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An Independent Judiciary – Counterbalance to the Erosion of Fundamental Rights in Europe

The existence of a European criminal justice system is no longer in question, but there is also not yet an answer as to how it should be constituted. European law was and is directed primarily towards the integration of economic and social systems to which the direct influence of penal law, which continues to be expressed in the sovereign and publicly determined deprivation of freedom, is foreign. In consequence, existing programs of legitimacy for European legal development are not directly suited to the European criminal justice system. Currently we are confronted with the problem of whether and how the current programming of European law toward system integration can also be transferred to the criminal justice system. Also affected by this is the judiciary, which must continue to develop as a European, independent, and impartial punishing power. Decoupled from the traditional nation-state, it is now subject to new demands of: legitimacy (I), content (II), and organization (III).

I. "Passive Beings"? The Function of the European Judiciary between Systemic and Political Integration

What and to what extent may the judiciary control? The law, its application, its content, its creation? *Montesquieu* sees the danger of the judges as potential "oppressors" if their function is not clearly separated from the executive and legislative.[1] The famous statement from "The Spirit of the Laws" is derived from this, namely, that the judges are "no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigor."[2] This determination of function is linked with a legal understanding of the Enlightenment which viewed the law as an embodiment of a higher, practical rationality. Understandings of law and liberty belong together. If the laws are in accordance with the understanding of liberty, they also set the boundaries of individual liberties, that is, what the individual is allowed to do. The application and maintenance of this "spirit of the laws" makes the organizational principle of a strict separation of powers necessary as a principle of liberty itself which is to become a practically effective "political liberty."[3]

The judiciary, impartial in the face of social power and independent of its influence, is limited to the application of the "right" law. It is not entitled to any controlling functions vis-à-vis the legislator beyond this, let alone intervention in the legislative powers. In this, the rationally-guided understanding of law loses strength. The legal system pro-

1 Montesquieu, Vom Geist der Gesetze (The Spirit of the Laws), 1965, p. 213.

2 Montesquieu, l.c., p. 221.

3 Montesquieu, l.c., 11th book, Third Chapter, "In what liberty consists." "(...)but political liberty does not consist in an unlimited freedom. In governments, that is, in societies directed by laws, liberty can consist only in the power of doing what we ought to will, and in not being constrained to do what we ought not to will. (...)"

vides guidance for society, and the determining factor is no longer to be only individual legal protection, but the provision of prosperity and security. Rules are a letter of indemnity for the society focused on risk, and only a loose connection to the law remains. As a consequence, the connection of the judge, and in particular the judges of the constitutional courts, to the legislator is also loosened. It opens a space for the judiciary to consider moral principles and political goals. One premise of the prevention state also consisted of a material understanding of law which made it possible for the judiciary to highlight the democratic legislative process with ostensibly objective systems of values. The judiciary thus steps into the shoes of the law-makers and expands their range for decisions at the cost of the principle of democracy.[4] An understanding of fundamental rights which includes more than their defensive function and views them as an objective system permeating the state and society risks tying in to the judicial history of the Weimar Republic, when the third power desired to and did implement an application of a material legal understanding of its own political power vis-à-vis the democratic law-makers oriented toward restoration.

Despite this historical experience, there will be no direct return to a liberal and function-limiting understanding of the judiciary as the guardian of basic rights if one only interprets it in the context of a functioning liberal economic society.[5] Overcoming this apparent context, discourse theory desires to expand the judicial control of basic rights beyond its defensive function and set it in the framework of the modern principle of democracy. According to this reading, democratic processes have the advantage of the assumption of practical rationality[6] if they enable citizens to pursue cooperatively the political project of just living conditions by perceiving their right to self-determination and mutual recognition of their right to participation.[7] According to this, judicial controls extend to the "procedural conditions of the democratic creation" of laws and does not protect a specific set of fundamental rights, but instead the forms which first make possible the exercising of citizens' private and public autonomy.[8] The legitimation of law and state arises from the forms of communicative, publicly responsible, and deliberative politics. For its part, the law gains legitimacy not as an external order which is to be imposed on politics, but as a system which secures democracy-strengthening political cooperation amongst free and equal citizens. Hence, constitutional controls can intervene in the legislative process to the extent that the procedural requirements are disregarded.[9] Controls aimed at an "idealized" correct content do not occur.[10]

But what happens if such a procedural paradigm faces an object which remains subjected to continual change? Could it be that the discourse-theoretical perspective on the

4 The discussion is led by P.-A. Albrecht, Das Strafrecht auf dem Weg vom liberalen Rechtsstaat zum sozialen Interventionsstaat, in: P.-A. Albrecht: Der Weg in die Sicherheitsgesellschaft. Auf der Suche nach staatskritischen Absolutheitsregeln, 2010, p. 259 ff. Cf. also Denninger, Das Bundesverfassungsgericht zwischen Recht und Politik, in: Denninger, Das Recht in globaler Unordnung, 2005, p. 96 ff.

5 Cf. Habermas, Faktizität und Geltung, p. 328 f.

6 Habermas, Faktizität und Geltung, p. 333.

7 Cf. Habermas, Faktizität und Geltung, p. 320.

8 Cf. Habermas, l.c.

9 Habermas, l.c., p. 340.

10 Habermas, l.c.

function of judicial control remains dependent on the consolidated national constitutional state? In the European legal space, gaps remain in legitimacy based on procedure. In its decision on the Treaty of Lisbon,[11] the Federal Constitutional Court closed these gaps insofar as it ensured a tight coupling of the European legislative process to national constitutional law. This is especially true for penal law which – as a component of freedom, security, and law – must satisfy increased procedural demands and thus requires the effective participation of national parliaments as a necessary condition of European criminal legislation.[12] The assertion of democratic procedural conditions through judicial controls thus always works with the reference to the established constitutional law of the national state.

But this does not yet say anything about the function of judicial controls within a European criminal justice system which is becoming independent. The legal understanding of judicial controls is based on the authorization to exercise force.[13] The legitimacy of penal law does not only depend procedurally, but also materially, on the conditions for, requirements of, and consequences of punishment. As is typical for the use of state force, on the European level specific criteria are needed which provide unique legitimacy to penal law. Peno-legal principles such as legality, guilt, or a fair trial, however, must yet be developed in the European systemic context of penal law. On the one hand there exists too little judicial control regarding the guarantee of this principle, and on the other hand there is already too much judicial control regarding the expansion of criminal legislation via annex competencies. A procedural paradigm alone cannot guarantee the protection of the private and public autonomy of European citizens vis-à-vis and within legislation. Penal law shows that it is not only about participation, but about the protection from force, which is not exhausted with the participation in the decision on criminal policies. The European (criminal) judiciary functions as the custodian of rights which precede political processes and which must be bindingly enforced.

In Europe, individual cases which must be used to test the protection of fundamental rights always have a meaning that extends beyond the particular case. Fundamental rights which are strengthened in an individual case could require the European lawmakers to increase political efforts on universal guarantees for proceedings in a European criminal justice system. The judiciary cannot replace democratic legislation. It cannot expand judicial power for its own sake, but instead must reveal itself to be a strong custodian of fundamental rights and interpret its controlling function more offensively the more gaps there are in the democratic legislative process and the less secure individual legal positions are.

The European Union is still characterized by the antinomy of system integration and political integration.[14] The control of the internal market and the protection of the four fundamental freedoms are subject to a logic of their own which is decoupled from norms,

11 BVerfG, 2 BvE 2/08 on June 30, 2009.

12 BVerfG, l.c., Para. 363 and 365.

13 Kant, Metaphysik der Sitten (Metaphysics of Morals), Ausgabe der Preussischen Akademie der Wissenschaften Tome VI, p. 231. Here it states: "(...), if a certain practice of freedom is in itself a hindrance to freedom according to general laws (that is, it is injust), then the force which is used against this practice as a prevention of the hindrance to freedom is in accordance with freedom pursuant to general laws (that is, it is just) (…)."

14 Cf. Habermas, Staatsbürgerschaft und nationale Identität, in : Faktizität und Geltung, p. 632 ff.

principles, values, and the agreement on these.[15] Political integration in Europe, on the other hand, only takes place slowly and is often limited to the nation-state.[16] To the present, the European Court of Justice has viewed its function to be primarily a contribution to systemic integration in the sense of a juridification of the economy and administration on the European level. With the Treaty of Lisbon, fundamental rights have become a binding element of all European legislation, whether it is in the application of the EU Charter of Fundamental Rights or as a part of the constitutional principles of the member states. The possible accession of the EU to the European Convention on Human Rights strengthens the legal framework of Europe's political integration which understands itself not only as an economic body but also as a public space for free and equal Union citizens. In the future, judicial control in Europe – exercised by European courts – will have to make its contribution not only to systemic integration, but also to political integration, the structure of which must first be determined by the implementation of effective basic rights throughout Europe. The European criminal justice system will be a seismograph for whether and to what extent this political integration is successful.

II. European Judiciary between National Sovereignty and European Judicial Control

The European judiciary remains ambivalent in its task of co-creating a grammar of law for Europe's political integration. On the one hand, it leaves the national democratic law-makers great leeway for discretion and judgment in the concrete organization of the protection of fundamental rights, even when they are implementing European law. In "Advocaaten voor de Wereld,"[17] the European Court of Justice did not even use the measure of the principle of legality on the listed types of offences in Art. 2 Para. 2 of the framework decision on the European arrest warrant.[18] According to the ECJ, the determining factor should only be whether the offence which occasioned the arrest warrant in the issuing member state satisfies the criteria of legal certainty.[19] In its "Tillack decision"[20] the ECJ rejected the legal binding force of Art. 10 Reg. 1073/99, which includes a transfer of information of the European Anti-Fraud Office (OLAF) to the state prosecutor's offices of the member states. It thus deprived all investigation actions conducted on the basis of Art. 10 Reg. 1073/99 of a review in regards to fundamental rights. Finally, the decision on data retention[21] did not apply legal data protection limits, as the data retention itself is not viewed as an act of criminal prosecution. As different as the objects of the decisions are, they are united by a basic problem of European legal protection which primarily affects penal law. It is always about interventions in positions

15 Cf. Habermas, l.c., p. 644.
16 Habermas, l.c., p. 645.
17 European Court of Justice, Judgment on May 3, 2007, Rs C-303/05.
18 2002/584/JI : Council Framework Decision of June 13, 2002, on the European arrest warrant and the surrender procedures between Member states (...), OJ L 190, July 18, 2002, 1 ff.
19 ECJ, Case C-303/05, Ref. No. 53 f.
20 ECJ, Case T-193/04, Judgment on October 15, 2004 and ECJ Case C-521/04, judgment on April 19, 2005.
21 Judgment of the ECJ on February 10, 2009, Case C-301/06; Directive 2006/24 of the European Parliament and Council on March 15, 2006.

on basic rights which have a direct effect in the nation-states but are initiated by European law. The indirect legal foundation of an intervention in basic rights is thus not under the control of a European judicial instance which decides on questions of competency, however. The system of penal legislation is being differentiated vertically and horizontally, but judicial control does not always follow this differentiation. From this, the problem arises of patchy protection of peno-legal principles which has great variance in its scope.

On the other hand, the judicial control by European courts is increasingly expanding into areas which originally fell under national sovereignty and which a short time ago would have been inaccessible for European intervention. Both national legislation as well as the executives are first held to the maintenance of basic rights in the European context. In its decision "Salduz v. Turkey,"[22] the European Court of Human Rights reinforced the right to a defense lawyer at the earliest possible time in an unfolding criminal proceeding – at the latest at the time that the suspect is questioned by the police.[23] The access to a lawyer is an essential element of the principle of nemo tenetur.[24] Limitations are only allowed if the guarantee of a fair trial does not suffer.[25] Interventions in this right cannot be justified if the withdrawal of the defense lawyer has the effect that the defendant's rights are irreparably damaged at an early point of time in the proceedings – for example during the first questioning.[26] For some of the signatory states, the adjudication of the ECHR had the result of a legal necessity to reform their criminal procedural law.[27] For the European Commission, the decision had the added criminal policy value of being able to take a more offensive stance on the step-by-step realization of European-wide guarantees for criminal proceedings.[28] Its criminal policy initiative to anchor the right to a lawyer as a European procedural right is intrinsically tied to the "Salduz decision."[29]

In the case "S and Marper v. United Kingdom,"[30] the ECHR limited the discretionary range of the signatory states regarding the scope of data protection and elaborated on European-wide binding criteria for the protection of privacy in the sense of Art. 8 of the European Convention on Human Rights. According to this, the undetermined retention of data of persons who were not suspects or had not been accused of a crime constituted an unjustified intervention according to Art. 8 of the European Convention on Human Rights.[31] Retaining data in this manner increases the risk of stigmatizing and is thus

22 Salduz v. Turkey, application no. 36391/02, judgment on November 27, 2008.
23 Salduz v. Turkey, Para. 52.
24 Salduz v. Turkey, Para. 54.
25 Salduz v. Turkey, Para. 51.
26 Salduz v. Turkey, Para. 54.
27 Cf. European Commission, Directorate-General Justice, Reflection Paper for Experts' meeting, Brussels October 11 and 12, 2010, p. 6 – 8.
28 Cf. e.g. Resolution of the Council of November 30, 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295/1 on December 4, 2009.
29 Cf. also European Commission, COM(2010) 392 final, Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings, Brussels July 20, 2010.
30 ECHR, Application nos. 30562/04 and 30566/04, Judgment on December 4, 2008.
31 ECHR, l.c., Para. 66.

incompatible with the presumption of innocence.[32] No public interest, not even in questions of homeland security, can outweigh the private legal protection interest of the innocent and the integrity of their privacy.[33] This decision also set the legal framework for future interventions in the right to informational self-determination and must be authoritative for future European regulations on data retention.

Not only the judges in Strasbourg, but also those in Luxembourg have strengthened the judicial control of basic rights where the legislation passed by the European lawmakers is patchy and the European executive's application endangers fundamental rights. The Eurostat case[34] shows: In the case of a European fraud investigation, defense rights must already be taken into consideration in the administrative preliminary proceedings. If these rights are violated, the evidence gathered could be excluded. In contrast to the Tillack decision, investigation measures of the European Anti-Fraud Office (OLAF) can always be checked by the judiciary regardless of whether they directly affect the criminal procedural or disciplinary measures in the member states.[35] In its decisions on the freezing of assets due to the suspicion of being a member of a terrorist organization,[36] the European Court of Justice made clear that European fundamental rights are inviolable for every measure with direct effects on a citizen of the Union – regardless of which legal source the measure uses as justification. One can see that the differentiation of the European criminal justice system can be reflected in European jurisprudence on criminal matters. Vertically, national law is set in a binding international, European legal framework which affects national law-makers. Horizontally, on the European level itself, the European Union sees its use of its competencies in criminal matters confronted by a strong and controlling European judiciary which bindingly and continually develops the protection of European basic rights. The risk of a further erosion of fundamental rights which is created by the Europeanization of penal law is faced with indications of a push towards more codification initiated by the European judiciary.

III. European Jurisprudence between Internal Market Romance and Penal Law

Since the founding of the European Communities, the European Court of Justice has also been the court for the European internal market. Its decisions are viewed as the motor of European integration. When politics hesitated, the ECJ showed the way. The four fundamental freedoms of the internal market, the rights of market participants and consumers, are established in European jurisprudence and continually developed using individual cases. The European internal market and its legal framework are appropriate examples for systemic integration via law. But times have changed. Once the European Communities were characterized by their economic problems, butter mountains and milk lakes, and problems of cross-border trade and mutual recognition of product labe-

32 ECHR, l.c., Para. 122.
33 ECHR, l.c., Para. 127.
34 ECJ T-48/05, judgment on July 8, 2008.
35 Cf. in detail Braum, JZ 2009, p. 298 ff.
36 Cf. Kadi Barakaat/Rat and Commission, T-315/01 and C-402/05P, judgment on September 3, 2008; Ayadi/ Council of the European Union, T-253/02 and C-403/06, judgment on December 3, 2009.

ling was at the forefront, and it was questionable what was schnapps and what was beer. But now things are getting serious: The problem of whom and according to which criteria should suffer from the social death often associated with a penal sentence goes beyond simple systemic deficits. The previous problems may even seem somewhat romantic in contrast to the deprivation of citizens' freedoms. Is the European Court of Justice organizationally prepared to accept this new reality of European law for what it is and to take it on in a normatively convincing manner?

The beginnings have been made. The European arrest warrant which, regardless of all justified critique could turn out to be at the same time the motor of European criminal law administration, also resulted in a judicial reform of an accelerated preliminary ruling procedure.[37] Union citizens waiting in pre-trial custody in a member state must – if the trial is to be fair – receive clarity on their legal positions within an appropriate time frame for the proceedings. This is a part of the adaptation of the judicial instruments to the fact of a European criminal justice system.[38] At the same time, the pressure on the ECJ and ECHR to conclude proceedings is steadily increasing. The process of mutual recognition leads to an increased demand for the European judiciary in its social integration function. Not only imprisonment, but the collection and processing of evidence and, not least, the pronouncement of sanctions within the European crimino-legal boundaries provoke necessary questions about a coherent European legal protection which – as it is politically tedious – in the short-term can only be guaranteed by European courts. Finally: The Treaty of Lisbon provides for the erection of a European prosecutor's office in Art. 86 TFEU. Its rules – material and procedural – will influence the European criminal justice system. Starting with the first investigative actions of such an agency, penal law thrusts itself upon European judicial controls. In its current structure, the European Court of Justice is not sufficiently prepared for the deepened Europeanization of penal law. The consolidated version of the Treaty of Lisbon provides a remedy in Art. 19 TEU and in particular in Art. 257 TFEU. At the European Court of Justice, a special chamber for criminal matters could be set up. More judges with penolegal experience and education could be prudently used to complement the staff of the European Court of Justice.

Art. 6 Para. 2 of the Treaty of Lisbon also provides for the accession of the European Union to the European Convention on Human Rights. With this, the jurisprudence of the ECHR would be directly binding for all legal decisions of the European Union. The relationship between the Luxembourg and Strasbourg courts is therefore in need of clarification. That which up to the present was the object of informal dialogue of European courts in order to avoid incoherency or even contradictions in the interpretation of basic rights must now be overcome procedurally and in the context of a joint court constitution. Various models of the future organization of European courts – which link both high European courts with one another – are imaginable. The European Court of Human Rights would only then be able to exercise its competencies if the legal recourse within the European Court of Justice has been exhausted. Preliminary proceedings made

37 Cf. Council Decision of December 2007 amending the Protocol on the Statute of the Court of Justice, OJ L 24, January 29, 2008, p. 42.

38 Cf. on this Lazowski, Towards the reform of the preliminary ruling procedure in the JHA Area, in: Braum/Weyembergh, Le contrôle juridictionnel dans l'espace pénal européen, p. 211 ff. (p. 224 ff.).

sense in order to ensure a common practice in the interpretation of human rights. At the same time, an appeals system from the ECJ to the ECHR is necessary. In order to avoid pushing the latter into the role of an appeals instance, it should be considered whether a common chamber made up of judges from both the ECJ and the ECHR at the ECHR could decide on their interpretation. This concentration of judicial control would secure individual freedom in a differentiated European criminal justice system: the dialogue of the highest European courts leads to a consolidated structure of common European jurisprudence – a new path for European penal law with the strong tendency to limit and reverse the erosion of fundamental rights which was started by states' criminal policies.

Finally: Europe's jurists must be able to participate in continuing education programs. Not only a traditional transfer of positive legal material is meant, but a mutual exchange of practical experience and principles in a European judicial dialogue. The contribution of the European judiciary to the political integration of Europe in large part depends on whether the erosion of basic rights is replaced by the lived-out and inviolable charter of European liberties, not forgetting the functional deficits and problems of control in modern penal law.

The following contributions reflect the search for a European-organized judicial power and include a selection of the lectures held at the Luxembourg conference "Criminal Justice in Europe: Challenges, Principles and Perspectives."[39] The conference discussed the role and function of the judiciary in the face of the challenges posed to it by the executive and legislative branches and the cross-border cooperation. *Peter-Alexis Albrecht* states clear postulates of principles to the European law-maker: Justice and freedom can only be guaranteed by a penal law which is concentrated on a core area and protected by an independent European judiciary. This is a contrast to the erosion of basic rights in the European securitized society. *Lord Justice Sir John Thomas* demands structures which make it possible for the judiciary to preserve its internal and external independence. From his perspective, a European and independent judicial power must take on the task of correcting mistakes made by European criminal legislation, particularly in the area of mutual recognition. *Pedro Caeiro* asks about the prospects of cross-border cooperation and about a solution to competency conflicts of the European judiciary based on principles and secured by the rule-of-law state. In the adjudication of the European Court of Justice, with the example of the most current Mantello decision,[40] *Katalin Ligeti* sees a deficit of coherency and further development of principles of mutual recognition oriented on basic rights. Finally, *John Winterdyk* points out basic deficits of world-wide criminal justice systems from a criminological perspective and reminds us of the problem that the protection of basic rights by an independent judiciary is not least also a question of the distribution of financial resources. The contributions are united by the idea that criminal policy in Europe is in need of judicial control and academic critique. The goal of this issue is to contribute to both.

39 Luxemburg, October 22 – 23, 2010.

40 ECJ, decision of the court on November 16, 2010, Case C-261/09.