unten 4.

8 Frank Arloth – Horst Krä, S*trafvollzugsgesetze*, Bund und Länder. 4. Aufl., München, C.H.Beck, 2017, Einleitung D, Rn. 11; Debus, *Konzeptionen*, 74.

9 Vgl. van Zyl Smit, Humanising Imprisonment; Council of Europe, *Einzelhaft für Gefangene, Auszug aus dem 21. Jahresbericht des CPT*, Strasbourg, Council of Europe, 2011, 2, https://rm.coe.int/16806fa178.

des Europäischen Gerichtshofs für Menschenrechte (EGMR) sowie Resolutionen des Europäischen Parlaments zur Gewährleistung der Menschenrechte in den Vollzugseinrichtungen.[10] Trotz ihres bloßen Empfehlungscharakters sind sie in der Praxis faktisch zum Prüfungsmaßstab für nationales Recht geworden, indem sie in der Rechtsprechung des EGMR und in der Inspektionspraxis des Anti-Folter-Komitees argumentativ herangezogen werden.[11] Eine Entscheidung des deutschen Bundesverfassungsgerichts[12] führte auf nationaler Ebene ebenfalls dazu, dass die Landesparlamente bei der Verabschiedung von Landesstrafvollzugsgesetzen auf die Europäischen Strafvollzugsgrundsätze Bezug nahmen.[13] In der Entscheidung zur Verfassungsmäßigkeit der seinerzeitigen rechtlichen Regelung des Jugendstrafvollzugs führte das BVerfG dazu aus:

> *„Auf eine den grundrechtlichen Anforderungen nicht genügende Berücksichtigung vorhandener Erkenntnisse oder auf eine den grundrechtlichen Anforderungen nicht entsprechende Gewichtung der Belange der Inhaftierten kann es hindeuten, wenn völkerrechtliche Vorgaben oder internationale Standards mit Menschenrechtsbezug, wie sie in den im Rahmen der Vereinten Nationen oder von Organen des Europarates beschlossenen einschlägigen Richtlinien oder Empfehlungen enthalten sind …, nicht beachtet beziehungsweise unterschritten werden …".*[14]

Damit wurden die grundsätzlich „weichen" Regelungen bzw. Empfehlungen erheblich aufgewertet und unmittelbar zum Prüfungsmaßstab nationalen Rechts, zumindest in Deutschland.

Bekräftigung der 2006 etablierten Grundsätze

Ebenso wichtig wie die neu gefassten und erweiterten Grundsätze sind die mit der Revision 2020 *bestätigten* Grundsätze, die als nicht reformbedürftig angesehen wurden.

Zur Erinnerung: Die EPR 2006 hatten im Vergleich zu den Vorgängerregelungen erstmals sog. Grundprinzipien (*Basic principles*) formuliert.[15]

[10] Dünkel et al., Europäische Strafvollzugsgrundsätze verabschiedet! *Neue Kriminalpolitik*, 86; zur Rspr. des EGMR vgl. Dirk van Zyl Smit – Sonja Snacken, *Principles of European Prison Law and Policy*, Oxford, OUP, 2009; Gaëtan Cliquennois – Sonja Snacken, European and United Nations monitoring of penal and prison policies as a source of an inverted panopticon?, *Crime, Law and Social Change* 70 (2018), 1– 8.

[11] AK-*Feest/Lesting/Lindemann* 2017, Teil I, Rn. 10.

[12] BVerfGE 116, 69 ff (= NJW 2006, S. 2093 ff.).

[13] AK-*Feest/Lesting/Lindemann* 2017, Teil I, Rn. 10.

[14] Vgl. BVerfGE 116, 90 = NJW 2006, S. 2097.

[15] Vgl. dazu bereits Dünkel – Morgenstern – Zolondek, Europäische Strafvollzugsgrundsätze verabschiedet!; Dünkel, Die Europäischen Strafvollzugsgrundsätze, 141 ff.

Einige Regelungen sind dem deutschen Leser aus der Dogmatik des Strafvollzugsgesetzes von 1977 und den entsprechenden nach 2006 verabschiedeten Landesgesetzen vertraut (z. B. der Gesetzesvorbehalt in Nr. 2, der Verhältnismäßigkeitsgrundsatz in Nr. 3 oder der Wiedereingliederungsgrundsatz in Nr. 6[16]), jedoch sind sie gelegentlich moderner gefasst. So bezieht sich der Angleichungsgrundsatz in Nr. 5 nur auf die *positiven* (man könnte auch sagen „sozialstaatlichen") Aspekte des Lebens in Freiheit, womit eine Angleichung an unzulängliche Systeme in Freiheit, z. B. der Gesundheits- und Sozialfürsorge, nicht angestrebt werden soll.

Ein kleiner, aber nicht unbedeutender Unterschied zu den früheren Fassungen der EPR war, dass in Nr. 1 nicht nur auf die Wahrung der *Menschenwürde* Bezug genommen, sondern die Achtung der *Menschenrechte insgesamt* hervorgehoben wird. Die EPR betonten 2006 in besonderem Maß die Bedeutung des Vollzugspersonals (das „eine wichtige öffentliche Dienstleistung erbringt") und die Zusammenarbeit mit externen sozialen Diensten bzw. die Einbeziehung der Zivilgesellschaft. Es geht demgemäß auch um die Verantwortung der Gesellschaft für die Wiedereingliederung. In diesem Zusammenhang sind auch Inspektionen und „Monitoring" (Rule 9 und Teil VI) von besonderer Bedeutung.

Eine wichtige Regelung zur „Qualitätssicherung" stellt Rule 4 dar, die eine mit Kostenargumenten begründete Absenkung von Lebensstandards auf ein menschenrechtswidriges Niveau ausdrücklich untersagt. *Van Zyl Smit* betont in diesem Zusammenhang, dass eine Kriminalpolitik, die mehr Gefangene „produziert", als das Gefängnissystem auf humane Weise unterzubringen vermag, zu ändern ist und sich die Gefangenen mit den unerträglichen Haftbedingungen der Überbelegung nicht abfinden müssen.[17]

Aus Raumgründen kann auf die unverändert gebliebenen Grundsätze der EPR nicht näher eingegangen werden. Ein wichtiger Aspekt soll aber dennoch genannt werden, weil er durch eine weitere aktuelle Empfehlung des Europarats stark aufgewertet wurde. In der CM/Rec (2018) 5 zu Kindern inhaftierter Eltern wurden Grundsätze einer familienfreundlichen Gestaltung des Strafvollzugs

[16] Die EPR bekennen sich eindeutig zur Wiedereingliederung als alleinigem Vollzugsziel und sind insofern konform zur Rspr. des deutschen BVerfG, das die Aufgabe des Schutzes der Allgemeinheit dem Resozialisierungsgrundsatz unterordnet, so auch die „ganz h. M." in der Literatur, vgl. zusammenfassend L/N/N/V-*Neubacher* 2015, B, Rn. 26–38, 28.

[17] Vgl. van Zyl Smit, Humanising Imprisonment, 11. In diesem Sinne hat der Europarat mit seiner Empfehlung R (1999) 22 „concerning Prison Overcrowding and Prison Population Inflation" konkrete Maßnahmen zur Reduzierung der Gefängnispopulation vorgeschlagen und – wie auch bereits der EGMR (s. den berühmten Fall *Kalashnikov vs. Russia* aus dem Jahr 2002, hierzu van Zyl Smit – Snacken, Principles of European, 2009, 32 f., 88 f.) – betont, dass die Überbelegung im Strafvollzug eine „inhumane und erniedrigende Behandlung" und damit Verletzung von Art. 3 EMRK darstellen kann.

weiter ausdifferenziert.[18] Die *Aufrechterhaltung sozialer Bindungen* durch Besuchskontakte und Lockerungen gehört zu den wesentlichen Faktoren des Wiedereingliederungsprozesses, und aus der sog. Desistance-Forschung wissen wir, das positive familiäre Bindungen oder Partnerschaften den Ausstieg aus der Kriminalität erleichtern bzw. begünstigen können.[19]

Neu gefasste Regelungen in den EPR 2020 – Besondere Sicherheitsmassnahmen und Einzelhaft (Isolation)

Die Neufassung der Europäischen Strafvollzugsgrundsätze von 2020 beinhaltet vor allem detailliertere Vorschriften zu Sicherheitsmaßnahmen und dabei insbesondere die Regelung zur Isolation von Gefangenen, die schon in der Fassung von 2006 im Hinblick auf die Unterbringung in Hochsicherheitsanstalten oder -abteilungen „auf Extremfälle" beschränkt werden sollten.

Anlass für die Überarbeitung der EPR 2020 waren u. a. die in den sog. *Nelson-Mandela-Rules* der Vereinten Nationen von 2015 im Vergleich zu den EPR 2006 ausformulierten stärkeren Restriktionen[20] und die vom Komitee zur Verhütung von Folter und unmenschlicher oder erniedrigender Behandlung (*CPT*) aufgestellten Mindeststandards bzgl. der Isolierung (Einzelhaft) von Gefangenen.

Die *Mandela-Rules* enthalten Regelungen in Bezug auf jede Art der unfreiwilligen Isolierung, wie Absonderungen oder Einzelhaft. Sie besagen u. a., die Vorschriften dass zu den allgemeinen Lebensbedingungen, z. B. zu Bewegung und Sport ausnahmslos auch für besonders sicher untergebrachte Gefangene gelten sollen. Sie untersagen die zeitlich unbestimmte (Regel 43a) oder Langzeit-Einzelhaft („*prolonged solitary confinement*", Regel 43b). Regel 44 definiert die Einzelhaft als „die Absonderung eines Gefangenen für mindestens 22 Stunden pro Tag", die Langzeit-Einzelhaft als „eine mehr als 15 aufeinanderfolgende Tage währende Einzelhaft". Regel 45.1 der Mandela-Rules lässt Einzelhaft (*solitary confinement*) nur ausnahmsweise als „letztes Mittel" und für die kürzest mögliche Dauer mit der

[18] Vgl. hierzu Frieder Dünkel, Ehe- und familienfreundliche Gestaltung des Strafvollzugs. Rechtliche und rechtstatsächliche Entwicklungen in Deutschland in Ruch, Andreas – Singelnstein, Tobias (Hrsg.), *Auf neuen Wegen – Kriminologie, Kriminalpolitik und Polizeiwissenschaft aus interdisziplinärer Perspektive. Festschrift für Thomas Feltes zum 70. Geburtstag*. Berlin, Duncker & Humblot, 2021, 545–559.

[19] Vgl. Ineke Pruin, *Die Entlassung aus dem Strafvollzug: Strukturen und Konzepte für einen gelingenden Übergang in ein deliktfreies Leben im europäischen Vergleich,* Mönchengladbach, Forum Verlag Godesberg, 2022.

[20] United Nations Office on Drugs and Crime, *United Nations Standard Minimum Rules for the Treatment of Prisoners (The Mandela Rules)*, 2015, www.un.org/ga/search/view_doc.asp? symbol=A/C.3/70/L.3.

Maßgabe zu, dass die betroffenen Gefangenen einen Anspruch auf eine rechtliche Überprüfung haben müssen.

Die *CPT-Standards* stellen fest, dass es eine kleine Gruppe an Gefangenen in jedem Land geben dürfte, die ein hohes Sicherheitsrisiko darstellten und besonders sicher untergebracht werden müssten. Das CPT schlägt vor, als Ausgleich zu den strengen Haftbedingungen ein intern „relativ gelockertes Regime" anzuwenden und vielfältige Aktivitäten sowie Kontakte zu Mitgefangenen zu gestatten. Die hoch gesicherte Unterbringung soll nur so lange wie zwingend notwendig aufrecht erhalten werden.[21]

Im *21. Jahresbericht des CPT* wurden diese Grundsätze nochmals weiter präzisiert. Einzelhaft kann „extrem schädigende Auswirkung auf die geistige, körperliche und soziale Gesundheit der Betroffenen haben"[22]. Dementsprechend ist sie auf „ein absolutes Minimum" zu begrenzen. Die zu beachtenden Prinzipien der Verhältnismäßigkeit (im Hinblick auf Anlass und Dauer), der Rechtmäßigkeit (Gesetzesvorbehalt), der Nachvollziehbarkeit (Begründungspflicht und aktenmäßige Dokumentation), der Notwendigkeit (Begründung jeglicher zusätzlicher Einschränkungen von Grundrechten als Nebenwirkung der Einzelhaft, z. B. kein automatischer Entzug von Besuchen u. a. Kontakten mit der Außenwelt) und der Nichtdiskriminierung verdeutlichen dieses Bemühen des CPT, jegliche Form der Einzelhaft bzw. Isolierung von Gefangenen zu minimieren.[23] Einzelhaft kann zulässig sein als Disziplinarstrafe, nach Auffassung des CPT für maximal 14 Tage, bei Jugendlichen in jedem Fall kürzer, ferner als Präventivmaßnahme bei gefährlichen Gefangenen (z. B. zum Schutz von anderen Gefangenen und Bediensteten). Die materiellen Haftbedingungen (Zellengröße, ausreichendes Tageslicht, Belüftung und Ausstattung) sollten die gleichen Mindeststandards erfüllen wie normale Hafträume.[24]

Vor diesem Hintergrund wird die weitergehende Ausdifferenzierung und Präzisierung der Vorschriften zu besonderen Sicherheitsmaßnahmen und der Einzelhaft (Isolierung von Gefangenen) in der *Aktualisierung der EPR* im Jahr 2020 verständlich.

Die Nummern 51.1-53.9 der EPR 2020 erfassen Vorschriften zu den besonderen Sicherungsmaßnahmen, aber auch zur Sicherheit allgemein.[25]

Die Sicherungsmaßnahmen (*security*) sind „auf das zur Erreichung der sicheren Unterbringung (der Gefangenen) notwendige Mindestmaß zu beschränken" (Nr.

[21] Council of Europe, *Entwicklungen der CPT-Standards bezüglich Gefängnishaft – Auszug aus dem 11. Jahresbericht des CPT*, 2001, 6, https://rm.coe.int/16806cd23b.

[22] Council of Europe, *Entwicklungen der CPT-Standards bezüglich Gefängnishaft*, 1.

[23] Council of Europe, Entwicklungen der CPT-Standards bezüglich Gefängnishaft, 2 f.

[24] Council of Europe, Entwicklungen der CPT-Standards bezüglich Gefängnishaft, 4 ff.

[25] Vgl. hierzu auch Debus, *Konzeptionen*, 73 ff.

51.1). Einrichtungen der baulichen oder technischen Sicherheit sind durch den Einsatz von geschulten Bediensteten zu ergänzen[26] (Regel 51.2). Die Gefangenen werden ihrer Risikoeinstufung entsprechend, angemessen untergebracht.

Die Regeln 52.1 bis 52.5 sind unter der Kategorie Sicherheit (*safety*) zusammengefasst. Die Gefangenen sind nach der Aufnahme auf die Gefahr für sich oder Dritte zu untersuchen. Den Gefangenen soll eine Teilnahme am Anstaltsalltag ermöglicht werden. Die EPR 2006 hatten Maßnahmen der *security* ebenso wie der *safety* generell restriktiv gestalten wollen, dabei aber nicht präzisiert, unter welchen Bedingungen diese Anwendung finden können.

Die 2020 neu formulierten Regeln 53.1-53.9. umfassen besondere (Hoch-) Sicherheitsmaßnahmen und die ergänzenden Regelungen des 53A betreffen Fragen der Absonderung bzw. Einzelhaft. Sie dürfen nur ausnahmsweise und mit zeitlicher Beschränkung und Erlaubnis des Fachministeriums angeordnet werden. Ebenfalls ergänzt und weiter differenziert wurde die Einzelhaft im Rahmen disziplinarischer Bestrafung (vgl. die Regeln 60.6a-f).

Nach Regel 53.1 i. d. F. vom 1.7.2020 sind (Hoch)Sicherheitsmaßnahmen nur zulässig, wenn Gefangene eine besondere Gefährdung für die Sicherheit darstellen. Sie dürfen nur in Ausnahmefällen angeordnet werden und nur solange als die Sicherheit durch weniger eingriffsintensive Maßnahmen *nicht* gewährleistet werden kann (Regel 53.2). Diese Maßnahmen können auch die Absonderung (*separation*) betreffen Die Arten von Sicherheitsmaßnahmen, ihre Dauer und die zulässigen Anlassgründe sind durch die nationale Gesetzgebung festzulegen (Regel 53.4). Die anordnende Vollzugsbehörde muss die Dauer der Maßnahme schriftlich festlegen und dem Gefangenen eine Kopie der Entscheidung samt Rechtsmittelbelehrung aushändigen (Regel 53.5). Sicherungsmaßnahmen dürfen nur im individuellen Einzelfall (nicht gruppenbezogen) auf der Basis einer aktuellen Risikoeinschätzung und verhältnismäßig bezogen auf das Risiko angeordnet werden (Regeln 53.7 und 53.8).

Zur Absonderung enthält Regel 53A einige Spezifizierungen. Eine bedeutsame Erweiterung gegenüber 2006 ist, dass nunmehr alle Formen der Absonderung erfasst werden. Gefangene, die von anderen Gefangenen abgesondert werden, haben einen Anspruch auf mindestens zwei Stunden Kontaktzeit pro Tag mit anderen Gefangenen, mit Bediensteten oder Besuchern (Regel 53A.a.: „*meaningful human contact*"). Der Haftraum muss den Standards der Unterbringung in normalen Hafträumen entsprechen. Mit zunehmender Dauer der Absonderung müssen kompensatorische Maßnahmen zur Minderung negativer Effekte der Einzelhaft

[26] Der Einsatz von Bediensteten wird unter dem Stichwort der „dynamischen Sicherheit" gesehen, die Sicherheit durch Vertrauen und intensive Beziehungsarbeit herstellt (Nr. 51.2: „*… shall be complemented by the dynamic security provided by an alert staff who know the prisoners under their control*").

ergriffen werden, wie z. B. zusätzliche Kontaktzeiten und andere Aktivitäten. Der Hofgang im Freien ebenso wie die Zurverfügungstellung von Lesematerial sind unabdingbar, auch das Recht, Beschwerden und Rechtsmittel einzulegen.

Die Einzelhaft als Disziplinarmaßnahme ist nunmehr in Regel 60.6.a.-f. detaillierter geregelt. Bedauerlicherweise gilt für diese Form der Isolierung von Gefangenen das Gebot von mindestens zwei Stunden „bedeutsamen menschlichen Kontakts" (s. o.) nicht. Es bleibt insoweit bei der einen Stunde Aufenthalt im Freien, die nicht notwendig soziale Kontakte beinhalten muss. Ebenfalls zu kritisieren ist, dass die Europäischen Strafvollzugsgrundsätze es erneut versäumt haben, eine absolute Höchstgrenze für die disziplinarische Einzelhaft festzulegen.[27] Das CPT hatte – wie erwähnt – ein Maximum von 14 Tagen für geboten gehalten, die Mandela-Rules gehen von maximal 15 Tagen aus (s.o.).

Weitere Neuregelungen der EPR 2020

Abgesehen von dem Hauptanliegen der Revision der EPR bzgl. Absonderung und Einzelhaft gibt es 7 nachfolgend behandelte weitere Bereiche mit substantiellen Änderungen:

Aktenführung und -verwaltung

Zur *Aktenführung und -verwaltung* sind einige ergänzende Regelungen zu den Rules 14.-16. eingefügt worden. So sind bei der Aufnahme jenseits der in Rule 15.1a.-f. genannten Daten der Gefangenen (Identität, Grund und Zeitpunkt der Aufnahme, persönliche Habe, erkennbare Verletzungen oder Gesundheitsprobleme) auch die Namen von Kontaktpersonen, die bei Notfallsituationen (Tod, Verletzungen, Krankheiten) zu benachrichtigen wären, ebenso wie die Zahl der Kinder und ihrer (gesetzlichen) Betreuer aktenmäßig festzuhalten.

Neu hinzugefügt wurde Rule 16A, die sich mit der Aktualisierung der in den Akten bei der Aufnahme (Rule 15) oder alsbald nach der Aufnahme (Rule 16) erhobenen Daten befasst (Rule 16A.1). Rule 16A.2 sieht zusätzlich vor, dass alle Gefangenenakten Informationen zu dem zugrundeliegenden Justizverfahren, individuelle Vollzugspläne mit Details zur geplanten Entlassungsvorbereitung und Entlassung, das Verhalten im Vollzug („*behaviour and conduct*") einschließlich einer Risikoeinschätzung bzgl. Selbst- und Fremdgefährdungen, die Absonderung und Anordnung von Einzelhaft sowie disziplinarische Sanktionen, angewendete Zwangsmaßnahmen, Durchsuchungen, insbesondere körperliche

[27] Zur Kritik van Zyl Smit, Humanising Imprisonment, 3 f.

Durchsuchungen, jegliche Verlegungen und eine Liste der persönlichen Habe enthalten. Diese Informationen sollen grundsätzlich vertraulich behandelt werden und nur den gesetzlich Befugten zugänglich sein (Rule 16A.3). Grundsätzlich sollen Gefangene auch Zugang zu ihren Gesundheitsdaten haben und eine Kopie der entsprechenden Akten erhalten, es sei denn sicherheitsbezogene Vorschriften stehen dem entgegen (Rule 16A.4.).

Diese sehr viel detailliertere verbindliche Aktenführung reflektiert Regelungen der Nelson-Mandela-Rules, die auf die herausragende Bedeutung der Daten für evidenzbasierte Entscheidungen (der Vollzugsadministration und ggf. bei der bedingten Entlassung oder bei Rechtsschutzverfahren) hinweisen.[28]

Vollzug an weiblichen Gefangenen

Hinsichtlich des *Freiheitsentzugs an Frauen* wurde eine Grundsatznorm in Rule 34.1 hinzugefügt, die nicht nur – wie in den EPR 2006 betont – mögliche Diskriminierungen von Frauen vermeiden will (vgl. Rule 13), sondern die Entwicklung spezifischer „gender-sensitive policies" und positive Aktivitäten verlangt, um den besonderen Bedürfnissen weiblicher Gefangener bei der Anwendung der EPR zu entsprechen. Damit tragen die EPR den 2010 von den Vereinten Nationen verabschiedeten sog. Bangkok-Rules[29] Rechnung, die differenziert den Vollzug an weiblichen Gefangenen geregelt haben und auf die im Kommentar zu den EPR explizit verwiesen wird.[30]

Angesichts der häufig anzutreffenden Vorgeschichte von Gewaltopfererfahrungen und/oder sexuellen Missbrauchs, den weibliche Gefangene erlitten haben, wird in Rule 34.3 nunmehr die Zurverfügungstellung spezialisierter Hilfeleistungen

[28] Vgl. Council of Europe, *Recommendation Rec(2006)2-rev – Commentary.* Ministers' Deputies, CM Documents, CM(2020)17-add2, 1373rd meeting, 8 April 2020, 10 Legal questions, 10.2 European Committee on Crime Problems (CDPC), 2020, 7; „*The Nelson Mandela Rules also point out that good records can be used, amongst others, to generate reliable data about imprisonment trends and the characteristics of the prison population in order to create a basis for evidence based decision making (Rule 10).*"

[29] United Nations Office on Drugs and Crime, *United Nations Rules for the Treatment of Women Prisoners and Non custodial Measures for Women Offenders (the Bangkok Rules),* vom 21.12.2010, A/Res/65/229, Wien, UNODOC, 2011.

[30] Vgl. Council of Europe, *Recommendation Rec(2006)2-rev – Commentary,* 21; der Kommentar verweist im Übrigen auf vom CPT angemahnte weitere Aspekte einer geschlechterdifferenzierten Vollzugsgestaltung, vgl. *CPT Factsheet*: 'Women in prison' [CPT/Inf(2018) 5]; unter dem Stichwort des „*gender-sensitive prison management, staffing and training*" wird beispielsweise die Notwendigkeit einer gemischt-geschlechtlichen personellen Ausstattung und eines Spannungen reduzierenden, betont gewaltächtenden Umgangs mit den Insassen angemahnt (S. 6 f.).

einschließlich therapeutischer Angebote und ferner effektiver Rechtschutz besonders hervorgehoben.

Ausländer im Vollzug

Hinsichtlich des Vollzugs an *ausländischen Gefangenen* berücksichtigen die EPR eine weitere im Zeitraum nach 2006 verabschiedete spezielle Empfehlung, die „CM/Rec (2012) 12 concerning foreign prisoners". In Rule 37 wird ebenso wie für den Frauenvollzug nicht nur eine Vermeidung von Diskriminierungen gefordert, sondern es sollen positive Maßnahmen ergriffen werden, um den besonderen Bedürfnissen ausländischer Gefangener gerecht zu werden. Ebenfalls neu ist, dass Kontakte mit Personen außerhalb der Anstalt, insbesondere der Familie und Freunden, ferner der Bewährungshilfe und anderen kommunalen Dienstleistern aufrecht erhalten und entwickelt werden sollen.[31] Die vielfältigen Informationspflichten gegenüber ausländischen Gefangenen müssen in einer für sie verständlichen Sprache gegeben werden (Nr. 37.7) und schließlich wird betont, dass verurteilte ausländische Strafgefangene in gleichem Maß wie andere Gefangene die Möglichkeit einer bedingten vorzeitigen Entlassung haben sollen. Dies wird man dahingehend interpretieren müssen, dass damit eingeschlossen auch die einer bedingten Entlassung vorausgehenden Entlassungsvorbereitungsmaßnahmen (z. B. Vollzugslockerungen) vorzuhalten sind.

Arten und Anwendung von Zwangsmaßnahmen

Der *Gebrauch von Zwangsmaßnahmen* wurde in Rule 68 weiter präzisiert und zugleich eingeschränkt. Es dürfen nur die gesetzlich vorgesehenen Zwangsmittel unter strikter Berücksichtigung des Verhältnismäßigkeitsprinzips eingesetzt werden, und zwar sowohl hinsichtlich der Anwendungsvoraussetzungen, der Dauer und Intensität des Eingriffs. Handfesseln, Eisen und andere erniedrigende Zwangsmittel sind verboten.

Zwangsmittel dürfen niemals gegenüber Frauen während der Arbeit und während oder unmittelbar nach der Geburt eines Kindes angewendet werden

[31] Unter Hinweis auf die Rspr. des EGMR (vgl. *Labaca Larrea and Others v. France*, Nr. 56710/13, Entscheidung vom 07.02.2017 zu Art. 8 EMRK) und Forderungen des CPT wird hinsichtlich des Kontakts zu Angehörigen auf die Notwendigkeit von kostengünstigen Telefonmöglichkeiten einschließlich Videokommunikation, ggf. durch internetbasierte (kostenlose) Angebote verwiesen, vgl. Council of Europe, *Recommendation Rec(2006)2-rev – Commentary*, 24.

(Rule 68.7 unter Verweis auf Nr. 48.2 der Nelson Mandela Rules und Rule 24 der Bangkok Rules). Und schließlich wird gefordert, dass alle Zwangsmaßnahmen in einem Register eingetragen werden, womit eine gerichtliche Überprüfung ermöglicht bzw. erleichtert wird.

Beschwerden und Rechtsschutz

Die Regelungen über den *Rechtsschutz im Strafvollzug* wurden erheblich erweitert und konkretisiert. Aus den Regeln 70.1-7 wurden nicht weniger als 13 Unterregelungen (70.1-13). In Rule 70.1 wird nunmehr explizit auf einen Rechtsmittelweg zu einer unabhängigen, ggf. justizförmigen Rechtsmittelinstanz verwiesen, die zu einer Aufhebung der angefochtenen Entscheidung befugt sein muss („*to a judicial or other independent authority with reviewing and remedial power*"). Dies verdeutlicht den beabsichtigten verstärkten Rechtsschutz. Dieser wird in den Folgenormen weiter differenziert. Gefangene sind über Beschwerderechte und das Verfahren aufzuklären. Verfahren im Zusammenhang mit dem Tod oder Misshandlungen an oder von Gefangenen müssen unverzüglich strafrechtliche Ermittlungsverfahren nach sich ziehen.[32] Die beschleunigte Behandlung und effektive Mitwirkung des Gefangenen wird besonders hervorgehoben, auch die ggf. vertrauliche Behandlung von Gefangenenbeschwerden soll gewährleistet werden. Die Inanspruchnahme von Rechtsberatung bzw. Rechtsbeiständen wird gestärkt, ferner müssen auch schriftliche Beschwerden von Angehörigen der Gefangenen oder von Organisationen, die sich um Gefangene kümmern („*organisation concerned with the welfare of prisoners*") berücksichtigt werden. Die neu eingefügte Regelung, dass die Gefängnisverwaltung in einem Register alle Anträge und Beschwerden von Gefangenen dokumentieren muss, ist von erheblicher praktischer Bedeutung für die Arbeit von Inspektions- und Aufsichtsgremien.

Alles in allem wird deutlich, dass das Ministerkomitee des Europarats die Rechte und den Rechtsschutz von Gefangenen in etlichen Ländern als defizitär betrachtet. Die umfangreiche Dokumentation von kritischen Fällen nicht ausreichenden Rechtsschutzes im Kommentar zu den EPR 2020 anhand von Entscheidungen des EGMR und CPT-Standards aufgrund der Besuche in einigen Ländern belegt dies eindrucksvoll.[33]

[32] Die neue Rule 70.5 basiert auf verschiedenen Entscheidungen des EGMR und CPT-Standards, vgl. Council of Europe, *Recommendation Rec(2006)2-rev – Commentary,* 44 m. w. N.

[33] vgl. Council of Europe, *Recommendation Rec(2006)2-rev – Commentary*, 43-46.

Vollzugspersonal

Eine wichtige Neuerung wurde im Abschnitt über „*Prison management*" in Rule 83 eingefügt. Danach ist *ausreichendes Personal zu jeder Zeit* vorzuhalten, um die sichere und geschützte Unterbringung von Gefangenen zu gewährleisten. Auch in Ausnahmesituationen muss ausreichend Personal vorhanden sein, um möglichst schnell den Normalbetrieb wiederherstellen zu können.[34]

Aufsicht und Kontrolle („inspections" und „monitoring")

Rule 92 geht vom Grundsatz aus, dass Gefängnisse regelmäßig von staatlichen Gremien inspiziert werden sollen, um einen ordnungsgemäßen und nationalen wie internationalen Vorgaben entsprechenden Vollzug zu gewährleisten. Insoweit blieben die EPR 2006 unverändert. Stark erweitert wurden dagegen die Regelungen zu einer unabhängigen Kontrolle des Vollzugs in Rule 93. Dabei gehen die EPR davon aus, dass es eine Vielfalt von unabhängigen Gremien geben kann, von Ombudsleuten bis hin zu mit entsprechenden Funktionen ausgestatteten Strafrichtern oder nationalen Aufsichtskomitees o. ä.[35]. Sehr differenziert wird nunmehr aufgeführt, dass die unabhängigen Gremien uneingeschränkten Zugang zu allen Gefängnissen, Gefangenenpersonalakten und Registern über Gefangenenbeschwerden sowie sonstigen Datenquellen bzgl. der Haftbedingungen haben müssen. Auch unangemeldete Besuche auf Eigeninitiative und die Möglichkeit vertrauliche Gespräche mit Gefangenen zu führen sind zu gewährleisten. Eine Sanktionierung von Gefangenen, die Informationen gegeben haben, wird ausgeschlossen. Im Übrigen werden die unabhängigen Kontrollorgane praktisch dem CPT gleichgestellt, mit dem sie zusammenarbeiten sollen. Ferner haben sie wie das CPT das Recht, Empfehlungen an die nationale Vollzugsverwaltung zu machen, die in angemessenem Zeitraum über die getroffenen Aktionen berichten muss. Die Berichte der Kontrollgremien müssen veröffentlicht werden. Damit werden die nationalen Kontrollmechanismen und das System des „monitoring" insgesamt erheblich aufgewertet. Leitidee der Überarbeitung der EPR 2020 insoweit war, dass die Vereinten Nationen mit dem Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT-Mechanismus) eine

[34] Als Beispiel nennt der Kommentar die Situation eines Streiks von Vollzugsbediensteten, Naturkatastrophen oder zivile Unruhen außerhalb der Anstalt, die nicht dazu führen dürfen, dass Gefangene wegen Personalmangels über längere Perioden in ihren Zellen eingeschlossen werden, vgl. Council of Europe, *Recommendation Rec(2006)2-rev – Commentary*, 49.

[35] Vgl. Council of Europe, *Recommendation Rec(2006)2-rev – Commentary*, 51.

entsprechende Form nationaler Kontrollgremien gefordert hat, deren Arbeit mit dem CPT auf eine Ebene gestellt werden soll.[36]

Ausblick

Die Europäischen Strafvollzugsgrundsätze entwickeln sich mit der Neufassung von 2020 immer mehr zu einer Superkontrollinstanz in Menschenrechtsfragen in Europa. Dies umso mehr als sie im Kontext mit den Standards des Europäischen Komitees zur Verhinderung von Folter, erniedrigender oder inhumaner Behandlung (CPT), der Rechtsprechung des EGMR und von anderen Menschenrechtsinstrumenten, wie den sog. Nelson-Mandela-Rules der Vereinten Nationen, zu lesen sind, auf die die EPR in vielfältiger Weise Bezug nehmen.

Aus der Sicht der deutschen Strafvollzugsgesetzgeber gibt es Handlungsbedarf, da ein Unterschreiten der Vorgaben des Europarats und anderer Menschenrechtsinstrumente ein „Indiz" der Verfassungswidrigkeit beinhaltet (s. o. unter 1.).

Der unmittelbare Handlungsbedarf ergibt sich jenseits der Defizite insbesondere im Hinblick auf Sicherungsmaßnahmen und dabei bzgl. der Einzelhaft, Absonderung u.ä. Es bedarf einer gesetzlichen Normierung der Höchstdauer einer bei Unterbringung in Einzelhaft als Sicherungsmaßnahme entsprechend der europäischen Vorgaben von maximal 14 bzw. 15 aufeinander folgenden Tagen. Ferner der Absicherung einer intensiven medizinischen und personellen Betreuung während der besonders belastenden Unterbringung in Einzelhaft.

Notwendig ist ein gesetzliches Verbot der Fixierung, da die Möglichkeit der Fesselung ausreichend erscheint, die ihrerseits nur als *ultima ratio* zulässig sein sollte, da sie die Gefangenen in eine totale Hilflosigkeits- und Ohnmachtssituation bringt. Deshalb bedarf es weiterhin einer gesetzlichen Regelung der Höchstdauer bei Fesselungen und eine effektive Kontrolle der Einhaltung dieser Normen.[37]

Ergänzend wird man das Gebot einer maximalen Obergrenze von 14 oder 15 Tagen auch auf disziplinarische Isolierungen ausweiten müssen, da sie in den EPR weitgehend mit der sicherungsbezogenen Isolierung gleichgestellt werden. Für den Jugendstrafvollzug – so das CPT – müssen kürzere Obergrenzen gelten. Das hat zur Folge, dass alle Bundesländer (außer Brandenburg, das die disziplinarische

[36] Vgl. United Nations, General Assembly, Res. A/RES/57/199, angenommen am 18.12.2002; Deutschland hat dieses Abkommen 2008 ratifiziert und mit der Nationalen Stelle zur Verhütung von Folter ein entsprechendes Gremium geschaffen, vgl. hierzu Frieder Dünkel – Christine Morgenstern, The monitoring of prisons in German law and practice, *Crime, Law and Social Change* 70 (2018), 93–112, 103; zu den Jahresberichten der Stelle s. https://www.nationale-stelle.de/nationale-stelle.html.

[37] Debus, *Konzeptionen*, 237.

Isolierung in Form des Arrests abgeschafft hat) ihre Gesetze anpassen und die Höchstdauer des Arrests von bisher 4 auf zwei Wochen und im Jugendstrafvollzug von zwei Wochen auf eine Woche reduzieren müssen.

Darüber hinaus ist die Praxis gefragt, die Vollzugswirklichkeit mittels valider deskriptiv-statistischer Instrumente zu dokumentieren und eine umfassende vergleichbare Datengrundlage zu schaffen, die nicht nur der Wahrnehmung von Rechten der betroffenen Gefangenen, sondern darüber hinaus einer evidenzbasierten, durch Forschung zugänglichen und begleiteten Vollzugsgestaltung dient.

Insgesamt zeigt sich, dass die EPR aus dem Jahr 2020 den deutschen Strafvollzugsgesetzgeber vor erhebliche Herausforderungen stellen und der Reformbedarf evident ist.

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MY HUNGARY: IN HONOR OF KÁROLY BÁRD

George P. Fletcher[1]

Before the treaty of Trianon in 1920, Hungary was an equal part of the Austro-Hungarian Empire. Its territory stretched from the Carpathian mountains to the Adriatic Sea. Both my father's family and my mother's family come from small towns in the 'greater' Hungary that existed before Trianon. Their stories are connected to the upheavals of the First World War and explain my subsequent efforts to teach in Budapest and incidentally become witness to the first major political struggles that have lasting significance.

In the Hungary of my imagination, Jews and Christians respected each other. In the case of my father Miklós, neither religion appealed to him. He was a proud secular Jew. His father Fülöp had made money in the latter part of the 19th century. I'm not sure but he was regarded as *földbirtokos*, or the owner of a large estate near Szécsény. On one of my many cycling trips in Hungary, I found his gravestone and have a picture of it now in my den. As contrasted to the religious Jews in the cemetery, he had a simple stone without Hebrew lettering.

As a result of my grandfather's status, my father was inducted in the First World War as an *Einjährig-Freiwillige*, or 'one year volunteer.' My understanding of his rank is based on the opinion of István Deák, the professor of Eastern European history at Columbia University.

When I moved to New York in 1983, I had my Hungarian roots in mind and bought an apartment at 404 Riverside Drive – overlooking the statue of Lajos Kossuth. Due to the careful attention of Deák, this statute remained free of graffiti in the days when the would-be artists had taken over all the statues in that part of Riverside Drive. I soon discovered that as a result of Deák's influence, the neighbourhood bore a Hungarian influence, notably the Hungarian pastry shop at 111th and Amsterdam. The pastry shop is still there and the amazing thing so far as I know as authentic as the *cukrásda* in Nagymihály – the place where my material uncle Harry became addicted to *krémes*. Of course these are rich pastries

[1] Cardozo Professor of Jurisprudence at Columbia University School of Law.

and not to be recommended for anyone on a diet. This explains why when I am teaching at Columbia, I always gain weight.

Back to my adventures in Budapest. My experience in the Soviet Union in the 1980's taught me how to deal with the Communist governments. I contacted some people at the Eötvös Loránd Faculty of Law and they were willing to employ me because I had published articles in the former Soviet Union. I knew that they had no money to pay me but they would probably have very nice apartments at their disposal. I negotiated a deal that required me to teach in return of an apartment. They gave me a fantastic apartment overlooking the Danube, the romantic centre of the entire country. It was on the flat Pest side facing the famous Gellért hotel in Buda, the hilly side. Down the street to the left was the famous market consisting of independent stalls selling Hungarian delicacies like goose liver. (Note in this memoir the associations with the delicacies of Hungarian cuisine).

Hungary in the early 1990s was a place of great hope for the emergence of democracy in Eastern Europe. Though a small landlocked country, *Magyarország* is situated right as the cross-roads between Germany and the East. During the Holocaust, the Jewish community suffered less in Hungary than in, say, Poland. As a result, the Jewish community in Budapest has maintained some important institutions, such as Hannah's kosher restaurant, a place where I have frequently gone for Friday night dinner. The liberal synagogue is one of the largest in the world (along with Florence). In the neighbourhood around the synagogue there is a rejuvenated and stylish ghetto with many cafes.

My duties at the law school were to teach two classes, one on advanced criminal law in Hungarian and another, in English, for foreign students. The first was teeth-breakingly difficult and the second very interesting because the students were basically Israelis, both Jews and Arabs, who because they were not admitted to one of the four universities, had to study abroad. This was before the founding of the *miklalot*, or colleges, which provide opportunities for Israelis not admitted to the top universities. Budapest was closer and cheaper than London. The teaching was less important for me than the opportunity to observe, close-hand, three major legal stories than unfolded while I was there. As I recall, at that time, I relied heavily on Károly's book on criminal justice in order to get my bearings in the local legal system.[2] This was not difficult, however, because all of Eastern Europe – indeed most of the world outside of the English-speaking and French-speaking areas – relies on the German theoretical structure, which I had learned in Freiburg in the 1960's.

[2] Bárd, Károly, *A büntető hatalom megosztásának buktatói: Értekezés a bírósági tárgyalás jövőjéről,* Budapest, Közgazdasági és Jogi Könyvkiadó, 1987.

I recall visiting Károly at the Ministry of Justice. There was an elevator that enchanted me. A conveyer belt kept going around, one had to jump on and off at exactly the right time. I understand that, alas, safety considerations have prevailed.

Now for some legal issues I encountered while I was living along the Danube. Capitalism may bring some surprises for low-income workers. The problem in Budapest was deregulating the price of gas. As a result, taxi drivers would have to pay more and did not understand that in the end the passengers would pick the additional charges. They went on strike. They started clogging the bridges between Buda and Pest and made even bicycle traffic impossible. I managed to walk over the famous Freedom Bridge to the Gellért Hotel, where I would frequently hang out in the bars and cafes. Strikes were a new phenomenon in Hungary. No one knew how to handle this one. The army and the police both said they would not intervene. There was no National Labour Relations Board, no legislation, no idea what to do. Finally, the political bosses sat down and came up with a compromise on the gas increase. Democratic capitalism got off to a good start.

Gas prices are apparently a sensitive issue. As of the end of 2018, a price increase in France generated major protests and is threatened to undermine the Macron coalition. Pocketbook issues are apparently significant, though no one seems to do much comparative thinking about gas prices. For example, prices in Israel are significantly higher than in Europe. This is a consequence both of taxation and simple economics of supply and demand.

The second significant legal event of the 1990's of this time was the trial of József Végvári, which focused on another problem new to the Hungarian government in the transition to democracy – freedom of speech. Végvári had been a member of the secret service before the transformation. In a burst of enthusiasm for the new regime, he invited a television crew into the secret file chambers of the Hungarian equivalent of the KGB. He was arrested but then in February 1990 the democratic forces won the election. The problem was what to do with him. It would have been natural to regard him as a 'good guy' with his heart in the right place but the disciplined prosecutor implicitly applied the German principle of strict prosecution (Legalitätsprinzip), i.e. no discretion in favour of politically favoured perpetrators. This was the rule of law with a vengeance.

Végvári's trial before a military court was straightforward but the verdict was unusual and yet characteristic of military justice reflective of hierarchical organizations. They sentenced him to an 'official censure.' This might have affected his reputation within the military but would not likely an impact in larger civil society. The closest thing I have witnessed to this is verdicts by student judiciary boards. The Men's Judiciary Board at Cornell could issue official and unofficial censures, the former going on the student's transcript. The case that came before

us circa 1958 was of a student revolt against the so-called parietal rules, essentially rules about having girls in your room. The rules are a thing of the past, as are the Communist governments that generated so many of these legal stories. Under the outdated principle *in loco parentis* [in place of parents], university administrations tried students for vague charges with no due process. The sanction of expulsion can destroy a student's career. As noted, however, the situation of student justice may be taking a turn for the positive.

The third major case in Hungary during this period was an abstract constitutional review of the death penalty, another leftover from the Communist period. Although the U.S. still maintains the death penalty, it was taboo in Western Europe and therefore the issue for the Hungarian democrats was whether they would abolish the penalty in order to appear more Western. There was little doubt about the outcome but the case was interesting because Hungary had adopted the German principle of abstract constitutional review. By comparison, an American case requires standing, namely someone who is actually affected by the death penalty. The danger of abstract review is that these decisions can be purely symbolic: Would Hungary appear more Western or not? (Of course, 'Western' does not include the many American states that maintain and actually use the death penalty.)

In the hearing on the death penalty, which I attended, the court called several 'expert' witnesses. The idea that there could be an expert witness on a philosophical and empirical issue like capital punishment is in itself significant. There are essentially two approaches to the issue, one philosophical based on the Kantian theory of retribution and the other empirical based on the Benthamite principle of deterrence. No expert can decide which of these schools to follow and even if he could, there would be counter-arguments within the school itself. In the international community, run by practical people, no one would argue for retribution, regardless of the type of penalty. But deterrence too is problematic. It can lead to obvious unjust sanctions like a year in jail for jay-walking, and even if the sanction did have a deterrent effect, we could not calculate the costs and benefits of expending these resources for a minor objective. The problem for deterrence is the timeline as well as communication of the sanction to the public. Perhaps repeated sanctions for jay-walking might be effective but there is no reason not simply to lie about the sanctions and tell the public that these sanctions are being imposed (and of course, make up even more serious sanctions).

The most interesting expert in the Hungarian capital punishment debate was András Sajó, an academic who often teaches at the Cardozo Law School in New York. He lent some academic respectability to what was otherwise a political decision designed to impress the West. The court came back after lunch and

declared the death penalty unconstitutional. Why not? It cost them nothing and it gained Hungary some respectability with the Council of Europe. One thing that this case should teach us is that the 'standing' rule in the U.S. has a sound basis. Courts should not be engaged in propaganda. Courts make sounder decisions only if real people, defendants, as well victims, have standing, that is they are affected by the court's decisions.

On the way out of the Court, I picked up my coat at the cloak room. I had a claim tag with the inscription "Supreme Soviet. Hungarian People's Republic." Institutions designed for constitutional scrutiny were now serving new (political) purposes.

What should we infer from these stories about Hungary in its critical time of transition from communism to some sort of democratic capitalism? Many of these vignettes (Végvári and capital punishment) have little to do with democracy or capitalism. Yet they may suggest a mentality of excess that correlates with political transitions. In the capital punishment decision, in particular, the Court was acting in a way to impress outsiders.

There is another point about comparative law that can be drawn from these Hungarian stories. The actual law in Hungary had little to do with any of these results. If anything, the law of procedure was important in reaching a peaceful accommodation about the conflicting political interests. This is true in all legal systems. The rules of the game are more important than judgments by the referee about whether a strike is a strike, a ball is a ball. In European legal education, however, procedure has a lower status than the theory-laden fields of substantive law. No one exports its procedural system but, as we have noted, the German *Dogmatik* has had influence around the world.

Now back to the cuisine. My parents told me that for the first five years of my life living in Budapest I was entranced by the food, mostly because as my parents told me, I ate nothing but *palacsinta*. I discovered that *palacsinta* in Hungary is something like a hot dog in the U.S. The best one are sold on the streets. A restaurant will make it too fancy and ruin the taste.

But it is hard to forget the pastry at Gerbeaud or the fish soup at the Duna Korzó. In the 1990's I organized a conference at Ráckeve on the outskirts of Budapest. In that neighborhood we did in fact find a good *palacsinta* stand.

In 1996 I visited Hungary again with a friend who prepared a memorial trip, a calendar with photographs of key spots. On one sign we see: Fleischer, György, Géplakatos Mester. This is in fact the name under which I was born. Yet I am relatively sure that this is not me. As Károly pointed out to me, the sign lists only 6 digits in the phone number. Yet the sign is sufficiently close to remind of my mystical connection to the Hungary of my parents' origins.

Now allow me to close this trip down into my past by reflecting on the Hungarian language. My sister Lillian, born 9 years before me, spoke Hungarian

as her native language. By the time I came along, my parents, Fanny and Miklós, had adapted more to life in Chicago and decided to speak English with me. This was unfortunate. First, because my parents spoke imperfect English, and secondly, I was going to school and even if I did not know a word of English in Kindergarten, I would have learned the language in a matter of months.

Hungarian belongs to small minority of non-Indo-European languages in Europe. Finnish is the closest relative. There is an unmistakable rhythm to these languages. Once I head a couple speaking Finnish and thought for a moment that it was Hungarian.

The interesting feature of Hungarian as a language is that it lacks a gender distinction. This does not imply that Hungarians can't tell the difference between male and female. It's simply that they don't think it is as important as some other things, namely spatial relations. If you want to say that you are putting one object next to, beside, or on top of another object, one has to mark these spatial relations with an elaborate set of suffices.

One feature of Hungarian I celebrate is the way to say 'I love you.' One word – Szeretlek – says it all.

An amateur linguist named Benjamin Lee Whorf claimed that language influences the way we think. This is hard both to prove and to refute. Yet it might be true Ernő Rubik invented his famous cube because he was Hungarian.

Another feature of the language is that there is an elaborate system for expressing respect and familial associations. Unlike English with its reliance on a single form 'you' in the second person ('thou' has become archaic), Hungarian has three levels of respect. In the most serious form of deference the third person is used.

Also, familial relationships are expressed in terms like 'bácsi' – older brother, which has become a general term of esteem. None of these complications is a problem for native speakers, but for a wannabe Hungarian speaker like myself these details can be daunting.

One other point about the language. Hungarians have magnificent ways of cursing. My father never said anything grave. But one of my uncles used an expression that would put most Americans to shame. Suffice it is to say that it referred to the deity and a sexual act.

Of course there are significant places in Hungary outside of the capital. Lake Balaton in the west is a popular place for vacations, Pécs in the southwest is the location of the Herendi *porcelán* factory. I have made many trips and still retain my mother's collection of Herendi lamps. The *puszta* is famous for its cowboys and Debrecen in the East is the home ground of my uncle Béla.

Allow me to close with an anecdote that captures the lost glory of Hungary before the Treaty of Trianon. After Hungary declared war against the United

States in 1944, an advisor rushes into President Roosevelt's office and the following dialogue transpired:

FDR: What is Hungary?

Advisor: It is a kingdom in Eastern Europe.

FDR: So they have a king. What is his name?

Advisor: Well, actually, they have a regent named Admiral Horthy.

FDR: So that means they have a navy?

Advisor: Once they did have a navy and seaport on the Adriatic.

FDR: So why did they declare war against us?

Advisor: The truth is they want to invade Romania, but Hitler told them otherwise.

These are the memories of the greater Hungary, the land of my imagination.

THE REFORM OF THE LAW OF HOMICIDE IN ISRAEL

Mordechai Kremnitzer / Khalid Ghanayim[1]

Introduction

The Israeli Parliament (Knesset) enacted in January 2019 new homicide offenses, which replaced the former homicide offenses that originated in the Criminal Code Ordinance, 1936 i.e. as a British legislation during the British mandate in Palestine (1920-1948). Although the source of the Code is English Common Law,[2] the original sin of the homicide offenses was that the law didn't reflect English Common Law but an incoherent mixture of Ottoman-French Law and English Common Law.[3]

Repeated criticism was made on the former law of homicide from academics[4] and the Supreme Court,[5] especially concerning premeditated murder, provocation

[1] Professor Emeritus and former Dean of the Faculty of Law at the Hebrew University of Jerusalem, and President of the Israeli Press Council, Senior Fellow at The Israel Democracy Institute; Senior lecturer at the faculty of law University of Haifa, Board member of the Haifa Centre for German and European Studies (HCGES) University of Haifa.

[2] See Miriam Gur-Arye, Penal Law (Preliminary and General Part Bill) 1992, *Hebrew University Law Review* 24 (1994), 9–70; in Hebrew Khalid Ghanayim, The Distinction Between Justification and Excuse 74, 2002 in Hebrew.

[3] See Arnold Enker, Murder During Committing an Offense: The Ratio Between the other Offense and the Offense of Causing Death, *Bar-Ilan Law Studies* 1 (1980), 1–39 (in Hebrew); Yoram Shachar, The Intention of the Legislator on Premeditation, *Bar-Ilan Law Studies* 2 (1982) 204–218 (in Hebrew).

[4] See Shachar, The intention of the Legislator; Shneur-Zalman Feller, More on the Preparation as Element of the Premeditation, 33 *Hapraklit* (1981), 578–582 (in Hebrew); Arnold Enker, Murder with Premeditation, *Hebrew University Law Review* 6 (1976), 478–498 (in Hebrew); Nili Velinski – Mordechai Bas, On The Interpretation of the Elements of Premeditation, *Hebrew University Law Review* 6 (1976), 499–511, (in Hebrew); Arnold Enker, Another Note On The Interpretation of the Elements of Premeditation, *Hebrew University Law Review* 6 (1976), 512–513, (in Hebrew); Mordechai Kremnitzer, Premeditation or Just Intention – In the Offense of Murder with Premeditation? On the Essence of the Element of Provocation in the Offense of Murder with Premeditation, *Criminal Law, Criminology and Police* 1 (1986), 9–38, (in Hebrew); Mordechai Kremnitzer – Liat Levanon, On the Element of Provocation in the Definition of the Premeditation, Following F.H.C 1042/04 Beton v. State of Israel, in Dror Arad Eilon – Yoram Rabin – Yaniv Vaki (eds.), *Essays in Honor of David Wiener: On Criminal Law and Ethics,* Tel Aviv, The Israel Bar Publishing House, 2009, 547–582, (in Hebrew).

[5] See F.H.Crim. 1042/04 Beton v. State of Israel, 61(3) 646 (2006); Crim.A. 4711/03 Abu Zeid v. State of Israel, (2009); Crim.App. 6062/11 Tamtawi v. State of Israel, (2015); Crim.App.

and the straight jacket as to sentencing. This critique brought the Minister of Justice (Prof. Daniel Friedman) in Mai 2007 to appoint a State Committee to revise the law, which composed of Academics, the State Attorney`s Office and the Public Defender`s Office.[6] The Committee submitted its report in august 2011[7] and the proposed reform was adopted, with minor changes, by the Parliament in January 2019.[8]

The main novelty of the reform is the transformation in the role of murder.

The former law

The former law contained 3 homicide offenses:

(1) Murder as the aggravated homicide, punished by a mandatory life sentence, and defined as: (a) Killing the father, mother, grandfather or grandmother, with the mental element of intention or recklessness in the form of indifference or rashness.[9] (b) Killing with premeditation.[10] (c) Killing during the perpetration of an offense or the preparation to commit it or with purpose of enabling or assisting the commission of another offense, or with purpose to escape from punishment. The mental element for killing is intention or recklessness in the form of indifference or rashness, and the other offense is any criminal offense, i.e. felony, misdemeanor and even transgression.[11] The former law included the possibility of a mitigated sentence, for the cases of killing the abuser, killing by a perpetrator suffering from mental disorder, and killing by little deviation from the reasonableness of criminal law defenses. The crime and the conviction remain murder, whereas the court has discretion to mitigate the sentence.[12]

870/80 Ledai v. State of Israel, 35(1) P.D. 29 (1981); Crim.App. 647/85 Kesar v. State of Israel, 41(1) P.D. 347 (1987); Crim.App. 747/86 Eizman v. State of Israel, 42(3) P.D. 447 (1988)

6 Mordechai Kremnitzer was the Chair of the Committee.

7 See Report of The Committee on Examining The Elements of Homicide Offenses (Amendment – Homicide Offenses) 2011 in Hebrew.

8 See Book of The Codes No. 2779, p. 230 from 10 January 2019.

9 See below the text belongs to notes 24-25 on the definition of reckless-rashness.

10 Premeditation was defined in section 301 of the Penal Code as intention to cause death, with preparation and without provocation.

11 The Case law and academia criticized the mental element of rashness, and the "other offense" including misdemeanor and transgression; see Crim.App. 4711/03 Abu Zeid v. State of Israel, (2009); Crim.App. 6062/11 Tamtaui v. State of Israel, (2015); Enker, Murder During Committing an Offense.

12 See Khalid Ghanayim, The Reform of Homicide Offences: From Murder with Mitigated Sentence to Homicide with Diminished Liability, 33 *Bar-Ilan Law Studies* 245 (2021) (in Hebrew).

(2) Manslaughter as the basic homicide, defined as killing with the mental element of (spontaneous) intention or recklessness in the form of indifference or rashness toward causing the death, and punished by 20 years imprisonment as maximum sentence.
(3) Culpable homicide by negligence, punished by 3 years imprisonment as maximum sentence.

The new law

The new law includes 5 homicide offenses: Murder as basic offense, aggravated Murder, homicide with diminished liability, homicide by rashness, and the offense of homicide by negligence.

The new law seeks to serve and emphasize two principles: The first principle is the special importance of the value of human life and its special severe infringement; and the second principle is the culpability of the offender. It also reflects an approach to the principle of legality, as to the division of labor between the Legislator and the Judiciary, namely that the first is entrusted with the task of making generalizations on degrees of severity and leniency up to the point of hindering individual justice. Individual justice is entrusted in the hands of the Judiciary. The principle of legality favored a list of aggravated circumstances and a clear formulation of them avoiding ambiguous terms like bad or base motives. The expressive function is served through the label murder and the stigma it carries, the special severe punishments of life imprisonment and even more so – mandatory life imprisonment. Focusing on murder (violating the value of human life) and not on aggravated murder enables the legislator to express a clear view on the importance of the protected interest of human life as such. A focus on aggravated circumstances, on the other side, dilutes this message since the sanction expresses not only the severity of life deprivation but also the aggravating circumstances.

The same spirit explains the relative heavy punishment provided for the cases of homicide with diminished liability[13] 20 years of imprisonment for three cases of this category and 15 years for one.[14] The same attitude is reflected in the 12 years of imprisonment for killing by rashness.

The principle of culpability is expressed in the possibility of avoidance from aggravated murder when the totality of the case-circumstances signifies a

[13] On this offense, see below text belongs to note 24.

[14] See Mordechai Kremnitzer – Khalid Ghanayim, Tötung des Haustyrannen: Minderschwere Tötung, in Marc Engelhart – Hans Kudlich – Benjamin Vogel (eds.) *Festschrift für Ulrich Sieber*, Berlin, Dunker & Humblot, 2021, 244; Ghanayim, The Reform of Homicide Offences.

somewhat lower level of culpability, that does not reach the very severe culpability required for aggravated murder. A critique of the Supreme Court complaining of unjust sentences, especially in cases of killing due to subjective provocation,[15] premeditated mercy killing, due to a rigid mandatory life imprisonment for murder – is being listened to, responded and remedied.

The relatively broad category of diminished responsibility (taken out of murder) is a further example of this principle of culpability. In the former law, these instances (not including provocation) were included within murder with discretional mitigation of punishment. This was clearly unjust because of the undeserved stigma on the one hand and the effect of diluting murder and blurring its severity.[16]

An additional effort, in the new law, was invested in protecting not only minors and the vulnerable by defining their killing as aggravated murder, but also women who are victims of abuse by their partners and killed by the tyrant partner. This type of killing reflects a patronizing and condescending attitude towards women`s dignity and equality. Two aggravated cases deal with special protection of women: One deals with the victim of homicide being a partner of the perpetrator and the killing was done following a systematic or prolonged abuse, physical or mental, by the tyrant partner;[17] This aggravation is intended to catch cases of abuse becoming into a way of life, desecrating the body of the abused victim and the sanctity of her life, leading gradually to a final scenario of fatal violence. The other deals with what is often named as killing due to "honor of the family", namely killing as a punitive action intended to impose authority or instill fear and to impose ways of conduct on a community. Although the main aim of this case is this type of "honor killing", the formulation is not restricted to this kind of case and is not conditioned on a cultural background. What makes this case so severe are the extreme affront to the rule of law, the violation of the human dignity of the victim who is being used (by killing her) to send a message, the horror instilled in women as a group, and the violation of women's equality and liberty.[18]

A totally different kind of case, in a sense a mirror image of the killing by the abuser, is the leniency offered to the killing of the abusive tyrant. The new law

[15] See F.H.Crim. 1042/04 Beton v. State of Israel, 61(3) 646 (2006). It is worth to mention that when the court was convinced that the perpetrator was subjectively provoked, and this provocation did not fulfill the requirement of the objective provocation of the reasonable man, the homicide still remain as murder with premeditation.

[16] See Ghanayim, The Reform of Homicide Offences.

[17] See bellow on the aggravated circumstance No. 6 in aggravated murder.

[18] See the aggravated circumstance No. 5 in aggravated murder; and Mordechai Kremnitzer – Khalid Ghanayim, Honor Killing – An Aggravated Murder?, in *Essays in Honor of Justice Joubran,* Jerusalem, The Harry Sacher Institute for Legislative Research and Comparative Law, The Faculty of Law Hebrew University of Jerusalem, 2022, (forthcoming, in Hebrew).

recognizes killing the abusive tyrant by the victim of the abuse or his relative as a homicide with diminished responsibility, with punishment of 15 years imprisonment.[19] This is the most lenient case of this category.[20]

Murder[21]

The offense of murder reflects a severe case of homicide, which is killing by intention to kill or indifference towards the fatal result of causing death, and punished by life imprisonment as the maximum sentence. As mentioned, the offense of murder, the basic homicide offense, is a severe killing but not the most severe. This approach follows a consistent trend of the case law in support of regarding intentional killing, whether spontaneous or premeditated, as murder. This, even in spite the clear language of the former law demanding premeditation.[22] The mental element of the new offense of murder is not only intention, but also indifference, due to the view that indifference is very close and sometimes even similar in severity to intention.

Indifference is an attitude of not caring whether the victim's life will be vanquished or not. The indifferent perpetrator does not even prefer the non-occurrence of the result. He cannot care less. The lack of preference implies a complete choice of the fatal outcome of his conduct and a full reconciliation/acceptance with this result. The perpetrator exhibits a far-reaching contempt for human life, which brings him very close to the intentional killing. The attitude of "could not care less" as characteristic of indifference is an extreme disregard even denial of value towards human life.[23] Therefore, murder as the basic homicide offense is causing death by intention or indifference.

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[19] See text belongs to supra note 13; and See Kremnitzer – Ghanayim, Tötung des Haustyrannen: Minderschwere Tötung; Ghanayim, The Reform of Homicide Offences.

[20] As mentioned above, text belongs to note 14, the sentence for the other 3 cases of diminished liability is 20 years.

[21] Section 300 of the Penal Code, Amendment 137.

[22] See F.H.Crim. 1042/04 Beton v. State of Israel, 61(3) P.D. 646 (2006); the English and Irish law defining the mental element of murder in intention.

[23] On Indifference in German law see Detlev Sternberg-Lieben – Frank Schuster, in Adolf Schönke – Horst Schröder, *Strafgesetzbuch Kommentar,* 30. Auflage, München, C.H. Beck, 2019, $15 paras. 72ff; on Swiss law see Stephan Trechsel, Schweizerisches Strafgesetzbuch Kurzkommentar, Zürich, Schulthess Polygraphischer Verlag, 1992, Art. 18 para 23; on Austrian law see Egmont Foregger – Eugen Fabrizy, Strafgesetzbuch Kommentar, 12. Auflage, Wien, Manz, 1999, $6 paras. 12; on Scottish Law see Cawthorne v. H.M. Advocate, [1968] JC 32; On English Law Commission, see Law Commission No. 304: Murder, Manslaughter and Infanticide (2006) para 1.15 at p.4, p. 38; Law Commission, A New Homicide Act for England and Wales? *Consultation Paper* No. 177 (2005), para 3.158 at p.

Homicide with rashness[24]

Mens rea in Israeli law, as in the Anglo-American law, is the subjective mental element, consists of intention, reckless-indifference and reckless-rashness.[25] While homicide with intention or indifference constitutes the basic homicide offence of murder, punished by life imprisonment as maximum sentence, rashness is a lesser homicide offense, punished with 12 years imprisonment as a maximum sentence. Rashness is defined in Israeli penal Code[26] as "accepting an unreasonable risk that those consequence may result, while hoping to be successful in avoiding them". A perpetrator who acts out of rashness is a perpetrator who acts not wanting the result to occur, believing that it will not occur. It can be assumed that the perpetrator would not have committed the act of homicide if he believed that the act would result in the death of the victim.

Aggravated murder[27]

The most severe cases are now enumerated in murder in aggravated circumstances, punished in general by a mandatory life imprisonment. According to subsection (B), a narrow opening is left for special rare cases in which an aggravated circumstance takes place but consideration of all circumstances of the case leads to the conclusion that the case does not reflect the special high degree of culpability required by aggravated murder. This change reduces the gap between the basic offense of murder and the aggravated murder and makes the distinction between them less dramatic. Both offenses: the basic and aggravated offenses are named murder and carry a life sentence. The difference in sentencing is reduced to the difference between a maximum punishment for murder and a mandatory punishment as a rule with exceptions in aggravated murder. In the former law, the difference was between a mandatory life imprisonment for murder as the aggravated homicide offense and 20 years imprisonment for manslaughter as the basic homicide offense, whereas both offenses included both intentional and reckless killings.

85, para 3.162 at p. 86; see also the Model Penal Code, Part II (The American Law Institute, 1980) section 210.2(b).

24 Section 301C of the Penal Code, Amendment 137.

25 Rashness in Anglo-American legal system can be compared to bewusste Fahrlaessigkeit in European-Continental legal system, such as the German law; see Sternberg-Lieben – Schuster, *Strafgesetzbuch Kommentar*, $15 paras. 203.

26 Section 20(A)(2)(b).

27 Section 301A of the Penal Code, Amendment 137.

The aggravated circumstances are 11: (1) The act was committed after planning or after a real process of weighting and crystallization of a decision to kill;[28] (2) The act was committed with the purpose of enabling or assisting the perpetration of another offense, or with the purpose of hiding another offense or enabling the escape from justice after committing another offense. The other offense is an offense punished by 7 years of imprisonment or more;[29] (3) The victim was a witness in a criminal trial or was expected to deliver a testimony in a criminal trial or a judge in a criminal trial and the act was done with the purpose to prevent or thwart an investigation or a judicial process; (4) The act was done out of a motive of racism or hostility of a group; (5) The homicide was committed as a punitive action intended to impose authority or instill fear and to impose ways of conduct on a group;[30] (6) The victim is his partner and the act was done after systematic or continuous abuse of the victim, physically or mentally; (7) The act was done with special cruelty or during a physical or mental abuse of the victim; (8) The victim is helpless, a minor under 14, or a minor under 18 that the perpetrator is under duty to protect ; (9) The act was done while creating a real danger to an additional person, other than the victim; (10) The homicide act is a terror act, as defined in the Law of Combat Against Terrorism;[31] (11) The act was committed in the framework of the activity of a criminal organization or a terroristic organization in order to pursue the objectives of this organization.[32]

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[28] On Premeditation see also Mordechai Kremnitzer, On Premeditation, *Buffalo Criminal Law Review* 1 (1998), 627–660.

[29] While according to the former law, killing during the perpetration of an offense or the preparation to commit it constitutes an aggravating, the new law rejecting this aggravating and requires a causal relation in the sense of purpose between the other offense and killing.

One might reject the limitation of the severe offense; it can be argued that precisely when killing is associated with minor offense, such as misdemeanor, the contempt it displays for human life increases; see also Mordechai Kremnitzer – Khalid Ghanayim, The Elements of aggravated Murder according to sec. 301A(a)(2) Penal Code, *Law & Government* 2021, 311 (in Hebrew).

[30] See Kremnitzer – Ghanayim, Honor Killing – An Aggravated Murder?

[31] Due to the broad definition of terror acts – as an act of violence with a knife or a weapon, committed out of a religious, political or ideological motive (not accompanied with a purpose of instilling fear or influencing policy) becomes aggravated murder. This seems to be unjustified. The aggravating factor in terroristic activity is the special impact of fear caused by these acts. When this factor is missing, aggravation loses its ground. The mere fact that the killing is committed out of a non-egoistic motive does not make it more severe.

[32] The proposal of the committee included additional circumstances, such as: the victim is a public employee in law enforcement bodies and the act was done in connection to his/her role; the victim is an elected official where the act was done in connection with his role; and the act was done to satisfy a sexual instinct or a lust to kill. These circumstances were rejected by the Government and Parliament (with the exception of a judge acting in a criminal trial), because of the difficulty to find a valid principle for distinction between

Some of the circumstances refer directly to the mental element and enhance the disrespect shown by the defendant to the value of human life, such as the deliberated (premeditated) killing; the killing coupled with a wrongful purpose such as the purpose to commit another offense or escape justice; the killing out of a base motive such as a racist or hostile motive towards a group. Other cases are instances in which strong inhibitions are expected to prevent the conduct and the defendant's act shows the opposite – the lack of inhibitions. This applies to killing of the helpless or minors, killing with special cruelty or abuse (also in premeditated killing). It proves a special moral depravity. In another group of cases the value of human life is additionally attacked, as in exposing another person to danger to his life – it also proves a high level of disrespect to the value of human life; or when another protected interest is endangered, such as the administration of justice in killing a witness or a judge, the duty to special protection owed to minors and helpless people, human dignity in killing with cruelty, racist killing, or killing as a punitive action. In some cases the wrongdoing is increased (and so does the culpability) because of the general fear and sense of insecurity caused by the killing, as in the context of terrorism and criminal organizations, racist killings, killings as a punitive action.

Homicide in circumstances of dinished liability/responsibility[33]

In the new law, there are 4 cases of diminished liability/responsibility:

(a) Killing the abuser
Killing the abuser is the most lenient case of diminished liability/responsibility, with 15 years of imprisonment as a maximum sentence. It is a homicide committed by the defendant in a state of serious mental distress, caused by severe and continued abuse of herself or of a member of her family by the person whose death the defendant caused. Killing the abuser has unique characteristics, bearing in mind the ramifications on the victim of consistent abuse. The abused victim suffers from a collapse of trust in the home as a safe haven (one's castle) and in one's body as a taboo site protected from unwanted touch, as a necessary condition for a person's peace of mind and autonomy. The abuse shapes also loneliness, helplessness, a constant state of fear, a feeling of worthlessness, shrinking of the cognitive and volitional faculties – the conditions of personal autonomy. It is perhaps most

those included in the aggravated case and those excluded, and the rarity of these kinds of cases.

[33] Section 301B of the Penal Code, Amendment 137.

helpful to describe the battered woman as a hostage under torture.[34] The situation of the battered woman reflects a close proximity to several modes of diminished responsibility: the very difficult mental state in which the woman is being trapped resembles a state of necessity as an excuse, since the expectation from her to respect the life of the abuser is significantly reduced and therefore- diminished her culpability. Moreover, the woman's severe despair reduces significantly her culpability. Serious and ongoing abuse shapes a provocation-like situation. The death of an abusive husband prevents future abuse against the woman and her children, hence the proximity to self-defense, which significantly reduces the wrongfulness and the culpability. The combination of an extreme mental distress, despair, existential fear and justified anger, against the background of the need to escape both hell and the inevitable loss of life – reduces significantly both the wrongdoing of the killing (of the abuser) and the culpability of the victim turned into a killer. Following the abuse and suffering, even the deliberated decision to put an end to her misery by killing the abuser cannot be considered as premeditated and change the evaluation of her deed. Her act is like a drowning grip on a life-line intended to prevent her next abuse, as the only way for her to save life or lives. Premeditation is described as a rational process under conditions of autonomy. It does not fit the situation and mental state of the battered woman. In any case, the rational for regarding the case as aggravated is not applicable. The opposite is true – it is an obvious case of reduced culpability.[35]

Then, other cases are included in this category, carrying a maximum sentence of 20 years: provocation, close to mental incapacity and little divergence from conditions of defenses.

(b) Provocation

A central problem of the old law related to the function and characteristics of provocation. It stemmed from the mixed nature of the Israeli law on homicide (French-Ottoman and English). From the Ottoman Law, the aggravation of premeditation was adopted, namely killing "in cold blood, without any provocation immediately before the act, under circumstances in which he was able to think and to understand the result of his actions".[36] On the face of it, it is sufficient that the defendant acted in hot blood, caused by a provocation that brought about a

[34] See also the Canadian Case of Lavallee v. The Queen, 55 C.C.C. 3d 97 (1990), [1990] 1 SCR 852, (1990) 76 C.R. (3d) 329 (S.C.C.).

[35] See Kremnitzer – Ghanayim, Tötung des Haustyrannen: Minderschwere Tötung; Ghanayim, The Reform of Homicide Offences.

[36] This was the legal definition of provocation in the former section 301 of the penal code, influences by the Ottoman-French legislation. See also Crim.App. 125/50 Jacobowitz v. A.G., 6 P.D. 514 (1952); Crim.App. 65/49 Khalil v. A.G., 4 P.D. 75 (1950).

spontaneous intention with no premeditation. But, the judiciary, being accustomed to draw inspiration from English law[37] did not stop at a subjective test, examining the state of mind of the defendant, with the effect of negating premeditation. It required, based on English law (with a different structure of homicide offenses and a different rational and function of provocation) an additional objective test. Accordingly, it was not enough that the defendant acted while being provoked; it is also required that a reasonable person in his shoes could also lose his temper.[38] Difficult questions rose, for instance whether and to what extent the objective test should be suited to the defendant and his specific traits. The question of recognition or rejection of a claim of provocation was critical because of its very different implications: a conviction of murder with a mandatory life sentence or a conviction of manslaughter with a maximum sentence of 20 years imprisonment. In the new law, killing under provocation has a double role. Subjective provocation is sufficient to negate the aggravation based on premeditation, i.e. locating the case as a plain murder. When the provocation fulfills all conditions required in the law concerning diminished liability/responsibility, it falls under this category. This is a more complex and refined differentiation, with more moderate outcomes. The new law defines homicide in diminished liability due to provocation, as:

The act was committed immediately after a provocation against the defendant and as a reaction to this provocation, provided that two conditions are fulfilled:

- because of the provocation the defendant was under a considerable difficulty to control himself;
- This difficulty mentioned above reduces his culpability, when considering the totality of circumstances of the case.

It is not enough that the defendant almost lost control of himself. This fact (not the act of killing) can be understood as a human-natural reaction to the provocation and has therefore to be recognized as diminishing his culpability. The totality of circumstances has to be taken into account. It can happen that the provoked killer was the initiator of the incident – he provoked the provocation against him. Such conduct should be measured and it may rule out the mitigation of his culpability.

(c) Homicide by perpetrator suffering from mental disorder

It is a homicide case close to mental incapacity (insanity). The definition of this case in the new law is the same as in the former law:

In a situation, in which – because of a severe mental disturbance or because of a defect in his/her intellectual capability, the defendant's ability to do one of

[37] On English law at that time, and criticism on it, see Glanville Williams, Provocation and the Reasonable Man, *Criminal Law Review* (1954), 740–754.

[38] See Crim.App. 46/54 A.G. v. Segal, 9 P.D. 339 (1955). See also Shneur-Zalman Feller, *Principles of Criminal Law*, Vol. I. Jerusalem, 1984, 567, (in Hebrew).

the following was severely restricted, even though not to the point of complete incapacity [insanity] said in section 34H:

– to understand what he/she was doing or that his/her act is wrong or
– to refrain from committing the act.

Insanity is a defense negating culpability, therefore, homicide done by perpetrator suffering from severe mental disorder is very close to insanity, and therefore the homicide done in these circumstances in homicide of reduced culpability.[39]

(d) Homicide in circumstances of a light deviation from the conditions of self-defense, necessity or duress

While in the former law this phenomenon was defined as homicide committed through a little divergence related only to the condition of "reasonableness", the new law refers to all conditions of these defenses, provided that the circumstances of the case reflect reduced culpability. In these cases, homicide is committed in a state of a partial defense, and therefore, at least his culpability (and sometimes also his wrongdoing) is reduced.[40]

The law-proposal of the committee included an additional case of diminished responsibility, namely mercy killing – killing of dying suffering person motivated by pity. The Parliament and the Government rejected this proposal, probably due to religious considerations.

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[39] See Ghanayim, The Reform of Homicide Offences.
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HUMAN RIGHTS VIOLATIONS IN U.S. IMMIGRATION AND CRIMINAL JUSTICE PRACTICES – AN ESSAY IN HONOR OF PROFESSOR KÁROLY BÁRD ON THE OCCASION OF HIS 70TH BIRTHDAY

John Shattuck[1]

I am delighted to present to my dear friend and former colleague Károly Bárd the following thoughts about the condition of human rights in the United States in two areas of particular interest to him: immigration and criminal justice. Professor Bárd has had a long and distinguished career as an advocate, teacher, and academic expert in the field of human rights and criminal law. I was pleased during my tenure as Rector of Central European University to appoint him as Head of the Legal Studies Department, a position in which he served the University with great distinction. I was equally pleased to engage with him from time to time on the tennis court, where our friendly skirmishes were a welcome diversion from our daily academic work.

Immigration

Immigration has long been the "third rail" of American politics and a source of political controversy in the US. Immigration policy is torn between competing visions of what the United States should be – a nation of immigrants based on an inclusionary vision that imagines a broad pathway to the rights and responsibilities of citizenship, or a walled-off nation based on an exclusionary vision that imagines immigration as a threat to the security of current citizens. In recent years US politics and media have been flooded with images of exclusion: children piled into cages at detention camps, migrant caravans "invading" the southern border, court battles over walls and travel bans.

[1] Rector and Professor of Legal Studies Emeritus, Central European University; Senior Fellow and Director, Reimagining Rights and Responsibilities in the United States, Carr Center for Human Rights Policy, Harvard Kennedy School; Professor of Practice in Diplomacy Fletcher School, Tufts University. This essay is adapted from a Carr Center report coauthored by John Shattuck and Mathias Risse, Toward a More Equal Liberty: Reimagining Rights and Responsibilities in the United States" (October 2020) https://carrcenter.hks.harvard.edu/publications/ reimagining-rights-responsibilities-executive-summary. Research assistance was provided by Rahaf Safi and Cathy Sun.

Tensions over these competing visions of immigration have marked most of America's history. In the late 19th and first half of the 20th century immigration policies actively discriminated against Asian and Middle Eastern immigrants, favoring literate European nationals, and numerically restricting the number of people who could seek refuge in the US. In the decades following World War II and the Holocaust, the US was at the forefront of an international human rights movement, implementing changes in domestic policy to protect asylum seekers from persecution, end quotas based on nationality, and affirm constitutional protections for migrants seeking entry. At the same time, exclusionary xenophobia produced new caps on immigration from Mexico and Latin America.

U.S. laws in theory provide due process rights for immigrants and safety for refugees, reflecting the legal basis for a rights-oriented vision of America. In recent years, however, former President Donald Trump has taken major steps to roll back or undermine these laws. The new administration of President Joe Biden has announced plans to restore a rights-oriented approach to immigration, but it is too early to tell how successful these will be.

Following the creation of the US Customs and Border Protection Authority (CPB) in 2003, serious problems emerged with due process and accountability at the border. Despite thousands of complaints of physical, sexual and verbal abuse, and property theft, over 90 percent resulted in "no action" decisions against border agents.[2] The Trump administration expanded the impunity of CBP by limiting public information about the scope of misconduct and authorizing summary removal of migrants without a judicial hearing. New expedited removal programs implemented in 2020 targeted Mexican and Central American migrants for removal within 10 days, precluding any time for detailed screenings and legal counsel.[3] The Trump administration also increased the hurdles for asylum seekers by raising the standards for "credible fear" interviews, the first step in the asylum process.[4] In 2018, then-Attorney General Jeff Sessions reversed policies that had allowed victims of domestic violence or gang violence to claim asylum, dramatically decreasing acceptance rates in some localities.

The Trump administration violated the international legal principle of "non-refoulement" – prohibiting the return of refugees fleeing persecution to conditions

[2] Guillermo Cantor – Walter Ewing, *Still No Action Taken: Complaints Against Border Patrol Agents Continue to Go Unanswered*, Special Report, Washington, DC., American Immigration Council, 2017, https://www.americanimmigrationcouncil.org/research/still-no-action-taken-complaints-against-border-patrol-agents-continue-go-unanswered.

[3] Tal Kopan, Justice Department Rolls Out Case Quotas for Immigration Judges, *CNN* (2 April 2018), https://www.cnn.com/2018/04/02/politics/immigration-judges-quota/index.html.

[4] Julia Edwards Ainsley, Trump Administration Drafts Plan to Raise Asylum Bar, Speed Deportations, *Reuters* (18 February 2017), https://www.reuters.com/article/us-usa-immigration-asylum/trump-administration-drafts-plan-to-raise-asylum-bar-speed-deportations-idUSKBN15Y04A.

of serious danger. Through a series of interlocking policies and programs, Trump severely limited the ability of immigrants to seek asylum at the southern border, cutting refugee admissions to a trickle. These programs included a "metering" policy limiting the number of individuals who can make asylum claims at the border; Migrant Protection Protocols, which return Central American asylum seekers to potentially dangerous conditions in Mexico while awaiting decisions on their claims; and bans on asylum to immigrants who do not present themselves at a recognized port of entry. Another program requires Central American migrants to present themselves for asylum in the countries through which they transit, including Guatemala, El Salvador, and Honduras, despite longstanding concerns about violence and persecution in these countries.

The most notorious Trump administration policy was the separation of migrant children from their parents and caregivers at the border, scattering them among 100 Office of Refugee Resettlement shelters and other sites across the country.[5] Internal government memos showed that this policy – which effectively forced migrants to choose between remaining in their home countries in dangerous circumstances with their children, or leaving their children behind – was explicitly intended to deter asylum seekers.

Following nationwide criticism, the Trump administration signed an executive order in June 2018 ending the family separation policy. Even after the official end of the policy, however, more than a thousand additional children were separated from their families. The total number of children separated since the separation policy went into effect in July 2017 was estimated at the end of 2020 to be more than 5,400.[6] While in detention facilities, separated children and unaccompanied minors were often subject to abuse, including hundreds of reported cases of sexual abuse by adult staff members.

The vast majority of immigrants facing removal do not have access to legal counsel. Even young children are expected to shoulder the cost of counsel or represent themselves in immigration court. As a result, only 37% of all immigrants are able to secure legal representation in their removal cases.[7] An additional problem that confronts due process in immigration courts is the severe shortage

[5] SPLC – Southern Poverty Law Center, Family Separation Under the Trump Administration – A Timeline, *SPLC* (17 June 2020), https://www.splcenter.org/news/2019/09/24/family-separation-under-trump-administration-timeline.

[6] Jacob Soboroff – Julia Ainsley, Trump Administration Identifies at Least 1,700 Additional Children It May Have Separated, *NBC* (18 May 2019), https://www.nbcnews.com/news/us-news/1-700-additional-separated-migrant-children-identified-trump-administration-n1007426.

[7] Ingrid Eagly – Steven Shafer, *Access to Counsel in Immigration Court*, Washington DC., American Immigration Council, 2016, https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court.

of immigration judges, with hearing backlogs of over a year and a half, often resulting in immigrants with valid claims ultimately giving up their right to a hearing. In September 2019, the Trump administration introduced accelerated "rocket dockets", which limited refugees' ability to appear in court; in some 17,000 cases, 80% resulted in absentee removal orders, increasing the likelihood that refugees would be sent back to conditions of danger.[8]

Private businesses and corporations are contractors in the U.S. immigration system, operating detention centers and conducting surveillance of asylum seekers. Private prisons are now the federal government's default detention facilities for undocumented immigrants, housing more than three-quarters of the average daily immigration detainee population. Private prison contractors profit from the detention of migrants by implementing cost-cutting measures. Human rights organizations have reported on contracted facilities with sordid, unhygienic conditions, inadequate food and water, overcrowding, physically violent staff, and lack of medical and mental health treatment in facilities.

In the midst of the global pandemic, the Trump administration exploited the public fear surrounding COVID-19 to further wall off asylum seekers in violation of domestic and international law. In March 2020, the administration began expanding travel restrictions, slowing visa processing, closing the U.S. border with Canada and Mexico, and moving to bar asylum seekers and undocumented immigrants from entering the country. Detention centers housing migrants have become breeding grounds for contracting sickness and disease, with thousands of positive tests for COVID-19 in facilities, creating new dangers for migrants already fleeing dangerous situations.

Proposed reforms of the US immigration system to comply with constitutional due process and international law

- **Secure Due Process at the Border.** Reform the border control system: Mandate accountability and transparency of Customs and Border Control agency, issue broad "credible fear" guidance for assessing asylum claims, require asylum claims raised in removal proceedings to be fully reviewed and if plausible to be referred to an immigration judge for determination, curtail expedited removal at the border, and reopen the green card renewal process and temporary work visas.
- **Secure Humanitarian Protections.** Reform the asylum and refugee processing system: Bar the separation of migrant children from their families; prohibit the return of refugees to conditions of persecution; end the ban on asylum

[8] Eagly – Shafer, *Access to Counsel.*

claims of refugees coming through transit countries; overturn the designation of Guatemala, El Salvador and Honduras as "Safe Third Countries"; establish federal court review of "safe country" designation procedures; reinstate the Temporary Protected Status program for refugees fleeing war, famine or natural disasters; reinstate the Deferred Action for Childhood Arrivals program (DACA), and provide pathways to citizenship for TPS and DACA individuals.

- **Secure Due Process in Immigration Proceedings.** Reform the immigration court system: Increase the number of immigration judges, transfer immigration courts from the federal executive to the judicial branch, implement right to government-funded counsel for indigent noncitizens eligible for relief from removal and unaccompanied children and migrants with mental disabilities; provide access to qualified interpreters to facilitate communication with immigrants who have difficulty understanding procedures; end the detention of immigrants charged with non-felony crimes; and end the expedited removal of immigrants already in the US, unaccompanied minors, and the mentally ill.
- **Establish Accountability for Private Contractors.** Provide congressional oversight of private contractors performing immigration functions, ban private detention facilities, end private contractors' DNA testing and surveillance of asylum seekers.

Criminal Justice

The US Constitution provides the right to due process of law through the Fifth and 14th Amendments. These constitutional requirements are intended to protect citizens against arbitrary deprivation by the government of their life, liberty or property. In practice, due process rights are applied unevenly and inequitably in the criminal justice system, disproportionately affecting people of color and other disadvantaged populations.

The US criminal justice system is both costly and ineffective, with high expenditures often unrelated to public safety. Over the past several decades, police and law enforcement have become increasingly militarized. Through federal grants starting in the 1960s, and dramatically increasing after the attacks of September 11, 2001, local governments have obtained military gear, weapons, and vehicles, ostensibly for counterterrorism and counter-drug programs. Now nearly 90% of cities in the US with populations over 50,000 have SWAT (Special Weapons and Tactics) Teams.[9] Some studies have tied the rise in killings of civilians by police

[9] Jeff Adachi, Police Militarization and the War on Citizens, *American Bar Association Human Rights Magazine* 42 (2016), https://www.americanbar.org/groups/crsj/publications/

in certain areas to increased police militarization. Over 1,000 people are killed by police each year, with racial minorities far more likely to be victims of police violence.

The high volume of arrests in the US disproportionately targeting minority and disadvantaged populations is a result of policies instituted around the "war on drugs" in the 1980s and 1990s. While drug arrests decreased slightly from 2006 to 2015, the rate has recently increased again, even as arrests for violent crimes and property crimes have continued their downward trend. These drug arrests come at a high cost to taxpayers with no clear correlation to public safety.

Following arrest, many defendants spend long periods in jail before they are tried for a crime. Half a million people are currently in state and local jails awaiting trial. Many economically disadvantaged people are incarcerated because of their inability to pay bail, sometimes spending weeks or months imprisoned – a violation of due process and the right to a speedy trial. Pretrial detention can severely impact employment, family relationships, and mental health. The federal Bureau of Justice Statistics reports that over half the individuals charged with nonviolent crimes have their bail set above $5,000, a prohibitive cost for many.[10] Some defendants plead guilty simply in order to be released from detention. As with other aspects of the system, pretrial detention disproportionately affects people of color, with studies finding that minorities are more likely to be required to pay bail, amounts are set higher, and they are less likely to be able to pay than non-minority defendants.[11]

Once a verdict has been reached or a guilty plea entered, injustices continue in sentencing. In federal cases sentences are based on guidelines issued by the US Sentencing Commission, while at the state level sentencing varies according to state law. Both federal and state sentencing practices include mandatory minimum sentences and, most recently, algorithm-based assessment tools that predict the likelihood of recidivism. These practices have been criticized for taking away the sentencing discretion of judges, and for lack of transparency and removal of the ability of defendants to challenge the accuracy of information used in sentencing. More than 90% of criminal cases are settled with a plea bargain, which can lead to innocent defendants pleading guilty in order to avoid long sentences.[12] Twenty-five states allow the death penalty for crimes, and in July 2019, the Trump administration

human_rights_magazine_home/2016-17-vol-42/vol-42-no-1/police-militarization-and-the-war-on-citizens/.

[10] Bryan Covert, America is Waking Up to the Injustice of Cash Bail, *The Nation* (19 October 2017), https://www.thenation.com/article/america-is-waking-up-to-the-injustice-of-cash-bail/.

[11] Radley Balko, 21 more studies showcasing racial disparities in the criminal justice system, *The Washington Post* (9 April 2019), https://www.washingtonpost.com/opinions/2019/04/09/more-studies-showing-racial-disparities-criminal-justice-system/.

[12] John Gramlich, Only 2% of Federal Criminal Defendants Go to Trail, and Most Who Do Are Found

reinstituted capital punishment on the federal level.[13] President Biden has announced that he will halt federal executions. In addition to constitutional issues with the death penalty, capital punishment has been shown in some cases to have executed innocent individuals, and has not been proven to be a deterrent to crime.

The US is an international outlier on incarceration, holding 22% of the world's imprisoned people with only 4% of the world's population.[14] The US imprisons more than two million people in federal and state prisons and jails.[15] The annual cost of mass incarceration in state prisons is more than $80 billion, the second-fastest growing category of state spending after Medicaid.[16] Mass incarceration threatens the mental and physical health of prisoners, and disrupts the lives of their families and communities. The high rate of COVID-19 infection in prisons has brought new attention to overcrowding and unsanitary conditions.

The rapid increase in the federal prison population led to increased use of private prison facilities, which at their peak incarcerated 19% of federal inmates, as well as 7% of state inmates.[17] After a 2016 report by the Justice Department found that private prisons are less safe and less effective than government-run institutions, the US government began phasing out private prisons.[18] In 2017, the Trump administration reversed course and began using private prisons again. Despite documented flaws in prison privatization, private prisons now account for approximately 15% of federal and 7% of state prisoners.[19] Their use has been increasing for the detention of immigrants, where private detention facilities are located in remote locations and have less accountability than government facilities.

The final stage of the criminal justice process is post-conviction release. There

Guilty, *Pew Research Center* (11 June 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/.

13 Death Penalty Information Center, State by State, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state.

14 Bryan Stevenson, Slavery Gave America a Fear of Black People and a Taste for Violent Punishment. Both Still Define Our Criminal-Justice System, *The New York Times* (14 August 2019), https://www.nytimes.com/interactive/2019/08/14/magazine/prison-industrial-complex-slavery-racism.html.

15 NAACP – National Association for the Advancement of Colored People, Criminal Justice Fact Sheet, August 2020, https://www.naacp.org/criminal-justice-fact-sheet/.

16 Nicole Lewis – Beatrix Lockwood, How Families Cope with Hidden Costs of the Incarceration for the Holidays, *The New York Times(* 20 December 2019), https://www.nytimes.com/2019/12/17/us/incarceration-holidays-family-costs.html.

17 Ann Carson – Daniela Golinelli, *Prisoners in 2012 – Advance Counts*, Washington DC., Bureau of Justice Statistics, 2013, https://www.bjs.gov/content/pub/pdf/p12ac.pdf.

18 Department of Justice, *Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons*, Washington DC., Department of Justice, 2016, https://oig.justice.gov/reports/2016/e1606.pdf.

19 Ann Carson, *Prisons in 2018,* Washington DC., Bureau of Justice Statistics, 2020, https://www.bjs.gov/content/pub/pdf/p18.pdf.

are approximately 4.5 million people under probation or parole supervision in the US.[20] Data show that 45% of state prison admissions are a result of violations of the probation or parole terms, accounting for 95,000 people a day.[21] Reincarcerating people who have already served a prison term and are not a threat to public safety costs states $2.8 billion annually.[22] After their final release, convicted felons face disenfranchisement and difficulties in obtaining employment. Only 14 states now restore the right to vote after a convicted felon is released.[23] Additionally, an estimated 70 million people in the United States have a criminal record that impacts their ability to find a job after release;[24] one study estimates that this results in an annual loss of at least 1.7 million workers from the workforce with a cost of at least $78 billion to the economy.[25]

The high costs, inequities and limited effectiveness of the US criminal justice system have sparked recent bipartisan efforts to reform aspects of the system. In 2018, Congress passed the First Step Act (FSA), which expands early-release programs, increases job training and other programs aimed at reducing recidivism, and modifies mandatory minimums for drug offenses and other crimes. States have also undertaken reforms, with 35 states reducing their imprisonment rates following reductions in crime rates.[26] Texas and Minnesota, for example, have made changes in probation and parole to improve reentry outcomes. Colorado and New Jersey have reformed pretrial detention and bail to reduce the number of people in prison awaiting trial. Kansas and South Dakota recently reformed

[20] The Pew Charitable Trusts, *Probation and Parole Systems Marked by High Stakes, Missed Opportunities*, The Pew Charitable Trusts, 2018, https://www.pewtrusts.org/-/media/assets/2018/09/probation_and_parole_systems_marked_by_high_stakes_missed_opportunities_pew.pdf.

[21] Alan Greenblatt, Probation and Parole Violations Are Filling Up Prisons and Costing States Billions, *Governing* (18 June 2019), https://www.governing.com/topics/public-justice-safety/gov-parole-probation-report-criminal-justice.html.

[22] Greenblatt, Probation and Parole.

[23] NCSL – National Conference of State Legislatures, Felon Voting Rights, *NCSL* (28 July 2020), https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx.

[24] Executive Office of the President of the United States, *Economic Perspectives on Incarceration and the Criminal Justice System*, Washington DC., Executive Office of the President of the United States, 2016, https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/CEA%2BCriminal%2BJustice%2BReport.pdf.

[25] NCSL, Barriers to Work: People with Criminal Records, National Conference of State Legislatures, *NCSL* 17 July 2018, https://www.ncsl.org/research/labor-and-employment/barriers-to-work-individuals-with-criminal-records.aspx.

[26] Adam Gelb – Jacob Denney, National Prison Rate Continues to Decline Amid Sentencing, Re-Entry Reforms, *The Pew Charitable Trusts* (16 January 2018), https://www.pewtrusts.org/en/research-and-analysis/articles/2018/01/16/national-prison-rate-continues-to-decline-amid-sentencing-re-entry-reforms.

their juvenile detention systems by creating diversion programs to keep youth out of prison, reducing the number of incarcerated youth and reducing prison costs.

Proposed reforms of the US criminal justice system to comply with due process requirements and eliminate racial discrimination

- **Reform Law Enforcement and Strengthen Public Safety.** Public safety reforms should be designed and implemented to redefine law enforcement, increase funding of social services, abolish "qualified immunity" (which shields police officers from accountability through civil liability), demilitarize the police, prohibit chokeholds and "no-knock" unannounced searches, eliminate racial discrimination in policing, and bar police unions from blocking disciplinary actions against police officers. The call for "defunding" should not mean abolishing the police, but shifting some funds to social service agencies that can better perform non-law enforcement functions currently assigned to police such as mental health care, drug treatment, homeless assistance, community mediation and restorative justice. Public safety and racial justice would be advanced by making greater investment in communities ravaged by violence and the discriminatory justice system.
- **Reduce Mass Incarceration.** Review and reform federal and state sentencing codes and procedures to reduce mass incarceration and create alternatives to imprisonment, establish procedures for the early release of prisoners during COVID pandemic and similar public health emergencies, expand the release of nonviolent offenders, and create increased opportunities for home confinement under federal First Step Act.
- **Reform Sentencing Laws and Practices.** Eliminate federal and state mandatory minimum sentencing, treat drug abuse as a rehabilitation issue not requiring imprisonment, decriminalize marijuana use, and abolish the death penalty.
- **Reduce Pre-trial Detention.** Eliminate federal and state cash bail in most cases and limit the use of pre-trial detention to violent crimes where the defendant is a direct threat to public safety.
- **Reduce Juvenile Detention.** Develop federal and state programs to shut down the "school-to-prison pipeline," implement diversion and rehabilitation programs for juveniles who have committed non-violent crimes, prohibit the charging of juveniles as adults and holding them in adult facilities, and resentence prisoners serving long prison sentences imposed when they were juveniles.
- **Ban Private Prisons.** Ban the private operation of prisons and detention centers.

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CRIMINAL CONTEMPT IN BANKRUPTCY PROCEEDINGS

Tibor Tajti[1]

"While it is true that the contempt power might become a vehicle for the imposition of judicial tyranny if used improperly, statutes and judicial self-restraint have tempered its exercise. It is a useful and important remedy, the abrogation of which would seriously handicap the judicial system. [...]. It is the sole means available to the courts by which they may see that their decrees are carried out and without this power the remedy of injunction would be illusory."[2]

Why Focus on This Question?

Academic and practical reasons justify focus on the role criminal contempt plays in bankruptcy. If there is a dearth of comparative scholarship generally juxtaposing the distinctively Anglo-Saxon concept of contempt of court with what civilian systems offer instead, then this applies *a fortiori* if the perusal of criminal contempt is observed in the context of bankruptcy proceedings.[3] The notable exception being the United States (US), with its unparalleled deference attributed to bankruptcy law as a socio-legal phenomenon, expressed and illustrated by the incomparably rich and diverse case-load. These, and the voluminous literature highly critical of the US contempt laws,[4] make the US the most suitable benchmark no comparative work could bypass.

The neglect might though be due also to misconceptions, like believing that the Anglo-Saxon contempt is limited to offenses committed against government officials.[5] This is obviously mistaken. Even the few bankruptcy cases herein, each illustrating a particular instance of contemptuous behavior of creditors, officers

[1] Professor of law, Central European University – PU, Vienna (Austria).

[2] Criminal Contempt: Violations of Injunctions in the Federal Courts, *Indiana Law Journal* 32 (1957), 514–527, 515.

[3] Herein, US nomenclature is used. Hence, the term 'bankruptcy' covers both company reorganizations and liquidations, as well as proceedings opened against individuals and other entities.

[4] *See, e.g.,* John A. E. Pottow – Jason S. Levin, Rethinking Criminal Contempt in the Bankruptcy Courts, *The American Banktrupcy Law Journal* 91 (2017).

[5] Based on exchanges with Prof. Károly Bárd.

of bankrupt companies or their attorneys reacted upon by civil and criminal contempt sanctions, should prove that.

Of equal importance are the myriad practical dilemmas of legal systems continuedly struggling with making administration of bankruptcy cases more efficient, as is the case in the post-socialist systems of Central and Eastern Europe (CEE). Here, the garden variety of contemptible behavior of participants in the bankruptcy process clearly present a major stumbling block, in addition to the negative effects of the extremely intense bankruptcy stigma.[6] Unfortunately, the concrete appearance forms of demeaning behavior are evidenced more by anecdotal evidence shared by those facing the defects in real life then by a sufficiently large number of publicized cases; let alone academic studies. Figuratively speaking, while the multi-faceted set of issues the law on contempt powers of courts is made of is quite widely discussed among scholars and practitioners in the US, in emerging legal systems is largely (if not completely) ignored.

For a practical example why US sources might serve as a toolbox for others let us mention a concrete example from Hungary, where (similarly to other parts of the region) the efficient administration of bankruptcy proceedings is contingent on the willingness of the insolvent company's officers to cooperate with the appointed bankruptcy practitioner (IP, or trustee in the US). In fact, everything starts with making properly composed financial reports available to the IP in due time. This often is not achievable as courts have no means to speedily enforce their related procedural orders as contempt of court rules are dysfunctional. Refusal to obey turnover orders of bankruptcy courts, however, were forcefully dealt with in the US, indeed, through the instrumentality of both civil[7] and criminal[8] contempt rules already in the 19th century.

As far as the European Union is concerned, irrespective of the increased importance of cross-border insolvencies,[9] the desire to overcome the bankruptcy stigma, or the innovative tools designed for preventing wasteful liquidation of businesses in financial distress,[10] the impact of contemptuous behavior on the efficiency of either cross-border, or preventive restructuring proceedings, has so far escaped attention.

[6] On how the bankruptcy stigma affects the attitude of individuals and officers of companies vis-à-vis bankruptcy as a phenomenon, and how it cripples the administration of bankruptcy proceedings, see Tajti, Tibor, Bankruptcy Stigma and the Second Change Policy: the Impact of the Bankruptcy Stigma on Business Restructurings in China, Europe, and the United States, *China-EU Law Journal* 6 (2018), 1–33.

[7] *Oriel v. Russel* 278 U.S. 358 (1929).

[8] *In Re Wiese* 1 S.W.3d 246 (Tex.App. – Corpus Christi 1999).

[9] Regulation 2015/848 on insolvency proceedings.

[10] Directive 2019/1023 on preventive restructuring frameworks.

Contempt of Court Defined

Contempt Defined

Black's Law Dictionary defines contempt as '*[c]onduct that defies the authority or dignity of a court or legislature [and] such conduct interferes with the administration of justice, it is punishable, usually by fine or imprisonment.*' Contempt of court, a sub-type of contempt, may appear in direct or indirect (or constructive) forms. The first is an act that occurs "*in the presence of the court which tends to interrupt its proceedings and subvert justice.*"[11] As we will see below, as a rule, bankruptcy courts have criminal contempt powers only in these cases.

As opposed to that, indirect contempt, encompasses such contumacious acts which do not take place in front of the court but still "*tend to degrade the court, or to obstruct, or defeat the administration of justice,*"[12] (e.g., sending threatening letters). These criminal contempt cases are already in the bailiwick of district courts though the 'preparatory phases' normally occur before bankruptcy courts. One line of cases is generated, indeed, by the uncertainties and the resulting differing interpretation of courts on where the exact borderlines of direct versus indirect contempts are.

European civil law systems typically do not possess a distinct, monolith legal concept, similar to common laws 'contempt of court.' In lieu of a *concept*, they have rather "merely" rules, provisions or sometimes even distinct crimes scattered throughout various sources. This discrepancy causes cognitive problems detectable in research and in law reform processes.

Civil versus Criminal Contempt

Notwithstanding that this writing is focused on the criminal prong of contempt, one should not forget that the concept rests on two feet: the second being its inseparable civil twin. Although numerous dilemmas concerning the demarcation of the application-zones of the two have remained alive up until today, the basic rule has largely remained the same as stated in 1951, and "*[i]t is the purpose of the punishment rather than the character of the act punished which determines whether the proceeding to punish is for civil or rather criminal contempt.*"[13]

[11] Ibid, at 12.
[12] Ibid, at 13.
[13] Contempts of Court, 1951 JAG Journal 12.

Civil contempt is 'remedial and coercive in nature,' and it therefore has the dual purpose of "*[enforcing] mandates of the court relating to the rights and remedies of one party against another in private actions and [insuring] that orders and decrees affecting these rights are obeyed*."[14] Criminal contempt's function, as opposed to that, is to "*preserve the power and vindicate the dignity of the courts.*"[15] A more recent source states rather that normally, "*civil contempt addresses present or future compliance with an order, judgment, or decree, rather than punitive sanctions for past noncompliance. The latter is the subject of criminal contempt.*"[16]

It is a further exacerbating factor that the tandem often appears in cases together, the civil contempt normally being the first, milder "punishment," and the criminal one being reserved for repeat and more severe contempts of courts. In a 2015 New York case, the court added that "*[t]he element which serves to elevate a contempt from civil to criminal is the level of willfulness with which the conduct is carried out.*"[17]

Justice Scalia consequently rightly noted in his concurring opinion in the *International Union, UMWA v. Bagwell*[18] case that "*our cases have employed a variety of not easily reconcilable tests for differentiating civil and criminal contempt.*" This was a case in which the Supreme Court, involving a $25 million contempt fine imposed for "*widespread and ongoing violation of labor injunction*" on a trade union, found the imposed contempt be criminal rather than civil because it was 'significant.' As a result, jury trial should have been mandated. Though US courts have found, for example, turnover orders to be of 'quasi-criminal' nature.[19]

The differentiation is important for more reasons, including the different proving standards: the civil contempt's *'preponderance of the evidence'* versus its criminal kin's higher-standard *'beyond reasonable doubt'* threshold. Further,

[14] Ibid, at 14.

[15] Ibid, at 14.

[16] Rosemary E. Williams, Annotation, Proof of Motion Seeking Sanctions of Criminal Contempt for Violation of Order of Bankruptcy Court and Automatic Stay Pursuant to 11 U.S.C.A. § 105(a), Fed. R. Bankr. P. 9020 and Defenses, 133 Am. Jur. Proof of Facts 3d 273 (2013 & Supp. April 2017).

[17] *McCarthy v Ciano*, 50 Misc.3d 861 (2015).

[18] 114 S.Ct. 2552 (1994).

[19] *Oriel v. Russel* 278 U.S. 358 (1929). As Siegel, commentator of the case put it back then: "*Although it is conceded that the turn over proceeding is civil in its nature, it is argued that the contempt motion is quasi-criminal and therefore the degree of proof required on a motion to punish for contempt should be beyond a reasonable doubt.*" Benjamin Siegel, Contempt in Bankruptcy Cases, *American Bankruptcy Review: The Monthly Magazine for Lawyers, Bankers, and Business Men* 4 (1928), 291–322, 297. He quoted also the following passage from *Free v. Shapiro*: "*By the weight of authority, in attaching for contempt for failure to turn over assets adjudged to be withheld, the Court will not imprison the bankrupt unless satisfied beyond reasonable doubt of his guilt.*"

contrary to civil contempt authority, *"[b]efore imposing sanctions under its inherent sanctioning authority, a court must make an explicit finding of bad faith or willful misconduct."*[20] The higher proving standards ensure also that bankruptcy courts (with referrals to district courts), imposing criminal contempt sanctions, may sanction *"a broader range of conduct, unlike the civil contempt authority, which only allows a court to remedy a violation of a specific order (including "automatic" orders, such as the automatic stay or discharge injunction)."*[21]

Bankruptcy Crimes versus Criminal Contempt of Court

The last short clarification to be raised relates to the question whether there is a need for criminal contempt rules when a penal system possesses a specific 'bankruptcy crime' the function of which is equal with those of criminal contempt? Some bankruptcy crimes, namely, directly target contemptuous behavior obstructing the administration of bankruptcy proceedings,[22] as is the case with the US federal crime of 'concealment of assets, false oaths and claims, bribery.'[23] Further exacerbating factor obscuring the picture is that *"[c]riminal contempt is [perceived as] a crime in the ordinary sense."*[24]

Still, there are two key distinctions. The first is that criminal contempt serves the purpose of punishing *"repeated or aggravated failure to comply with **a court order**."*[25] [Emphasis added.] Its function is not merely to punish the wrongdoer but to discipline the contemnor fast during, and for the sake of, efficient administration of bankruptcy proceedings.

[20] *In re Lehtinen*, 564 F.3d 1052, Bankr. L. Rep. (CCH) ¶ 81474 (9th Cir. 2009). Williams, Proof of Motion, 8.

[21] Williams, Proof of Motion, 8.

[22] The previous Hungarian Bankruptcy Code from 1978 (Law No. IV. of year 1978 on the Criminal Code), for example, contained a crime named 'Administrative Obstruction of Bankruptcy Proceedings' ("*Adminisztratív csődbűntett*" – BTK §290(5)), which could have been used to punish bankrupt-company officers failing, or refusing, to cooperate with the appointed bankruptcy practitioner (trustee), among others, by not handing over the required financial reports. The crime was abolished in 2011. Now §31 of the Bankruptcy Act ("*1991. évi XLIX. törvény a csődeljárásról és a felszámolási eljárásról*") details the duties of company officers and §33 foresees fines for infringement of these rules.

[23] Federal bankruptcy crimes are codified as U.S. Code Title 18 (Crimes and Criminal Procedure), Chapter 9 (Bankruptcy), §§151-158. The leading US authority on bankruptcy crimes is Stephanie Wickouski, *Bankruptcy Rimes*, 3rd ed. Washington D.C., Beard Books, 2007.

[24] *Bloom v. Illinois,* 391 U.S. 194, 201, 88 S.Ct. 1477, 1481 (1968).

[25] Black's Law Dictionary.

This comes in addition to the goal of vindicating the authority of the court. Months if not years-lasting full-scale criminal proceedings are not designed for these purposes. In the US, where the number of annual bankruptcy cases (both, individual and company cases) is extremely big and participation of non-attorney "helpers" is also possible, without contempt powers the system would presumably grind to a halt.

The Brief History of Contempt Powers in the United States

A Word on the Beginnings • The history of contempt powers use in bankruptcy is also interesting. For example, the remedial relief was perceived as a criminal one exclusively in the US until later half of the 19th century.[26] Yet as punishment could have eventually been meted out in the form of a payment of a fine, and the increasing "*concern [of courts] to remedy the adverse party as well,*"[27] civil contempt was separated from its criminal twin step-by-step during the last decades of the 19th century. Year 1904 is identified by US sources when "*the dichotomy was officially born with the initial separation of civil and criminal contempt for the purposes of review.*"[28]

The 1978 Bankruptcy Code and the Ensuing Developments • The 1978 federal Bankruptcy Reform Act, repealing the 1898 Act, has revolutionized US bankruptcy law in many respects. It centralized the system, meaning the almost complete abolishment of various State mechanisms that had played a competitive or ancillary roles to federal bankruptcy proceedings. The terminology was also revamped: the key term 'bankrupt' was substituted by the neutral word 'debtor' as a reference to the insolvent individual or legal entity.

As far as the disciplining and other powers of institutions operating the systems are concerned, the newly created 'bankruptcy courts' were entrusted with powers "*much broader than that exercised under the former referee system*"[29] yet without enjoying the protections in Article III of the US (federal) Constitution.[30] The exact

[26] For a review of the development of the law on contempt powers see Louis H. Pollack (article editor), Civil and Criminal Contempt in the Federal Courts, *Yale Law Journal* 57 (1947), 83–107.

[27] Pollack, Civil and Criminal Contempt, 91.

[28] Pollack, Civil and Criminal Contempt, 92.

[29] Wellness International Network, Ltd. v. Sharif 135 S.Ct. 1932 (2015), para I(A), at 1939, Sup. Ct. Reporter.

[30] While district court judges enjoy the protections of Article III, namely, life tenure and pay that cannot be diminished (U.S.C.A. Const. Art. 3, § 1), *"[b]ankruptcy judges are judicial officers of the United States district court, appointed to 14-year terms by the*

confines of bankruptcy courts' powers have ever since remained a contentious yet obviously important issue as even three US Supreme Court decisions has tried to put an end to the debate though not specifically focusing on contempt powers.[31]

The new bankruptcy courts are ever since perceived as a special class of courts having "*powers of a court of equity, law, and admiralty*"[32] and inherent contempt powers as well.[33] However, this is applied unreservedly only to their civil contempt powers as express provision in the first, 1978 version of the statutory text restricted their criminal contempt powers.[34] The 1984 amendments of the Code then repealed the provision without substituting it by a new express ban ever since. As a result, the positions of the Appellate Courts are divided though the majority position is that bankruptcy courts have powers to issue civil but not criminal contempt orders unless "*committed in the presence of the judge of the court or warrantying a punishment of imprisonment.*"[35]

This formulation leaves some bankruptcy judges in limbo though "*[i]f the bankruptcy court concludes it is without power to punish or to impose the proper punishment for conduct which constitutes contempt, subdivision (a)(3) [of Rule 9020] authorizes the bankruptcy court to certify the matter to the district court.*"[36] In the case of *In Re Finney,*[37] for example, the bankruptcy court did conclude the criminal contempt trial, found the defendant to be in criminal contempt, and then referred the case to the district court for sentencing.

Some doubts surround also the question when may the bankruptcy court *sua sponte* initiate contempt proceedings. Namely, Rule 9014 gives such powers only

Courts of Appeals, and subject to removal for cause. 28 U.S.C.A. § 152(a)(1), (e)." Wellness International Network, Ltd. v. Sharif 135 S.Ct. 1932 (2015), paras 1 and 5, at 1933.

31 See *Northern Pipeline Const. v. Marathon Pipe Line Co.*, 102 S.Ct. 2858 (1982), *Stern v. Marshall* 131 S.Ct. 2594 (2011), and *Wellness Intern. Network, Ltd. v. Sharif* 135 S.Ct. 1932 (2015).

32 See 18 U.S.C. §401, which reads: "A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as –

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions".

33 For a thorough updated coverage of the topic see Williams, Proof of Motion.

34 28 U.S.C.A. §1481.

35 Rule 9020. Contempt Proceedings, codified as 28 U.S.C.A. §1481. Subdivision (a) of Rule 9020 reads: "(a) Contempt Committed in Presence of Bankruptcy Judge. Contempt committed *in the presence of a bankruptcy judge* may be determined *summarily by a bankruptcy judge*. The order of contempt shall recite the facts and shall be signed by the bankruptcy judge and entered of record." [Emphasis added.]

36 Rule 9020, Advisory Committee Notes to Subdivision (a).

37 167 B.R. 820 (E.D. Va. 1994).

to the trustee and to a 'party of interest' but not to bankruptcy judges, which is an issue not addressed expressly by the other pertinent Rule 9020 either.

One final issue requires commenting: the relationship of bankruptcy courts' equitable powers enshrined into Section 105 of the Bankruptcy Code and contempt powers. Namely, the broadly formulated section, playing pivotal role in administering bankruptcy proceedings, does ***not*** expressly grant contempt powers to bankruptcy courts. Nonetheless, some courts have found "*that it preserves (if you believe in inherent powers) or grants (if you are a textualist) at least civil contempt power to bankruptcy courts. Indeed, in Taggart v. Lorenzen, the Court relied upon precedents grounded exclusively in equity practice in determining when contempt for violation of a statutory injunction was appropriate.*"[38]

What the US Cases Reveal

The exploration of the comparably rich US caseload on criminal contempt would be a boon to comparatists and law reformers alike. The garden variety of the reasons, the types of contemptuous behavior sanctioned by criminal contempt in bankruptcy proceedings, and the very contents of the contempt orders would be telling in many respects. There are many more variants, well-above the scenarios illustrated by the few cases mentioned above. Potentially all grave and repeated contempts of courts could be punished by criminal contempt; be it the context of bankruptcy proceedings or of any other area of law. This may go as far as finding a contemnor guilty of criminal contempt (by a jury) for willful violation of a district court's order prohibiting infringement of the respondent's trademark.[39] Presuming that the stakes contempt of court cases involve are of peppercorn value would be gravely mistaken, too.

Epilogue

US contempt laws' weak points and harsh critique notwithstanding, though having its strengths as manifested in its richness in sight as well, the sequitur of the above elaboration should be obvious. Until the state of perfection is reached, and respect for law would not be so embedded in participants of the bankruptcy process that nobody would even think of willfully disrespecting the law or the courts, the comparative study of the *criminal contempt-bankruptcy nexus* would

[38] Bruce A. Markell, Courting Equity in Bankruptcy, *The American Bankruptcy Law Journal* 94 (2020), 227–264.

[39] *Young v. U.S. Ex Rel. Vuitton et Fils, S.A.* 107 S.Ct. 2124 (1987).

undoubtedly be rewarding beyond expectations; for scholars, practitioners, and law reformers alike.

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STRATEGY FOR GLOBAL GOVERNANCE AGAINST GLOBAL CRIME *UNTOC*[1] *& UNCAC*[2] *WANTING*

Uglješa Ugi Zvekić[3]

Comprehensive and Effective Global Anti-Crime Governance

For a comprehensive and effective global anti-crime governance there is a need to develop a clear strategic approach which recognize the manifold linkages among global anti-crime types and manifestations and their relationship with sustainable development. Such a strategy for global crime governance will provide clear directions for an appropriate mutually-supportive, referential, beneficial and results-oriented implementation of the normative instruments (in particular UNTOC and UNCAC), their respective governing bodies and review mechanisms, including the monitoring and outcome (impact) assessment of the effectiveness of global governance against global crime.

In short, this is about promoting an instrumental and integrating strategic direction against global crime based on the existing normative framework (UNTOC and UNCAC) and the developmental platform: Sustainable Development Goals 2030 (SDGs).[4]

[1] United Nations Convention against Transnational Organized Crime, Adopted by the UN General Assembly: 15 November 2000, by resolution 55/25 Entry into force: 29 September 2003, in accordance with article 38 Signatories: 147; Parties: 190; supplemented by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.

[2] United Nations Convention against Corruption (UNCAC), Adopted by the UN General Assembly: 31 October 2003, by resolution 58/4 Entry into force:14 December 2005, in accordance with article 68(1) Signatories: 140; Parties: 187.

[3] Ambassador of the European Public Law Organization (EPLO) at the UN in Vienna and the Senior Advisor at the Global Initiative against Transnational Organized Crime.

[4] Transforming our world: the 2030 Agenda for Sustainable Development, Adopted by the General Assembly on 25 September 2025, by resolution A/RES/70/1 of 21 October 2015.

Background and Rationale

Global challenges of crime governance today see an increasingly close link between organized crime and corruption, as both activities are intertwined through mutual instrumentality. Corruption offers the means to allow illicit markets to operate – by ensuring impunity for criminal actors, facilitating methods of legitimizing illicit gains or ensuring flows of illicit goods through trafficking networks and across borders. Conversely, the power, influence and wealth accrued through organized crime places criminal actors in a position to influence state officials and shape the wider political economy.

In summary, transnational organized crime is characterized by modes of operation and instruments which include: threats, extortion, violence and *corruption***.** Corruption in particular is used, on the one hand, for the maintenance and expansion of illicit activities and control over illicit markets and trade, and on the other, to access licit market and/or state-based economic opportunities (e.g. public works; public bids, etc) and influence both law and policy making as well as law and policy administration and implementation.

Corruption is today an organized endeavour. Without taking away the dangerous and risks posed by the routine, petty level corruption transactions to which many citizens all over the world are exposed every day in their everyday contacts with public administration at the local, regional and national levels, the increasing threat is manifested in the high level and international corruption. These are by no means organized illicit endeavours – the *transnational organized corruption***.**

In the context of development, the impact of organized crime on governance and the rule of law is heightened, particularly in fragile and post-conflict states. Organized crime and corruption are increasingly recognized as impeding development (SDGs Goal 16), inhibiting economic growth and amplifying state fragility. Although neither are new phenomena, over recent years their spread, impact and influence have reached unprecedented levels, with profound effects in both developing and developed countries.

The inextricable links between organized crime and corruption require an integrated, coordinated approach to prevention, international cooperation and in particular asset recovery. This includes minimizing the opportunity for such activities, targeting illicit profits (including anti-money-laundering efforts and asset recovery), nurturing an anti-crime culture and concerted international cooperation efforts.

The transnational organized corruption will be the predominant manifestation of corruption and organized crime nexus on the international level. This emerging international challenge requires much more integration both normative and

practical between UNCAC and UNTOC but also other relevant international instruments such as drug conventions, arms and terrorism legal and policy instruments, including those from the human rights ambit.

Therefore, greater integration and cross-fertilization in the various UN anti-crime, drugs and terrorism instruments are also needed to help promote more effective prevention, prosecution and adjudication of these interrelated sinister phenomena.

Such an integration is also needed in terms of the review of those instruments, including more cross-fertilization between the Conference of the State Parties of UNCAC (COSP) and UNTOC (COP). More integration between organized crime and corruption manifestations requires much more integration in and of the crime governance.

UNTOC and UNCAC: Prevention, Criminalization and International Cooperation

Within the international normative anti-crime and criminal justice realm, the UN Convention against Transnational Organized Crime (UNTOC)[5], ratified by 190 member states (February 2020) and the UN Convention against Corruption (UNCAC)[6], ratified by 187 (February 2020) member states, represent the normative, criminal-justice-based platforms for the prevention, criminalization and international cooperation against (transnational) organized crime and (transnational) corruption.

The developmental platform, which covers prevention in the wider social and cultural space, is represented by *2030 Agenda for Sustainable Development*, and in particular Goal 16: Peace, Security and Justice for All with the two most relevant targets, 16.4 and 16.5. These aim (respectively) to 'significantly reduce all forms of organised crime' (with a particular focus on illicit arms and financial flows) and 'substantially reduce corruption and bribery in all their forms' by 2030. These goals are a significant step towards approaching organized crime as a mainstream development concern and extending responsibility for its prevention across a broader range of development actors.

[5] https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html.
[6] https://www.unodc.org/unodc/en/treaties/CAC/.

Prevention

What is the preventative potential of UNTOC and UNCAC, and how can the synergies between them be maximized to support a wider, development-based approach to preventing organized crime and corruption?

UNTOC aims to promote international cooperation with a view to both combating and preventing transnational organized crime. Article 31 contains the key material dealing with prevention, obligating states parties to undertake a range of measures. These include developing projects and establishing best practices and policies aimed at the prevention of transnational organized crime; reducing opportunities for transnational organized crime to occur in lawful markets; promoting cooperation between law enforcement and the private sector – and several others.

However, the preventative ambit under UNTOC is rather limited both in terms of the level of elaboration as well as in terms of the guidelines and instruments for monitoring, evaluation and impact assessment.

This is not to say that UNTOC is an unmitigated failure on the prevention front. For example, it has a well-developed preventative dimension when it comes to money laundering, as it promotes regulations for banks and other financial institutions to control transfers of illicit cash. Similarly, international cooperation through mutual legal assistance or extradition has a preventative function by helping to eradicate safe havens for criminals.

Prevention is a central tenet of UNCAC, evident in its three main stated aims – to 'promote and strengthen measures to prevent and combat corruption more efficiently and effectively; to 'facilitate international cooperation and technical assistance in the prevention of and fight against corruption'; and to 'promote integrity, accountability and proper management of public affairs'.

In contrast to UNTOC, however, this convention devotes an entire chapter (Chapter 2) to prevention measures, as opposed to just a single article. These cover a wide array of areas, such as creating and maintaining preventative anti-corruption bodies; strengthening systems for ensuring integrity of civil servants; and applying codes of conduct for public officials.

In terms of prevention measures, UNCAC offers a much richer and more detailed resource than UNTOC. However, while it provides for the monitoring of the state of affairs when it comes to a number of specific preventive measures it provides no clarity on the impact assessment of those preventive efforts.

Both UNTOC and UNCAC call upon the civil society to play an important role in the prevention of organized crime and corruption, respectively, and both, see very limited role for the civil society in the *review process*.

Criminalization and related provisions

UNTOC establishes several criminal offences when transnational in nature and involve organized criminal group. These are:

Art.5. Participation in an organized criminal group

Article 6. Laundering of proceeds of crime

Article 8. Corruption

Article 23. Obstruction of justice, and

Article 2. Serious crime.

In addition, the Protocols supplementing UNTOC (Human Trafficking, Smuggling of Migrants, Illicit Manufacturing and Trafficking in Firearms) also establish few offences such as "trafficking in persons", "smuggling of migrants", and related "producing a fraudulent travel or identity document" and " procuring, providing or possessing such a document" and "illicit manufacturing of firearms, their parts and components and ammunition", "Illicit trafficking in firearms, their parts and components and ammunition" and "falsifying or illicitly obliterating, removing or altering the marking(s) on firearms" for those state-parties which have ratified UNTOC and relevant Protocols thereto.

UNCAC establishes several mandatory criminal offences such as:

Article 15. Bribery of national public officials

Article 16. Bribery of foreign public officials and officials of public international organizations

Article 17. Embezzlement, misappropriation or other diversion of property by a public officials

Article 23. Laundering of proceeds of crime

Article 25. Obstruction of justice.

UNCAC also "suggests" for adoption (optional) the following criminal offences:

Article 18. Trading in influence

Article 19. Abuse of functions

Article 20. Illicit enrichment

Article 21. Bribery in private sector

Article 22. Embezzlement of property in the private sector

Article 24. Concealment.

UNTOC and UNCAC have in *common "laundering of proceeds of crime", "obstruction of justice" and "corruption: bribery of public officials (national, foreign and international)".*

In addition UNTOC and UNCAC have in common or similar a number of provisions regarding prevention and combat of money laundering, liability of

legal persons, prosecution, adjudication and sentencing, seizure and confiscation, joint investigations, special investigative techniques (e.g. controlled delivery), protection of witnesses, etc,

International cooperation

Both UNTOC and UNCAC provide for international cooperation and in particular as related to extradition, mutual legal assistance, transfer of sentenced persons and transfer of criminal proceedings and law enforcement cooperation.

UNCAC in its Chapter V promulgates *Asset recovery* as a fundamental principle of this Convention.

UNTOC and UNCAC provide the most important instrument for an effective and global implementation of the international cooperation forms and modes which overcomes the limits of the bilateral treaties. In other words, all the state parties which have ratified UNTOC and/or UNCOC can use international cooperation as per the two Conventions respectively even when there are no bilateral treaties or those in existence do not include criminal offences and/or other provisions contained in UNTOC and UNCAC. This is the most powerful potential for an effective and the broadest possible international cooperation against organized crime and corruption in their forms and manifestations as envisaged by the two respective Conventions.

Conference of the Parties to the Convention

Article 32 of UNTOC and Article 63 of UNCAC establishes each "Conference of the (State) Parties to the Conference"- COP for UNTOC and COPS for UNCA respectively with the aim to improve the capacity to combat and achieve the objectives of the Conventions and to " promote and review" the implementation. UNTOC COP also covers the Protocols supplementing the Convention.

UNTOC COP and UNCAC COSP share similar objectives including facilitating activities of the Parties to the Conventions, mobilization of voluntary contributions, the exchange of information on patterns and trends in transnational organized crime and corruption and on successful practices in prevention and combat, cooperation with relevant international and regional organizations, and

- Reviewing periodically the implementation,
- Making recommendations to improve the Conventions and their implementation respectively,
- Proposing (following the initial period of five years after the entry into force

of the Convention) an amendment to the Convention (Article 39 of UNTOC and Article 69 of UNCAC).

Conferences of the (State) Parties have adopted their own rules of procedure. Conferences are held regularly on biennial basis, COP hosted in Vienna and COSP hosted by a government of a State Party. Up to date there were 10 COPs and 8 COSPs- the next one will be held this year in December in Cairo, Egyp.t

Review Mechanism(s)

The purpose of the Implementation Review Mechanism is to assist States parties in their implementation of the Convention. The Mechanism promotes the purposes of the Convention, provides the Conference of the States Parties with information on measures taken by States parties in implementing the Convention and the difficulties encountered by them in doing so, and helps States parties to identify and substantiate specific needs for technical assistance and to promote and facilitate the provision of such assistance. In addition, the Mechanism promotes and facilitates international cooperation, provides the Conference with information on successes, good practices and challenges of States parties in implementing and using the Convention, and promotes and facilitates the exchange of information, practices and experiences gained in the implementation of the Convention.

Review Mechanism(s) UNTOC COP

As regards the Review mechanism(s), first there was a WG on the Review of the Implementation of the Organized Crime Convention and Protocols Thereto (till 2012), to be replaced by Open-Ended Intergovernmental Meeting To Explore All Options Regarding An Appropriate And Effective Review Mechanism For UNTOC And The Protocols Thereto (2015 and 2016) and then Open-Ended Intergovernmental Meeting For The Purpose Of Defining The Specific Procedures And Rules For The Functioning Of The Review Mechanism For The United Nations Convention Against Transnational Organized Crime And The Protocols Thereto (2017 onwards).

The 10th UNTOC COP in October 2018, 18 years following the adoption of UNTOC, finally adopted by Resolution 9/1 the UNTOC Review Mechanism:

- *'guiding principles and characteristics'* are based on those enshrined of UNCAC. These are exclusively "intergovernmental" and "impartial". Civil society contribution is based on a good will of the governments.
- *Country Review:* Countries are subject to review as per thematic clusters, rather than by instrument: the first review cycle is 8 years. Peer review by

two other countries allocated by a very complex drawing of lots. The process begins by completing a self-assessment questionnaire for each instrument (Convention plus 3 Protocols to which the Party under review is a member of) to be finalized with the two peer reviewing countries. Parties are *encouraged* to consult with civil society. The self-filled in questionnaire is made available to an online system (SHERLOC) so it can be shared with other States Parties and the Secretariat (the UNODC). A list of observations agreed between the country under review and the two peer reviewers is then circulated to the COP. It can choose to keep parts of it confidential but may decide to make it available to the public at large. The country reviews will be placed into the COP's *General Review*, which is held in the plenary of the COP each second year with the aim to "*facilitate the exchange of experiences, lessons learned, best practices and challenges in implementing the Convention and Protocols and the identification of technical assistance needs, with a view to improving their effective implementation and promoting international cooperation."* The general discussion will focus on some general trends rather than countries' peculiarities thus avoiding any focused public discussion.

– The *thematic working groups* (based on the 3 Protocols, as well as on international cooperation and technical assistance), which meet usually on annual basis, will consider the lists of observations on the basis of which it will produce general to the COP. No specific country reference is envisaged. Following the closure of the official deliberations by the working groups a *"Constructive Dialogues"* civil society and other stakeholders is envisaged but no specific country or situation is to be dealt with.

The UNTOC Review Mechanism is a very complex and voluntaristic process. It will start from next year that is two years after its adoption which means 20 years after the adoption of UNTOC.

Review Mechanism UNCAC COPS

In comparison with the review mechanism of UNTOC, the Review mechanism of UNCAC is well in place and functional (Resolution 3/1 of the Conference of the States Parties to the United Nations Convention against Corruption). It is based on the peer review (one State Party from the regional group and the second from another region; the self-assessment check-list; governmental experts guidelines; blueprint; etc.). The review of the UNCAC implementation is carried out by a well developed schedule and cycles as per chapters of the Convention.

The first cycle started in 2010 and covered the chapters on Criminalization and Law Enforcement, and International Cooperation: the second cycle started

in 2015 and covers the chapters on Preventive Measures and Asset Recovery. Summary report of the first cycle was made available while the country reports are confidential although the Governments may decide to make them accessible to the public at large.

What is lacking?

As noted the review mechanism for UNTOC still has not started with the implementation while that of UNCAC is operating since 2010 and is now in its second cycle.

The findings of the UNCAC's first cycle review are positive in terms of the efforts on the part of the countries to introduce changes in domestic anti-corruption legislation although to a much greater extent when it comes to the mandatory (and more traditional corruption offences) rather than to the optional corruption offences (less traditional ones). The use of special investigative techniques is rather limited and law enforcement cooperation very limited. There is a lack of systematic data of various sorts in order to assess the patterns and trends of corruption as well as the responses to it.

There is also a need to make country reports public and transparent.

But moreover, in view of the increasing link between organized crime and corruption there is an urgent need to promote in practice cross-fertilization and coordination between the two review mechanisms.

The Role of the Civil Society

Am important issue of concern is the role of civil society in the review process. The key role played by civil society in the *Universal Periodic Review of the UN* Declaration-Charter of Human Rights is of fundamental importance. The country under review prepares a report on the state of human-rights issues there. The charter envisages a mandatory role for civil society. In other words, there is a compulsory report that must be prepared by civil-society actors on issues of human rights in the countries reviewed. Therefore, the Charter recognizes the important role of civil society.

It is not that the Universal Periodic Review is unproblematic. Human rights are politically very sensitive and some governments tend to be uncooperative with civil society. It is not that the review process works perfectly by any means. However, the fact remains that the instrument itself, the Charter, recognizes and mandates the role of civil society.

By contrast, in the anti-crime arena, where the two most important conventions are UNTOC and the UNCAC, which are equivalent to the HR Charter, the recognition of the role of civil society in the review mechanism is very limited and exclusively based on a good will of the Parties under review. Civil society, according to the UNTOC and UNCAC review mechanisms, has almost no real in the review process. As stated above while HR UPR is *"a State driven process"*, both review mechanisms of UNTOC and UNCAC are *"an intergovernmental process"*. The wording clearly expresses the main features of each of the review mechanism,

Such an unsatisfactory normative and de facto position of the civil society makes both conventions *de iure* weak with respect to their own opening principles. Both refer to the role and importance of civil society in the fight against organized crime and corruption. The problem is, if this is not followed up through legislative provision or a mechanism allowing for such a role, then these opening declarations are undermined and they become nothing more than mere ideological statements. The conventions create an expectation for civil society to be engaged in preventing and controlling organized crime and corruption but, then, they do not provide for fully fledged civil-society participation in the review process.

The limited role of civil society in the UNCAC and UNTOC review mechanisms is a devolution and a step backward with respect to the Universal Periodic Review of the Human Rights Charter.

What is Needed?

Strategic approach towards global governance against global crime

For a comprehensive and effective global anti-crime governance there is a need to develop a clear strategic approach which recognizes the manifold linkages among global anti-crime types and manifestations and their relationship with sustainable development.

The existing United Nations anti-crime normative framework is rather rich.[7]

[7] Single Convention on Narcotic Drugs of 1961 (as amended in 1972), the Convention on Psychotropic Substances of 1971, and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988), relevant anti-terrorism conventions and protocols (in particular, Terrorist Financing Convention (1999), Nuclear Terrorism Convention (2005)), Universal Declaration of Human Rights, Arms Trade Treaty, and UNTOC and UNCAC, are of utmost importance for the global response to global crime challenges. The existing regional conventions and protocols (e.g.EU; Council of Europe; African Union, Organization of American States, the Arab League; etc) as well as of other international organizations such as FITF and OECD, are also of paramount importance for a comprehensive and effective global anti-crime governance. The 2030 Agenda for

There is an ample political and normative framework and platform which provide for the development of a clear strategy to promote effective cross-fertilization, coordination, cooperation and mutually supportive implementation of the global anti-crime governance.

Such a Strategy for Global Anti-Crime Governance will provide clear directions for an appropriate mutually-supportive, referential, beneficial and results-oriented implementation of the normative instruments, their respective governing bodies and review mechanisms, including the monitoring and outcome (impact) assessment of the effectiveness of global governance against global crime.

The main objective will be to promote an instrumental and integrating strategic direction against global crime within the framework of the existing normative framework and the developmental platform (SDGs).

Three related targets are of operational nature:

– Mobilization and capacity building of civil society to contribute to UNTOC and UNCC Review Mechanism even in its limited role;
– Political and ethical work for the promotion of the mandatory role of civil society in the review mechanism of both UNTOC and UNCAC
– Increasing the responsive and dynamic capacity of UNTOC and UNCAC: Recognition and adequate normative positioning within the framework of UNTOC and UNCAC of the emerging types and manifestations of transnational organized crime and corruption, and in particular regarding the Transnational Organized Corruption.
– Amending the Review Mechanisms to include Impact Assessment: from Output to Outcome

All in all, there is an urgent need to increase the capacity of UNTOC and UNCAC to be more responsive and dynamic in providing normative recognition of the emerging global crime manifestations and the impact of their implementation in order to increase the effectiveness of global anti-crime governance.

Sustainable Development (2015), is the developmental and political platform of strategic importance, which includes a number of relevant anti-crime goals and targets, and in particular Goal 16: Peace, Security and Justice.

CRIMINAL PROCEDURAL LAW AND INTERNATIONAL CRIMINAL COOPERATION

DEVELOPING EU CRIMINAL LAW – SOME PERSONAL REFLECTIONS ON 9 MAY

Péter Csonka[1]

On 9 May 2021 the European Union has officially launched, in Strasbourg, the Conference on the future of Europe. This process will involve much reflection on what Union policies work well, or not so well, and may ultimately trigger a revision of the Treaties. The Union institutions must take stock of what has been achieved and what remains to be done.[2] Obviously, our future priorities must follow the wake of our achievements but also deliver innovations capable of addressing new challenges, in particular new crime phenomena and the changing needs of cross-border police and judicial cooperation. For example, the approximation of hate crimes has no legal basis in the current Union treaties while extremist hate crimes are on the rise.[3] Likewise, traditional judicial cooperation is being tested by the post-COVID need of digitally exchanging sensitive information and evidence.

Developing criminal law and judicial cooperation in criminal matters has been a key component of Union policies for the last 20 years, with its foundations going further back in time, to the Schengen and European Political Cooperation treaties, but also building on the Council of Europe's innovative but intergovernmental treaties. The Union's current area of freedom, security and justice (AFSJ) seeks to provide citizens and companies with both security and rights, in particular by ensuring an ever-increasing coordination between judicial authorities, the progressive mutual recognition of judgments and judicial decisions in criminal matters, and the necessary approximation of criminal laws, both substantive and procedural.

Admittedly, much progress has been achieved since the 1999 Tampere Programme: there is a robust Union *acquis* on cooperation between judicial

[1] Deputy Director at DG JUSTICE, European Commission. These views are purely personal and do not represent those of my employer, the European Commission.

[2] For an earlier stock-taking see Péter Csonka – Oliver Landwehr, 10 Years after Lisbon – How "Lisbonised" is the Substantive Criminal Law in the EU?, *Eurocrim* 4 (2019), 261–267.

[3] Judit Bayer – Petra Bárd, *Hate speech and hate crime in the EU and the evaluation of online content regulation approaches*, Brussels, European Parliament, 2020. https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655135/IPOL_STU(2020)655135_EN.pdf.

authorities, covering the recognition and execution of a range of judgements and decisions, e.g., arrest warrants, investigation and supervision orders, prison sentences and financial penalties. This progress is facilitated by the progressive but much-needed harmonisation of certain aspects of national substantive criminal and procedural laws, including minimum standards to protect the rights of suspects and victims, and it is enforced through the forward-looking case law of the CJEU. The Union's efforts to establish a common area of justice (AFSJ) are thus visible, both in the progress of judicial cooperation and in the protection of the rights of persons involved in justice-related issues, these areas of Union law equally benefiting from the application of the Charter of Fundamental Rights. Going forward, however, significant challenges remain in making this existing *acquis* work efficiently throughout the Union, at the heart of which is ensuring effective implementation of the adopted legal instruments in all Member States. Besides offering funding to stimulate coordination and helping national authorities to organise judicial training, the European Commission should not shy away, ultimately, from deploying the tools it has at its disposal, as the guardian of the Treaties.[4]

As the world becomes more fractured and unsettled, the Union's core task remains to protect and further Europe's achievements, including its open democratic societies and liberal economies, while keeping terrorism and cross-border organised crime effectively under control. Judging by the relevant indicators, it seems that the terrorist threat in the Union will remain high and new attempts to carry out attacks likely. While the number of fatalities has decreased since 2015 (from 151 to 62 in 2017), the number of jihadist-inspired attacks (33) in 2017 more than doubled, with the number of arrests in relation to jihadist terrorist activities reaching high levels (705 in 2017). Similarly, organised crime remains a challenge for the authorities: Europol's current Serious and Organised Crime Threat Assessment (SOCTA 2017) records more than 5000 organised crime groups (OCGs) operating on an international level and currently under investigation in the EU. Overall, this number highlights the substantial scope and potential impact of serious and organised crime on the EU. More than one third of these groups active in the EU are involved in the production, trafficking, or distribution of illicit drugs. Other major criminal activities for organised crime groups in the EU include organised property crime, migrant smuggling, trafficking in human beings, and excise fraud. 45% of the groups mentioned in the SOCTA 2017 are involved in more than one criminal activity. It is estimated that the economic loss due to organised crime and corruption remains high in the Union, between

[4] Laurent Pech – Kim Lane Scheppele, Illiberalism Within: Rule of Law Backsliding in the EU, *Cambridge Yearbook of European Legal Studies* 19 (2017), 3–47.

€218 and €282 billion annually. In addition, organised crime and corruption have significant social and political costs, such as infiltration of the legal economy through the investment of laundered criminal proceeds.

Digitalisation profoundly affects the criminal justice field, acting as both a catalyst of cross-border criminal activity and an effective tool to fight organised crime. In recent years, the European Union has taken steps to modernise the information systems used by law enforcement officials in the respective Member States, to better enable cross-border cooperation in criminal cases. In particular, EU law enforcement authorities, including Europol, eu-LISA and Frontex, are equipped with state-of-the-art digital (ICT) tools for gathering and sharing information, and can exchange and process operational data in a structured, encrypted, fully automated and interoperable way. In contrast, judicial practitioners in the Member States, as well as Eurojust and other JHA agencies, often lack appropriate tools to tackle serious cross-border crime and enhance cooperation among involved authorities. In particular, the lack of a structured and integrated information system to support operational exchanges of crucial information and evidence during cases requires practitioners to find workarounds based on cumbersome manual procedures. At Eurojust, such limitations slow down efforts to provide the level of service national authorities require in cross-border investigations.

Faced with the evolution of crime, globalisation, and technological innovations, there is a clear need to adapt the Union's *acquis* to the actual needs of practitioners and citizens and thus enable appropriate responses to new developments, including those linked to digitalisation and the use of Artificial Intelligence (AI). A primary challenge is the establishment of a solid EU criminal law framework capable of coherently tackling serious and/or cross-border crime ("euro-crimes") and other areas of crime in which the approximation of offences or sanctions is essential for the enforcement of EU law ("accessory crimes") in full respect of Member States' legal traditions. It is important to strike the right balance between EU action and respect for Member States' legal traditions, in particular in the area of sanctions. In the years to come, the Union should revisit its legislation on environmental crimes, in particular to support the objectives of a long-term Union policy for the protection of the environment with an appropriate set of criminal and other sanctions. Moreover, the Union should tackle the rising phenomena of hate crime and gender violence, in necessary by revising the legal basis in the Treaties (neither crime category is mentioned among the cross-border crimes within the Union's competence but both can be serious).

Another high priority in the area of justice is to strengthen mutual trust based on democracy, the rule of law, and fundamental rights, to increase fairness and sustainability in society, and to ensure the smooth functioning of the single market. It is now clear that further efforts are required to consolidate the system

of mutual recognition of judgments and judicial decisions in criminal matters, including by ensuring minimum harmonisation of criminal procedural rules. One major issue here is to address the growing lack of mutual trust due to problems in the functioning of criminal justice systems or poor prison conditions in some Member States and the ensuing refusals of European Arrest Warrants.[5] Arguably, prison conditions could be addressed under the current treaty, at least as far pre-trial conditions are concerned, whereas post-trial detention would require a revision of the Treaties. However, the more systemic issues, issues which run deep to undermine mutual trust, such as the perceived or real lack of judicial independence, whether affecting prosecution services or courts, would clearly require adapting the Treaty framework, in a way that the strict obligation of mutual recognition is brought in line with the equally strict obligation to respect the Charter of Fundamental Rights and, indeed, the common tenets of the Rule of Law.

Judicial cooperation is also bound to expand further in order to keep pace with the ever-increasing Union-level police cooperation, as reflected by the competences of Europol or other home affairs agencies. Police and judicial cooperation should go hand in hand, otherwise there is a regrettable risk of disconnect. As the Union's institutional landscape for judicial cooperation gains maturity through the recent reform of Eurojust and the necessary integration of various judicial networks, it will also grow in complexity owing to their future interaction with the European Public Prosecutor's Office (EPPO) and its direct criminal enforcement. The Union will need to ensure coherence of action and adequate funding for all actors in this chain, including *vis-à-vis* the Union's law enforcement and administrative agencies. The EPPO's operational work, likely to start on 1 June 2021, may create another useful dynamic towards a larger material competence and more harmonised rules of criminal procedure, for example in the area of evidence-collection and admissibility. These changes would be possible already now, but the unanimity requirement could be an impediment.

Besides finalising pending legislative files, such as those on e-evidence, and ensuring the implementation of the *acquis*, reflection should also begin on possible initiatives that could help the Union complete its criminal justice arsenal. Issues worth exploring in the medium or long term could include:

[5] Wouter van Ballegooij, *The Cost of non-Europe in the area of Procedural Rights and Detention Conditions*, Brussels, EPRS, 2017. https://www.europarl.europa.eu/RegData/etudes/STUD/2017/611008/EPRS_STU(2017)611008_EN.pdf. Wouter van Ballegooij, *European Arrest Warrant. European Implementation Assessment*, Brussels, EPRS, 2020. https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642839/EPRS_STU(2020)642839_EN.pdf.

- The transfer of criminal proceedings, perhaps in the broader context of rules on conflicts of jurisdiction and the principle of *ne bis in idem*;
- Cross-border use and admissibility of certain types of evidence;
- Protecting vulnerable suspects and accused persons;
- Updating Union law on corruption and environmental crime;
- Extending the material competence of the EPPO and harmonising its procedures;
- Developing minimum standards on pre-trial detention and on compensation for unlawful detention;
- Continuing work on victims' rights, including access to justice and compensation;
- Enhancing convergence and cooperation between Eurojust, the European Judicial Network (EJN), and the EPPO;
- Issuing or revising handbooks on mutual recognition instruments to help practitioners implement CJEU case law;
- Use of Artificial Intelligence (AI) in criminal proceedings;
- Enhancing the digitalisation and interoperability of criminal justice authorities and EU bodies.

Of course, before becoming Union law any initiative in these areas of evolution will be subject to political validation and practitioners' scrutiny: for both the Commission will need to demonstrate their added-value and strict compliance with principles such as subsidiarity and proportionality. Not an easy task!

I hope these perspectives will help demonstrate that Professor Bárd got it right with his unfailing and visionary belief in the Europeanisation of criminal laws.[6]

[6] Bán Tamás – Bárd Károly, Az Európai Emberi Jogok Egyezménye és a magyar jog: 5., 6. és 7. cikkek, *Acta Humana: Hungarian Centre for Human Rights Publications* 3 (1992) 3–162; Bárd Károly, European Criminal Law?, in Lahti, Raimo (ed.), *Towards a Rational and Humane Criminal Policy = Kohti rationaalista ja humaania kriminaalipolitiikkaa: Dedicated to Inkeri Anttila = omistettu Inkeri Anttilalle*, Helsinki, European Institute for Crime Prevention and Control (HEUNI), 1996, 241–253; Bárd Károly, *Fairness in Criminal Proceedings: Article Six of the European Human Rights Convention in a Comparative Perspective*, Budapest, Magyar Hivatalos Közlönykiadó, 2008; Bárd Károly, *Az áldozatok méltósága és a vádlottak jogai: összehasonlító jogi tanulmány*, Budapest, HVG-ORAC Lap- és Könyvkiadó Kft., 2021.

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THE FUTURE OF FREE PROOF IN CRIMINAL CASES

Mirjan Damaška[1]

Stupendously rapid changes in various domains of social life have begun to affect the administration of criminal justice. Consider only that the full adjudicative process is everywhere in decline, and that systems of criminal procedure find it harder and harder to function in accordance with their own long standing principles. But the judge's freedom from legal constraints in evaluating evidence seems at first blush to be unaffected by the winds of change: legal rules limiting the judges freedom to assess the probative value of evidence continue to be regarded with suspicion, and must be justified lest they be viewed as a partial regression to the legal proof system of *ancien régime*'s criminal procedure. On the pages that follow I shall argue, however, that the actual sway of the continental free evaluation principle is already more limited than conventional wisdom suggests, and that its importance will be further diminished in the future. Going forward, I will claim, legal proof rules of certain genre will appear increasingly desirable and constrain judges in their fact-finding activity.

First, then, about the extent of free evaluation of evidence *rebus sic stantibus*. After the French Revolutionary Assembly adopted a variant of the English jury system, the view prevailed that the assessment of the probative potential of evidence is a matter of legally untouchable inner psychological acceptance, or a matter of the decision-maker's *"conviction intime"*. The certainty required for establishing the defendant's guilt was believed to be insufficiently transparent to justify reasoned explanation, and jurors were not required to give reasons for their decisions. Their factual findings were consequently exempted from appellate review.[2] Soon, however, unreviewable jury verdicts were subjected to criticism as being erratic, and most continental jurisdictions abandoned the view that the processing of evidence is impervious to regulation. The freedom of the judges to determine the probative value of evidence came to be interpreted to include only the exemption

[1] Sterling Professor Emeritus of Law at Yale Law School.

[2] The exemption was also supported by the idea that jurors were imagined as avatars of the sovereign French people, and by the briefly help antipathy toward the hierarchical review of verdicts.

from *legal* rules on the matter. The judges, it was proclaimed, remained bound by rules of rational inference and the maxims of experience. And since observance of these rules is obviously possible, the rectitude of the trial court's factual findings was subjected to systems of open or latent superior review. This understanding of free evaluation of evidence was more recently embraced by the Strasbourg court. Although it did not go so far as to proclaim that unreasoned judgments necessarily violate the fairness of trials, its pronouncements on alternative ways of safeguarding procedural justice are far from compelling.[3] In short, the conclusion seems warranted that in most continental European jurisdictions the system of *"conviction raisonné"* has replaced the older system of *"conviction intime"* as the dominant decision-making standard.

It should not be overlooked, however, that open or latent hierarchical review of factual findings reduces the space for the trial court's free evaluation of evidence. It reduces this space to such a degree that it becomes questionable to claim that only a few exceptions exist from legally unconstrained judicial assessment of probative value. This claim can be sustained only by the unrealistic legal doctrine that court decisions are not a source of law. It is true that appellate court decisions dealing with factual issues are often deeply contextual, so that no clear and sharp edged rules can be abstracted from them. Yet, rules capable of limiting the fact-finders' freedom emerge in all jurisdictions. They are collected and usually even published. If a judge is ignorant of these rules, or disregards them, it is often strained to say that he or she has run afoul of extralegal precepts of logic or experience, rather than he or she was insufficiently aware or respectful of the law. Take the example of a prosecution witness who asserts that a video footage contains decisive incriminating information, while the defendant refuses to consent to the playing of the recording. If the appellate court rules that the defendant has the right of refusal, and that no incriminating inference should be drawn from the exercise of this right, a rule has emerged constraining the judge's fact-finding freedom.[4] And if in a subsequent case the trial judge justifies the judgment of conviction by the defendant's refusal to consent, it is only doctrinal legerdemain to blame him or her for failing to observe extralegal considerations, rather than failing to follow

[3] Bárd, Károly, Can the jury survive after the judgment of the ECHR in Taxquet v. Belgium, in Bruce Ackerman et al. (eds.): *Visions of Justice,* Berlin, Duncker & Humblot, 2016, 79–93.

[4] Many courts, including the European Court of Human Rights, have in fact forbidden authorities to oblige the defendant to turn over incriminating documents. See Bárd, Károly, *Fairness in Criminal Proceedings: Article six of the European Human Rights Convention in a comparative perspective*, Budapest, Magyar Közlöny Kiadó, 2008, 290. Restrictions on drawing inferences from the refusal follow from the widely accepted ban on drawing negative inferences from the defendant's silence. What remains controversial, however, is whether lies detected in the defendant's testimony can be interpreted to his detriment.

the law of his or her jurisdiction. Appellate court decisions of this nature, capable of restraining the judge's fact-finding freedom, are legion in most jurisdictions.

But this is only part of the story. Restrictions of the judicial fact-finding freedom can also emanate from rules barring the use of evidence obtained in violation of basic human rights. As is well known, rules of this genre have mushroomed in the aftermath of the traumatic experience with totalitarian and autocratic regimes of the past century. On first inspection it seems that rules prohibiting the use of illegally obtained evidence are unrelated to the judges' freedom in processing evidence: they only narrow the pool of information available to them, and have nothing to do with the evaluation of evidence remaining in the pool. But this analytically correct observation misses the mark in situations in which judges become exposed to *reliable* but illegally obtained information that cannot fail but produce an impact on their mind. In this situation rules devoted to the admissibility of evidence mutate *sub silentio* into rules dealing with the evaluation of evidence, requiring judges to attribute no probative value to evidence that has affected their thinking. But can judges disregard knowledge that has been lodged in their mind? The answer depends on the character of psychological operations involved in evidence processing. If judges are capable of reasoning by attaching separate value to items of information, and then coming to a conclusion by aggregating or disaggregating these values, they can follow the law's mandate and attribute no probative value to prohibited evidence. Empirical evidence suggests, however, that it is difficult for humans to disentangle the value of discrete information from global judgments, and to process received information in monadic fashion. It is true that when properly obtained evidence is clearly insufficient for conviction, the law's mandate to exclude illegal but reliable evidence can be effective: judges must acquit the defendant. But when properly obtained evidence is compelling, they face a predicament: unless they recuse themselves, they must imagine what a judge uncontaminated by illegal information would decide. Would this hypothetical judge, they must ask themselves, find untainted evidence sufficient for conviction? Observe, however, that even if they successfully switch to this third person's viewpoint, their decision no longer rests on their personal conviction which is in many jurisdictions a *sine qua non*. The third person perspective may even call for a factual finding contrary to what judges actually believe on the basis of illegal but credible information. It would thus not be surprising if empirical research revealed that in advancing reasons for their factual findings many judges simply omit any reference to illegal evidence even if it has actually influenced their verdict.[5] Briefly, then, the exclusion of illegally obtained

[5] The outlined problem does not arise, of course, if credible evidence was illegally obtained prior to the trial, provided that traces of this evidence are excluded from the file of the case and trial judges remain unaware of the prohibited information.

evidence represents another area in which evidence law purports to interfere with decision-makers' native reasoning processes.

Negative legal proof rules, so prominent in the criminal procedure of the *ancien régime,* have also not entirely disappeared. These rules, it will be recalled, are provisions requiring judges to abstain from finding certain facts if they failed to acquire legally specified evidence. The fact that they have become convinced of these facts without the prescribed evidence is irrelevant. Consider a few salient examples. Provisions exist in many jurisdictions exclusively enumerating acceptable means of proof, or ways in which evidence must be presented in court. If persuasive information emerges at the trial from means of proof the law does not recognize, or from evidence presented in an inappropriate manner, judges are not allowed to use it, no matter how important it may appear to them in ferreting out the truth. Or consider that in some jurisdictions certain facts cannot be established without expert witnesses. Appellate court may even deny judges the power to substitute the expert's opinion by their own, so that they are left with the option of either accepting that expert's opinion, or appointing another expert in the hope of obtaining an opinion corresponding to their own.[6] Surviving are also legal rules requiring confirmation, or corroboration, of reputedly weak evidence. A relatively recent example is the provision that a conviction cannot be based solely on hearsay testimony: that the judge may be persuaded of a person's guilt by a single hearsay witness makes no difference. It is true that rules of this genre are disliked, and that their number is dwindling not only in continental European criminal procedure, but also in Anglo-American justice systems. Responsible for their present unpopularity is that they are based on an abstract *ex ante* determination of probative value, so that they can be over-inclusive and erect obstacles to the accuracy of verdicts in particular cases. Would it not be prudent, one might ask nevertheless, to welcome some well selected rules prohibiting conviction on presumptively weak evidence without legally specified confirmation? Police confessions, erroneous eyewitness identifications and information supplied by jailhouse informants come readily to mind. Be this as it may, the opinion now prevails that the danger of presumptively weak evidence is usually not serious enough to outweigh the possible increase in unjustified acquittals which could result from the absence of legally required corroboration. But when all that has been said so far is taken into consideration, the conclusion is still warranted, despite this antipathy toward corroboration rules, that free evaluation of evidence has a considerably more limited reach than is often proclaimed.[7]

[6] This was the position of the German Supreme Court in the middle of the past century. See Gerhard Walter, *Freie Beweiswürdigung*, Tübingen, Mohr Siebeck, 1979, 99.

[7] An exception is countries which still cling to jury trials. The juror's freedom from legal constraints is especially pronounced in Anglo-American jurisdictions where criminal juries

What can one say about the likely fortunes of free evaluation of evidence in the future? To offer conjectures on this topic is largely to talk about the increasing influence of science and technology on factual inquiry. An increasing number of facts that used to be determined by witnesses, or could not be determined at all, can now be established by sophisticated technical instruments. And as the gulf widens between reality perceived by our sensory apparatus and reality discovered by devices capable of revealing the world beyond the reach of this apparatus, the importance of human sensing has begun to decline in a variety of social spheres. In some sports, for instance, challenges are appearing to the rulings of referees by recourse to instruments capable of determining facts more accurately than the human sensorium. Will the administration of justice be able to close the door to increasingly reliable fact-finding instruments and methods without becoming vulnerable to charges of dilettantish dabbling and obscurantism? Consider that even as things now stand witness testimony is increasingly confronting a competitor in the "silent testimony" of technological devices, testimony that must be translated to judges by expert witnesses. The importance of these "translators" of silent testimony will inevitably grow. Consider also that in some jurisdictions facts are becoming subject of formal expert testimony which until recently belonged to the basket of background information used by judges to evaluate evidence formally presented in court. For the establishment of these facts common sense and ordinary experience may not much longer be sufficient. In some American courts, for example, the question whether the woman's delayed report of rape weakens her credibility calls for the opinion of experts rather than uneducated guesses of the jurors. Changes seem likely even in the vitally important matter of assessing witness credibility. Following improvements in the precision of instruments like the polygraph, for example, one can easily imagine the emergence of rules requiring that the testimony of witnesses, especially those offered by the prosecution, be corroborated by expert testimony.

All this is not to say that forensic fact-finding will in the foreseeable future be handed over to men and women in white coats. Science and technology, it has rightly been remarked, are not Trojan horses in the citadel of free evaluation of evidence. Scientific consensus is rare, and the attitude of ordinary people to scientists is sufficiently ambivalent to prevent judges from unreflectively deferring to experts. Assuming that polygraph experts will be permitted to testify, for instance, judges will still remain entitled to assess their credibility. Nor is it

render general verdicts. In the continental European version of jury trials, where jurors answer specific factual questions and return special verdicts, a degree of control over their fact-finding is possible. For the duty of the Spanish jury to explain its verdicts, see Stephen Thaman, Should criminal juries give reasons for their verdicts?, *Chicago-Kent Law Review* 88 (2011), 613–628.

likely that criminal cases will be decided by overwhelming statistical evidence, although due to the magic of numbers statistics is the most serious candidate for replacing ordinary reasoning in adjudication. This seems to follow from differences between testimonial (anecdotal) and statistical evidence. Witnesses testify about concrete facts they perceived concerning relevant events, while statistical experts are ignorant of these facts and merely inform the court about the frequency of relevant events (*quod plerumque fit*). And while the probability of error in witness testimony remains unexpressed, it is clearly indicated in the statement of statistical experts. If the latter claim that the probability of the defendant's guilt is 99%, for example, the possibility still remains that the defendant falls in the remaining statistical 1% niche. He can claim that he belongs in this niche and can object that he should not be sacrificed on the altar of statistically optimal decision-making. Since judges strive in criminal cases to deliver individualized justice, it is hard for them to disregard this argument. It is hard for them to disregard it, even though statistical reasoning would in a large number of cases yield the greater number of accurate results. This shows that the opposition to decision-making on statistical evidence stems less from epistemic reasons than from moral, political and cultural background considerations. It has in fact been persuasively argued that ordinary cognition represents the ethical and political predicate of justice as presently conceived, and that judicial surrender of ordinary to expert reasoning that requires sailing over deep mathematical waters would undermine the legitimacy of criminal proceedings.[8] All things considered, then, it seems unlikely that law will obligate judges to disregard their native reasoning processes and decide cases on the basis of expert findings and opinions. The imperialism of science is not likely to extend so far.

What one should expect in the not too distant future, however, is the increased acceptance of negative proof rules based on scientific insight, and especially acceptance of their presently disliked corroboration kind. This is because legal rules of this kind, although based on scientific insights and technological achievements, preserve the space for judges to assess the value of evidence by using ordinary cognitive processes. Judges are not compelled by these rules to establish the defendant's guilt contrary to their beliefs, but are prohibited from convicting him or her without the imprimatur of science.[9] An example of such a rule has already been given: a legal provision can easily be imagined requiring that the testimony

[8] Jonathan Cohen, Freedom of Poof, in William Twining (ed.), *Facts and Law, 16 Archives for Philosophy of Law and Social Philosophy*, Hudson, NY, Steiner Books, 1983, 1–6.

[9] Rules of this genre illustrate Károly Bárd's contention that some norms serve neither concerns about fact-finding accuracy, nor the protection of substantive values (such as privacy or human dignity). Their purpose is instead to reduce the danger of wrongful convictions. See Bárd, *Fairness in Criminal Proceedings,* 55.

of a prosecution witnesses be corroborated by an expert in the application of a scientifically based method of credibility determination. An increasing number of rules of this kind are likely to be accorded a legitimate place in future evidence law, while at an equal pace the number of situations will decrease in which judges can establish facts solely on their subjective assessment of probative value. In other words, the free evaluation of evidence will be further weakened.

Should this development be deplored? Does free evaluation really deserve to be considered an ideal forensic fact-finding arrangement from which only a few exceptions are tolerable? What should give us pause in accepting this view is that it implies the undesirability of injecting the law into one of the most important activities in the administration of justice. To devotees of the rule of law this must appear strange. An ideal system to them would be one in which rules of law determine the value of evidence in advance and lay down what proof is needed for factual determination. Like the rule of law in general, these rules would then function as a safeguard against arbitrariness and prejudice, guaranteeing uniformity and facilitating predictability. An added benefit of their existence would be the protection against charges of partiality in decision-making. Why should such a system, saturated by law, not be considered ideal to a devotee of the rule of law, rather than being viewed as a regression to an earlier stage in the evolution of forensic fact-finding? The main reason is that the probative effect of evidence depends so much on the context and the particularity of experience that adopting fixed rules on such an unstable subject would be like trying to define a chameleon by reference to the color of skin. This suggests, however, that it is more appropriate for a devotee of the rule of law to treat free evaluation of evidence as the second best solution rather than as an ideal. To the extent that useful rules on the processing of evidence can be drafted, they should not be treated as a departure from but rather as a movement toward a truly ideal fact-finding system. And while as far as we can see scientific proof will not replace reliance on ordinary cognition, this replacement cannot be ruled out for some distant and very differently organized society. But we need not worry about the possible remote agonies of the presently venerated free evaluation of evidence. We should say instead with Racine:

"... tant de prudence entraine trop de soin nous ne savons prévoir les malheurs de si loin."[10]

[10] "So much prudence requires too much care, we do not know how to foresee misfortunes from so far". Racine, Andromaque, Act I, Scène I.

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DIE FESTSTELLUNGEN, SCHLUSSFOLGERUNGENUND VORSCHLÄGE DER FORSCHUNG DER GEGENÜBERSTELLUNG

Fenyvesi Csaba[1]

Az Ünnepelt igazi emberjogi harcos. Ezért is gondoltam, hogy a szembesítésről írok tiszteletére. Ugyanis a témakutatásom megmutatta, hogy a szembesítések körében is előfordulhat nem csak a tisztességes eljárás, a jogorvoslat, a védelem elveinek megsértése, hanem az embertelen, megalázó bánásmód alkalmazása is, amelyekkel szemben minden hatóságnak kellő szigorral kell fellépni, és nyomatékosítani azt a nemes gondolatot, hogy az állam kötelessége nemcsak a jogsértés orvoslása, hanem annak megelőzése is. Ennek szellemében nyújtom át gondolataimat, amelyekkel további lendületet és erőt kívánok adni Bárd Károly jövőbeli munkásságához.

Der Gefeierte ist ein wahrer Menschenrechtskämpfer. Aus dieser Überlegung dachte ich, ich werde zu seinem Ehren über die Gegenüberstellung schreiben. In der Tat haben meine Untersuchungen gezeigt, dass sogar im Kreis der Gegenüberstellungen nicht nur Verstöße gegen die Grundsätze der Prinzipien des ordnungsgemäßen Verfahrens, des Rechtsmittels, der Verteidigung, sondern auch die Anwendung unmenschlicher und erniedrigender Behandlung vorkommen können, gegen die alle Behörden mit angemessener Strenge vorgehen und den edlen Gedanken betonen sollen. dass der Staat verpflichtet ist, nicht nur Rechtsmittel bei Rechtsverletzungen anzubieten, sondern auch diesen vorzubeugen. In diesem Sinne überreiche ich meine Gedanken, mit denen ich der zukünftigen Tätigkeit/Arbeit von Károly Bárd weiteren Schwung und Kraft geben möchte.

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In Ungarn lagen keine heimischen (bzw. meiner Meinung nach auch keine ausländischen) wissenschaftlichen Forschungen zur Gegenüberstellung, die auch die psychologischen, strafprozessrechtlichen und kriminalistischen Aspekte der komplexen Institution abdecken, vor.

[1] Universitätsprofessor, Universität Pécs, Rechtswissenschaftliche Fakultät, Lehrstuhl für Straf- und Zivilverfahrensrecht.

A) Die Forschung umarmt aber neben dieser Wechselwirkung der dreifachen Einheit auch die Geschichte der Gegenüberstellung – worüber ich die Folgenden feststellen konnte: In der Antike trifft man statt der Gegenüberstellung als Wahrheitsfindungsmittel die Folter. Das Rechtsinstitut der Gegenüberstellung erscheint erst nach der Glanzzeit der Tortur zwischen dem 17. und dem 18. Jahrhundert, und ihre Stabilisierung und Legalisierung erfolgten erst im 19. Jahrhundert.

In der ersten Hälfte des 20. Jahrhunderts finden wir schon detaillierte Regeln über die Gegenüberstellung in den Strafprozessordnungen, unter anderen auch in dem ungarischen Gesetz. Bis zur Mitte des letzten Jahrhunderts wird sie überwiegend in dem Stadium der Hauptverhandlung angewendet, in der zweiten Hälfte übernimmt jedoch ihr kriminalistischer, vor Allem ihr kriminaltaktischer Aspekt die führende Rolle, so wird sie von nun an vor Allem in der Untersuchungs-, Ermittlungsperiode eingesetzt. In der Hauptverhandlung existiert sie jedoch in vereinfachter Form.

Im 20. Jahrhundert wird die Gegenüberstellung in dem (weiterhin in Übergewicht stehenden) Ermittlungsverfahren in der (weniger wichtigen) Hauptverhandlung – vor Allem aus Gründen des Informations- und Datenschutzes bzw. des Schutzes der Minderjährigen –mit Grenzen angewendet.

Aus der rechtshistorischen Untersuchung lässt sich deutlich erkennen, dass die Erscheinung, der Auftritt der Gegenüberstellung eine 300-400 jährige einheitliche Periode ist, während der die Daseinsberechtigung und die Wahrheitsfindungsfunktion dieser Rechtseinrichtung von keinem Theoretiker oder Gesetzgeber in Frage gestellt wurde, und dies gilt auch für unser Zeitalter.

B) Aus der rechtlichen Regelung der Gegenüberstellung stellte es sich heraus, dass in den angelsächsischen Rechtssystemen dieses Rechtsinstitut gar nicht existiert. Zu der Klärung des Sachverhalts und der Überzeugung der Geschworenen und der Richter wenden sie also andere Methoden an.

Von den Ländern der kontinentalen Rechtsfamilie konnte man feststellen, dass die Rechtsvorschriften über die Gegenüberstellung – die Wichtigkeit dieser Rechtseinrichtung heraushebend – in den nationalen Strafprozessordnungen zu finden sind. Die relativ kurzen, nicht besonders ausführlichen Rechtsnormen über die Gegenüberstellung werden im Allgemeinen durch kriminalistischen, kriminaltaktischen und polizeitechnischen Empfehlungen, Ratschläge und Methoden ergänzt. Dies stimmt vor Allem in den Ländern zu – und diese sind in Mehrheit –, wo das Übergewicht der Gegenüberstellung in das Ermittlungsverfahren fällt. Obwohl die Gegenüberstellung als Wahrheitsfindungsmittel in der Mehrheit der europäischen Länder in beiden Hauptstadien des Strafverfahrens, also sowohl während der Ermittlungen, als auch in der Hauptverhandlung angewendet wird, ist diese Behauptung wahr und begründet.

Die Effektivität der europäischen Gegenüberstellung ist variabel. Im Allgemeinen könnte man sagen, sie ist bescheiden. Es lässt sich erkennen, dass sie die Rechtsanwender in Mittel- und Osteuropa – vor Allem wegen den Traditionen – für bedeutender halten, als in Westeuropa, man kann aber keine deutlicheren Unterschiede zwischen der (niedrigen) Wirksamkeit der verschiedenen Regionen erkennen. Hier möchte ich bemerken, dass sich die schwachen Effektivitätsquoten (sogar in Absolutzahlen) – die von den ausländischen Rechtsanwendern genannt wurden – an einander ähneln, und sie stimmen mit den Daten und Fakten meiner ungarischen, empirischen Forschung überein.

Trotz ihrer bescheidenen Wirksamkeit traf ich auf kein Land unter den Anwendern, wo die Existenz, die Praxis und die Zukunft der Gegenüberstellung in der Gegenwart bezweifelt wurde. Zugleich entdeckte ich jedoch ich in den Ländern – die sie nicht verwenden – kein Bedürfnis, „Zwang oder Sehnsucht" nach ihrer Einführung.

C) Die folgende Behauptung – dass die Gegenüberstellung in der Konvention zum Schutze der Menschenrechte und Grundfreiheiten (EMRK), sowie in anderen internationalen Abkommen und Empfehlungen expressis verbis nicht erwähnt werde – gehört auch in den Bereich der internationalen Untersuchung. Trotz dieser Behauptung findet man in der Rechtsprechungspraxis des Europäischen Gerichtes für Menschenrechte – da die Mehrheit der Mitgliedstaaten die Gegenüberstellung kennen – indirekte Richtlinien über ihre Anwendung. Es ist deutlich erkennbar, dass die Straßburger Rechtauslegung die Gegenüberstellung mit der Vernehmung verbindet, da es sich – sowohl in dem Fall der Zeugen, als auch in dem Fall des Beschuldigten – um eine spezielle Form der Vernehmung handelt. Das Gericht hält die Gegenüberstellung für eine Vernehmungsform oder Verfahrenshandlung, die zur Befriedigung oder Stärkung der Rechte innerhalb des Menschenrechtspakets des Beschuldigten entsprechend ist. In diesem Bereich sind vor Allem das Recht des Beschuldigten, die Person, das Verhalten und die Authentizität der Aussagen von Zeugen bzw. anderen Beschuldigten persönlich, durch Stellung von Fragen, durch Bemerkungen oder durch das Mittel der einfachen Beobachtung zu kontrollieren.

Die Gegenüberstellung kennt das Gericht als eine Form, die diese Forderungen sowohl in der Periode der Ermittlungen, als auch in dem Hauptverhandlungsstadium erfüllen kann, wenn die Verteidigung (der Beschuldigte oder sein Verteidiger) mindestens im Laufe einer dieser Verfahrensphasen die Möglichkeit zur Überprüfung der den Beschuldigten belastenden Zeugen bekommt bzw. mit ihnen konfrontiert wird. Allein der Ausfall der Gegenüberstellung bedeutet aber nach dem Menschengericht keine Verletzung des Rechtes auf faires Verfahren, wenn die Verteidigung die Zeugen auf andere Weise befragen konnte.

Auch das kann festgelegt werden, dass allein der Verzicht auf die Gegenüberstellung zu keiner Rechtsverletzung führen kann, da die Konfrontierung aus rationalen Gründen, wie zum Beispiel aus dem Grund des Zeugenschutzes im Fall der Anonymität manchmal überhaupt nicht in Frage kommt.

Die hohe Anzahl der durchzuführenden Gegenüberstellung kann den irrationalen Verzug des Verfahrens in der Praxis auf keinem Fall begründen, und darf als kein Entlastungsumstand für die nationalen Behörden in Hinsicht auf ihr zögerndes Verhalten in Acht genommen werden.

Schließendlich weisen einige Fälle darauf hin, dass es im Rahmen der Gegenüberstellung nicht nur zur Verletzung der Rechte auf faires Verfahren und auf wirksame Beschwerde bzw. zum Verstoß gegen den Grundsatz der Verteidigung, sondern auch zur Anwendung von unmenschlicher und erniedrigender Behandlung führen kann. Das Menschengericht muss gegen diese Rechtsverletzungen besonders streng auftreten, damit es die Durchsetzung des folgenden Gedankens fördern kann: Nicht nur die Wiedergutmachung, sondern auch die Prävention der Rechtsverletzungen gehört zu den Aufgaben des Staates. Die schriftlichen Rechtsquellen und die Rechtsprechungspraxis dürfen keine „eingebauten" Rechtsverletzungen enthalten, die in allen europäischen Rechtsstaaten Rechtsmittel bedürfen.

D) Aus der empirischen Forschung über die Gegenüberstellung sind zahlreiche Schlussfolgerungen zu ziehen, von denen ich aber hier nur die wichtigsten herausheben möchte.

Durchschnittlich gibt es in jeder zweiten Strafsache Gegenüberstellung, sie kommt also oft vor, und kann als Rechtseinrichtung nicht außer Acht gelassen werden. Ihre Effektivität ist aber seit Jahrzehnten bescheiden und stagnierend. Über einen Erfolg (z.B. über die Klärung eines Widerspruchs) im Fall einer Gegenüberstellung können wir ungefähr in jeder zehnten Strafsache sprechen. Ein echter Gesinnungswechsel als Veränderung einer früheren Aussage liegt aber nur bei einigen Prozenten.

Auch die Tatsache ist beachtenswert, dass die Teilnahme von Minderjährigen sowie Familienmitgliedern an Gegenüberstellungen um 8-10 % liegt.

Aus den Protokollen des Ermittlungsverfahrens ist die alte Festlegungsart in zwei Spalten – zum Glück – verschwunden. Vor dem Gericht werden die Geschehnisse der Gegenüberstellung am einfachsten – meistens in einem Satz schematisch – festgelegt.

Rechtsbehelfe im Bezug der Gegenüberstellung werden nur selten eingelegt, darüber hinaus wurden sie in überwiegender Mehrheit abgewiesen.

Auch die Behauptung scheint begründet zu sein, dass der Ausfall der Gegenüberstellung unter den Ursachen der Ergänzungserhebungen dank der Empfindlichkeit,

der Achtung und der Angst vor den Ergänzungserhebungen noch weniger vorkommt, als in den vergangenen Jahrzehnten.

In keiner Periode des Verfahrens traf ich auf Bemerkungen über nonverbale Zeichen. Das bedeutet aber meiner Meinung nach kein Problem, da ich nach meiner Forschung aus psychologischem Aspekt darauf gekommen bin, dass die nonverbalen Metakommunikationszeichen keine zuverlässigen Informationen über die eventuelle täuschende Absicht, die Authentizität und den Wahrheitsgehalt der Aussage liefern.

E) Die Methode verfügt jedoch über kriminalpsychologisches Basis. Sie ist anwendbar, obwohl ihre Anwendbarkeit durch psychologische Versuche nicht begründet worden ist.

F) Der Begriff und die Arten (Klassifizierung) der Gegenüberstellung sind geklärt. Als Beweisverfahren lässt sie sich von den Wahrheitsfindungsmethoden der UStPO und der Kriminalistik – so z.B. von der Vernehmung, der Erkennungsprobe, der Beweisprobe, der Vernehmung am Tatort, der Durchsuchung, der Leibesvisitation, dem Lügendetektor und dem Kreuzverhör – leicht unterscheiden und abgrenzen.

Das Übergewicht der Gegenüberstellungen liegt gegen den echten Willen der Rechtswissenschaft und des Gesetzgebers auch jetzt in der Periode des Ermittlungsverfahrens, und nicht in der Hauptverhandlung, was nach den kriminalistischen Argumenten auch von mir gefördert wird.

Daneben stelle ich fest, dass man über keine obligatorische Gegenüberstellung sprechen darf, und dass es auch zu ausgeschlossenen Beweismitteln führende Gegenüberstellungen gibt.

G) Unter den Neuigkeiten der kriminaltaktischen Empfehlungen sollen folgende erwähnt werden:

a) es soll ein separierter Gegenüberstellungsraum geschaffen werden;

b) im Bereich des konkreten Vollzugs der Gegenüberstellung sollen die einführenden Fragen über die Beziehung der Teilnehmer zu einander ausfallen;

c) die Festlegung der physiognomischen Metakommunikationszeichen soll ausfallen;

d) im Fall einer erfolglosen Gegenüberstellung soll statt eines Protokolls eine Meldung erstellt werden;

e) im Fall einer planweisen und gründlichen Vorbereitung und der intensiven, konzentrierten Durchführung kann man mit einem besseren Ergebnis rechnen, und die von mir vorgestellten ausführlich analysierten gegenüberstellungstaktischen Fehler können mit größerer Wahrscheinlichkeit vermieden werden.

Die Antworten auf die Grundfragen der Forschung über die Gegenüberstellung (die Bewertung der Hypothesen)

a) Die theoretische Grundlage der Konfrontierung der Aussagen von Auge zu Auge – nämlich, dass die leugnende Person, die die Wahrheit verneint, nach der Mitteilung der Wahrheit durch den anderen Teilnehmer, wegen seiner Entschlossenheit und Selbstsicherheit, wegen der Spannung, aus Scham oder wegen ihres Gewissens zusammenbricht und ihre Aussage verändert – ist aufrechterhaltbar bzw. sie ist aufrechtzuerhalten.
b) Die Gegenüberstellung verkörpert eine mögliche, rechte, legale und faire Form der Wahrheitsfindung.
c) Ihre Durchführung im Strafverfahren ist vor Allem währen des Ermittlungsverfahrens gerechtfertigt, man darf jedoch auf ihre Anwendung in der Hauptverhandlung auch nicht verzichten. (Hiermit beantwortete ich auch die Frage der Hypothese in Punkt g.)
d) Mit dem Zeugenschutzprogramm ist diese Rechtseinrichtung in dem Maße vereinbar, dass ihre Anwendung einerseits aus gesetzlichen, anderseits taktischen Gründen nicht in jedem Fall möglich bzw. erwünscht ist.
e) In Hinsicht der Personen im Kindesalter ist diese Methode nicht durchzuführen, und bei Jugendlichen und Familienmitgliedern muss man mit besonderer Vorsicht und Bedenken vorgehen, und sie darf nur in begrenztem Kreis und niedriger Zahl angewendet werden.
f) Ich halte es für bestätigt, dass ihre fakultative Anwendung die Vereinfachung und Beschleunigung der Strafprozesse fördern kann.
g) Durch den Einsatz der – auch von mir unterstützten – methodischen Empfehlungen können die Effektivität ihres Vollzugs erhöht, und die zu ihrer Durchführung benötigte Zeit vermindert werden.

Die Zukunft der Gegenüberstellung

Die internationalen Tendenzen bzw. die Forschungsergebnisse beachtend können wir über ein langsames Verschwinden auf keinem Fall sprechen, die Verengung ihrer Anwendung kann aber nicht außer Acht gelassen werden. Diese Tendenz ist durch mehrere Faktoren gefördert. Diese sind die Folgenden:

a) der Widerstand der angelsächsischen Länder gegenüber dem Rechtsinstitut;
b) die Verstärkung des Zeugenschutzes in Europa;
c) die Erscheinung der „reuigen Pentitos“ infolge der Verstärkung der organisierten

Kriminalität, und das damit zusammenhängende Gegeninteresse der Strafverfolgung und der Rechtsprechung;
d) der Vorrang der kriminaltaktischen Mittel;
e) die „Massenerzeugung" und die Schablone der Verbrecher wegen der Überbelastung der Strafverfolgungsbehörden;
f) der Mangel der Weiterentwicklung der eigenen kriminaltaktischen Methode;
g) sie lässt sich nicht einmal mittels der Computerisierung weiterentwickeln, da sie damit nicht verbinden ist;
h) die (persönliche) Anwendbarkeit des Instituts ist begrenzt.

Diese Tendenzen dürfen wir aber nicht überwerten, und aus folgenden Gründen dürfen wir auf ihre Anwendung nicht verzichten:
i) ihre Methode erfüllt die Forderungen des Rechtsstaates;
j) ihre Erfolglosigkeit führt zu keinen unbehebbaren Fehlern (zum Justizmord);
k) sie verletzt nicht das Recht auf faires Verfahren;
l) ihre Taktik ist detailliert bearbeitet;
m) bessere Lösungen für das Problem – die sie ersetzen und überflüssig machen könnten – hat man bis heute nicht gefunden.

Schließendlich müssen wir herausheben, dass – trotz jener niedrigen Effektivität – auch der kleinste Gewinn Erfolg für die Strafverfolgung und für die Rechtsprechung bringt. Und heutzutage bedeutet das nicht wenig!

POLITISCHE JUSTIZ IN RUSSLAND: STRAFPROZESSE GEGEN UKRAINISCHE STAATSBÜRGER[1]

Artem Galushko[2, 3]

In den vergangenen Jahren standen in Russland eine ganze Reihe von ukrainischen Staatsbürgern vor Gericht; die Anklagen lauteten auf kriminelle Vergehen von Spionage bis hin zu Terrorismus. Die Prozesswelle begann kurz nach der rechtswidrigen Annexion der Krim durch Russland im Frühjahr 2014. Dieser Umstand sowie die zahlreichen Verfahrensverstöße in diesen Prozessen legen den Verdacht nahe, dass die betroffenen Ukrainer einer politischen Justiz zum Opfer fielen – einzelne Beobachter haben sogar bereits Parallelen zu Stalins Schauprozessen gezogen.[4]

Der Begriff der politischen Justiz wird unterschiedlich definiert.[5] Auf den Fall der in Russland inhaftierten ukrainischen Bürger trifft am ehesten Ron Christensons Definition zu, nach der das Recht hier „nur als Alibi dient"; die Prozesse sind also „fiktive Gerichtsverfahren, aber echte politische Ereignisse. Ihr einziges Ziel ist politisch."[6] So werden trotz Russlands Behauptung, nicht am Konflikt in der

1 Der Text wurde von der Deutschen Gesellschaft für Osteuropakunde (DGO) für die Zeitschrift Osteuropa in Berlin übersetzt.

2 Postdoktorand in der Max-Planck-Fellow-Gruppe "Governance of Cultural Diversity", gefördert durch das Era-Net/RUS-Projekt "Post-imperial Diversities – Majority-minority-relations in the Transition from Empires to Nation-states".

3 Der Beitrag erschien in einer früheren Version: Artem Galushko, The Soviet Kingdom of Crooked Mirrors and Its Legacy of „Twofold Constitutionalism": Politically Motivated Trials against Citizens of Ukraine in the Russian Federation, *Hague Journal on the Rule of Law* 8 (2016), 155–181.

4 National Post, Putin Revives Show Trials as a Political Weapon, *National Post* (1.11.2012.) Zu den Verfahrensverstößen siehe Andriy Osavoliuk –Palina Brodik – Mariya Lysenko, *28 Hostages of the Kremlin*. Brussels, The Open Dialogue Foundation, 2016.

5 John Laughland, *A history of political trials: from Charles I to Saddam Hussein, the past in the present*, Oxford, Peter Land Ltd, 2008; Ron Christenson, *Political trials: Gordian knots in the law*, 2nd Edition. New Brunswick, NJ, Transaction Publishers, 1999; Otto Kirchheimer, *Political justice: the use of legal procedure for political ends*, New Jersey, NJ, Princeton University Press, 1961.

6 Christenson, *Political trials*, 10–11. – Siehe auch Barna, Ildikó– Pető, Andrea, *Political justice in Budapest after World War II.*, Budapest, CEU Press, 2014, 25.

Ukraine beteiligt zu sein,[7] manche der ukrainischen Angeklagten wie „feindliche Kombattanten" behandelt.[8] Sie werden außerhalb ihres Landes festgehalten und wegen Kriegsverbrechen belangt – ein Vorwurf, der nur im Rahmen eines zwischenstaatlichen Konflikts Sinn ergibt.[9] Auch die hohe Zahl von Anklagen wegen Terrorismus und Spionage kurz nach der Annexion der Krim und die Intensität der strafrechtlichen Verfolgung ukrainischer Bürger in Russland deuten indirekt darauf hin, dass Russland in den Konflikt im Nachbarland involviert ist.

Politische Geiseln

Was verbindet einen Filmemacher, einen antifaschistischen Aktivisten, einen Nationalisten, einen Hirten, einen Rentner, einen Geschichtslehrer, einen Jura-Absolventen und eine Kampfpilotin? Unter anderem die Tatsache, dass sie als ukrainische Staatsbürger in Russland in Haft waren und größtenteils noch sind. Die Behörden werfen ihnen Verbrechen gegen die Russländische Föderation oder gegen die russische Minderheit in der östlichen Ukraine vor. Doch mit ihrer Entführung und Inhaftierung hat Russland seinerseits sowohl gegen nationales als auch internationales Recht verstoßen.[10] Die ukrainische Staatsanwaltschaft hat

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[7] Russland spricht von einem innerukrainischen Konflikt zwischen Kiev, Donec'k und Luhans'k. Den Beweis, dass Russland eine zentrale Rolle spielt, führen u.a. in diesem Band Nikolay Mitrokhin, Im Namen des Staates, Russische Nationalisten im Ukraine-Einsatz, *Osteuropa* (2019), 103–121, und Maksim Aljukov, Von Moskaus Gnaden, Genese und Geist der „Volksrepublik Donezk", *Osteuropa* (2019), 123–131.

[8] Gerichtsverfahren gegen feindliche Kombattanten sind nach Posner „eine noch reinere Form des politisch gefärbten innerstaatlichen Strafprozesses", sie spiegelten „militärische und politische Ziele wider". Eric Posner, Political trials in domestic and international law, *Duke Law Journal* 55 (2005), 75–152, 130.

[9] Der Begriff des zwischenstaatlichen Konflikts ist durch die Rechtsprechung des Internationalen Strafgerichtshofs für das ehemalige Jugoslawien mittlerweile hinreichend definiert, siehe Absatz 84, S. 34, des Urteils der Berufungskammer im Fall Duško Tadić, Nr. IT-94- 1, 5.7.1999, www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf; Elizabeth Wilmshurst, *International law and the classification of conflicts*, Oxford, OUP, 2012, 470.

[10] Allein schon die Entführung ukrainischer Bürger aus ihrem Land widerspricht dem im Völkerrecht verankerten Interventionsverbot, vgl. das Urteil des Internationalen Gerichtshofs zu militärischen und paramilitärischen Aktivitäten in und gegen Nicaragua vom 27.6.1986, www.icj-cij.org/do- cket/files/70/ 6503.pdf. Siehe auch Dieter Fleck – Michael Bothe (eds.), *The handbook of international humanitarian law*, Oxford, OUP, 2007, Abs. 202, 48; Caroline von Gall, Analyse: In Feindes Hand. Das Verfahren gegen Nadija Sawtschenko, *BpB* (26.2.2015), www.bpb.de/201885/analyse- in-feindes-hand-das-verfahren-gegen-nadija-sawtschenko; Ilya Nuzov – Anne Quintin, The Case of Russia's Detention of Ukrainian Military Pilot Savchenko under IHL. EJIL-Talk, *European Journal of International Law Blog* (3.3.2015), www.ejiltalk.org/the-case-of-russias-detention-of-ukrai-nian-military-pilot-savchenko-under-ihl. Auf eine willkürliche Anwendung

wegen Entführung und illegaler Inhaftierung ukrainischer Bürger Anklage unter Berufung auf Art. 146, 3 (illegale Freiheitsberaubung oder Entführung) und Artikel 332, 3 (illegaler Transport von Personen über die Staatsgrenze der Ukraine) des ukrainischen Strafgesetzbuches erhoben. Wegen der Inhaftierung von 24 ukrainischen Marinesoldaten in der Straße von Kertsch hat die Ukraine Beschwerde beim Internationalen Seegerichtshof in Hamburg eingelegt. Der Gerichtshof entschied Ende Mai 2019 mit 19:1 Stimmen, dass die Matrosen unverzüglich freizulassen sind. Russland behauptet, der Gerichtshof sei nicht zuständig.[11]

Zu einer selektiven Anwendung nationalen und Verletzung internationalen Rechts kommt immer wieder auch eine höchst zweifelhafte Beweislage. Die einzelnen Fälle sprechen für sich:

Die ukrainische Kampfpilotin Nadija Savčenko wurde bei heftigen Kämpfen im Osten der Ukraine im Juni 2014 von prorussischen Separatisten als Geisel genommen und anschließend gewaltsam nach Russland verbracht. Die Gefangennahme geschah im Zuge eines bewaffneten Konflikts, die Pilotin war offen sichtbar bewaffnet und trug Uniform. Aufgrund der Sachlage hätte Savčenko folglich unabhängig von Russlands Position in dieser Frage unter dem Schutz des Genfer Abkommens von 1949 stehen müssen.[12] In Russland wurde ihr illegaler Grenzübertritt (Art. 322 in Russlands Strafgesetzbuch) und Mord an zwei russischen Journalisten (Art. 105, Abs. 2(L), Mord an zwei oder mehr Personen aus Hass gegen eine soziale Gruppe) vorgeworfen – der Mörser-angriff, dem die beiden Journalisten zum Opfer fielen, fand jedoch erst eine Stunde nach Savčenkos Gefangennahme statt.[13]

nationalen russischen Rechts verweist u.a. Gleb Boguš, Podmena obvinjaemogo. Juridičeskij analiz dela Savčenko. *Carnegie.ru* (21.3.2016), https://carnegie.ru/commentary/63081.

11 Der Wortlaut der Beschwerde und das Urteil unter: www.itlos.org/cases/list-of-cases/case-no-26/. Siehe zu dem Fall auch Otto Luchterhandt, Gegen das Völkerrecht. Die Eskalation des Konflikts im Asowschen Meer, *Osteuropa* (2019), 3–22.

12 Auf der internationalen Ebene ist von Verstößen gegen das Genfer Abkommen vom 12. August 1949 über die Behandlung der Kriegsgefangenen, Teil 1, Art. 4 (A)(1) und des sowohl von Russland als auch der Ukraine ratifizierten Zusatzprotokolls I vom 8. Juni 1977 zu sprechen. Siehe dazu die Ausführungen zu Art. 45 des Zusatzprotokolls I, das „Personen, die an Kriegshandlungen teilgenommen haben" im Zweifelsfall ein Recht auf den Kriegsgefangenenstatus zuspricht, in: Fleck, Bothe, *Handbook* [Fn. 7], Abs. 703, 374. Die Entführung ukrainischer Bürger nach Russland und ihre dortige Haft verstößt außerdem gegen Art. 5 EMRK (Recht auf Freiheit und Sicherheit). Siehe den Fall Savriddin Dzhurayev gegen Russland, Nr. 71386/10, Absatz 257. – Vgl. auch die Fälle Iskandarov gegen Russland, Nr. 17185/05, und Abdulkhakov gegen Russland, Nr. 14743/11, in: Bernadette Rainey – Elizabeth Wicks – Clare Ovey, *The European Convention on Human Rights*, Oxford, OUP, 2014, 179.

13 Siehe die Resolution des Europäischen Parlaments zum Fall Savchenko unter www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2015-0011.

Der Regisseur Oleg Sencov und der Aktivist Oleksandr Kol'čenko wurden im Mai 2014 auf der Krim verhaftet und gewaltsam nach Russland verbracht.[14] Dort wurden ihnen Terroranschläge (Brandanschläge gegen Organisationen, die Russlands Annexion der Krim unterstützten und gegen ein Lenindenkmal sowie weitere Denkmäler aus der Sowjetzeit) zur Last gelegt.[15]

Der ukrainische Aktivist Mykola Karpjuk wurde im März 2014 nach Russland entführt. Der Geschichtslehrer Stanislav Klych wurde im August 2014 beim Besuch einer Freundin in Russland festgenommen. Beiden wurde vorgeworfen, während des ersten Tschetschenienkriegs 1994 russische Soldaten ermordet zu haben.[16]

Der angehende Jurist Jurij Jacenko wurde im März 2014 auf einer Reise in Russland festgenommen und der illegalen Einreise sowie des Besitzes von Schwarzpulver beschuldigt (Art. 222 in Russlands Strafgesetzbuch).

Der 73jährige Rentner Jurij Soloženko wurde im August 2014 während einer Geschäftsreise in Moskau festgenommen und in einem nichtöffentlichen Prozess der Spionage angeklagt (Art. 276).

Serhij Lytvynov, der unter einer leichten psychischen Behinderung leidet, wurde im August 2014 in Russland verhaftet, wo er sich zu einer zahnärztlichen Behandlung aufhielt. Er wurde der illegalen Einreise und des mehrfachen Mordes an russischsprachigen Bewohnern der östlichen Ukraine beschuldigt (Art. 356, § 1, Gräueltaten gegen Zivilbevölkerung und Kriegsverbrechen).[17] Alle diese Fälle weisen zahlreiche Ähnlichkeiten mit den politischen Schauprozessen in der Sowjetunion auf.

[14] Da die internationale Gemeinschaft die Annexion der Krim nicht anerkannt hat und diese weiter als besetztes Gebiet gilt, hätten Sencov und Kol'čenko als Zivilpersonen den Schutz des Genfer Abkommens IV von 1949 genießen müssen. Dort heißt es in Art. 76: „Die einer strafbaren Handlung beschuldigten geschützten Personen sollen im besetzten Gebiet gefangen gehalten werden und, falls sie verurteilt werden, dort ihre Strafe verbüßen." Siehe Genfer Abkommen über den Schutz von Zivilpersonen in Kriegszeiten, www.admin.ch/opc/de/classified-compilation/ 19490188/index.html.

[15] Art. 205.4 Teil 1 des Russländischen Strafgesetzbuchs (Organisation und Führung einer terroristischen Vereinigung), Art. 205.4 Teil 2 (Durchführung eines Terroranschlags), Art. 30 Teil 1 und Art. 205 Teil 2 (Vorbereitung eines Terroranschlags), Art. 30 Teil 3 und Art. 222 Teil 3 (versuchter illegaler Erwerb von Sprengstoff), Art. 222 Teil 3 (illegaler Erwerb, Transport und Lagerung von Waffen und Munition), Art. 205.4 Teil 2 (aktive Teilnahme an einer terroristischen Vereinigung).

[16] Art. 209 (Bandenkriminalität) des Russländischen Strafgesetzbuches und Art. 102 (V) (Mord an einem Staatsbeamten) des Sowjetischen Strafgesetzbuchs von 1960, das zum angeblichen Tatzeitpunkt noch in Kraft war.

[17] Die Anklage wurde später fallengelassen und Lytvynov stattdessen ebenso willkürlich nach Art. 162 § 3 wegen schweren Raubs zu achteinhalb Jahren Haft verurteilt, siehe Halya Coynash, Arrest a Ukrainian – Russia's Investigative committee will do the rest, *Khpg.org* (15.7.2015), http://khpg.org/index.php?id=1436827549.

Politische Justiz: das sowjetische Erbe

Die „juristische Tradition" der sowjetischen Schauprozesse ist gründlich erforscht.[18] Aus den vorliegenden Untersuchungen zu Stalins Kampagnen gegen seine politischen Gegner lässt sich eine Reihe von informellen Praktiken der sowjetischen Strafgerichtsbarkeit ableiten:

Gerichtliche Willkür bzw. Ungleichheit vor dem Gesetz: Wer in Opposition zu den herrschenden Eliten stand oder eine mögliche Bedrohung für diese darstellte, war dadurch prinzipiell benachteiligt.

Voreingenommenheit zugunsten der Staatsanwaltschaft oder Anklage: Für Angeklagte galt statt einer Unschulds- eine Schuldvermutung.

Geständnisse und Selbstbezichtigungen: Sie konnten jeglichen objektiven Beweis für die Schuld eines Angeklagten ersetzen.

Außergerichtlicher Charakter von politischen Geheimprozessen, die als beschleunigte, vereinfachte Verfahren abgewickelt wurden.

Wiedereinführung des Analogieprinzips in der Rechtsprechung.

Politisch motivierte, punktuelle und willkürliche Amnestien oder *Begnadigungen* für bestimmte Angeklagte.

Ex-parte-Kommunikation zwischen Staatsanwälten, Richtern und politischen Initiatoren von Schauprozessen.

Die meisten dieser Merkmale finden sich, zusammen mit einigen neuen Praktiken politischer Justiz, auch in den jüngsten Verfahren gegen ukrainische Staatsbürger in Russland und auf der Krim wieder.

Wandel und Kontinuität der politischen Justiz

Neben den erwähnten Merkmalen der stalinistischen politischen Justiz, die zum Kernbestand der ungeschriebenen sowjetischen Verfassung zählen, sind die politischen Verfahren im Russland der Gegenwart auch durch einige neue Praktiken

[18] Peter Solomon, *Soviet criminal justice under Stalin*, New York, NY, CUP, 1996; Peter Solomon, *Soviet criminologists and criminal policy: specialists in policy-making*, London, Macmillan, 1978; Christopher Osakwe, Prerogativism in modern soviet law: criminal procedure, *Columbia Journal of Transnational Law* 23 (1985), 331–352; Niels Rosenfeldt, *The „Special" World: Stalin's Power Apparatus and the Soviet System's Secret Structures of Communication*, Copenhagen, Museum Tusculanum Press, 2009; Donald Rayfield, *Stalin and his hangmen: the tyrant and those who killed for him*, New York, NY, Random House Trade Paperbacks, 2004; Joshua Rubenstein – Vladimir Naumov (eds.), *Stalin's Secret Pogrom: The Postwar Inquisition of the Jewish Anti-Fascist Committee. Annals of Communism*, New Haven, CT, Yale University Press, 2001; Alexander Yakovlev, *A century of violence in Soviet Russia*, New Haven, CT, Yale University Press, 2002.

charakterisiert. Manche Autoren argumentieren, die ukrainischen Bürger, gegen die in Russland neue Schauprozesse geführt würden, hätten – anders als die Opfer Stalins, deren Wille vom NKVD gebrochen worden sei – immerhin eine Chance, ihren Widerstand aufrechtzuerhalten.[19] So konnte Oleg Sencov vor seiner Verurteilung zu 20 Jahren Haft ein Schlusswort sprechen, in dem er sich über die Verlogenheit seines Verfahrens mokierte.[20] Stanislav Klych und Mykola Karpjuk, die ihre „Geständnisse" widerriefen, gaben vor Gericht eine Erklärung ab und zeigten öffentlich die Spuren ihrer Folterung.[21] Allerdings hatte es in den frühen sowjetischen Schauprozessen wie dem Šachty-Prozess unbeugsame Reden und widerrufene Geständnisse gegeben, „gerade diese Missgeschicke und Widerrufe gaben den Verfahren den Anschein von real durchlebten und nicht nur gespielten Ereignissen".[22]

In jedem Fall setzen die neuen Merkmale dieser Prozesse die hergebrachten Praktiken der sowjetischen politischen Justiz nicht außer Kraft. Zeugenberichte, Medien und Menschenrechtsorganisationen beschreiben immer wieder dasselbe Muster selektiver Justiz gegen ukrainische Bürger in Russland. Die betreffenden Verfahren sind selbstredend keine einfache Neuauflage von Stalins Schauprozessen, mit den Verfahren der „Stagnationsperiode" unter Leonid Brežnev, in der bereits „stärker auf rechtmäßige Abläufe geachtet wurde, politische Repressionen aber fortdauerten", haben sie dagegen einiges gemeinsam.[23]

Russland ist nicht der einzige postsowjetische Staat, der eine Renaissance politischer Gerichtsprozesse erfährt. Wo Bagatelldelikte verhandelt werden, wird der Buchstabe des Gesetzes zwar nicht selten befolgt, sobald jedoch die Macht der herrschenden post- sowjetischen Eliten auf dem Spiel steht, halten die zuständigen Instanzen es offenbar für zu riskant, „gewöhnlichen" Gesetzen oder Verfassungen eine echte Rolle in den Verfahren zuzugestehen. Politisch motivierte rechtliche Verfolgung von Oppositionsführern wie Jurij Lucenko und Julija Tymošenko, die beide erfolgreich Beschwerde beim EGMR eingelegt haben, war einer der Auslöser der Euromajdan-Revolte in der Ukraine.[24] In manchen postsowjetischen Staaten

[19] Robert Coalson, Unlike Stalin's Show-Trial Victims, Russia's Political Defendants Don't Back Down, *RadioFreeEurope/RadioLiberty* (20.8.2015), https://www.rferl.org/a/russian-political-defendants-defiant-closing-speeches/27199801.html.

[20] Sencovs Schlusswort ist nachzuhören unter, https://www.rferl.org/a/ukraine-russia-sentsov/27197750.html.

[21] Ukrainians in Russian Court, Detention of Klykh and Karpiuk in sham „Chechen War" trial extended, *Ukraine Today* (27.10.2015), www.youtube.com/watch?v=sRB6Y4ZwI0Y.

[22] Elizabeth Wood, *Performing justice: agitation trials in early soviet Russia*, Ithaca, NY, Cornell University Press, 2005.

[23] Time Magazin, Soviet Justice: Still on Trial. When politics enters in, legality goes out the window, *Time Magazine* (31.7.1978), 46.

[24] Ähnlich gelagert waren die Fälle von Valerij Ivaščenko und Anatolij Makarenko, die

werden politische Häftlinge zu ebenfalls politischen Zwecken wieder freigelassen, so etwa in Belarus, wo Präsident Lukašenka 2015 eine Amnestie für eine Reihe prominenter Oppositioneller erließ, um den Westen vor seiner erwartbaren Wiederwahl wohlwollend zu stimmen, oder in Aserbaidschan 2016, vor einem Staatsbesuch von Präsident Aliev in den USA.[25] Andere ehemalige Sowjetrepubliken wie Turkmenistan, Usbekistan oder Tadschikistan haben sich nach dem Ende der Sowjetunion zwar demokratische Verfassungen gegeben, doch die Diskrepanz zwischen Gesetzen, die nur auf dem Papier existieren, und informellen juristischen Praktiken ist eklatant. Nach wie vor wird in diesen Ländern jede Form von politischer Opposition unterdrückt, und politische Prozesse sind dafür, wie schon in sowjetischer Zeit, ein probates Mittel.

Verfassungsdualismus und Konstitutionalisierung der politischen Justiz

In Bezug auf die ehemalige Sowjetunion wurde das Phänomen der „Scheinverfassungen" und der „Verfassung ohne Verfassungsstaat" erstmals gründlich von Alexei Trochev untersucht.[26] Drei Punkte hebt Trochev besonders hervor: Die nichtlineare Entwicklung des Russländischen Verfassungsgerichts – „dieselben mächtigen politischen Akteure, die den Gerichtshof 1991 geschaffen hatten, lösten ihn zwei Jahre später fast auf, um ihn kurz darauf erneut wiederzubeleben"; die wachsende Autorität des Gerichts, „je schwächer die russische Demokratie wird"; die verzögerte oder ganz fehlende Umsetzung bestimmter Entscheidungen des Verfassungsgerichts seitens der Verwaltung und regulärer Gerichte.[27] Was den dritten Punkt betrifft, verweist Trochev auf das „Leninsche Erbe" und eine

gleich- falls den EGMR anriefen. – Zur politischen Justiz in der Ukraine siehe die auf fünf Jahre angelegte Fallstudie von Tatiana Kyselova, Dualism of Ukrainian Commercial courts: Exploratory Study, *The Hague Journal on the Rule of Law* 6 (2014), 178–201. Kyselova bezieht sich insbesondere auf Richard Sakwas Konzept des „dualen Staats", siehe Richard Sakwas, The dual state in Russia, *Post-Soviet Affairs* 26 (2010), 185–206.

25 Freed Belarus Opposition Figure Delivers Warning about Lukashenko, *Deutsche Welle* (24.8.2015). – Afgan Mukhtarli: Explaining Azerbaijan's Surprise Prisoner Amnesty. Move interpreted as an attempt to deflect international criticism of Baku's poor human rights record.

26 Alexei Trochev, *Judging Russia: constitutional court in Russian politics, 1990–2006*, Cambridge, CUP, 2008; Siehe auch David S. Law – Mila Versteeg, Sham Constitutions, *California Law Review*, 4 (2013), 863–952.; H.W.O. Okoth-Ogendo, Constitutions without constitutionalism: reflections on an African political paradox, in Douglas Greenberg et al. (eds.), *Constitutionalism and democracy: transitions in the contemporary World*, Oxford, OUP, 1993, 65–80.

27 Trochev, *Judging Russia*, 4, 127.

noch immer „sowjetisch anmutende Rechtskultur, in der statt der Rechtsnormen der geltenden Verfassung häufig ministerielle Richtlinien umgesetzt werden […], selbst wenn das Verfassungsgericht diese bereits als verfassungswidrig eingestuft hat".[28] Dies habe – zusammen mit den Umwälzungen nach dem Ende des Kommunismus und dem mangelnden „Verfassungsbewusstsein" auch der Bürger – dem Autoritarismus des Putin-Regimes in die Hände gearbeitet.[29]

Armen Mazmanyan fasst diese und andere postsowjetische „Verfassungs-Perversionen" wie etwa den von der Sowjetunion ererbten „politischen Legalismus" und „Rechtsnihilismus" unter der Überschrift „Failing Constitutionalism" (Gescheiterter Verfassungsstaat) zusammen. Das hervorstechendste Merkmal dieses Syndroms ist, dass die Grundprinzipien eines fairen Verfahrens wie in einem Zerrspiegel in ihr Gegenteil verkehrt werden: Aus der Unschuldsvermutung wird eine Schuldvermutung, das Prinzip des *nullum crimen sine lege* wird durch das Analogieprinzip ersetzt, das der gerichtlichen Fürsorgepflicht durch gerichtliche Willkür, und anstelle des Grundsatzes der Waffengleichheit gilt eine einseitige Begünstigung der Anklage oder Staatsanwaltschaft. Auch die Rationalität gerichtlicher Strafen ist zum Nutzen der herrschenden Eliten verschoben: Statt um Schuldausgleich, Prävention, Nacherziehung, Resozialisierung des Täters, Sühne und Vergeltung für begangenes Unrecht[30] geht es um politische Rache, Monopolisierung von Macht, den Erhalt des politischen Status Quo, die Legitimation des bestehenden Regimes, um die Einschüchterung möglicher Opponenten und die Verbreitung und Durchsetzung regimekonformer ideologischer Positionen. Wenn weder objektive (actus reus) noch subjektive (mens rea) Elemente eines Verbrechens für einen Straftatbestand entscheidend sind, werden Menschen allein aufgrund der von ihnen ausgehenden „sozialen Gefahr" verurteilt, wie die Herrschenden sie wahrnehmen.

Legt man die von dem Rechtsphilosophen Joseph Raz zusammengefassten Merkmale einer Verfassung zugrunde – laut Raz ist diese immer „1. konstitutiv für die rechtliche und politische Struktur eines Landes, 2. stabil, 3. schriftlich fixiert, 4. anderen Rechtsnormen übergeordnet, 5. justiziabel, 6. fest verankert (entrenched) und drückt 7. eine gemeinsame Ideologie aus"[31] – so liegt die konstitutionelle Natur der politischen Justiz in vielen postsowjetischen Ländern auf der Hand.

[28] Ebd., 41.

[29] Ebd., 300–303.

[30] Heribert Ostendorf, Vom Sinn und Zweck des Strafens, in: Informationen zur politischen Bildung, *BpB* 306 (2018), www.bpb.de/izpb/268220/vom-sinn-und-zweck-des-strafens?p=all.

[31] Joseph Raz, *Between authority and interpretation*, Oxford, OUP, 2009. Hier zitiert nach Wojciech Sadurski, *Constitutionalism and the Enlargement of Europe*, Oxford, OUP, 2012, 45.

Fast alle genannten Merkmale treffen auf diese politische Justiz zu. Sie bildet erstens die Grundlage einer parallelen rechtlichen und politischen Struktur, die die drei staatlichen Gewalten spiegelt: Es gibt spezielle, in der offiziellen Verfassung nicht vorgesehene Instanzen mit außerordentlichen Befugnissen, die in politischen Verfahren „legislativ", „judikativ" und „exekutiv" tätig werden. Zweitens ist das System der politischen Justiz kurzfristig stabil, da es sich gegen jede Opposition abschottet und die Macht einer einzigen herrschenden Partei sichert. Schriftlich fixiert sind die Usancen der politischen Justiz drittens zwar meist nicht, doch das gilt laut Raz potenziell auch für Teile der regulären, geschriebenen Verfassungen, „etwa für das sogenannte ‚Gewohnheitsrecht'".[32] Viertens sind die ungeschriebenen Regeln der politischen Justiz, wie aus den geschilderten Fällen hervorgeht, für das Überleben der herrschenden Elite so wichtig, dass sie grundsätzlich Vorrang vor regulären Rechtsnormen haben. Sie sind fünftens justiziabel aufgrund weiterbestehender sowjetischer Rechtsauffassungen (wie der Begünstigung der Anklage oder Staatsanwaltschaft, der gerichtlichen Willkür und anderer außergesetzlicher Praktiken) und sechstens tief verankert aufgrund der schieren Langlebigkeit der Sowjetunion. Die gemeinsame Ideologie, die sich gegen innere und äußere „Feinde" des Regimes richtet, spielt – siebtens – für die postsowjetischen politischen Prozesse eine geradezu zentrale Rolle.

Der Rechtsphilosoph Andrej Meduševskij spricht im Zusammenhang mit Reformphasen in Russland generell von einem Dualismus der Rechtssysteme: Einem „positiven [häufig ausländischen Quellen entlehnten] Recht" hätten hier oft Regeln eines „ungeschriebenen bäuerlichen Rechts" gegenübergestanden, das sich „in der geltenden Gesetzgebung nur selten widerspiegelte, aber die reale Basis des Rechtsbewusstseins der überwiegenden Mehrheit der Bevölkerung bildete".[33] Meduševskij beschreibt die Sowjetunion als „nominellen Verfassungsstaat": die rein deklarative offizielle Verfassung diente als rechtliche „Tarnung" für die politischen Repressionen der Kommunisten und zur Legitimation ihrer Herrschaft im In- und Ausland.[34] Die Verlogenheit des Regimes – die sich auch auf zahlreichen anderen Ebenen manifestierte – wurde schließlich von der dissidentischen Bewegung entlarvt, die die sowjetischen Rechtsnormen demonstrativ umzusetzen versuchte und dafür strafrechtlich verfolgt wurde.[35]

[32] Raz, *Between authority*, 325.

[33] Andrei Medushevsky, *Russian constitutionalism: historical and contemporary development*, London, Routledge, 2006, 99.

[34] Andrej Meduševskij, Stalinizm kak model'. Obozrenie izdatel'skogo proekta „ROSSPEN" „Istorija stalinizma", *Vestnik Evropy* 30 (2011), http://magazines.russ.ru/vestnik/2011/30/me34-pr.html.

[35] Ebd.

Die Spaltung eines Rechtssystems in einen formalen (deklarativen) und einen ungeschriebenen (operativen) Teil ist kein exklusiv (post)sowjetisches Phänomen. In seiner historischen Entscheidung im Fall „Streletz, Kessler und Krenz gegen Deutschland" kam der EGMR zu dem Schluss, dass die politische Führung der DDR gegen die internationalen Verpflichtungen, die Verfassung und Gesetzgebung des Landes verstoßen habe, indem sie das ungeschriebene Gebot, die Staatsgrenzen „um jeden Preis" und auch unter Einsatz von Schusswaffen gegen Flüchtende zu schützen, über zum betreffenden Zeitpunkt geltendes Recht gestellt habe.[36]

Der sowjetische Verfassungsdualismus erinnert in gewissem Sinn an die japanische Tradition des *Honne* und *Tatemae*, also die Unterscheidung von „wahren" Gefühlen und öffentlichem Auftreten. Ein auf den Staat als ganzen bezogenes Beispiel erwähnt Matthias Zachmann in einem Aufsatz zum japanischen Völkerrechtsdenken: so hätten japanische Völkerrechtler während des Pazifikkriegs, als die Kaiserliche Armee Gräueltaten beging, „versucht, den Anschein aufrechtzuerhalten, dass Japan sich weiterhin an das humanitäre Recht halte, und dabei zunehmend den Kontakt zur Realität verloren".[37]

Fazit

In Russland ist – wie in einer Reihe anderer ehemaliger Sowjetrepubliken – neben der offiziellen, schriftlich niedergelegten Verfassung auch eine inoffizielle „Zweitverfassung" in Kraft, zu deren Kernbestand politisch motivierte Prozesse gehören. Dieser Verfassungsdualismus gebiert eine rechtliche Parallelwelt mit ungeschriebenen Regeln und Traditionen, die über der Verfassung stehen und die offizielle Gesetzgebung faktisch unwirksam machen.

Die in den letzten Jahren in Russland angestrengten Verfahren gegen ukrainische Staatsbürger sollten mit ihrem offensichtlich im Voraus feststehenden Ausgang dem einheimischen Publikum eine bestimmte Botschaft vermitteln. Die Ukrainer wurden als Nation von Terroristen, Spionen, Kriegsverbrechern und Saboteuren dargestellt, um so die rechtswidrige Annexion der Krim und Russlands militärisches Vorgehen im Osten der Ukraine zu rechtfertigen. Doch die Strategie, die Ukrainer wie auch sämtliche Gegner der Putinischen Politik en bloc

[36] Vgl. Artikel 67 des Urteils des EGMR im Fall „Streletz, Kessler und Krenz gg. Deutschland", Nr. 34044/96, 35532/97 und 44801/98, in: David Harris – Michael O'Boyle – Ed Bates – Carla Buckley, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights,* Oxford, OUP, 1995, [Fn. 71], 495.

[37] Urs Matthias Zachmann, Does Europe Include Japan? European Normativity in Japanese Attitudes towards International Law, 1854–1945, *Rechtsgeschichte – Legal History* 22 (2014), 228–243.

als Vertreter eines „radikalen Bösen“ zu diffamieren, scheint sich nur kurzfristig ausgezahlt zu haben; die Umfragewerte des Präsidenten sinken.[38]

Die zahlreichen politisierten Gerichtsverfahren in Russland legen die Befürchtung nahe, dass die Führung des Landes sich in zunehmendem Maß an der sowjetischen Vergangenheit orientiert. Auch in der Sowjetunion wurde die Praxis der politischen Justiz nicht nur auf die eigenen Staatsbürger angewandt: Sowjetische Berater standen den kommunistischen Satellitenstaaten etwa bei der Organisation des Schauprozesses gegen Trajčo Kostov in Bulgarien, des Geheimprozesses gegen Imre Nagy in Ungarn oder des Slánský-Prozesses in der Tschechoslowakei zur Seite.[39]

Für die heutige Situation spricht Christopher Walker von einem antidemokratischen „Toolkit“: Moderne autoritäre Staaten lernen in puncto Machterhalt von anderen – vergangenen wie zeitgenössischen – autoritären Regimen.[40] Gerade die russische Spielart der „illiberalen Demokratie“ stößt bei autoritären Herrschern auf lebhaftes Interesse, zumal die verhältnismäßig schwache internationale Reaktion auf die neuen russischen Schauprozesse den Eindruck der Straflosigkeit im Kreml verstärkt.[41] Doch wie die Geschichte zeigt, können Schauprozesse ein repressives Regime auf die Dauer nicht erhalten. Was Putin und seine Anhänger – ungeachtet der Revolutionsphobie des russischen Präsidenten – aus der Vergangenheit nicht gelernt zu haben scheinen, ist, dass politische Justiz ein zweischneidiges Schwert ist: Es kann sich auch gegen die kehren, die es in der Hand halten.

Aus dem Englischen von Olga Radetzkaja, Berlin

[38] Die Zeit, Nun sinkt auch das Vertrauen in Wladimir Putin, *Die Zeit* (31.1.2019), www.zeit.de/2019- 01/russland-wladimir-putin-popularitaet-sinkt.

[39] George H. Hodos, *Show trials: stalinist purges in Eastern Europe, 1948–1954*, New York, NY, Praeger, 1987.

[40] Christopher Walker, The Hijacking of „Soft Power”, *Journal of Democracy* 27 (2016), 49–63, 53.

[41] Zum Begriff der „illiberalen Demokratie“ siehe Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad*, New York, NY, W.W. Norton & Company, 2007.

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THE PROCEDURAL AUTONOMY OF THE MEMBER STATES AND THE PRINCIPLES OF EQUIVALENCE AND EFFECTIVENESS

Katalin Holé[1]

In my essay I discuss the autonomy of national procedure laws and the limits of this doctrine, and what requirements the principles of equivalence and effectiveness impose upon the law enforcement authorities, namely the national courts and authorities, and what codification actions shall be considered by the legislator in the field of criminal procedure law in order to enforce these principles.

Procedural autonomy of member states

In its decision published in the *Deutsche Milchkontor* case the ECJ held that all member states shall ensure the enforcement of EU law even in lack of any relevant EU rules. In lack of specific EU rules and unless the general principles state otherwise the national authorities act upon national material and procedural law.[2]

This rule has become a consistent practice of the ECJ, but – as I have referred to this before – the procedural autonomy of member states is far from being unlimited. According to section (3) of article 4 of the TEU *"pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."*

For the enforcement of community law the Lisbon Treaty defines another obligation for the member states and their courts. Section (19) of article 19 of the TEU states that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by EU law".[3]

[1] Senior Lecturer, ELTE Faculty of Law.

[2] See section 17 of the judgement delivered in the C-205/82-215/82 Deutsche Milchkontor et al. unified cases on 21 September 1983 [EBHT 1983, p 2633].

[3] Section (1) of article 19 of the Treaty on the European Union.

According to the practice of the Court, from section (3) of article 4 of the TEU, and in line with the relevant provisions of the Treaty on the European Commission, two obligations limiting the procedural autonomy of member states emerge: the principle of effectiveness and the principle of equivalence.

Principle of effectiveness

According to the principle of effectiveness national law cannot hamper or make impossible the execution of Community law.

Regarding the principle of effectiveness the ECJ found that in all cases in which the question arises whether any national procedural rules make it more difficult or impossible to exercise the rights of private persons it shall be examined what position these rules have in the procedure, as well as the conduct of the procedure and its specialities before the available national fora.[4]

The principle of effectiveness was a key issue in the *Factortame et al* case.[5] Upon the motion of the *House of Lords,* the British supreme court of the time the ECJ had to rule whether *a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law, must disapply that rule.*[6] T*he Court has also held that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law.*[7] According to this judgment the

[4] See section 55 of the judgement delivered in the C-426/05 Tele2 Telecommunication case on 21 February 2008 [EBHT 2008, p I-685], section 33 of the judgement delivered in the C-222/05-C-225/05 Van der Weerd et al unified cases on 7 June 2007 [EBHT 2007, p I-4233], section 14 of the judgement delivered in the C-312/93 Peterbroeck-case on 14 December 1995 [EBHT 1995, p I-4599], section 19 of the judgement delivered in the C-430/93 and C-431/93 Van Schijndel and van Veen case on 14 December 1995 [EBHT 1995, p I-4705].

[5] See judgement delivered in the C-213/89 Factortame Ltd. and Others case on 19 June 1990 [EBHT 1990, p I-2433].

[6] See section 17 of the judgement delivered in the C-213/89 Factortame Ltd. and Others case on 19 June 1990 [EBHT 1990, p I-2433].

[7] See section 20 of the judgement delivered in the C-213/89 Factortame Ltd. and Others case on 19 June 1990 [EBHT 1990, p I-2433].

House of Lords had to set aside the application of those rules which did not allow the application of interim measures against the state.[8]

Principle of equivalence

The principle of equivalence states that during the execution of the community law the application of national law shall be without any discrimination compared to procedures used for the settlement of pure internal legal disputes, which similar to community law.

During the execution of its claims based on EU law the parties to the proceeding shall not get into a more disadvantageous situation than in case of the enforcement of its similar claims based on internal law.

A condition of the respect for the principle of equivalence is that the given provision of national law shall be applied to all claims with similar subject and legal basis, based both on community law and internal law without any discrimination.[9] For decision making about the equivalence the similarity of the relevant rules shall be examined objectively and also theoretically, with regard to their position in the principle, the conduct of the given procedure and the specialities of the rules.[10]

In relation to this, in the *Transportes Urbanos y Servicios Generales* case[11] the ECJ had to examine whether, in the light of their purpose and their essential characteristics, the action for damages brought by Transportes Urbanos, alleging breach of European Union law, and the action which that company could have brought on the basis of a possible breach of the Constitution may be regarded as similar. According to the decision of the Court, the two actions for damages have exactly the same purpose, namely compensation for the loss suffered by the person harmed as a result of an act or an omission of the State.[12]

[8] See section 21 of the judgement delivered in the C-213/89 Factortame Ltd. and Others case on 19 June 1990 [EBHT 1990, p I-2433].

[9] See section 36 of the judgement delivered in the C-231/96 Edis-case on 15 September 1998 [EBHT 1998, p I-4951], section 41 of the judgement delivered in the C-326/96 Levez-case on 1 December 1998 [EBHT 1998, p I-7835], section 55 of the judgement delivered in the C-78/98 Preston and others case on 16 May 2000 [EBHT 2000, p I-3201], and section 62 of the judgement delivered in the C-392/04 and C-422/04 Germany and Arcor joint cases on 19 September 2006 [EBHT 2006, p I-8559].

[10] See in this approach section 63 of the judgement delivered in the C-78/98 Preston and others case on 16 May 2000 [EBHT 2000, p I-3201].

[11] See the judgement delivered in the C-118/08 Transportes Urbanos y Servicios Generales case on 26 January 2010 [EBHT 2010, p I-635].

[12] See sections 35-36 of the judgement delivered in the C-118/08 Transportes Urbanos y Servicios Generales case on 26 January 2010 [EBHT 2010, p I-635].

"The only difference between the two actions referred to in paragraph 35 of this judgment is the fact that the breaches of law on which they are based are established, in respect of one, by the Court in a judgment given pursuant to Article 226 EC and, in respect of the other, by a judgment of the Tribunal Constitucional."[13]

However, in light of the principle of equivalence the ECJ ruled that this sole difference cannot suffice to establish a distinction between those two actions.[14] Therefore the right to appeal available for the violation of the constitution had to be ensured also in case of violation of community law.

The obligation to interpret the law of member states in conformity with EU law results from the obligation of the effective enforcement of community law. Based on section (3) of article 4 of the TEU and earlier on the rules of the TEC with the same content since the judgement of the ECJ in the *Von Colson and Kamann* case[15] it has become consistent case law that all authorities of member states, including judicial organisations shall interpret national law in a way that they shall consider obligations resulting from community law to the highest extent.[16] According to the procedural rules of member states the court decisions which are contrary to community law and cannot be subject to remedy may ground the obligation of member states to pay damages.

The obligation to interpret in compliance with community law may also be derived from Hungarian constitutional rules.

[13] See section 43 of the judgement delivered in the C-118/08 Transportes Urbanos y Servicios Generales case on 26 January 2010 (EBHT 2010, p I-635].

[14] See sections 44-45 of the judgement delivered in the C-118/08 Transportes Urbanos y Servicios Generales case on 26 January 2010 [EBHT 2010, p I-635].

[15] See especially section 26 of the judgement delivered in the C-14/83 Von Colson and Kamann case on 10 April 1984 (EBHT 1984, p 1891).

[16] See especially section 8 of the judgement delivered in the C-106/89 Marleasing-case on 13 November 1990 [EBHT 1990, p I-4135], section 26 of the judgement delivered in the C-91/92 Faccini Dori case [EBHT 1994, p I-3325], section 40 of the judgement delivered in the C-129/96 Inter-Environmental Wallonie case on 18 December 1997 [EBHT 1997, p I-7411], section 48 of the judgement delivered in the C-131/97 Carbonari and others case on 25 February 1999 [EBHT 1999, p I-1103], section 106 of the judgement delivered in the C-378/07-C-380/07 Angelidaki and others joint cases on 23 April 2009 [EBHT 2009, p I-3071], and section 113 of the judgement delivered in the C-397/01-C-403/01 Pfeiffer and others joint cases on 5 October 2004 [EBHT 2004, p I-8835].

The effect of the decisions of the ECJ to the national jurisprudence

In the application of EU law it has been a consistently applied principle that if the national court initiates preliminary ruling procedure based on article 267 of the TEU (former article 234 of TEC), the national court gets obligatory legal interpretation in the judgement – of which it is the primary addressee – and it is obliged to it.

"Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court." [17]

Moreover, those judgements of the ECJ cannot be put aside which it delivers in preliminary ruling procedures initiated by other national courts.

The legal effects of the judgement of the ECJ have also been examined by the Hungarian Supreme Court[18].

With reference to the *Van Gend & Loos*[19] case declaring the direct effect of community law and to the *Costa kontra E.N.E.L.*[20] case declaring the supremacy of community law the Supreme Court stated[21], that Hungarian courts have to comply with the case law of the European Court of Justice.

According to the highest Hungarian judicial forum case law may be interpreted as generally applicable and obligatory. Preliminary rulings have normative force and may have legal effect also in other cases.

Regarding the temporal effect of the judgements the Supreme Court ruled after reviewing the practice of the ECJ that the interpreting preliminary rulings usually have *ex tunc*, i.e. retroactive effect. This means, therefore, that the content of the

[17] See section 3 of the judgement delivered in the 29/68 Milch-, Fett- und Eierkontor / Hauptzollamt Saarbrücken case on 24 June 1969 [EBHT 1969, p 165].

[18] See in the case Legf. Bír. Kfv. I. 35.055/2007, published as decision BH 2008.135.

[19] See the judgement delivered in the 26/62 Van Gend & Loos case on 5 February 1963 [EBHT 1963, p 3].

[20] See the judgement delivered in the 6/64 Costa kontra E.N.E.L. case on 15 July 1964 [EBHT 1964, p 1141].

[21] The judgement was supported in legal literature, see Vincze, Attila, The judgement of the Supreme Court about the registration tax. Decision about the application of the judgement of the European Court of Justice about Hungarian registration tax in ongoing cases [A Legfelsőbb Bíróság ítélete a regisztrációs adóról. Döntés az Európai Bíróságnak a magyar regisztrációs adóval kapcsolatos ítélete folyamatban lévő ügyekben való alkalmazhatóságáról], *Jogesetek Magyarázata (JeMa)* (2010), 51–56.

norm established as result of the interpretations shall be applied as of the time when the relevant piece of community legislation entered into force.

According to the judgements of the ECJ delivered in the similar manner: "a preliminary ruling does not create or alter the law, but is purely declaratory, with the consequence that in principle it takes effect from the date on which the rule interpreted entered into force."[22] Therefore "a rule of Community law as thus interpreted must be applied by an administrative body within the sphere of its competence even to legal relationships which arose and were formed before the Court gave its ruling on the request for interpretation."[23]

In legal literature many authors share the same opinion.[24]

The ex officio application of the judgement of the ECJ, regardless of the requests of the parties is not unique in the legal system. The resolutions for the uniformity of the law delivered by the Curia and the judgements of the Constitutional Court interpreting the provisions of the Fundamental Law are also sources of the interpretation of law. These sources were established outside of the ongoing procedures, not in relation with those, even though the interpretation of law set forth in the decisions shall be applicable also for the proceeding court. In its Decision 52/1997 (X. 14.) AB the Constitutional Court also held that the principles set forth in its generally obligatory decision interpreting the Fundamental Law shall be applicable also in ongoing procedures.[25]

In his monograph "Theories and misbeliefs in the science of criminal procedure law" Árpád Erdei examines jurisprudence, thus resolutions for the uniformity

[22] See section 35 of the judgment delivered in the C-2/06 Kempter-case on 12 February 2008 [EBHT 2008, p I-411]. Furthermore, see section 33 of the judgement delivered in the C-137/94 Richardson-case on 19 October 1995 [EBHT 1995, p I-3407], section 16 of the judgment delivered in the 61/79 Denkavit Italiana case on 27 March 1980 [EBHT 1980, p 1205], section 43 of the judgment delivered in the C-50/96 Deutsche Telekom case on 10 February 2000 [EBHT 2000, p I-743], and section 21 of the judgment delivered in the C-453/00 Kühne & Heitz case on 13 January 2004 [EBHT 2004, p I-837].

[23] See section 36 of the judgment delivered in the C-2/06 Kempter-case on 12 February 2008 [EBHT 2008, p I-411], and cf. with section 22 of the judgment delivered in the C-453/00 Kühne & Heitz case on 13 January 2004 [EBHT 2004, p I-837], and in this approach with section 44 of the judgment delivered in the C-347/00 Barreira Pérez case on 3 October 2002 [EBHT 2002, p I-8191], section 41 of the judgment delivered in the C-453/02 and C-462/02 Linneweber and Akritidis joint cases on 17 February 2005 [EBHT 2005, p I-1131], and section 34 of the judgment delivered in the C-292/04 Meilicke and others case on 6 March 2007 [EBHT 2007, p I-1835].

[24] Bernhard W. Wegener, AEUV Art. 267 (ex-Art. 234 EGV) [Vorabentscheidung], in Christian Calliess – Matthias Ruffert (Hg.): *EUV/AEUV,* München, C.H.Beck, 2011, margin number 55; Rolf Karpenstein, EGV Art. 234 [Vorabentscheidung] (Nizza-Fassung), in Eberhard Grabitz – Meinhard Hilf: *Das Recht der Europäischen Union*, München, C.H.Beck, 2009, margin number 103.

[25] See Decision 52/1997 (X. 14.) AB of the Constitutional Court.

of the law and the judgements of the Constitutional Court as factors forming the procedure, and states that "the court does not have power of legislation", therefore the jurisprudence may only shade the picture of the procedure, but cannot rewrite it due to the lack of competence". Erdei stresses that the function of the court is only to elaborate on the content of norms which are carried by legal sources, therefore this notion means the ruling tendency of legal interpretation and application of law emerging from the legislative actions of the court which has no legislative power.[26]

The decisions of the Supreme Court and the Constitutional Court are applied by the courts regardless of the initiative of the parties, as the main guidelines of the interpretation of law. In line with the principle of equivalence during the enforcement of community law the application of national law shall be performed with reference to the procedures used for the settlement of purely internal disputes, similar to community law, without any discrimination. It results from this interpretation that the proceeding court shall apply those set forth in the decisions of the ECJ's rulings regardless of the initiative of the parties, similarly to the content of the judgements of the Constitutional Court or the Curia.

Legal science also follows this opinion.[27]

The binding force of the judgements of the ECJ is one of the debated issues of legal literature. Attila Vincze analyses this problem in his study "About the procedural effect of the judgments of the European Court of Justice". The question is whether these decisions have "erga omnes" or only "inter partes" effect. The reasons against the "erga omnes" effect is that it assumes legislative powers for the European Court of Justice, but, on the other hand, it is the main tool for the unified application of community law.[28]

If the ECJ rules upon the ineffectiveness of a piece of community law, the judgement obviously has "erga omnes" effect, because it applies to all courts of member states. Regarding community legal acts it is obvious that the different approach towards their effectiveness by member states' courts make the unified character of community law questionable and it endangers the basic principle of legal certainty.[29]

[26] See Erdei, Árpád, *Theories and misbeliefs in the science of criminal procedure law [Tanok és tévtanok a büntető eljárásjog tudományában],* Budapest, ELTE Eötvös Kiadó, 2011, 107.

[27] Vincze, Attila, About the procedural effectiveness of the judgements of the European Court of Justice [Az Európai Bíróság ítéleteinek processzuális hatályához], *Magyar Jog* (2008) 819–826, 821; Vincze, The judgement of the Supreme Court, 55–56.

[28] Vincze, About the procedural effectiveness, 820; Vincze, The judgement of the Supreme Court, 55–56.

[29] Cf.: section 15 of the judgment delivered in the 314/85 Foto-Frost kontra Hauptzollamt Lübeck-Ost case.

However, in case of a valid norm there is no such effect, as later reasons for ineffectiveness, even for another preliminary ruling procedure may emerge. As I have referred to it before, it results from the goal of the procedure and the community loyalty obligation that the judgement interpreting community law binds the initiating court.

However, the "erga omnes" effect results from the case law of the European Court of Justice, because "if the given provision of community law has already been interpreted by the Court, or the proper application of the community law provision is so obvious that it allows no reasonable doubts", the preliminary ruling procedure is not possible. [30]

After analysing the practice of the ECJ Attila Vincze stated that it is not the judgement of the ECJ which has "erga omnes" effect but the EU norm, which is interpreted in the specific judgement of the ECJ[31]. The judgement delivered in the preliminary ruling procedure is not constitutive but merely declarative, therefore it becomes effective retroactively.[32] This is in harmony with the statements of Erdei about jurisprudence, provided that the case law remains within the limits of legal interpretation.[33] It shall be added though that for this the European Court of Justice has been heavily criticised.

The limits of the principle of procedural autonomy in criminal procedure

Another important issue is in what procedures the guidelines of the decisions containing the described principles shall be applied.

Attila Vincze explains that these judgements shall be relevant in all cases when the individual faces the state, its organisations, authorities, whether upon his/her own request or in a procedure, therefore criminal procedure is a relevant field.[34]

In addition to the obligation related to the harmonization of criminal law resulting directly from EU law the unified direct application of these rules also affect the provisions of member states' criminal procedure law.

[30] Cf.: section 21 of the judgment delivered in the 283/81 *Srl CILFIT* és *Lanificio di* Gavardo SpA kontra Ministero della sanità.

[31] Vincze, About the procedural effectiveness, 820; Vincze, The judgement of the Supreme Court, 55–56.

[32] Cf.: section 35 of the judgment delivered in the C-2/06 Willy Kempfen KG kontra Hauptzollamt Hamburg-Jonas case of the European Court of Justice on 12 February 2008.

[33] See Erdei, *Theories and misbeliefs*, 107.

[34] Vincze, About the procedural effectiveness, 820; Vincze, The judgement of the Supreme Court, 55–56.

However, due to the principles of legal certainty and the prohibition of retroactive effect this shall not result in the establishment of aggravation of criminal responsibility.[35]

With regard to this principle the European Court of Justice held that the prosecutor shall not participate in the enforcement of national rules which are contrary to community rules with direct effect, even if the member state has failed to implement such rules; moreover, the prosecutor shall disregard of filing the indictment in such case. Also, national courts shall not apply the rules of national criminal law which are contrary to community law if it contributed to postponing the declaration of the invalidity of the national rules. This means that the national court cannot aggravate the sentence with reference to a judgement which was based on rules contrary to community law.[36]

In connection with the examined decisions the modification of the Hungarian criminal procedure code shall be considered. I believe that it would be reasonable to regulate the case of criminal law facts incompatible with community law as procedural obstacle of procedural nature – due to the changing nature of community law – because in lack of such rules – unless the prosecutor receives full discretional powers – there is no opportunity to terminate the procedure in the system of Hungarian criminal procedural law. It is further problem if the court realises that that the material law norm does not comply with the requirements of community law. In lack of proper procedural rule the court cannot enact any procedural actions.

It results from the nature of procedural law that the application of its institutions are (or should be) regulated properly. Procedure cannot tolerate the lack of regulations if it wants to keep up the appearance of fairness.[37]

With regard to the requirement of the prohibition of retroactive effect, which is a principle of criminal law it is the obligation of national courts to interpret national law in light of the text and goal of community law.[38]

[35] Cf. Vincze, See case 80/86 Kolpingshuis Nijmegen BV, section 13; case 14/86 Pretere di Salo kontra X. section 20.

[36] See Farkas, Ákos, *Criminal law cooperation in the European Union* [*Büntetőjogi együttműködés az Európai Unióban*], Osiris, Budapest, 2001, 20–21. Case 103/88. (1989) ECR p 1839, Case 21/81(1982) ECR p 381.

[37] Erdei, Árpád, Prohibitions in evidence [Tilalmak a bizonyításban], in Erdei, Árpád, *Tények és kilátások,* Budapest, KJK, 1995, 51.

[38] C-334/92 case Teodoro Wagner Mizet kontra Foado de Garaghia Salarial case; C-106/89 case Marleasin kontra Le Comercial International de Alimentacion SA.

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COVERT ONLINE ENTRAPMENT IN TRANSNATIONAL CRIMINAL CASES – LESSONS FROM A HUNGARIAN JUDGMENT

Zsolt Szomora[1]

The jubilarian, Professor Károly Bárd is domestically and internationally renowned for his achievements in the field of criminal procedural law and human rights jurisprudence. In Hungary, he is regarded as a trailblazer for involving human rights issues and standards in the domestic procedural doctrinal thinking, which occurred as a new challenge and requirement for Hungarian (criminal procedural) law after the democratic transition in 1989.[2] His dedication for human rights is not only reflected by his scientific oeuvre but also by his additional responsibilities of high practical relevance such as the chairmanship of the Intergovernmental Committee entrusted with the preparation of the ratification of the European Convention on Human Rights in Hungary or his agency of the Hungarian Government before the European Commission and the European Court of Human Rights.

Celebrating Professor Bárd's birthday, this short essay addresses a delicate issue of evidentiary law in the matrix of domestic law, EU law and European human rights standards.

[1] Professor, Institute of Criminal Law and Criminal Sciences at the University of Szeged, Hungary. This research was supported by the Erasmus+ Programme of the European Union (Digicrimjus: New challenges for teaching, researching and practicing criminal law in the digital age, University of Szeged, University of Konstanz, Istanbul University). My special thanks go to Balázs Garamvölgyi who drove my attention to this particular Hungarian court case.

[2] One of the highlights of his oeuvre is his monograph „*Emberi jogok és büntető igazságszolgáltatás Európában. A tisztességes eljárás büntetőügyekben – emberijog-dogmatikai értekezés* (*Human rights and criminal justice in Europe. Fair trial in criminal proceedings – a treatise on human rights doctrine*) Budapest, Magyar Közlöny Lap- és Könyvkiadó, 2007".

Introduction

The *European Investigation Order* (EIO) represents a major step towards the free movement of evidence between the member states of the European Union. Looking back to the long, organic development having lasted for many decades now, a characterization of different periods can be made, and more paradigm shifts can be witnessed.[3] The EIO has turned back to "locus regit actum" as the governing principle, which principle is now supported by the principle of mutual recognition and the principle of assimilation.

"*Mutual recognition* as the main pillar of this old-new system provides an initial presumption that the procedural act of legal assistance carried out in the other member state is lawful, fair and complies with human rights, therefore any complaint against this presumption should go beyond the foreignness (= not the same rules) of the applied procedural rules, e.g violation of human rights or concrete breach of law etc. It is also important to note that the *principle of assimilation* also plays a supporting yet significant role in this regime – if a similar (domestic) procedural act does exist in the legal system of the requested state with regard to legal assistance, the execution of the legal assistance cannot be refused."[4]

Having this current situation in mind, let us take an excursion to the past and discuss an Italian-Hungarian case and its possible implications for the future. The criminal offence concerned in this case was committed in 2003, that is before Hungary's accession to the European Union. Thus, one could argue that such a judgment cannot be relevant when dealing with the current situation and challenges of mutual legal assistance in the EU. I think the contrary: also a past case and a judgment delivered upon it can raise questions and can lead to detecting controversies or problems under the current legislation and practice, even if the already mentioned supporting principles of mutual recognition and assimilation had not yet been as advanced back then as they are today. The case is connected to the question of secret data gathering, some forms of which are also addressed by the EIO Directive. Besides other means of covert investigation, the interception of telecommunications is regulated in an independent Chapter of the Directive, which naturally shows its special position among evidentiary procedures and its particular connection to human rights issues.

[3] On these, in detail, see Karsai, Krisztina, Locus/Forum Regit Actum – a Dual Principle in Transnational Criminal Cases, *Hungarian Journal of Legal Studies* 60 (2019), 155–172, 161.

[4] Karsai, Locus/Forum Regit Actum, 164.

The Case

The facts adjudicated by the Hungarian court brings us to Italy, more precisely to Sicily. In examining the case, I would like to take the point of view of a typical Hungarian criminal judge who is not familiar with Italian law.

As I mentioned, the criminal offence dates back to 2003, when the Computer Investigation Team of the Police located in Palermo was authorized by the Prosecutor's Office to install a file sharing server under the title "OnlySex" and to upload pornographic material with preteen children involved in sexual activities to a folder named "Sex Preteen Directory" located on this server. In other folders uploaded to the server, legal pornographic photos and videos of adult participants were placed. The file sharing server was installed in order to detect offenders and offences against minors on the internet. While operating this server, the Italian Police detected an IP address registered in Hungary and discovered that seven pieces of child porn files were downloaded via this IP address. They notified the Hungarian investigation authorities and transferred the evidence to them. The transferred files contained in detail the reasons for and the methods of the installation of this file sharing server, its detailed technical features and how the identification of the perpetrators was carried out. Furthermore, the actual seven photos that had been downloaded by the perpetrator were transferred to the Hungarian Police as well, which enabled the legal qualification of the offence as child pornography.

After the documents were presented to the Hungarian Prosecutor's Office, a search was conducted in the house of the presumed offender, his computer was seized and searched as well. A computer expert's opinion was made on the ground of the search and concluded that none of the seven child pornographic photos could be found in the defendant's computer, not even their file names could be detected. No other illegal porn material was found either. However, the names of some files that had been uploaded by the suspect to the Italian server in the course of file sharing could be identified, their content could however not be reconstructed. The Prosecutor's Office considered this enough evidence in order to file an indictment for committing the offence of child pornography by acquiring the seven files indicated by the Italian Police.

The first instance court acquitted the defendant. Summarizing the court's reasoning for the acquittal:[5]

1. The criminal offence of child pornography was committed only and exclusively by way of communication with the Sex Preteen Directory.

[5] Judgment of a District Court in Budapest (Budapest IV. és XV. Kerületi Bíróság 1.B.XV.107/2007/25.).

2. The criminal offence and the procedure have to be adjudicated under the Hungarian rules, that is, the legality of the investigation in the foreign country and the admissibility of the evidence gained thereby have to be examined in accordance with the Hungarian Code on Criminal Procedure and irrespective of whether or not the evidence is admissible under Italian law. That is, the Hungarian court stood on the "forum regit actum" principle.

3. The covert operation of the file sharing sever was not authorized by a judge but by the prosecutor.

4. The covert operation of the file sharing server did not intend to detect criminal offences committed in the past, quite the contrary, the criminal offences were committed only by using this server.

5. The Hungarian court deemed illegal that the Italian authorities uploaded child pornography to this server.

6. The court stressed that this kind of covert investigation represents a serious violation of the children victims' personality rights, therefore the necessity and proportionality of the evidentiary action can be made questionable.

Consequently, the court of first instance held the IP address and the photos transferred by the Italian authorities inadmissible. Any other evidence found in the procedure did not support the liability of the defendant beyond reasonable doubt, so the court entered a judgement of acquittal.

After the prosecutor had filed an appeal, the second-instant court uphold the acquittal of the defendant. The final judgment accepted the reasons delivered by the first-instance judgment as flawless and added several other arguments as follows:[6]

1. It stressed that the specific covert method of investigation, a so-called internet trap server was not provided for as a covert interception of telecommunication under Hungarian law. This argument refers again to the "forum regit actum" principle.

2. The court deemed the covert operation of the trap server a criminal offence and concluded that the evidence transferred had been obtained by committing a criminal offence and hence inadmissible.

3. With reference to the ECtHR judgment *Teixeira de Castro v. Portugal*, the Hungarian court held that the covert operation of the trap server violated the fair trial principle under Art. 6 of the ECHR because it represented an unlawful provocation to commit a criminal offence. The defendant could not have committed the specific criminal offence without the file sharing server's being operated by the authorities.

[6] Judgment of the Metropolitan Court Budapest (Fővárosi Törvényszék 24.Bf.XV.8068/2008/5.).

Conclusions from the case

After having summarized the reasons given by Hungarian courts, I am going evaluate them retrospectively, from the point of view of the EU regime of legal assistance in criminal matters currently in force. To this end, I would like to address three issues: 1) the significance of the dual principles "locus/forum regit actum", 2) the significance of the human rights protection regime of the ECHR, and 3) the special position of secret data gathering in the field of evidence law.

"Locus regit actum" and the admissibility of evidence

Today, one could argue that, under current EU law, an obviously different position prevails, namely that the "forum regit actum" principle has once again been replaced by the "locus regit actum" principle in the EIO Directive. The fact that the "forum regit actum" principle does not involve a commitment to accepting the admissibility of evidence gathered in accordance with the principle was highlighted as one of the main flows of this principle. However, Karsai points out rightly that the "locus regit actum" rule does not involve such a commitment either. Neither of the two principles contains expectations or consequences on admissibility or eligibility at all, since these dual principles have no conceptual element in this regard. However, due to the prevalence of the "locus regit" principle by the execution of an EIO, the exclusion of evidence based on solely formal flaws is no longer an option for EU member states. However, material flaws, in particular any act of legal assistance containing human rights violation, could result in unlawfully obtained evidence today as well.[7]

Kusak deems the introduction of an instrument aimed at evidence-gathering without standards ensuring its admissibility a missed opportunity to finally shape the so far non-existent concept of mutual recognition of evidence.[8] Partly from a human (procedural) rights point of view, Jurka and Zajančkauskienė also stress that the lack of common standards and the doubts about securing proper defence functions may create additional thresholds for the assessment of admissibility of the evidence obtained in the other member state and in the state which issued the EIO.[9] Due to the lack of common rules in the EU, admissibility of evidence

[7] Karsai, Locus/Forum Regit Actum, 169.

[8] Martyna Kusak, Mutual admissibility of evidence and the European Investigation Order: aspirations lost in reality, *ERA Forum* 19 (2019), 391–400, 396.

[9] Raimundas Jurka – Jolanta Zajančkauskienė, Movement of Evidence in the European Union: Challenges for the European Investigation Order, *Baltic Journal of Law and Politics* 9 (2016), 56–84, 80.

gathered using the EIO is still governed by the domestic laws and the fact that member states usually lack rules regarding the admissibility of evidence collected abroad.[10] This is the case in the Hungarian procedural legislation as well.

The relevance of ECHR standards for mutual legal assistance in the European Union

The Hungarian court of second instance deemed the application of the trap server as undercover incitement, referred to the Teixeira judgement of the ECtHR, and, consequently, held that this covert method violated the fair trial principle. Before evaluating this approach of the Hungarian court on its merits, it has to be emphasized that the EU member states act under the scope of the ECHR when issuing or executing an EIO or when a domestic court decides on the admissibility of evidence. ECtHR cannot adjudicate on EU law directly, but the transposed EU norms become part of the national legal system as well, and therefore, their application can evidently fall under the jurisdiction of the ECtHR.[11] Therefore, the *human rights standards set by the Strasbourg Court are of high relevance in EU mutual legal assistance issues.*

In my opinion, the Hungarian court's evaluation of the trap server as unlawful incitement by officials was not correct. If an analogy to the activity of undercover agents is made, the application of the trap server represents aiding and abetting rather than incitement. The substantive test of incitement was elaborated in several judgments of the ECtHR, mainly in drug trafficking and corruption cases (e.g. *Teixeira de Castro v. Portugal*,[12] *Khudobin v. Russia*,[13] *Ramanauskas v. Lithuania*,[14] *Bannikova v. Russia*[15]).[16] According to this test, the Court examines the reasons underlying the covert operation and the conduct of the authorities carrying it out. In particular, it will determine whether there were objective suspicions that the applicant had been involved in criminal activity or was predisposed to commit

[10] Kusak, Mutual admissibility of evidence, 398–399.

[11] Karsai, Locus/Forum Regit Actum, 167.

[12] Application no. 25829/94, 9 June 1998.

[13] Application no. 59696/00, 26 October 2006.

[14] Application no. 74420/01, 5 February 2008.

[15] Application no. 18757/06, 4 November 2010.

[16] Also in Hungarian literature, the issue of incitement by officials is typically addressed in case notes on judgments delivered by Hungarian courts either in drug crime or corruptions cases. See Mészáros, Bence, A Fővárosi Ítélőtábla határozata a kábítószerrel visszaélésre való hatósági felbujtásról, *Jogesetek Magyarázata (JeMa)* (2011), 28–34; Bangó, Zoltán Ábel, Kúria harmadfokú döntése a megbízhatósági vizsgálat keretében elkövetett korrupciós bűncselekményről, *Jogesetek Magyarázata (JeMa)* (2018), 29–34.

a criminal offence. In respect of the specific case of the trap server, there was no suspicion that the defendant had been involved in criminal activity, but on the other side, there was a predisposition to acquire child pornography. Persons who connected to the Sex Preteen directory might deliberately be searching for such possibilities on the internet. It was not the Italian Police that instigated the illegal file sharing, it merely made the file sharing possible for persons who were searching for such a possibility. Therefore, I conclude that the reference made by the Hungarian court to the Teixeira case was not correct.

The same conclusion can be made also regarding the remark of the first-instance court that the application of the trap server was not authorized by a judge but by the prosecutor. This statement can also be argued now by the case law of ECtHR: in the judgment *Bannikova v. Russia*, the Court held that a supervision by a prosecutor may be appropriate provided that adequate procedure and safeguards are in place. This represents a material approach, which means that the absence of the authorization by a domestic court can not be argued by a mere formal point of view.

Observing the Strasbourg case law discussed above would now allow the conclusion that the Hungarian courts' reference to human rights issues were not correct. However, at this point, a recent judgment of the ECtHR shall also be mentioned when making analogy from undercover agents to virtual agents, that is the trap server. Analogies might be wrong but necessary, since the operation of a trap server has not yet been tested before the ECtHR, as to my knowledge. Such analogy allows the reference to the case *Grba v. Croatia* of 2018.[17] In this case, the ECtHR states that the prohibition of entrapment also extends to the recourse to operation techniques involving the arrangement of *multiple illicit transactions with a suspect* by the state authorities. The Court has held that such operation techniques are recognised and permissible means of investigating a crime when the criminal activity is not a one-off, isolated criminal incident but a continuing illegal enterprise. Any extension of the investigation to multiple illicit transactions must be based on valid reasons, such as the need to ensure sufficient evidence to obtain a conviction, to obtain a greater understanding of the nature and scope of the suspect's criminal activity, or to uncover a larger criminal circle. Absent such reasons, the state authorities may be found to be engaging in activities which improperly enlarge the scope or scale of the crime.[18]

In the combat against child pornography, international cooperation of investigative authorities is essential. There were many cases, where covert telecommunication

[17] Application no. 47074/12, 23 November 2017.

[18] Guide on Article 6 of the European Convention of Human Rights. Right to a fair trial (criminal limb). State as of 31 December 2020, 45.

methods were used or even the operation of dark web servers were taken over by the authorities in order to infiltrate transnational criminal circles and to detect offenders behind child porn transactions. Europol regularly reports that joint investigation teams contributed to dismantling a network of child-abuse photographers.[19] In my opinion, these methods are in harmony with the "Grba test" regarding multiple illicit transactions by state authorities. I am however not convinced that the Preteen Sex Directory Case under discussion would comply with this test. The directory was not specifically targeted against individuals that were already under suspicion of child porn transactions, but it made possible the discovery of single and isolated porn users who did not necessarily engage in any other actions. That was the case of the Hungarian defendant. The operation of the undercover file sharing server enabled the entrapment of an entirely random circle of porn users, and these multiple illicit transactions might have improperly enlarged the scope or scale of the crime. This might be against the standard set out in the Grba judgment.

The special position of secret data gathering

In the case discussed, the evidence used by the prosecution in Hungary had been obtained by the Italian Police's covertly operating the trap server. Since secret data gathering is a very particular action of a state, strongly attached to sovereignty, and which action represents a very intense intrusion into the privacy rights of those concerned, covert investigation methods will always have a special position in the matrix of mutual legal assistance in the European Union. This special situation is clearly reflected also in the EIO Directive. Art. 29 par. 3 and Art. 30 par. 5 extend the generally applicable grounds for non-recognition or non-execution to those, in which the certain investigative measure would have not been authorized in a similar domestic case. Consequently, if a member state is not allowed to act on its own in its domestic cases, the execution of the investigative measure for the interest of another member state can be refused. Although there is no direct connection between the EIO and the admissibility of evidence, it is also clear that

[19] Of many examples, see Europol, Joint Action in 22 European Countries against Online Child Sexual Abuse Material in the Internet, *Europol Press Release* (16 December 2011), https://www.europol.europa.eu/newsroom/news/joint-action-in-22-european-countries-against-online-child-sexual-abuse-material-in-internet; Europol, International Network of Child Abuse Photographers Dismantle, *Europol News Article* (08 September 2014), https://www.europol.europa.eu/newsroom/news/international-network-of-child-abuse-photographers-dismantled; Europol, Dark Web Child Abuse: Administrator of Darkscandals Arrested in The Netherlands, *Europol Press Release* (12 March 2020), https://www.europol.europa.eu/newsroom/news/dark-web-child-abuse-administrator-of-darkscandals-arrested-in-netherlands.

in case a ground for the refusal of the EIO's execution exists, the domestic court will naturally tend to the exclusion of evidence obtained that way.

If we look into the Hungarian regulation, the secret investigative measure of "trap" is made possible in order to identify and catch the perpetrator or collect evidence of the criminal offence concerned.[20] However, the application of a trap presupposes that there is a suspicion that the person concerned might have already committed the criminal offence, and *the operation of a trap is explicitly excluded by Hungarian law if the criminal investigation has not yet been launched formally.*[21] The operation of the trap server in the case under discussion happened before there was any suspicion against the defendant, and the criminal procedure was launched only after and on the ground of the information that was obtained as a result of operation of the trap server. This speaks for the exclusion of the evidence.

Against such automatic exclusion of evidence, Kusak argues that member states, despite the lack of common standards, should not exclude evidence gathered under different rules to those provided for under domestic laws. In case of doubt, a balancing test should apply, verifying the impact of evidence on fundamental EU rights, especially the right to defence, and the compliance of the evidence with Article 6 of the ECHR.[22]

From this point of view, not considering the specific exclusion of the operation of a trap server under Hungarian law, the evidence still would have to be tested according to the general requirements of the application of covert investigative measures, and even beyond the scope of Article 6 of the ECHR. *Proportionality* is one of the most important and sensitive requirements affecting not only the privacy rights of the defendant but those of anyone concerned by the measure.[23]

[20] Art. 215 par. 3 of the Hungarian Code of Criminal Procedure (Be.).

[21] Under the Hungarian Code of Criminal Procedure, a vast number of covert investigative methods may also be applied during the so-called preparation phase prior to the investigation („előkészítő eljárás"). Applying a trap, however, is not allowed in order to find suspicion of a criminal offence in the course of the preparation phase (Art. 341 Be.).

[22] Kusak, Mutual admissibility of evidence, 399. The general question arises whether or not domestic limitations to evidence are relevant to the actions of foreign states as foreign states are not parties to the domestic criminal procedures, hence not addressees by the exclusionary rules Karsai, Krisztina, Grenzüberschreitende Beweisverbote. In Walter Gropp et al. (eds), *Die Entwicklung von Rechtssystemen in ihrer gesellschaftlichen Verankerung*, Baden-Baden, Nomos, 2014, 153–162, 157-158. As for secret data gathering, the case law of the ECtHR does not prevent the possibility of evidence obtained unlawfully under the law of a member state still being admitted. See *Schenck v. Switzerland* referred to by Bárd, *Emberi jogok és büntető igazságszolgáltatás Európában*, 227. In this context, the danger of forum shopping is mentioned by Jodie Blackstock, The European Investigation Order, *New Journal of European Criminal Law* 1 (2010), 481-498, 497.

[23] The requirement of proportionality for the application of covert investigative methods is specified in Art. 214 par. 5 Be.

Consequently, when using intercept evidence or other covert methods of investigation, *Article 8 of ECHR* shall necessarily be considered.[24] In this case, photos and videos of children were used who were victims of serious sexual offences. This clearly embodies the violation of their personality rights, which violation did not serve the identification of those who committed the offences against them or the identification of already existing criminal circles but it made possible the identification of anyone who had an inclination to child porn as a consumer. Thus, the proportionality of this measure could be challenged. As proportionality represents a human rights guarantee in the collection of evidence by covert measures, its different evaluation by the courts of different member states might lead to the inadmissibility of evidence obtained in other member states. As a result, we get back to the issue of human rights, which covers the field of evidence law as an umbrella.

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[24] In the context of the specific rules provided for intercept evidence by the EIO, the significance of Art. 8. is highlighted by Blackstock, The European Investigation Order, 497.

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EINIGE AKTUELLE GARANTIELLE FRAGEN ÜBER DIE VERWENDUNG DER RESULTAT DER VERHÜLLTEN FAHNDUNGSMITTEL

Mihály Tóth[1]

Kedves Karcsi!

Pár hónap korkülönbség van csak köztünk, magamat is vigasztalom tehát azzal, hogy ennek a tisztelgő kötetnek az apropóján nemcsak ünneprontás, elcsépelt és felesleges nyafogás is lenne az idő múlásán keseregni. Ez talán Rád sem jellemző. A fontos, hogy nem érhet az a szemrehányás: hagytuk a hónapok és évek homokszemeit a kezeink közül nyomtalanul kiperegni. Talán marad majd valami – ha nem is aranyszemcse, néhány időtálló „szakmai forgács" – magunk után.

Közösek voltak egyetemi éveink, nem átlagos évfolyam tagjaiként jártunk az Egyetem térre. Ha most látom egykori évfolyamtársaimat, hallok felőlük, büszkén gondolok sokukra. Azután a Te utad rövidesen a minisztériumba vezetett, én az ügyészségre kerültem. „Bürokrataként" próbáltunk az ismert körülmények szorításán valamelyest lazítani. Néha sikerrel, máskor nem. Olykor talán tehettünk volna többet is. Ezt most mindketten a katedrán igyekszünk pótolni: a kör bezárul, ha nem zárult is még le.

Nem véletlen, hogy az itt következő rövid vázlat németül íródott.

Mindketten tiszteljük a német dogmatika biztonságot adó rendszerét, logikáját, egzakt nyelvezetét, és gyakran ebben kerestünk menedéket a mai pillanatnyi önös érdekek és indulatok által vezérelt világban is. A cikkben érintett leplezett eszközök örök problémája pedig az általad oly sokat elemzett emberi jogi aspektusok miatt is fontos. Mi, a mostanság terjedő relativizálási kísérletek ellenére is jól tudjuk, mi a különbség rendőrállam és jogállam között.

Ez a pár éve elhangzott előadásom számomra azért is emlékezetes, mert édesanyám, német szakos tanárnőként hosszú időt töltött azzal is, hogy a cikkben említett Heltai Gáspár szavait nekem segítve, autentikusan ónémetre fordítsa. Az előadás kicsit szerkesztett változatát tehát most a Te tiszteletedre közlöm, de a Mamámra is emlékezve.

Tudom, hogy szándékaimat is, szövegét is megérted.

[1] Doktor der Ungarischen Akademie der Wissenschaften, Universitätsprofessor, Károli Gáspár Universität der Reformierten Kirche, Rechtswissenschaftliche Fakultät, Institut der Kriminalwissenschaften; Forschungsprofessor, Zentrum für Sozialwissenschaften, Institut für Rechtswissenschaften.

„Befugnisse zur geheimen Überwachung von Bürgern wie sie für den Polizeistaat typisch sind, können nach der Konvention nur insoweit hingenommen werden, als sie zur Erhaltung der demokratischen Einrichtungen unbedingt notwendig sind"

(Fall Klass und Andere – EGMR)

Die Schwerigkeit der Vergleichung

Terminologische Unterschiede machen es immer schwierig, fachsprachliche Begriffe genau zu vergleichen.

Wie im Allgemeinen bei der Untersuchung der ähnlichen, eigenartige Terminologie gebrauchenden Gebiete der Jura, muss ich also auch diesen Überblick mit einer kurzen Klärung der Begriffe beginnen. Die Unterscheidung *der geheimen Informationsammlung und der geheimen Datenerwerbung* in unserer früheren StPO[2] – obwohl die beiden Tätigkeiten hinsichtlich ihrer Resultät völlig identisch sein können – hatte meiner Ansicht nach ausschließlich das Ziel, schon mit der Benennung klar zu machen, ob diese Verfahren, die ohne die Kenntnis des Betroffenen verlaufen, *im Rahmen der Ermittlungen* geführt werden, oder *außer den* in verfahrensrechtlichem Sinne genommenen *Ermittlungen* (typisch vorangehend). Die erste heißt „Information", die zweite – „ Angabe". Der Unterschied ergibt sich also nicht aus der inhaltlichen Verschiedenheit der zwei Begriffe. Darum ist es hier ohne Bedeutung, in eine ausführlichere Analyse davon einzugehen, welchen semantischen Unterschied zwischen der *Angabe* (Kenntnis über eine Tatsache) und der *Information* (*interpretierte*, relevant gemachte Angabe) es gibt oder es geben mag.

Das echte, sachliche Problem bestand nämlich immer, nach wie vor bestehend, darin, dass auf die Anwendung und Benützung *der geheimen Angabenerwerbung* im Laufe des Ermittlungsverfahrens beziehen sich exaktere, klarere, dadurch aus garantieller Hinsicht mehr annehmbare Vorschriften, als auf die weitaus mehr „mystizitierbare", zerstreut geregelte *geheime Informationsammlung*. Die dazu berechtigten Organe behandhabten letztere Tätigkeit immer lockerer, was aber deren Verwendbarkeit anbelangt, machten sie dabei dieselben ausdrücklichen Ansprüche geltend, wie im Falle der vorherigen. Und inzwischen bezeichneten sie als ein unnützbares theoretisches Aufwerfen die Frage, worin sich der Verdacht unterscheidet, der die Sammlung der geheimen Information *zwecks in der Absicht der Strafverfolgung*, z.B. *der Aufklärung einer Straftat* begründet[3], warum

[2] G. XIX. 1998

[3] Siehe den 63.§ Absatz des . G XXXIV. 1994 über die Polizei

ist er anders, als der zur Verordnung der Fahndung/Ermittlungen genügende und zugleich nötige „einfache" Verdacht. All das bedeutet natürlich nicht, dass keine Interpretationsprobleme im Laufe der Fahndung/Ermittlungen auftauchen würden, wenn es sich um die heimlich erworbenen Beweise handelt.

Dieser kurze Beitrag beschränkt sich diesmal auf zwei Fragen: er weist darauf hin, welche Änderungen in der Regelung das neue ungarische Sprachprozessordnung[4] bringt, und er knüpft einige Bemerkungen an die Interpretierung des Privatsphärenkreises. Davor aber halte ich für begründet, einige wichtigere, lehrreichere Stationen des zur jetzigen Regelung führenden langen Weges hervorzurufen.

Eine kurze Nachlese im Fluss der Vergangenheit sowie der jüngsten Vergangenheit

3Im Laufe der Aufklärung der Straftaten (oder der dafür erklärten Verhaltensweisen) wurden selbstverständlich von Anfang an geheime Mittel verwendet, und es wurde auch angestrebt, deren wirkungsvolle Methodik auszubilden.

In Gáspár Heltais Arbeit, geschrieben in der Mitte des XVI. Jahrhunderts über die Methoden der Inkvisition, können wir schon über das geheime Abhorchen oder den Einsatz des verdeckten Fahnders lesen, der „unter den Vorhang verstecket wird", um vom Delinquenten „alle seine Reden zu vernehmen, der Arme kann aber den aussagenden Diener nicht sehen. […] Hernach werden ihm manche unter den verräterischen Dienern nach etlichen Tagen hinterlistig nachgesandet, welche den Armen auf jede Weise bespähen, was er macht, wo er herumgehet, wem er schmeichelt und mit wem er redet. Auch ein solcher wird zu ihm gelassen, welcher ein großes freundschaftliches Herzen gegen ihn vortäuschet, sich mit ihm belustiget, mit ihm herumschweifet und schwanzet, und ihn auf jede Weise zum Reden bringet. Und höret er etwas von ihm, gibt er hinterhältig alles davon den Jägern Kunde." [5]

Jahrhunderte hindurch wurden höchstens die Methoden feiner, und erweitert wurden auch die technischen Möglichkeiten. Die regelmäßige Verwendung der geheimen Mittel wurde hinter formale, sie zu verhüllen probierende juridische Auslagen versteckt.[6]

[4] G. XC. 2019.

[5] *Háló. Auswahl aus den Werken Gáspár HELTAIS*. Budapest, Verlag Magvető, 1979, 144-145. Das Werk erschien ursprünglich im Jahre 1570. Der Text übersetzt für diese Angelegenheit von meiner Mutter Klara Toth ins Frühneuhochdeutsche.

[6] Schon der ursprüngliche, im Jahre 1949 datierte Text unserer früheren Verfassung deklarierte: „die Volksrepublik Ungarn versichert die Achtung des Postgeheimhisses und der Privatwohnung. 1972 bestand die Änderung nur darin, dass die Vorschrift in den 66.§ kam.

Bei uns in Ungarn haben geheime Rechtsregel – stilgemäß – bis zum letzten Jahrzehnt des vorigen Jahrhunderts die die Privatsphäre betreffenden geheimen Mittel und Methoden bestimmt.

Äußerst charakteristisch ist zum Beispiel, dass die 17. Rechtsverordnung 1974 über die Staats- und öffentliche Sicherheit auf die Verwendbarkeit der verhüllten Mittel evident nicht einen Hinweis enthielt, wie die verhüllten Mittel verwendet werden können, dabei aber den Ministerrat bemächtigte, ausführliche Regeln ausarbeitend „für die Durchführung der Rechtsverordnung zu sorgen". Aufgrund dieser Berufung entstand der nunmehr geheimer Beschluss 6000 (1975) des Ministerrates (datiert am 2. 6. 1975), dessen Bestimmung zur Aufgabe des Hauptabteilungsvorstands des Innenministeriums für Staatssicherheit „die Verwendung der in der Rechtsregel festgelegten Mittel und Methoden" im Rahmen „der Verteidigung gegen die Tätigkeit feindlicher Elemente" machte. Diese „Rechtsregel" war die geheime Verweisung Nummer 1/1975 des stellvertretenden Präsidenten des Ministerrates, deren 2. Punkt Erwähnung „der verborgenen operativen technischen Abhorchung" und „der geheimen Kontrolle von Postsendungen" tat. Die ausführliche Regelung wurde laut mehr als hundert geheimer Vorschriften der Verwaltung verfertigt, enthielt Befehle und Verweisungen, hatte die Aufgabe, als methodischer Wegweiser verwendet zu werden, und zwar bei der Polizei, der Grenzwache, sowie der Staatanwaltschaft.

Die derzeit noch weniger akzentuierten schweren Bedenken um die Verfassungsmäßigkeit hat das Gesetz XI. 1987 über die Rechtsschaffung gesteigert, da nach dessen Verordnung „die persönlichen Freiheitsrechte und deren Beschränkung" im Gesetz (hätten) geregelt werden müssen.

Die Regimeänderung erfolgte auch auf diesem Gebiet nicht von einem Tag auf den anderen. Die Oberste Staatsanwaltschaft hat im Herbst 1988 eine wissenschaftliche Konferenz über die aktuellen Aufgaben der Anklagebehörde veranstaltet, und da hat *Sándor Nyíri* aufgeworfen, dass die allgemeine aufklärende, außer dem Strafverfahren, vorzüglich „parallel mit den offenen Ermittlungen geführte" Tätigkeit der Polizei sogar vor dem Staatsanwalt geheim gehalten wird, und zwar „nicht nur hinsichtlich ihrer Mittel und Resultate, sondern auch ihres Seins und ihrer Verwendung. […] Man muss die Frage stellen, wie lange die Aufrechterhaltung der heutigen Lage möglich ist, ob die Frage im Gesetz nicht geregelt werden müsste und der Staatsanwalt entsprechende Aufsichtsmittel gewähren sollte."[7]

Ins letzte Jahrzehnt des Jahrtausends getreten, wurde unvermeidlich, die geheime Fahndungs/Ermittlungstätigkeit in gesetzliche Rahmen einzuschränken.

[7] Sándor Nyíri: *Die Vergangenheit ist immer mit uns*, Nyíregyháza, Verlag Ardlea, 2012, 105. Der völlige Text der Rede kann in der Sondernummer 1998 des Staatanwaltschaftsberichts gelesen werden.

Es wurde das X. Gesetz 1990 über die provisorische Regelung der Genehmigung der besonderen geheimdienstlichen Mittel und Methoden, dann, nach politischen Diskussionen und mehreren verworfenen Vorschlägen[8] das Polizeigesetz/ Gesetz über die Polizei (XXXIV, 1994), das die obige Frage im Wesentlichen bis zum heutigen Tag als hervorgehobene Rechtsquelle reguliert, und das Gesetz CXXV. 1994 über den Nationalsicherheitsdienst.

In den folgenden Jahren probierte man mit wirklichem Rechtsregeldumping die unveränderte Prosperität der geheimen Mittel zu legalisieren, und wenn man auf Grund besonderer Bemächtigung berechtigt war, diese in Anspruch zu nehmen, wurde das für einen beinahe/ zu Statussymbol. Man hat gemeint, der juridische Hintergrund, „die offen gemachte Verwendung" legitimiert, dass in den nächsten Jahren fünf Ermittlungsaufgaben versehende Organe, daneben weitere fünf Geheimdienste und die innere Abwehr der Polizei, insgesamt also 11 Organisationen Berechtigung bekommen können, die geheimen Mittel in Anspruch zu nehmen. Bei der im Wesentlichen mit dem Heutigen gleichen Regelung hat sich auch das Mittelsystem ausgestaltet, in folgender Weise: die Verwendung der Mittel ist *an Bewilligung nicht gebunden;* die Berechtigung ist *mit staatsanwaltlicher Genehmigung zu beschaffen;* weiterhin, die Mittel *können mit Erlaubnis des Richters beziehungsweise des Justizministers in Anspruch genommen werden.*

Im uns näher interessierenden Strafverfahren traf der ursprünglich genehmigte Text des G XIX. (Strafverfahrengesetz) nur über die richterliche Zulassung und die Verwendung der geheimen Angabenbeschaffung Verordnungen, über die vor der Einleitung des Strafverfahrens beschaffene (auf Grund der Bemächtigung besonderer Gesetze durchgeführte) geheime *Informationsammlug*, die vor der Einleitung des Strafverfahrens beschaffen worden ist (auf Grund besonderer Gesetze durchgeführt), enthielt es nur insofern Vorschriften, dass diese der Staatsanwalt (aber ausschließlich er) erkennen kann. / Abs.206. (2)/

Die Vorschriften, die sich auf die Verwendbarkeit des Resultats der geheimen *Informationsammlug* beziehen, kamen erst ab Juli 2006 ins Srafverfahren, hinsichlich ihres Wesens bis zum heutigen Tag in unveränderter Form. Als konjunktive Voraussetzung der Inanspruchnahme derer wurden ursprünglich die analogen Bedingungen der Vendwendbarkeit der geheimen Datenerwerbung und die fristlose Anzeigepflicht aufgesetzt. Einige Jahre später hat man wahrgenommen/ sah man, dass das die geheime Information und die Ermittlungen führende Organ kann auch identisch sein. Die Anzeigepflicht wurde also mit der alternativen Vorschrift der Verordnung der Ermittlungen ergänzt. (G. CLXXXVI. 139. § 2010) Schließlich vertauschte das G. CLXXXVI. 41.§ 2013 das Wort „fristlos" – neben der Betonung der gesetzlichen Bedingungen der Verordnung – um das Wort „sofort".

[8] So war zum Beispiel der im Januar 1991vorgelegte Gesetz-Vorschlag N. T. 1462

Diese Änderungen haben die fortdauernden Interpretationsprobleme nicht vermindert.

Die abweichende Anschauung des neuen Verfahrensgesetzes

Es wäre frühzeitig, die Verordnungen des Projekts des neuen Strafverfahrensgesetzes mit dem vorigen Gesagten zu vergleichen. Soviel ist jedenfalls festzustellen, dass die geheime Informationsammlung zwecks Strafverfolgung ins Strafverfahren kam, wodurch die Aufsicht des Staatanwalts darüber geschafft worden ist, weiterhin, die Regeln der Verwendbarkeit des Resultats der geheimen Informationsammlung von anderem Zweck, also von keinem der Strafverfolgung ergänzt und eindeutiger gemacht worden sind, und das verspricht eine Besserung gegen die gegenwärtige, oft widerspruchsvolle Lage.

Es wäre gut, wenn es in der Zukunft keinen Grund für Vorwürfe so häufig geben würde, weder einerseits deshalb, dass die Garantien aus Übertreibung der Interessen der Strafverfolgung – wenn auch nur von guter Absicht – zurückgedrängt werden, noch andrerseits, weil wichtige Beweise wegen der starren und bürokratischen Verwendung des Garantiesystems verloren gehen. Das liegt aber in erster Linie nicht mehr an den Buchstaben des Gesetzes.

Die Begründung der ausdehnenden Auslegung der Privatsphäre

Unabhängig von der neuen Regelung taucht als berechtigte Frage auch weiterhin auf, ob die geheimen Abhorchen auf Veranstaltungen, die aktuell mit keinem gemeinschaftlichen Zweck, das heißt in geschlossenem Kreis gehalten, auf sonst gemeinschaftlichen oder für die Öffentlichkeit zugänglichen Orten stattgefunden werden, an richterliche Erlaubnis gebunden wären.

Die Antwort ist unter ausgereiften rechtsstaatlichen Verhältnissen relativ leicht zu geben. Die Öffentlichkeit – der Teil unseres Alltags, der sich auf der Straße, dem öffentlichen Gelände, in Anstalten, die von einem jeden in Anspruch genommen und besucht werden können, sowie im Massenverkehr befindet, – bedeutet zugleich auch den Verzicht auf unsere Privatrechte. Wir müssen zur Kenntnis nehmen, dass auf den Straßen, verkehrsreichen Knotenpunkten, öffentlichen Verkehrsmitteln, in Parken, bei Bankautomaten, auf kulturellen Veranstaltungen, Massenversammlungen, in Bädern, Stadien usw. Aufnahmen von uns gemacht werden können. (Ausdrücklich diesem Zweck dienen die Straßenüberwachungskameras.) Weiterhin müssen wir auch zur Kenntnis nehmen, dass unsere Taten, Benehmen, Worte, Beziehungen bei der Erledigung unserer Angelegenheiten, dem

Verkehr, dem Einkaufen beobachtet und registriert werden können (siehe die dazu berechtigten Regel der Privatermittlungen).

Den grundlegenden Personenrechten, den intimen Berechtigungen des Privatlebens und der Privatsphäre kann die gesellschaftliche Umwelt, das System der gesellschaftlichen Beziehungen, die Öffentlichkeit in solchen Fällen rationale Grenzen setzen.

Die Grenzen beziehen sich aber auf beide Seiten. Sie zeigen auch, dass *all das nur für unsere in der Tat die Gemeinschaft angehenden – prinzipiell alle betreffenden, einen jeden bei den gleichen Bedingungen berühren könnenden – Offenbarungen gültig ist,* wenn also weder wir selbst, noch ein anderer/andere den Bannkreis des öffentlichen Organs beschränken können, den wir in Anspruch nehmen. Durch diese wahllose Öffentlichkeit gilt es eben für *gemeinschaftlich.* In *dem* Moment, wenn dieser Bannkreis entweder von uns oder einem anderen, dann aber mit der uns bekannt gemachten Entscheidung – oft auf Grund von Konsensus – verengt wird, *hört das Organ der Öffentlichkeit auf, das den anderen unbeschränkte Zugänglichkeit gewährleisten könnte.* Das beinahe uferlose *Gemeinschafliche* kann nicht mit einem gewissen beschränkten, *geschlossenen Gemeinschaftlichen* identifiziert werden.

Gerade hinsichtlich darauf reguliert das Gesetz und die Praxis als Teil der Privatsphäre außer der Wohnung zum Beispiel das Büro, die für Familienereignisse gemietete Fahrzeuge[9], sogar auch die Gefängniszelle. Und genauso, wenn der Eintritt, der Aufenthalt auf einem sonst öffentlichen Vergnügungsort (kontrollierbar) begrenzt werden, können, Informationen, persönliche Angaben dann nur unter strikten Bedingungen von Außenstehenden verschaffen werden können. Die bewusste Begrenzung, Selektierung der Öffentlichkeit, der Gemeinschaft/des Publikums macht von unseren persönlichen Entscheidungen abhängig, an wen, welchen Kreis wir unsere Äußerungen, Taten, Worte zugänglich machen.

*

Entsprechend den rechtsstaatlichen Prinzipen, dem Geist – und auch den Vorschriften – des Gesetzes ist es also, wenn wir diese *kontrolliert geschlossenen Veranstaltungen* für Teile der Privatsphäre halten. Der Schauplatz liegt da *außerhalb des öffentlichen oder für das Publikum offen stehenden Orts.* Wenn die Behörde bei solcher Gelegenheit Informationen über die Worte, Taten des Betroffenen ohne

[9] Es wäre wohl richtiger, wenn das Gesetz kein „öffentliches Verkehrsmittel" erwähnen würde (ein Schiff oder ein Bus, die sonst als solche Mittel funktionieren, können ja für eine geschlossene Veranstaltung auch vermietet werden), sondern „als öffentliches Verkehrsmittel funktionieres Fahrzeug".

sein Wissen zu verschaffen und die festzusetzen wünscht, ist es dazu nötig, eine richterliche oder ministeriale Erlaubnis zu haben.

Vielleicht können einige von diesen Gedanken beweist haben: es ist keine einfache Frage zu entscheiden, wie wir die Rolle, die Mittel, die Bedingungen und die Zukunft des Geheimdienstes im Kampf gegen die Straftaten beurteilen sollen. Es ist Tatsache, dass solche Mittel nicht einmal von den stabilsten Rechtsstaaten entbehrt werden können, die sind wichtige Pfänder ihrer Staatstätigkeit, ja was noch mehr ist, ihres Fortbestandes. Trotzdem, ist es nicht zu befürchten, dass unsere unbegründete Prävalenz die demokratischen Eirichtungen, anstatt sie zu schützen, untergräbt? Können wir wohl lösen, dass die Gesetzmäßigkeit und die Wirksamkeit sich nicht einander zu Lasten erstarkt?

Wir wollen darauf vertrauen, dass die sich gestaltende Praxis unseres neuen, genaueren Verfahrensregelsystems uns behilflich sein wird, solche und ähnliche Fragen beantworten zu können.

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HUMAN RIGHTS

CORONA-MASSNAHMEN: VON DER ENTKOPPELUNG VON GEFAHR UND GEFAHRENABWEHR, DER FATALEN EROSION DER GRUNDRECHTE UND DES VERHÄLTNISMÄSSIGKEITSGRUNDSATZES UND DER HINNAHME STAATLICHER INKONSISTENZ

Alexander Blankenagel[1]

Die Corona-Maßnahmen, die im wesentlichen auf die Reduzierung oder Unterbindung sozialer Kontakte zielen, enthalten noch nie dagewesene Beschränkungen fast aller wesentlichen Grundrechte bis hin zur Menschenwürde. Viele der Maßnahmen sind nach vor-Corona-Maßstäben offenkundig rechtswidrig bzw. rechtlich äußerst zweifelhaft; die gerichtliche Kontrolle ist jedoch ungenügend. Zum Teil fehlt es schon an der Gefahr, ohne deren Vorliegen die Grundrechtsbeschränkungen nicht zu rechtfertigen sind. In anderen Fällen fehlt die Erforderlichkeit, weil dort untersagt wird, wo bewährte Möglichkeiten der Infektionsvermeidung als weniger grundrechtsbeschränkendes Mittel im Kampf gegen Corona zur Verfügung standen. Die Angemessenheit der Maßnahmen wird durch die Verabsolutierung des Wertes von Leben und Gesundheit sowie durch deren vermeintliche zeitliche Begrenzung und durch finanzielle Ausgleichsmaßnahmen unterlaufen. Die verfassungsrechtlich geforderte Konsistenz – Folgerichtigkeit – der Anti-Corona-Maßnahmen wird von den Gerichten vernachlässigt. Alle Gerichtsbeschlüsse ergehen schließlich im Verfahren des einstweiligen Rechtsschutzes: Die Gerichte legen die Latte der überschlägig geprüften Rechtswidrigkeit der Maßnahmen sehr hoch und verstecken sich hinter einem tatsächlich wohl nie stattfindenden Hauptsacheverfahren. Verdeckt wird so, daß man im Sommer und Herbst 2020 versäumt hat, aus den Erfahrungen des Frühjahrs zu lernen und es vorgezogen hat, das Narrativ der Corona-Apokalypse aufrecht zu erhalten.

Einleitung

Die Anti-Corona-Maßnahmen im Frühjahr sowie seit dem Herbst 2020 in Deutschland wiederholen sich in der immer weitergehenden Reduzierung sozialer Kontakte, in Form von direkten Kontaktverboten wie auch von indirekten durch

[1] Lehrstuhl für Öffentliches Recht, Russisches Recht und Rechtsvergleichung, Juristische Fakultät, Humboldt-Universität zu Berlin (emeritiert).

die Schließung „ansteckungsverdächtiger“ Einrichtungen. Allerdings: Kontakte sind nicht gleich Kontakten! Produktion, Bürorarbeit (im Homeoffice arbeiteten Mitte Februar nur 25 % der Beschäftigten, vorher noch weniger[2]) und öffentlicher Verkehr finden, abgesehen von der Maskenpflicht, weiter so statt, als wäre nichts. Die Politik klammert sich an ihren eigenen Befund vom Herbst 2020, daß das Anwachsen der Infektionszahlen seinen Grund in den sonstigen sozialen Kontakten der Bevölkerung hat. Wie man das festgestellt hat, bleibt ein Rätsel: Laut Robert-Koch-Institut weiß man bei 75 Prozent der Ansteckungen nicht, wo sich die betreffenden angesteckt haben.[3] Da die Politik angesichts des Weiterlaufens von Produktion, Büroarbeit und öffentlichem Verkehr zeigen mußte, daß sie etwas tut, schloß sie alle Kultureinrichtungen (inklusive Schulen und Universitäten), Restaurants, Beherbergungsbetriebe und Sportanlagen und reduzierte dadurch die Lebensqualität drastisch. Das wäre doch gelacht, so wohl das Kalkül, wenn man die Leute nicht durch das Austrocknen von „sinnlosen“ Begegnungsmöglichkeiten zuhause halten könnte. Auf der Strecke bleiben persönliche Freiheit, Religionsfreiheit, Meinungs- und Versammlungsfreiheit, Wissenschafts- und Kunstfreiheit, Freizügigkeit sowie wirtschaftliche Betätigungsfreiheit und Eigentum; wirtschaftliche Existenzen werden massenweise vernichtet. Auch die Menschenwürde ist berührt, wenn man die alten Menschen in Altersheimen ohne Abschied von ihren Angehörigen einsam sterben läßt oder auch die freie Wahl von Interaktionspartnern und Interaktionsformen auf ein Minimum reduziert wird.

Die Restriktionen werden von der Bundeskanzlerin und den regelmäßig in der Mehrzahl von ihr „überzeugten“ Ministerpräsidenten der Länder gebetsmühlenmäßig immer wieder damit gerechtfertigt, daß die konkreten gefahrenabwehrenden Maßnahmen immer verhältnismäßig sein müßten und seien. Das Vorhandensein einer Gefahr, nämlich der Pandemie, wird still und global vorausgesetzt.

Gefahrenabwehr und Verhältnismässigkeit

Die Gefahr

Die gegenwärtigen Restriktionen dienen der Gefahrenabwehr. Wenn bzw. soweit keine Gefahr vorliegt, sind Einschränkungen von Grundrechten rechtswidrig. Wie ist nun in der Situation einer ansteckenden Krankheit – um das panikgetränkte Wort

[2] Der Spiegel, Zahl der Homeoffice-Arbeiter in den vergangenen Monaten gestiegen, *Der Spiegel,* (16.02.2021), https://www.spiegel.de/wirtschaft/corona-krise-zahl-der-homeoffice-arbeiter-steigt-deutlich-an-a-13e5186d-46f0-4cf9-9da0-b5cee159532c.

[3] Darauf verweist mit Quellenangabe etwa das OVG Magdeburg Beschluß v. 24.11.2020 – 3 R 220/20, BeckRS 2020, 32485, Rz.69.

von der Pandemie zu vermeiden – und nach dem Bundes-Infektionsschutzgesetz (IfSG) die Gefahr zu definieren und welche Rechtsgüter sind gefährdet und müssen geschützt werden. Die potentiell berührten Rechtsgüter sind Leben und Gesundheit der Gesellschaftsmitglieder sowie die Funktionsfähigkeit des Gesundheitssystems. Wie steht es aber mit der Gefahr? Der Bundestag hat gem. § 5 Abs. 1 S. 1 IfSG eine epidemische Lage von nationaler Tragweite festgestellt. Ist für das Vorliegen einer Gefahr die schiere Existenz einer Epidemie unabhängig von einer abstrakten oder konkreten Ansteckungswahrscheinlichkeit hinreichend? Im System des klassischen Gefahrenabwehrrechts wäre das sehr ungewöhnlich: Die Gefahr muß grundsätzlich in der Situation, in der ein Verhalten beschränkt oder verboten werden soll, abstrakt oder konkret gegeben sein.

Ansteckungsgefahr ist nach den von der Politik und den Virologen/Epidemiologen formulierten Gefahrparametern gegeben, wenn sich Personen räumlich vor allem in geschlossenen Räumen, aber grundsätzlich auch im Freien auf weniger als zwei Meter nahekommen. § 28 IfSG lautet in seinem für die Gefahr relevanten Teil folgendermaßen:

> *(1) Werden Kranke, Krankheitsverdächtige, Ansteckungsverdächtige oder Ausscheider festgestellt oder ergibt sich, dass ein Verstorbener krank, krankheitsverdächtig oder Ausscheider war, so trifft die zuständige Behörde die notwendigen Schutzmaßnahmen, insbesondere die in § 28a Absatz 1 und in den §§ 29 bis 31 genannten, soweit und solange es zur Verhinderung der Verbreitung übertragbarer Krankheiten erforderlich ist.*

Die Norm ist von ihren Voraussetzungen her relativ klar und entspricht dem sonstigen Gefahrenabwehrrecht: Soweit und solange es erforderlich ist, kann die zuständige Behörde die notwendigen Schutzmaßnahmen treffen. Dies legt nahe, daß es sich zumindest um eine abstrakte Gefahr handeln muß. Da die Gefahrenfeststellung durch die Identifizierung von Kranken, Krankheitsverdächtigen, Ansteckungsverdächtigen oder Ausscheidern – den Verursachern der Gefahr – geschieht, sind die notwendigen Schutzmaßnahmen an diesen „Gefahrenherd" zu koppeln und soweit und solange wie erforderlich zu treffen. Darüber hinaus ist nach dem IfSG auch die Inanspruchnahme des Nichtstörers, also des Nichtverursachers der Gefahr, allerdings wohl nur nachrangig[4], möglich. Zu gefahrenthobenen Gefahrenabwehrmaßnahmen § 28 IfSG ermächtigt nicht.

[4] OVG Hamburg, Beschluß v. 18.11.2020 – 5 Bs 209/20, BeckRS 2020, 34449, Rz. 24: „Störer", also die Personengruppen des § 28 Abs. 1 S. 1 IfSG, seien vorrangig in Anspruch zu nehmen; ebenso VGH Kassel Beschluß v. 8.4.2020 – 8 B 910/20, BeckRS 2020, 5627, Rz. 52.

Eben dies wird teilweise in der Literatur vertreten: Wegen der Existenz der ansteckenden Krankheit Corona bestehe eine allgemeine Gefahrenlage im gesamten Geltungsgebiet des IfSG; in der Konsequenz bejaht man die Zulässigkeit von Restriktionen zur Bekämpfung der „Pandemie" unabhängig vom Infektionsgeschehen am konkreten, wie auch immer definierten Ort – Kommune, Kreis, Bezirk.[5] Auch in einer ganzen Reihe von Gerichtsentscheidungen bleibt die Gefahr seltsam unspezifisch: Sie wird mal auf das Geltungsgebiet des IfSG bezogen, mal als Infektionsgefahr bei beliebigen Formen zwischenmenschlicher Kontakte für das Geltungsgebiet einer Rechtsverordnung bejaht, dabei hinnehmend, daß bei den konkreten Verhaltensweisen keine Infektionsgefahren entstehen, sondern allenfalls in deren Umfeld.[6]

Betrachten wir einige Maßnahmen im Hinblick auf das Vorhandensein einer Gefahr. Ein Epidemiologe hat einmal gesagt, daß alleine mitten auf einem Feld sich niemand mit Corona anstecken könne; im Freien und ohne enges Zusammentreffen von mindestens zwei Menschen besteht also keine Infektionsgefahr.[7] Eine Gefahr ist daher dort ausgeschlossen, wo die Größe der Räumlichkeiten und die Art der Tätigkeit die jeweiligen Akteure sozusagen in der Isolation halten, wie etwa das Tennis- oder auch Badmintonspielen in Hallen: Wo

[5] So etwa Thomas Vießmann, „Corona-Entschädigungen" für Unternehmer im Lockdown: Kein Sonderopfer wegen Störereigenschaft?, *Neue Zeitschrift für Verwaltungsrecht* (2021), 15–19, 17, 18: Jeder, der potentielle Infektionsquellen vorhält oder anbietet, sei verdächtig, die Schwelle zur konkreten Gefahr zu überschreiten; daß es vorher nicht zu Infektionen gekommen sei – Hotels –, sei unerheblich. Das Rechtsgut bei Deutschlands Freiheit von übertragbaren Krankheiten. – Keine Erörterung der Gefahr Holger Schmitz – Carl-Wendelin Neubert, Praktische Konkordanz in der Covid-Krise, *Neue Zeitschrift für Verwaltungsrecht* (2020), 666–670, 666 ff.; treffend Heribert Prantl, *Not und Gebot: Grundrechte in Quarantäne*, München, C.H.Beck, 2021, 74: Wenn man in die Begründung Corona schreibe, gehe fast alles – zur Laschet-Regierung in NRW.

[6] Einige Beispiele: OVG Berlin-Brandenburg, Beschluß vom 16.10.2020 – OVG 11 S 88/20, BeckRS 2020, 27820, Rz. 28: Beherbergungsverbot; VGH München, Beschluß vom 20.11.2020 – 20 CS 20.2729, BeckRS 2020, 32218, Rz. 9: Untersagung eines Parteitages; VGH München, Beschluß v. 1.11.2020 – 10 CS 20.2449, BeckRS 2020, 30392, Rz. 19: Versammlungsfreiheit; OVG Münster, Beschluß vom 23.12.2020 – 13 B 1983/20.NE, Rz. 25 ff.: apokalyptisch; OVG Schleswig, Beschluß v. 2.10.2020 – 3 MR 41/20, BeckRS 2020, 26000, Rz. 12: Interesse der Gesamtbevölkerung; VGH Kassel, Beschluß v. 8.4.2020 – 8 B 910/20, BeckRS 2020, 5627, Rz. 47; OVG Saarlouis, Beschluß v. 22.12.2020 – 2 B 373/20, BeckRS 2020, 37080, Rz. 14, das in dunkelsten Farben die Ansteckungssituation in den Altersheimen und allgemein schildert: Es ging um die Schließung einer Tennishalle! OVG Münster, Beschluß vom 23.12.2020 – 13 B 1983/20.NE, Rz. 34 – Golf; OVG Magdeburg Beschluß v. 24.11.2020 – 3 R 220/20, BeckRS 2020, 32485, Rz. 64 f.: Schießanlage – Gefahren allenfalls bei der Anfahrt

[7] Im Sinne der Befolgung müssen die Adressaten die Regeln nachvollziehen und annehmen können, Jens Kersten – Stephan Rixen, *Der Verfassungsstaat in der Corona-Krise*, München, C.H.Beck, 2020, 53.

man in großen Hallen durch ein Netz getrennt ist, kommt man sich nicht nahe und betreibt quasi Einzelsport. Das gleiche gilt für Einzelsportarten im Freien wie Golf oder Joggen. Eine Infektionsgefahr kann allenfalls vor und beim Betreten bzw. Verlassen der jeweiligen Räumlichkeiten oder des jeweiligen Ortes entstehen und dementsprechend durch die Regelung dieses Vorfelds der eigentlichen Tätigkeit neutralisiert werden. Gleichwohl darf man weder Tennis noch Badminton in Hallen spielen noch andere, sichere Sportarten wie Golf, betreiben.

Die Gerichte haben also die Gefahr entweder nach dem Motto „Jeder Kontakt ist gefährlich" globalisiert oder die Gefahr mit der unterstellten gebündelten Unvernunft der Betroffenen beim Kontakt im Vorfeld bejaht. Die Gefahrenabwehr, maW die Grundlage tiefgehender Grundrechtsbeschränkungen, hat sich ihrer lästigen Voraussetzung, der Gefahr, entledigt und die Grundrechte wohlfeil gemacht.[8]

Die Erforderlichkeit der Maßnahmen

Liegt eine Gefahr vor, so muß die gefahrenabwehrende Grundrechtsbeschränkung verhältnismäßig, also geeignet, erforderlich und angemessen sein. Die Geeignetheit vieler Restriktionen kann und soll unterstellt werden – wenn und soweit sie befolgt werden, also kein strukturelles Vollzugsdefizit anzunehmen ist wie im Falle der Untersagung oder Reduzierung persönlicher Kontakte.[9] Sprechen wir über die Erforderlichkeit der Restriktionen, in § 28 IfSG als „Notwendigkeit"[10] thematisiert: Der Staat darf nicht alle Maßnahmen und zumal nicht nur nützliche Maßnahmen anordnen, sondern nur Maßnahmen, die für die Erreichung infektionsschutzrechtlich legitimer Ziele objektiv notwendig (erforderlich) sind.[11] Eine Maßnahme muß bei vorhandener Eignung zur Gefahrenbekämpfung

[8] Womit die Gefahrenabwehr und ihre Grundrechtsbeschränkungen ihre Grundlage verlieren; dagegen Kersten – Rixen, *Verfassungsstaat,* 64: Eine Versammlung könne nur angesichts einer manifesten Gefahr verboten werden.

[9] So das OVG Lüneburg, das aus dem strukturellen Vollzugsdefizit eines Beherbergungsverbots auf dessen fehlende Eignung (und auch Erforderlichkeit) zurückschloß, OVG Lüneburg, Beschluß vom 15.10.2020 – 13 MN 371/20, BeckRS 2020, 26667, Rz. 57.

[10] Die Besonderheit des § 28 IfSG besteht darin, daß schon der Gesetzeswortlaut die inhaltliche („soweit") und die zeitliche („solange") Erforderlichkeit der „notwendigen Schutzmaßnahmen" regelt; das ist allerdings bei ordnungsrechtlichen Normen nicht ungewöhnlich und verlagert die Erforderlichkeits- bzw. Verhältnismäßigkeitsprüfung in den Tatbestand der Norm. Die Rechtsprechung mogelt sich häufig über diese tatbestandlichen Voraussetzungen des § 28 IfSG hinweg und führt eine klassische, verfassungsrechtliche Verhältnismäßigkeitsprüfung durch; Kommentare verfahren ebenso.

[11] OVG Lüneburg, Beschluß vom 15.10.2020 – 13 MN 371/20, BeckRS 2020, 26667, Rz. 49, unter Hinweis auf den in gleiche Richtung argumentierenden Senatsbeschluß v. 26.5.2020 - 13 MN 182/20.

oder Schadensverhinderung den geringstmöglichen Eingriff in das jeweilige Grundrecht darstellen. Systematisch spiegelt die Erforderlichkeit die Aktualität und Schwere der Gefahr: Je weniger aktuell und je geringfügiger die Gefahr ist, desto strenger ist der Maßstab der Erforderlichkeit. Den vermeintlich strengen Maßstab der Erforderlichkeit relativieren Rechtsprechung und Literatur allerdings durch einen der Verwaltung zugestandenen gerichtlich nicht überprüfbaren Entscheidungsspielraum, eine Einschätzungsprärogative.[12]

Ist die Gefahr gering, so ist der Maßstab der Erforderlichkeit streng. Sie ist gering dort, wo die Gebäude sehr groß sind und daher durch zahlenmäßige Begrenzung des Zugangs zum Gebäude und durch entsprechende Vorkehrungen im Gebäude verhindert werden kann, daß sich Menschen in einem Abstand von weniger als zwei Metern begegnen. Je größer die Räumlichkeiten und je fokussierter die Regelung des Zugangs und des dort Verweilens, desto geringer die Gefahr, zumal wenn auch noch Masken getragen werden. Große Gebäude haben Museen, Ausstellungen, Konzertsäle und Kinos; sie trafen im Sommer 2020, während der Phase der Öffnung, unter Verzicht auf möglichen Umsatz auch Vorkehrungen zur Begrenzung des Zugangs, ebenso wie, bei entsprechender Größe der Räumlichkeiten, auch Restaurants. Diese Maßnahmen verhinderten dann bei gutem Besuch Ansteckungen, wie die damaligen niedrigen Ansteckungszahlen zeigen. (Im übrigen hätten man Infektionen wegen der überall erforderlichen Registrierung der Besucher auch ohne Probleme nachverfolgen können) Gleichwohl sind die Museen, Konzertsäle, Kinos und alle, auch die ausreichend geräumigen Restaurants, im Spätherbst geschlossen worden. Die Bund-Länder-Konferenz, die VO-Geber der Länder haben sich über diese eine geringe Gefahr belegenden Tatsachen und die Möglichkeit der Nachverfolgung der Ansteckungen hinweggesetzt.

Die Rechtsprechung spiegelt eher die jeweiligen Infektionszahlen als die Rechtslage wider. Im Frühherbst des letzten Jahres, als die Infektionbszahlen noch gering waren, wurden einige Maßnahmen aufgehoben, so etwa, wie schon erwähnt, ein Beherbergungsverbot durch das OVG Lüneburg.[13] Mit steigenden Infektionszahlen sank aber die Kontrollschärfe der Rechtsprechung. In den Fällen, in denen schon die Gefahr zweifelhaft bzw. gering war, erfolgte die Prüfung nach dem Motto „Augen zu und durch". Einer mühsamen Feststellung einer Gefahr – die Losung lautete: Jede Begegnung von zwei Menschen ist gefährlich – folgt dann eine oft mühsame Bejahung der Geeignetheit und sehr mühsame Bejahung der

[12] OVG Berlin-Brandenburg 16.10.2020, Beschluß vom 16. 10. 2020 – OVG 11 S 88/20, BeckRS 2020, 27820, Rz. 23: „tatsächlicher Einschätzungsspielraum", unter Hinweis auf das BVerfG vom 13. Mai 2020 - 1 BvR 1021/20, Rz. 10; OVG Magdeburg, Beschluß v. 24.11.2020 – 3 R 220/20, BeckRS 2020, 32485, Rz. 35: Weiter Gestaltungsspielraum/offensichtliche Verstöße.

[13] OVG Lüneburg, Beschluß vom 15.10.2020 – 13 MN 371/20, BeckRS 2020, 26667, Rz. 57.

Erforderlichkeit, die dann in manchen Fällen gegen jede Plausibilität unter Rekurs auf eine zulässige generalisierende Betrachtung bejaht wird, weil die Achtsamkeit zweier sich begegnender Menschen zweifelhaft sei[14] oder auch eine Ansteckung nicht ausgeschlossen werden könne.[15] In anderen Fällen wird die Erforderlichkeit von Totalverboten bejaht, weil andere Schutz- und Hygiene-Konzepte nicht gleich geeignet seien.[16] Die potentielle Kontrollschärfe des Grundsatzes der Erforderlichkeit wurde schließlich noch, wo nötig, durch eine viel zu großzügig bemessene Einschätzungsprärogative des VO-Gebers neutralisiert.[17]

Die Verhältnismäßigkeit der Maßnahme im engen Sinne

Auf den Waagschalen der verfassungsrechtlichen Abwägung der Angemessenheit liegen einerseits der Schutz von Leben und Gesundheit sowie, diesen dienend, die Funktionsfähigkeit des Gesundheitssystems und andererseits je nach Fallkonstellation die freie Entfaltung der Persönlichkeit durch und in Sozialität sowie, im Falle von Verwandtschaft, der Schutz der Familie sowie, in bestimmten Fällen, die Berufsfreiheit oder der Eigentumsschutz. In manchen Entscheidungen wurde auch noch die Effizienz der Gefahrenbekämpfungsmaßnahme mit der Schwere der Grundrechtsbeschränkung abgewogen.[18] Die Abwägung bei der Angemessenheit setzt eine Gewichtung der miteinander kollidierenden Rechtsgüter voraus; hier ist der VO-Geber nicht durch eine Einschätzungsprärogative geschützt. [19]

Die Politik und ihr folgend der Mainstream der öffentlichen Diskussion propagieren Leben und Gesundheit als höchste, unter allen Umständen zu schützende Rechtsgüter; wer diese „selbstverständliche Wahrheit" anzweifelt oder gar sich dagegen ausspricht, wird als Corona-Leugner und als Verschwörungstheoretiker marginalisiert.[20] Die Rechtsprechung, deren mittelbare Aufgabe es doch ist, diesen

[14] OVG Münster, Beschluß vom 23.12.2020 – 13 B 1983/20.NE, Rz. 37, 38.

[15] S. zB VGH München, Beschluß vom 16.11.2020 – 20 NE 20.2561, BeckRS 2020, 32249, Rz. 217; ähnlich auch das BVerfG, Beschluß vom 11. 11. 2020, 1 BvR 2530/20, Rz.15.

[16] OVG Hamburg Beschluß v. 18.11.2020 – 5 Bs 209/20, BeckRS 2020, 34449, Rz. 31; anders OVG Berlin-Brandenburg Beschluß v. 16.10.2020 – 11 S 88/20, BeckRS 2020, 27820 Rz. 36: Beherbergungsverbot: Hygienekonzept hinreichend.

[17] S. noch einmal das OVG Münster, Beschluß vom 23.12.2020 – 13 B 1983/20.NE, Rz. 37, 38.

[18] OVG Berlin-Brandenburg, Beschluß vom 16.10.2020, OVG 11 S 88/20, BeckRS 2020, 27820, Rz. 35.

[19] S. noch einmal das OVG Berlin-Brandenburg; Beschluß vom 16.10.2020 – OVG 11 S 88/20, BeckRS 2020, 27820, Rz. 32 ff.: In einer sorgfältigen Abwägung kommt das OVG zur Rechtswidrigkeit des Beherbergungsverbots; die Entscheidung fiel vor der zweiten Corona-Welle.

[20] Hans Michael Heinig – Thorsten Kingreen – Oliver Lepsius – Christoph Möllers – Uwe Volkmann – Hinnerk Wißmann, Why Constitution Matters – Verfassungsrechtswissenschaft

öffentlichen Diskurs und diese Marginalisierung am Maßstab der Verfassung zu überprüfen, hat sich diesem Narrativ in der Regel angeschlossen, weswegen es häufig an einer substantiellen Abwägung fehlt;[21] daß etwa das Leben und noch weniger die Gesundheit kein höchster, d.h. absoluter Wert ist, wird geflissentlich übersehen. Die Gerichte verweisen auf finanziellen Ausgleichsmaßnahmen, was nur bei Eingriffen in Art. 12 und Art. 14 GG greift (und in der Sache zum „dulde und liquidiere" des 19. Jahrhunderts zurückführt).[22] Einen Golf- oder Tennisspieler im Rahmen der Angemessenheit darauf zu verweisen, er könne ja weiter joggen, walken, inlineskaten, radfahren oder Gymnastik betreiben, ist eine kaltschnäuzige Grundrechtsverweigerung.[23] Darüber hinaus haben die Gerichte sich in die zeitliche Begrenzung der Restriktionen gerettet: Die Maßnahmen seien in ihrer Geltung zeitlich beschränkt und den VO-Geber treffe eine ständige Nachschaupflicht.[24] Dabei verschweigen die Gerichte die regelmäßige Verlängerung der Maßnahmen und umgehen so das Abwägungsproblem, daß Grundrechtsbeschränkungen um so schwerer wiegen, je länger sie dauern.

Die Folgerichtigkeit der Massnahmen

Neben der tiefgehenden Beschränkung der Grundrechte stört an den Corona-Maßnahmen auch ihre Inkonsistenz: Das Zusammentreffen vieler Menschen und die Unterschreitung der infektionsverhindernden Distanz von zwei Metern sind in vielen Fällen erlaubt. Der gesamte Einzelhandel blieb bis Mitte Dezember offen; das Weihnachtsfest läßt schön grüßen. In Fabriken und sonstigen Produktionsstätten wird weiterhin gearbeitet. In den Büros wurde das home-office so lange wie möglich hinaus gezögert und dies staatlicherseits gleichgültig hingenommen. Der öffentliche Nah- und Fernverkehr funktionieren – mit Maskenpflicht – weiter: Die

in Zeiten der Corona-Krise, *Juristen Zeitung* 18 (2020), 861–863; Prantl, *Not und Gebot*, 101.

[21] OVG Münster, Beschluß vom 23.12.2020 – 13 B 1983/20.NE, Rz. 40; OVG Magdeburg Beschluß vom 24.11.2020 – 3 R 220/20, BeckRS 2020, 32485, Rz. 41, 71.

[22] OVG Münster, Beschluß vom 23.12.2020 – 13 B 1983/20.NE, Rz. 41 f. – S. dazu J. Jens Ritze – Rouven Schwab, Dulde und liquidiere: Staatshaftungsansprüche in Coronazeiten, *Neue Juristische Wochenschrift* 73 (2020), 1905–1910; sehr kritisch zur Adäquanz der Entschädigungen Foroud Shirvani, Defizitäres Infektionsschutz-Entschädigungsrecht, *Neue Zeitschrift für Verwaltungsrecht* (2020), 1457; ebenso Schmitz – Neubert, Praktische Konkordanz in der Covid-Krise, 666–669.

[23] OVG Münster, Beschluß vom 23.12.2020 – 13 B 1983/20.NE, Rz. 40.

[24] S. zB VGH München Beschluß vom 14.6.2020 – 20 NE 20.1196, BeckRS 2020, 14609 Rz. 28; VGH München Beschluß vom 7.7.2020 – 20 NE 20.1497, BeckRS 2020, 16177, Rz. 40; OVG Bremen Urteil vom 9.11.2020 – 1 B 339/20, BeckRS 2020, 30294, Rz. 47; so auch J. Gerhardt, Infektions-Schutzgesetz, 5. Aufl., 2021, § 18 Rz. 16 sowie 21.

Einhaltung der notwendigen Distanz ist im Nahverkehr in den Stoßzeiten schlicht unmöglich. Im Fernverkehr unterläßt es die Bahn bis heute, über die Reservierung für Abstand in den Waggons zu sorgen. „Körpernahe Dienstleistungen" können wieder angeboten werden, was man bei Friseuren und Fußpflege gerade noch verstehen kann, bei Nagel- und Tätowier-Studios aber nun wirklich nicht. Buchhandlungen Blumenläden und Gartencenter dürfen, soweit pro Kunde 10 bzw. 20 qm zur Verfügung stehen, öffnen: Wieso nicht bei gleichen Gegebenheiten der gesamte Einzelhandel? Warum dürfen Museen und Galerien nur bei einem Inzidenzwert von unter 50 öffnen, obwohl bei Regulierung des Besuchs über Slots wie im Sommer und Herbst 2020 hier bedeutend mehr Fläche pro Besucher zur Verfügung steht? Warum taucht die Innengastronomie in diesen Beschlüssen überhaupt nicht auf, trotz aller Investitionen in Belüftungsanlagen, Reduktion der Tischzahlen und Dokumentation der Gäste zur potentiellen Nachverfolgung wie im Sommer 2020?

Die Widersprüchlichkeit der Regelung ähnlicher oder identischer Sachverhalte ist zunächst ein gesellschaftliches Problem. Je widersprüchlicher das Regelungssystem, desto poröser die Akzeptanz der Maßnahmen;[25] ohne weitgehende Akzeptanz aber können die Maßnahmen nicht funktionieren, da eine adäquate Überwachung der Befolgung aus quantitativen Gründen unmöglich ist. Sie ist aber auch ein juristisches Problem. Die Inkonsistenz der Beschränkungen widerspricht dem Gebot der Folgerichtigkeit staatlicher Maßnahmen (nach alter Terminologie: der Systemgerechtigkeit[26]). Der Grundsatz der Folgerichtigkeit (oder auch Kohärenz) verpflichtet den Normgeber zu Konsequenz dort, wo er sich für ein bestimmtes Regelungssystem entschieden hat; er bedeutet grundsätzlich eine umfassendere Justiziabilität in gewisser Relativierung des Gestaltungsspielraums des Normgebers.[27] Die Corona-Rechtsprechung ist allerdings kein Beleg dieser umfassenderen Justiziabilität. Die Gerichte haben die Folgerichtigkeit unspezifisch als Gleichheitsproblem thematisiert und die Widersprüchlichkeit der Maßnahmen in der Regel unter Hinweis auf den weiten Entscheidungsspielraum des VO-Gebers

[25] Das OVG Hamburg, Beschluß vom 30.4.2020 – 5 Bs 64/20, BeckRS 2020, 7265, Rz. 50, unterstellt optimistisch diese Akzeptanz trotz der Widersprüchlichkeit der Maßnahmen.

[26] S. dazu Max Erdmann, Kohärenz in der Krise, *Neue Zeitschrift für Verwaltungsrecht* (2020), 1798–1799; als Aspekt der Verhältnismäßigkeit hat das BVerfG dies als „Konzeptbefolgungspflicht" in der Entscheidung zum Rauchverbot in Gaststätten thematisiert, BVerfGE 121, 317 (Ls. 1)und 356; als Problem der Gleichheit firmierte der Grundsatz der Folgerichtigkeit in der Pendlerpauschale-Entscheidung, BVerfGE 122, 210/231 ff.; als konkretes Beispiel, freilich ohne Erwähnung der Folgerichtigkeit, s. OVG Magdeburg, Beschluß 24.11.2020 – 3 R 220/20, BeckRS 2020, 32485, Rz. 48: Schlüssiges Sich-Einfügen in Gesamtkonzept.

[27] Erdmann, Kohärenz, S. 1799 bzw. 1801.

neutralisiert,[28] großzügig übersehend, daß die Konzeptbefolgungspflicht eben diesen Entscheidungsspielraum einhegen soll.[29] Zum Teil haben sie die konkreten Maßnahmen zwar als lückenhaft und widersprüchlich bezeichnet, dies aber mit dem Argument neutralisiert, daß der VO-Geber ein bestimmtes Regelungssystem verfolgt habe und deswegen die Widersprüchlichkeiten hinzunehmen seien, weil sonst das System zusammenfalle.[30] Einen überzeugenden Nachweis des Systemzusammenbruchs bleiben die Gerichte allerdings schuldig. Die Gerichte sind also bei Gefahr und Verhältnismäßigkeit schon schlecht in die rechtliche Kontrolle der Corona-Maßnahmen eingestiegen und haben das dann bei der Folgerichtigkeit nahtlos fortgesetzt.

Der einstweilige Rechtsschutz als Achillesferse des Grundrechtsschutzes in Corona-Zeiten

Alle bisherigen Gerichtsentscheidungen ergingen im Verfahren des vorläufigen Rechtsschutzes; da es in der Regel um Rechtsschutz gegen Rechtsverordnungen ging, war Grundlage § 47 Abs. 6 VwGO. Die Rechtsprechung prüft hier grundsätzlich in zwei Schritten. Geprüft werden zunächst die Erfolgsaussichten in der Hauptsache: Sind die Erfolgsaussichten in der Hauptsache groß, wird in der Regel vorläufiger Rechtsschutz gewährt, bei geringen Erfolgsaussichten nicht.[31] Bei unklaren Erfolgsaussichten nimmt das Gericht eine Güterabwägung vor: Wie gewichtig ist die Grundrechtsverletzung, wenn vorläufiger Rechtsschutz nicht gewährt wird, der Antragsteller in der Hauptsache dann aber Erfolg hat? Wie groß ist der Schaden für das Gemeinwohl, wenn der vorläufige Rechtsschutz gewährt wird, der Antragsteller dann aber im Hauptsacheverfahren keinen Erfolg hat? Dabei müssen die Gründe, die für den Erlaß einer einstweiligen Anordnung sprechen, die dagegen sprechenden Belange des Gemeinwohls deutlich überwiegen.[32] Soweit es

[28] OVG Hamburg, Beschluß vom 30.4.2020 – 5 Bs 64/20, BeckRS 2020, 7265; Rz. 41 – Irrelevanz der Möglichkeit adäquaten Infektionsschutzes im Einzelhandel mit Verkaufsflächen von mehr als 800 qm; ebenso OVG Magdeburg Beschluß vom 29.4.2020 – 3 R 71/20, BeckRS 2020, 12629, Rz. 37.

[29] Erdmann, Kohärenz, 1800.

[30] OVG Magdeburg Beschluß vom 24.11.2020 – 3 R 220/20, BeckRS 2020, 32485, Rz. 58; s. auch ebda, Rz. 68: Verzicht auf innere Folgerichtigkeit; VGH München Beschluß vom 18.12.2020 – 20 NE 20.2678, BeckRS 2020, 36149, Rz. 30: Möglichkeit von Differenzierungen in einem Gesamtkonzept.

[31] OVG Bremen Urteil vom 9.11.2020 – 1 B 339/20, BeckRS 2020, 30294, Rz. 11; OVG Berlin-Brandenburg Beschluß vom 4.1.2021 – OVG 11 S 132/20, BeckRS 2021, 2, Rz. 16.

[32] OVG Berlin-Brandenburg Beschluß vom 4.1.2021 – OVG 11 S 132/20, BeckRS 2021, 2, Rz.

um vorläufigen Rechtsschutz gegen Einzelmaßnahmen geht, verläuft die Prüfung und Abwägung analog.

Die Corona-Rechtsprechung entscheidet in der Regel gegen den Antragsteller nach zwei Mustern. Entweder wird der Antrag abgelehnt, weil er in der Hauptsache wahrscheinlich keinen Erfolg haben wird[33] oder aber die Güterabwägung geht zuungunsten des Antragstellers aus, weil die Grundrechtsverletzungen die Belange des Gemeinwohls nicht deutlich überwiegen, mit anderen Worten klein geredet werden.[34] Dazu kommt häufig noch der Hinweis auf die staatlichen Entschädigungen sowie das Argument der „Gesamtkonzeption".[35] Abwägungen mit einem Ergebnis zugunsten des Antragstellers fallen in der Regel nur bei besonders wichtigen Grundrechten oder auch bei offenkundig unsinnigen Maßnahmen an.[36] Es gibt schließlich eine gewisse Korrelation mit den Infektions-. Krankenhausbelegungs- und Todeszahlen: Im Frühjahr und Spätwinter 2020 fielen die Entscheidungen in der Regel meist negativ aus, im Sommer und Herbst bis zum steilen Anstieg der Zahlen öfter auch mal positiv und dann mit dem Beginn des Dezembers wieder negativ.[37] Die erstinstanzliche Verwaltungsgerichte schließlich scheinen eher geneigt zu sein, Anträgen stattzugeben;[38] dies mag damit

17, mwNw; OVG Bremen Urteil vom 9.11.2020 – 1 B 339/20, BeckRS 2020, 30294, Rz. 12; OVG Schleswig Beschluß vom 2.10.2020 – 3 MR 41/20, BeckRS 2020, 26000, Rz. 9 f.

33 OVG Magdeburg Beschl. v. 24.11.2020 – 3 R 220/20, BeckRS 2020, 32485, Rz. 22.

34 VGH München, Beschluß vom 14.6.2020 – 20 NE 20.1196, BeckRS 2020, 14609, Rz. 27 f.; VGH München, Beschluß vom 29.5.2020 – 20 NE 20.1165, BeckRS 2020, 10750, Rz. 18 f.

35 Zur Entschädigung s. die Nachweise in Anm. 21; zur Gesamtkonzeption s. BVerfG, Beschluß vom 11. 11. 2020, 1 BvR 2530/20, Rz. 16.

36 VGH München Beschluß vom 11.9.2020 – 10 CS 20.2063, BeckRS 2020, 24837, Rz. 13 ff.: Versammlungsfreiheit; VGH München Beschluß vom 1.11.2020 – 10 CS 20.2449, BeckRS 2020, 30392, Rz. 17 ff.: Versammlungsfreiheit/Maskenpflicht; s. aber demgegenüber die das Versammlungsverbot bestätigende Entscheidung BVerfG, NVwZ 2021, 55/55; OVG Berlin-Brandenburg Beschluß vom 4.1. 2021 – OVG 11 S 132/20, BeckRS 2021, 2, Rz. 19 ff.: Attest für Ausnahme von Maskenpflicht/hohen Sensibilität der persönlichen Gesundheitsdaten in den Attesten. – Besonders unsinnig etwa VG Hamburg, Beschluß vom 11.03.2021 - 9 E 920/2, S. 5: Maskentragepflicht beim Joggen in den öffentlichen Grünanlagen; VGH München, Beschluß vom 24.11.2020 – 20 NE 20.2605: Testpflicht für Grenzgänger.

37 Ausgewertet wurden 7 VG-Entscheidungen, 27 OVG/VGH-Entscheidungen sowie 21 BVerfG-Entscheidungen in drei Zeiträumen, nämlich bis einschließlich Mai 2020, vom Juni 2020 bis November 2020 und dann vom Dezember 2020 bis heute. Im Zeitraum bis Mai 2020 gab es eine stattgebende bei insgesamt 12 ablehnenden Entscheidungen; im Zeitraum von Juni bis November gab es 7 stattgebende und 26 ablehnende Entscheidungen; im Zeitraum Dezember bis heute gab es 3 stattgebende und 5 ablehnende Entscheidungen.

38 Bei den VG-Entscheidungen gab es 4 zumindest teilweise stattgebende Entscheidungen gegenüber 3 ablehnenden Entscheidungen; bei den OVG gab es 7 stattgebende Entscheidungen gegenüber 20 ablehnenden Entscheidungen.

zusammenhängen, daß sie nicht über die Aussetzung von Rechtsverordnungen inter omnes entscheiden.

Auch die Bilanz des vorläufigen Rechtsschutzes beim BVerfG ist für potentielle Beschwerdeführer entmutigend.[39] Die Anträge bzw. Verfassungsbeschwerden richteten sich in der Regel gegen Corona-Maßnahmen; es gab aber auch Anträge, die sich gegen deren Lockerung richteten. Die wiederum entmutigende Bilanz zeigt bei 21 ausgewerteten Beschlüssen drei unterschiedliche Entscheidungstypen. Zum Teil war die zugrundeliegende Verfassungsbeschwerde in der Sache offenkundig aussichtslos: Das BVerfG hat dann direkt die Verfassungsbeschwerde zurückgewiesen und in der Konsequenz auch den Erlaß der einstweiligen Anordnung.[40] Bei der zweiten Gruppe von Entscheidungen hatte der Antragsteller den Rechtsweg oder andere Rechtsschutzmöglichkeiten nicht ausgeschöpft: Das BVerfG hat dann wegen des Grundsatzes der Subsidiarität den Erlaß einer einstweiligen Anordnung und auch die Verfassungsbeschwerde abgelehnt.[41] Schließlich gibt es die Fälle, wo ein Erfolg der Verfassungsbeschwerde möglich erschien: Hier hat das BVerfG die bei der einstweiligen Anordnung übliche Abwägung der Schwere der Grundrechtsverletzung bei Nichterlaß der einstweiligen Anordnung bzw. der Schäden für das Gemeinwohl bei Erlaß einer einstweiligen Anordnung, aber fehlender Grundrechtsverletzung vorgenommen; auch hier wurde der Erlaß der einstweiligen Anordnung regelmäßig abgelehnt.[42]

Schließlich hat der verwaltungsgerichtliche und verfassungsgerichtliche einstweilige Rechtsschutz auf das Hauptsacheverfahren verwiesen und so seine Zahnlosigkeit demonstriert: Empirisch gesehen wird es bei den Corona-Maßnahmen so gut wie nie zum Hauptsacheverfahren kommen. Die Verwaltungsgerichte müßten daher die Erfolgsaussichten der Hauptsache besonders intensiv prüfen: Sie erwähnen diese Pflicht, prüfen aber mit normaler Intensität.[43] U. Volkmann hat in seinem Blog „Der Ausnahmezustand" im März 2020 prognostiziert, daß kein Verwaltungs- oder auch Verfassungsgericht es riskieren wird, der Regierung im Kampf gegen die als existenziell empfundene

[39] H. Zuck und R. Zuck zählen in der Zeit vom 19. 3. 2020 bis 11. 6. 2020 36 Kammerentscheidungen, von denen nur 3 den Anträgen stattgaben, diess., Rüdiger Zuck – Holger Zuck, Die Rechtsprechung des BVerfG zu den Corona-Fällen, *Neue Juristische Wochenschrift* 73 (2020), 2302–2303.

[40] Als ein Beispiel s. Beschluß vom 29. August 2020 - 1 BvR 2039/20 Versammlungsrecht.

[41] Als ein Beispiel s. Beschluß vom 18. April 2020 - 1 BvR 829/20 Verbot, die Wohnung zu verlassen.

[42] S. etwa 1 BvQ 42/20 vom 1. 5. 2020: Kontaktverbote; 1 BvR 1187/20 vom 7. 7. 2020: Kontaktbeschränkung, Kontaktnachverfolgung und Maskenpflicht.

[43] VGH München Beschluß vom 7.7.2020 – 20 NE 20.1497, BeckRS 2020, 16177, LS 2 sowie Rz. 18; ebenso OVG Bremen Urteil vom 9.11.2020 – 1 B 339/20, BeckRS 2020, 30294, Rz. 11; VGH München Beschluß vom 10.6.2020 – 20 NE 20.1320, BeckRS 2020, 12010, Rz. 21.

Bedrohung durch Beanstandung von Anti-Corona-Maßnahmen in den Arm zu fallen.[44] Wir schreiben wieder den März, allerdings des Jahres 2021, und wissen unendlich viel mehr über die Krankheit; die von diesem Wissen unbeeindruckt sich wiederholenden Anti-Corona-Maßnahmen der „zweiten Welle" und ihre erneuten, leider nur zu bekannten Grundrechtsbeschränkungen bleiben weiter unbehelligt von gerichtlicher Kontrolle.

Kein schönes Resüme in dieser Zeit!

Die Corona-Politik der Bund-Länder-Konferenz und die Umsetzung der beschlossenen Maßnahmen durch die Länder seit dem Herbst 2020 sind ein Trauerspiel. Sie lassen zunächst eine sorgfältige Gefahrenprognose vermissen: Das mittlerweile und anders als beim ersten Lockdown vorhandene Wissen über Corona sowie das im Sommer 2020 angesammelte Know-How der Infektionsvermeidung und Infektionsverfolgung wurden blasiert für irrelevant erklärt und die Chance der adäquaten Vorbereitung auf die „zweite Welle" im Winter etwa durch effizienten Schutz der Risikogruppen, Aufstockung und bessere Bezahlung des Pflegepersonals[45], bessere finanzielle und digitale Ausstattung des Robert-Koch-Instituts oder der Gesundheitsämter[46] oder auch Erhöhung der Testkapazitäten wurde verpaßt. Der Mühe, differenzierte, gefahradäquate und verhältnismäßige, vor allem erforderliche und angemessene Regelungen zu erlassen, hat man sich gar nicht erst unterzogen und statt dessen die Gesellschaft und Teile der Wirtschaft mit der kostspieligen Keule eines zweiten Lockdowns zu Boden gestreckt. Die Gerichte, im Sommer und Frühherbst angesichts niedriger Infektionszahlen noch kritisch gegenüber fragwürdigen Anti-Corona-Maßnahmen, haben sich mit dem Steigen der Zahlen im Spätherbst und dem Auftauchen von Mutanten zunehmend hinter dem Nebel einer allgegenwärtigen Gefahr sowie der Entscheidungsspielräume der Exekutive versteckt und die Ausweichmöglichkeiten des vorläufigen Rechtsschutzes genutzt: Von einer sorgfältigen gerichtlichen Kontrolle konkreter Maßnahmen kann keine Rede sein. Die in der Panik des Frühjahrs gerade noch verständliche Entscheidung, die sozialen Beziehungen und die Kultur einzufrieren und im Gegenzug die Wirtschaft größtenteils unbehelligt zu lassen, ist in sturer Einfallslosigkeit auf Kosten der Lebensqualität wiederholt

[44] Uwe Volkmann, Der Ausnahmezustand, *Verfassungsblog* (20. 3. 2020), https://verfassungsblog.de/der-ausnahmezustand/.

[45] S. den Bericht in der Berliner Zeitung vom 12. 3. 2021 „Tausende Pflegekräfte während der Pandemie arbeitslos".

[46] S. zu diesen Unterlassungen die Süddeutsche Zeitung vom 29. 3. 2021, S. 13 „Im Blindflug durch die Pandemie".

worden.[47] Versäumt hat man es, in die Diskussion um ein sinnvolles Umgehen mit Corona in die geschlossene Gesellschaft von Politikern und Virologen/Epidemiologen breiten gesellschaftlichen Sachverstand zu integrieren, obwohl das immer wieder gefordert worden ist. Das Narrativ von der „überall wütenden Pandemie" – übersetze: das Narrativ der Pest und der Apokalypse – hätte in Frage gestellt, durchbrochen werden können; nicht mehr auf die Impfung wie das Kaninchen auf die Schlage starrend hätte man sich überlegen können, was geschehen soll, wenn man Corona nicht „wegimpfen" (W. Kretschmann) kann. Und schließlich: Ob man „nach Corona" unproblematisch zum status quo ante zurückkehren kann, ob das Freiheitsverständnis der Gesellschaft nicht bleibenden Schaden erleidet, ist eine offene Frage.[48]

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[47] Sehr treffend Thorsten Kingreen, Ist das Kunst? Dann kann das weg!, *Verfassungsblog* (4. 11. 2020), https://verfassungsblog.de/ist-das-kunst-dann-kann-das-weg/: „Die Verordnungsgeber versuchen sich hier an der gewagten Unterscheidung zwischen der systemrelevanten „Wirtschaft" und dem gerade nicht so wichtigen Sport- und Kulturbereich. Friseure dürfen öffnen, Kosmetiksalons nicht. Wir dürfen in den nächsten Wochen tagein, tagaus durch Autohäuser und Baumärkte streifen, aber das Kino und die Kabarettbühne sind tabu. Maßgeblich für die Abgrenzung zwischen geöffneten und geschlossenen Einrichtungen ist damit die folgende Kontrollfrage: Ist das Kunst? Dann kann das weg!"

[48] Lepsius u. a., Why Constitution Matters, 864.

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A KANTIAN 'FOUNDATION' OF HUMAN RIGHTS THROUGH THE IMPOSSIBILITY OF THEIR FOUNDATION

Herbert Hanreich[1]

Positive foundations of human rights fail due to the vagueness of the concept of 'humanity' in such rights; the *Universal Declaration of Human Rights* is such a vague concept. An assumption, however, about what 'humanity' is, is what human rights concepts necessarily presuppose, tacitly or explicitly.

The pretension to have found a positive determination turns that vagueness into an ideology affecting politics and people accordingly. This is demonstrated in a critique of two of such pretensions by briefly analyzing an Islamic and a Confucian model, respectively.

The German philosopher I. Kant has provided a philosophical theory underlining the vagueness *in principle* when trying to define what human beings are. In this way he has provided a foundation of human rights *ex negativo*; other ways are not possible. This can have positive consequences for politics.

Introduction

Human rights are rights designed to transcend subjective, cultural and national boundaries. They are designed as natural law, i.e. as rights human beings have prior to their legal and institutional constitution. But they aim at their legalization and institutionalization. They have a moral dimension that seeks political and legal implementation; without it, they would be mere declarations of intentions.

Today, those rights are laid down in declarations, treaties, and manifestations adopted by international bodies. The most prominent of those documents is the *Universal Declaration of Human Rights* (UDHR) of 1948.

The UDHR, however, has always been contested, for various reasons, the fiercest objections among them being those against its principles of universality and individuality. Those criticisms emerge from socially or culturally imbued

[1] Ass.-Prof. Dr. Herbert Hanreich (retired), Department of Applied English, I-Shou University, Taiwan

forms of collectivism meant to redefine what individuals really 'are'; they have become new addressees of human rights, intended to replace 'Western-style' individuality.

Chapter II of this paper deals with two of such collectivisms. Transformed into official documents in the 1990ies, they still play, in updated versions, a prominent role in the global discourse on human rights.

Reciprocally, it has been claimed that 'Western-style' human rights are likewise expressions of ideological biases favoring one's own domestic product. But is it so?

For many of its defenders it was Immanuel Kant who has provided a viable ethical-philosophical foundation[2] of those claims more than two centuries ago. Chapter III is about those claims.

But I think there could be other sources for the defense of modern human rights, yet not by arguing in favor of certain moral assumptions, but rather negatively, namely by demonstrating an impossibility *in principle* of unambiguously defining humanity (Chapter I). Some of Kant's theoretical ('transcendental') doctrines are helpful in this aspect (Chapter IV). This would have, in turn, consequences for the political status of human rights (Conclusion). But prior to it I briefly consider what I mean under foundation.

I. Some thoughts on 'foundation'

Human rights concepts hold – implicitly or explicitly – that there is something like a nature in human beings which deserves special attention and protection, which, in turn, requires special legitimation. Unsurprisingly, the nature of this 'nature' differs depending on the various cultures and political circumstances in which drafters of human rights texts are situated. Those contexts are contingent; they are the sources of values from where proofs 'prove' this – and not that – version of human rights. Theoretically, they are all equivalent for they all lack (by nature, one is tempted to say) gapless and rigid intellectual immunity vis-à-vis criticisms from other competitors. It seems that the foundation business within a multi-cultural context runs dry. Is there a way out? I think there is.

I believe that a position which refers to human dignity as its core *humanum* – just as Article 1 of the UDHR does – makes a point in this direction. It differs from alternative models in an important way. Its assumption namely abstains from a precise and substantial qualification, rendering its accurate definition an

[2] This enterprise seems to be futile when recalling what an author of the first draft of the UDHR, asked about the principles of that emerging *Declaration*, replied: 'No philosophy whatsoever.' (Steven Pinker, *Enlightenment Now*, New York, NY, Viking, 2018, 419)

impossible task to undertake since we cannot possibly know *what exactly* is to be identified when referring to the vague term 'dignity'. But what seems to be at first sight a terminological weakness finally turns out to be its normative strength: dignity *must not* be defined. It is my contention that a conclusive foundation of human rights must be able to demonstrate its inconclusiveness *in principle*.

But first I shall briefly discuss two Western-critical models of human rights developed in regional preparatory meetings for the World Conference of Human Rights, held in Vienna in 1993.

II. Colonizing human rights in the name of collectivities

Countries and cultures have claimed through their leaders that the UDHR is a Western-influenced creation that needs to be counterbalanced by somehow broader perspectives. Two powerful alternatives to the 'westernized' human rights concept have been advanced in the early 1990s: Islam[3] and (Confucian) East-Asian authoritarianism[4]; there are others.

We have official documents, written manifestations of what governments of those regions or faiths hold as *human rights* as they target existing 'Western' versions[5]. They are, as I wish to demonstrate, politically and philosophically highly problematic because of an awry collusion of nature and culture.

Islam and human rights

Islamic governments insist on their own human rights model. Central for the understanding of their perspective is the so-called *Cairo Declaration on Human Rights in Islam* (CDHR)[6], adopted in Cairo in 1990 by the *Organisation of Islamic*

[3] Other religions could also be apt candidates to be put under critical scrutiny with respect to human rights. Sam Harris, *The End of Faith*, New York, NY, Norton, 2004, 158, has beautifully described how liberal rights such as homosexuality or porn consumption have been miraculously turned by U.S. Christian leaders into 'abominable sins' that deserve to be publicly prosecuted.

[4] Otfried Hoeffe's newspaper article on *Konfuzius, der Koran und die Gerechtigkeit,* in *Frankfurter Allgemeine Zeitung* (24 August 2015), deals with a similar topic. However, it is a rather academic, less critical article envisaging a world that could share common values from various cultures.

[5] Historically, the UNDHR is not a 'Western' version. It has been adopted by all UN member states in 1948 save a few abstentions.

[6] I shall refer to its revised successor document of 2020 below.

Conference, representing more than 50 member states at that time.[7] But its substantial shortfalls have become so obvious that the *Conference* decided to redraft it, moderating its wording by using phrases intended to align it more with existing human rights models. Presently (March 2021), it is in the process of being adopted.

But let's first have a look at the CDHR. Something peculiar springs immediately into the eyes of the unprepared reader.

The *Preamble* of the CDHR stipulates mankind's "freedom and right to a dignified life in accordance with the Islamic Shari'ah..." At the end of this document there is also a general clause that concerns anything proclaimed in this *Declaration*: "All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah." (Art. 24)

Those key passages obviously equal human rights with the provisions of the Sharia, a kind of civil law for Muslims regulating family affairs which also includes the stoning of adulterous women. Apparently, the drafters of the *Cairo Declaration* simply tried to replace the UDHR with religious dogma. We must infer, therefore, that non-Muslims are excluded from protection by these rights. At this point we do not need to continue reading this document.

As mentioned above, a revised version of the *Cairo Declaration* was drafted by the now re-baptized *Organization of Islamic Cooperation*[8] (OIC). It is more or less ready for adoption;[9] it is entitled *The OIC Declaration on Human Right*s (OICDHR). Experts see in this new document some improvements vis-à-vis the *Cairo Declaration*, but at the end, so critical voices, changes proposed therein are not much more than cosmetic ones.[10] The new declaration "falls short on issues related to family values, freedom of speech, and political participation."[11]

[7] For an overview of history and circumstances of the CDHR and its successor declaration see Mohammad H. Mozaffari, OIC Declaration on Human Rights: Changing the Name or a Paradigm Change?, 2021; Turan Kayaoglu, The Organization of Islamic Cooperation's Declaration on Human Rights: Promises and Pitfalls, *Brookings Doha Center Publications* (28 September 2020).

[8] In 2008 the *Organisation of Islamic Conference* changed its name into *Organisation of Islamic Cooperation.*

[9] This revised *Cairo Declaration* was provisionally adopted in November 2020 by the IOC Member states. Unfortunately, this document is not available via the Internet. Therefore, my knowledge of the contents of this new declaration depends exclusively on commentators familiar with that final draft.

[10] A similar strategy seems to be applied by representatives of the so-called Islamic reform movement, for instance when propagating the "establishment of a democratic system on the basis of Islamic moral standards" (my re-translation into English). So one of its figureheads in Europa, Reza Aslan, *Kein Gott ausser Gott: Der Glaube der Muslime von Muhammad bis zur Gegenwart*, trans. Rita Seuss, München, C.H.Beck, 2019, 297. It is difficult *not* to see the problem with such a statement.

[11] Kayaoglu, Organisation.

Despite much rarer occurrences of the term Sharia the new version conspicuously often stresses the importance of national sovereignty, cementing political and religious priority over the individual, since many OIC Member states have introduced Sharia legislation. Subsequently, commentators have concluded that "there appears to be a legal trick behind all this rhetoric which leaves us with a notion that is completely empty…"[12]

Let us go back and have a look at the crucial paragraphs of the CDHR that deal with its foundation. Basically, there is only one paragraph – to be found in the *Preamble* – that hints at the 'transcendental' sources from where those provisions originate; it is what comes closest to a 'foundation' of Islamic human rights in that document:

"Believing that fundamental rights and freedoms according to Islam are an *integral part of the Islamic religion* and … they are binding *divine commands*, which are contained in the *Revealed Books* of Allah… [as]…*divine messages* and that safeguarding those fundamental rights and freedoms is an act of *worship* whereas the neglect or violation thereof is an abominable *sin*…" (my emphasis).

A culture that takes its most fundamental rights of its people as deriving from *divine commands*, *revealed* as *divine messages* that must be *worshipped*, has the tremendous and unenvious task to explain, first, why anybody else from a different culture should take those rights seriously and, second, what rights would have those who happen to live in that very same culture but do not share such revealed insights.

Apparently, those infidels commit *abominable sins* for which they must be punished accordingly. The CDHR clearly states that faithful Muslims must not consider non-Muslims as equal.

There is no wiggle room for other interpretations.

Asian values

We have a similar problem with so-called 'Asian values', a set of principles designed to offer a counter-view to existing human rights purportedly on the basis of Confucianism. The main document containing those principles – *The Bangkok Declaration of Human Rights* (BDHR) – emerged from regional preparatory meetings for the UN World Conference on Human Rights in Vienna in 1993, just like the CDHR.

The nations that signed the BDHR have been authoritarian states as well[13].

[12] Mozaffari, OIC Declaration, 25.

[13] A very brief but quite useful overview on background and political implications invoking 'Asian Values' can be found in: Susan J. Henders, Asian Values, *Editors of Encyclopaedia Britannica,* https://www.britannica.com/topic/Asian-values#ref338316.

Main sponsors of this declaration were Singapore, China, S-Korea, and Malaysia. Its forerunner is a statement entitled *Our Shared Values* prepared by Singapore in 1990. This document comprises the BDHR of 1993 *in nuce*: "Nation before community and society above self; family as the basic unit of society; community support and respect for the individual; consensus, not conflict; and racial and religious harmony."

Apart from authoritarianism there are other features shared by both declarations. They both prioritize culture-induced collectivities (e.g. family, community, government) over the individual; they prioritize duties over rights; they emphasize harmony as opposed to critical inquiry; and they don't provide any argument that could convince people who do not share their cultural values. They are 'shared values', but shared only by specific regional in-groups as they exclude the rest of the world. Again, we have here not an ethical concept addressing all human beings, but only addressing those who contingently happen to share similar cultural values. They are not human rights; they are expressions of a certain, sometimes questionable cultural understanding of what 'humanity' means *for them* – for self-appointed speakers who pretend to speak on behalf of 'their' culture. People – individuals – living in the same region who happen to have different views are simply excluded.

Some thirty years have passed since *Our Shared Values*, woven into the BDHR for official presentation, has been promulgated. Meanwhile, the notion of identifiable 'Asian' values has become obsolete, for various reasons.[14] New declarations from that region followed[15], without, however, substantially changing BDHR's core message. The Asian-value doctrine is still propagated in at least some of its signatory powers until this day.[16]

[14] Prominently, Amartya Sen, in *Human Rights and Asian Values. Sixteenth Morgenthau Memorial Lecture on Ethics & Foreign Policy*, New York, NY, Carnegie Council on Ethics and International Affairs, 1997, 9, warns of oversimplification when using terms like 'Asian values' or 'Western values'.

[15] For instance, the *ASEAN Human Rights Declaration* (AHRD), introduced in 2012 by ASEAN Member states meant to complement the BDHR, insists on regional particularities to be taken into account with regard to human rights. Article 7 reads accordingly: "... the realization of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds." Yuyun Wahyuningrum of the *Heinrich Boell Stiftung Southeast Asia* critically noted in 2018 that "[w]hile AHRD guarantees most of the rights, it also, at the same time, protects the states from being accused of committing abuse and violation on human rights."

[16] Just take today's China's main official political and social doctrine, the so-called *Xi Jinping Thought* of 2017. I am not aware that Singapore or Malaysia have recently changed their position in this context; patriarchal structures – 'family values' – still exist in now democratic countries of that region.

One may ask if those regionalized versions were intended to provide an *alternative* view meant to *replace* present universal models, or whether they were merely intended to present a *complementary* position that should be taken into account *in addition* to 'Western' models. Reading those regional versions, however, one has to come to the conclusion that it is the alternative view, not the complementary one that reflects the political intentions of those regional groups. Again: why else would they stress the adjective *human* in their documents whenever referring to regional or faith-based particularities that, as they seem to think, *essentially* 'encumber'[17] individuals?

One cannot help but conclude that they indeed mean that this is exactly what human beings are by nature: they are by nature cultural beings. Since cultures and their values are manifold we need to assume that we only have – by nature, so-to-speak – culturally indexed human beings, legitimizing, therefore, some (self-appointed) representatives of given cultures to assess the nature of this culture, which – now as 'nature' – can be imposed upon (in this way) culturally defined individual beings. But cultures (can) change.

This collation of culture and nature is an ideological concept. It offers free tickets for those in power to define one's culture so as to draw political conclusions in their own favor. Both documents meant to replace the UDHR are perversions of modern human rights.

III. Kant's moral foundation of human rights?

Most commentators agree that Kant did not provide a strict foundational basis for modern human rights. The German term for human rights – *Menschenrechte* – hardly occurs in his writings. He uses similar phrasings which, however, do not exactly match modern concepts of human rights.[18]

Despite this lack of an explicit terminology there is an ongoing discussion whether or not Kant's philosophy is supportive of a present-day understanding of human rights, especially in his moral philosophy.

[17] Michael Sandel, *Justice,* New York, NY, Farrar, Straus and Giroux, 2010, 220, speaks of 'encumbered selves', as opposed to individualistic views, co-opting thereby implicitly the Asian model for his own communitarian views.

[18] Otfried Hoeffe, Das angeborene Recht ist nur ein einziges. Hat Kant eine Philosophie der Menschenrechte?, in Reza Mosayebi (ed.), *Kant und Menschenrechte*, Berlin, Boston, MA, Walter de Gruyter, 2018, 37; Stefan Gosepath, Das Problem der Menschenrechte bei Kant, in Mosayebi (ed.), *Kant und Menschenrechte*, 179.

Key element in Kant's moral philosophy is the term freedom. He distinguishes between inner and outer freedom, or between morality and legality. Morality or *inner* freedom describes our ability to act independently from sensual inclinations: pure (non-empirical) reason subjugates our maxims for ensuing actions "under…a general law."[19] This inner freedom, i.e. freedom from outer influences, would feature pure reason as the decisive moral factor for the guidance of our outer actions. Moral freedom, therefore, is the determination of our will through pure reason, transforming our empirical will (*Willkuer*) into the pure – or universal – will (*reiner Wille*), now liberated from personal sensual desires. Kant's notion for such a desired determination of the will is the Categorical Imperative (a "synthetic-practical proposition a priori"[20]).

Legal or 'outer' freedom, on the other hand, focuses on rights we (should) have vis-à-vis others within the framework of positive laws, with the only restriction that one's freedom must not interfere with the freedom of others: "Right is the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom"[21]. We have here the classic subjective, liberal rights – to be free to do whatever we want unless restricting others' freedom. Assuming this outer freedom is for Kant a "postulate of reason"[22] for which, being contingent, "no proof is possible"[23].

Which is now the proper subject of the foundational human rights discourse: the inner or the outer freedom?

In an often-quoted passage Kant refers to an innate right all humans have: "Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only innate right belonging to every person by virtue of their humanity."[24]

This crucial quote indicates that *innateness* refers to the contingent *outer* freedom as a subjective, legal right which deserves utmost protection and respect – just like modern human rights[25]. What is to be protected for Kant is hence the outer (political) freedom *because* of the inner qualities – morality, dignity, autonomy – of human beings: individuals are to be legally and politically empowered to act

[19] Immanuel Kant, Metaphysik der Sitten, in Wilhelm Weischedel (ed.), *Werke in sechs Baenden*, Band IV, Darmstadt, Wissenschaftliche Buchgesellschaft, 318.

[20] Immanual Kant, *Grundlegung zur Metaphysik der Sitten,* Hamburg, Meiner, 1965, 420.

[21] Kant, Metaphysik, 337.

[22] Ibid, 338.

[23] Ibid, 341.

[24] Ibid, 345. For Hoeffe, Recht, 40, this freedom functions as "principle of 'all' positive legislation".

[25] Jürgen Habermas, Kants Idee des ewigen Friedens – aus dem historischen Abstand von 200 Jahren, in Jürgen Habermas, *Die Einbeziehung des Anderen*, Frankfurt am Main, Suhrkamp, 1999, 225: "Bei Kant finden Menschenrechte konsequenterweise ihren Platz in der Rechtslehre – und nur hier."

morally, as free beings. Kant's 'transcendental' concern ("a priori proposition") focuses on morality, whereas 'proving' legal (= human) rights results from 'merely' common sense considerations: we'd better organize our social world in a way that guarantees best our moral (transcendental) determination. Legality is the means to moral ends (Kant: 'hypothetical imperative').

Taking this constellation into account, one cannot positively claim that Kant 'proved' the existence of human rights. What he 'proved' is the importance of the function of (human) rights, namely to politically and legally protect human beings as moral beings: our humanity is essentially our morality, to be secured by subjective (human) rights.[26]

But: how can we, strictly speaking, 'know' morality, a transcendent entity that is to be positively protected? How do we 'know' our genuine subject for which human rights should be instrumental?

IV. Why are human beings not what they 'are'?

I wish to turn to a quite different mode of a 'Kantian foundation' by resorting to some of his theoretical – transcendental – thoughts. It proposes a foundation *ex negativo*, i.e. a reflection on the impossibility of defining satisfactorily what things, or, for this matter, human beings, *truly* are. I begin with some general remarks on truthfulness and knowledge.

Theories – we have nothing but theories available, implicitly or explicitly – guide our actions as they make reasonable assertions about reality. They depend on beliefs inscribed into theories we reasonably believe to be true whenever interpreting 'world'. Any human rights concept is such a theory (or idea) that supports its purported truthfulness with reasons.

We know, however, that reasons – the argumentative stuff of theories – are biased in various ways, deriving from one's own experiences or from other contingent circumstances, but not from the world itself, especially when reasoning about concepts or ideas. Hence, our reasoning is indexed with 'facts' stemming from a biographically, intellectually, and historically limited understanding of the world.[27] 'Hard' truths are not available, only debatable interpretations of ideas on the basis of more or less convincing reasons. [28]

[26] Some variations of that inner-outer freedom deliberations can be found in Mosayebi (ed.), *Kant und Menschenrechte*.

[27] Just to mention some recent approaches in this aspect: modern hermeneutics, cognitive psychology, and systems theory.

[28] Except for common knowledge – every-day experiences or some scientific truths – for which doubts are not appropriate.

If you conceive of a theory that aims at the understanding of something *essential* – here, for our purpose, the humanity in human beings –, then we have before us issues that only allow the generation of what I would call 'soft' truths. 'Hard' truths on such subjects are for Kant not possible because our senses, Kantian guarantors of 'hard' truths, play no role in it. 'Soft' truths may nevertheless be useful, for practical purposes. Kant denotes them as 'regulative ideas', as opposed to 'constitutive' knowledge. Take for example freedom. We cannot positively 'know' that inner freedom exists. Neither, however, can we rightly assume its *non-existence*. Freedom, as a consequence, "can never be subject of any possible theoretical knowledge..., but just be taken as a regulative or merely negative principle"[29]. For instance when we talk about responsibilities. It is this 'negative' concept of knowledge that is interesting for our purpose here.

In the second part of his *Critique of Pure Reason* (Transcendental Dialectics), Kant mentions three mayor examples of regulative ideas: the self, the world, and god, presenting for each of them examples what goes awry when confusing regulative ideas with positive, 'hard' realities. He calls such misconceptions *paralogisms*: the misinterpretation of mental constructions as substantial beings-in-themselves.

Kant lists four paralogisms, the third one dealing with misconceptions regarding identity and self of a person[30]. A person is a reality that persists identically in time. But how do I *know* that any given person remains the same, since 'identity' is empirically not accessible? I only 'know' by transferring the awareness of me being identically myself as enabled through what Kant calls the 'inner self' or the 'inner sense of time' on objects of the outer world: "The identity of a person can only be found in my own consciousness,...for in the apperception time is only represented in me." (A 362/363)[31]. This is how we 'know' the identity of persons.

Kant concludes that no one can "have the least representation of a thinking being through an external experience, but only through self-consciousness. Thus, such objects are nothing further than the transference of this consciousness of mine to other things..." (A 347), thusly underlining "the impossibility of settling anything dogmatically about an object of experience beyond the bounds of experience..." (B 424)

In other words: No one is epistemologically entitled *in principle* of *colonizing* the indefinable Self (or Selves) of human beings with contents that pretend to function as its 'true' foundation. Such would be the business of politics impregnated by ideologies, but not by informed knowledge.

[29] Kant, Metaphysik, 326-327.

[30] I am aware of the marginality of the following theoretical considerations for common everyday life. Emphasis is therefore put on *'sensu stricto'*.

[31] Quotes from Kant's *Critique of Pure Reason* follow the pagination of the German Akademie-Ausgabe.

Conclusion

Human rights demand a rational foundation, particularly within political discourses; they must include all human beings *per definitionem*. We have looked into two, politically important human rights concepts that implicitly claim to comprise all people. But their concepts of humanity are socially and culturally indexed, amenable, therefore, only for a limited group of people. Propagated as human rights they are a contradiction in terms; they are ideologies.

There is a third model, the United Nations' UDHR of 1948. Its core value is the claim of an individual's *dignity* that must be preserved at any circumstances. Contrary to cultural or social indexations, 'dignity' cannot be fixated on given contingencies, for it is a vague term, a stopgap solution that must not be replaced by contents that would transform its vagueness into just another contingency that can be exploited by those who are in power to define such contingencies to their political advantage.

Immanuel Kant prepared a theoretical background for such a view. He tried to proof that non-empirical claims – defining humanity, dignity, freedom, etc. – cannot be known in a strict sense: what human beings 'are' must remain open, to be filled only by individuals themselves. This openness *in principle* can, and should be, conclusively translated into legal and political realities: granting a maximum of freedom, guaranteeing a minimum of political repression for all individuals. This is what human rights are about.

What human beings *are* by nature must, therefore, remain transcendent[32] – this is what can be proved, be it just negatively.

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[32] Of course, this also can be said about fruit flies, planets or cargo trains – it just would not matter.

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THE EXPLOITATION OF LABOUR AND THE EUROPEAN VALUES

Ferenc Irk[1]

On the values of the European Union encoded in legal norms

When looking for the values of the European Union encoded in legislation we are confronted with the strange situation that they are phrased clearly and most concisely in a piece of draft legislation available with the title "*Treaty Establishing a Constitution for Europe*" (widely known as the draft European Constitution)[2], which has never been approved.

Article 1-2 is entitled "*The Union's values*". It says that *"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."*

Article I-3 is entitled "The Union's objectives". According to section 5 *"In its relations with the wider world, the Union shall uphold and promote its values* (emphasis mine – FI.*) and interests. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter."*

Article I-19 is entitled "The Union's institutions". According to section 1, *"The Union shall have an institutional framework which shall aim to: promote its values."*

The promotion of common values is emphasized in the document in several other places as well. For example in section 5 of Article I-40 on the Specific provisions relating to the common foreign and security policy; in section 1 of Article I-57 on The Union and its neighbours; in section 1 and 2 of Article I-59

[1] Emeritus researcher, National Institute of Criminology, Budapest Hungary

[2] Treaty Establishing a Constitution for Europe. https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty_establishing_a_constitution_for_europe_en.pdf.

on the Suspension of certain rights resulting from Union membership; also, the same can be found in Part II The Charter of Fundamental Rights of The Union Preamble of the draft, which says that *"The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values".* The text then continues:

"Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels; it seeks to promote balanced and sustainable development and ensures free movement of persons, services, goods and capital, and the freedom of establishment.

To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter."

Section 2 of Article III-292 of the draft under TITLE V regulating The Union's External Action stresses specifically that "the Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

(a) safeguard its values, fundamental interests, security, independence and integrity;

(b) consolidate and support democracy, the rule of law, human rights and the principles of

international law..."

Among the statements on the decrees of the Constitution, statement 12 on the explanations appended to the Charter of Fundamental Rights gives voice to the commonly held European values, which, in effect, repeats the principles laid down in the Charter.

The above quotations used as examples clearly define the principles that the member states of the European Union have to (or at least should) follow and the principles that the Member States of the European Union fail to uphold both individually and taken as a whole as well because *although their values and interests* might as well be the same *in the long term* they are different *in the short term.* Consequently, their short-term interests often overrule their short-term

and long-term common values. Was it maybe because of this realization that the member states of the European Union have failed to approve of the Agreement?

Failing to come to the necessary agreement has serious consequences as *Ágnes Heller* pointed out in an interview shortly before her death[3]. According to *Szilárd Teczár's* interpretation Heller, a philosopher emphasized that as *there is no European Constitution* those who act against the common European interests cannot be called to account because it cannot be said that they act against the Constitution but only that *"they don't comply with the European values, which is a rather vague concept"*.

The validity of the above statements will be tested in the following against the way the exploitation of the workforce is dealt with in the European Union.

The concept of exploitation and the way it operates

The concept of *exploitation* can be identified with a certain kind of purposeful action, which means taking advantage of someone or something unjustly or cruelly. There are various ways of exploitation just as the number and the composition of the groups of people involved are varied. The *concept* involves forced (or slave) labour, and the groups of perpetrators and victims characterized by their age group, gender and occupation.

When analysing this gross form of the misuse of power (advantage) experts most often focus on the issues of *economic exploitation*. This *concept* means that a person generates profit with his or her work for another person without being offered or given fair remuneration. There are two known forms of it: *organizational or "micro-level"* and *structural or "macro-level"* exploitation. The former means the commercial power of economic enterprises in the area of commercial activities. The latter – especially in connection to free trade – focuses exploitation on wide layers of society. This approach means a close connection to the Marxist theory, according to which the capitalist class is an exploiting entity and capitalism itself is based on exploitation.[4]

Forced and slave labour can be regarded as an especially serious kind of exploitation of labour. The relevant sources of literature also confuse these two concepts several times and they often mention forced labour and slave labour together. Therefore, both will be defined in the following.

[3] Teczár, Szilárd, Ágnes Heller: „Orbánnak ilyen a természete, ösztönösen erre törekszik". Interview, *Magyar Narancs* (9 May 2019), https://magyarnarancs.hu/belpol/ez-valami-uj-119535.

[4] See http://en.wikipedia.org/wiki/Exploitation. There are also so-called neoclassical and neoliberal theories of exploitation but I am not going to expound them here.

Forced labour has two, basically different meanings. One specifically views things in terms of enemies and focuses on punishment. According to it "*forced labour* is a prohibited kind of free labour, which is introduced in a war or after that by violent, overpowering military or civil powers because they are in an *economic emergency situation,* which they are trying to solve by punishing or sometimes even destroying people groups or persons regarded as their enemies"[5]. The other meaning is closely related to an exploitation-centred and widespread approach of production in our present world and also to the two central themes of criminological investigations: human trafficking and sexual exploitation.

Based on regular information coming from civil organizations, mainly from developing countries, *Veronika Gyurácz* summarizes the essence of *slave work* in the following:

> *"There are still a lot of practices around the world that infringe on people's personal freedom, who are treated as property, their labour is exploited, and all this with violence and intimidation. These concerns are shared by the most important international organizations that guarantee international legal protection and they urge the member states to make efforts in order to put an end to slave work. For example, since 2007 there has been a special envoy at the United Nations, assigned to ensure that these practices are treated uniformly as slavery by the national authorities and that the victims receive protection accordingly and the perpetrators are held responsible."*[6]

The exploitation of labour is kept alive as most of the consumer habits in our globalised world are incompatible with fairness as a supreme value of Europe and are consequently unacceptable from a moral point of view. The reason behind it is distorted capitalism, which is based on exploitation that serves to satisfy the hunger for profit instead of the keystones of bourgeois society: the sanctity of private property, the freedom of contract and equality before the law. The goal of exploitation is the cheap production of products, serving customer needs to the outmost, with a wide selection of goods and securing a huge extra profit through these. The key participants of the globalised economy have no regard for the consequences of the process that starts with production, continues through transport and consumption and ends with the destruction of goods. The treadmill of production (ToP) theory contains the detailed *connections* of that. The *direct losers*

[5] https://hu.wikipedia.org/wiki/K%C3%A9nyszermunka.

[6] Gyurácz, Veronika, Legal and pedagogical protection against modern-day slavery in Hungary [Jogi és pedagógiai védelem a modernkori rabszolgaság ellen Magyarországon], *Acta Humana* 2 (2016), 75–94, https://folyoiratok.uni-nke.hu/document/nkeszolgaltato-uni-nke-hu/AH_2016_2_04_Gyuracz.pdf.

of the present capitalist economy are the people who are exploited and the *indirect losers* are all the others except for the *short-term winners.* Their *method* is extra-profit oriented exploitation, their *instruments* are underpaid workers who produce raw material and turn it into finished products at the peril of their health and their *target group* are the consumers who are "purchased" through advertisements. The "engines" of the *networks formed by companies* are power centres that focus their intellectual and material resources on short-term goals only, assert only their interests and ignore the damage they cause to society and nature through the activities aimed at achieving their goals. They make use of the legal environments in the individual countries that are unable to secure the priority of the public interest. The *direct* consequences of this economy include hazards and often serious damage to the body and physical health on a large scale as well as the degrading of the natural environment. The *indirect* consequences are the unpunishable sins that are materialised in the metamorphosis of the exploitation of the natural environment at an increasing speed in a process starting from production continuing with consumption and ending in the destruction of the products.

On the silent victims of exploitation

Both forced labour and slave labour can be closely related to *human trafficking.*[7] *The goal of human trafficking is always exploitation*, which can mean prostitution or other forms of sexual exploitation, forced labour or services, slavery or similar practices, oppression of others and the illegal removal of the organs of the human body. *"Human trafficking may involve exploitation through forced labour, including the following areas: agriculture, building industry, textile industry, catering (restaurants, bars, hotels), horticulture, care work, fishing."*[8] In spite of these realizations, experience shows that while criminologists consider human trafficking and prostitution a central issue, the literature of the field pays much less attention to *the exploitation of human labour.* This difference may be due to the fact the profit from the exploitation of labour concerns a much wider

[7] See further: UN. General Assembly A/RES/55/25 8 January 2001: 55/25 United Nations Convention against Transnational Organised Crime. Specifically Article 3 (a) https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_55_25.pdf.

[8] Windt, Szandra (ed.): *Guiding and assisting the European victims of human trafficking, [Az emberkereskedelem európai áldozatainak irányítása és segítése] – RAVOT-EUR HOME/2012/ISEC/AG/4000004405. Informative manual on the Transnational Guiding Mechanism operating between Belgium, the Netherlands and Hungary, assisting the victims of human trafficking,* Budapest, The Interior Ministry of Hungary, 2015, 10–12.

spectrum of society than sexual exploitation. The purpose of the operation of the present network is that the direct or indirect exploiters should do everything they can to maximize a fast profit. There is nothing new about it since it coincides with the usual activity that has characterized the spheres of economic interests for a long time. The parties concerned who take part in it include the state and the indirect beneficiaries of exploitation. The most important actors among the latter are the buyers and the consumers of the products. Because of this, *the exploitation of labour can still be included in the category of normality instead of deviance* up to the present times. On the one hand, different international and national organizations regularly condemn companies for breaking the legal regulations that prohibit inhuman work and call for humane working conditions as part of the normal operation of the economy. On the other hand, however, these companies do not tend to follow norms unless they are forced to. The main reason for that is that the *moral checks* and the *legal values* that often fail to involve sanctions do not constitute enough *balances* against the extra profit oriented *economic interests.*

The past few decades have been just enough – mainly through the help *of NGOs and the media supporting them* – for the population of economically developed countries to receive information about the risky conditions severely harming or endangering human life and health among which the people who take part in the production of cheap products work.[9] For a long time, people may have had the impression that such working conditions can prevail only in the Far East, in Africa and South-America, that is, in places far from their living space. People living in the "first world" may have regarded it only as sensational news that they felt sorry about and something morally indifferent and routinely acceptable in the "third world" when they heard about a clothes factory burning down completely, chemical contamination victimizing huge numbers of people or other disasters. They may have thought things like that were just something normal in those places, something that cannot happen in their own environment and that this kind of work culture is not characteristic of "the developed world".

Interest in the circumstances of exploitation of labour started to grow gradually around the turn of the millennium concerning countries of the European Union

[9] See, for example: Der Tagesspiegel, Ausbeutung auf Kakaofarmen. Arbeiter profitieren nicht gleichermaßen vom fairen Handel, *Der Tagesspiegel* (4 July 2019), https://www.tagesspiegel.de/wissen/ausbeutung-auf-kakaofarmen-arbeiter-profitieren-nicht-gleichermassen-vom-fairen-handel/24526252.html.

as well.[10] In the report of the Group of Experts on Action against Trafficking in Human Beings (GRETA)[11] for example, we can read the following:

"85. GRETA's country-by-country reports show that in many States Parties, trafficking for the purpose of sexual exploitation is the predominant form of trafficking as far as identified victims are concerned. At the same time, trafficking for the purpose of labour exploitation has been on the rise and was the predominant form of exploitation in some countries (e.g. Belgium, Cyprus, Georgia, Portugal, Serbia, United Kingdom). While there are considerable variations in the number and proportion of labour trafficking victims amongst the evaluated countries, all countries indicated an upward trend of labour exploitation over the years."[12]

The *European Parliament* summarized the different forms of modern-day slavery in a 70-page study in December 2018.[13] At the same time, an 80-page volume was published to address the risk of modern-day slavery in the private sector with the support of *several private institutions*.[14]

It was only in the middle of the second decade of the 21st century that the leading politicians of the European Union started to realize the seriousness of the widespread practice of the exploitation of labour in the countries of the European Union. They also managed to conclude that it is not enough to condemn exploitation through declarations in legal formulas but something has to be done. So, for example in 2019 *Gerd Müller*, the minister of development of Germany put it in this way: *"Hourly wages of a few cents, life-threatening working conditions, this is not sustainable. In other words, it cannot go on like that."*[15]

[10] See, for example: Daniel Mennig, Ausbeutung im Gewächshaus. Gemüse aus Spanien: Hungerlöhne für Pflücker, *SRF* (3 July 2018), https://www.srf.ch/news/panorama/ausbeutung-im-gewaechshaus-gemuese-aus-spanien-hungerloehne-fuer-pfluecker; DW, Ausbeutung von Arbeitsmigranten angeprangert, *DW* (05 December 2018), https://www.dw.com/de/ausbeutung-von-arbeitsmigranten-angeprangert/a-46594133; Bozzay, Balázs: Román nők ezreit erőszakolták meg és kényszerítették munkára Szicíliában, *Index.hu* (30 December 2019), https://index.hu/kulfold/2019/12/30/emberkereskedelem_kenyszermunka_nemi_eroszak_kizsakmanyolas_olaszorszag_roman_ferfi/

[11] For more detail, see G R E T A Group of Experts on Action against Trafficking in Human Beings. Council of Europe:7th GENERAL REPORT ON GRETA'S ACTIVITIES covering the period from 1 January to 31 December 2017 https://rm.coe.int/greta-2018-1-7gr-en/16807af20e.

[12] GRETA Report 39.

[13] Silvia Scarpa, *Contemporary Forms of Slaver,* Brussels, European Parliament, Policy Department for External Relations, PE 603.470, 2018.

[14] IFC, *Managing Risks Associated with Modern Slavery, A Good Practice Note for the Private Sector,* London, Ergon Associates – Ethical Trading Initiative, 2018.

[15] See further: Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung, *Der Grüne Knopf – Fragen und Antworten,* 19 September 2019. https://www.flachsbarth.info/wp-content/uploads/2019/09/190909_DerGrueneKnopf_FAQ.pdf.

The decision of the European Parliament and the study that was published on the same day as the statement and presumably had helped to prepare it may have answered a few questions. However, the different forms of modern-day slavery still seem to raise their heads in the EU. The issued was also addressed by the plea issued by the trade unions in 2019, calling for the abolition of slave labour on Europe's roads.[16]

We can conclude from all these that serious problems persist not only in the so-called developing world but in the economies of the member states of the European Union as well, which exploit the citizens of the member states looking for work – often at each other's disadvantage.[17] It has also become clear that in this symbiosis both the more and the less developed countries of the continent take part. The *Covid-19 epidemic* that broke out in the countries of the European Union in 2020 brought to the surface several problems that had lain "swept under the carpet" for a long time. Problems that the big companies involved in exploitation could not hide any more due to their serious consequences, which suddenly started to concern multitudes.[18] It seems, that the conclusions that can be drawn from the experiences of the pandemic prove that the established forms of corporate behaviour can be expected to change only if the measures taken are strictly controlled and monitored by the government and the media.[19]

However, the expectations concerning these changes are far from being certainties at present. Examples like that of the Lufthansa airline serve as a warning for this. The German-Austrian company, which pocketed astronomical extra profit earlier amidst an emerging global economic crisis – without regard to the expected future demands for air travel, an industry facing complete makeover – demands to be paid billions of euros[20] with the assistance of the European

[16] EFA Press Release, EU Governments Must Abolish Modern Slavery on Europe's Roads, *EFA Greens,*10 January 2019, https://www.greens-efa.eu/en/article/press/eu-governments-must-abolish-modern-slavery-on-europes-roads/.

[17] See here: FRA, Súlyos munkaerőkizsákmányolás: az Európai Unión belül mozgó vagy ide érkező munkavállalók, *FRA* (2016), https://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-severe-labour-exploitation-summary_hu.pdf.

[18] Most recently see in more detail: Szilágyi, Károly, Tönnies: vesztfáliai példaképből közellenség, *Euronews* (26 June 2020), https://hu.euronews.com/2020/06/26/tonnies-vesztfaliai-peldakepbol-kozellenseg.

[19] See, for instance, here: Das Erste, MOMA-Reporter: Aus für Werkverträge bei Tönnies. Was macht der Fleischgigant jetzt anders?, *Das Erste* (22 January 2021), https://www.daserste.de/information/politik-weltgeschehen/morgenmagazin/reportagen/moma-reporter-aus-fuer-werkvertraege-toennies-grossschlachterei-100.html.

[20] Merkur.de, Nach Kurs-Absturz in der Corona-Krise: Lufthansa fliegt aus dem Dax – Tausende Stellen stehen auf der Kippe, *Merkur.de* (06 August 2020), https://www.merkur.de/wirtschaft/lufthansa-coronavirus-rettungspaket-dax-kuendigungen-entscheidung-angela-merkel-eu-kommission-krise-stellenabbau-zr-13716604.html.

Union[21] (successfully) by the governments concerned.[22] Their argument amounts to moral blackmail. They threaten to make huge masses of employees redundant overnight if the governments don't comply with their wishes. The strongest car manufacturing concerns follow suit.[23] Their CEOs have "forgotten" about the enormous profit they garnered by cheating when they seemingly complied with the environmental requirements of the EU. They also neglect the change that can be expected to take place in the role of car travel. The meat factory where the most acute centre of the epidemic in Europe came to be formed owing to the exploitative work done there also applied for state subsidy.[24]

The Covid-19 pandemic is causing significant economic and social traumas. There seems to be a break in the dominance of global economic centres often operating in symbiosis with the public administrative organs of the different states. Therefore the time has come for a new approach to prevail in the European Union, which is based on the *European value system*, a system that first slowed down and later stopped exploitation and the destruction of the environment, which puts an end to exploitation, reforms the culture of consumption and prefers the traditional European values.

Systemic error with serious consequences

The cycle continuing from production through consumption to the production of waste and the destruction of the environment and going on to production again is a systemic error that can be neither addressed nor corrected in the long term

[21] BMWI, EU-Kommission genehmigt Stabilisierungspaket für die Lufthansa, BMWI Pressemitteilung (25 June 2020), https://www.bmwi.de/Redaktion/DE/Pressemitteilungen/2020/20200625-eu-kommission-genehmigt-stabilisierungspaket-fuer-die-lufthansa.html.

[22] DW, Bund sagt Lufthansa Milliardenhilfe zu, *DW* (25 May 2020), https://www.dw.com/de/bund-sagt-lufthansa-milliardenhilfe-zu/a-53562479; Handelsblatt, Österreich und Lufthansa einigen sich auf Rettungspaket für Austrian Airlines, Handelsblatt (08 June 2020), https://www.handelsblatt.com/unternehmen/handel-konsumgueter/fluggesellschaft-oesterreich-und-lufthansa-einigen-sich-auf-rettungspaket-fuer-austrian-airlines/25897804.html?ticket=ST-4960650-Ruodoni3fDSVTbFTAN3G-ap4.

[23] Erste Am Communications, Autobranche leidet unter Corona-Pandemie, *Erste Blog* (25 May 2020), https://blog.de.erste-am.com/autobranche-leidet-unter-corona-pandemie/. Sven Satter, Wegen COVID-19: Daimler-Hauptversammlung fand erstmals virtuell statt, *Daimler* (09 July 2020), https://www.daimler.com/magazin/berufsleben/virtuelle-hauptversammlung.html.

[24] 24.hu, Állami támogatást kér a húsüzem, ahol Európa egyik legsúlyosabb járványgóca alakult ki, *24.hu* (12 July 2020), https://24.hu/kulfold/2020/07/12/koronavirus-nemetorszag-husuzem-tamogatas/.

through legal instruments only (especially through instruments of the penal law) because the decisions of political authorities are based on *double ethics.* This is proved by the fact that the norms set up by the UN and the European Union that rest on cultural and moral foundations do not prevail or do not prevail fully in the practical steps supported, tolerated or prohibited by the governments of the member states. All this can lead to the conclusion that we are active or passive participants of a worldwide network that follows a misguided course. In this network, national and international institutions define through legislation the acts they prohibit on the one hand. On the other hand, however, these above-mentioned institutions often fail to punish those who break these rules, because they follow their short-term interests. Instead, they tolerate and often even support the activity of those break these norms and cause damage to society. The decision-makers of political power centres often focus their efforts on prohibiting the political-economic status quo through legal instruments on the one hand, while supporting or at least tolerating it also through legal instruments. In connection with our present subject matter, it means that they directly or indirectly support the activity of the economic power centres, which focus only on their economic interests in the short term. An integral part of this is, however, the exploitation of the workforce involving harm to human life and health owing to the unacceptable risks and the exploitation of the natural environment as well.

Ákos Farkas highlights several causes of the problems mentioned above – among them problems in the harmonization of law.[25] Article 83 of the Treaty on the Functioning of the European Union (TFEU)[26] mentions specifically some aspects of exploitation only (the sexual exploitation of women and children is in connection with our topic among them) as ones that the following statement of Article 83 refers to: *"Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States."* As Farkas points out the same piece of legislation (Article 83) makes it possible to extend the scope of the crimes clearly specified by stipulating that *"on the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph."* In his opinion

[25] Farkas, Ákos, The limitations EU criminal law [Az EU büntetőjog korlátai], *Ügyészségi Szemle (Journal of Prosecution)* 2 (2018) 98–120. http://ugyeszsegiszemle.hu/hu/201802/ujsag#74.

[26] Consolidated Version of the Treaty on the Functioning of the European Union. https://eur-lex.europa.eu/resource.html?uri=cellar:9e8d52e1-2c70-11e6-b497-01aa75ed71a1.0006.01/DOC_3&format=PDF.

"Law, including penal law is not or cannot be forced to adopt radical changes except in the case of natural, historical and political cataclysm; in all other cases it strives to develop organically, in a way that can be supported dogmatically although there may be exceptions from this." In his view, the reason behind it is that "although the way European countries think about penal law goes back to common Roman and Medieval roots, has common concepts and institutions, these are embedded in the history, culture and traditions as well as the state administrational, political and institutional conditions of the given country and also in the level of economic development and the religious differences, which firmly hold the law together."[27]

In international law, the exploitation of labour (or more exactly of the workforce) seldom appears as a separate legal concept. As *Miklós Hollán* discusses in detail in his study[28] which contains a review of the European penal codes, this behaviour is mainly present as the goal of human trafficking. He puts it in this way:

"At the beginning of the 20th century (and at the middle of it) and also in our days the scope of the goal of mainstream human trafficking can be illustrated with two intersecting sets. The expansion of the scope is clearly shown by the fact that human trafficking can be committed not only to for the purpose of prostitution but other sexual acts and the exploitation of labour."[29]

By analysing the facts that have become known in this topic, the criminologist has come to the conclusion that within the context of political and economic power, *penal law* can address the flaws present at a systemic level in societies to a limited

[27] Farkas, The limitations EU criminal law, 113.

[28] Hollán, Miklós, *The foundations of measures taken against human trafficking through national penal law in international law and their limitations concerning fundamental right, [Az emberkereskedelem elleni nemzeti büntetőjogi fellépés nemzetközi jogi alapjai és alapjogi korlátai]* OTKA PD No, 73641, 2013, invitation of proposals for postdoctoral scholarship. http://real.mtak.hu/12338/1/73641_ZJ1.pdf.

[29] For a more detailed discussion of the topic, see Hollán, Miklós: *Human Trafficking, Punishable cases of exploitation and the limits of regulations of penal law [Emberkereskedelem. A kizsákmányolás büntetendő esetei és a büntetőjogi szabályozás határai],* Budapest, HVG-ORAC Lap- és Könyvkiadó, 2012. For international criticism summarising the advantageous and disadvantageous characteristics in the application of the law – with special regard to the treatment of the victims of prostitution and forced labour in relation to human trafficking – see, for example Egyesült Államok Külügyminisztériuma, Jelentés az emberkereskedelemről – 2019, 20 June 2019, https://hu.usembassy.gov/wp-content/uploads/sites/232/tip2019_hu.pdf, also U.S. Department of State, 2019 Trafficking in Persons Report, *Office to Monitor and Combat Trafficking in Persons* (June 2019), https://www.state.gov/reports/2019-trafficking-in-persons-report/; and also Gyurácz: Legal and pedagogical protection, 75–94.

extent only. Consequently, it can have hardly any impact on events that pose grave dangers to society. It is especially true of techniques of advocacy manifested at global levels, which have become widely accepted and therefore seem to be normal and the danger they pose to society remains unnoticed.

The above-mentioned difficulties in legislation and the application of law serve as a warning – even among present-day, cataclysmic circumstances that were rated as rare occurrences by Farkas – that curbing the exploitation of labour is only possible *by laying new foundations for production.* We are faced with an important systemic error, the elimination of which also requires the rethinking of – among others – such basic concepts as, for instance, the wellbeing of citizens.[30]

This change can be facilitated by the successful management of the Covid-19 epidemic. From this respect, it is worth noting that the European Union took a common stand to regulate the private sector and even secured uniform principles for the acquisition and distribution of vaccines.[31] The above examples, however, are only rays of hope yet. The methods for overcoming the epidemic seem to override the previously discussed moral weaknesses for the time being. Still, the above-mentioned initiative cannot make us forget that although the European Union is trying to distribute vaccines fairly this method deprives the poorer part of the world of accessing the vaccine production capacity.[32]

Conclusions

It would be possible to change the habits, partly of production, partly of consumption that have roots in the political-economic system if some "rules of the game" were radically transformed. One of them, for instance, is *the separation of political and economic power centres*, which have been nearly completely intertwined (we could also say hopelessly entangled) and the redefinition of the separation and the distribution of social policy and economic policy functions. Accepting this statement means that the first thing to do is to change the legal environment of the conditions of production. This, in turn, means that the assessment of the different

[30] See the example of New Zealand here: Eleanor Ainge Roy, New Zealand 'wellbeing' budget promises billions to care for most vulnerable, *The Guardian* (30 May 2019), https://www.theguardian.com/world/2019/may/30/new-zealand-wellbeing-budget-jacinda-ardern-unveils-billions-to-care-for-most-vulnerable.

[31] For more detail, see Katalin Sipos's opinion here: Radó, Nóra, A válság válhat az új normalitássá a Földön, *Qubit* (26 January 2021), https://qubit.hu/2021/01/26/a-valsag-valhat-az-uj-normalitassa-a-foldon?_ga=2.203679065.856786797.1611430484-1283964420.1499259203.

[32] Fehér, János, A magukat oltató gazdag országok hátrahagyták a szerencsétleneket, és ez mindenkinek rossz lesz, *Telex.hu* (23 January 2021), https://telex.hu/koronavirus/2021/01/23/vakcina-hozzaferes-elosztas-igazsagtalansag-szegeny-orszagok-oltas-nelkul-who.

forms of exploitation, which belong to the category of normality at present, needs to be changed. As a consequence, the scope of potential victims may be expected to expand inevitably. Making their helpless situation visible may give more emphasis to their role. The *ethical and legal norms can reinforce each other* so there is more hope for the fulfilment of the demand that Károly Bárd emphasises in his academic dissertation[33] about the obligations of the state, namely that the victims *"have the right concerning the crimes committed against them to be persecuted by the state"*.

The *reduction of the role of present-day multinational business activities that in the short term focus on extra profit only* can be achieved by having the values declared in the European Union prevail. The following conditions have to be fulfilled to achieve that:

- It should not be possible for the main economic and political actors in the states to regard the exploitation of labour as part of normality but these acts should belong to the category of prohibited deviances both form a moral and a legal point of view.
- The morally upheld legal norms should be kept.
- It should be possible to enforce the compliance with the norms if need be through regular inspections at all the main points of the chains consisting of points for the production, transport and sale of products.
- It should be possible to enforce these principles.

The initial steps aimed at the elimination of the exploitation of labour can already be seen in some European countries. These suggest that neither those who sell the end product nor the consumers will be able to avoid the responsibility much longer for the malfunctioning system. For this to happen it has to become clear that *the victims of this faulty system who are still silent secure others' wealth and well-being.* This condition is, however, *morally unacceptable*. At the same time, we must be aware of the fact that *"giving voice to the victim only means – and the merits of the victimology movement cannot be denied in this respect – that abstract legal order, the abstract ethical order is infringed indirectly but through very concrete individual pain and suffering."*[34]

[33] Bárd, Károly, *The dignity of the victims and the rights of the defendants – comparative legal study [Az áldozatok méltósága és a vádlottak jogai – összehasonlító jogi tanulmány]*, Doctoral thesis, Budapest, Magyar Tudományos Akadémia, 2020, 144.

[34] Bárd, *The dignity of the victim,* 186.

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kuendigungen-entscheidung-angela-merkel-eu-kommission-krise-stellenabbau-zr-13716604.html.

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REITERATING THE OBVIOUS – EDUCATION IS A HUMAN SECURITY ISSUE

Wilma Moraa Isaboke[1]

Foreword

As an ex-student of professor Károly Bárd, I am immensely pleased to be part of this well-deserved tribute to him. Professor Bárd is a remarkable human being who is a wonderful combination of a superb teacher mentor and outstanding intellectual.

Words cannot express the gratitude that I feel other than to say Thank you.

Thank you, professor Bárd, for the fantastic lectures and discussions on human rights. For your passion for the subjects and creative way of teaching, clarifying things in multiple ways in a straightforward fashion helping us grasp concepts and theories. For your patience and creation of an inclusive learning environment where we could engage, deliberate, question, succeed and fail without judgement.

Thank you for teaching me the interconnectedness of things and impacts in our lives through human rights and criminal justice lens, consistently exemplifying integrity and championing good work, skills that I have come to adapt in my life and in seminal lectures with my students.

Thank you for taking me under your supervision and being the chairperson of my doctorate dissertation's defense committee. You played a key role in shaping and finalizing my doctoral research promptly. I am grateful for your timely feedback and encouraging words when it was challenging to study while dealing with the responsibilities of being a new mother. I owe it to a wonderful scholar like you.

Above all, I write this essay on education as a human security issue because of caring individuals and passionate educators like you who impact and transform the lives of many using education. As an African woman, I comprehend the challenges girls and women in the African continent face due to lack of education access. I seek to advocate for girls' education so that they can enjoy many benefits in life that stem from education, just as I am.

Asante Sana, Professor Károly Bárd!

[1] Senior Learning Development Associate at the UNHCR Global Learning Development Center and Seminal Lecturer at Eötvös Loránd University in Hungary

Introduction

When the COVID-19 pandemic hit, most governments worldwide temporarily closed educational institutions to control the virus's spread. While many western nations reacted and swiftly introduced measures to support learners, such as online learning, initiatives, and technology, many developing countries face challenges. Lack of remote learning policies and other factors continue to leave many children and others out and behind in accessing educational services.

The pandemic highlighted the gaps in many education systems and governance, revealing many governments' incompetence to provide and sustain educational systems within their jurisdiction. This inability remains a stark reality and reveals the lack of education for so many, especially girls. Before the pandemic, 130 million girls were out of school.[2] "At the height of the pandemic, 1.5 billion students were affected worldwide, and over 767 million of these students were girls" in 200 countries.[3]

In sub-Saharan Africa, before the pandemic, efforts to improve the education system were visible, and State parties were enacting their responsibilities required in their legislations and various African Union legal instruments. This paper will discuss four documents that strategically position women's education as indispensable in tackling the many challenges faced in Africa.

The efforts to improve the quality and access to education for girls became more derailed with the pandemic. As the pandemic continues, the question arises about the damage caused and harmful consequences of constantly regulated closures due to the pandemic and the general entrenched lack of access to girls' education in sub-Saharan Africa?

This article restates the obvious by emphasizing that it is imperative to examine education's promotion and provision through a human security lens. Thus, the article begins by exploring the challenges confronted before and during the pandemic, then examines the effects of non-schooling on girls, followed by discussing African documents to emphasize education as a human security issue.

[2] UNESCO, *Keeping Girls in the Picture-Youth Advocacy Toolkit*, UNESCO, 2020, 4, https://apa.sdg4education2030.org/sites/apa.sdg4education2030.org/files/2020-09/374113eng%20%281%29-compressed.pdf.

[3] UNESCO, COVID-19: UNESCO and Partners in Education Launch Global Campaign to Keep Girls in the Picture, *UNESCO News* (28 September 2020), https://en.unesco.org/news/covid-19-unesco-and-partners-education-launch-global-campaign-keep-girls-picture.

Challenges confronted before and during the pandemic

Challenges of education access for girls in sub-Saharan Africa is not a new phenomenon. Before the pandemic, poverty and socio-economic and cultural factors contributed heavily to these challenges. In addition, several countries had yet to fully recover from the Ebola epidemic in 2014, even when the 2019 outbreaks hit.[4]

Many learners were affected by the Ebola lockdowns, especially linguistic minorities, persons with disabilities, and those living in poor and remote areas.[5] Girls in these groups are uniquely affected due to the intersectionality of many of these issues.

Many of the 130 million girls who were not in school before the pandemic come from low-income countries, mostly in sub-Saharan Africa. UNESCO estimates that 11 million girls may not return to school due to the "unprecedented education disruption."[6]

Analysis indicates "girls will be less likely to return to school when they are needed at home for income-generating and caring responsibilities, or if their families can no longer afford school fees and other associated costs such as uniforms, school materials, and transportation."[7] Moreover, "some may be forced into an early marriage or resort to transactional sex to cover basic needs [or] some may face early or unintended pregnancy."[8]

Evidence from the past indicates that girls are particularly vulnerable in the face of prolonged school closures like the times of Ebola or conflict. "School closures have been found to exacerbate girls' and women's unpaid care work, limiting the time available to learn at home."[9] Also, "the gender digital divide and girls' reduced access to information and communication technology (ICT), even in contexts with high mobile and internet coverage, also translates into reduced learning opportunities during school closures."[10]

4 Global Business Coalition for Education, *Ebola Emergency: Creating Safe Schools and Preventing a Long-term Crisis*, Global Business Coalition for Education, 2014, 1, https://gbc-education.org/wp-content/uploads/2014/12/EbolaEducationReport1232014.pdf.

5 UNESCO, *Keeping Girls in the Picture*, 5.

6 UNESCO, *Keeping Girls in the Picture*.

7 UNESCO, *Keeping Girls in the Picture*, 7.

8 UNESCO, *Keeping Girls in the Picture*, 7.

9 UNESCO, *Building Back Equal Girls Back to School Guide*, UNESCO, 2020, 3, https://www.unicef.org/media/75471/file/Building-back-equal-Girls-back-to-school-guide-2020.pdf.

10 UNESCO, COVID-19 Education Response- Addressing the Gender dimensions of COVID-Related School Closures, *Issue Note* 3.1 (2020), 2.

The global efforts over the years for universal education narrowed the gender gap in primary school in many parts of sub-Saharan Africa. However, the persistence of the reasons mentioned above hindered further progress. The COVID-19 pandemic obliterated recent progress.

Effects of non-schooling

From the World Bank's World Development Indicators, two-thirds of girls complete their primary education in low-income countries, and only one in three completes lower secondary education.[11] While access to primary education is crucial and provides a foundational basis for life, compelling evidence suggests that "completing secondary education is associated with greater economic, social and political benefits than primary education alone."[12]

Various studies suggest that secondary education has "a positive effect on cognitive skills, which in turn correlate strongly with increased wages and GDP growth, poverty reduction, and reduced fertility and population growth."[13]Secondary education returns have been demonstrated for low-and middle-income countries, with women experiencing higher returns than men, reinforcing that the education of adolescent girls remains a priority."[14]

The impacts of low educational attainment have significant consequences on a girl's life trajectory, including:

1. impacts to earnings and standards of living;[15]
2. child marriages and early childbearing;[16]
3. fertility and population growth;[17]
4. impacts the health, nutrition, and well-being of girls and women; [18]

[11] Quentin Wodon et al., *Missed Opportunities: the high Cost of Not Educating Girls*, World Bank, 2018, 7, https://openknowledge.worldbank.org/bitstream/handle/10986/29956/HighCostOfNotEducatingGirls.pdf?sequence=6&isAllowed=y.

[12] UNICEF, *Secondary Education Guidance: Multiple and flexible Pathways*, UNICEF, October 2020, 1, https://www.unicef.org/reports/secondary-education-guidance-multiple-flexible-pathways-2020.

[13] Psacharopoulos, G. – Patrinos, H. A, *Returns to Investment in Education: A decennial review of the global literature*, World Bank, 2018.

[14] UNICEF, *Secondary Education Guidance*, 1.

[15] Quentin Wodon et al., *Missed Opportunities*, 12–20.

[16] Quentin Wodon et al., *Missed Opportunities*, 21–23.

[17] Quentin Wodon et al., *Missed Opportunities*, 24–29.

[18] Quentin Wodon et al., *Missed Opportunities*, 30–37.

5. affects a girl's agency, decision-making process, and choices;[19]
6. consequences on social capital and institutions.[20]

Education should be understood as a process of liberation, empowerment, assimilating knowledge, gaining skills, and embracing values that make a difference to one's life and society. It is a human right, a human development issue, and human security issue. The discussion above on the effects of non-schooling and the impacts of a girl's lack of education reiterates education's significance. It is indispensable and demonstrates how it is exceptionally interrelated to human security, human rights, and, at the same time, a human development issue. The lack of it has dire consequences not only to a girl but to society.

Education as a human security issue

Traditionally human security has been defined as freedom *"freedom from fear and freedom from want".*[21] It is a precondition for human development to ensure that people can lead a life of dignity. The approach that is human security, and one that makes it stronger, is that it is participatory, where solutions are based on identifying people's needs and finding comprehensively tailored solutions.

For this paper, we will use the definition of human security provided by the Commission on Human Security as described in "Human Security Now:"

> *Human security [is] to protect the vital core of all human lives in ways that enhance human freedoms and human fulfillment. Human security means protecting fundamental freedoms – freedoms that are the essence of life. It means protecting people from critical (severe) and pervasive (widespread) threats and situations. It means using processes that build on people's strengths and aspirations. It means creating political, social, environmental, economic, military and cultural systems that together give people the building blocks of survival, livelihood and dignity.*[22]

Basic education has intrinsic value because it directly affects people's security. Literacy is vital in guaranteeing that girls and women can read the information relating to their rights, access public services, sign contracts, manage businesses,

[19] Quentin Wodon et al., *Missed Opportunities*, 37–41.
[20] Quentin Wodon et al., *Missed Opportunities*, 43–47.
[21] UNDP, *Human Development Report*, Oxford, OUP, 1994, 22.
[22] Commission of Human Security, *Human Security Now*, New York, NY, Commission of Human Security, 2003, 4.

access financial services, and manage land. Illiteracy and innumeracy are themselves insecurities.

These freedoms are vital in alleviating many insecurities that women and girls confront. They also facilitate the enjoyment of many human rights for women and girls and are a development tool through their empowering nature. This is at the core of realizing Africa's Agenda 2063, the 2030 Sustainable Goals, and general human development.

General comment No.13 adopted by the Committee on International Covenant on Economic Social Cultural Rights definition of education encapsulates its vital significance and centrality in providing human security in many aspects of life and its relation to realizing many rights and fostering sustainable human development. Among other things, it states that:

> *Education is both a human right and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.*[23]

The quote reflects many human security components and addresses the individual benefits of education, which spill into society and alleviate societal burdens in many ways. It also highpoints the multifaceted and interconnected nature of education with other vital subjects to girls and women's protection and empowerment.

The four African human rights instruments and operationalization documents this article discusses reflect similar insight.

The African Charter on Human and Peoples Right

The African Charter on Human and Peoples' Rights (Hereafter, the Banjul Charter) in its preamble mentions that:

[23] United Nations CESCR, General Comment No.13: The Right to Education (Article 13) (1999), paragraph 1.

[It is] essential to pay particular attention to the right to development, and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.[24]

The Charter also guarantees rights to all without discrimination by requiring the application of all the Charter rights "without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status."[25]

It explicitly mentions that "every individual shall have the right to education."[26] Thus, to realize the right to development as mentioned in the preamble, African States party to the Charter must guarantee education to all within its jurisdiction. However, this has not been the reality for many, especially girls and women. To address challenges confronted by girls and women in Africa, The African Union established the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (hereafter the Maputo Protocol).

The African Charter on the Rights and Welfare of the Child (1999)

The Child Charter underscores the significance of early access to education and defines a child as a human below 18 years. It underlines that every child in Africa is entitled to rights and freedoms without discrimination on sex and among other grounds.[27]

The disparities in access to education in the African continent between girls and boys are addressed by article 11, paragraph 3. It explicitly directs States to provide free basic education for all and pay particular attention to school attendance and retention, affecting many girls.[28] States are to take appropriate measures that have a gendered perspective to ensure equal access.[29]

[24] The Banjul Charter (1986).
[25] The Banjul Charter, Article 2.
[26] The Banjul Charter, Article 17.
[27] The African Charter on the Rights and Welfare of the Child (1999), Article 3.
[28] The African Charter on Rights of the Child, Article 11(3- a,c &e).
[29] The African Charter on Rights of the Child, Article 11(3- a,c &e).

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

The Maputo Protocol declares education as a right, protection, and empowerment tool for girls and women in Africa. States are called upon to "commit themselves to modify the social and cultural pattern of conduct of women and men through public education, information, and communication strategies, with a view to achieving the elimination of harmful cultural practices and traditional practices and all other practices."[30]

Article 12 on the right to education and training is pivotal as it bestows upon State parties the duty to:

(a) eliminate all forms of discrimination against women and guarantee equal opportunity and access in the sphere of education and training;

(b) eliminate all stereotypes in textbooks, syllabuses, and the media that perpetuate such discrimination;

(c) protect women, especially the girl-child, from all forms of abuse, including sexual harassment in schools and other educational institutions and provide for sanctions against the perpetrators of such practices;

(d) provide access to counseling and rehabilitation services to women who suffer abuses and sexual harassment;

(e) integrate gender sensitization and human rights education at all levels of education curricula, including teacher training.[31]

Education is significant in laying the foundation to achieve sustainable development for women globally.[32] The 2030 Sustainable Development Goals considers education as central in eradicating poverty, driving sustainable human development, and building peace.[33] Overall, goal no.4 aims to ensure "inclusive and equitable quality education and promote lifelong learning opportunities for all." However, target 4.5 presumes that by 2030, there will be "equal access to all levels of education and vocational training for the vulnerable, including persons with disabilities, indigenous peoples and children in vulnerable situations."[34] The closure of schools due to COVID-19 slowed progress towards these targets, making their realization by 2030 a distant goal.

[30] The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2005), Article 2(2).

[31] Women's Protocol, Article 12 (1- a&b).

[32] Women's Protocol, Article 19.

[33] United Nations, Sustainable Development Goal, Goal 4: Quality Education, 2030, https://sdgs.un.org/goals/goal4.

[34] UN Sustainable Development Goal 2030, Goal 4: Quality Education.

Agenda 2063

Many African governments are committed to the 2030 Sustainable Development Goals, and the African contextualized goals of delivering inclusive and sustainable development through Agenda 2063. Agenda 2063 is:

> *"Africa's blueprint and master plan for transforming Africa into a global powerhouse of the future. It is the continent's strategic framework that aims to deliver on its goals for inclusive and sustainable development and is a concrete manifestation of the pan-African drive for unity, self-determination, freedom, progress, and collective prosperity pursued under Pan-Africanism and African Renaissance."*[35]

It contains seven aspirations**:**

1. A prosperous Africa based on inclusive growth and sustainable development;
2. an integrated continent politically united based on the ideals of Pan Africanism and the vision of Africa's Renaissance;
3. an Africa of good governance, democracy, respect for human rights, justice, and the rule of law;
4. a peaceful and secure Africa;
5. an Africa with a strong cultural identity, common heritage, values, and ethics;
6. an Africa, whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children;
7. Africa as a strong, united, resilient, and influential global player and partner.[36]

While not as known as the 2030 SDGs, it is notable in its context-related approach. A significant focus of Agenda 2063 is gender parity in all spheres of life, with education being pivotal to the realization of these aspirations. The first aspiration toward a robust development of human capital depends on "sustained investments based on universally early childhood development and basic education, and sustained investments in higher education's science, technology, research and innovation and the elimination of gender disparities at all levels of education."[37]

While the aspirations articulate developments with education inclusivity at their core, Aspiration no.6 considers how it relates to women: "[A]n Africa whose

[35] African Union Commission, Agenda 2063- The Africa We Want, 2015, https://au.int/en/agenda2063/overview.

[36] African Union Agenda 2063, paragraph 8.

[37] African Union Agenda 2063, Aspiration 1, paragraph 14.

development is people-driven relying on the potential of African people, especially its women and youth, and caring for children." [38]

Girls and women must be empowered[39] in order to participate and enjoy active roles in all aspects of development, including social-economic, political, and environmental efforts, as well as "to exercise rights to own and inherit property, sign contracts, register and manage businesses, have access to productive assets such as land, credit, inputs and financial services."[40]

Education is at the core of this empowerment and vital in combating all forms of gender-based violence and discrimination against women and girls. The Aspirations declare "all harmful social practices (especially female genital mutilation and child marriages) will be ended and barriers to quality health and education for women and girls eliminated."[41]

Education to create change is not limited to girls and women. For the African continent to transform, boys and men must be engaged. Partnerships are crucial because human security issues are multifaceted, and one actor and sector alone cannot achieve change. Partnerships in our globalized world have become the norm in many spheres, and the Agenda strongly reflects it.

Conclusion

Sub-Saharan Africa has the highest incidence of poverty and the lowest recorded levels of learning today. Governments must address the pandemic's consequences on human security, particularly for girls. Using the human security approach guarantees the integration of education into various sectors. In return, educated girls and women have the opportunity to master their lives, make their living, and contribute to their development and their communities, countries, and world.[42]

Human security and sustainable human development approaches are significant in eradicating poverty and improving the lives of many living in poverty.[43] Progress in one area forwards progresses in another, while failure in one intensifies the risk of failure in another. Education is squarely amid all these interlinkages and holds

[38] African Union Agenda 2063, Aspiration 6.
[39] African Union Agenda 2063, Aspiration 6, paragraph 49, 50 &52.
[40] African Union Agenda 2063, Aspiration 6, paragraph 50.
[41] African Union Agenda 2063, Aspiration 6, paragraph 51.
[42] UNDP, Human Development Report- New Dimensions of Human Security (1994), 24-33. Also see, United Trust Fund for Human Security, Human Security Handbook-An Integrated Approach for the Realization of the Sustainable Development Goals and the Priority Areas of the International Community and the United Nations System, (2006), 24.
[43] UN General Assembly, A/Res/66/290, (25 October 2012), 1-2, paragraph 4.

its purpose in protecting and empowering. Failure to provide leaves many behind and disempowers many.

Therefore, while the COVID-19 pandemic has reduced efforts done in the educational sector, there is an opportunity for governments and stakeholders to build gender-inclusive educational systems that are resilient and responsive to unforeseen circumstances. Adopting inclusive quality education will guarantee that girls stay in school and live better lives.

Inclusive education involves a blend of learning systems. Many nations could not undertake distance virtual learning due to inadequate or lack of digital infrastructure, skills and resources. For African countries and others, this is the time to start investing to ensure a better future.

It is also an opportunity for governments to learn lessons from the past and present and find ways to mitigate pandemics' impacts. Human security anticipatory and participatory methodology is vital in the mitigation process. Education security remains to be crucial in protecting and empowering girls.

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DIGNITY AT THE WORKPLACE. WHAT IS PROTECTED AND WHO HAS TO PROTECT IT?

Csilla Lehoczky-Kollonay[1]

Short view on the twists and turns of the view of work in the society – with messages for today

At the beginning of history, labour, especially physical labour done for others under supervision, was not a term of dignity, rather a concept of inferiority and even disgrace. Slaves and serfs – connected to the lower birth status or defeat – were identified with the concept of labour, meaning physical labour, becoming a term of humiliation. Looking at the late medieval Europe – besides domestic forms of work under the power of another person, semi-serfdom – labour becomes also a form of criminal punishment, wedged in the concept of chastisement mechanisms: coercion imposed not only for criminal acts but also for any conduct – begging, truancy of just being poor – going against the ruling norms of the unjust societies.

Michael Foucault in his renowned work on "Discipline and punish – The birth of the prison" described a system of the middle ages – penitentiary forced labour and prison factory.[2] He goes back to Jeremy Bentham's Panopticon: an architecture, that allows a watchman to observe inmates from a central tower without the inmates knowing whether or not they are being watched in a given moment. This mechanism that "automatizes and disinvidualizes power"[3] is applicable not only in prisons but, among others, also in workshops to supervise workers. As Foucault adds, it must be understood as a generalizable model of functioning; a way of defining power relations in terms of the everyday life of men.[4] The 18th and 19th century the depersonalizing, objectifying effect of the industrialisation treating working persons as a commodity has not seen workshops as a place of dignity, either. Apart from pious statements by the Catholic church (some far-sighted, but

[1] professor emerita of Central European University

[2] The Hôpital General – (Rasphuis), Michel Foucault, *Discipline and Punish,* New York, NY, Vintage Books, 1995, 30, 120–121.

[3] Foucault, *Discipline and punish,* 202.

[4] Foucault, *Discipline and punish,* 205.

not reaching political level[5]) "all 'the lower orders': workers, the poor and the like"[6] were far from considered "worthy".

Labour becomes praiseworthy when it becomes mandatory.

A radical shift, turning concepts upside down, comes with the communist regimes, already in the early 20th century. Inferiority turns into respectability in regimes when being a "worker" becomes mandatory for everyone as a precondition to be acknowledged as a citizen, to have citizens' rights. This happened first after the 1917 Russian Revolution. In the 1918 Russian Constitution of the Soviet State, i.e. a state governed by "soviets", the councils of "workers and peasants", excluded everybody from the right to vote or to be a candidate, "who employ hired labour, who has income without work (capital interest, income from property), private merchants and traders"[7]. Similar approaches entered most of the Soviet-Block countries after WWII, "lands of workers and working peasants" treating as deviant those having income from own property. The ranking between physical and intellectual work also reversed: physical labour qualified members of the "ruling class", whereas "the class of intellectuals" became second rank, even politically suspicious, affected by adverse measures. Of course, this harsh "class-differentiation" of the early communist period softened with time.

After a look at these extreme turns of the past, still having implications for today's developments, we will see next the process how dignity, acknowledged as the apex of human rights in international human rights law, can make its way to entering the workplace.

The start of the idea of dignity of labour

Human dignity as a universal human right and a fundamental value related to human labour first appears in post-World War II UN documents. The ILO Declaration of Philadelphia of 10th of May 1944 – documents – in the light of the horrors of the concentration camps, the scenes of genocide and also forced labour – emphasises social justice as basis of lasting peace, together with freedom and dignity and proclaims, as no.1 principle, that "labour is not a commodity".[8] The Preamble to the 1945 Charter

[5] Pope Leo XIII and his prophetic calls in the Encyclical *Rerum Novarum* (1891). See also Christopher McCrudden, Human Dignity and Judicial, Interpretation of Human Rights, *The European Journal of International Law* 19 (2008), 655–724, 662.

[6] Mika LaVaque-Manty, Universalizing Dignity in the Nineteenth Century, in Remy Debes (ed.): *Dignity: A History*, Oxford, OUP, Online: June 2017, 301–322, 304.

[7] Articles 64, 65.

[8] Part I. of the Declaration. https://www.ilo.org/legacy/english/inwork/cb-policy-guide/declarationofPhiladelphia1944.pdf.

of the United Nations[9] starts with declaring faith in dignity and it is renowned as the central concept of the of the Universal Declaration on Human Rights.[10]

Although mentioned frequently as a novel idea, it was rather "the culmination of a significant historical evolution of the concept" from expression of esteem for office, rank, personality in ancient ages[11] to its post-WW II legal concept as "inherent" in human beings.[12]

Looking for other (language) versions of "dignity", we find the same idea in the 1927 book of Otto Sinzheimer, founding-father of German labour law, who considered *"Menschenwürdige Existenz"* (an existence worthy of man) as a goal to be achieved by providing people with fundamental social rights.[13] Here dignity is a result to be achieved by just distribution in an all-societal meaning.

By today the term dignity is used widely, becoming the basic idea of European and international human rights law. Its meaning remained unsettled, context-specific, varying from jurisdiction to jurisdiction and also over time.[14] It is considered as an end to be achieved and fulfilled by guaranteeing human rights, and, at the same time, the opposite: as a foundation, source of human rights. In the more specific context of human labour and social justice the same dual meaning is present as a ground (i.e. being inherent in humans) of the right to certain treatment and, in the Sinzheimer-meaning as an expected result (certain level of living) of socially just distribution, i.e. social justice in the society.

The public-private divide and dignity at the workplace

The "public-private divide" in law divided and delayed the arrival of dignity to the workplace.

Civil and political rights entitle the individuals and oblige the state in the vertical relation between the citizens and the state, whereas in the contractual employment

[9] Signed 26 June, 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, https://www.un.org/en/about-us/un-charter.

[10] Preamble, Recital 1, 5, Article 1 and 22, the latter one expressing a connection of dignity to social security. https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/UniversalDeclarationofHumanRights(1948).aspx.

[11] McCrudden, Human Dignity, 656–657.

[12] McCrudden, Human Dignity, 658, 664.

[13] „[D]em Menschen soziale Grundrechte (zu) verleihen, die ihm ein des Menschen würdige Existenz si chern. Hugo Sinzheimer, Das Wesen des Arbeitsrechts (1927), in Hugo Sinzheimer, *Arbeitsrecht und Rechtssoziologie,* Band 1. Frankfurt, Köln, Europäische Verlagsanstalt, 1976, 108 ff (110) Referred by Manfred Weiss, Re-Inventing Labour Law, in Guy Davidov – Brian Languille (eds.), *The Idea of Labour Law*, Oxford, OUP, 2011, 44–46.

[14] McCrudden, Human Dignity, 655.

relation rights are exercised in a horizontal, private context, between the employer and the employee, where both parties have their specific, legitimate interest that needs protection. The contract-based subordination of the dependent worker as weaker party raises the necessity of protection of dignity under the power of the employer, on the other hand, the just economic and business interest of the employer requires limitation of the civil autonomy and civil rights within employment.

For this different, more private context the legal guarantee of dignity at the workplace has remained out of focus even after it was declared in the UN human rights treaties relevant for employment relations (the ICESCR, CERD, CEDAW and the CRPD). Only general terms indicate in their Preambles that those rights derive from inherent human dignity, there is no reference to employment or workplace. General Comment (no.18) to the ICESCR on the right to work, the most pertinent GC on our subject also stops at the door of the workplace: only the right to work and the freedom to choose the job get relevance as part of dignity.[15] Dignity inside the "private area" of the workplace in terms of the universal eonomic rights was left out.

The time factor has specific significance here: the progress of the international legal instruments and legal thinking, first of all the approximation of civil-political social-eonomic rights started change.

Dignity was present rather as moral issue in the "private" context of employment, as protection against "humiliation". If wages are too low, if assigned tasks are much below the level of knowledge, skill and education, can be perceived "humiliating". However, as long as they are corresponding to the contract, and the contract is in compliance with the statutory norms or collective agreements – in legal terms they are considered consensual. Thus, the perception of dignity at the workplace connected it primarily to non-discrimination, respect for the limits of the unilateral power of employer and respect for the privacy of employees.

The progress brought by Article 26 of the Revised European Social Charter. Revolutionary or stepping back?

The very first international treaty provision in Europe protecting dignity at the workplace *expressis verbis* was Article 26 on "The Right to Dignity at Work" of the Revised European Social Charter[16] (the "Social Charter") adopted in

[15] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 18: The Right to Work (Art. 6 of the Covenant)*, 6 February 2006, E/C.12/GC/18, Sections 1, 4, 19., https://www.refworld.org/docid/4415453b4.html.

[16] The European Social Charter (1961) the human right treaty of the Council of Europe complementing the European Convention on Civil and Political Rights, its revised and extended version, the Revised Social Charter was adopted in 1996.

1996. Its two paragraphs protect against two different kinds of human rights violation, linked to that time idea of "dignity". Paragraph 1 protects against sexual harassment – signalling that sexual harassment was considered separate from sex-discrimination.[17] Paragraph 2 aimed at protection from hostile working environment directed against an individual, based on any specific characteristic of a person. This was named "moral harassment" along French terminology, "mobbing" or "bullying" would be the closest in present day English terms.

Beyond this novelty its provisions brought another type of progress: making protection against harassment a responsibility of the employer – confirming the shift from earlier times when workplace harassment was considered merely personal misbehaviour, beyond the responsibility of the employer and actionable as a private lawsuit against the offender.

Article 26 has been criticized for its limited scope, protecting only non-material rights, while it should cover fundamental "material" workplace rights (e.g. fair wage, reasonable working time) as well.[18] So far altogether two collective complaints were submitted under Article 26§2, both on conscientious objection to certain tasks. In the context of military service the complaint was considered a freedom of occupation (Art 1§2) issue, not implying harassment.[19]

The other case[20] – connected to objection for conscientious reason to termination of pregnancy and related examination – the only decision so far when the Committee found violation of Article 26§2 – is significant regarding the allocation of responsibility for the effective protection against harassment.

In the complaint against Italy, claiming that under the law permitting conscientious objection to health personnel, those doctors who not objected to perform abortion had been confronted with isolation at work and often needed to carry out abortions alone amounting to a form of harassment. Even if the Committee found the statements by the doctors largely anecdotal and therefore insufficient to ground a violation of the Social Charter, considering the obligations imposed on the State by Article 26§2 to take preventative action to ensure moral harassment does not occur in situations where it is likely, it found the failure of the Government to take any such action amounted to a violation of Article 26§2.[21]

[17] In that time thinking the "unwanted conduct" (harassment) could mean also more favourable treatment, opposite of discrimination.

[18] Barbara Kresal, Article 1 – Human Dignity, in Filip Dorssemont – Klaus Lörcher – Stefan Clauwaert – Mélanie Schmitt (eds.), *The Charter of Fundamental Rights of the European Union and the Employment Relation*, Oxford, Hart Publishing, 2019, 191–208, 197.

[19] *European Organisation of Military Associations and Trade Unions (EUROMIL) v. Ireland* Complaint (No.164/2018, 21 October 2020) §35.

[20] *Confederazione Generale Italiana del Lavoro (CGIL) v. Italy* Complaint No. 91/2013

[21] *Ibid.* §297.

The clear and firm statement on the positive obligation of the state to take preventive actions definitively closed earlier interpretation discussions, generated by the obscure text of the provision.

The extension of the protection of dignity to other labour related rights has not happened. The European Committee of Social Rights (the supervisory body of the implementation of the Social Charter) declared, that "[h]uman dignity is the fundamental value and indeed the core of positive European human rights law"[22] – however this fundamental value was invoked only in social matters, such as the right to social services in extreme poverty, eviction and homelessness, or treatment in elderly homes.

Health and safety is the only exception. The Committee repeatedly emphasized the importance of dignity in connection with the right to the protection of everyone to health under Article 11, since physical and mental integrity is considered an element of dignity. This explains connecting workplace health and safety to dignity, under Article 3, with regard to the potential dignity harm of working under unsafe or unhealthy conditions.[23] Besides Article 26, Article 3 remained the only provision on fundamental workplace rights invoking dignity.

This independence of "dignity" from labour standards (wage, working time, dismissal etc.) raises the question: can the violation of dignity in employment occur even when "material" working conditions are provided at acceptable or even high level? Article 26 answers "yes", while not questioning the indispensability of a floor of "material" conditions for dignity.

The CFREU: extension of the European concept of dignity

Subsequently to several, unclear declarations on "dignity" in the international documents, the Charter of Fundamental Rights of the European Union (CFREU) has clearly declared the double role of dignity in its Article 1: "The dignity of the human person is not only a fundamental right in itself, but constitutes the real basis of fundamental rights."[24] The declaration of this double role might suggest the missing answer to the above question, how dignity, declared as a general, inherent, inviolable right of all human beings, is connected to workplace standards. If fundamental rights are identified as elements filling the idea of dignity, and dignity

[22] *International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No. 14/2003. (8 Sept. 2004), §31.

[23] Klaus Lörcher, Article 3 – The Right to Safe and Healthy Working Conditions, in Niklas Bruun – Klaus Loercher – Isabelle Schoemann – Stefan Clauwaert (eds.), *The European Social Charter and the Employment Relation*, Oxford, Hart Publishing, 2017, 181–197, 189.

[24] CFREU, Explanation to Article 1.

is considered as a founding element of those rights – then dignity is present and guaranteed in employment if those rights are effectively protected.

This somewhat simplified explanation leaves questions behind.

First, there is a lack of any clear delineation of the rights whose guarantee realizes the presence of dignity, apart from unspecified references to Article 31 CFREU on "fair and just working conditions", an umbrella term, or a random list of a number of specific labour rights. Usually reasonable working time, fair pay, safe and healthy working conditions, non-discrimination, involvement in enterprise matters are mentioned.[25]

Even if Article 1 may be invoked before the CJEU either in a preliminary ruling procedure, or in an action for annulment, no case was brought to it yet. Similarly, the CJEU has not yet referred to Article 1 CFREU at all up to now, neither in matters dealing with labour relations nor in any other matter.

Not only CFREU Article 1, but "dignity" as such is not present in the employment related case law of the CJEU. A few decisions can be found under the title of "consumer protection" dealing with "professional dignity", the reputation of persons and their profession providing goods or services (e.g. dentist, pharmacist[26]) – confirming the return to the "classic" meaning of dignity: a moral prestige, reputation, respectfulness.

Then we get to the second question: connecting dignity to the guarantee of fundamental labour rights, at least a floor of all important conditions, would it mean that dignity in employment is ensured if those rights are ensured? In the light of this concept of dignity we come to the same conclusion as under Article 26 of the Social Charter: certain forms of treatment might violate dignity even under high standards of material conditions in employment. Involvement in enterprise matters seem to be the exception: if it is genuinely guaranteed, written or unwritten rules of daily life potentially can prevent systemic violation of dignity.

The European Human Rights Court – recent lessons. Panopticon returns?

Recent decisions of the European Court of Human Rights ("the Court") confirm the need of paying closer attention to the "non-material" conditions of employment, to the protection of dignity in terms of respect for privacy, and the boundaries of private life by the employer. The special attention is made necessary by the revolutionary developments of high technology and the gradual transformation

[25] Kresal, Article 1, 203.

[26] Case C-339/15, Case C-649/18.

of the relation between the employers and employees under the new technological conditions.

Two key judgements are to be mentioned here. One of them, *Bărbulescu v. Romania* [27] relates to the right of the employer to collect data on the employee's internet activities, the other one, *López Ribalda and Others v. Spain*[28] to surveillance through CCTV cameras.

In the *Bărbulescu* case a sales engineer at a private company, was asked to open a Yahoo Messenger account for professional purposes. The employer prohibited the private use of its equipments and warned everyone that communications might be monitored. The engineer nevertheless used it for private communications. The employer presented him the 45-page transcript of the recorded internet communications, some of them of intimate nature and finally he was dismissed.

In the *Ribalda* case the employer supermarket installed CCTV cameras (visible and hidden) to monitor the activity and conduct of the supermarket employees, not informing them on the hidden cameras, leading to the dismissal of the employees who were involved in stealing.

Two issues, addressed in both cases, are relevant for our subject. First, the role of the State in these cases between private parties. The Court established, as an obligation of State authorities to strike a fair balance between the competing interests of the parties (the respect for private life under Article 8 of the Convention and the employer's interest in the protection of its rights to its property and to supervise the operation of its business. When national authorities failed to fulfil this balancing obligation the violation of Article 8 of the Convention was found.[29]

Another principal matter was in both cases the lack of correct notification in advance by the employer on the surveillance. The detailed arguments expressed in the cases underlined the increased importance of attentiveness under the growing influence of surveillance technology to the use of personal data and information on personal matters.

In the *Bărbulescu* case the Court attributed great significance to the fact whether the employee was notified in advance of the monitoring and its nature, particularly that not only the use of internet but also the contents of the private communications were monitored. Accessing the contents of the private communications without notification impinged upon the employee's reasonable expectation of privacy. The remarkable judgement raised concern at this point: it implies that the notification eliminates or radically reduces the privacy of the employee, if he knows that he is watched, may not have expectations on privacy.

[27] E.Ct.H.R. (GC) 5 September 2017 (Appl. No. 61496/08).

[28] E.Ct.H.R. (3rd sect.) 9 January 2018 (Appl. Nos. 1874/13 and 8567/13).

[29] §§140–141.

The negative impact of monitoring, especially when combined with a dependent status – is evidently violating the dignity of a person. The fact that he knows he is monitored, is not protecting rather endangering his dignity.

This is where "Panoticism" returns and highlights the dangers for dignity implied in modern surveillance methods including the growing role of algorithms. The importance of strict guidelines and explicit requirements on the "non-material" workplace conditions need attention from all interested actors.

Conclusion

The brief overview of the role of dignity under the global and European documents justifies that examining dignity as a non-material concept is not narrowing, rather broadening. Not questioning its indispensable interrelationship with the basic labour standards its independent examination represents high level public interest under technical conditions of today and tomorrow. This public interest requires and already established the role of the state bridging the public-private divide and its obligations in permanently adjusting the regulatory and institutional environment to the changing conditions, including and relying on the role given to further actors – employers, trade unions and other civil organisations.

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REVISITING THE EUROPEAN CONSENSUS IN LIGHT OF THE VIENNA RULES ON TREATY INTERPRETATION

Eszter Polgári[1]

The techniques and methods of interpretation meant to ensure that the interpretation of the ECHR remains up-to-date are oftentimes labelled as activist and triggered fierce opposition in member states. This piece proposes to ground one of the most contested tools used to enhance the protection within the framework of the Vienna rules on treaty interpretation, and it argues that understanding the European consensus inquiry as subsequent practice may increase its legitimacy and add a methodological discipline to its use.

Introduction

The European system created on the basis of the European Convention on Human Rights and Fundamental Freedoms [hereinafter: Convention or ECHR] is undoubtedly the most successful regime devoted to the protection of human rights. The rights in the Convention "are expressed in sparse and abstract *universal* terms"[2], which have been filled with content through interpretation by the European Court of Human Rights [hereinafter: ECtHR or Court]. The creative solutions adopted by the ECtHR have triggered considerable amount of critique and resistance both among judges and academics,[3] and the political backlash that followed certain judgments threatened to shake the foundation of the ECHR system.[4] Without elaborating in details on the various steps leading to

[1] Assistant professor and Chair of the Human Rights Program at the Department of Legal Studies, Central European University, Vienna, Austria.

[2] Steven Greer, The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation?, *UCL Human Rights Review* 3 (2010), 1–14.

[3] See among others: Marc Bossuyt, Is the European Court of Human Rights on a Slippery Slope?, in Spyridon Flogaities – Tom Zwart – Julie Fraser (ed), *The European Court of Human Rights and its Discontents*, Cheltenham, Edgar, 2013, 27–36.

[4] See for example: Sarah Lambrecht, Reforms to Lessen the Influence of the European Court of Human Rights: A Successful Strategy?, *European Public Law* 21 (2015), 257–284.

the amendment of the Preamble to the Convention,[5] it is important to note what were the driving forces behind the reform and why the principle of subsidiarity "has gained an increasingly high profile".[6] On the one hand, the Court became "the victim of its own success" and the excessive backlog of cases hindered the efficiency of its work;[7] on the other hand, some member states fiercely pursued an agenda aimed at curtailing the role of the Court as an activist defender of human rights.[8] The current era was labelled as the "age of subsidiarity",[9] which resulted in bringing "the centre of gravity of the Convention system" in principle closer to those benefitting from the protection.[10]

The effective implementation of the Convention is based on a "shared responsibility" between the Court and the member states: ideally, domestic authorities function as 'first-line defenders', and in line with the principle of subsidiarity, the Court's work is limited to its supervisory task.[11] While the notion of shared responsibility is uncontested, its practical application constantly confronts the Court with a dilemma: should it assert its standard-setting role, or should it rather remain deferential to the choices of the domestic authorities? National sovereignty and the legitimate interest of victims pull the Court in opposite directions: on the one hand, it is expected that the ECtHR respects (and not extends) the obligations states accepted upon ratification, on the other hand, it has to provide effective and up-to-date protection for individual rights.[12] The interpretative methods and doctrines that serve the latter end are frequently

5 Protocol 15 amended the Preamble to the ECHR with explicit references to subsidiarity and the margin of appreciation.

6 Alastair Mowbray, Subsidiarity and the European Convention on Human Rights, *Human Rights Law Review* 15 (2015), 313–341.

7 Lynne Turnbull, A Victim of its Own Success: The Reform of the European Court of Human Rights, *European Public Law* 1 (1995), 215–225, 219, or Laurence Helfer, Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime, *European Journal of International Law* 19 (2008), 125–159, 126.

8 Nikos Vogiatzis, When 'Reform' Meets 'Judicial Restraint': Protocol no. 15 Amending the European Convention on Human Rights, *Northern Ireland Legal Quarterly* 66 (2015), 127–149, 129.

9 Robert Spano, Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity, *Human Rights Law Review* 14 (2014), 487–502.

10 Dean Spielmann, Whither the Margin of Appreciation? *Current Legal Problems* 67 (2014), 49–65, 65.

11 See further: Janneke Gerards, The European Court of Human Rights and National Courts: Giving Shape to the Notion of 'Shared Responsibility' in Janneke Gerards – Joseph Fleuren (ed), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-Law*, Cambridge, Intersentia, 2014, 13–94, 32–34.

12 François Ost, The Original Canons of Interpretation of the European Court of Human Rights in Mireille Delmas-Marty (ed), *The European Convention for the Protection of*

deemed activist, and for this reason they are particularly prone to (often well-founded) criticism. In order to counter the objections, this piece proposes to reconceptualize the most contested tool used for 'updating' the ECHR, *i.e.* the European consensus inquiry, in light of the rules on interpretation contained in the Vienna Convention on the Law of Treaties [hereinafter: VCLT or Vienna rules]. It is submitted that understanding the consensus inquiry within the framework of subsequent practice as laid out in in Art. 31 (3) *b)* could enhance its legitimacy and acceptance by adding a normative basis for its use.

The role of the VCLT in the case-law

The general rules of interpretation for treaties are laid down in Articles 31 to 33 of the VCLT and these are considered to form part of customary international law.[13] According to the general rule contained in Article 31 (1) "(a) treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to terms of the treaty in their context and in light of its object and purpose". The provision follows the 'crucible approach', *i.e.* "[a]ll the various elements, so far as they are present in any given case, would be thrown into the crucible and their interaction would give the legally relevant interpretation".[14] 'Context' – as specified in Article 31 (2) and (3) – and the 'object and purpose' of the treaty are "modifiers to the ordinary meaning of a term which is being interpreted in the sense that the ordinary meaning is to be identified in their light".[15] 'Context' accommodates both historical and forward-looking perspectives, and not only encompasses agreements and instruments drawn up "in connexion with the conclusion of the treaty" but reflects on subsequent agreements and practice as well.

Although the ECHR is an international treaty, explicit references to the VCLT are scarce in the jurisprudence of the ECtHR. The infrequent mentions, however, do not indicate – as Letsas argues – "that the VCLT has played very little role in the ECHR case law",[16] to the contrary, the interpretative techniques and methods

Human Rights: International Protection versus National Restrictions, Dordrecht, Martinus Nijhoff, 1991, 283–318, 310.

[13] Richard Gardiner, The Vienna Convention Rules on Treaty Interpretation, in Duncan B. Hollis (ed), *The Oxford Guide to Treaties,* Oxford, OUP, 2012, 475–506, 476.

[14] Yearbook of the International Law Commission (1966) vol. II, 95. The use of the singular rule was an intentional choice among the drafters, and this supports the 'crucible' approach. See Gardiner, The Vienna Convention, 480.

[15] Richard Gardiner, *Treaty Interpretation*, Oxford, OUP, 2015, 211.

[16] George Letsas, Strasbourg's Interpretive Ethic: Lessons from the International Lawyer, *European Journal of International Law* 21 (2010), 509–541, 512.

applied by the Court – except for the doctrine of the margin of appreciation[17] – have basis in or may be derived from the Vienna rules. The ECtHR unequivocally endorsed Articles 31-33 of the VCLT in *Golder v. the United Kingdom* as "in essence generally accepted principles of international law" five years before it entered into force,[18] and it continues to serve as a guiding framework for interpretation ever since.[19] The practical consequences of this commitment are well summarized in *Magyar Helsinki Bizottság v. Hungary*:[20] first, as a starting point, "the Court is required to ascertain the ordinary meaning to be given to the words in their context and in the light of the object and purpose of the provision from which they are drawn".[21] Second, in order to tailor the Vienna rules to the ECHR, the Court noted: "the context of the provision is a treaty for the effective protection of individual human rights and that the Convention must be read as a whole, and interpreted in such way as to promote internal consistency and harmony between its various provisions".[22] Effectiveness is further mandated by the 'object and purpose' of the ECHR that "requires that its provisions must be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory".[23]

Third, it follows from identifying the Convention as an international treaty that due regard has to be accorded to its broader environment: it "cannot be interpreted in a vacuum and should so far as possible be interpreted in harmony with other rules of international law of which it forms part".[24] This frequently invoked statement of the Court not only indicates an aspiration towards anti-fragmentation, but also opens the door to systemic integration as contained in Article 31 (3) *c)* of the VCLT.[25] Finally, the Court – in line with its supplementary nature – emphasized the limited role the *travaux préparatoires* may play: on the basis of the jurisprudence they "are not delimiting for the question whether a right may be considered to fall within the scope of an Article of the Convention if

[17] As Ulfstein correctly notes, the margin of appreciation does not instruct the Court how the ECHR ought to be interpreted, it only distributes "the interpretational competence between the ECtHR and national organs". Geir Ulfstein, Interpretation of the ECHR in light of the Vienna Convention on the Law of Treaties, *The International Journal of Human Rights* 7 (2020), 917–934.

[18] *Golder v. the United Kingdom* 4451/70 (21/02/1975), A18, para 29.

[19] See for example: *Mihalache v. Romania* [GC] 54012/10 (08/07/2019), para 90; or *Hirsii Jamaa and Others v. Italy* [GC] 27765/09 (23/02/2012), ECHR 2012-II 97, para 170.

[20] *Magyar Helsinki Bizottság v. Hungary* [GC] 18030/11 (08/11/2016).

[21] *Ibid*, para 119.

[22] *Ibid*, para 120.

[23] *Ibid*, para 121.

[24] *Ibid*, para 123.

[25] *Ibid*.

the existence of such a right was supported by the growing measure of common ground that had emerged in the given area".[26]

The case-law confirms that the Vienna rules are flexible enough to accommodate the methods and doctrines invoked in the interpretation of the ECHR, and the 'special character' of the Convention[27] has not resulted in the development of a competing interpretative framework; the Court merely puts emphasis on effectiveness and a dynamic approach to the text over the traditional international law principles of state consent and restrictive interpretation of state obligations.

Subsequent practice

Article 31 (3) adds further sources that need to be taken into account together with the 'context' when establishing the ordinary meaning of a term. Subsequent agreements and practice constitute "forms of authentic interpretation whereby all parties themselves agree on (or at least accept) the interpretation of treaty terms by means which are extrinsic to the treaty".[28] As Villiger noted authentic interpretation offers "*ex hypothesi*" the right interpretation and consequently it is conclusive to the ordinary meaning.[29] In the ECHR case-law subsequent agreements contained in Article 31 (3) *a)* do not play a significant role, there is no judgment that would refer to them beyond the citation of the Vienna rules. Subsequent practice,[30] on the other hand, has been invoked by the Court explicitly and – as it will be explained below – implicitly more frequently.

In order to assess whether the case-law of the ECtHR is in harmony with the VCLT's provision on subsequent practice, a brief overview of the rule is indispensable. 'Practice' itself covers a great number of positive actions, in public international law it would simply encompass "what states do in their relations to one another".[31] Some argue that subsequent practice must be consistent, common and concordant,[32] and it has to be acquiesced in by other parties, otherwise it will remain a supplementary means of interpretation under Article 32 of the VCLT.[33]

[26] *Ibid*, para 137.

[27] For an explanation of the peculiarities of the ECHR see for example: *Ireland v. the United Kingdom* 5310/71 (18/01/1978), A25, para 239.

[28] Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden, Martinus Nijhoff, 2009, 429.

[29] *Ibid*, 326.

[30] VCLT Article 31 (3) *c)*.

[31] Irina Buga, *Modifications of Treaties by Subsequent Practice*, Oxford, OUP, 2018, 23.

[32] Ian M. Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester, MUP, 1984, 137.

[33] Georg Nolte, *First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation* (19 March 2013), UN doc A/CN.4/660, para 118.

However, Special Rapporteur Nolte put forward a more permissive definition: in his view subsequent practice does not require the participation of all parties, "if it is 'accepted' by those parties not engaged in the practice, [it could] establish a sufficient agreement regarding the interpretation of a treaty".[34] It is traditionally limited to state practice only, however, recently a wider interpretation has surfaced including – among others – the practice of UN treaty monitoring bodies as well.[35] Finally, the VCLT itself is silent on the potential modifying effect of such practice, but this possibility is undoubtedly recognized in international law.[36]

The review of the case-law of the ECtHR presents little evidence to the widespread explicit reliance on subsequent practice, but this shall not lead to the quick conclusion that the notion is wholly absent from the jurisprudence. The Court first considered the subsequent practice of the member states was *Soering v. the United Kingdom*[37] when it reviewed state practice in relation to capital punishment. It importantly noted:

> *[s]ubsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2 § 1 (art. 2-1) and hence to remove a textual limit on the scope for evolutive interpretation of Article 3 (art. 3).*[38]

Since member states opted for "the normal method of amendment of the text in order to introduce a new obligation" even the special character of the Convention could not justify modifying the interpretation through dynamic interpretation.[39]

This position was first revisited in *Öcalan v. Turkey* where the Grand Chamber endorsed the Chamber's finding on abolishing death penalty in peace time.[40] By that time all member states signed Protocol no. 6, three ratifications were awaited, though only Russia did not outlaw it domestically. On the basis of the strong support for Protocol no. 6, the Chamber concluded: "[s]uch a marked development could now be taken as signalling the agreement of the Contracting States to abrogate, or at the very least to modify, the second sentence of Article 2 § 1".[41]

[34] Georg Nolte, *Second Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation* (26 March 2014) UN doc A/CN.4/671, para 60.

[35] Magnus Killander, Interpreting Regional Human Rights Treaties, *Revista SUR* 7 (2010), 149–169.

[36] Magdalena Forowicz, *The Reception of International Law in the European Court of Human Rights*, Oxford, OUP, 2010, 37.

[37] *Soering v. the United Kingdom* 14038/88 (07/07/1989), A161.

[38] *Ibid,* para 103.

[39] *Ibid.*

[40] *Öcalan v. Turkey* [GC] 46221/99 (12/05/2005), ECHR 2005-IV 131.

[41] *Ibid*, para 163.

Despite the fact that formally no unanimity was discernible among the member states, the practice was sufficiently concordant not to exclude the modification of the text of Article 2 on the basis of subsequent practice. In May 2003 Protocol no. 13 completely abolishing capital punishment was opened for signature and it entered into force a year later. When the judgment in *Al-Saadoon and Mufdhi v. the United Kingdom*[42] was delivered only two member states did not sign Protocol no. 13 and three of those which signed failed to ratify it. These numbers "together with consistent State practice in observing the moratorium on capital punishment, [were] strongly indicative that Article 2 [had] been amended so as to prohibit the death penalty in all circumstances."[43]

Interestingly, subsequent practice is not always invoked in support of evolutive interpretation. In *Hassan v. the United Kingdom* the ECtHR relied on the common practice of the member states not to derogate from Article 5 in order to detain persons on the basis of the relevant Geneva Conventions.[44] Invoking Article 31 (3) *b)* in this case provoked wide criticism: instead of enhancing the protection under the Convention, the Court practically read into Article 5 additional legitimate grounds for detention in contravention of the principle of non-regression.[45]

In addition to the scarce explicit references to subsequent practice, the ECtHR has appealed to state practice numerous times without invoking the VCLT in the interpretative process: "the Court confirmed that uniform, or largely uniform national legislation, and even domestic administrative practice, can in principle constitute relevant subsequent practice."[46] This approach translates into the consensus inquiry frequently applied by the Court in various contexts. In simplistic terms, the consensus is based on a rough, methodologically questionable comparative analysis of the national (and at times international) solutions adopted by the member states and sufficient convergence – in principle – constitutes a relevant consideration for interpretation. The ECtHR still owes a definition of the European consensus, but on the basis of the case-law commentators understand the notion rather as a 'trend' than a 'consensus' in the traditional sense of the term: "the Court is looking to find a trend rather than an agreement as such or an outright majority".[47] Although

[42] *Al-Saadoon and Mufdhi v. the United Kingdom* 61498/08 (02/03/2010), ECHR 2010-II 61.

[43] *Ibid,* para 120.

[44] *Hassan v. the United Kingdom* [GC] 29750/09 (16/09/2014), ECHR 2014-VI 1, para 100.

[45] See for example: Luigi Crema, 'Subsequent Practice in *Hassan v. United Kingdom:* When Things Seem to Go Wrong in the Life of a Living Instrument', 4 *QIL* 3 (2015); and *Hassan* (n 44) partly dissenting opinion of Judge Spano, joined by Judges Nicolaou, Bianku and Kalaydjieva, para 13.

[46] Nolte (n 33) para 54.

[47] Paul Mahoney – Rachel Kondak, Common Ground. A Starting Point or Destination for Comparative-Law Analysis by the European Court of Human Rights?, in Mads Andenas – Duncan Fairgrieve (ed), *Courts and Comparative Law*, Oxford, OUP, 2015, 119–140, 122.

judgments do no assess the commonalities identified in the domestic laws openly under Article 31(3) *b)* of the VCLT, it may be argued that the Court is indeed relying on subsequent practice to some extent.

The consensus is understood "as a tool that can bring forward a particular human rights problem from the margin of appreciation and trigger evolutive interpretation",[48] or in other words, it can bridge the gap between the margin of appreciation and the dynamic interpretation of the Convention.[49] If there is a consensus on an issue, the margin of appreciation becomes narrower, and the Court applies a stricter scrutiny to the actions of the domestic authorities. If the matter concerns the interpretation of the scope of a right, ideally the consensus results in a dynamic approach. While the link between subsequent practice and evolutive interpretation does not call for further explanation, it is necessary to note the key differences between the two notions.[50] The evolutive interpretation of the ECHR derives from the 'object and purpose' of the treaty and is based on the original intent of the parties, while subsequent practice is linked to 'context' and presupposes a later – subsequent – intent.[51]

References to the European consensus in the case-law do not constitute a homogeneous group, the various labels applied by the Court cover different modalities: the more 'conservative' notions, such as European consensus,[52] common European standard[53] or common European approach[54] are more demanding, *i.e.* entail the presumption of a broad agreement among the member states in addressing a particular issue, and have a different impact on the interpretation of the ECHR than those describing an emerging consensus or a trend, be that European[55] or international.[56]

[48] Kanstantin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, Cambridge, CUP, 2015, 24.

[49] Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Antwerp, Intersentia, 2002, 199.

[50] See also: Ineta Ziemele, European Consensus and International Law, in Anne van Aaken and Iulia Motoc, *The European Convention on Human Rights and General International Law*, Oxford, OUP, 2017, 23–40, 24.

[51] Julian Arato, Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences, *The Law and Practice of International Courts and Tribunals* 9 (2010), 443–494.

[52] *Alekseyev v. Russia* 4916/07; 25924/08; 14599/09 (21/10/2010), para 83.

[53] *Shtukaturov v. Russia* 44009/05 (27/03/2008), para 95.

[54] *Sheffield and Horsham v. the United Kingdom* [GC] 22985/93; 233390/94 (30/06/1998), para 57.

[55] *Vallianatos and Others v. Greece* [GC] 29381/09; 32684/09 (07/00/2013), ECHR 2013-VI 131, para 91.

[56] *Christine Goodwin v. the United Kingdom* [GC] 28957/95 (11/07/2002), ECHR 2002-VI 1, para 85.

From the perspective of subsequent practice only the 'conservative' notion of consensus may be relevant; it requires a broad convergence among the member states, *i.e.* an almost established legal consensus. Besson argues that the European consensus "corresponds to a form of subsequent State practice or interpretative custom of the ECHR" and it is based on state practice and *opinio juris* similarly to customary international law.[57] However, as Ziemele notes, the ECtHR does not elaborate on what it means by consensus: subsequent practice or state practice coupled with *opinio juris*.[58] This paper proposes that linking the 'conservative' notion of consensus unequivocally to subsequent practice would benefit the Court: the higher standards required by the Article 31 (3) *b)* of the VCLT could discipline the use of evolutive interpretation and inject methodological rigor into the consensus inquiry. The broader convergence assumed by subsequent practice would not rule out occasional references to a trend or emerging consensus. These forms of "hypothetical consensus"[59] would remain supplementary means of interpretation within the meaning of the VCLT and may only be used to support interpretation based on other conventional methods and doctrines deriving from Article 31(1) of the VCLT.[60]

Finally, it is important to differentiate between subsequent practice that results – as shown above – in the modification of the ECHR and subsequent practice that is relevant for the interpretation of the scope of the right or the assessment of compliance with the limitation clause. From the point of view of international law in the former case the original intent of the states favoring evolutive treaty interpretation is not sufficient, it needs to be supported by further evidence substantiating *opinio juris* in the traditional sense, or express state consent (*e.g.* the signature of the relevant protocol in the cases on abolishing capital punishment).[61]

Conclusion

Recourse to the consensus inquiry has been subject to widespread criticism primarily for the lack of methodological discipline.[62] Subsuming certain forms

[57] Samantha Besson, Comparative Law and Human Rights, in Mathias Reimann – Reinhardt Zimmermann, *The Oxford Handbook of Comparative Law*, Oxford, OUP, 2019, 1231–1232.

[58] Ziemele, European Consensus and International Law, 36.

[59] Letsas, Strasbourg's Interpretive Ethic, 531.

[60] See also: Anja Seibert-Fohr, The Effect of Subsequent Practice on the European Convention on Human Rights. Considerations from a General International Law Perspective in Anne van Aaken – Iulia Motoc (ed), *The European Convention on Human Rights and General International Law*, Oxford, OUP, 2017, 61–82, 80–81.

[61] Seibert-Fohr, The Effect of Subsequent Practice, 80.

[62] See for example: John L. Murray, 'Consensus: Concordance, or Hegemony of the Majority?' in *Dialogue between Judges*, Strasbourg, CoE, 2008, 39.

of the consensus inquiry under subsequent practice and distinguishing their normative value on objective grounds, *i.e.* how consistent and common the state practice is, would add democratic legitimacy to its use: ultimately the solution elevated to the level of the Convention would verifiably originate from the member states. This approach is not new to the Court. In *Bayatyan v. Armenia* the Grand Chamber overruled the Convention organs' prior case-law on conscientious objection to military service – among others – on the basis that "there was nearly a consensus among all Council of Europe member States".[63] If one accepts – as Nolte submitted – that member states are aware of their obligations under the ECHR when they legislate on a certain issue and their actions follow from a "*bona fide* understanding of [their] obligations", embracing a standard deriving from national laws – pending that it is widely shared – with reference to subsequent practice leading to an evolutive interpretation is not at odds with state consent.

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[63] *Bayatyan v. Armenia* [GC] 23459/03 (07/07/2011), ECHR 2011-IV 1.

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FROM HARM TO OFFENSE: REFLECTIONS ON THE CONSTRUCTION OF SPEECH NORMS IN THE KARDASHIANS' REPUBLIC

András Sajó[1]

"We have become too civilized to grasp the obvious."
George Orwell

The following are to address a concern that troubles Károly Bárd's generation. We have lived through the vicissitudes of communism with the firm belief that certain assumptions about liberty (as envisioned by classic liberals like John Stuart Mill, or Isaiah Berlin[2]) are indispensable for building a free society. Now, we see with unease not only that liberty is in peril and much less desired than we had thought in communist days, but also that the foundations which we thought to be indispensable and correct, are replaced in a new cultural wave, creating new evidence, meaning and most likely, new (legal) norms. These new norms have the potential to jeopardize the liberty we had dreamed of – a value that is now endured as an inconvenience by declining generations. It is inconvenient for us too, frozen in time, yet in human history ideas tend to change under the increasing pressure of new circumstances and beliefs. The banality of this observation notwithstanding, it is worth reminding those witnessing such processes with great indignation that insisting on 'eternal truths' of their youth is complete rubbish and gibberish in the eyes of the new generation. This is not unlike the experience of those generations that preceded us (to which, like our parents, we now have more understanding, and conversely, we may even have some more understanding for the next generation, if for no other reason, hoping for their understanding.) The following remarks are merely to describe the transformation of the concept of harm and its impact on the generation of new standards governing social (and even legal) speech, transforming (narrowing) the idea of permissible and protected speech.

Today, an increasing number of people in Western societies are rejecting principles of the Enlightenment, in the belief that they still respect liberalism. They claim rights but refer to concerns not envisioned as rights in the past and consider methodologies and processes of decision-making, and evidence that were

[1] University Professor, Department of Legal Studies, Central European University, Vienna, Austria

[2] An author of considerable interest for Károly, see Bárd, Károly, A szabadság boldogító gyötrelme [The Joyful Suffering of Freedom], *Múlt és Jövő,* 3 (2017).

not acceptable under the Enlightenment's old canons of rationality. Freedom of expression is gaining new meaning, among others because harm means something different from what Mills considered to be harmful. Different rights, different harms, yet the very same words. Like many others of our generation, I have some arguments in favor of the old understanding of harm, but little does this matter. Each generation has an equal right to err. New communities and new terminology produce new norms. The dominant concepts of society change, often without any formal acceptance of these changes. These are much rather a matter of public sentiment instead, and sentiments are neither good, nor bad. They have an eroding effect (with erosion building up sand with the opportunity of constructing new sandcastles). The next generation will take these new meanings for granted. There is no guarantee that these new concepts will serve them better than adherence to old concepts and meanings. What matters from the socio-cultural perspective is acceptance. There can be better normative arguments within a culture, which indicate that the new concepts are inferior in underpinning an allegedly shared value, but that is secondary (even if relevant) from the point of view of social acceptance. When the better argument is too obviously superior, we will be told that the value underlying it is a false idol.

It seems to me that the currently prevailing Western social sentiments influencing society, with formidable impact on freedom of expression, are based on the denial of individual responsibility. The individuals are not responsible for their actions and for what they represent. The person is the product, victim and lucky winner of their circumstances: individuals are victims (in a world where people are imagined either victims or privileged), they are harmed by the 'structure' of society and not responsible for their own acts. Agency does not matter. Security (ensured through mild despotism[3]) and respect without merit are prioritized.

The CJEU invention of a 'right to be forgotten' is illustrative of the lack of interest in individual responsibility, even though what is to be deleted or made inaccessible is an official fact documenting one's illicit act, available in an otherwise existing public record.[4] But all this is of no consequence: it appears, it was in line with prevailing public sentiment. Instead, as Lord Devlin famously stated: 'What is important is not the quality of the creed but the strength of the belief in it.'[5]

[3] Alexis de Tocqueville, *Democracy in America*, Chicago, IL, University of Chicago Press, 2002, 663.

[4] *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González.* CJEU (Grand Chamber), 13 May 2014. The CJEU failed to look at the speech aspects of the matter (simply disregarding the views of the AG) and therefore the judgment is not only absurd in its consequences but also technically imperfect as a matter of proportionality analysis.

[5] Patrick Devlin, *The Enforcement of Morals*, London, New York, NY, OUP, 1965, 114.

This is certainly wrong from the perspective of moral philosophy. As a prejudice, it reinforces emotive argumentation, but it describes well what really matters for value changes (be they induced by moral arguments, interest, brain washing or an accident born out of social sentiment).

The erosive changes are perhaps most visible in the area of the freedom of expression (although the diminishing rights (or constant erosion) of the accused in the name of fair trial is also remarkable).[6]

While there are good moral and practical reasons for change, it was much rather the improper application of the principles that caused the injustices of the liberal order. Liberty was not equally distributed and the injustice resulting from this distortion and the disregard of liberal principles pushed many in an inferior status. However, my remarks below do not address the reasons for the changes coming about; instead, I focus on the transformation of the concept of harm, resulting in an upheaval in the regulation of speech.

On Harm

In the classic Millean concept, harm and other people's fundamental rights were the limits to fundamental liberty rights.

> *"The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others. His own good, whether physical or moral, is not a sufficient warrant."*[7]

In the Millean approach there are two considerations which, if jointly present, will justify coercive intervention of the state into liberty: harm caused to a liberty (right) of a person.

Harm for Mill (most likely) means a *direct* invasion of a liberty (or in a more restrictive approach: right) of another.

As for the second component in the Millean equation: it is liberty (most probably meaning a liberty right) of an actual person that is harmed.[8] What

[6] Károly is an expert on this matter and I do not intend to carry coal to Newcastle.

[7] John Stuart Mill, *On Liberty*, London, Penguin, 1985, 68.

Of course, penalists like Károly would attribute this position to Anselm Feuerbach. Mittermaier had enormous difficulties justifying the penalization of contraventions where the offense harmed a state interest.

[8] In an alternative formulation of the French Declaration of 1789 the limit of fundamental

amounts to a right remains contested. The understanding of what rights pertain to the individual certainly evolves with society.

Let's consider the Millean meaning and changes related to it, regarding first the right (liberty) that is harmed, followed by a survey of changes regarding the understanding of harm and its causation.

The right that is harmed

As mentioned above, in order to determine whether liberty, and in particular freedom of speech can be restricted, and even criminalized, or not, a right has to be affected (harmed). Fundamental (human) rights receive particular protection and the purpose (aim) of the limitation is subject to more demanding scrutiny. If fundamental rights are not a relatively closed list, then additional interference into liberty or rights will be possible. As the interpretation of the legitimate grounds for the restriction of fundamental human rights under the European Convention of Human Rights demonstrates, practically any right (including collective interests) may serve to restrict a fundamental liberty right in the name of protecting the rights of others (which are attributed equal weight in the case-law of the Strasbourg Court).

A further shift (related to 'sensitivity' which became an object of harm) is related to recent changes in the concept of 'others' in the context of the 'right of others.' Communal (a group of collective) interests are treated as the right of a specific member within, the collective entailing imaginary collectives. New sensitivities dictate the consideration of previously unheard of harm to unheard of right holders, among others the Earth (Gaia as opposed to humans, suffering the consequences of the damage to their environment) and animals. Not to my surprise,[9] the CJEU concluded that alleged suffering of animals in ritual (kosher) slaughtering is a sufficien "right of others" to restrict the freedom of religion of religious Muslims and Jews who eat halal/kosher meat.[10]

(human) rights is the *fundamental* right of others (and not any right or (even collective) interest presented as a right.

[9] The judicial nonchalance in this matter was a long time ago present, see *Cha'are Shalom Ve Tsedek v. France*, Application no. 27417/95. 27 June 2000.

[10] Judgment in Case C-336/19. *Centraal Israëlitisch Consistorie van België and Others.* (In order to promote animal welfare in the context of ritual slaughter, Member States may, without infringing the fundamental rights enshrined in the Charter, require a reversible stunning procedure which cannot result in the animal's death.)

Harm and its competitors

As mentioned above, Mill's standard understanding of harm is that it is direct and substantive, an actual impediment to liberty, the exercise of a right. Legitimate harm (a harm that is caused lawfully, for example originating from a true, or lawful statement) is no ground for restricting speech. If the famous corn dealer is accused of speculation and suffers a financial disadvantage, that is no ground restricting speech (unless the opinion expressed is libelous).

Harm is contextual. Smoking, as long as it causes harm to the smoker only, cannot be restricted, for there is no harm to the right of others, self-harm pertaining to the scope of autonomy. However, where health care is socialized, extra health care costs due to smoking justify intervention, since it causes harm to the financial interests of the health care community (unless this is covered by extra contributions of the smokers in their health plan). But even where there is harm to others, in light of proportionality considerations criminal sanctions are not necessarily appropriate. The smoker is using his liberty right, but the acts of disapproval (including coercive measures of the state and social sanctions like stunning and reprobation) are not acts of disrespect: these are the legal and social consequences of his autonomous choice, foreseeable and not arbitrary per se.

Smoking has a high likelihood of causing harm to bystanders and (in the form of externalities) to society through self-harming, yet the relationship (causation) can be very indirect or even speculative.

It is argued that smoking and drugs, or (compulsive) gambling harms the family. But such assumptions are speculative regarding identifiable individuals, even if statistically well founded. In some families the causal effect is demonstrable (as gambling impairs the family livelihood); in other families it is non-existent. Statistical assumptions hardly satisfy the individualized harm concept; the general prohibition of a self-regarding harm due to cumulative probabilistic effects is statistical paternalism. But this remains a fundamental contradiction of Mill, who besides individual actual harm as the only basis for coercive restriction, recognizes collective self-preservation and therefore, implicitly, the collective being harmed (or running the risk of harm).

Of course, it is hardly objectionable to create a barrier or a bump to reduce the number of road accidents or to put in place work safety measures (even if this limits the freedom of the entrepreneur owner and even that of the employees who would like to increase their productivity as a matter of choice by disregarding the safety measure that makes their work more cumbersome).[11] Liberty is limited (though not in excessive way as liberty aims can still be achieved) to reduce

[11] I follow here Joseph Raz, *The Morality of Freedom*, Oxford, OUP, 1986, 378.

harm – even if this is partly self-inflicted harm. However, even in this context, social conventions will determine what is excessive (society does not tolerate a general motorway speed limit of 30 miles per hour which would probably be held suboptimal, once society accepts a certain number of road accidents). The bottom line is that harm, even death is accepted. But this does not necessarily contradict the harm principle which does not say that harm must be prevented by the state (though it may be prevented, even by coercion) but only that (fundamental) liberty rights cannot be infringed by coercion. The hypocrisy lies elsewhere: modern European human rights law insists on a quasi-absolute obligation of the state to protect life (and, implicitly, security) and this is endorsed (without thinking of all the socially accepted or stipulated exceptions) by the social state (the mild despot). But this is not the topic of this short essay, though it has grave consequences for the scope of admissible interferences may.

Turning to the subject of grounds for criminalization, the Millean harm principle was revised and challenged over the last 150 or so years. Feinberg, still within the liberal paradigm, argued that (*inevitable*) offense to others is also sufficient grounds for restrictive state intervention.

The harm/offense dilemma in law can be illustrated by reference to some seminal demonstration and sensitivity cases. In *Skokie*[12], a 1977 demonstration permit case, the municipality found a planned march of a small group of neo-Nazis unlawful for inciting violence, hatred, abuse or hostility toward a person or group of persons by reason of reference to religious, racial, ethnic, national or regional affiliation. The ban was found to be in violation of the freedom of speech of the Neo-Nazi group's members. There were numerous Holocaust survivors living in the city of Skokie and a great many locals and other people were outraged; some locals claimed that they are afraid and the sight of Nazi symbols caused them emotional stress given their terrible lived experience under the Nazi regime. From the perspective of harm, the legal issue was whether the ethnic group was actually harmed (was there harm to be prevented in view of the alleged incitement)? Was offending the feelings of the specific target audience not harm in itself? This was not a concern for US legal analysis. The First Amendment interpretation did not allow for the consideration of the target's emotional response. The underlying idea is that considering offense (the speech effect on the target) opens the floodgates of sensitivity, with the potential of subsequent abuse, rendering a personal (idiosyncratic or abusive) *feeling* sufficient to silence speech. This is how the prejudice of regulators prevails, just like in the case

[12] *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978); *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977).

where 'pornography'[13] or other unpopular content is considered to be "offensive" to morals or other sensitivities. In this logic, harm is replaced with systemic harm (comfortably replacing moral impacts). Such systemic harm typically involves a feeling of oppression among members of a group. This is exactly where we arrived at with the criminalization of hate speech in Germany. The reason why speech (or other liberties which are fundamental or human rights, for that matter) is protected gets completely lost in the process of expanding the concept of harm. (See also speech restrictions in matters of privacy, and the protection of personality rights which was used in post-communist countries to forego disclosing the name of denunciators (moral wrongdoers).

The trend is rather clear, but distinction between direct Millean harm and other harms and offense remains blurred. In *Skokie* the effect of the march is arguably close to individual harm as the march displaying the swastika targeted an actual audience of victims and arguably, the Holocaust survivor audience members suffered grave emotional distress at the sight of the swastika. But there was no indication that physical harm will occur. The march of an organized anti-Roma mob in the Hungarian village of Gyöngyöspata is a borderline case:[14] the local Roma were not victims in the sense of the Skokie Holocaust survivors, but were part of a group that was subject to systematic prejudice. Those marching acted in a way that was found to amount to real threat. The European Court of Human Rights (ECtHR) found that the criminal conviction of those participating in the march did not violate the freedom of expression. When compared with political speech propagating anti-migrant policies (expulsion, reduced welfare etc.) where there is no harm, only calls to deprivation of benefits in the future: these qualify as hate speech (advocating for discrimination or discrimination) in many jurisdictions and are not protected, perhaps for harming „dignity".[15]

The paradigmatic example for offense to sensitivity as grounds for restricting speech is *Otto-Preminger-Institut v Austria*.[16] In this case, the ECtHR found that the mere existence of a private showing of a blasphemous film that may be viewed by a few willing Austrians sufficed for a criminal offense in view of the fact that 95 percent of Tirolians are Catholic. The possible or imagined disapproval and dislike sufficed for an offence, and once there was an offense, sanctions applied.

For Waldron, the offense in most of the above examples amounts to harm because they make life more difficult for those insulted. Well, the essence of

[13] In matters of pornography the negative impact on society (and minors in particular) is considered, either as a matter of offended moral feelings or a matter of public morality. But pornography as such is generally not considered as protected speech.

[14] *R.B. v. Hungary*, Application no. 64602/12, 12 September 2016.

[15] *Féret c. Belgique* (Requête 15615/07), 17 Juillet 2009.

[16] *Otto-Preminger-Institut v. Austria*, (13470/87) [1994] ECHR 26, 20 September 1994.

impactful speech is that it is inconvenient. Life is a tough place, especially when people are hunting for signs of disrespect. But for Waldron, the message of hate speech is that "[t]he time for your degradation and your exclusion by the society that presently shelters you is fast approaching"[17] and hence, it is harmful. In this approach, the meaning of harm is extended and causation is replaced with speculation to condemn speech that is considered to be "incorrect" (equivalent to "the destruction of the moral fabric of society" in past sexually prudish times).[18] The reason for such extension of harm is that the speech denies the equality of the group's members, bringing them into harm's way. This consideration resonates well with a basic assumption of constitutional democracies, namely, that all citizens are equal (and have an equal right to respect). However, notwithstanding this natural inclination to support the fundamental assumption of democratic government, it does not follow that a position contrary to this fundamental assumption of equality causes any specific harm and is grounds to apply criminal sanctions – as it happened in *Féret,* mentioned above. Waldron would most probably not insist on punishing hate speech if it is not addressed to a victim group. Meanwhile, for other scholars it suffices that an offense causes a feeling of degradation and exclusion (by perpetuating feelings of inferiority), and therefore the expression of such ideas shall be criminalized in all circumstances.

The direct harm principle is subject to social criticism. In view of its arguably narrow scope, there were serious shortcomings in the application of the principle, partly because certain socially important interests and concerns were not

[17] Jeremy Waldron, *The Harm in Hate Speech*, Cambridge, MA, Harvard University Press, 2012, 96.

[18] According to David Leebron, President of Rice University, "The deliberate use of such terms as 'the China virus'" foster bigotry that played a significant role in the increase of attacks against Americans of Asian origins, https://boniuk.rice.edu/, accessed 14 May 2021. The statement was made in the context of a series of murders that many people claimed that were racially motivated with no conclusive evidence at the time of the statement. Of course, President Leebron's position is not the position of the law, but this train of thought illustrates how legal concepts change. With the increasing world-wide endorsement of criminalizing "hate speech" speech that allegedly promotes bigotry will on the long run be proscribed as harmful (in the current legal categories as being inciting). The cultural shift occurs in an environment where victim groups compete and where it is believed (perhaps rightly) that the winning argument is the pain of any given community and the assumption that offensive and disrespectful speech is harmful because it 'takes the voice away from the community", given that the speech offensive to a group (a minority, or even majority) is frightening and demeaning to the extent of silencing (members of the group being afraid or humiliated to the extent that the member will not express their views.) I mention this only to illustrate how far ordinary speech codes or social construction of appropriate speech moved from Mill's harm principle. It is possible that the prevailing First Amendment understanding of judges in the US will resist this change but certainly there will be and already is a cost on the legitimacy of the law that resists social self-perceptions of vulnerability.

considered to be affected rights and therefore, even if there was state inflicted harm (even through neglect) or harm caused by a third, private party to these interests, it did not figure in the context of application. For those concerned by a specific social injustice, the state failed to intervene to prevent/counter/punish harms which affected large segments of society, since these were held by the liberal government to be non-existent harms. Note that these social justice concerns were based mostly on social class, while today, social justice is a matter of identity, moreover: grievance-based identity. For a social justice concern animated by identity claims, the assumption of neutral speech regulation and the anathema of content-based discrimination are simply illusions or cultural blinders, dictated by some kind of elite interest of domination.

According to the social justice-seeking criticism, the Millean understanding of harm enabled and sanctioned a socially biased and prejudiced, narrow concept of harm, to the detriment of certain groups whose typical harm was disregarded (or the group itself was disregarded, as in the case of slavery). The harm of rape, for example, was recognized, but not that of marital rape, or the traditional concept of marriage rejected the idea that the denial of the right to marry caused harm to homosexuals, etc. Disadvantaged groups insisted on an extended understanding of harm, to include, in particular, harm to their social standing. The concept of direct harm is therefore considered to be insensitive to (group) vulnerability. Victimhood became the trump card in a world where guilt was cultivated in a system of inherited bad consciousness.

In this process, all discontent and grievance is presented as a matter of harmed right, with a considerable extension of the idea of harm. Harm became extended and subjective, and as such, determined by those who claimed to suffer it and not by any objective standard that the alleged victim and the person causing the alleged harm can share. Harm is what people *perceive* as harmful or injurious to them or their group. Indeed, what is considered as harmful to the group is now presented as harm to the member of the group. Injury is their privilege, in the sense that they are the only ones who can determine its existence, with the perpetrator being unable to even notice this harm from his dominant social position.[19]

A spectacular example for the prevalence of this subjective understanding of harm was the Assange extradition case for violation of the US Espionage Act, where the Westminster Magistrate court denied the US request, finding that the

[19] In an alternative extension of the concept of harm, harm occurs when dignity is impacted challenging the equal worth of the person. Meir Dan-Cohen, Defending Dignity, Meir Dan-Cohen, *Harmful Thoughts: Essays on Law, Self and Morality*, Princeton, NJ, Princeton University Press, 2002, 150–171. Dignity is allegedly a common, shared concept but its vagueness results in an arbitrariness that is comparable to that of subjective understanding harm.

American prison system could not guarantee the prevention of Assange's suicide.[20] The fact that the harm (suicide) is Assange's choice and that there is no evidence that extradited prisoners are being put into conditions forcing them to inevitably commit suicide, and that the ECtHR has not found in other cases that extradition to the American prison system was unsafe, was of no concern. There was no actual danger of suicide and even the distant possibility was subject to contradictory medical expert testimony. What matters here, for our purposes, is that human agency is no longer considered to be relevant.

A specific new understanding of harm that will be crucial for limiting freedom of expression originates from the introduction of the concept of systemic or structural harm.[21] In this logic, group status is injured by hypothetical consequences for the group member who feels injured because the group (or even organization) is harmed. (A traditional form of this type of harm goes back to feudal status and its legacy: the honour of the army depends on the individual reputation of officers, an approach still recognized under German law.[22])

In a further step away from the harm principle, rights or liberties can be restricted, even coercively, to advance social goods, in particular happiness and social justice. Harm is not part of the equation. This understanding stems from a specific understanding of the function of the state. It can be argued that even Mill, the good utilitarian that he was, was in favour of taking measures (albeit not necessarily coercive measures) for the greatest happiness of the greatest number. While liberals later denied the admissibility of a state promotion of happiness, particularly by coercively restricting rights, since the state does not know what amounts to happiness for individuals, a pragmatic liberal compromise was nevertheless accepted in constitutional welfare states. While the state (especially where its action is endorsed by the democratic process) may promote collective goals, at a minimum, coercive state activity must respect fundamental individual rights. The practical debate centres on the question of to what extent (and what rights).

I am not arguing that the uncertainties regarding harm beyond the core are necessarily originating in arbitrariness nor that they are not self-serving. Harm is always socially construed. Further, there can be reasonable disagreement on the evidence of harm (what is the evidence of harm, how much evidence must

[20] https://www.judiciary.uk/wp-content/uploads/2021/01/USA-v-Assange-judgment-040121.pdf, accessed 14 May 2021.

[21] SCOTUS does not recognize actual responsibility for this type of harm. *Milliken v. Bradley* (418 US 717, 1974). On structural injustice, see Iris Marion Young, *Responsibility for Justice*, New York, NY, OUP, 2011.

[22] BVerfGE 93, 266 (*Soldaten sind Mörder* case).

be provided), and, of course, there is (to some extent) reasonable disagreement[23] surrounding the values and rights that are important or relevant for harm, as well as the reasons for inflicting harm (e.g. an epidemic requires restrictions, although the risk of harm may be speculative (statistical) and the victims cannot be identified *ex ante*). A growing sensitivity to dignity interests prevails.

Thanks to a cultural shift towards demands for an unconditional recognition of identity, i.e. to be what one believes himself to be, without consideration of merit, a slow and hardly visible erosion was already underway when the coming of the internet and social media suddenly challenged the freedom of expression paradigm in a fundamental way. It is asserted that the shift originates in the new structure of internet-based communication, and social media in particular, where many more speakers reach larger and larger, somewhat random audiences, without the built-in social control that managed past forms of communication, the values, rights and interests elevated to rights included, at least partly, to the already canonized list. However, the cultural and personal sensitivity that was already at work is equally important and the social media merely reinforces this narcissistic change. Sensitivity dictates the subjective understanding of harm because the vulnerability-centred, anti-meritocratic world of sensitivity is comfortable and hence, attractive. Consider the example of the wife of the actor Alec Baldwin who became a celebrity for inviting "social media followers into her home life with Alec Baldwin and their five fair-haired young children by routinely sharing images like her underwear-clad workout routines, innumerable pregnancy selfies and the sponsored diaper-ad videos of her infant son."[24] Her Instagram followers felt offended by the fact that her body looked too good for her age and she rumbled that she became a victim of body shaming, while her followers started an anti-Baldwin campaign digging into her (alleged) Spanish origins, a matter that earned her innumerable attacks and further publicity. The arguments in the competition of being harmed are not exactly a matter of freedom of expression nor of privacy, dignity or anything worth the ink and interest spent on it – but this is the basis for the restriction of speech (here, primarily in the non-legal sphere, but who knows who will sue whom?)

What is happening here is the censorial victory of increased social sensitivity: in the world of the internet everybody feels offended (with being offended providing a cheap moral high ground). This generalized sense of offense pushes

[23] See John Rawls, *Political Liberalism, The burdens of judgment*, New York, NY, Columbia University Press, 1993, 56–57.

[24] Katherine Rosman, Hilaria Baldwin: The strange story of Alec Baldwin's wife and her 'fake Spanish roots', *The Irish Times* (4 January 2021), https://www.irishtimes.com/life-and-style/people/hilaria-baldwin-the-strange-story-of-alec-baldwin-s-wife-and-her-fake-spanish-roots-1.4449271, accessed 14 May 2021.

public sentiment towards censorship, a position that is welcomed by democratic and non-democratic governments alike, eager to produce censorship upon popular demand. Of course, the less democratic a government the more enthusiastic it will be to protect its population from offensive speech. The reasons for speech overprotection are easily forgotten in a Kardashian republic.

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LEGAL THINKING ABOUT OUR EDITED SELF

Judit Sándor[1]

The Age of Biotechnology

The first draft sequence of the human genome was reported 20 years ago in the scientific journals *Nature*[2] and *Science*.[3] Back then, in 2001, the 21st century was already being heralded by many, optimistically, as the century of biology. Nevertheless, unlocking the secrets of the human genome has brought not only scientific success but also numerous ethical issues. We also reached a new phase of the textuality of genetics, as we use letters to describe gene sequences, and scientists refer to the codes obtained this way and eventual mutations using letter codes. This marks the beginning of genetic literacy as well.

The term *eugenics* was used by Francis Galton as early as in 1883.[4] It has gained several connotations over time and has been misused in ways that led to great human tragedies, but it was also seen by many as a positive step. Since the beginning of the 20th century, though in different waves, sometimes wandering astray and with numerous detours, human genetics has been growing vigorously and, thanks to the Human Genome Project, it has influenced almost all areas of medicine.

In human imagination, fantasy and literature, artworks related to this topic, and which still shape our thinking, genetic interventions had appeared long before modern genetics started to flourish. The first example to mention can be Mary Shelley's *Frankenstein*, written in 1818, which still serves as a reference in ethical debates. Since then, all irresponsible experiments on human subjects have been associated with the term 'Frankensteinian'.

Huxley's *Brave New World*, his modern classic that has been translated into many languages, was published in 1932. The list may be continued with the "Geneticists'

[1] Professor at the Faculty of Political Science, Legal Studies and Gender Studies of the Central European University (CEU)

[2] International Human Genome Consortium, Initial Sequencing and Analysis of the Human Genome, *Nature* 409 (2001), 860–921.

[3] Craig J. Venter – Mark D. Adams – Eugene W. Myers – Peter W. Li – Richard J. Mural et al., The Sequence of the Human Genome, *Science* 291 (2001), 1304–1351.

[4] Nicholas W. Gillham, Sir Francis Galton and the Birth of Eugenics, *Annual Review of Genetics* 35 (2001), 83–101.

Manifesto", an influential proclamation written in 1939.[5] Eugenics, experiencing a revival before the war, covered almost all areas of life, including psychiatry, child education, reproduction, sterilization and selective murder of people under the name of euthanasia. Selective murder and interventions committed in the name of eugenics cast dark shadows over genetics and still urge caution. However, the discovery of the double-helix structure of DNA by James Watson, Francis Crick and Rosalind Franklin in 1953 brought new momentum to the development of genetics.

Embryo research was eased by the birth of Louise Brown in 1978[6], the first human to have been born after conception by in vitro fertilization and embryo implantation. The first in vitro interventions were followed by, the Human Genome Project[7] and the first cloned mammal, Dolly the Sheep[8], was born in 1996, although her birth was officially announced only in 1997. Cloning made biotechnology's achievements tangible and, as a result, 1997 became the golden age of setting standards for bioethics. The Oviedo Convention[9], UNESCO's Universal Declaration on the Human Genome and Human Rights[10], was adopted. The movie *Gattaca*[11], which foresaw a caste system of society based on genetic traits, was also released that year. From then on, news stories on genetics have been published on an almost daily basis and ranged from the announcement of the first draft of the human genome to the *en masse* emergence of biobanks.

Naturally, there have always been periods of setbacks, failures, and ethical fiascos. After Jesse Gelsinger, a young participant in the first gene transfer trial, died in 1999,[12] at least for a decade gene therapy had become a black label. Researchers

5 Leonard Darwin, The Geneticist's Manifesto, *The Eugenics Review* 31 (1940), 229–230, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2962351/pdf/eugenrev00238-0033.pdf.

6 Louise Brown, on 40 years of IVF: 'I was the world's first IVF baby, and this is my story', *Independent* (25 July 2018), https://www.independent.co.uk/life-style/health-and-families/ivf-baby-louise-brown-story-test-tube-world-first-40th-anniversary-a8455956.html.

7 Beginning on October 1, 1990 and completed in April 2003, the HGP gave the possibility for the first time, to read nature's complete genetic blueprint for building a human being.

8 The birth of Dolly was important because she was the first mammal to be cloned from an adult cell. Her birth proved that specialized cells could be used to create an exact copy of the animal they came from.

9 Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine ETS No.164

10 UNESCO: Universal Declaration on the Human Genome and Human Rights, http://www.unesco.org/new/en/social-and-human-sciences/themes/bioethics/human-genome-and-human-rights.

11 *Gattaca* is an American dystopian science fiction film written and directed by Andrew Niccol.

12 Meir Rinde, The Death of Jesse Gelsinger, 20 Years Later, *Distillations* (4 June 2019), https://www.sciencehistory.org/distillations/the-death-of-jesse-gelsinger-20-years-later.

failed to inform Jesse about the earlier patients' side effects or about the fact that two lab monkeys were killed by the high doses of adenoviruses.

In the field of genetic based therapy, we reached the latest stage of progress a few years ago, but this might be one of the most significant milestones so far. In fact, having a vast knowledge of the genetic background of certain human diseases, of stem cell research and of cell reprogramming is not enough if we cannot apply these technologies to cure people or eliminate certain biological threats. Without clinical application, these remain only interesting scientific achievements to be published; however, clinical applicability is crucial for mankind.

This is the area in which gene editing provides opportunities, by correcting the gene segments responsible for a predisposition to our diseases. Although it is similar in many ways to gene therapy, gene editing opens new horizons. The most well-known gene editing technique is CRISPR[13]. The term CRISPR was first used by the Spaniard Francisco Mojica in 2000 and it is an acronym that refers to the organization of short, repeated DNA sequences found in the genomes of bacteria. Although several journals rejected his publication as not interesting or required more laboratory proof, finally in 2005, he and his colleagues managed to publish his paper.[14] CRISPR is based on the molecular defense system in bacteria. It was known that the CRISPR defense system is found in many bacteria, but only much later was it discovered that it can be used as genetic scissors.

To use a more illustrative metaphor, gene editing works a bit like Microsoft's "replace text" feature. After writing a long text, it is not uncommon that we change our minds and decide to replace an expression with another that fits better. The replace text feature can be very useful in these cases. It searches through the text for the words to replace and it replaces them with one click. In any case gene editing, unlike "gene manipulation" or "gene engineering," is a friendly term that is followed by international curiosity and hope rather than fear.

[13] CRISPR is the abbreviation of the term Clustered Regularly Interspaced Short Palindromic Repeats. The discovery of the type II prokaryotic CRISPR "immune system" has allowed for the development for an RNA-guided genome editing tool that is simple to use.

[14] Francisco J.M. Mojica – César Díez-Villaseñor – Jesús García-Martínez – Elena Soria, Intervening Sequences of Regularly Spaced Prokaryotic Repeats Derive from Foreign Genetic Elements, *Journal of Molecular Evolution* 60 (2005), 174–182.

Pride and Prejudice

At the end of November 2018, Chinese researcher He Jiankui revealed the birth of the first gene-edited babies, Nana and Lulu.[15] The babies' names, of course, are pseudonyms; the twins' birthplace and their real names are unknown. He Jiankui's glory did not last long, as even the Chinese authorities have since distanced themselves from experimental interventions in human subjects. It seems that the first announcement of a new biotechnological method is often scandalous, and the research results are surprising. Racing to be the first always involves keeping secrets from competitors. However, He Jiankui was not in a competitive position, as scientific consensus at the moment is against this kind of intervention; besides, the intervention was not even justified.

He Jiankui announced his work on gene editing at the Second International Summit on Human Genome Editing, in Hong Kong, on November 25, 2018. The news was treated as a scientific success, but not long after the announcement several experts on bioethics suggested that such a surprising transformation could only occur if ethical approval procedures were ignored. It turned out that transparent ethical procedures indeed did not take place. Human gene editing, like many other biotechnological innovations, involves terminological novelties, too. In this case, changing the previous terms *genetic manipulation* or *genetic modification* to *gene editing*, also changed the connotation and suggested a much smaller intervention or correction with a better result.

In all, 22 embryos were gene-edited, and 11 embryos were used in six implantation attempts before Nana and Lulu were born. The procedure can raise many kinds of ethical concerns. One of them was the result they wanted to achieve by gene editing. The intervention's goal was to confer genetic resistance to HIV.

Dr He claimed that he received approval from Shenzhen Women and Children's Hospital, but he failed to obtain authorization from his university or the four other hospitals from which some of the gene-edited embryos came. Even though the couples participating in the experiment were informed, the focus of their consent was much more on the copyright of photographs of the unborn babies than highlighting the novelty of the procedure. Is it appropriate to ask for the public's help in the acceptance of a scientific announcement instead of going through prior professional challenges? Although He made an attempt to publish his results in a scientific journal a few days before the Hong Kong Summit, the CRISPR Journal, founded not long before, had no idea that the babies had actually been born.

[15] BBC News, He Jiankui Defends 'World's First Gene-Edited Babies, *BBC News* (28 November 2018), https://www.bbc.com/news/world-asia-china-46368731.

The public knows relatively little about the birth of Nana and Lulu. The mother gave birth by emergency cesarean section. The twins' birthplace was not made public; all we know is that He Jian-kui left by plane to be there at the time of their birth. The goal of the procedure was to make the babies resistant to HIV. Therefore, on one of the babies' genes, the so-called CCR5 located on chromosome 3, He artificially created a CCR5Δ32 allele, with the help of the CRISPR "scissors".[16] In order to contract HIV, it is necessary to have a functioning CCR5 gene. Therefore, the aim of the experiment was to alter the function of this gene.

As a result of the international outrage following the incident, the case was also subject to court proceedings. That is how it emerged that a third child was also born. A court in Shenzhen found that He and two collaborators forged ethical review documents and misled doctors into unknowingly implanting gene-edited embryos in two women. The twins were born in November 2018, but it has not been made clear when the third baby was born; in fact, no information at all has been provided about the third child. He was sentenced to imprisonment and fined 3 million yuan (350,000 £). Experts from all over the world agreed that there are safer and more effective ways to prevent HIV infections. The experiment was deemed irresponsible, premature and unjustified, because it exposed the babies to risks associated with gene editing without any benefit.[17]

Professional and Ethical Responses

China's first reaction stressed He's success and its pride in the great accomplishment of Chinese science, but the general climate had changed by November 26, as a group of 122 Chinese scientists and ethicists published a joint statement through a Chinese application, calling the experiment 'crazy' and asking for serious penalties to be applied against him.

They also emphasized that it is forbidden to conduct such an experiment on human beings. Subsequently, many other Chinese scientists condemned the experiment. On November 26, the Chinese government opened an investigation and referred to the violation of several regulations, but it has not been made at all clear which laws were broken by He's work. On November 29, the Vice-Minister

[16] Myles W. Jackson published a rather interesting book on the history of CCR5 gene and Delta 32 allele, which is of great importance for both understanding how HIV infections develop and curing them. See Myles W. Jackson, *The Genealogy of a Gene*, Cambridge, MA, The MIT Press, 2015.

[17] Kiran Musunuru, Opinion: We Need to Know What Happened to CRISPR Twins Lulu and Nana, *MIT Technology Review* (3 December 2019), https://www.technologyreview.com/2019/12/03/65024/crispr-baby-twins-lulu-and-nana-what-happened/.

of Science and Technology issued an order to suspend any work at He's laboratory. After He left the summit on gene editing, he went to an unknown destination and all kinds of rumors spread about his whereabouts.

There are a number of professional and ethical concerns regarding the intervention. For example, He disabled a completely healthy gene in order to reduce the risk of a disease that the children did not even have and that could have been prevented by antiviral drugs and safe sex. Even if the experiment was successful, disabling CCR5 does not guarantee full immunity to HIV infection, because some strains may enter healthy cells through another protein.

According to Kiran Musunuru, many scientific objections may be raised against He's experiment.[18] The most pervasive one is the mosaicism in the twins, which means that the gene editing did not lead to consistent outcomes in the cells and the interventions carried out influence the various cells of the children. in different ways. Moreover, only half of Lulu's CCR5 genes were edited; it appears that the other cells are all intact.

The Chinese gene-edited baby case was in front of the People's Court of Nanshan District, Shenzhen, Guangdong Province and the judgement was held on December 30, 2019.

The court found that He Jian-kui and others committed a crime of "illegal medical practice", sentenced to a fixed-term imprisonment of 3 years to probation, and a fine of 3 million yuans. Although the reference to *illegal practice* usually means that medical activity was conducted without license, it is not entirely clear what was the basis of the criminal proceeding in the Chinese law. Nevertheless, in December 2020 China modified its criminal code to adopt a ban on *changing the human genome*. In the new amendment[19] "Illegal medical practices" were added to Article 336, which includes "the implantation of genetically edited or cloned human embryos into human or animal bodies, or the implantation of genetically edited or cloned animal embryos into human bodies." This amendment entered into force on March 1, 2021. This new law has no retroactive effect but clearly indicates that China would like adopt international standards of genome ethics in the future.[20]

[18] The view from inside the 'medical scandal' of China's gene-edited babies. In a Q&A, geneticist Kiran Musunuru describes his unintentional connection to the scientist behind the scandal and the book that came out of the experience available online at https://penntoday.upenn.edu/news/Penn-geneticist-offers-perspective-from-inside-medical-scandal-chinas-gene-edited-babies.

[19] Amendments to the Criminal Law of the People's Republic of China (11) (Adopted at the 24th meeting of the Standing Committee of the 13th National People's Congress on December 26, 2020), in this revision Act (article 39), a new article 336-1 were added.

[20] I am very grateful to Yao-Ming Hsu for his kind help with the clarification of the relevant Chinese law.

What Are the Legal Aspects of Gene Editing?

Gene editing raises numerous legal questions, one of them being whether it is possible to make a legal difference between specific versions of gene editing. Who decides on what is considered a disease or an anomaly, which diseases are worth being corrected, treated and improved and which ones can be? What kind of social implications will gene editing have when it becomes widely available?

Some normative distinctions have been made already in the case of gene therapies, separating somatic and germline interventions. Somatic gene therapies involve modifying a patient's DNA to treat or cure a disease caused by a genetic mutation.

While somatic gene editing affects only the patient who is being treated (and only a part of his/her cells), germline editing affects every cell of the organism, including eggs and sperm, and this way the edited characteristics are passed on to the future generations. At the moment, it is difficult to foresee its possible consequences.

Human germline genome editing means deliberately changing the human genome (not only a single cell) that will become a characteristic of the child to be born. Human germline editing modifies the genome of a human embryo and it may affect every cell, which means it may have an impact not only on the person to be born, but also on his/her future descendants. Because of this, the clinical application of germline editing is banned in the United States, Europe, the United Kingdom, China and many other countries.

Although Article 13 of the Oviedo Convention (1997) was not drafted to respond to the issues of gene editing – at that time nobody knew of this procedure – the distinction it makes is also applicable for gene editing. According to the Article, "*an intervention seeking to modify the human genome may only be undertaken for preventive, diagnostic or therapeutic purposes and only if its aim is not to introduce any modification in the genome of any descendants*."

The Committee on Bioethics of the Council of Europe reaffirmed this important distinction[21]; however, in the future, it is questionable whether it is right to maintain the ban on germline gene editing completely, even when it becomes completely accurate and safe. Must a serious genetic disease be treated generation by generation if it could be cured once and for all?

Among bans on interventions, it is important to mention Article 14 of the

[21] "Ethics and Human Rights must guide any use of genome editing technologies in human beings" Statement by the Council of Europe Committee on Bioethics available online at: https://www.coe.int/en/web/portal/-/-ethics-and-human-rights-must-guide-any-use-of-genome-editing-technologies-in-human-beings-.

Oviedo Convention, which bans sex selection: "The use of techniques of medically assisted procreation shall not be allowed for the purpose of choosing a future child's sex, except where serious hereditary sex-related disease is to be avoided."

The other normative anchor is to examine the purpose that such an intervention could serve. Although it is difficult to establish it legally, it is important to define the difference between a disease to be cured and an anomaly. Who decides about what is considered a disease or an anomaly, and which diseases are worth correcting, treating and improving?

Enhancement and performance enhancing have become accepted in many fields; it is enough to think about the improvement of vision through eye surgery, or the numerous – legal and illegal – means of performance improvement in sport.

Julian Savulescu and his colleagues believe that most of the leading athletes are born with a genetic advantage; consequently, they claim that genetically enhancing athletic performance is completely legitimate, as elite and competitive sport above a certain level is all about competition between genetic advantages anyway.[22] Obviously, diligence and a lot of training are essential but, according to Savulescu, in this case, genetic intervention in order to enhance performance can be justified.

Therapy or Enhancement?

During the application of new procedures, one of the most controversial topics is how to set the boundaries between therapy and enhancement. Russian biologist Denis Rebrikov, for example, offered his help in gene editing to allow deaf couples to give birth to children without a genetic mutation that impairs hearing. Rebrikov emphasized that he will implant gene-edited embryos only if he receives regulatory approval. The community with hearing disability, nevertheless, may regard this offer as an indication that their identity needs to be gene-edited. For them gene editing may be regarded not as a desirable therapy but rather a form of intervention that emphasizes their disability. On the other hand, those who advocate for enhancement of different capabilities in sport and other fields of life may welcome gene editing as a form of enhancement.

According to a survey on gene editing, conducted by the Pew Research Center in 2018, 54% of respondents thought that people will use gene editing in morally unacceptable ways. Furthermore, about seven-in-ten Americans (72%) were on the opinion that changing an unborn baby's genetic characteristics to treat a serious disease or condition that the baby would have at birth is an appropriate

[22] Françoise Baylis, *Altered Inheritance,* Cambridge, MA, Harvard University Press, 2019, 58.

use of medical technology, while 27% of the respondents say this would be taking technology too far. [23]

It is an even more complex moral question what constitutes an editable genetic anomaly. For instance, there are autistic individuals in the upper spectrum with exceptional mathematical creativity. An artist might suffer from several mood disorders, but in some ways, this is what feeds their artistic creativity. It can be concluded that neurodiversity is also an important value.

Genome research and gene editing raise numerous ethical, legal and social questions, many of which – including privacy issues, informed consent and the equitable representation of participants – are still unsolved. Furthermore, the availability and open distribution of genomic data is still uneven.

In 2018 The Nuffield Council's 205-page-long report reflected on the social and ethical issues related to genome editing in a more venturous way than any previously published ethical or legal statements.[24]

By 2019 almost all relevant international organizations and professional societies issued a statement or a declaration on genome editing. In September 2020, the American National Academy of Medicine and the Royal Society of Great Britain published a report entitled *Heritable Human Genome Editing* (HHGE).[25] The HHGE Report does not recommend a moratorium on research. Instead, it clearly delineates six categories of potential clinical applications of HHGE and indicates that only two of those could be considered today. HHGE may be applied initially for only the most severe monogenic diseases and in a limited number of situations. I think in the future, indeed the sharp distinction between the somatic and germ line editing should be revisited.

[23] Cary Funk – Meg Hefferon, Public Views of Gene Editing for Babies Depend on How It Would Be Used, *Pew Research Center* (26 July 2018), https://www.pewresearch.org/science/2018/07/26/public-views-of-gene-editing-for-babies-depend-on-how-it-would-be-used/.

[24] The report includes the discussion of various ethical issues that arise in relation to the prospect of genome editing becoming available as a reproductive option for prospective parents.

[25] National Academy of Medicine, National Academy of Sciences, and the Royal Society, *Heritable Human Genome Editing*, Washington, DC., The National Academies Press, 2020, https://www.nap.edu/catalog/25665/heritable-human-genome-editing.

How Does Gene Editing Rewrite the Structure of Ethical Debates?

Legal and ethical reactions to the latest transformation technologies have changed since the foundation of the Human Genome Project. First of all, reactions are no longer delayed, but mostly happen in parallel or, in the case of cloning, even anticipating the scientific possibilities. This is necessary, because cloning or gene editing has created opportunities that cannot be corrected if implemented prematurely. The possibility of human cloning, for example, impelled legislators to introduce regulations banning cloning as early as in 1997, although the technology and successful implementation were far from being available then. The second important difference is that society today participates much more actively in shaping expectations, hopes and rejections of biotechnology, and several works of art, movies and literary pieces provided utopian or dystopian visions and predictions, some of which have already become reality. As all of this affects our thinking, law and ethics try to provide answers, and in many cases, they anticipate the changes in biotechnology. In the case of gene editing, it was Jennifer Doudna who drew the public's attention to the widespread social implications of gene editing.[26] She is the model of the responsible scientist in the 21st century. Earlier, it was not appropriate for scientists to share their doubts with the public. Instead, they were expected to behave as if they were successful and infallible.

To put it simply, there are two very contrasting perspectives in ethical debates: there are those who argue for the sanctity of life, which cannot be altered, and the others who support the individual's decision and autonomy.

The fact that the embryos that would not have gained a chance of life without the intervention of gene editing now can be implanted encourages pro-life advocates to support gene editing, because this way may give a chance of life to embryos and fetuses with serious diseases. However, this goes against the usual combination of protecting life and refusing interventions. A challenging intervention might save potential lives.

The concept of autonomy is also difficult to define in gene editing procedures. Whose autonomy are we talking about? The autonomy of the pregnant woman, the unborn child, the parents? It is important to highlight that one's genes are not one's fate, and personality is not determined by any single gene. The interests and viewpoints of families affected by genetic diseases have to be respected. Extreme

[26] Robert Sanders, CRISPR Inventor Calls for Pause in Editing Heritable Genes, *Berkeley News* (1 December 2015), https://news.berkeley.edu/2015/12/01/crispr-inventor-calls-for-pause-in-editing-heritable-genes/.

interventions, such as germline gene editing, may be justified only in exceptional and justified cases to fight serious diseases.

Consequently, gene editing also rewrites the structure of ethical debates. It affects the concept and cases of discrimination and the field of assisted reproductive procedures. It revolutionizes the concept of medical treatment. It may raise or reduce the inequalities based on health conditions. It may lead to numerous new rights in the field of genetics. Good gene editing practice can only be achieved through the close cooperation of natural and social sciences.

Conclusions

With the technical possibility of genome editing we have reached a new era of altering human beings and even altering human inheritance. Genome editing constitutes new responsibilities in many fields. Science and society have never been so much dependent on each other. We may look optimistically into our future with mRNA-based vaccines in our arms and may rightly hope to tackle other dreadful diseases by using genetic knowledge. But we must also learn from the past episodes of eugenics and the instances of fraud and failure that have been the result of merciless scientific competition, unfettered commercial interest, or simply individual pride. As human rights lawyers we need to engage in regular communication with scientists in the field of biotechnology, as these emerging technologies are going to shape humanness in the future, and they may influence the rights of children and adults, and affect our perceptions of disability, discrimination and privacy.

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RULE OF LAW, CONSTITUTIONAL DEMOCRACY

THE 2018 CONSTITUTIONAL REFERENDUM IN ECUADOR AND THE TRANSITORY COUNCIL OF CITIZEN'S PARTICIPATION AND SOCIAL CONTROL

Oswaldo Ruiz-Chiriboga[1]

This contribution aims to demonstrate that the 2018 constitutional amendment that created the Transitory Council of Citizen's Participation and Social Control altered the structure of the Ecuadorian State and therefore it could not have been approved by referendum. I do not advance any theory. Instead, I present and analyze the proceedings that led to the referendum, the actions and omissions of the Transitory Council, and their impact on the separation of powers and the autonomy of the public functions. This is an empirical study based on the Ecuadorian legislation and the regulations and decisions adopted by Ecuadorian institutions.

Introduction

The Ecuadorian State is formed by the three traditional branches of government: the executive, the legislature and the judiciary. But by approving the 2008 Constitution, Ecuadorians decided to include two additional branches: the transparency and social control branch and the electoral branch. The separation of powers and the checks and balances would be achieved if the five branches respect their respective roles and powers.

The President of the Republic, Lenín Moreno, broke the checks and balances and the separation of powers when he bypassed constitutional amendment proceedings and called for a referendum, by which a transitory *ad hoc* body was created in 2018. This transitory body was called *Consejo de Participación Ciudadana y Control Social transitorio* (Transitory Council of Citizen's Participation and Social Control, hereinafter "TCCPSC"). The Constitutional Court was not given the opportunity to review whether the referendum questions were constitutional. The referendum questions were presented to the electorate as Moreno drafted them.

This contribution aims to demonstrate that the 2018 constitutional amendment that created the TCCPSC altered the structure of the State and therefore it could

[1] Assistant Professor, Department of Legal Studies, Central European University (CEU)

not have been approved by referendum. I do not advance any theory. Instead, I present and analyze the proceedings that led to the referendum, the actions and omissions of the TCCPSC, and their impact on the separation of powers and the autonomy of the public functions. This is an empirical study based on the Ecuadorian legislation and the regulations and decisions adopted by Ecuadorian institutions.

The submission of the referendum questions to the Constitutional Court

In September 2017, President Moreno announced his intention to call for a referendum and a popular consultation. On October 2, 2017, Moreno sent the amendments proposal to the Constitutional Court. The amendments were contained in five yes/no questions. Moreno also included two questions for a popular consultation.

The Admission Chamber of the Constitutional Court admitted Moreno's request, and two cases were opened: Case No. 0001-17-CP regarding the two popular consultation questions and Case No. 002-17-RC regarding the five referendum questions.

With an order of November 6, 2017, the judge-rapporteur of the referendum case, Tatiana Ordeñana, summoned Moreno and all the individuals and organizations interested in presenting arguments to a public hearing. Additionally, in accordance with Article 9 of the *Codificación del Reglamento de Sustanciación de Procesos de Competencia de la Corte Constitucional* (Codification of the Rules for the Substantiation of Proceedings before the Constitutional Court, hereinafter "CRSP"), Ordeñana suspended the deadline the Court had to decide on the referendum questions.[2] Specifically, the deadline that the judge-rapporteur suspended was the one established in Article 105 of the *Ley Orgánica de Garantías Jurisdiccionales y Control Constitucional* (Organic Law on Jurisdictional Guarantees and Constitutional Control, hereinafter "OLJGCC"), which provides: "If the Constitutional Court does not decide on the summon, the introductory notes and the referendum questionnaire within twenty days after having initiated the respective prior constitutional control, it will be understood that the Court has issued a favourable opinion". The suspension of the legal deadline meant that the days the Court took in preparing the public hearing and receiving the position of the amici curiae do not count for the purposes of Article 105 OLJGCC.

The public hearing was held on November 15, 2017, as scheduled. After the public hearing, the judge-rapporteur, in accordance with Article 9 CRSP, lifted the

[2] Constitutional Court, Judge Ordeñana's Order, Case No. 002-17-RC, November 6, 2017.

suspension of the legal deadline,[3] which meant that the days the Court was going to take in giving its opinion on the constitutionality of the questionare had to be counted for the purposes of Article 105 OLJGCC. The same day, Judge Ordeñana sent her draft opinion to the General Secretariat of the Constitutional Court.

After a plenary session of November 28, 2017, the President of the Constitutional Court decided to convene an extraordinary session to be held on December 5, 2017, for the Court to discuss Judge Ordeñana's opinion. Taking into account the days that the legal deadline was suspended, the Court was of the opinion that the deadline it had to decide on the constitutionality of the referendum was going to expire on December 7, 2017. The audio of the November 28 plenary session, as well as Judge Ordeñana's opinion, were leaked. Judge Ordeñana considered that creating the TCCPSC would interfere with the other branches of government.[4]

The call for a referendum without the opinion of the Constitutional Court

On November 29, 2017, without waiting for the Constitutional Court's opinion, Moreno issued the Executive Decrees No. 229 and 230 calling Ecuadorians for a referendum and a popular consultation. The Executive Decrees justified the call arguing that:

> *"As of this date far exceeded the term of 20 days provided for in Article 105 of the [OLJGCC] so that the highest body of constitutional control of the country issues an opinion on the constitutionality of the draft call for a referendum submitted by the President of the Republic; it is imperative to apply the legal effects anticipated to this omission, that is, that it will be understood that a favourable opinion has been issued".*

Decrees 229 and 230 did not take into account the suspension of the legal deadline ordered by the judge rapporteur. If the President of the Republic considered that the Constitutional Court was not complying with the legal deadline, or that the Court's rules of procedure could not modify the legal deadline, or that the judge rapporteur was not authorized to suspend the deadline, or any other reason, the President of the Republic could have presented objections. At no time Moreno

[3] Constitutional Court, Judge Ordeñana's Order, November 23, 2017.

[4] The complete audio of the November 28, 2017 plenary session and some extracts of Judge Ordeñana's opinion are available at "*Moreno mintió! Audio de la Corte Constitucional evidencia que llamado a Consulta es ilegal*" (22 December 2017), *Dato Duro,* https://datoduroec.tumblr.com/post/168832220497/moreno-minti%C3%B3-audio-de-la-corte-constitucional.

questioned or in any way objected the suspension of the legal deadline. In fact, none of the parties involved in the constitutional proceedings, including those who were supporting the referendum, questioned the decision of the judge rapporteur. Moreno, therefore, acted in bath faith. He was silent on this point during the entire constitutional proceeding and then circumvented the Court using arguments he never raised before.

The timing of the Executive Decrees, together with Moreno's lack of opposition to the suspension of the legal deadline, show that Moreno decided to bypass the Constitutional Court not because the Court took more than 20 days, but because justice Ordeñana was against the creation of the TCCPSC. Assuming for a moment that Moreno was right and the Constitutional Court could not suspend the legal deadline, then the deadline for the Court to decide would have expired on October 27, 2017. Why did Moreno wait until November 29 to pass the Executive Decrees? The only viable answer is that justice Ordeñana's opinion was leaked sometime after November 23 and Moreno was afraid that the rest of the justices could have the same opinion.

President Moreno also sent the Executive Decrees No. 229 and 230 to the *Consejo Nacional Electoral* (National Electoral Council, hereinafter "NEC"). On December 1, 2017, the NEC declared the beginning of the electoral period. At this date, the Constitutional Court was still within the time to decide on the constitutionality of the referendum. However, on December 1, 2017, the President of the Constitutional Court, without giving any reason, decided to suspend the plenary session of the Court.[5]

The suspension of the Constitutional Court's plenary session closed the doors for the constitutional review of the referendum. By the sole decision of the President of the Constitutional Court and without giving any reason, the other justices of the Constitutional Court were prevented from discussing and deciding on the constitutionality of the proposed constitutional amendments.

The TCCPSC changed the fundamental structure of the state

On February 4, 2018, the referendum and the popular consultation took place. Ecuadorians voted "yes" to the seven questions. The TCCPSC was created by the approval of question 3 that read as follows:

> *"Do you agree to amend the Constitution of the Republic of Ecuador to restructure the Council of Citizen Participation and Social Control, as well as to terminate the*

[5] Official communication No. 7126-CCE-SG-2017.

constitutional term of its current members and that the Council that transitorily assumes its functions has the power to evaluate the performance of the authorities whose designation corresponds to it, being able, if the case, to anticipate the termination of their periods according to Annex 3?"

The Constitutional Court has stated that the fundamental structure of the State is the division of government in five branches. If a constitutional amendment aims at altering this division, then the fundamental structure of the State would be affected. The Constitution Court adopted this decision in 2011 when another transitory body was created: the Transitory Judiciary Council (*Consejo de la Judicatura Transitorio*). The Constitutional Court decided that the creation of this transitory body that replaced the Judiciary Council for 18 months was not a modification of the structure of the State because the transitory body was entrusted with the same powers and functions as the definitive body.[6] Furthermore, the executive did not have complete control over the selection of the standing members of the transitory body. The executive could only appoint one member, while the remaining two members were appointed by the legislature and by the transparency and social control branch of government.[7]

Unlike the 2011 constitutional amendments, the 2018 amendments gave the executive greater control over the selection of the members of the transitory body. The seven standing councilpersons and the seven alternates of the TCCPSC were selected by the Parliament from seven lists of three names each prepared by the President of the Republic. In other words, Moreno handpicked all the members of the TCCPSC.

Additionally, question 3 of the 2018 referendum gave the TCCPSC more attributions than the definitive body had. The additional attributions were: (a) to evaluate the performance of the authorities, and (b) to anticipate the termination of the terms in office of such authorities if they failed the evaluation. Likewise, the members of the TCCPSC decided by themselves that they had extra attributions, not listed in question 3, of appointing transitory authorities who replaced the authorities whose terms in office were terminated, disregarding the national laws that regulate how the positions should be filled.

As to the attributions mentioned in (a) and (b), they are attributions that belong to the legislature. According to Article 120(9) of the Constitution, the Parliament has the power "to audit the activities" of the executive, electoral, and transparency and social control branches of government and other bodies of the public sector. Article 131 of the Constitution gives the Parliament the authority

[6] Constitutional Court, Opinion No. 001-11-DRC-CC, February 15, 2011, 42–43.
[7] Id., 43.

to remove several high-ranking officers if there is a failure to perform the duties listed in the Constitution. The removal is done through impeachment proceedings. Giving to the TCCPSC the attributions of the Parliament means that one branch of government took the powers of another branch.

The evaluation and termination attributions of the TCCPSC

Exercising its "evaluation" and "termination" attributions, the TCCPSC ceased 29 out of the 31 authorities. Table 1 lists these authorities and the branches of government they belonged to.

TABLE 1

AUTHORITIES CEASED BY THE TCCPSC

BRANCH OF GOVERNMENT	AUTHORITY
Judiciary	The five members of the Judiciary Council
	The nine justices of the Constitutional Court
Electoral	The five members of the National Electoral Council
	Three out of five judges of the Electoral Dispute Settlement Court
Transparency and Social Control	The head of the Ombudsperson's Office
	The head of the Superintendence of Banks and Insurances
	The head of the Superintendence of Companies
	The head of the Superintendence of Popular and Solidary Economy
	The head of the Superintendence of Territorial Planning
	The head of the Superintendence of Control of the Market's Power
	The head of the Superintendence of Communication

According to question 3, the TCCPSC was supposed to evaluate *all* the authorities appointed by the extinct Council of Citizens' Participation. Yet, the TCCPSC did not evaluate the head of the Office of the Comptroller General (*Contraloría General del Estado*). The relevance of this omission is that the Comptroller General was an "ally" of President Moreno.[8]

Conversely, the TCCPSC did evaluate and ceased the justices of the Constitutional

[8] Colectivo de Abogados por la Democracia, Judicialización de la política y bloqueo político: El caso del 'proceso' de la Revolución Ciudadana en Ecuador, *Virgilio Hernandez Blog* (30 August 2018), http://virgiliohernandez.ec/blog/2018/08/30/216/; Augusto Verduga Sánchez,

Court. As mentioned above, question 3 gave the TCCPSC the constitutional powers the legislature has to audit and remove from office those authorities who fail to perform theirs tasks. But not even the Parliament has the power to remove the justices of the Constitutional Court. Article 431 of the Constitution provides that "the members of the Constitutional Court shall not be subject to impeachment, nor can they be removed from office by those who appoint them". Part of the doctrine considered that this constitutional provision was not applicable to the transition regimen because the latter was the result of direct democracy.[9]

Similar arguments were given regarding the powers the TCCPSC took for itself to appoint transitory authorities and to pass regulations on how the definite replacements ought to be appointed. Julio César Trujillo, president of the TCCPSC, stated that the contradictions between the Constitution and the decisions and regulations approved by the TCCPSC should be decided in favour of the latter because they were the expression of the will of the people.[10]

The only legal basis the TCCPSC and its supporters gave to justify their arguments was a judgment of the Constitutional Court that decided that the transition regimen approved in 2008, when the current Constitution was adopted, had the same status as the Constitution. In the TCCPSC's opinion, the very same conclusion had to be applied to the 2018 transition regime.[11]

It is true that in 2008 the Constitutional Court decided that the transition regime had the same status as the Constitution and that in some cases of contradiction between the Constitution and the transition regime the latter prevailed.[12] But the TC-

Lawfare segunda parte, caso Ecuador, *Ruta Krítica* (4 July 2018), https://rutakritica.org/2018/07/04/lawfare-segunda-parte-caso-ecuador-2/; Xavier Flores, La Contraloría ecuatoriana contra los derechos, *Xavier Flores Aguirre Blog* (15 April 2019), https://xaflag.blogspot.com/2019/04/la-contraloria-ecuatoriana-contra-los.html.

9 Hernán Salgado Pesantes, La evaluación y destitución de los jueces constitucionales, *El Universo* (27 May 2018), https://www.eluniverso.com/opinion/2018/05/27/nota/6779270/evaluacion-destitucion-jueces-constitucionales. Salgado Pesantes was later appointed by the TCCPSC as a justice of the Constitutional Court.

10 Gina Chávez Vallejo, ¡La Constitución está por encima del Consejo de Participación Transitorio!, *Ruta Krítica* (17 June 2018), https://rutakritica.org/2018/06/17/la-constitucion-esta-por-encima-del-consejo-de-participacion-transitorio/; Cesar Trujillo dice que el CPCCS sí está por encima de la Constitución!, (8 May 2018). Video streamed at the National Assembly by congressman Juan Cristóbal Lloret, https://www.youtube.com/watch?v=g9bIVmKw4Nw; Julio Cesar Trujillo, Cpccs transitorio modificó la Constitución con el mandato para la selección de autoridades, *El Comercio* (9 May 2018), https://www.elcomercio.com/actualidad/cpccs-modificacion-constitucion-autoridades-concursos.html; Julio Cesar Trujillo, Nuestros mandatos están a nivel constitucional, *El Telégrafo* (30 March 2018), https://www.eltelegrafo.com.ec/noticias/politica/3/trujillo-nuestros-mandatos-estan-a-nivel-constitucional.

11 TCCPSC, Resolution No. PLE-CPCCS-T-O-028-09-05-2018, May, 9, 2018.

12 Constitutional Court, Judgment 002-0S-SI-CC, Cases OOOS-OS-IC and 0009-0S-IC, December 10, 2008.

CPSC was wrong when it considered that the very same could be said regarding the 2018 transition regime. The difference between both transition regimes is their origin.

When the Constitutional Court decided that the 2008 transition regimen had the same status as the Constitution, it considered that the transition regimen was approved at the same time as the Constitution[13] and, more importantly, by the same body that drafted the Constitution, namely, the Constituent Assembly. Therefore, the Constitution and the transition regimen had "the same popular legitimacy".[14] They differed only on their purpose. Because of their same origin and popular legitimacy, there was no hierarchy between the Constitution and the transition regime. If there was a conflict between them, the solution could only be found on a case-by-case basis, taking into consideration the aim of the relevant provisions of each normative body and the will of the constituent.[15]

The 2018 transition regime is completely different. The so-called "mandates" and other decisions passed by the TCCPSC could not have the same value and hierarchy than the Constitution. The TCCPSC did not have the same powers and attributions than a constituent assembly and their members were not elected by the people but by Moreno. In fact, the "will of the people" is diametrically different in a referendum than in a constituent assembly. A referendum is not an expression of the ultimate sovereignty of the people. As Colón-Ríos argues:

> *"In the context of constitutional reform, a constitutionally mandated referendum is nothing but a juridical exercise required by the amendment procedure itself: when citizens express their support or reject a constitutional amendment, they exercise constituted, rather than constituent, power. […] A referendum presents citizens with a set of pre-designed alternatives that they cannot change; it does not necessarily allow citizens to put into question and deliberate about different constitutional provisions, much less about the constitutional regime as a whole. […] Moreover, if citizens are asked to vote on a set of disparate and complex proposals, the referendum can easily turn into a mere 'plebiscitary' exercise in which voters simply express their support or dislike of current government officials, particularly of the executive. A referendum does not guarantee the degree of deliberation and debate necessary for the maximization of the ideal of popular participation either: citizens do not become authors of their amended constitution, but merely 'consent' to the proposed changes. A democratic process of constitutional change mandates a degree of openness and participation similar to that present in a (democratic) constitution-making episode".*[16]

[13] Official Bulletin No. 449, on October 20, 2008.

[14] Constitutional Court, Judgment 002-0S-SI-CC, *supra* n. 12, 16.

[15] Ibid., 17.

[16] Joel Colón-Ríos, The Legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform, *Osgoode Hall Law Journal* 48 (2010), 199–245, 235–236.

The 2008 Constituent Assembly had the openness and citizens' participation that the 2018 referendum lacked. The drafting phase of the 2008 Constitution created a "strongly dialogical scenario that sought to expose all the assembly members to a set of demands and proposals elaborated by a broad spectrum of social organizations".[17] The Assembly members were not only elected by the people, but they received hundreds of individuals and organizations and processed hundreds of proposals. The Assembly was a democratic space accessible to the otherwise excluded sectors of the population. For instance, Ávila points out that new institutions included in the Constitution "were not created or developed by jurists but by social movements, particularly the indigenous".[18]

Conversely, the 2018 referendum was a mere plebiscitary exercise in which the voters were not provided with the necessary tools to take an informed decision. The Organization of American States (OAS) Electoral Mission that monitored the 2018 referendum concluded that question 3 that created the TCCPSC was not clear, it did not allow the elector to accept or reject each of the individual topics it contained, it was incomplete, the provided information was insufficient, and the consequences it could produce were blurred. These shortcomings, according to the Mission, impacted on the electors' right to have an informed vote.[19] Therefore, the popular legitimacy of the 2008 transition regimen can never be compared to the 2018 transition regimen. Finally, the self-given attributions the TCCPSC usurped to itself found no basis in the text of the referendum. The TCCPSC acted *ultra vires.*

The self-given attribution to appoint "transitory" authorities

Exercising its self-given attributions that were not included in the 2018 referendum, the TCCPSC appointed "transitory" authorities that replaced the ones that were ceased by it. According to national law, in cases of temporal or definitive absence of the standing authorities, they ought to be replaced, as appropriate, by their alternates or subordinates.

This never happened. The persons that were supposed to replace the standing authorities were never evaluated by the TCCPSC and still they were not appointed as replacements. The TCCPSC simply ignored national laws. Moreover, when the TCCPSC appointed the "transitory" replacements, it did not follow any selection

[17] Pablo Andrade, El reino (de lo) imaginario: Los intelectuales políticos ecuatorianos en la construcción de la Constitución de 2008, *Ecuador Debate* 85 (2012), 35–48, 39.

[18] Ramiró Ávila, *El neoconstitucionalismo transformador. El Estado y el derecho en la Constitución de 2008,* Quito, Abya Yala, 2011, 14–15.

[19] OAS, *Misión de Expertos Electorales, Referéndum y Consulta Popular. República del Ecuador,* 4 de febrero de 2018. Informe Final, 28.

procedure. There was no judicial or administrative control over the designations. The TCCPSC had absolute discretion.

As to the Constitutional Court, the TCCPSC not only ceased all nine justices, but it also declared a "constitutional vacancy" (*vacancia constitucional*), meaning that the country became "courtless" until the definitive replacements were appointed. There is no constitutional or legal provision that allows any authority to declare such type of "vacancy". Quite the opposite, the law provides how to proceed in cases of temporary or definite absence of a member of the Constitutional Court.[20] This procedure was arbitrarily ignored by the TCCPSC.

Conclusions

The constitutional amendments sought by President Moreno should have been reviewed by the Constitutional Court, but Moreno circumvented this revision. The lack of constitutional review produced severe problems for democracy and human rights. Question 3 of the referendum that created the TCCPSC, was incomplete, unclear and blurred, which impacted on the electorate's right to an informed vote. The Constitutional Court could have corrected the question if it had been allowed to conduct its constitutional review. The obscurity of the question represented a hindrance in the expression of the people's will. Furthermore, the people's participation and deliberation were limited to approving or rejecting complex constitutional amendments contained in five questions, plus two extra questions of the popular consultation, that were not interconnected between them and discussed topics ranging from mining, sexual violence and ecology to corruption, statute of limitations and presidential term limits. The Constitution requires a prior constitutional revision precisely to protect the freedom of the elector. If there is not enough information or if the electorate cannot understand the questions, then the electorate is not free.

The almighty TCCPSC presented itself as the voice of the people. It had the haughtiness of calling its decisions "mandates", as if they were approved by the people, picturing them as supra-constitutional. The TCCPSC was unstoppable. It became an *ad hoc* administrative tribunal that did not apply pre-established rules or procedures. The referendum altered the separation of powers and the autonomy of the public functions. Such a change, according to the Constitution, shall not be approved by a referendum. The 2018 constitutional amendments in Ecuador were unconstitutional.

[20] Articles 183-184 OLJGCC.

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HUMAN DIGNITY AND 'ILLIBERAL DEMOCRACY' IN TIME OF CRISIS

Gábor Halmai[1]

'Illiberal democracy' as an alternative, anti-dignity identity in Europe

This paper attempts to illuminate the impact of the spread of 'illiberal democracy' in Europe on the status quo of human dignity. All this has been impacted by 'converging crises'[2] from the not far past financial and the migration crisis to the current, pandemic-induced health and economic crisis.[3] The hidden research question behind this investigation has been, how the retreat of liberal democracy impacted the ideal state Europe wanted to achieve after WWII, in which human dignity is the most important governing principle, and whether only liberal democracy can recognize dignity by guaranteeing rights on the basis of a universal recognition of citizens as morally equals.[4]

I argue here that 'illiberalism' practiced by some governments in EU Member States does not guareantee human dignity neither to migrants nor the their own citizens.[5] The main theoretical objects of this illiberal critique are the values of

[1] Professor and Chair of Comparative Constitutional Law, European University Institute, Florence, Italy

[2] The term is used by Rogers Brubaker, Why Populism?, *Theory and Society* 46 (2017), 357–395, 373.

[3] See Mariana Mazzucato, Capitalism's Triple Crisis, *Project Syndicate* (30 March 2020).

[4] See this understanding of relationship between liberal democracy and dignity in Francis Fukuyama, Against Identity Politics *Foreign Affairs,* (September/October 2018). Fukuyama argues that nationalism as the other major form of recognition of citizens driven by the fear that immigrants are taking away national identity of the host countries threatens democracy. Contrary to Fukuyama Ivan Krastev and Stephen Holmes argue that multiculturalism is not the main target of illiberalism, therefore it cannot be combatted by abondoning identity politics. Ivan Krastev – Stephen Holmes, *The Light that Failed: A Reckoning*, London, Allen Lane, 2019, 43. But for instance Hungarian Prime Minister Viktor Orbán's emphasis of ethnic homogeneity of the Hungarian nation proofs that illiberals fight against the concept of a multicultural society. Viktor Orbán's Speech at the Annual General Meeting of the Association of Cities with County Rights, 8 February 2018.

[5] One of the latest sign of the disrespect of human dignity in one of these 'illiberal' Member States is the 22 October 2020 decision of the packed Polish Constitutional Tribunal on abortion. The judges has determined that abortion due to foetal defects is unconstitutional even in the very few cases the previous restrictive regulation allowed. According to the reasoning this further curtailment of the human dignity of women was necessary to protect

political liberalism: human dignity and rights, justice, equality and the rule of law, its commitment to multiculturalism and tolerance, ideas of Isaiah Berlin's 'negative liberty', Karl Popper's 'open society', John Rawls' 'overlapping consensus, or Ronald Dworkin's equality as the 'sovereign virtue'.[6] From an institutional point of view, and this was visible in the legal reactions both to the refugee crisis of 2015 and to COVID-19 in 2020 illiberalism challenges liberal democracy, which isn't merely a limit on the public power of the majority, but also presupposes rule of law, checks and balances, and guaranteed fundamental rights. This means that there is no democracy without liberalism advancing human dignity and fundamental rights, and there also cannot be liberal rights without democracy[7]. In this respect, there is no such a thing as an 'illiberal or anti-liberal democracy,' or 'democratic illiberalism' for that matter. Those who perceive democracy as liberal by definition also claim that illiberalism is inherently hostile to values, such as human dignity, or with constitutionalism, as an institutional aspect of liberal democracy: separation of powers, constraints on the will of the majority, human rights, and protections for minorities.

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the human dignity of the unborn fetus. See Anna Rakowska-Trela, A Dubious Judgment by a Dubious Court: The abortion judgment by the Polish Constitutional Tribunal, *Verfassungsblog* (24 October 2020), https://verfassungsblog.de/a-dubious-judgment-by-a-dubious-court/.

6 These attacks against liberal values, such as human dignity occurring first and foremost in the post-Communist countries, where the entrenchment of human dignity into the newly enacted constitutions was an important element of the democratic transition in the early 1990s. See Catherine Dupré, *Importing the Law in Post-communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity*, Oxford, Hart Publishing, 2003.

7 Cf. Jürgen Habermas, Über den internen Zusammenhang von Rechtsstaat und Demokratie, in Ulrich Preuss (hg.), *Zum Begriff der Verfassung. Die Ordnung der Politischen,* Frankfurt am Main, Fischer, 1994. 83–94. The English version see Jürgen Habermas, Rule of Law and Democracy, *European Journal of Philosophy* 3 (1995), 12–20. Also Juan José Linz and Alfred Stepan assert that if governments, even being freely elected violate the right of individuals and minorities, their regimes are not democracies. See Juan José Linz – Alfred Stepan, Toward Consolidated Democracies, *Journal of Democracy* 7 (1996), 14–33, 15. Similarly, János Kis claims that there is no such thing as nonliberal democracy, or non-democratic liberalism. See Kis, János, Demokráciából autokráciába. A rendszertipológia és az átmenet dinamikája [From Democracy to Autocracy. The System-typology and the Dinamics of the Transition], *Politikatudományi Szemle* 28 (2019), 45–74. Those critics, which argue that liberalism as a three hundred years old concept predates liberal democracy forget that not only democracy but also liberalism presupposes general and equal suffrage.

Authoritarian Neo(il)liberalism

Paradoxically, politically illiberal leaders, like Viktor Orbán of Hungary use (neo) liberal economic policy to support their autocratic (constitutional) agenda.[8] As many argue referring to Karl Polányi's influential book, *The Great Transformation* the resistance to social democracy through authoritarianism in the name of economic liberalism prepared the ground for Fascism, and can lead to autocracy again.[9] Some also claim that the Covid-19 crisis has clearly precipitated a dramatic confrontation between Polányi's opposing principles of the reality of society and the putative freedom of radical individualism, because the contagion became a host of the illusory utopianism neoliberalism that defies the inevitable need of solidarity in the time of such a pandemic.[10]

While others, mostly left-wing populists react to the unfulfilled promise of social-rights constitutionalism, based on T.H. Marshall's theory of social rights being continuous with civil and political rights, which turned out to be a misconception in most of East Central European countries' constitutional practice. As Samuel Moyn argues, a commitment to material equality disappeared, in its place market fundamentalism has emerged as the dominant force of national and global economics.[11] Regarding the US, the recently published book of Jacob Hacker and Paul Pierson argues that the right-wing economic policies pursued by the Republican party diverge from the centre-left economic preferences of a majority of voters, but that a majority of US voters have preferences on social and cultural issues which also diverge from those advocated by the Democratic party.[12] This analysis is also true for European voters, a majority of whom are to the right of social-democratic and other left parties on social and cultural issues, and this makes the 'supply' of a plutocratic, ever-more right-wing parties all over the world more and more dangerous for democracy.[13]

[8] This phenomenon is called by Michael Wilkinson 'authoritarian liberalism'. See Michael A. Wilkinson, Authoritarian Liberalism as Authoritarian Constitutionalism, in Helena Alviar – Günter Frankenberg (eds), *Authoritarian Constitutionalism*, Cheltenham, Edward Elgar, 2019.

[9] Ibid., and also Bojan Bugarič, The Two Faces of Populism: Between Authoritarian and Democratic Populism, *German Law Journal* 20 (2019), 390–400.

[10] Cf. Margaret Somers – Fred Block, Polanyi's Prescience, COVID-19, Market Utopianism, and the reality of Society, *Economic Sociology & Political Economy* (16 October 2020), https://economicsociology.org/2020/10/16/polanyis-prescience-covid-19-market-utopianism-and-the-reality-of-society/?fbclid=IwAR0oRy2z0RGgDNLWx9xFjL1Y7cs8xsKe5I60ENm7XGI_qwneYnxhfI0PXwg.

[11] Samuel Moyn, *Not Enough: Human Rights in an Unequal World,* Cambridge, MA, Harvard University Press, 2018.

[12] Jacob Hacker – Paul Pierson, *Let Them Eat Tweets: How the Right Rules in an Age of Extreme Inequality*, New York, NY, Liveright, 2020.

[13] See Sheri Berman, Where did Trumpism come from?, *Social Europe* (31 August 2020),

Central and Eastern European states' dependence on foreign capital – as Bojan Bugarič and Mitchel Orenstein argue – also seemed to force governments in this region to endorse neoliberal economics especially prior to 2008.[14] This has created a greater possibility of populist backlash, and after the global financial crisis right-wing populist parties' policies shifted towards economic nationalism based on 'work, family, fatherland.'[15] In the case of the Orbán governments since 2010 this does not mean that they are against globalisation and big businesses with trans-national corporations.[16] According to Gábor Scheirig the 'Orbánomics' propagates a social-Darwinist model of 'work-based society', based on 'neo-illiberalism.'[17]

The packed Hungarian Constitutional Court rubber stamped the government's neoliberal economic policy, changing its predecessor's practice, which in the mid 1990's was willing to strike down austerity measures for the protection of social rights closely tying them to the protection of equal human dignity. Although social solidarity was an underdeveloped societal practice from the beginning of the democratic transition for several reasons, originally the Constitutional Court strongly committed itself to the protection of human dignity and this way guaranteed a higher profile for social (solidarity) rights, especially in case of social care based on neediness.

Then, as a contrast, in the 'non-solidary' system of the Hungarian Fundamental Law of 2011 social security does not appear as a fundamental right, but merely

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https://www.socialeurope.eu/where-did-trumpism-come-from?fbclid=IwAR1CJYiPF_6uFalCGgHB9TKlDTk-ppcu3ZFnfAPpyoZYxGaSE5ccpugcCnw.

Similarly, Simon Wren-Lewis, Why neoliberalism can end in autocratic, populist and incompetent plutocrac, *Mainly Macro* (22 September 2020), https://mainlymacro.blogspot.com/2020/09/why-neoliberalism-can-end-in-autocratic.html.

[14] See Mitchel Orenstein – Bojan Bugarič, How Populism Emerged from the Shadow of Neoliberalism in Central and Eastern Europe, *LSEblogpost* (October 21, 2020), https://blogs.lse.ac.uk/europpblog/2020/10/21/how-populism-emerged-from-the-shadow-of-neoliberalism-in-central-and-eastern-europe/.

[15] Mitchel Orenstein – Bojan Bugarič, Work, Family, Fatherland: the political economy of populism in central and Eastern Europe, *Journal of European Public Policy* (19 October 2020), https://www.tandfonline.com/doi/abs/10.1080/13501763.2020.1832557?journalCode=rjpp20.

[16] See Gábor Scheiring, *The Retreat of Liberal Democracy. Authoritarian Capitalism and the Accumulative State in Hungary*, London, Palgrave MacMillan, 2020.

[17] Gábor Scheiring, Why businesses embrace populists and what to do about it: lessons from Hungary, *The Conversation* (September 8, 2020), https://theconversation.com/why-businesses-embrace-populists-and-what-to-do-about-it-lessons-from-hungary-141757?fbclid=IwAR1CJYiPF_6uFalCGgHB9TKlDTk-ppcu3ZFnfAPpyoZYxGaSE5ccpugcCnw.

The term 'neo-illiberalism' first appeared in Reijer Hendrikse, Neoliberalism is over – welcome to the era of neo-illiberalism, *openDemocracy* (7 May, 2020), https://www.opendemocracy.net/en/oureconomy/neoliberalism-is-over-welcome-to-the-era-of-neo-illiberalism/?fbclid=IwAR1CJYiPF_6uFalCGgHB9TKlDTk-ppcu3ZFnfAPpyoZYxGaSE5ccpugcCnw.

as something the state 'shall strive' for, which is a step backward in comparison with the 1989 Constitution. Social insurance is not a constitutional institution any more, and the provisions of the Fundamental Law do not guarantee equal dignity and the former level of property protection. The recent case law of the Constitutional Court reaffirms the initial concerns: dignity supported social solidarity got lost in the illiberal backsliding of the past ten years.

One of rules of the new Fundamental Law contradicting the principle of dignity – and societal solidarity, humanity in wider sense – after the Seventh Amendment of 2018 is the issue of criminalizing homelessness. Article XXII(3) of the Fundamental Law reeds as follow: 'Using a public space as a habitual dwelling shall be prohibited.' The amendment overrode a former decision of the Constitutional Court on the Misdemeanour Act,[18] in which the Court stated that the punishment of unavoidable living in a public area fails to meet the requirement of the protection of human dignity. Right after the Seventh Amendment the Misdemeanour Act was also modified, and introduced the regulatory offence of habitual dwelling on a public place accompanied with a humiliating procedure: police officers are empowered to order homeless people into shelters and can arrest them if they disobey after being ordered three times in a 90-day period. Punishments include jail, community service and their possessions being destroyed (also pets are taken away).[19] Five judges from different courts of first instance challenged this piece of legislation before the Constitutional Court from October 2018 and in the subsequent months, stating that the new regulation infringes human dignity, legal certainty, right to fair trial and personal liberty.

The Constitutional Court has published its shocking decision in early June 2019,[20] and declared that the criminalization and imprisonment of homeless people is in line with the Fundamental Law.[21] According to the majority decision:

[18] Hungarian Constitutional Court Judgement of 12 November 2012, Decision 38/2012 (XI. 14.) AB. Cf. its press release available at https://hunconcourt.hu/announcement/provisions-of-the-act-on-contraventions-criminalizing-people-living-at-public-areas-permanently-are-against-fundamental-law/.

[19] New Hungary Law Bans "Rough Sleepers", Rights Groups Complain', *Reuters* (15 October 2018), https://www.reuters.com/article/us-hungary-homeless/new-hungary-law-bans-rough-sleepers-rights-groups-complain-idUSKCN1MP1EB.

[20] Hungarian Constitutional Court Judgement of 6 November 2018, Decision III/1628/2018 AB (not available in English).

[21] Streetlawyer Association, The Constitutional Court has Made an Inhumane Decision on the Confinement of Homeless People, https://utcajogasz.hu/en/resources/misdemeanour-cases/the-constitutional-court-has-made-an-inhumane-decision-on-the-confinement-of-homeless-people/.

"[…] nobody has the right to poverty and homelessness, this condition is not part of the right to human dignity" which means that people living in neediness or at streets shall not be protected by the right to human dignity, they do not share the value of equal dignity. Nine constitutional court justices think that homeless persons shall be punished if they do not cooperate with the state – by which they were left behind earlier, when the same state missed to fulfil its obligation for social care. These justices state that the enjoyment of fundamental rights is dependent on the fulfilment of constitutional duties of the person, which characterised the state-socialist rights regime before 1989. The majority holds that, "according to the Fundamental Law, human dignity is the dignity of an individual living in a society and bearing the responsibility of social co-existence." This attitude establishes the misuse of solidarity, and it means a complete disruption with the dignity-interpretation of 1990's, the core of which was that a person's dignity was inviolable irrespective of development or conditions, or fulfilment of human potential. Based on these most important fundamental rights which formed the foundation of a person's legal status, the Constitution did not permit the revocation or restriction of any part of the legal position already attained by a human being.[22]

The Seventh Amendment constitutionalised the Orbán-government's anti-immigration policy, which is undermining again the value of dignity, (international and societal) solidarity and humanity as well. According to article XIV of the Fundamental Law, 'No foreign population shall be settled in Hungary. […] A non-Hungarian national shall not be entitled to asylum if he or she arrived in the territory of Hungary through any country where he or she was not persecuted or directly threatened with persecution.' The political context of these measures is the increasing hostility towards refugees and national non-governmental organizations (NGOs) helping them, which was triggered by the government.[23] The Constitutional Court in its decision 3/2019. (III. 7.) AB also decided about the constitutionality of certain elements of the Stop Soros legislative package, and ruled that the criminalization of 'facilitating illegal immigration' does not violate the Fundamental Law. The Court again refers to the constitutional requirement to protect Hungary's sovereignty and constitutional identity to justify this clear violation of freedom of association, freedom of expression hiding behind the alleged

[22] This position of the Constitutional Court has first been formulated in its decision 23/1990 AB on the death penalty, and again in decision 64/1991 AB on abortion. See, for instance, the summary of the later decision, http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-1991-s-003?fn=document-frameset.htm$f=templates$3.0.

[23] Gábor Halmai, 'Hungary's Anti-European Immigration Laws' (4 November 2015) available at <http://www.iwm.at/transit/transit-online/hungarys-anti-european-immigration-laws/> accessed 12 February 2020.

obligation to protect Schengen borders against 'masses entering uncontrollably and illegitimately' in the EU.[24] Besides infringing the rights of the NGOs, the decision deprives all asylum seekers of the protection of all fundamental rights by stating that 'the fundamental rights protection … clearly does not cover the persons arrived in the territory of Hungary through any country where he or she had not been persecuted or directly threatened with persecution. Therefore, the requirements set forth by Article I Paragraph (3) of the Fundamental Law regarding the restriction of fundamental rights shall not be applied to the regulation of the above listed cases'.[25] With this the Court denies the core of human dignity: the right to have rights.

Illiberal Treatment of the Pandemic

No one reasonably disputes that emergency situations, caused by a huge number of migrants or the coronavirus pandemic require special legal and constitutional measures even in fool-fledged liberal democratic systems. These measures have to take into account various aspects, among them economic and health considerations, which can lead to different balancing outcome between certain legitimate public interest, like security, public order and public health, and fundamental rights, such as right to human dignity, right to life, freedom of movement, right to education, freedom of information and expression, privacy, etc. Even decisions of democratic legislators and governments potentially reviewed by independent judicial bodies can lead either to 'under-' or 'overreaction' to migrantion or the pandemic. But certain illiberal regimes used the crisis situation as a pretext to strengthen the autocratic character of their systems. In some cases this needed an 'underreach'[26], like in Poland to insist on the presidential election, which was important to entrench the power of the governing party's incumbent, despite the health risks.[27] Elsewhere on 'overreach' has served the same purpose, like in Hungary, where an unlimited emergency power of the government has been introduced after the very first cases of contagion.[28]

[24] Hungarian Constitutional Court Judgement of 25 February 2019, Decision 3/2019 (III. 7.) AB, para. 43.

[25] Ibid., para. 49.

[26] See the term used by Jonathan Gould – David Pozen, How to Force the White House to Keep Us Safe in a Pandemic, *Slate* (6 April 2020), https://slate.com/news-and-politics/2020/04/nancy-pelosi-white-house-covid-19-supplies.html.

[27] Jacub Jaraczewski, An Emergency by Any Other Name? Measueres Against the COVID-19 Pandemic in Poland, *Verfassungsblog* (24 April 2020), https://verfassungsblog.de/an-emergency-by-any-other-name-measures-against-the-covid-19-pandemic-in-poland/.

[28] Gábor Halmai – Kim Lane Scheppele, Don't Be Fooled by Autocrats! Why Hungary's

As Francis Fukuyama argues, it is not a matter of regime type, why some countries have done better than others in dealing with the crisis so far.[29] Some democracies have performed well, but others have not, and the same is true for autocracies. Therefore, for him the factors responsible for successful pandemic responses have been state capacity, social trust, and leadership. Indeed, one can think on the old democracies, such as the US and the UK, which did not perform well due to lack of state capacity and/or effective leadership. On the other hand, all the states he mentioned, which have used the crisis to give themselves emergency powers, moving them still further away from democracy happen to be non-democracies. Like Hungary, where on the orders of the Hungarian health minister 36,000 hospital beds were cleared across the country – mostly by ejecting terminally and chronically ill patients from these hospitals and sending them home.[30] Nurses were frantically explaining to family members how to change drips and bandages, how to administer shots, how to look for dangerous turns in these patients' conditions. As a consequence, tens of thousands of Hungarian families were isolated at home with sick and dying loved ones who should have had hospital care. Two hospital directors were fired for resisting the government's orders, which overrode doctors' assessments of what was best for their patients' health.[31] Never mind that the real need for beds was about a tenth of the government estimates this measure alone violated human dignity and in some cases the right to life of the patients. This is the same denial of solidarity and treatment of human beings as non-equal in their humanity, and with this undermining democracy during the 2015 migration crisis by the Hungarian government. The ninth amendment to the Hungarian Fundamental Law, introduced in November 2020 amidst the second wave of the pandemic, used the pandemic as a pretext to fix children's gender identity at birth so that later gender changes can never be reflected on the birth register. By blatantly rejecting the self-determination rights of the children as part of their human dignity, this new provision reads:

Emergency Violates Rule of Law, *Verfassungsblog* (22 April 2020), https://verfassungsblog.de/dont-be-fooled-by-autocrats/?fbclid=IwAR1y2QoJktMihGxcp5G5QGkR8NZ9WerG6z3fHj808QDiHMPPym1XEB-x3cM.

[29] Francis Fukuyama, Pandemic and Political Order, *Foreign Affairs* (July/August 2020), https://www.foreignaffairs.com/articles/world/2020-06-09/pandemic-and-political-order.

[30] Hungary prepares for the worst and empties tens of thousands of hospital beds, *Bne Intellinews* (20 April 2020), https://www.intellinews.com/hungary-prepares-for-the-worst-and-empties-tens-of-thousands-of-hospital-beds-181318/.

[31] Hungarian Spectrum, Miklós Kásler's Housecleaning Hits a Nerve in Certain Fidesz Cricles, *Hungarian Spectrum* (15 April 2020), https://hungarianspectrum.org/2020/04/15/miklos-kaslers-housecleaning-hits-a-nerve-in-certain-fidesz-circles/.

"Every child shall have the right to the protection and care necessary for his or her proper physical, mental and moral development. Hungary protects children's right to the gender identity they were born with and ensures their upbringing based on our national self-identification and Christian culture."[32]

Another observation of Fukuyama is that given the importance of strong state action to slow the pandemic, it will be hard to argue against a stronger state involvement during a national emergency. Also, according to Ivan Krastev and Mark Leonard the virus rather strengthened than weakened national sovereignty.[33] Similarly, a report of Carnegie Europe asserts that most governments have assumed executive powers considered to be broadly necessary to contain the health crisis, and it remains uncertain whether these will entail long-term restrictions on democratic rights and human dignity.[34] Measures implemented to prevent or slow the spread of the virus have a disproportionately negative impact on vulnarable catagories of people, not only migrants, refugees, but also ethnic minorities, the elderly, prisoners, those with phisical or mental disabilities.[35] Ivan Krastev calls it one of the Corona-paradoxes that when people realize the threat to dignity and fundamental rights they are rather inclined to reject authoritarian rule.[36] Because one common understanding, has been that the 'rights versus public health' paradigm is fundamentally flawed: rights-respecting measures which secure public confidence are "more likely to be more effective and sustainable over time than arbitrary or repressive ones".[37]

The COVID-19 pandemic further complicated the answer to the question, what is the state of the human dignity-based 'civilisation', which according to

[32] See Gábor Halmai, Gábor Mészáros, Kim Lane Scheppele, So It Goes, Part II, *Verfassungsblog* (20 November 2020), https://verfassungsblog.de/so-it-goes-part-ii/.

[33] Ivan Krastev, Mark Leonard, Europe's pandemic politics: How the virus has changed the public's worldview, *ECFR* (20 June 2020), https://ecfr.eu/publication/europes_pandemic_politics_how_the_virus_has_changed_the_publics_worldview/.

[34] Richard Youngs, How the Coronavirus Tests European Democracy, *Carnegie Europe* (23 June 2020), https://carnegieeurope.eu/2020/06/23/how-coronavirus-tests-european-democracy-pub-82109.

[35] Joelle Grogen, States of Emergency, *Verfassungsblog* (26 May 2020), https://verfassungsblog.de/states-of-emergency/.

[36] Ivan Krastev, Sieben Corona-Paradoxien – es ist nicht leicht zu begreifen, was das Virus mit unserer Welt gemacht hat, während wir in unserem Zuhause festsassen, *Neue Zürcher Zeitung* (16 June. 2020), https://www.nzz.ch/meinung/sieben-corona-paradoxien-was-das-virus-mit-uns-gemacht-hat-ld.1557102?reduced=true.

[37] Alice Donald – Philip Leach, Human Rights – The Essential Frame of Reference in the Global Response, *Verfassungsblog* (12 May 2020), https://verfassungsblog.de/human-rights-the-essential-frame-of-reference-in-the-global-response-to-covid-19/.

Catherine Dupré is so close to the ECtHR idea of 'democratic society'.[38] As Harvard philosopher, Michael Sandel argues that the pandemic, and in particular the new appreciation of the value of supposedly unskilled, low-paid work, offers a starting point for new politics centered on the 'dignity of work'.[39] Geraldine Van Bueren calls for a new social contract, which requires both justiciable socio-economic rights and a prohibition of class discrimination, because the pandemic has brought to the forefront the need to include class in this emerging social contract, in order to provide everyone with a meaningful right to dignity.[40] It remains to be seen, whether this crisis can indeed serve as a catalyst for such change.[41] One reason for cautious optimism is the recent 'revolution of dignity'[42] in Belarus spearheaded by women against the last traditional dictatorship in Europe.

Conclusion

As it has been shown, beyond the choice between economic and health considerations also applied in liberal democratic countries, certain illiberal regimes used the crisis situation as a pretext to strengthen the autocratic character of their systems. Paraphrasing James Carville's bonmot we should say: It's the authoritarianism, stupid, which is behind illiberal and populist reactions to COVID-19. The ultimate question is, whether as after all other crisis so far, also after this pandemic we can hope for the restoration of capitalism and democracy with it, or we have to face "the crisis of the crisis of capitalism," which will kill democracy as well.

[38] See Catherine Dupré, Dignity, Democracy, Civilisation, *Liverpool Law Review* 33 (2012), 263–280, as well as in the midst of the migration crisis (*The Age of Dignity – Human Rights and Constitutionalism in Europe,* Oxford, Hart Publishing, 2015.)

[39] See Julian Coman, Interview with Michael Sandel, The Populist backlash has been a revolt against the tyranny of merit, *The Guardian* (6 September 2020), https://www.theguardian.com/books/2020/sep/06/michael-sandel-the-populist-backlash-has-been-a-revolt-against-the-tyranny-of-merit?CMP=Share_iOSApp_Other.

[40] Geraldine Van Bueren, The New Social Contract – A Dignified Life for both the Poor and the Wealthy, in Logi Gunnarson et al. (eds.), *The Human Right to a Dignified Existence in an International Contex*, Baden-Baden, Oxford, Nomos, Hart, 2019.

[41] For a more pessimistic view see Albena Azmanova's new book, which claims in the current phase of 'precarity capitalism' we face not with a crisis of capitalism but a 'crisis of the crisis of capitalism.' See Albena Azmanova, *How Fighting Precarity Can Achieve Radical Change Without Crisis or Utopia*, New York, NY, Columbia University Press, 2020.

[42] See Slawomir Sierakowski interviews Adam Michnik, Belarus's Revolution of Dignity, *Project Syndicate* (21 August 2020), https://www.project-syndicate.org/onpoint/belarus-revolution-of-dignity-by-adam-michnik-and-slawomir-sierakowski-2020-08.

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Bne Intellinews, Hungary prepares for the worst and empties tens of thousands of hospital beds, *Bne Intellinews* (20 April 2020), https://www.intellinews.com/hungary-prepares-for-the-worst-and-empties-tens-of-thousands-of-hospital-beds-181318/.

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UPGRADING RULE OF LAW IN EUROPE IN POPULIST TIMES

Dimitry Vladimirovich Kochenov[1]

Besides honoring Prof. Károly Bárd the task of this brief paper is to provide a concise tour d'horizon of EU law development in the field of the Rule of Law over the last years, which have significantly reinforced the powers of the supranational institutions in this domain, and have previously never been considered part of supranational competence / purview of regulation.

Introduction

I sat in Prof. Károly Bárd class exactly 20 years ago, earning LL.M. at CEU, which I have just rejoined, following 20 unfaithful years with the Dutch, Italian and US institutions (among many others). CEU LEGS has always stood on three pillars. One of these pillars radiating authority, wisdom and respect is Prof. Bárd. I am thus immensely grateful for the generous invitation to contribute to this *Liber* offered to one of the founding fathers of a great school, which shepherded so many notable academics and practitioners. In honoring Prof. Bárd I turn to the topic, which has preoccupied me over the last 20 years and which brought me back to CEU: the Rule of Law.

[1] CEU Democracy Institute, Budapest; CEU Legal Studies Department, Vienna; COMPAS Visiting Academic (Hilary term 2021), School of Anthropology, University of Oxford. An enlarged version of this chapter is forthcoming in the *Polish Yearbook of International Law* (2021). This work has been prepared in the auspices of the EU's Horizon 2020 research and innovation programme as part of RECONNECT project under Grant Agreement no. 770142.

Discovering the Rule of Law – Reinventing the Union

In dealing with the Rule of Law backsliding in the EU, the Court of Justice managed to turn the proclamation-based rule of law value of Article 2 TEU into an enforceable substantive principle of law, spanning across both the EU and national legal orders. In discussing these issues it is important to fully realise the fact that the rule of law and democracy backsliding problems occur in the EU does not point in the direction of any specificity of the Union: defiance is widespread in federations, as R. Daniel Kelemen, *inter alia*, has demonstrated, using the US as an example. The EU is thus not that special.[2] What was special about the EU is that although adherence to the rule of law has always been praised as an essential feature of its constitutionalism, the Union possessed – so it seemed – no competence to intervene in the cases when backsliding occurred at the national level.[3] And of course there is nothing close to the US National Guard in the European Union to help restore law and order in the recalcitrant Member States.[4]

The competence lacuna had to be filled sooner or later, allowing the EU to graduate into a true constitutional system that actually stands by its principles[5] – and the case-law of the last three years could be interpreted as starting precisely this kind of transformation. Given its vital importance combined with its innovative nature, one could characterize it as a welcome power grab – an organic part of the usual incrementalism in EU law's development, but going further than usual this time. What were the main aspects of this development? Four interrelated component parts can be identified.

– The Court has managed, firstly, to turn the presumption of compliance with the rule of law into an enforceable promise backed by the necessary competence to intervene (II.).[6]
– Moreover, secondly, the Court of Justice has also articulated the core substantive elements of the supranational rule of law,[7] which it had the competence

[2] R. Daniel Kelemen, Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union, *Government and Opposition* 52 (2017), 211–238.

[3] But see Carlos Closa – Dimitry Kochenov – Joseph H.H. Weiler, Reinforcing the Rule of Law Oversight in the European Union, *EUI RSCAS Research Paper* (2014).

[4] Mark Tushnet, Enforcement of National Law against Sub-National Units in the United States, in Jakab, András – Dimitry Kochenov (eds.), *The Enforcement of EU Law and Values: Methods against Defiance*, Oxford, OUP, 2017, 316–325.

[5] Cf. Andrew Williams, Taking Values Seriously: Towards a Philosophy of EU Law, *Oxford Journal Legal Studies* 29 (2009), 549–577.

[6] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* EU:C:2018:117.

[7] For a now classical account, see, Laurent Pech, The Rule of Law as a Constitutional Principle

to enforce, going beyond the circularity of the definition offered in *Les Verts* and focusing predominantly on judicial independence (III.).[8]

– The Court has moved on, thirdly, to ensure that its newly-found substance of the rule of law cutting through the legal orders is actually effectively enforceable and that this enforcement includes ample possibilities for interim relief, including the interventions to reverse the structural changes made by the member states in their systems of the judiciary and, crucially, the empowerment of the *national courts* of the Member States, with the help of EU law, to do the same (IV.).[9]
– As a consequence, lastly, the Court of Justice joined the emerging trend observable around the world, where international bodies and courts play an increasing role in the structuring and organization of the judiciaries at the national level (V.).[10]

All these changes could not but lead to a significant upgrade of rule of law standards also at the supranational level, as the Court had to take into account the recent significant advances in the area of understanding of the rule of law and apply them to the well-tested areas of EU law, such as the guarantees of independence of the bodies to meet the standards of 'court or tribunal' in the context of Article 267 TFEU as well as welcoming direct actions by the Commission against the Member States whose courts fail to take a meaningful part in the dialogue with the Court of Justice. The inter-court dialogue, which the Court is officially striving to protect, is thus not a dialogue of equals any more, as Araceli Turmo has amply demonstrated.[11] This is notwithstanding the fact that a questionable judicial genre of a press release is at times required to remind the national-level interlocutors of such *status quo*.[12]

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of the European Union, *Jean Monnet Working Paper Series* (28 April 2009). Cf. Ronald Janse, *De renaissance van de Rechtsstaat*, Heerlen, Open Universiteit, 2018.

8 Koen Lenaerts, New Horizons for the Rule of Law within the EU, *German Law Journal* 21 (2020), 29–34.

9 Pal Wennerås, Saving a forest and the rule of law: *Commission v Poland.* Case C-441/17 R, *Commission v Poland,* Order of the Court (Grand Chamber) of 20 November 2017, *Common Market Law Review* 56 (2019), 541–558.

10 David Kosař – Jiří Baroš – Pavel Dufek, The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism, *European Constitutional Law Review* 15 (2019), 427–461, 461.

11 Araceli Turmo, A Dialogue of Unequals – The European Court of Justice Reasserts National Courts, Obligations under Article 267(3) TFEU, *European Constitutional Law* Review 15 (2019), 340–358.

12 Justin Lindeboom, In the Primacy of EU Law Based on the Equality of the Member States? A Comment on the CJEU's Press Release Following the *PSPP* Judgment, *German Law Journal* 21 (2020), 1032–1044.

Turning the presumption into an enforceable promise

The most recent case-law reinventing EU's rule of law calls for a new way of approaching the Union: from a system of 'declaratory' rule of law,[13] where the adherence of the national authorities to this principle is merely a presumption, the Union emerged as a constitutional system where this presumption is being gradually replaced with a statement of full adherence to this statement as a fact, which comes with a possibility of checking whether this presumption holds true combined with a possibility to police serious deviations *both* in the political *and* in the legal context. Leaving aside the political context of Article 7 TEU, which has been analyzed in the literature in detail, this contribution focused on what has been the most important set of developments in EU law over the last several years and what is bound to be the core legacy of President Lenaerts' Court: the articulation of the rule of law as a workable principle of law applicable across the legal orders in the EU. Indeed, if only an actual, as opposed to a declaratory, rule of law system can lend its 'constitutional' characterization some truth, the EU is only becoming a constitutional rule of law-based system now, in front of our eyes.

The swift transformation of the law at both supranational and the national level that this fundamental shift entails is a result of the revolutionary case-law over the last two years, since the *Portuguese Judges* ruling, where the Court for the first time in EU history turned to Article 19(1) para 2 TEU in order to kill two birds with one stone. Firstly, it gave clear EU law substance to the value of the rule of law in Article 2 TEU, thus elevating the independence of the judiciary to a new level both in theory and in practice in the context of the EU legal system. Secondly, it found a way to articulate EU law jurisdiction in the cases involving threats to judicial independence at the *national* level, *de facto* broadening the material scope of EU law to a significant extent. It goes without saying that such broadening, predicted by eminent scholars of the past, form Judge Kakouris to John Usher,[14] is rock-solid in terms of its legal grounding in the texts and the

[13] Dimitry Kochenov, Declaratory Rule of Law: Self-Constitution through Unenforceable Promises, in Jiří Přibáň (ed.), *The Self-Constitution of European Society beyond EU Politics, Law and Governance*, Abingdon, Routledge, 2016, 159–179.

[14] John A. Usher, How limited is the jurisdiction of European Court of Justice?, in Janet Dine – Sionaidh Douglas-Scott – Ingrid Persaud (eds.), *Procedure and the European Court*, London, Chancery Law Publishing, 1991, 72-84, 77; John A. Usher, General Course: The Continuing Development of Law and Institutions, in Frank Emmert, *Collected Courses of the Academy of European Law*, 1991, European Community Law. Vol II, Book 1, The Hague: Martinus Nijhoff Publishers, 1992, 37–165, 122; Constantinos N. Kakouris, La Cour de Justice des Communautés européennes comme cour constitutionnelle: trois observations, in Ole Due – Marcus Lutter – Jürgen Schwarze (eds.), *Festschrift für Ulrich Everling*, Baden

spirit of the Treaties. It can be hypothesized that such developments as the ones we witnessed over the last two years, could occur much earlier in the history of EU's constitutionalism. Yet, there was probably no overwhelming need for their articulation before now. Indeed, as one remembers from school physics lessons, where there is action – there is reaction. The presumption of compliance by all the Member States' authorities with the rule of law – criticized amply by one of the present authors[15] – has actually worked well until the moment when rule of law and democratic backsliding became the main headache of the powers that be in Brussels and other capitals. Indeed, should the backsliding continue, the very soul of the Union would be emptied of any content: if it is not anymore a club of rule of law-abiding democracies, the added value of the whole integration project comes naturally questioned.[16] The issue is thus not helping the Polish and the Hungarian people to remain free. The very rationale of the Union as such is at issue.[17] Tomasz Koncewicz is absolutely right: 'undoubtedly, while this emerging rule-of-law case-law adds constitutional layers to the community of law, its reformative potential and significance go clearly beyond the courtroom'.[18]

Articulating the substance of the EU rule of law: discovering the importance of judicial irremovability and independence

Appealing to the independence of the judiciary, which is one of the least questioned crucial elements of the rule of law, in order to accomplish the transition from restating presumptions to ensuring compliance is a move of towering importance, especially considered in its simplicity. As explained by President Lenaerts: 'It follows that national courts or tribunals, within the meaning of Article 267 TFEU, are, first and foremost, called upon to protect effectively the rights that EU law

Baden, Nomos, 1995, 629–640; Constantinos N. Kakouris, La Mission de la Cour de Justice des Communautés Européennes et l'ethos du Juge, *Revue des affaires européennes* 4 (1994), 35–41.

15 Dimitry Kochenov, The EU and the Rule of Law –Naïveté or a Grand Design?, in Maurice Adams – Anne Meuwese – Ernst Hirsch Ballin (eds.), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism*, Cambridge, CUP, 2017, 419–445.

16 Tomasz T. Koncewicz, Understanding the Politics of Resentment: Of the Principles, Institutions, Counter-Strategies, Normative Change, and the Habits of the Heart, *Indiana Journal of Global Legal Studies* 26 (2019), 501–630.

17 Carlos Closa, Reinforcing of EU Monitoring of the Rule of Law', in Carlos Closa – Dimitry Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge, CUP, 2016, 15–35.

18 Tomasz T. Koncewicz, The Supranational Rule of Law as First Principle of the European Public Space – On the Journey in Ever Closer Union among the Peoples of Europe in Flux, *Palestra* 5 (2020), 167–216.

confers on individuals, thereby providing them with "supranational justice" and upholding the rule of law within the EU'.[19] The deep change at the heart of EU's constitutionalism has thus brought about seemingly nothing new: all the elements i.e. draws upon – form the on-going dialogue between the national courts acting in their EU-law capacity and the Court of Justice to the need to ensure that individuals can fully draw on their 'legal heritage'[20] of rights articulated at the supranational level – have been with us all along. It is their reshuffling, in the light of reinterpreting the requirements of Article 19(1) TEU as well as Article 47 CFR in order to enable EU's direct intervention – like in *Commission v. Poland (The Independence of Supreme Court)* where a complete restoration of the *status quo ante* has been ordered by the Court, undoing the so-called "judicial reform" – or an indirect intervention – like in *A.K. (The Independence of the Disciplinary Chamber of the Polish Supreme Court)*, the Court instructing the Polish counterpart to apply a clear test of independence to the questionable body at issue parading as one of the chambers of the Polish Supreme Court, based on the substantive meaning of judicial independence drawn from the analysis of Article 47 CFR.[21] This combination of the possibility of direct and indirect intervention combined with the perception of 'nothing new' is precisely the appeal and the strength of the remarkable case-law over the last two years.

Preventing fast deterioration, while empowering the local courts: interim relief

Having learnt from its failures to prevent the successful completion of the attacks against the judiciary in Hungary,[22] the Court of Justice and the Commission paid significant attention to ensuring that sufficient interim measures are put in place in order to ensure that the attacks against the rule of law not continue successfully following the Commission's victories in court and during the process. As with many other cases of relevance, the starting point of the interim relief

[19] Koen Lenaerts, Our Judicial Independence and the Quest for National, Supranational and Transnational Justice, in Gunnar Sevik – Michael-James Clifton – Theresa Haas – Luísa Lourenço – Kerstin Schwiesow (eds.), *The Art of Judicial Reasoning: Festschrift in Honour of Carl Baudenbacher*, Berlin, Springer, 2019, 155–174, 158.

[20] Case 26/62 *van Gend en Loos* [1963] ECR 1 (special English edition).

[21] Cf. Laurent Pech, Article 47(2), in Steve Peers et al. (eds.), *The EU Charter of Fundamental Rights: A Commentary*, 2nd ed., Oxford, Hart Publishing, 2021.

[22] Case C-286/12, *Commission v. Hungary (Judicial Retirement Age)* EU:C:2012:687. Dimitry Kochenov – Bárd, Petra, The Last Soldier Standing? Courts versus Politicians and the Rule of Law Crisis in the New Member States of the EU, *European Yearbook of Constitutional Law* 1 (2019), 243–287.

was seemingly disconnected from the rule of law issues as such and concerned environmental protection measures, yes, scholars saw the implications of saving a UNESCO-protected forest from the spruce beetle instantly as the dawn of a new era in the understanding of interim relief required and authorized by EU law.[23]

Most importantly, the case-law on the interim-relief by the Court of Justice can in fact be viewed as set of examples to follow for the national courts enforcing EU law. These are obliged to grant interim relief to ensure that EU law rights are preserved 'before it's too late', as President Lenaerts also underlines in his scholarly writings.[24]

New case-law has revolutionized interim relief in reaction to the attacks to the whole systems of institutions as it brought about the requirement of *status quo ante* restoration: the reversal of the attack.[25] Such developments, combined with newly-discovered monetary tools to influence the authorities, which are particularly persistent in their failure to comply, as we have seen in the *Polish Forest*, bring the system of remedies in EU law to a new level in terms of guaranteeing effective compliance with the principle of the rule of law.

Supranational consequence: a gradual upgrade of EU law

The most recent rule of law developments have had a direct and unmistakable impact on the supranational level of the law. Form *Commission v. France*, which outlawed the abuse of *CILFIT* solidifying, from the ECJ's point of view, the unequal relationship between the courts engaging in the dialogue the Court is striving to protect, to the tightening of the independence requirement applied to any body aspiring to qualify as a 'court of tribunal' of a Member State in the sense of Article 267 TFEU, the law as it stands draws directly on the saga of *Portuguese Judges* and the *Commission v. Poland* cases.

Going sector specific the direction of the development of the law is largely similar, as also the case law on the meaning of the 'judicial authority' under the EAW FD saw a significant tightening of the notion of 'independence' which is required in order to be able to send EAW requests. The *Prosecutors' Cases* make

[23] Wennerås, Saving a forest and the rule of law, 541.

[24] Lenaerts, Our Judicial, 157 and the references cited therein.

[25] This does not, regrettably, apply to the defense of the independence of the supranational judiciaries, as it clear from the Court of Justice's own *Sharpston* cases. For a detailed analysis, see, Graham Butler – Dimitry Kochenov, Independence and Lawful Composition of the Court of Justice of the European Union, *Jean Monnet Paper* (2020), https://jeanmonnetprogram.org/wp-content/uploads/JMWP-02-Dimitry-Kochenov-Graham-Butler.pdf.

is abundantly clear that the general move in the direction of infusing the idea of independence with more importance is fully aligned in the Area of Freedom, Security and Justice and EU law *sensu lato*, as we have seen in *Banco Santander SA*. All in all, the Union is going through a deep process of rethinking the idea of judicial independence at the national level and this rethinking does *not* only concern the Member States experiencing rule of law or democratic backsliding. Instead it emerges as a general principle applying equally throughout the EU, without touching the ECJ itself, however, which is more concerned with respecting the Member States (not always legal) power, caring less about the perception of own independence.[26]

The Court of Justice joining the global trend

The Court of Justice joined the game of domestic judicial design by international courts,[27] which the European Court of Human Rights has been playing for years, especially as far as the aspects of judicial independence and self-governance go. The Court could in fact be inspired by its Strasbourg *homologue* in framing the issue – even if the Strasbourg standards of judicial independence appear to go further than what the Court of Justice has articulated so far, and include the emerging notion of 'internal judicial independence',[28] including the requirements for judges 'to be free from directives of pressures from the fellow judges or those who have administrative responsibilities in the court such as the president of the court or the president of a division in a court.'[29] Besides the 'fake judges' considerations,[30] ECJ's efforts to neutralize the Disciplinary Chamber of the Polish Supreme Court as not independent and threatening the very fabric of EU (and Polish) legal order, could be viewed as a forceful intervention in support, precisely, of the internal judicial independence. The same applies to the requirement of

[26] Butler – Kochenov, Independence and Lawful.

[27] David Kosař – Lucas Lixinski, Domestic Judicial Design by International Human Rights Courts' *American Journal of International Law* 109 (2015), 713–760.

[28] Joost Sillen, The Concept of "Internal Judicial Independence" in the Case Law of the European Court of Human Rights, *European Constitutional Law Review* 15 (2019), 104–133.

[29] ECt.HR *Parlov-Tkalčić v. Croatia* Application No. 24810/06, 22 December 2009. For a detailed analysis of all the relevant ECt.HR case-law, see, Sillen, The Concept of "Internal Judicial Independence".

[30] Laurent Pech, Dealing with "Fake Judges" under EU Law: Poland as a Case Study in Light of the Court of Justice's Ruling of 26 March 2020 in *Simplon* and *HG*, *RECONNECT Working Paper* (2020).

independence and self-governance of the judicial councils.[31] On this reading, the ECJ is moving the meaning of judicial independence even further, helping the ECt.HR, which has already done significant work in this direction, as Joost Sillen has recently demonstrated.[32] The two standards – of 'internal independence' and 'established by law' in fact obviously and necessarily converge, since a court lacking internal independence does not meet the basic Article 6(1) ECHR requirement of impartiality and is thus not established by law.[33] The question about how the international and supranational courts meet this standard remains open.

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[31] E.g. ECt.HR *Oleksandr Volkov v. Ukraine* Application No. 21722/11, 9 January 2013.

[32] Sillen, The Concept of "Internal Judicial Independence".

[33] Sillen, The Concept of "Internal Judicial Independence", 109.

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THE RULE OF LAW REVISITED – FINNISH APPROACH

Raimo Lahti[1]

Introduction

When writing in honor of Károly Bárd, I recall many memories of our scientific contacts and friendship. The first contact is already from November 1976, at that time of Károly's guest lecture at the University of Turku, where I had in the same year started permanently as Professor of Criminal Law. Later our cooperation continued especially during the 30 years of Finnish-Hungarian Criminal Law Seminars in 1979–2009[2] *and during our common period in the International Advisory Board of the European Institute of Crime Prevention and Control, affiliated with the United Nations (HEUNI).*

'The rule of law and criminal law" was the general subject of the Finnish-Hungarian criminal law seminar in Miskolc in 1996, and I will after 25 years come back to this topic in the following essay. Firstly, however, I have some background comments on that Finnish-Hungarian cooperation (in which Károly Bárd had an important role) and on the significance of that cooperation.

In our bilateral criminal law seminars we had much common issues and interests to be discussed and studied. As *Tibor Horváth* aptly pointed out in his opening speech at the Miskolc seminar, the criminal law developments in the 1990s and were both in Finland and Hungary "influenced by the principle of a democratic constitutional state, and dependent upon the guarantee taken from the principle of *nullum crimen* and *nulla poena*, and the requirement of a penal system based on rationality and humanity"[3].

[1] Professor emeritus of Criminal Law at the Faculty of Law, University of Helsinki, Finland

[2] As for that 30 years' seminar activities, see Ligeti, Katalin (ed.), *Homage to Imre A. Wiener*, Nouvelles Études Pénales, No. 22, Toulouse, Association Internationale de Droit Pénal, Érès 2010; Raimo Lahti: From Comparative Criminal Law to the Europeanization and Internationalization of Criminal Law, in Ligeti (ed), *Homage to Imre A. Wiener,* 21–31.

[3] See the citation of the speech in the preface by, Imre A. Wiener, Finnish-hungarian seminars on criminal law and administrative law, *Acta Juridica Hungarica* 37 (1995/1996), 125–128, 127. This Vol. 37, Issue 3–4/1995/96 of the journal *Acta Juridica Hungarica* included the papers presented at the seminar. Raimo Lahti, The Rule of Law and Finnish Criminal Law Reform, *Acta Juridica Hungarica* 37 (1995/1996), 251–258.

The programmes of the seminars were oriented towards traditional comparison of legal cultures and solutions, *i.e.*, our cooperation was directed to comparative criminal law and criminal justice. A clear change in the orientation of Finnish-Hungarian cooperation took place from the 1990s. It had to do with the collapse of the "Iron Curtain" in 1989 and the following political-economic changes in Europe and globally as well as the emergence of legal development which has often been described by the expression "Europeanization and internationalization of criminal law". In the 2000s the general themes of the seminars were fully in accordance with the new priorities. The rapid development towards an international criminal law and European criminal law since the 1990s compelled to reassess the role of comparative criminal law and to pay attention to the intensified interaction between regional and international (or global) legal regulations on one hand, and the national legal orders, on the other.[4]

The total reform of Finnish criminal law was in fact implemented by partial legislative packages in 1980–2003[5]. The penal thinking which was adopted in this total reform (recodification) can be characterized by the demand for a more rational criminal justice system: *i.e.*, for an efficient, just and humane criminal justice. The penal system must be both rational as to its goals (utility) and rational as to its basic values (justice. humaneness).[6] An important effect of the new criminal and sanction policy can be seen in the reduced use of custodial sentences in Finland. Since the mid-1970s, the relative number of offenders sentenced to unconditional imprisonment was on the decrease until 1999: from 118 in 1976 to 65 in 1999 per 100 000 population and to the level of the other Nordic countries. At the same time the development of registered criminality signed a similar trend in all of Nordic countries, so that a dramatic cut in the prisoner rate in Finland did not result in a proportionate increase in the incidence of crime compared with other Nordic countries, where the prisoner rate stayed quite stable.[7]

[4] See Lahti, *Homage to Imre A. Wiener*, 22–24.

[5] The revised Finnish Penal Code with the amendments up to 766/2015 is electronically accessible as an unofficial translation into English from the website of the Ministry of Justice: https://www.finlex.fi/fi/laki/kaannokset/1889/en18890039_20150766.pdf.

[6] In more detail, see Raimo Lahti, Recodifying the Finnish Criminal Code of 1889: Towards a More Efficient, Just and Humane Criminal Law, *Israel Law Review* 27 (1993), 100–117; *idem*, Towards a Rational and Humane Criminal Policy – Trends in Scandinavian Penal Thinking, *Journal of Scandinavian Studies in Criminology and Crime Prevention* 1 (2000), 141–155. See also the article collections Raimo Lahti, *Zur Kriminal- und Strafrechtspolitik des 21. Jahrhunderts*, Berlin, de Gruyter, 2019; *idem, Towards an Efficient, Just and Humane Criminal Justice*, Helsinki, Finnish Lawyers' Association, 2021.

[7] In more detail, see Patrik Törnudd, *Fifteen Years of Decreasing Prisoner Rates in Finland*, Helsinki, National Research Institute of Legal Policy (NRILP), 1993; Tapio Lappi-Seppälä, *Regulating the Prison Population*, Helsinki, NRILP, 1998.

There was a parallel between the just-described Hungarian vision and the aims of the Finnish criminal law reform. In the 1990s, the bilateral criminal law seminars revealed a strong common interest in criminal law theory and practice, which took seriously the requirements of constitutionality and human rights. In the discussions of the 1996 Miskolc seminar turned out that the model or contents of the *Rechtsstaat* differed between Finland and Hungary, and they do differ also today. In Finland, there is not a special Constitutional court like in Hungary. Traditionally, a preventive and an abstract control of norms during the legislative process has prevailed in Finland and also in other Nordic countries. However, the ratification of the European Convention of Human Rights (Treaty of Rome of 1950) and the reform of constitutional rights in the 1990s implied a direct applicability of individual's fundamental (human and/or basic) rights in the courts. The new Finnish Constitution of 731/1999 even empowers the general courts to give in their judicial decisions priority to the provisions of the Constitution over an ordinary Act of Parliament in the case of "obvious conflict".

Due to different legal traditions, the exchange of information and scientific views about the significance of rule of law and constitutionalism in relation to criminal law and procedure was especially fruitful. For instance, the decisions of the Hungarian Constitutional Court on the abolition of death penalty and on the reasoning how the principles of *ultima ratio* and *nullum crimen sine lege* limit the use of criminal law were highly interesting examples of the "constitutional penal law".[8] It is worth noticing that *Imre A. Wiener* advised to separate problems affecting constitutional law and the internal systems of other branches of law (such as criminal and procedural law) in contrast to certain "over-constitutionalism".[9] I for my part I have emphasized that while the moral and political arguments of justice and humanity are now firmly fastened (although not exhaustively) to human rights and constitutional law, criminal

[8] The proceedings of the 1996 seminar include several relevant articles of Hungarian scholars, see especially Farkas, Ákos – Róth, Erika, The Constitutional Limits of the Efficiency of Criminal Justice, *Acta Juridica Hungarica* 37 (1995/1996), 139–150; Horváth, Tibor, The Problems of Constitutional Regulation of the Right to Life, *Acta Juridica Hungarica* 37 (1995/1996), 231–242; Lévai, Miklós, The Rule of Law and Criminalisation, *Acta Juridica Hungarica* 37 (1995/1996), 259–272; Wiener, Imre A., The Necessity Test Relevant to the Codification of Criminal Law, *Acta Juridica Hungarica* 37 (1995/1996), 335–346. See also Wiener, Imre A., Constitution and Criminal Law, *Acta Juridica Hungarica* 38 (1997), 19–37. Cf. from the Finnish point of view especially Kimmo Nuotio, The Difficult Task of Drafting Law on Principles, *Acta Juridica Hungarica* 37 (1995/1996), 287–302; Ari-Matti Nuutila, The Reform of Fundamental Rights and the Criminal Justice System in Finland, *Acta Juridica Hungarica* 37 (1995/1996), 303–314.

[9] Wiener, The Necessity Test, 345–346; Wiener, Constitution and Criminal Law, 27–37.

policy discourse should continuously be open to balancing different types of legal, political and moral arguments.[10]

The concepts of the rule of law and legality (nullum crimen, nulla poena sine lege)

Finnish scholar *Eero Backman* presented a paper on the concept of *Rechtsstaat* and criminal law in Hungary in 1990[11]. His distinctions and arguments are clarifying from a Finnish view. As for the legality principle, Backman referred to the doctoral thesis (1989) of *Dan Frände*[12] on the subject and, in particular, to the division of the legality principle in criminal law into the following four sub-clauses: a) the rule that only the law can define a crime and prescribe a penalty *(nullum crimen sine lege scripta); b)* the rule that criminal law must not be applied by analogy to the accused's detriment; c) the prohibition of the retrospective application of the criminal law to the accused's disadvantage *(nullum crimen sine lege praevia);* and d) the rule that a criminal offence must be clearly defined in the law *(nullurn crimen sine lege certa).*[13] This kind of classification and definitions of the main contents of the legality principle were not clearly recognized in the Finnish doctrine so far, although they had been generally accepted *inter alia* in the case-law of the European Court of Human Rights (ECtHR)[14]. For instance, in the traditional leading Finnish text-book in criminal law it was not adopted the rule b), according to which criminal law it is not permitted – without exceptions – to apply analogy to the accused's detriment.[15]

[10] Lahti, The Rule of Law, 257–258. See also generally Ari Hirvonen, The Rule of Justice and the Ethical Limits of Criminal Law, *Acta Juridica Hungarica* 37 (1995/1996), 221–230.

[11] Eero Backman, Rechtsstaat und Strafrecht, in Raimo Lahti – Kimmo Nuotio (eds.), *Towards a Total reform of Finnish Criminal Law,* Helsinki, University of Helsinki, 1990, 7–20.

[12] See Dan Frände, *Den straffrättsliga legalitetsprincipen,* Helsinki, Ekenäs, 1989.

[13] See now, in particular, Mikhel Timmerman*, Legality in Europe. On the principle nullum crimen, nulla poena sine lege in EU law and under the ECHR*, Cambridge, Intersentia, 2018, *passim*; as for the theory, see ch. 2. The forbid of analogy (*supra* point b) is expressed as the prohibition of the overly extensive interpretation of offenses and penalties (*lex stricta*).

[14] See Timmerman, *Legality in Europe*, ch. 3. See, typically, a case of the ECtHR: C. R. v. United Kingdom, Judgment of 22 November 1995, Series A. no. *35S-C.* In a later Case of Huhtamäki v. Finland, Judgment of 6 March 2012 (Application no. 54468/09), ECtHR confirmed the earlier reasoning: "The Court reiterates that Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen" (para 51).

[15] Brynolf Honkasalo, *Suomen rikosoikeus. Yleiset opit I*, Helsinki, Hämeenlinna, Karisto, 1965, 43–51.

For Backman these legality rules were only formal aspects of the *Rechtsstaatlichkeit* (the constitutionally governed state). The last-mentioned concept *t* included several additional criteria: a) anticipatory guarantees such as the general limiting preconditions for criminal liability and the principles concerning the organization of the judiciary; b) the procedural rules regarding the different phases of criminal proceedings; and c) the methods of appeal in criminal proceedings and the supervision of the administration of justice.

Another Finnish scholar, *Kaarlo Tuori*, has distinguished four models of the *Rechtsstaat* in his theoretical analysis: a) the so-called liberal *Rechtsstaat*, b) the model of the substantive *Rechtsstaat, c)* the formal concept of the *Rechtsstaat,* and d) the model of the democratic *Rechtsstaat.*[16]

Regarding these models, the last one presupposes a constitution based on democracy and fundamental rights but, in addition to this constitutional demand, requires an active and independent civil society.

The democratic model of *Rechtsstaat* is according to Tuori constructed with the presumption that democracy and fundamental rights must be regarded as complementary principles rather than opposing or rival ones. The Finnish legal system seems to correspond to this model with respect to, among other things, the means of reviewing the constitutionality of laws: there is neither judicial review nor a constitutional court, but rather a preventive and an abstract control of norms; that is, the conformity of a bill to the constitution is reviewed only during the legislative process.[17]

Any examination of the concepts of the rule of law and *Rechtsstaatlichkeit* reveals how vague or open to various interpretations they are, although their doctrines are very central to the Western liberal democracies. For instance, Backman's analysis indicates that the idea of the rule of law includes requirements as for both the substantive rules of the legal system and the procedural rules, which govern adjudication and enforcement in individual cases. The rule of law checklist (with benchmarks and standards), adopted by the Venice Commission in 2016, is now helpful for a sophisticated comparative analysis. It includes as sub-titles legality, legal certainty, prevention of abuse of powers, equality before the law and non-discrimination as well as access to justice.[18] In the following my view is, however, much narrower and is based on the Finnish legal experience since the 1990s.

[16] Kaarlo Tuori, Four models of the *Rechtsstaat,* in Maija Sakslin (ed.), *The Finnish Constitution in Transition,* Helsinki, Finnish Society of Constitutional Law, 1991, 31–41.

[17] Antero Jyränki, Taking Democracy Seriously. The problem of the control of the constitutionality of legislation. The case of Finland, in Sakslin (ed.), *The Finnish*, 6–30.

[18] *Rule of Law Checklist.* Adopted by the Venice Commission in 2016 and endorsed by the Council of Europe in 2017.

The *legality principle* includes, *inter alia*, the requirement of certainty of criminal law. The aim to limit judicial discretion was predominant in the Finnish criminal law reform since the 1970s. While the Swedish Criminal Code of 1965 had been criticized for using overly vague crime definitions, the Finnish law drafters sought to describe the offences as clearly as possible, for example by reducing the use of value-laden or otherwise ambiguous terms in the definition of the crime. On the other hand, the objective of more precise crime definitions collides with another aim of the Finnish reform work, namely the effort to synthetize crime definitions, in other words to cast them in a more abstract form (as in the crime definition on 'Causing of danger' or the definitional elements of 'Debtor's offences'; PC 21:13 and chapter 39). A reasonable balance between these conflicting aims was sought. An accommodation was also required between the principles of comprehensibility and certainty. Although clarity is a function of both comprehensibility and certainty of language, the maximization of one may be detrimental to the other.

Other means to limit judicial discretion have also been used. Thus, in many cases the existing offences have been split into subcategories (*e.g.* basic assault, aggravated assault, and petty assault), and the definition of an aggravated offence is based on an exhaustive list of criteria (however, a milder evaluation is always discretionary). In addition, the number and scope of sentencing scales (punishment latitudes) have been generally reduced.

In accordance with the legality principle and the values behind it, the basic concepts and principles governing the general preconditions for criminal liability are defined in the revised general part of the Penal Code to a greater extent than in the Penal Code's original form. For instance, the preconditions for liability for omissions as well as the concepts of intent, negligence, and mistake are defined in the new Code (chapters 3–4; 515/2003), unlike in the original Penal Code of 1889.[19] The significance of the legality principle was reinforced during the preparatory work by the constitutional reform (chapter 2, section 8, Constitution[20]).

One way to strengthen the legality principle was the effort to reduce and specify the use of the so-called *blanket provision* technique. For instance, the new provision on the legality principle in the revised Constitution obliges the legislature and courts to take a strict course of action in this respect, because the acts must be punishable under an Act of Parliament in force at the time when they were committed. This new constitutional provision on the legality principle, according to its *travaux préparatoires,* and the tradition of transforming

[19] See the following provisions in the revised PC 3:3; 3:6–7; 4:1–3.

[20] An unofficial English translation of the Constitution of Finland (731/1999), as it was in force in 2011 (1112/2011), is available on the website of the Ministry of Justice: https://www.finlex.fi/fi/laki/kaannokset/1999/en19990731_20111112.pdf.

international treaties requiring the penalization of certain acts, leads to the conclusion that the Finnish courts are not allowed to sentence for an act which only constitutes a criminal offence under international law. This conclusion differs from the Decision 53/1993 (X.13) of the Hungarian Constitutional Court, where individual responsibility for war crimes and crimes against humanity was established irrespective of their punishability under domestic law, and it was based on the general cogency of the relevant international law.[21]

The significance of the ratification of the European Convention on Human Rights and the reformed bill of rights in the Finnish Constitution

Remarkable changes in Finnish legal ideology have taken place since 1990, as far as the concepts of the rule of law and *Rechtsstaatlichkeit* are concerned. In May 1990 Finland ratified the European Convention on Human Rights and Fundamental Freedoms (ECHR), accepted the jurisdiction of the ECtHR, and recognized the right of individual petition. Before that an in-depth study on the compliance of Finnish legislation with the ECHR and Strasbourg case-law was conducted. Several Acts of Parliament were amended, for example with respect to pre-trial investigation and aliens' rights[22]. Finland joined the Council of Europe so late as in 1990, due to foreign policy reasons. Therefore, the ratifications of the ECHR occurred in Finland and Hungary in 1990 and 1993, timely near to each other. Both countries and their authorities faced similar problems in changing their legislation and judicial practices to comply with the ECHR provisions and the Strasbourg case-law. Károly Bárd had a key role in Hungary when the compliance with the ECHR was under scrutiny in Hungary.

The ECHR and other important human rights conventions have been incorporated through an Act of Parliament *in blanco.* Because of the predominance

[21] See Mohácsi, Péter – Polt, Péter, Estimation of War Crimes and Crimes against Humanity according to the Decision of the Constitutional Court of Hungary, *Revue Internationale de Droit Pénal* 67 (1996), 333–339. Cf. Bárd, Károly, Division of Jurisdiction between National and International Courts – What Role Should the European Human Rights Court Play? in Liget (ed.), *Homage to Imre A. Wiener*, 35–48: ECtHR ruled that Korbely did not fall under the category of crimes against humanity, although between October 23 and November 4, 1956, there were such atrocities in Hungary.

[22] See Matti Pellonpää, The Implementation of the European Convention on Human Rights in Finland, in Rosas, Allan (ed.), *International Human Rights Norms in Domestic Law*, Helsinki, Finnish Lawyers' Publishing Company, 1990, 44–67. Pellonpää, the first Finnish Judge in the ECtHR, made the in-depth study in Finland.

of the incorporation method, Finland can be said to represent dualism in form but monism in practice when implementing international law in the domestic legal order. This method of implementation affects the application of human rights treaties. The Parliamentary Constitutional Law Committee has confirmed the following principles: the hierarchical status of the domestic incorporation act of a treaty determines the formal rank of the treaty provisions in domestic law (that is, their rank is normally that of an Act of Parliament).

Incorporated treaty provisions are in force in domestic law in a form corresponding to their representation in international law; and the courts and authorities should resort to "human-rights friendly" interpretations of cases which have domestic status, in order to avoid conflicts between domestic law and human rights law.

New provisions on the fundamental rights in the Finnish Constitution were enacted in 1995, and they were included into the new Constitution of 1999. The new provisions on these basic rights, which are much more detailed than the earlier ones, for instance those concerning not only fundamental freedoms but also social rights, have been essentially inspired by the international human rights treaties. From the point of view of criminal law, there are important new provisions, for example on the legality principle in criminal law (corresponding to Article 7 ECHR) and the provision stating that a punishment entailing deprivation of liberty can only be imposed by a court.

Several of the enacted constitutional provisions make reference both to basic and human rights, thus giving semi-constitutional status to human rights treaties.[23] The *travaux préparatoires* for this reform emphasize the fact that the constitutional provisions are also directly applicable in the administration of law by judges and authorities, and so their binding effect is not restricted to law-making only. In addition to the 'human-rights-friendly' interpretation of the law, a similar 'basic-rights-friendly' interpretation is recommended, although the prohibition of courts to examine the constitutionality of Acts of Parliament was maintained.

In all, the requirements of *Rechtsstaatlichkeit* include several criteria which should be applied in constitutionally governed states like Finland: first, anticipatory guarantees such as the general principles limiting the use of substantive criminal law (see more *supra*) and the principles concerning the organization of the judiciary; second, the procedural rules regarding the different phases of criminal proceedings; and, third, the methods of appeal in criminal proceedings and the

[23] See Martin Scheinin, Incorporation and Implementation of Human Rights in Finland, in Scheinin (ed.), *International Human Rights Norms in the Nordic and Baltic Countries,* The Hague, Nijhoff, 1996, 257–294, 276.

supervision of the administration of justice. Major reforms of criminal procedural law have been carried out during the last thirty years in order to strengthen these requirements.

There are two special features in the institutions and actors of Finnish procedural law: First, the pre-trial investigations are led by senior police officers and not by prosecutors or judges. The decision as to whether an apprehended suspect is to be arrested must be made within 24 hours by a senior police officer or the prosecutor. A request that a person under arrest be remanded for trial shall be made to a court without delay and not later than noon on the third day following the day of apprehension. The court has also an important role in deciding on the use of covert coercive measures. The prerequisites for these measures are regulated in detail by the legal Act; covert coercive measures include telecommunications interception, the obtaining of data other than through telecommunications interception, traffic data monitoring, obtaining base station data, extended surveillance, covert collection of intelligence, technical surveillance (on-site interception, technical observation, technical monitoring and technical surveillance of a device), obtaining data for the identification of a network address or a terminal end device, covert activity, pseudo-purchase, the use of covert human intelligence sources, and controlled delivery.

Second, the office of the prosecutor general is an independent authority outside the judicial administration of the Ministries of Justice and Interior. When the legislation on criminal proceedings was modernized in the 1990s, the main model was Sweden's accusatorial type of trial. The accusatorial principle requires that the judge be an impartial third party, so that all the activities of bringing the criminal charge forward are handled by a separate official, the prosecutor, and his or her role is significant.

In addition to the accusatorial principle, the other leading principles governing the main hearing in the proceedings are the requirements of orality and immediacy. Therefore, all pleadings shall, as a rule, be oral, and the opposing party has the right to cross-examine all evidence presented against him/her. The acceptability of evidence other than oral evidence in open court is very restricted.

In the most recent years, ECtHR case law has influenced especially the fair trial guarantees of evidentiary procedure (such as the privilege against self-incrimination and the exclusion of unlawfully obtained evidence) and the significance and contents of the '*ne bis in idem*' principle.[24] In these respects Finnish procedural law has been reformed and applied in line with the practice

[24] Cf. generally Bárd, Károly, *Fairness in Criminal Proceedings*. Budapest, Magyar Közlöny Kiadó, 2008, *passim*.

of the ECtHR and, after Finland' membership in the European Union (EU) since 1995, in line with the judgments of the Court of Justice of the EU (CJEU).

For instance, explicit provisions have been included in the revised Code of Judicial Procedure (chapter 17, sections 18 and 25; 732/2015) on the privilege against self-incrimination and on the exclusion of unlawfully obtained evidence. A separate legal Act (781/2013) on the prohibition of double jeopardy (*i.e.* a prohibition against the cumulative use of criminal punishment and administrative penal fee) was introduced for tax fraud cases. Accordingly, as a rule, no charges may be brought nor court judgments passed if the same person in the same case has already incurred a punitive tax or customs increase (PC 29:11).

Challenges arising from the Europeanized criminal law and judicial procedure[25]

Károly Bárd saw already in his Inkeri Anttila honor lecture in 1996 certain possibilities for the birth of a European criminal law. According to him, there were two opposite direction discernible: on the one hand, there was a tendency towards the extension of the threat posed by criminal law (for example, through the broadening of the scope of the European instruments); on the other hand, the organs of the ECHR would continue to fix the minimum standards of a fair administration of justice.[26]

The administration of criminal justice, which so far has been an essential element of state sovereignty, has partially moved and is still moving, beyond the direct control of nation States. The ECHR and its case law have an important role in creating the European model of criminal procedure, as also Károly Bárd foresaw. One of the challenging questions to comparative criminal scientists is: to what extent can we speak about common legal positions in respect of the general part of criminal law, the common legal principles and concepts? The general principles and concepts of criminal law have been developed since the nineteenth century primarily by the doctrines and practices of national criminal law and national criminal justice systems. Such concepts and principles have been mainly developed within two legal cultures, under either civil law or the common law tradition, and have therefore largely differentiated. It is

[25] See, in more detail, *e.g.* Raimo Lahti, Multilayered criminal policy: The Finnish experience regarding the development of Europeanized criminal justice, *New Journal of European Criminal Law* 11 (2020), 7–19.

[26] Bárd, Károly, European Criminal Law, in Raimo Lahti (ed.), *Kohti rationaalista ja humaania kriminaalipolitiikkaa*, Helsinki, Helsingin yliopisto, 1996, 241–253.

certainly a cumbersome way to a common general part of European criminal law or harmonized general parts of national criminal laws.[27] For instance, the Hungarian scholar *Norbert Kis* demonstrated this difficulty by his analysis on the principle of culpability.[28] In spite of many successful partial reforms, the harmonization of national criminal laws by EU's legislative instruments has turned out to be much more difficult than developing in ECtHR common standards for criminal procedure.

In a recent European Criminal law Associations' Forum, Eucrim 2019/4, there are interesting analyses about the following developments: 20 years since Tampere, 10 years after Lisbon, 20 years of protecting the financial interests of the EU, and the establishment of European Public Prosecutor's Office (EPPO). As for the future, the Commission officials *Péter Csonka* and *Oliver Landwehr* are. however, pessimistic. although the 2011 Commission Communication on EU criminal policy, COM(2011)573 final, concluded with a "vision for a coherent and consistent EU Criminal Policy by 2020", because Member States' enthusiasm for new initiatives is limited[29]. Problems arise from the diverse legal regimes within the EU and the countries which have joined ECHR and, therefore, multi-layered criminal policy. For instance, *Mikhel Timmerman* concludes his monograph "Legality in Europe" that the EU legality principle leaves much to be developed and that the CJEU's approach to it lacks consistency[30].

[27] See especially Kai Ambos, Is the Development of a Common Substantive Criminal Law for Europe Possible?, *Maastricht Journal of European and Comparative Law* 12 (2005), 173–191; André Klip (ed.), *Substantive Criminal Law of the European Union,* Antwerpen, Maklu, 2011.

[28] Kis, Norbert, The Principle of Culpability in European Criminal Law Systems, in Hollán, Miklós (ed.), *Towards More Harmonised Criminal Law in the European Union*, Budapest, Magyar Tudományos Akadémia, 2004, 107–117.

[29] See Csonka, Péter – Oliver Landwehr, 10 Years after Lisbon. How "Lisbonised" is the Substantive Criminal Law in the EU? *Eucrim* (2019), 261–267.

[30] Timmerman, *Legality in Europe,* 312.

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SIMULACRUM OF PROGRESSIVE POLITICS

Andrea Pető[1]

The paper discusses the future of progressive politics, especially social democracy in Hungary. It argues, referring to the work by Tony Judt that the concept of "fear" is useful mobilizational force together with historical analogies based on analyzing the gendered history of the Hungarian progressive tradition.

Baudrillard's category of simulacrum was inspired by the paragraph story by Jorge Luis Borges, *On Exactitude in Science*.[2] In this short story Borges speaks about an empire which was so attached to the map of its own, when the empire collapsed nothing remained but the map, the simulation of the land which once was a powerful empire. After the collapse, the land was "inhabited by animals and beggars".[3] This paper is joining in the recent public debates about future of progressive politics in Europe. Following the 2008 triple crises (financial, migration and security) conferences and publications are trying to diagnose the causes of this recent dramatic decline in popularity of social democratic parties, previously the vanguards of progressive politics.

European social democracy is facing immense challenges after a long period of when "Social Europe" seemed to be consensual road for the future for even for conservative parties. Analysts are explaining the loss of popularity by different factors. Some are linking the crises either to the transformation of the capital into a new form of global free market capitalism or to the transformation of the state especially the welfare state provisions or to the transformation of the concept work itself. More paranoiac and elitist explanations are blaming the conservative and especially the emerging illiberal parties "stealing the cloth" of the social democrats by integrating their core values into their programs while at the same time depriving it from its political transformative potential. These changes in the

[1] Doctor of Science of the Hungarian Academy of Sciences; Professor at the Department of Gender Studies at Central European University, Vienna, Austria and a Research Affiliate of the CEU Democracy Institute, Budapest

[2] A previous version of this paper was published as "Inhabited by Animals and Beggars"?, *Queries* 2 (2010), 110–117.

[3] http://www.palacios-huerta.com/docs/Borges.pdf.

situation of social democracy are all connected to changes in social imaginary: the emerging cult of the individual is undermining the collective responsibility for social cohesion, communitarian units (*Gemeinschaft*) are replacing society (*Gesellschaft).* Social democrats in Europe tried to regulate global free market capitalism with social democratic values by a strong state such as solidarity with a mixed success. We cannot identify one or two factors which caused the declining popularity of today but rather the story of social democracy and progressive politics need to be retold and re-narrativised for a new start.

In this paper I would like to answer to the question how social democracy is shaping social imaginary in Hungary and I would like to do so with analyzing how gender differences are conceptualized in social imaginary. My starting point is Tony Judt, who in his analyses on future of social democracy pointed out that nobody ever forecasted the end of the roaming 1920s era, and it still ended among horrible circumstances.[4] Therefore he concludes, the only factor which can save social democracy in Europe, where by now the original social democratic values were mainstreamed largely without their home parties, is "a social democracy of fear". This fear for him means: "Rather than seeing to restore a language of optimistic progress we should begin by reacquainting ourselves with the recent past. The first task of radical dissenters today is to remind their audience of the achievements of the twentieth century, along with the likely consequences of our heedless rush to dismantle them".[5] So let me start this difficult endeavor to get to know more about our "recent past" with including another factor, namely gender into the analysis, trying to explain why social democracy is losing attraction as social imaginary today. I would like to expand the analyses of the "recent past" where Tony Judt stopped: to the post WWII period and I would like to focus on Hungary. I am claiming that the unresolved conflict of women's participation in social democratic movement is one of the reasons why social democracy is losing its popular support today. Is social democracy on its way to become a simulacrum in Hungary? Will social democratic imaginary disappear from Hungary? In the case of Baudrillard the empire vanished, and the simulacrum remained. In the case of Hungary, and the countries who felt at the wrong side of the Iron Curtain in 1945, the simulacrum is disappearing and the reality, namely the problems are remaining. And the responses to the structural crises (strong state, redistributive welfare policy, transforming unpaid care work to paid care work etc) are given by illiberal actors who consciously position themselves outside liberal value system.

[4] Tony Judt, What is Living and What is Dead in Social Democracy?, *The New York Review of Books* 56 (2009), No. 20.

[5] Judt: *What is Living.*

Answering to this question about the creation of the simulacrum we must go further back in time following the suggestion by Tony Judt examining "our recent past". Social democracy as an ideology was conceived by the founding fathers (and not by mothers) as a response to the problems of men who were employed reregulating the relationship between the state, capital and citizens. Women's movement was founded as an appendix to the "main movement" extending the argumentation of class struggle to the oppression of women by men stating that without political, legal, educational emancipation the socialist program can not prevail. The Hungarian Social Democratic Party in principle demanded equally suffrage for both men and women. But the fight for women's rights was not on the priority list of the male party leaders. Moreover, the party leadership did not support the women's separate mobilization following Clara Zetkin, who supported women's right to vote but she denied that women's question as a separate issue exists. She claimed that women's issues such as maternal leave, breast feeding allowances should be demanded by the social democratic movement as a whole.[6] The publication of Hungarian social democratic journal: *Nőmunkás* (Female worker) was received with resentment by the male dominated trade union and party. The former was afraid of the cheaper female workforce snitching paid employment from men therefore started unionization of women, while the latter saw a threat in separate women's movement representing particularism against the unity of universalist movement. In *Nőmunkás*, László Rudas, (1885-1950) pointed out as far as the fight for suffrage is concerned "We, proletarian women (!) it should not be our aim (the gaining the suffrage A. P.) for us there is no women's movement, there is no separate movement, but one movement, the movement of the proletariats, the socialism".[7] Before WWI the short lived cooperation between the liberals and the social democratic women was considered as a "bourgeois" influence by the party leaders. The social democrats argued with equality while liberals (and conservatives) with difference: in this equality however gender differences were subordinated to the "main aims" of the movement. Women who became political agents in the 20th century with the introduction of general suffrage changed how politics was played forever as sexual difference was introduced into politics.[8] The question is how the introduction of difference changed the universalist social democratic party aims. I can bring up in lots of other examples from the interwar

[6] Aranyossi, Magda, *Lázadó asszonyok. A magyar nőmunkásmozgalom története 1867–1919*, Budapest, Kossuth, 1963, 34.

[7] Rudas, László, Polgári és proletár nőmozgalom, *Nőmunkás* (1906. április 24.) Idézi Kovács, M. Mária, A magyar feminizmus korszakfordulója, *Café Bábel* 4 (1994), 180.

[8] Pető, Andrea – Szapor, Judit, Women and the Alternative Public Sphere: toward a Redefinition of Women's Activism and the Separate Spheres in East Central Europe, *NORA, Nordic Journal of Women's Studies* 12 (2004), 172–182.

period how the sexual "difference" was subordinated to the universalist party aims in the Hungarian social democratic party. Anna Kéthly, who was charismatic female leader of the social democracy much before the rise of successful female politicians from Scandinavia, editor of the *Nőmunkás*, nearly never stood up for "women's rights" publicly except the employment issues. At the same time the female politicians who were elected to the Budapest municipal on a social democratic ticket were ghettoized in the section on social policy which at the same time offered them a site for political training and building electoral support. This is exactly the strategy which is used by illiberal regimes.

After WWII half of Europe was occupied by the Red Army which had serious consequences for gender politics and for the mobilizational potential of the social democrats. After 1945 the sexual difference in the countries under Soviet occupation was framed in the equality discourse.[9] In that frame there were two alternatives: the social democratic and the communist handful of home grown and couple of hundreds returning from emigration from the Soviet Union. In 1945 the Social Democrat Party realized to their amazement that the communists, who in the interwar period were working under illegal conditions, had used their party to popularize themselves, now came out of hiding and demanded that they would be the single political representative of the working class.[10] The social democratic women's movement, apart from its well-built network and good working relations with the trade unions, also had conscious politicized women members. The Social Democrats after 1945 were proud that their female comrades "work with much greater agility than the average man".[11] The fact that it had state administration experience who worked in the Budapest municipal social policy section, actively took part in shaping social policy cannot be forgotten either. In the winter of 1945, the Social Democrat women's movement had the most radical program as far as gender equality is concerned; they were not bound by the tactical cautiousness that was so characteristic of the communists at that time. In their program the social democrats made a confident stand for the political and legal emancipation of women, equal pay for equal work, and furthermore, in accordance with broad social democratization, for the complete emancipation of women in the political and cultural spheres. For the social democrat women's movement two factors were to prove vital in their loss of social influence and to the failure of this promising political program. Their resistance was worn down by continual friction with the communists and they did not have material resources to distribute to the

[9] Pető, Andrea, A Missing Piece? How Women in the Communist Nomeclature are not Remembering, *East European Politics and Society* 16 (2003), 948–958.

[10] More on this see Pető, Andrea, *Hungarian Women in Politics 1945-1951*, East European Monographs Series, New York, NY, Columbia University Press, 2003.

[11] Archive of Institute of Political History, Budapest (further PIL) 283. 20. 7. 268.

impoverished country and its voters. They also proved vulnerable when faced with new politicizing methods, like communist party members sabotaging the sound system of their public rallies, introduced by the communist. The traditional Social Democrat political culture based on the value of democracy, which the communists were so jealous of, was rather a disadvantage than otherwise when it came to the struggle for the mobilization of the workers, especially the young ones and the winning over of the peasants. On the 1st May celebration in 1945 the social democratic women were marching together with men wearing white blouse, dark skirts, and red tie, while the communist women were marching separately from men wearing red and white dotted headscarf. This difference in style and appearance was reflected in how sexual difference was handled by these parties. With the merge, which in practice was a takeover of the social democrats by the communist, the necessity of politics was victorious over the mission of progressive politics. György Marosán (1908-1992), the legendary social democratic leader turned to be loyal communist responsible at that time for the women's section in the party, who often solved conflicts that came up in women's meetings with consciously masculine gestures – by slapping the table, or shouting depending on the situation – recognized the essence of the matter: "Somewhere in the neighborhood a new type of person is forming, someone who runs factories, a politician, a statesman, a soldier: the socialist woman. What will men who are very left wing, at least verbally, do if ten years on from now a woman appears who does not wish to remain a servant?"[12] The end of the social democrat women's movement by merging with the communists in 1948 is perhaps one of the reasons that this question has still not been even asked why politically engaged women were subordinated to the class struggle.

The construction of dominant masculinity was never questioned, and the sexual binaries of man and woman remained fixed categories used in political mobilization and in identity politics. The simulacrum was constructed, and it was only a question of time when it will fall into pieces as the map of the empire in the story by Borges while the problems of gender inequality continued to exist.

During the "statist feminist" period the ideological anti-feminism of the communist emancipation policy was based on the concept of class struggle. As Miglena Nikolchina pointed out anti "statist emancipation" arguments felt into a rhetoric trap as far as gender equality is concerned because it defined the workplace as a site of equality.[13] In the private realm gender relations were continued to be dominated by traditional representations and expectations of femininity and

[12] PIL 283/20/24. 102

[13] Pető, Andrea, Hungarian Women in Politics, in Joan Scott – Cora Kaplan – Debra Keats, (eds.), *Transitions, Environments, Translations: The Meanings of Feminism in Contemporary,* New York, NY, Routledge, 1997, 153–161.

masculinity.[14]Although the initial communist project was to change radically this realm and included hostile attitudes to sex as well as the idea of abolishing the family as the early days of the Bolsheviks did. This radicalism was quickly relinquished, and the small bourgeoisie values were adapted by the communist party and the simulacrum was covering the movement. On the level of official party ideology: it was assumed that gender equity has been achieved and women's problems have been resolved with the help of a well-developed state subsidized child-care system, paid pregnancy leaves, up to three years infant care, etc. And the official ideology had its theory of gender ("in so far as women are like men, they are equal"), the private sphere had its verbalized dichotomous gendered norms ("boys do not cry"). The place where real but unarticulated redefinitions of gender happened was the workplace which functioned as a nexus of the official and the private. The emancipated attitudes of women during communism became a matter of habitual practice learned during paid employment but remained largely without a language which might have shaped political mobilisation by gender.

The result is a lasting transformation of the "praxis" of femininity which will play an important role in 1989. If working women did not get very high in the professional and political hierarchies, they tended to perceive this as their own choice. This rhetorical strategy as a heritage of the statist feminist period is acting against addressing structural discrimination even today. From that point of view, women seem to blend easily in their environment so more difficult to address them and this partly explains the decrease of women's membership and active participation in politics in general and in the social democratic movement in particular. In Hungary in the transition process of 1989 the historical social democratic party was also re-founded together with the other "historical" parties. As a rule, the more the party was historical the fewer women were in there in (the historical Round Table debate which redefined Hungarian citizenship after the collapse of communism) and the less sensitive the party was to the issue of difference.

At the end of the Cold War brought the victorious neo-liberalization of Eastern Europe which also opened up space for the deep conservatism of the Hungarian society which survived the 50 years of statist feminism unchanged. In 1989 it was the former communist party which got into the market of political thoughts with a group of well-trained female politicians however their presence did not change the dominant masculine identity politics of the party. As the time passed the successor party of the communist party, the MSZP (Magyar Szocialista Párt-Hungarian

[14] For more on how gender operated during statist socialism see Miglena Nikolchina, The Seminar: Mode d'emploi Impure Spaces in the Light of Late Totalitarianism, *Differences – a Journal of Feminist Cultural Studies* 13 (2002), 96–127.

Socialist Party) failed to attract young female members because the difference discourse cannot be successful mobilization frame in a universalist frame especially when other alternatives emerged. The revival of the conservative and extreme right wing mobilised women in the framework of politics of motherhood.[15] In that framework the politics of motherhood women could find structural support for securing the family and a rhetoric which offers symbolic recognition of unpaid care work with the concept of women's dignity. The rhetorical frame of maternalism by the victorious conservatism is not questioned neither by the neoliberal "new feminism" of the young generation who believe that they alone are the source of their own success and they refuse to pay for the failures of others or acknowledge that these are structures factors causing discrimination nor by the ideologically uncertain MSZP which in principle staged itself as the successor of the social democratic values. The categorization for "men" and "women" as political agents worked in the early 1900, but it remained unresponsive to the political and intellectual shift towards developments of identity politics from the 1960s. The simulacrum of social democracy attracts the elderly voters with nostalgia, but it does not work for the younger voters who are moving towards other alternatives. As a consequence, in the social democratic movement women necessarily are ghettoized into the women's section where they are also fighting for the same agenda of women's difference but in a framework which does not offer them visibility publicly or the acknowledgement of gender difference. The members, middle aged and older, white women are as unfit for coalitional politics as were their fore-mother, the social democratic women in between 1945 and 1948 without the threat of dissolving themselves in the political agenda defined by others. And today these "others" are numerous. Therefore, coming up with a feasible strategy for the future is not easy. The social democrats are advocating socialist internationalism in an era where the alternatives are polarized around the axis of cosmopolitanism. They are advocating "women's politics" when the identity politics of the 1980s is already a part of history textbooks and without coalitional politics the chances of success is limited.

In Europe women's demands has changed during the past century: emphasis moved from needs to rights, not independently from the success of the social democratic movements earlier and within this, from the restricted right to parity in selected areas to the larger right of self-determination. This crucial shift was

[15] Pető, Andrea, Die Marien in der Sonne (Die Apokalyptischen Madonnen), in Johanna Laakso (ed./Hg.), *Frau & Nation / Woman & Nation,* Finno-Ugrian Studies in Austria 5, Wien, LIT-Verlag, 2008, 137–174. and Pető, Andrea, Anti-Modernist Political Thoughts on Motherhood in Europe in a Historical Perspective, in Heike Kahlert – Ernst Waltraud (eds.), *Reframing Demographic Change in Europe. Perspectives on Gender and Welfare State Transformations* (Focus Gender), Band 11. Berlin, Lit Verlag, 2010, 189–201.

not made in Hungary, the "patriarchal bargain" the loyalty to men as a key to self fulfilment was replaced by "party bargain": the loyalty to the MSZP which the women were unable neither to modernize nor to transform. As it is often the case with simulacrums.

Returning the issue of simulacrum which frames my contribution to this volume honoring Professor Károly Bárd, we cannot expect a popular impact of social democracy in the future if the internationalism and universalism, the two key corner stones of social democratic movement will not be reconceptualised This new start should lead to the formation of a new language and a new self-definition. I would not go as far as Tony Judt claiming that "social democracy" as a term has not relevance (everybody is a democrat nowadays and social is a too wide concept to attract anybody). Therefore, what remained for him is the "fear" from worst to come as a mobilization force. In that case we can only hope that parties claiming social democracy as a heritage will learn from the past mistakes and reconsider its position to difference. Otherwise social democracy together with progressive politics really becomes a vanishing simulacrum in a land "inhabited by animals and beggars".

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THE ROLE OF THE CONSTITUTIONAL COURT IN THE CONSTITUTIONAL CONTROL OF LEGISLATION

István Stumpf[1]

Definition of invalidity under public law, the case-law of the Constitutional Court

In a constitutional democracy, it is a basic requirement that in the legislative procedure only by respecting the rules of the legislative process can valid law be created. The norm created in an unconstitutional procedure is "invalid under public law".[2] With regard to the invalidity under public law, the Constitutional Court has established in several decisions that the procedural guarantees of legislation stem from the principles of the rule of law and legal certainty, thus valid legislation can only be enacted by observing the rules of the formalized procedure.

Invalidity under public law can be established on several grounds. The law has to be created by a competent organ, the legislative organ shall not go beyond the limits of its authorization, it shall create a legislative norm that is at the appropriate level in the hierarchy of norms,[3] it shall comply with the rules of the legislative procedure and, finally, it shall promulgate the law adequately.

Prior to the entry into force of the Fundamental Law , the Constitutional Court summarized its position on the invalidity under public law in the Decision No. 164/2011. (XII. 20.) on the constitutional review of the revised first Church Act[4] (Constitutional Court Decision 1). According to its well-established case-law, the Constitutional Court is authorized to examine the observance of the guarantee rules of the legislative process and, thus, to annul a law adopted in a seriously formally erroneous legislative procedure on the grounds of invalidity under public law. The Constitutional Court has already stated in its Decision No. 11/1992. (III. 5.) that: "*Procedural guarantees stem from the principles of the rule of law and legal certainty. (...) Valid legislation can only be enacted by observing the rules*

[1] University Professor, researcher, Széchenyi István University, Győr, National University of Public Service, Budapest, Hungary

[2] See the wording of Decision No. 29/1997. (IV. 29.) of the Constitutional Court, Decisions of the Constitutional Court 1997, 122. A law being invalid under public law corresponds to procedural unconstitutionality.

[3] See Article I (3) of the Fundamental Law: "The rules relating to fundamental rights and obligations shall be laid down in an act of Parliament."

[4] Act C of 2011on the Right to Freedom of Conscience and Religion, and on the Legal Status of Churches, Religious Denominations and Religious Communities.

of the formalized procedure (...)."[5] It was expressed by the Constitutional Court as a general rule in a 1997 decision that "*on the basis of an appropriate motion, a formally erroneous legislative procedure shall, in the future, provide a basis for the retroactive annulment of the law to the date on which it was promulgated.*"[6]

In Decision No. 39/1999. (XII. 21.), based on the above-cited case-law, the Constitutional Court concluded that "*the observance of certain procedural rules of the legislative procedure is a requirement of the rule of law for the validity of the law that can be deduced from Section 2 (1) of the Constitution.*"[7] In Decision No. 8/2003. (III. 14.), the Constitutional Court determined already as a constitutional requirement that "*legislation may be enacted only in accordance with the constitutional principle of legal certainty. The principle of legal certainty requires that legislation (...) is enacted in a reasonable order (...).*[8] In the evolution of the relevant jurisprudence another milestone was the constitutional review of the adoption of the so-called "Hospital Act". In this case, the Constitutional Court annulled the law by its Decision No. 63/2003. (XII. 15.) because the meeting of the National Assembly was convened in violation of the applicable procedural rules (not all members of the National Assembly were notified of the convening of the meeting and of the proposed agenda, and the draft agenda was not sent to the members of parliament in due time) and, as a result, the law, which was returned to the National Assembly by the President of the Republic for further consideration, could not be renegotiated on the merits by the members of parliament.[9] Finally, Decision No. 109/2008. (IX. 26.) of the Constitutional Court [Decision] should be mentioned, which stated that a violation of any provision of the Rules of Procedure does not automatically constitute a violation of Section 2 (1) of the Constitution, and thus leads to unconstitutionality.

The recent practice of the declaration of invalidity under public law – proposal for amendment before the final vote

The first petition alleging the unconstitutionality of the new Church Act[10] was primarily based on procedural grounds, namely that the proposal for amendment No. T/3507/98 submitted before the final vote was contrary to the Rule of

5 Decisions of the Constitutional Court 1992, 77., 85.
6 Decision No. 29/1997. (IV. 29.) of the Constitutional Court, Decisions of the Constitutional Court 1997, 122.
7 Decisions of the Constitutional Court 1999, 325., 349.
8 Journal of the Constitutional Court March 2003, 90.
9 Decisions of the Constitutional Court 2003, 676., 685-689.
10 Case No. of the Constitutional Court: 1279/B/2011.

Procedure. Pursuant to Section 107 (1) of the Rules of Procedure, proposal for a last minute amendment may be submitted in connection with any – previously voted – provision, if the voted provision is not in accordance with [A] the constitution or [B] another law, [C] any provision of the bill already voted, or [D] any provision of the bill not affected by the amendment.

In Decision No. 164/2011. (XII. 20.), the Constitutional Court established that the proposal for the last minute amendment in question resulted in a conceptual change concerning the essential regulatory issues of the bill, and its adoption went beyond the scope of incoherence contained in Section 107 of the Rules of Procedure[11]. Through this provision of the Rules of Procedure, Sections 2 (1) and (2) and Section 20 (2) of the Constitution, the procedural rule guaranteeing the exercise of democratic power and the activity of the members of parliament in the public interest, were also violated.

I also consider it as an important statement in this decision that, "in order to protect the legitimacy of the democratic exercise of power, it is ultimately the task of the Constitutional Court to enforce compliance with the basic rules of law and order that ensure a reasonable discussion of public affairs." Due to the serious infringement of procedural requirement detailed above, the Constitutional Court annulled the Church Act No. 1 in its entirety the day after publication (ex nunc).

The victory of exceptional rules – the Church Act in the second round

Subsequently, the Parliament enacted Act CCVI of 2011 on the Status of Churches, Religious Denominations and Religious Communities (Church Act No. 2).[12] Seventeen churches filed constitutional complaints against this act with the Constitutional Court, and the Commissioner for Fundamental Rights initiated proceedings for ex post review. The majority of the petitioners challenged the Church Act No. 2 on substantive grounds, but there was also a motion that again alleged serious infringements of the procedural requirements and asked for the annulment of the entire Church Act No. 2. The alleged procedural

[11] According to the position of the Constitutional Court, an incoherence that violates the requirement of normative clarity arises when there is serious uncertainty regarding the determination of the normative content of certain interrelated legal provisions, even with the help of multi-disciplinary legal interpretation.

[12] The announcement on the Constitutional Court Decision 1 was published on 19 December 2011 and it was published in the Hungarian Gazette the next day, on 20 December 2011. The proposal on the Church Act was submitted by the Parliamentary Committee on Human Rights on 21 December 2011.

unconstitutionality was based on the following reasons: it was unlawful to put the general debate on the bill on the agenda, the committees' recommendations were missing or formal, the members of parliament only had a few hours to read and study the legislative text and to form a well-founded opinion on both the concept of the act and its specific provisions.

In Decision No. 6/2013 on the constitutional review of the Church Act No. 2, the Constitutional Court confirmed that "a legislative procedure that sets aside and violates the guarantee provisions of the Rules of Procedure is also capable of undermining the legitimacy of the decision of an otherwise legally formed parliamentary majority; moreover, its regular occurrence devalues the institution of parliamentarism itself. Therefore, an act enacted contrary to an essential provision of the Rules of Procedure violates Articles B (1),[13] 4 (1)[14] and 5 (7)[15] of the Fundamental Law, is invalid under public law, which gives rise to the annulment of the act, even with retroactive effect to the date of its publication, provided that this does not cause a serious breach of legal certainty."

The Constitutional Court established in this case that the provisions of the Rules of Procedure in question, i.e. the rules on the agenda of the meeting of the Parliament, including the prior notification of the proposal for its agenda, are considered as guarantees of the exercise of democratic power and of the activities of the members of parliament to be carried out in the public interest, therefore their breach is considered to be such a serious procedural defect which renders the law invalid under public law.

The Constitutional Court ruled that the inclusion of the bill on Church Act No. 2 on the agenda did not comply with the guarantees provided by the Rules of Procedure. In the present case, not even a whole day (only a few hours) elapsed between the submission of the bill, its discussion at meetings of committees and its recommendation by the committees, and the discussion in the plenary of the Parliament. This, in itself, was enough to deprive the members of parliament of the opportunity to familiarize themselves with the legislation to the extent necessary for the responsible exercise of their parliamentary rights.

The Constitutional Court ruled on the one hand that the timing of the submission of the bill, its preparation by the committees and its inclusion on the agenda failed to ensure the conditions for a substantive discussion. However, on the other hand, it established that there was no specific provision of the Rules of

[13] Hungary is an independent and democratic State governed by the rule of law.

[14] The rights and obligations of Members of Parliament shall be equal, they shall carry out their duties in the public interest, and they may not be given instructions in that regard.

[15] Parliament shall establish its rules of procedure and debate within the framework of its House Rules, to be adopted by a majority of two-thirds of the votes of the Members of Parliament present.

Procedure directly applicable to the case manifestly violated. Consequently, the Constitutional Court did not establish invalidity under public law, and it rejected the motions to that effect.[16]

Nevertheless, as a constitutional requirement, it stated only in the reasoning that the legislative procedure must comply with the provisions laid down in the Rules of Procedure, and that, even in the event of uncertainty as to the interpretation of the provisions of the Rules of Procedure, thus of the provisions relating to the exceptional rules for extraordinary meetings, as a precondition for the exercise of the rights of the members of parliament, sufficient time should be allowed for thorough scrutiny and discussion in the meetings of committees and in a plenary meeting.

Unconstitutionality of transitional provisions – extended invalidity under public law

Upon the initiative of the Commissioner for Fundamental Rights, the Constitutional Court subjected the Transitional Provisions to the Fundamental Law (Transitional Provisions) to constitutional review proceedings. In its Decision No. 45/2012. (XII. 29.), the Constitutional Court followed its previous case-law in the sense that it examined the provisions of the Transitional Provisions in relation to invalidity under public law, The Constitutional Court had already held in its Decision No. 61/2011. (VII. 13.) that constitutional amendments may be reviewed on formal grounds, meaning that a serious violation of the rules of enactment may potentially render the adopted constitutional amendment invalid. This consequence, however, remained only a possibility in 2011. A revolutionary innovation of Decision No. 45/2012. (XII. 29.) was that it gave effect of the Constitutional Court's competence to review constitutional amendments on procedural grounds and annulled the Transitional Provisions. The most significant principles laid down in the decision can be summarized as follows:

[16] Dániel Karsai considered that a serious violation of the constitutionality of the legislation had taken place, and, with this decision, the Constitutional Court made the future possibility of establishing, from a constitutional point of view, invalidity under public law impossible (as we have seen, he was wrong). Karsai, Dániel, Rekviem a közjogi érvénytelenségért [Requiem for invalidity under public law], *Fundamentum* 1 (2013), 84–89. Also according to Tímea Drinóczi, by this decision, the Constitutional Court very narrowly limited the possibility of establishing invalidity under public law. In Drinóczi, Tímea, *Az alkotmányos párbeszéd. A többszint alkotmányosság alkotmánytana és gyakorlata a 21. században* [*Constitutional dialogue. The constitutional theory and practice of multilevel constitutionality in the 21st century*], MTA TK JTI electronic monograph series, vol. 1., Budapest, MTA TK JTI, 2017, 287–290.

1. In the opinion of the Constitutional Court, the Transitional Provisions cannot be considered an amendment to the Fundamental Law either formally or on the basis of its content, and that is because regardless of its adoption by a two-thirds majority of the members of parliament, it was not adopted on the basis of the rules applicable to the amendment of the Fundamental Law. [The Parliament did not adopt the Transitional Provisions on the basis of Article S) of the Fundamental Law, but on the basis of Section 2 of the Final Provisions.] In addition, the denomination of the Transitional Provisions does not formally comply with the constitutional provision on the denomination of an amendment to the Fundamental Law [Article S (4) of the Fundamental Law]. (…) According to the Constitutional Court, the Transitional Provisions went beyond this authorization both in substance and in time, as it is a "mixed-subject" legislation that contains also provisions that are not transitional. These latter provisions were created by exceeding the scope of authorization set forth in the Fundamental Law and were not incorporated into the Fundamental Law, therefore they cannot be considered as amendments to the Fundamental Law. The transitional provisions remaining within the scope of authorization are also not rules amending the Fundamental Law, as they are "transitional" in accordance with the authorization and not provisions incorporated into the Fundamental Law, they do not amend or supplement the Fundamental Law, but ensure its implementation, the transition from the Constitution to the Fundamental Law. In view of all this, the Constitutional Court has established that the Transitional Provisions cannot be considered as amending or supplementing the Fundamental Law. (Reasoning [68])

2. In a constitutional state governed by the rule of law, it is a requirement that the constitutional authority formulates its will in the constitution (Fundamental Law) and that it appears in the text of the constitution. Constitutional amendments incorporated into the text of the constitution also express the will of the constitutional authority. The will of the constitutional authority cannot appear in mixed-subject legislation where the level of the sources of law is uncertain. (Reasoning [75])

3. The Constitutional Court points out that in a state governed by the rule of law it is a requirement that the scope and content of the current Fundamental Law can be clearly determined at any time. This requirement applicable in a state governed by the rule of law must also be respected by the constitutional authority. (…) Serious constitutional legal uncertainty can be caused if the content and scope of the current Fundamental Law is uncertain or can be determined in several ways.[17] (This is called "*constitutional clarity*".)

4. It follows from the obligation of the Constitutional Court to protect the Fundamental Law, but also from the objective and constitutional purpose of the rule

[17] Reasoning [76], [78]

of competence, that the Constitutional Court is obliged to prevent the operation of legislation contrary to the Fundamental Law in the legal system. The protection of the Fundamental Law, and thus of the democratic state governed by the rule of law, and the preservation of the internal unity of the legal system as part of it, is an obligation of the Constitutional Court that can be deduced from the Fundamental Law. The Constitutional Court has an obligation set forth in the Fundamental Law to examine all laws that disrupt the internal unity of the legal system, especially those that violate the unity of the Fundamental Law itself. Therefore, the Constitutional Court has not only the right but also the obligation arising from the Fundamental Law to protect the Fundamental Law against any legislative decision, even if it arises from a two-thirds majority of the Parliament, which would impede, degrade the enforcement of the provisions of the Fundamental Law, render uncertain the legal content and scope of the Fundamental Law, its place in the hierarchy of sources of law, and the content of the Fundamental Law as a constitutional criterion. The Constitutional Court's role in protecting the Fundamental Law includes its duty to protect the Fundamental Law as a single and uniform document; with the normative content and structure as created by the constitutional authority: as a single and uniform legal document to be indisputable and stable for all.[18]

5. It is a constitutional requirement that the Fundamental Law may be amended and supplemented only on the basis of Article S) of the Fundamental Law. Provisions supplementing or amending the normative text of the Fundamental Law must be incorporated into the normative text of the Fundamental Law ("order of incorporation"). (…) The order of incorporation, as a constitutional requirement, can be deduced from Article B (1) of the Fundamental Law, the requirement of the rule of law, as well as Article S) of the Fundamental Law and the postamble of the Fundamental Law. However, the constitutional authority may only incorporate into the Fundamental Law objects of constitutional significance falling within the scope of regulation of the Fundamental Law. With the amendments and supplements to the Fundamental Law, the provisions that become part of the Fundamental Law must be integrated into the structure of the Fundamental Law in a coherent manner. Amendments to the Fundamental Law must therefore not result in an insurmountable contradiction in the Fundamental Law. Coherence in content and structure is a rule of law requirement arising from Article B (1) of the Fundamental Law, which must be ensured by the constitutional authority.[19]

Therefore, the Constitutional Court Decision No. 45/2012. (XII. 29.) established, in connection with the invalidity of constitutional amendments in public law, such substantive requirements for constitutional amendments, to which the Parliament

[18] Reasoning [82]
[19] Reasoning [84], [86]

must comply during the amendment of the Fundamental Law. All this was stated within the framework of the requirements of invalidity under public law.

In a democratic state governed by the rule of law, there can be no unlimited power. Accordingly, the constitutional amending authority cannot have unlimited power, either in procedural or substantive terms. From the cases of invalidity under public law discussed above, it is clear that the respective legislature with a two-thirds majority necessarily fills the powers at its disposal, and even sometimes goes beyond that. It remained a question in what direction the Constitutional Court was going further along the way of invalidity under public law in the context of a decision declaring the Transitional Provisions invalid under public law.

The Fourth Amendment to the Fundamental Law

The Fourth Amendment to the Fundamental Law settled, beyond any doubt, the constitutional debates over the constitutionality of constitutional amendments. The constitutional amending power made it clear that the Constitutional Court was not entitled to review the substance of constitutional amendments but, at the same time, it authorized the justices to examine the constitutional amendments on procedural grounds. It was a milestone also in the sense that it annulled the decisions of the Constitutional Court delivered before 1 January 2012, while maintaining their legal effect.

The Fourth Amendment to the Fundamental Law was the subject of criticism both at home and abroad. The Commissioner for Fundamental Rights (Ombudsman) asked the Constitutional Court to declare many provisions of the Fourth Amendment invalid under public law and to annul them. The applicant sought a declaration of invalidity under public law and the annulment of the contested provisions due to an internal incoherence within the Fundamental Law and with reference to the violation of the unity of the Fundamental Law. In its Decision No. 12/2013. (V. 24.), the Constitutional Court did not see any way to establish invalidity under public law, in this respect it rejected and in other respects it denied the application. Four judges of the Constitutional Court attached concurring opinion to the majority decision and another four dissenting opinions, it can be said that in fact the decision did not have a majority reasoning. The majority of the Constitutional Court changed its opinion/point of view adopted in Decision No. 61/2011. (VII. 13.) concerning the potential examination of the content of constitutional amendments, saying that in contrast to the former Constitution, which did not contain a provision to that effect, the Fundamental Law clearly takes a position on the issue (it is true that it is in the amendment under review!). As the majority of the Constitutional Court considered the Ombudsman's

application to be in fact aimed at reviewing the content of the Fourth Amendment, it rejected the application on the grounds that it did not fall within its competence.

An essential critical element of the incisive dissenting opinions written to the decision was that the legal validity of the amendments to the Fundamental Law can only be assessed on the basis of the rules valid and effective at the time of the adoption of the challenged law. The unconstitutionality of the amendment should not have been assessed on the basis of the criteria set out in the amendment currently on the agenda, because an amendment to the Fundamental Law cannot determine the basis for reviewing its own compliance with the Fundamental Law. This can only be done on the basis of the provisions of the Fundamental Law previously in force. Otherwise, any amendment to the Fundamental Law could exclude the possibility of its own revision, and, moreover, the limits of substantive amendment set out in the Fundamental Law could be neutralized by an amendment to the Fundamental Law.[20] There is no doubt that during the constitutional review of the Fourth Amendment to the Fundamental Law, the Constitutional Court acted in a self-restraining way compared to its previous decisions, and the division of the body is well reflected in the large number of dissenting opinions and concurring opinions.

Summary

Due to its place in the system of exercise of constitutional power, the Constitutional Court plays a special role in the constitutional control of the legislative activity of the legislative and executive power. This constitutional responsibility acquires special significance in situations where a governing force has a two-thirds, constitutional-amending majority in parliament. The cases where the government is forced to make a decision (crisis legislation, international pressure, vote-maximizing requirements) can often lead to situations where fundamental constitutional rights and values may be bracketed in order to achieve short-term goals. In addition to the normative provision in the Fundamental Law regarding the division of power, the constitutional requirement of the co-operation of powers must be also taken into account. All this cannot mean that the judicial power does not exercise judicial control over the administration and the Constitutional Court does not exercise constitutional supervision over the other branches of power.

[20] The Constitutional Court Decision and the dissenting opinions are presented in detail: Vincze, Attila, Az Alkotmánybíróság határozata az Alaptörvény negyedik módosításáról. Az alkotmánymódosítás alkotmánybírósági kontrollja [Decision of the Constitutional Court on the Fourth Amendment to the Fundamental Law. Constitutional Court control of constitutional amendment], *Jogesetek Magyarázata* 3 (2013), 3–12.

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