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УГОЛОВНОЕ ЗАКОНОДАТЕЛЬСТВО И ПРАВА ЧЕЛОВЕКА: НЕКОТОРЫЕ ПРИМЕРЫ РАЗВИТИЯ ЕВРОПЕЙСКОГО УГОЛОВНОГО ПРАВА

Т. Крюссманн
Грацский университет им. Карла и Франца, г. Грац, Австрия

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Аннотация. Уголовное право часто описывают как отрасль права, которая воплощает самые яркие национальные черты и которая в наименьшей степени подвержена изменениям. Разумеется, социальные нормы, нарушение которых ведет к определенному наказанию, существовали на протяжении всей человеческой истории. В Европе текущее понимание уголовного права сложилось под влиянием трудов мыслителей Просвещения, идей о правах человека в целом, либерализма и, наконец, национальных движений, что привело inter alia к знаменитой кодификации уголовного права в XIX в. Уголовный закон в России, несомненно, не развивался в изоляции от тех изменений, которые происходили в Европе в XIX в. Так, одним из маркеров его гуманизации выступила отмена телесных наказаний. Однако по сравнению с Европой уголовное право в России в гораздо меньшей степени рассматривалось как magna charta преступника (Франц фон Лист) — подход, приведший в конечном итоге к появлению учения о правах человека в уголовном законодательстве. На уголовный закон в России смотрели скорее как на воплощение неограниченного права государя определять наказание, и этот образ мышления находит свое отражение в современной российской доктрине уголовного права, вызывая сложности с определением критериев криминализации деяний.

Данная статья не затрагивает напрямую российские доктринальные подходы к уголовному законодательству. Цель работы состоит в демонстрации главенствующих в настоящее время в Евросоюзе) взглядов на то, какой эффект права человека оказывают на развитие уголовного права. На уголовное право сегодня влияют различные явления и процессы, и изменяющееся понимание прав человека занимает среди них весьма важное место. На Западе есть значительное количество публикаций по вопросам прав человека и уголовного законодательства в целом[1] [1; 2], и единую систематизацию здесь предложить едва ли возможно. Несомненно, существуют разделы уголовного права, которые весьма незначительно изменились под воздействием идей о правах человека. Одним из центральных принципов, регламентирующих права человека, является, например, принцип равенства[2], из которого проистекает криминализация рабства, работорговли, подневольного труда и торговли людьми. С другой стороны, незаконное перемещение людей — это гораздо более спорный вопрос в связи с тем, что государства демонстрируют сильное желание криминализировать незаконную миграцию. Еще одним столпом прав человека выступает право на частную собственность[3], которое определяет целый ряд уголовных санкций за нарушение права собственности на суше (кража, грабеж и т.д.) и на море (пиратство). По сравнению с ним право на жизнь представляет собой более трудную концепцию. Права человека стоят за всемирным движением за отмену смертной казни[4], однако вопросы, связанные с правом на жизнь, в гораздо меньшей

[1] Существует еще более обширная литература по вопросам прав человека и международного уголовного права.

[2] Статья 1 французской Декларации прав человека и гражданина 1789 г.: «Люди рождаются и остаются свободными и равными в правах. Общественные различия могут основываться лишь на общей пользе».

[3] Статья 17 французской Декларации прав человека и гражданина 1789 г.: «Так как собственность есть право неприкосновенное и священное, никто не может быть лишен ее иначе, как в случае установленной законом явной общественной необходимости и при условии справедливого и предварительного возмещения».

[4] Второй факультативный протокол к Международному пакту о гражданских и политических правах. URL: https://www.ohchr.org/EN/ProfessionalInterest/Pages/2ndOPCCPR.aspx ; Протокол к Американской конвенции о правах человека по отмене смертной казни. URL:

степени регулируются правами человека, чем религиозными и этическими взглядами, в таких аспектах, как криминализация абортов, пособничество в совершении самоубийства, а также эвтаназия. По некоторым видам прав человека идут весьма ожесточенные дебаты, например по вопросам свободы слова[5] [3] и религии, следовательно, и эти проблемы демонстрируют свое значительное влияние на развитие уголовного законодательства.

Европейское уголовное право, понимаемое как итог гармонизации национальных систем уголовного права государств — членов ЕС, представляет собой наглядный пример для изучения существующих подходов к определению прав человека. В научных публикациях высказывается мысль о том, что изменения в понимании прав человека могут приводить как к криминализации, так и к декриминализации деяний. Данная ситуация также описывается как выполнение правами человека функций «меча» (использование их для призывов к криминализации деяний) и «щита» (использование их с целью введения ограничений на применение уголовного права и декриминализации) [1]. Обе функции можно наглядно наблюдать при анализе европейского уголовного законодательства, разработанного в последнее десятилетие.

Применительно к России данное исследование направлено на внесение своего (надеемся, своевременного) вклада в зарождающуюся дискуссию о влиянии прав человека на уголовное право. Несмотря на то что роль прав человека закреплена в Преамбуле к недавно принятой Конституции Российской Федерации, статья 15 (п. 4) Конституции ограничивает прямое влияние закона о правах человека общепризнанными нормами и принципами международного права, а также договорами, заключенными РФ. Соответственно, представляется, что Конституция России закрывает двери перед самыми передовыми изменениями в международном законодательстве в сфере прав человека, которые еще не являются общепризнанными.

CRIMINAL LAW AND HUMAN RIGHTS — SOME EXAMPLES FROM THE EMERGENCE OF EUROPEAN CRIMINAL LAW

Thomas Kruessmann
KFU Graz, Austria

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Abstract. Criminal law is often described as the field of law that expresses the strongest national characteristics of a given jurisdiction and is the least amenable to change. Naturally, social rules providing some kind of penalty when violated have existed throughout the history of mankind. In Europe, the current understanding of criminal law has been shaped by Enlightenment thought, the ideas of human rights, liberalism and finally the national movements which led, *inter alia*, to the famous codifications of criminal law of the 19th century. In Russia, criminal law has certainly (not been isolated from the developments that took place in 19th century Europe. For example, the abolition of corporal punishment is but one good marker of humanisation. But compared to Europe, codified criminal law in Russia has been much less understood as the *magna charta* of the offender (Franz von Liszt), eventually leading to the study of human rights in criminal law. Rather, it has been viewed as the expression of the Tsar's unfettered power to mete out punishment, — a line of thinking which indicates the continuing difficulty in Russian criminal law doctrine to accept limitations on the power of the legislator to criminalize.

This paper will not deal with Russian doctrinal approaches to criminal law in a direct way. Instead, its purpose is to demonstrate the European Union's (EU's) current thinking on the effects that human rights have on the development of criminal law. As of today, criminal law is under a variety of influences among which the changing understanding of human rights is a very important one. In the Western world, there is a large amount of literature dealing with human rights and criminal law in general[1] [1; 2], and it is hardly

http://www.oas.org/juridico/english/treaties/a-53.html ; Протокол № 13 Конвенции о защите прав человека и основных свобод. URL: https://www.echr.coe.int/Documents/Library_Collection_P13_ETS187E_ENG.pdf.

[5] Несмотря на то что неабсолютный характер права на свободу слова не вызывает сомнений, его границы менялись в зависимости от эпохи и географической области [3].

[6] There is even more literature on human rights and international criminal law.

[7] Art. 1 of the French Declaration of the Rights of Man and of the Citizen of 1789: «Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good.»

possible to come to an overall systematization. To be sure, there are parts of criminal law which have experienced very little change in light of human rights. One central tenet of human rights, for example, is the equality of men[2] (in a pre-modern reading to include also women) which leads to the criminalization of slavery, slave trade, forced labor and trafficking in human beings. The smuggling of humans, on the other hand, is a much more controversial topic due to the fact that states show a strong desire to criminalize irregular migration. Another pillar of human rights is the human right to property[3] which informs a whole range of criminal law provisions for violations of the right to property on land (theft, robbery, etc.) and on water (piracy). By comparison, the right to life is a more difficult concept. Human rights are behind the global drive for abolishing the death penalty[4], but a number of other life-related issues are determined less by human rights than by religious and ethical views, such as the criminalization of abortion, aiding and abetting suicide, and euthanasia. Finally, a number of human rights are experiencing a very lively debate, e.g. freedom of speech[5] [3] and freedom of religion, consequently there is also a high impact on the development of criminal law.

European criminal law, understood as the total of the harmonized national criminal law systems of the EU Member states, offers a good example to study the effects of human rights. In the literature, there is the argument that changes in the understanding of human rights can lead both to criminalization and to de-criminalization. This has also been described as the «sword» function of human rights (using human rights to call for criminalization) and the «shield» function (using human rights law to call for limits to the use of criminal law and even de-criminalization) [1]. Both functions can be observed in a nutshell when analyzing the European criminal law that has emerged in the course of the last decade.

For Russia, this article represents a (hopefully timely) contribution to the still nascent discussion on the effects of human rights on criminal law. Despite the Preamble to the newly adopted Constitution of the Russian Federation (RF) which affirms the role of human rights, Article 15 (4) Constitution RF limits the direct impact of human rights law to the universally accepted norms and principles of international law as well as to treaties concluded by the RF. The Constitution therefore appears to be closing the door to cutting-edge developments in international human rights law which are still not universally accepted.

[8] Art. 17 (ibd.): «Since property is an inviolable and sacred right, no one shall be deprived thereof except where public necessity, legally determined, shall clearly demand it, and then only on condition that the owner shall have been previously and equitably indemnified.»

[9] Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), Aiming at the Abolition of the Death Penalty of 15 December 1989. URL: https://www.ohchr.org/EN/ProfessionalInterest/Pages/2ndOPCCPR.aspx ; Protocol to the American Convention on Human Rights to Abolish the Death Penalty of 6 August 1990. URL: http://www.oas.org/juridico/english/treaties/a-53.html ; Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Concerning the Abolition of the Death Penalty Under All Circumstances of 3 May 2002. URL: https://www.echr.coe.int/Documents/Library_Collection_P13_ETS187E_ENG.pdf.

[10] While it is undisputed that free speech is not an absolute right, its boundaries have fluctuated over time and in relation to geographical context [3].

1. Criminalisation: Freedom of speech and the problem of denialism

1.1. Introduction

Among the changes introduced in the 2020 into the Constitution RF, Article 67.1 (3) has the following wording: "The Russian Federation honors the memory of the defenders of the Fatherland and guarantees the defense of the historical truth. It is prohibited to diminish the achievements of the people when defending the Fatherland"[1]. The latter sentence refers to a very broad and still largely under-researched area of historiography. Apart from the epistemological issue whether there can be a single historical truth at all, scholarly research into some of the "difficult" issues such as collaboration of individuals with Nazi Germany, desertion, or anti-war efforts is not necessarily "diminishing the achievements of the people". However, a provision like Article 67.1 (3) Constitution RF could result, when imported into criminal law, in a limitation on the freedom of expression. The EU has been plagued by asimilar problem, i.e. the denial of the Holocaust (also called "denialism" or "negationism") and how it could be countered by means of criminal law. But while in the case of the EU the motivation for harmonizing criminal law was to protect human rights from racist or xenophobic transgressions, in the case of Russia the rationale for honoring the Great Victory is apparently not to

[1] Российская Федерация чтит память защитников Отечества, обеспечивает защиту исторической правды. Умаление значения подвига народа при защите Отечества не допускается.

prevent the hurting of the patriotic feelings of citizens, but to support a state-sponsored ideology.

1.2. EU Joint Action on combating racism and xenophobia

While every country is under the (at least persuasive) influence of human rights when debating the reform of criminal law, in the EU it has now, under the changed framework of competences of the Lisbon Treaty, become quite common to "upwardly" harmonize the criminal law of EU Member states in line with human rights obligations. The earliest example of this can be found in the area of combating racism and xenophobia. Triggered by the problem of Holocaust denial, increasing levels of racism and xenophobia compelled the EU to take action as soon as the Treaty of Maastricht opened up the EU's third pillar, i.e. what later became known as the area of freedom, justice and security. Going back to the concept of human rights as a "sword", it should be observed that what was worrying EU politicians and lawmakers was not racism and xenophobia as a public policy of Member states (although later this concerns also came up). On the contrary, it was racism and xenophobia as a private course of action, affecting societies and creating a climate of fear and retribution. Under a progressive understanding of human rights law, such occurrences also trigger the responsibility of states because their human rights obligations also include the positive obligation to create and nurture a social climate in which all citizens are safe and equal. The positive duty to protect thus provides the justification for a course of action that leads to the increase of criminal law sanctions while at the same time raising concerns about fundamental freedoms such as freedom of expression.

The EU took its first step in this direction by adopting a so-called Joint Action on 15 July 1996 concerning action to combat racism and xenophobia[2]. It is the foundation of what later became an entire policy area for the European Commission: combating racism and xenophobia[3].

The Joint Action starts out by observing that in the EU cases of racism and xenophobia are on the increase. Perpetrators were said to be "moving from one country to the other to escape criminal proceedings", exploiting the fact that racist and xenophobic activities are classified differently in different states. It is not clear whether this assumption was based on empirical research at the time and how large the share of perpetrators was who were suspected of moving back and forth between EU Member states. But this particular framing of the problem allowed the EU to take measures in order to "ensure effective judicial cooperation". Thus, while speaking only of racism and xenophobia, the Joint Action asked Member states to ensure effective cooperation, including, if necessary, by taking steps to see that the following behaviour would be punishable as a criminal offence:

– public incitement to discrimination, violence or racial hatred in respect of a group of persons or a member of such a group defined by reference to colour, race, religion or national or ethnic origin;

– public condoning, for a racist or xenophobic purpose, of crimes against humanity and human rights violations;

– public denial of the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 April 1945 insofar as it includes behaviour which is contemptuous of, or degrading to, a group of persons defined by reference to color, race, religion or national or ethnic origin;

– public dissemination or distribution of tracts, pictures or other material containing expressions of racism and xenophobia;

– participation in the activities of groups, organizations or associations, which involve discrimination, violence, or racial, ethnic or religious hatred.

Circumscribing racist or xenophobic activities predominantly as public expressions (inciting, condoning, denying, disseminating and distributing) brings this line of criminalization of course into conflict with the human right to freedom of expression. However, the Joint Action remained rather vague on this account, asking Member states only to take action in harmonizing their respective criminal laws until a certain date while declaring that human rights obligations of Member states shall not be affected. How this was to be achieved was not explained so that it would ultimately be left to the European Court of Human Rights (ECtHR) to decide on the measures adopted.

[2] Joint action to combat racism and xenophobia // Official Journal of the European Union. 1996. L 185. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al33058.

[3] Combating racism and xenophobia. Measures to combat different forms of racism and xenophobia // European Commission. URL: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/combating-racism-and-xenophobia_en.

Given that a specific concern in fighting racism and xenophobia was the denial of the Holocaust, the solution adopted in the Joint Action is rather peculiar. There is no express mentioning of Holocaust denial, instead the Joint Action refers to the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 April 1945. These include:

– crimes against peace;

– war crimes;

– crimes against humanity, including "persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated".

Thus, Holocaust denial is safely covered by the reference to Article 6, but only to the extent that it "includes behavior which is contemptuous of, or degrading to, a group of persons defined by reference to color, race, religion or national or ethnic origin". This limitation may be of no concern in the case of Holocaust denial, but it may raise question when it comes to the denial of other types of atrocities, e.g. the Holodomor in Ukraine, mass deportations or the genocide of Armenians at the hands of the Ottoman Empire.

1.3. EU Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law

The EU Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law[4] replaced the preceding Joint Action on combating racism and xenophobia. After lengthy negotiations it represents a milestone in the history of European criminal law because it directly obliges Member states to adjust their criminal law to common standards. At the same time, the Framework Decision is cognizant of the Member states' cultural and legal traditions when stating that its goal is to combat only particularly serious forms of racism and xenophobia. According to the Framework Decision's preamble, a full harmonization is "currently not possible"[5].

Interestingly, the Framework Decision drops the rather crude reference to perpetrators who travel between Member states to take advantage of differences in the legal framework. Instead, it refers to the principle of subsidiarity (Article 2 TEU) in explaining that the Framework Decision's objective, i.e. "ensuring that racist and xenophobic offences are sanctioned in all Member States by at least a minimum level of effective, proportionate and dissuasive criminal penalties", cannot be sufficiently achieved by Member states individually because "such rules have to be common and compatible and since this objective can therefore be better achieved at the level of the EU". This argument is rather circular because it does not explain why Member states are prevented from adopting "common and compatible" rules except that such amount of coordination is probably very difficult to achieve outside the realm of the EU.

In mandating the (partial) harmonization of criminal law, the Framework Decisionac knowledges the importance of human rights in two distinct directions: on the one hand, it ascertains that "racism and xenophobia are direct violations of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles upon which the European Union is founded and which are common to the Member States"[6]; on the other hand, it proclaims to respect the fundamental rights and observes the principles recognized by Article 6 TEU and in particular Article 10 ECHR (freedom of expression). So, the connection between the criminal law to be harmonized and human rights is obvious. Still, whether it will come to human rights violations can only be judged in light of application of the concrete norm of criminal law in a concrete set of circumstances.

In substantive terms, the Framework Decision raises a number of questions as to its effectiveness. The first offense to be harmonised is practically the same as in the Joint Action[7]. It is a classical "hate speech" offense with the following wording: "publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, color, religion, descent or national or ethnic origin". There is hardly any difference in the wording compared to the Joint Action, except that public incitement to discrimination is no longer included. Therefore, a situation

[4] On combating certain forms and expressions of racism and xenophobia by means of criminal law : Council framework decision 2008/913/JHA of 28 November 2008 // Official Journal of the European Union. 2008. L 328/55. P. 55–58. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008F0913.

[5] Preamble reference no. 6 of Framework Decision 2008/937/JHA.

[6] Preamble reference no. 1.

[7] Article 1 (1) lit. a) of Framework Decision 2008/937/JHA.

in which Nazis would call upon shopkeepers not to sell their products to Jewish citizens would not be caught under this harmonized offence. Nowadays, classical "hate speech" offenses requite common in the national criminal laws of all EU Member states so that an added value of this line of harmonization is not really visible.

The two offenses to be harmonized relating to international crimes[8] are now more elaborately circumscribed compared to the Joint Action. However, both are now also drafted according to a pattern which is likely to decrease their effectiveness [3, p. 65]. First of all, the modality of committal shall be harmonized in the following way: in each and every case, the relevant behavior shall be expanded from either "publicly condoning" or "publicly denying" to "publicly condoning, denying or grossly trivialising". This expanded wording is certain to create greater legal clarity. But beyond this welcome expansion, there is a more worrying situation. Although the scope of applicable international crimes is now clarified to include genocide, crimes against humanity and war crimes[9] as well as the crimes defined in Article 6 of the Charter of the International Military Tribunal, both now need to observe an important condition, i.e. that the conduct is "carried out in a manner likely to incite to violence or hatred" against a certain group or a member of such a group[10]. For questions of denialism, inciting to violence or hatred thus becomes an overall condition, effectively making Article 1 (1) lit. a) the most central provision and rendering the following paragraphs relating to international crimes obsolete. It also means that the "pure" denial of the Holocaust which is not likely to incite violence or hatred obviously falls out of the harmonization obligation.

Further serious limitations to the harmonization are introduced in the following two paragraphs. On the one hand, Member states are free, for the purpose of paragraph 1, to choose to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusive or insulting[11]. On the other hand, Member states may decide to make punishable the act of denying or grossly trivializing the crimes referred to in paragraph 1(c) and/or (d) only if the crimes referred to in these paragraphs have been established by a final decision of a national court of this Member State and/or an international court, or by a final decision of an international court only[12].

It thus appears that the legislative breakthrough in harmonizing the criminalization of racism and xenophobia intended by the EU has been rather botched. Some clarification has been achieved, but publicly condoning, denying or grossly trivializing the Holocaust as well as other international crimes when there is no likelihood of inciting violence or hatred effectively stands outside the applicability of this Framework Decision.

1.4. The limits of criminalization: Perinçek v. Switzerland

Presenting the role of human rights as a "sword" would not be complete without giving reference to the function of human rights as simultaneously limiting the amount of permissible criminalization. As already mentioned, there has been much concern in the EU that, not least as a result of right-wing populist parties, a social climate may emerge in which racism and xenophobia are increasingly accepted. As explained, an early trigger of such concerns was the denial of the Holocaust, but more recently other types of denial, including the denial of the Armenian genocide, have created waves. In this respect and against the background of a large number of national parliaments recognizing the Armenian genocide, a famous case was decided by the Grand Chamber of the ECtHR which had far-reaching consequences: the case of *Perinçek v. Switzerland*[13].

At the outset, it is important to clarify that Switzerland is not a Member state of the EU and that its relationship with the EU is governed by a series of bilateral treaties. These treaties do not include participation in the EU's area of justice, freedom and security. For this reason, the abovementioned Framework Decision 2008/913/JHA is not applicable to Switzerland. Independently of the harmonization exercise within EU Member states, Article 261 *bis* of the Swiss Criminal Code, entitled "Discrimination and incitement to hatred", provides for the following:

[8] Article 1 (1) lit. c) and d) Framework Decision 2008/937/JHA.

[9] Articles 6–8 of the Statute of the International Criminal Court.

[10] Article 1 (1) lit. c) and d) of Framework Decision 2008/937/JHA.

[11] Article 1 (2) Framework Decision 2008/937/JHA.

[12] Article 1 (3) Framework Decision 2008/937/JHA.

[13] Grand Chamber. Case of Perinçek v. Switzerland (Application no. 27510/08). Judgment. Strasbourg, 2015. URL: https://hudoc.echr.coe.int/eng#{"itemid":["001-158235"]}.

"(§ 1) Any person who publicly stirs up hatred or discrimination against a person or a group of persons on the grounds of their race, ethnic origin or religion;

(§ 2) any person who publicly disseminates an ideology aimed at systematic denigration or defamation of the members of a race, ethnic group or religion;

(§ 3) any person who with the same objective organises, encourages or participates in propaganda campaigns;

(§ 4) any person who publicly denigrates or discriminates against a person or a group of persons on the grounds of their race, ethnic origin or religion in a manner that violates human dignity, whether through words, written material, images, gestures, acts of aggression or other means, or any person who on the same grounds denies, grossly trivialises or seeks to justify a genocide or other crimes against humanity;

(§ 5) any person who refuses to provide a service to a person or group of persons on the grounds of their race, ethnic origin or religion when that service is intended to be provided to the general public;

— shall be punishable by a custodial sentence of up to three years or a fine."

The case was triggered by a number of public speeches of Mr. Perinçek who at the time was Chairman of the Turkish Workers' Party and a vocal proponent of radical left-wing positions. His speeches were given in the context of press conferences and a party rally in Switzerland in 2005. He claimed that the genocide of the Armenian at the hands of the Ottoman Empire is an international lie, that it had never happened and that this lie is now used by "imperialists of the USA and the EU". Mr. Perinçek was subsequently charged with a violation of Article 261 *bis* § 4 of the Swiss Criminal Code and sentenced to pay a fine. He appealed the fine, but the appeal was dismissed. He then appealed to the Swiss Federal Court, but again his appeal was dismissed. Finally, he lodged an appeal to the ECtHR on 10 June 2008. He complained that his criminal conviction and punishment for having publicly stated that there had not been an Armenian genocide had been in breach of his right to freedom of expression under Article 10 ECHR. He also complained, relying on Article 7 ECHR (no punishment without law), that the wording of Article 261 *bis* § 4 of the Swiss Criminal Code was too vague.

In ajudgment of 17 December 2013, a Chamber of the ECtHR held, by five votes to two, that there *had been* a violation of Article 10 ECHR. The Swiss Government then requested the case to be referred to the Grand Chamber. A Grand Chamber hearing was held on 28 January 2015 and the final judgment pronounced on 15 October 2015 in which a majority of the 17 judges came to the conclusion that the criminal sanction by the Swiss authorities amounted to a violation of the applicant's right to freedom of speech.

Being aware of the great importance attributed by the Armenian community to the question whether the historical mass deportations and massacres were to be regarded as genocide, the Court approached the issue from the need of balancing the dignity of the victims and the dignity and identity of modern-day Armenians (protected by Article 8 ECHR — right to respect for private life) with the right to freedom of expression of the applicant, taking into account the specific circumstances of the case and the proportionality between the means used and the aim sought to be achieved. The Court concluded that it had not been necessary, in a democratic society, to subject the applicant to a criminal penalty in order to protect the rights of the Armenian community at stake. In particular, the Court took into account the following elements: the applicant's statements bore on a matter of public interest and did not amount to a call for hatred or intolerance; the context in which they were made had not been marked by heightened tensions or special historical overtones in Switzerland; the statements could not be regarded as affecting the dignity of the members of the Armenian community to the point of requiring a criminal law response in Switzerland; there was no international law obligation for Switzerland to criminalize such statements; the Swiss courts appeared to have censured the applicant simply for voicing an opinion that diverged from the established ones in Switzerland; and the interference with his right to freedom of expression had taken the serious form of a criminal conviction.

1.5. Conclusion

The "sword" function of human rights presents an argument that is attractive at first glance. But it also opens up a wide field for critical thinking and research. There is a fine line between the amount of criminalization that is necessary from a human rights point of view and criminalization that is driven by sheer punitivity or the idea of securitisation, i.e. turning a certain societal or political problem

into a criminal threat[14]. It is in this direction that human rights often come in as a "defense", presenting limits to the desire of criminalizing certain action. This could, in theory, also be observed in Russia where the key word in Article 63.1 (3) Constitution RF is "diminishing" (умаление). While the term is probably not so problematic as far as constitutional law goes, it will need a very thorough analysis under existing human rights law obligations, in particular freedom of speech, when it comes to criminalizing certain activities.

To understand the particular weight of human rights arguments in the debate on criminalization is thus a difficult task. In general, it is for the criminal law sciences to counteract some of the populist arguments, *inter alia* by developing a sensorium for the question what legal interests (or human rights interests, for this purpose) shall be protected by a certain criminalization measure. Apart from the lack of criminological research, the actual rationale for criminalization is often not acutely questioned, and commentators are happy enough to point at the formal legitimacy of laws adopted by elected lawmakers. It is probably more necessary than ever to establish the legal interest (or, in German doctrinal thinking, the *Rechtsgut*) as a category to combine constitutional law with criminal law approaches in asking whether certain steps at criminalization are constitutionally acceptable, thus separating the wheat from the chaff.

2. De-criminalization: Irregular migration and the irregular stay of third-country nationals

2.1. Introduction

Apart from the "shield" function of human rights, there is another constellation which is much more rarely observed: it is that a government may be forced by human rights considerations to restrict its criminal law and delimit the applicability of a prohibition that it once had considered legitimate and necessary. There is one famous case in the history of EU integration which brought about such a consequence, but also triggered a cascade of follow-up cases which all lead to the question how much freedom an EU Member state has left in adopting criminal law responses once the EU agrees on a certain policy. This case is the so-called *El Dridi* case, decided by the First Chamber of the Court of Justice of the European Union (CJEU) on 28 April 2011[15].

2.2. Background

To put the *El Dridi* case and its aftermath into context, it is necessary to understand that the EU, within the area of freedom, justice and security, has committed itself to developing a common immigration policy, to include also the "prevention of, and enhanced measures to combat, illegal[16] immigration and trafficking in human beings"[17] [5–7]. For this purpose, the EU acquired legislative competence in the Treaty on the Functioning of the EU (TFEU) to adopt measures in the area of "illegal immigration and unauthorized residence, including removal and repatriation of persons residing without authorization"[18], but subject to "respect for fundamental rights and the different legal systems and traditions of the Member States"[19].

One center piece of this new EU immigration policy is Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member states for returning illegally staying third-country nationals ("Return Directive")[20]. It presents the attempt to lay down a unified procedure for return of irregularly staying third-country nationals. EU Member states had agreed to this normative framework in the Council, but remained skeptical. One strategy therefore was to limit the scope of remedies in order to sustain the efficiency of the return procedure[21]. Of course, the

[14] The term "securitisation" has been coined by Buzan, Wæverand de Wilde (1998) [4]. It denotes the process of state actors transforming subjects into matters of "security", — an extreme version of politicisation that enables extraordinary means to be used in the name of security.

[15] Case C-61/11 PPU : Judgment of the Court (First Chamber) of 28 April 2011 // InfoCuria. Case-law. URL: http://curia.europa.eu/juris/liste.jsf?num=C-61/11.

[16] The EU initially used the term "illegal", but later switched to "irregular" to indicate that it did not want to pre-determine the legal qualification under the national laws of EU Member states.

[17] Article 79 (1) TFEU. A variety of critical perspectives can be found at Afia Kramo [5], Mitsilegas [6], as well as João Guia, van der Woudeand van der Leun [7].

[18] Article 79 (2) lit. c) TFEU.

[19] Article 67 (1) TFEU.

[20] On common standards and procedures in Member States for returning illegally staying third-country nationals : Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 // Official Journal of the European Union. 2008. L 348. P. 98. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008L0115.

[21] According to Article 13 of Directive 2008/115/EC (ibd.), the third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return. Despite calling for an "effective" remedy, the appeal does not have the mandatory effect of halting the return procedure.

human rights of those to be returned could not be ignored in the procedural design. But there was a visible attempt to affirm the *a priori* conformity of procedures with human rights[22], leading to a very critical reception among scholarly commentators and human rights NGOs at the time[23] [8–10]. The second concern was that the Directive might diminish the scope for Member states to use criminal law as a means of deterring irregular migration. Up until the entry into force of this common EU policy, Member states had shown a very punitive attitude to cases of irregular migration, using the threat of criminal law in a very broad manner [11]. The EU had limited itself to criminalize the actions of persons engaged in trafficking in human beings and human smuggling, but refrained from proposing any measures to criminalize third country residents who attempted to get into the territory of one of its Member states or who were simply found there.

The gist of the procedure envisaged by the Return Directive is to terminate the irregular stay of the third-country national by a return decision of the EU Member state's competent authority and offering the person a window between seven and thirty days for voluntary departure, unless there is arisk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses a risk to public policy, public security or national security. Upon expiry of the deadline for voluntary departure or in the latter case where no such deadline is offered, national authorities are entitled to start removing the person, if needed by coercive means. According to Article 8 (4) Return Directive, coercive measures shall be proportionate and shall not exceed reasonable force. Measures "shall be implemented as provided for in national legislation in accordance with fundamental rights and with due respect for the dignity and physical integrity of the third-country national concerned."

What has earned the Return Directive criticism from a human rights point of view is not the permissibility of the use of force, but the possibility of placing the irregular migrant into detention for the purpose of removal. There is an entire chapter in the Directive devoted to this issue. While in general the rules on detention are a clear expression of concern over the proportionality of detention, there is the possibility of extending detention up to 6 months and under certain conditions even up to 18 months[24]. So, while the Return Directive was obviously designed to appeal to the punitive demands of Member states and to give them the possibility to "act tough" on irregular migrants, there remained a lingering concern how much freedom would be left to Member states to employ criminal law as a means of regulating irregular migration.

This situation came to a head with the Republic of Italy. This country had been the one Member state that had most extensively used the criminalization of irregular migration [12] and had also failed to implement the Return Directive by the deadline of 24 December 2010. Furthermore, the Italian Government had hoped that it could draw on a clause in the Return Directive that allowed a Member state to not apply the Directive to third-country nationals, if they are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law[25]. The Italian Government's "scheme" was basically to impose a sentence of imprisonment on irregular third-country nationals, whether they had just entered the country or whether they were found in it, only to suspend this penalty upon removal from the country. In this way it was argued that removal was effected as a result of a criminal law sanction. This "scheme" had been met with resistance both in academic writing and among the courts, but the Italian Constitutional Court effectively upheld the line of the Government while the latter simply delayed implementation of the Directive [13].

2.3. The El Dridi judgement

The *El Dridi* judgement by the CJEU is a preliminary ruling according to Article 267 TFEU, originating from the Corte d'appello di Trento. The referring court asked the CJEU "whether Directive 2008/115, in particular Articles 15 and 16 thereof [the rules on detention], must be interpreted as precluding a Member State's legislation, such as that at issue in the main proceedings, which provides for a sentence of imprisonment to be imposed on an illegally staying third-country na-

[22] Preamble para 24 of Directive 2008/115/EC (ibd.): "This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union." A similar reference is also contained in Article 1 of the Directive (ibid.).

[23] The Council of Ministers of the European Union must not adopt the outrageous directive! // Migreurop. URL: http://www.migreurop.org/article1333.html?lang=fr.

[24] Article 15 paras (5) and (6) of Directive 2008/115/EC.

[25] Article 2 (2) lit. b) of Directive 2008/115/EC.

tional on the sole ground that he remains, without valid grounds, on the territory of that State, contrary to an order to leave that territory within a given period"[26].

Mr. El Dridi, a third-country national, had entered Italy irregularly in 2004 and had not obtained a residence permit since. Therefore, the Prefect of Turin issued a deportation decree against him in 2004. Despite this decree, he continued staying in Italy irregularly. Finally, on 21 May 2010 the Questore di Udine issued a removal order based on the earlier deportation decree and notified it on Mr. El Dridi. However, since there was no place in a detention facility available, the Questore ordered him to leave the territory of Italy within 5 days. On 29 May 2010, upon checking whether he had complied with the order, he was still found to be residing in Italy. He was then sentenced to one year of imprisonment based on Article 14 (5b) of Legislative Decree No. 286/1998 which had the following wording: "A foreign national who remains illegally and without valid grounds on the territory of the State, contrary to the order issued by the Questore in accordance with paragraph 5a, shall be liable to a term of imprisonment of one to four years if the expulsion or the return had been ordered following an illegal entry into the national territory […]". Mr. El Dridi appealed this decision before the Corte d'appello di Trento which then requested the preliminary ruling of the CJEU. What followed became a watershed in EU law. The Court built its argument in three steps.

Firstly, it held that the Return Directive was applicable to the situation. Mr. El Dridi came under the scope of this Directive because he was a third-country national staying illegally on the territory of a Member state. The Court further noted that Italy was unable to draw on the exemption clause in Article 2 (2) lit. b) because the return order originated in a decree of the Prefect of Turin. Therefore, the removal of Mr. El Dridi was not to be considered the result of a criminal law sanction.

Secondly, the Court drew on its established jurisprudence according to which provisions in a directive which are not timely transposed into national law are capable of acquiring immediate effect in the national legal system of the Member state, if they are unconditional and sufficiently precise. The Court affirmed that this was the case with the provisions in Article 15 and 16 regulating detention.

Thirdly, the Court argued that the removal system foreseen by the Italian legislation was "significantly different" from the system provided for in the Return Directive. This concerned not only the technicality that no period for voluntary departure had to be given, not even in light of the fact that in the case of a lack of space in a detention facility there would be a 5-days-period for voluntary leaving the country as opposed to the minimum 7 days provided in the Return Directive. The gist of the difference was rather that the Return Directive's objective was to enable the removal and repatriation of the third-country national as efficiently as possible. In the case of Mr. El Dridi, holding him criminally liable for the sole reason that he violated a condition of the removal order was frustrating this objective and delaying the enforcement of the return decision. Therefore, the Court concluded that Member states, also in light of the duty of sincere co-operation in Article 4 (3) TEU, "may not apply rules, even criminal law rules, which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness[27].

The Court thus did not nullify the provisions of Italian criminal law, but declared that Italian criminal law was inapplicable to the extent that it contravened the Return Directive in those parts which were immediately applicable. In the concrete case, not only Mr. El Dridi had to be released from prison where he served his sentence, but also a large number of other third-country nationals sentenced on the same grounds [14].

2.4. The aftermath of the El Dridi judgement

It is quite ironic, as some observers have pointed out [15, p. 280], that a directive like the Return Directive which had originally been severely criticised for its lack of support to human rights was turned by the CJEU into an instrument for the protection of personal liberty. This was all the more remarkable as the Court had never before used its jurisprudence on the direct applicability of directives to interfere with Member states' criminal law. However, in a way the *El Dridi* judgement also opened Pandora's box [15, p. 281] in that Member states were now more eager than ever to learn which amount of residual freedom they would retain to use criminal law to deter irregular migration[28] [5; 11].

[26] Case C-61/11 PPU (El Dridi) : Judgement of the CJEU of 28 April 2011 para 29.

[27] Ibd. at para 55.

[28] Needless to say, Member states remained enthusiastic proponents of criminal law measures in the area of irregular migration; Criminalisation of Migrants in an Irre-

The *El Dridi* judgement was undoubtedly a breakthrough, and the Court spared no effort to sustain its effect in related areas of criminalization that the Member states had been experimenting with. The most important follow-up judgement was the CJEU's Grand Chamber judgement *Achughbabian* of 6 December 2011 which is a request for a preliminary ruling concerning the Return Directive originating from the Courd'appel de Paris (France)[29] [11; 16]. It raised the question whether a Member state was permitted to use criminal law to sanction a *per se* irregular stay outside a return procedure.

Mr. Achughbabian, a third-country national, had entered France on 9 April 2008 and had applied for a residence permit. His application was rejected on 14 February 2009 and he was ordered to leave French territory within one month. However, he stayed and was detected only on 24 June 2011 when he got caught in a random highway control. He was immediately placed into custody on the suspicion that he had violated Article L. 621-1 of the French Law on Foreigners and Asylum ("Ceseda"). According to this Law, "A foreign national who has entered or resided in France without complying with the provisions of Articles L. 211-1 and L. 311-1 or who has remained in France beyond the period authorised by his visa commits an offence punishable by one year's imprisonment and a fine of EUR 3.750."

Simultaneously, a deportation order was adopted by the Prefect of Val-de-Marne and served on Mr. Achughbabian. Police custody was permitted only for 48 hours so that the authorities applied to the *juge des libertés et de la détention* of the Tribunal de grande instancede Créteilfor anextension of the detention period beyond 48 hours. Mr. Achughbababian appealed and the Courd' appel de Paris decided to stay the proceedings and ask the CJEU for a preliminary ruling.

The case is different from *El Dridi* because the criminal sanction was threatened *prima facie* for past behaviour, i.e. the illegal stay in the country, and unrelated to the return procedure started simultaneously. However, the Court insisted that in order to give the return decision based on Article 8 (1) Return Directive practical meaning the Member state is under an obligation to take all measures necessary to carry out the removal. Holding the third-country resident criminally liable for his stay and sanctioning him with one year of imprisonment would manifestly frustrate the goal of the Return Directive. Therefore, the relevant provision of the French Law on Foreigners and Asylum had to be disapplied.

A final case that extended the *El Dridi* rationale concerned the issue of illegal entry. In *Sélina Affum v Préfet du Pas-de-Calais, Procureur général de la courd'appel de Douai*, a Grand Chamber judgement of the CJEU of 7 June 2016[30], the Court affirmed there is no principled difference between a criminal sanction provided for illegal stay, as in the case of *Achughbabian*, and illegal entry. In both cases, the speedy removal of the third-country national must not be frustrated by a criminal sanction, imposing imprisonment.

2.5. Conclusion

Reminiscent of its earlier *effet utile* jurisprudence in cases concerning the common market, the CJEU has again taken the lead to promote a common EU policy against "protectionist" aspirations of EU Member states. But unlike the earlier free flow of goods, services, capital etc., this new "free flow of returnees" is not so much motivated by human rights concerns, but by the attempt to reign in the punitive instincts of Member states. It is therefore technically a victory for human rights law over excessive criminalization, but in practice this policy is hardly interested in promoting the human rights of those sent back to their home countries.

The CJEU, in pre-empting criticism from Member states, has always been careful to point out that it is not depriving Member states of their power to enact criminal law *per se*. Its reassuring mantra is that the Return Directive "[…] does not exclude the right of the Member States to adopt or maintain provisions, which maybe of a criminal nature, governing, in accordance with the principles of that directive and its objective, the situation in which coercive measures have not made it possible for the removal of an illegally staying third-country national to be effected"[31].

gular Situation and of Persons Engaging with Them // FRA. 2014. URL: https://fra.europa.eu/en/publication/2014/criminalisation-migrants-irregular-situation-and-persons-engaging-them.

[29] Case C-329/11 : Judgment of the court (Grand Chamber) of 6 December 2011 // InfoCuria. Case-law. URL: http://curia.europa.eu/juris/document/document.jsf?text=&docid=115941&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3328007.

[30] Case C-47/15 : Judgment of the court (Grand Chamber) of 7 June 2016 // InfoCuria. Case-law. URL: http://curia.europa.eu/juris/document/document.jsf?docid=179662&doclang=EN.

[31] El Dridi (ibid.) paras 52 and 60; Achughbabian (ibid.) para 46.

In the Court's view, there is room for national criminal law measures when the third-country national has absconded or where his or her return is impossible due to practical (e.g. lack of documents, unwillingness of the home country to receive its national) or legal (non-refoulement) reasons. However, such explanations have hardly been convincing to Member states as they continue to search for loopholes to use criminal law as a deterrent against third-country nationals. It is probably the Achilles heel of the CJEU's approach that it chose to address the criminal sanction of imprisonment from a human rights point of view (deprivation of liberty). It overlooked that there are other criminal sanctions, most importantly fines that can be levied on irregular migrants. In practice, hardly any irregular migrant is able to pay a fine so that conversion of the criminal fine into a custodial sentence becomes the next challenge.

It is here where we stop in order not to delve ever more deeply into migration law and its interplay with criminal law. Suffice it to say that what has technically been a bold move of the CJEU to curtail the punitive instincts of Member states and to force them to accept limitations on their criminal law has not been driven by concern over human rights in the first place, but rather by the need to establish and defend a common EU policy. Human rights have served as an important stepping stone in this argument, but the outcome has hardly been more humane.

3. Overall conclusions

Criminal law is by no means static, and behind the many legislative initiatives that we see on the national level there is often not just a change in values, but also in sensibilities for human rights. Still, the punitive instincts of legislators, motivated by rhetorics of "acting tough", are often stronger than compassionate and humane impulses that societies also harbor. It is therefore up to every single country and its politicians to find the fitting answers.

The goal of this paper has been to show, using the example of European criminal law, that human rights can work "both ways": they can inform criminalization as well as de-criminalization. European criminal law as an emerging field of law is quite suitable to demonstrate these dynamics in a particular clear light. However, the examples are made more complicated by the ingredient of the issue of competences which is one of the major themes of European integration. The area of freedom, justice and security is one of shared competences, and while Article 79 TFEU empowers the EU to develop a common immigration policy, the antidote is Article 72 TFEU according to which the area of freedom, justice and security "shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security". While all sides share both a legal as well as a moral commitment to human rights, the lack of solidarity in implementing common policies remains an ongoing threat.

What can be learned from the emergence of European criminal law in a national context is that human rights law becomes a powerful argument when there are diverging interests and strong courts. Usually all sides subscribe to human rights and, indeed, it is difficult to argue that one is against human rights. Still, when there is a political and / or legal struggle, human rights help to create forceful arguments that are capable of "working both ways", i.e. promoting criminalization and de-criminalization.

For Russia, the Federal Constitution has been quite amenable to the wishes of the ruling class and there appears to be no real competition of political viewpoints. For doctrinal criminal law, it remains to be seen how the sweeping announcements in the country's basic law will be translated into criminal law and whether arguments based on human rights law will have the power to resist the impetus of criminalization.

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ИНФОРМАЦИЯ ОБ АВТОРЕ

Крюссманн Томас — старший научный сотрудник факультета уголовного права, уголовного процесса и криминологии Грацского университета им. Карла и Франца, профессор, г. Грац, Австрия; e-mail: thomas.kruessmann@uni-graz.at.

INFORMATION ABOUT THE AUTHOR

Kruessmann, Thomas — Senior Research Fellow, Department of Criminal Law, Criminal Procedure Law and Criminology, KFU Graz, Austria; e-mail: thomas.kruessmann@uni-graz.at.

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