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Some Thoughts on the Changing Faces of Human Dignity in Criminal Law**

I Substantive (Material) and Procedural (in)justice

1 Prelude

It was no surprise that, during the preparation of the new Hungarian Constitution, an extensive survey organised by the Government showed wide support amongst the population for life imprisonment without the option of parole.¹ This was duly incorporated in the new Constitution of Hungary² in Article IV. para (2). It is also a commonly shared – and most likely correct – opinion among Hungarian criminal lawyers and criminologists that, had the reestablishment of the death penalty been put to question, the majority of the *populus* would have rendered the same verdict, undoubtedly causing serious constitutional problems in the area of majoritarian democracy versus the 6th and 13th Additional Protocols of the European Convention on Human Rights (ECHR) to which Hungary is party.³ Alas, The Hungarian Government is not to escape this fate since the European Court of Human Rights (CHR) arguably found whole-life tariffs to be in violation of Article 3 of ECHR in its *Vinter and others v. UK* (2013) judgment.⁴

Be it as it may, the theoretical and philosophical questions underlying the rationale and justification for criminal law in general and punishment in particular, as well as criminal procedure, had to be revisited when drafting the new Criminal Code.⁵

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** I dedicate this article to my friend and colleague Professor Károly Bárd.

¹ *Magyarország Alaptörvénye* (2011. április 25) Fundamental Law of Hungary voted on by the Parliament on 18th April 2011.

² Article IV. para (2): 'No person shall be deprived of his or her liberty except for statutory reasons or as a result of a statutory procedure. Life imprisonment without parole shall only be imposed in relation to the commission of wilful and violent offences.'

³ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS No. 005 (entered into force 3 September 1953) promulgated in Hungary on 7th April 1993.

⁴ *Case of Vinter and Others v. The United Kingdom* Applications nos. 66069/09 and 130/10 and 3896/10, 9 July 2013.

⁵ 2012. évi C. törvény a Büntető Törvénykönyvről (Act C of 2012 on the Criminal Code of Hungary).

2 Procedural (In)justice

Undoubtedly the most important requirement a criminal justice system has to meet is – not surprisingly – justice. Many have written about the questions concerning procedural justice versus objective truth and the answers given shaped not only our thinking about the criminal justice system but also specific ways and methods of appeal proceedings or rules on double jeopardy (*ne bis in idem*) etc. Before we embark on the journey of exploring some criminal philosophical thoughts, it seems judicious to dwell further on some of the dualities inherent in criminal law.

I have in the past tried to draw attention to a certain type of duality in substantive criminal law: I defined it by relying on a reiteration of the Derridian difference (*différance*) by Kramer:

[...] difference serves as the sine qua non of presence. The identities of words, concepts, and objects [...] are determined wholly by the relationships in and through which they function. Until each thing has been at least vaguely separated or marked off from everything which is not it, it can never achieve the status or presence of a thing in any form whatsoever [...] Without difference, in short, no plenitude can present itself.⁶

As a consequence, criminal norms, by defining what *is* a criminal offence, also define what *is not* a crime. This difference accounts for the duality of functions of substantive criminal law: the limitation and the simultaneous protection of the freedom of human behaviour. This should not be confused with the traditional approach which, by viewing criminal law as a set of legal relationships between the state and the individual,⁷ asserts that, through normative prohibitions (commands), criminal law limits the individual's freedom and by that protects other individuals from the potential criminal.⁸ By defining what behaviours constitute crimes, criminal law also sets

⁶ As I wrote: a definition – and criminal norms are definitions – requires, yet must exclude, difference in order to define. [B. J. Gellér, *Legality on Trial* (Eötvös University Press 2012, Budapest) 17.] This statement is an alteration of Kramer's splendid recapitulation of the Derridian problem of *différance*: 'presence requires yet must exclude difference in order to be present': J. R. Kramer; 'Adolescents, abortion and amendments: choices after American Academy of Pediatrics v. Lungren [940 P.2d 797 (Cal. 1997)]' (1998) 33 University of San Francisco Law Review 133, San Francisco) 5. See J. Derrida: 'Différance' in *Margins of philosophy 1* (tr Bass, A. University of Chicago Press 1982, Chicago). The modification of this maxim in this work is justified by the 'presentness' of a definition. This idea is also followed up by Kramer: M. H. Kramer: *Legal theory, political theory, and deconstruction (against Rhadamanthus)* (Indiana University Press 1991, Bloomington/Indianapolis) 5ff.

⁷ As Ashworth puts it, 'criminal proceedings are an unequal contest between the individual [...] and the State.' (A. Ashworth 'Interpreting criminal statutes: a crisis of legality' [1991] *Law Quarterly Review* 432.)

⁸ A. Ashworth, *Principles of criminal law* (2nd edn, Clarendon Press 1995, Oxford) 16; G. P. Fletcher, *Rethinking Criminal Law* (Little, Brown 1978, Boston) xix; H-H. Jescheck, *Lehrbuch des Strafrechts, Allgemeiner Teil*. (3rd edn, Duncker & Humboldt 1978, Berlin) 1-5; C. Roxin, *Strafrecht, allgemeiner Teil, Band I*. (2nd edn, CH Beck'sche Verlagsbuchhandlung 1992, München) 3. Lewisch sees this connection as follows: 'the modern state derives its justification from its (protective) function to uphold the peace, which – because of historical reasons – it fulfils with the tools of criminal law. Criminal law, however, is not only the guarantor of civic freedom, it is also a threat to it' P. Lewisch, *Verfassung und Strafrecht. Verfassungsrechtliche Schranken der Strafgesetzgebung* (Universitätsverlag 1993, Vienna) 1.

out what is not criminal conduct, and by that it protects the individual from the enforcers of the commands, which is ultimately the state.⁹

Remarkably, substantive criminal law also raises issues connected to truth and justice. This, in turn, must be differentiated from procedural truth and justice, yet these two – substantive and procedural criminal law as well as truth and justice – are inextricably entwined as giant ropes holding the criminal justice system. I have also argued elsewhere that a criminal justice system cannot function without substantive criminal law and, in turn, substantive criminal law is unimaginable without the acceptance of some a priori values, which we revere as unquestionable principles as the basis of criminal legal thinking.¹⁰ The genus proximum of criminal legal thinking in a modern democratic state must be legality. Legality, however, is anchored in an a priori presumption: the equality of men. It seems almost self-evident that these very principles should govern criminal procedure, but whether the presumption of equality can be observed consequently throughout the criminal justice system is a disturbing question which is directed at us again and again in the wake of historical events or grandiose codifications.

The difference between truth and justice appears in a criminal procedure as the actual difference between facts as accepted by a judgment and the events in real life. From a procedural perspective, a judgment is just if the facts accepted by the judgment as true differ as little as possible from what actually happened, as the greater the difference between the facts of the judgment and the real past events, the greater the injustice inherent in the judgment and the proceedings.

At the same time, a certain difference between procedural fact-finding and actual past events is unavoidable. This follows not only from the limited nature of human cognition but also from the philosophical impossibility of complete understanding, definition and discovery.¹¹

The objective truthfulness of criminal judgments seem to be one of the main characteristics rendering a judgment just; consequently, the culmination of just – or, for that matter, unjust – judgments results in a just or unjust criminal justice system. Fact-finding and the procedural

⁹ See L. von Bar, *Gesetz und Schuld im Strafrecht (Fragen des geltenden deutschen Strafrechts und seiner Reform) Vol. 1. Das Strafgesetz* (J. Gutentag Verlagsbuchhandlung 1906, Berlin) 9. The realisation of this led Liszt to describe the criminal code as the criminals' Magna Carta: Jescheck (1978), 41. Further, Smith points out in connection with 'the preservation of civil liberties that 'the principal liberties in danger from an overinclusive public order law are, perhaps, freedom of speech and freedom from arbitrary arrest. But if the law is underinclusive, it will not afford proper protection to those whose interests are threatened by public disorder.' A. T. H. Smith, *The offences against public order (including the Public Order Act 1986)* (Sweet & Maxwell, Police Review Publishing Company 1987, London) 8. This difficult balancing, resulting from the duality of criminal law's function, is the main challenge for criminal justice. Thomas observes that 'the prohibition inherent in criminal statutes is dual: it addresses the organs of the state in establishing conditions precedent to punitive reaction. "Thou shalt not steal" also conveys the message "thou shalt not punish unless he is proved to have stolen." The constitutional importance of this aspect of the criminal law, which Dicey rightly identifies as the first principle of his idealistic rule of law, needs no emphasis.' D. A. Thomas, 'Form and function in criminal law' in Glazerook, P. (ed), *Reshaping the criminal law: essays in honour of Glanville Williams* (Stevens & Sons 1978, London) 21. Also A. I. Wiener, 'Büntetőpolitika – Büntetőjog (Criminal policy – criminal law)' in Wiener, A. I. (ed) *Büntetendőség – büntethetőség. Büntetőjogi Tanulmányok* (The imperative to punish and punishability. Essays on Criminal Law) (Közgazdasági és Jogi Könyvtár 1997, Budapest) 18, 26-27.

¹⁰ Gellér (n 6).

¹¹ See e.g. L. Wittgenstein, *On Certainty* (Basil Blackwell 1969, Oxford).

safeguards which allow errors occurring in the fact-finding to be corrected to the benefit of the defendant (e.g. the presumption of innocence) become one of the most important ingredients of a just criminal justice system.¹²

3 Substantive Criminal Law and a New Duality (Truth versus Justice)

It is striking to realise that substantive criminal law avails of the same duality of objective truth and justice as procedural law. Substantive criminal law, generally speaking, does not concern itself with establishing facts; nevertheless, abstraction, generalisation and analogy are key elements in substantive criminal law thinking. Abstraction means the exclusion of some concepts already whilst others are vested with decisive importance.¹³ In substantive criminal law the events of a real life occurrence are reflected as questions of a set of criminal legal concepts: A case – for example – in which drunken Jack was attacked without provocation by similarly drunken 7 months pregnant Jill (who was physically abused by Jack for years) with a kitchen knife and Jack, in order to avoid being stabbed, kicked Jill in the belly, after which a premature birth started and the baby died because it was not yet properly developed, will appear as a problem similar to such as ‘how we treat intoxication’, ‘what are the rules of self-defence’, ‘is there a battered women syndrome’, ‘when does human life start’, ‘what type of causation do we accept’, etc. By putting the real life events through the shredder of criminal law concepts, we abstract some elements and formalise these events.

I referred in my earlier work to Kramer, who claims that ‘it is not the ambiguity of the rules and patterns, but their generality or universality that must keep them undecidedly open till the events that constitute them have occurred.’¹⁴ Ambiguity is different from generality as far as the rules are concerned, and indeed both are inherent features of rules; generality is of universal importance since it is the structural feature of presence, which is expounded from the basic generality of IS, as opposed to IS NOT.¹⁵ Generality, therefore, is an attribute of every rule/structure which ‘can unfold in countless ways at each point in time, and only in retrospect will it have compelled a certain pathway or set of pathways of evolution.’¹⁶ Generality is inclusive, comprising all the possibilities which are not not-it. As such, in the structure/event setting, generality is structure-specific whilst ambiguity is event-specific. As a consequence, courts might have a general understanding of murder, self-defence, or intoxication; however, when trying to answer questions of the particular meaning of these concepts with respect to specific events, the generality becomes ambiguity. Answers to questions such as whether using substitutes for money in vending machines is theft or fraud, what appropriation actually means,¹⁷ whether a car can

¹² J. Habermas, *The Discourse Theory of Law and Democracy* (Stanford Law Books 2011, Stanford).

¹³ R. Alexy, *Theorie der juristischen Argumentation (Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung)* (2nd edn, Suhrkamp 1983, Berlin).

¹⁴ Kramer (n 6) 1991, 18.

¹⁵ Generality must also be distinguished from universality. Attention is drawn to this by Alexy, who claims that it is not the generality of rules that is relevant in order for them to qualify as moral principles but their universality. Alexy (n 13) 67.

¹⁶ Kramer (n 6) 1991.

¹⁷ For example consider *D.P.P. v. Gomez* (1993) A.C. 442; Smith (1994), 134-147; Smith and Hogan (1996) 514-528.

qualify as a carriage under certain circumstances,¹⁸ whether an aeroplane or roller skates are vehicles,¹⁹ or electricity is a physical object as far as theft is concerned,²⁰ make ambiguity out of structural generality. Generality is therefore the formal quality of a norm, which at the same time is the very source of its ambiguity in specific cases, which threatens its normative essence. The answers given to this ambiguity redefine the general rule. Therefore – as Kramer puts it – ‘what a pattern or rule is cannot be precisely answered before we know the particularised applications that determine its course.’²¹ In other words, like other rules, legal rules cannot mark out their own application and, therefore, the need for interpretation cannot be circumvented,²² because ‘statutory interpretation represents the legal moment when a court confronts the product of the legislative branch and must assign meaning to a contested provision.’²³ The ambiguities which are thus inherent in law do not mean that the outcome of every case is uncertain, but do not mean either that there is not some degree of interpretation in every case.²⁴

As we see, generality is therefore the formal quality of a norm, which at the same time is the very source of its ambiguity in specific cases. In the setting of the current argument, generality also adds to the gap between objective truth and the application of substantive criminal law because, by the application, both normative rule and objective past facts are modified in order to resolve the inherent ambiguity of the very norms applied. This distortion can even reach the level of fiction; that is, some substantive legal concepts are known to be untrue but must be accepted as true in order to guarantee the legal result required by the self-referential structure of criminal norms. A pertinent example could be the qualification of crimes committed whilst under the influence of alcohol or drugs. Different legal systems deal with this problem in different ways. It is clear that a fully intoxicated person cannot possess a *mens rea* (criminal mind, intention) in the traditional sense;²⁵ therefore, the doctrine of the ‘actus amounts to a crime only when it is accompanied by the

¹⁸ C. Roxin, *Strafrecht, allgemeiner Teil, Band I*. (2nd edn, CH Beck'sche 1992, München) 104. However there are decisions in which the court overstepped this line.

¹⁹ H. L. A. Hart, *The Concept of Law* (Clarendon Press 1994, Oxford) 126. One should recall the famous pronouncement of Justice Holmes in *McBoyle v. United States*, 283 U.S. 25 (1931) (interpreting interstate transportation of a stolen ‘motor vehicle’ to exclude an aeroplane): ‘Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.’ Ibid 27.

²⁰ 29 RGSr 111; 32 RGSt, 165. Roxin (1992), 77. Compare with Krey (1977), 137ff RGBL. I S. 288. Today it is section 248c of the StGB. Naucke (1991), 75. Smith (1994), 375; Smith and Hogan (1996), 529; *Low v. Blease* [1975] Crim. L. R. 513, D.C. Nagy (1997), 159; III Act of 1907 in Hungary.

²¹ Kramer (n 6) 18.

²² Compare with Alexy (n 13), 178-9.

²³ J. S. Schacter, ‘Metademocracy: the changing structure of legitimacy in statutory interpretation’ (1995) 108 Harvard Law Review, Cambridge 593.

²⁴ Compare with Alexy (n 13) 8.

²⁵ ‘Actus non facit reum nisi mens sit rea’ Smith, J. – Hogan, B., *Criminal Law* (8th edn, Butterworths, London/Dublin/Edinburgh, 1996), 30. See *R v. Caldwell* [1982] AC 341 a new definition of recklessness was adopted. See R. A. Duff, *Intention, Agency and Criminal Liability* (Blackwell 1990, Oxford) 5ff.

appropriate mens rea²⁶ has to be modified in some way. Any solution will be thus unjust in respect to this principle; additionally, it will operate with some degree of fiction as far as the *mens rea* of the intoxicated person is concerned. Substantive criminal law thus necessarily derails truth in at least two ways, first by simply applying its method of abstraction, secondly by creating and applying presumptive, fictional concepts; both these causes can be traced to the generality of norms. Of course, if we did not try to fix our notion of justice to objective truth, we could avoid this predictable clash of truth and justice, at least in substantive law. But what other point of departure could one define if justice is to be served at the level of a large scale system?

Alexy examines Hare's theory of moral reasoning²⁷ and observes that it is not the generality of rules that is relevant for them to qualify as moral principles but their universality.²⁸ That is, if it is always possible to say that all cases like *a* should be treated like *a*, that already constitutes a rule.²⁹ Alexy concludes that normative expressions, such as 'good' and 'ought,' do not refer to any kind of non-empirical object (as assumed by intuitionism), nor are they reducible to empirical expressions (as claimed by naturalism).³⁰ It is necessary to recall here the deconstructive approach suggested by Kramer who, as quoted above, argued that 'generality or universality [...] must keep [laws] undecidedly open until the events that constitute them have occurred.'³¹ Whilst the difference between ambiguity and generality/universality of norms has already been discussed, there is a further distinction to be drawn between generality and universality.

As observed, generality is inclusive and comprises all the possibilities which are not not-it. Hence, in the structure/event setting, generality is structure-specific whilst ambiguity is event-specific. Generality, this formal quality of a norm is complemented by a substantive quality: the moral force of the norm.

Moral force – which is a prerequisite if any moral reading should take place – may or may not derive from sources and factors advocated by naturalism, intuitionism etc. It is vital, however, that such should be anchored in some sort of authority serving as justification. In cases of popular support, such authority is readily available under the democracy principle. Nevertheless, if adjudication runs counter to majoritarian sentiments, the enforcement of minority morality has to be vindicated by – as Alexy proposes – the universality of norms. Universality in this sense has three dimensions: first, a dimension of time, which means that, in a historical perspective, *a* was treated as *a*; second, a majoritarian dimension, which reflects the beliefs of the majority as regards whether *a* should be treated like *a*; and third, integrity, as described by Dworkin,³² which, in this respect, means that treating *a* as *a* does not cause any contradiction within the structure of the

²⁶ J. C. Smith, B. Hogan, *Criminal Law* (8th edn, Butterworths 2003, London/Dublin/Edinburgh) 30.

²⁷ See in general Hare (1952); Hare (1963).

²⁸ Alexy (n 13) 67.

²⁹ *Ibid.*

³⁰ *Ibid.* 177.

³¹ Kramer (n 6) 1991, 61.

³² R. Dworkin, *Law's Empire* (Harvard University Press 1986, Cambridge) ch 6-7; R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press 1996, Cambridge) 10-11, ch 4.

law. The parallels between the dimension of time and the hermeneutic approach, the majoritarian requirement and the democracy principle³³ and finally the integrity of law and the Radbruch Formula³⁴ are striking and of great significance.

Even if one of the dimensions of universality is missing, the other two components endow a norm with the necessary universality. This seems to be true in respect of both legislative acts and judicial decisions. The lack of majoritarian support for a moral principle in a norm created by a judicial decision does not make it immoral, as long as the historical approach and integrity support such a reading.³⁵

The necessity of removing the otherwise infinite regress of justifications³⁶ makes it unavoidable that at some point a justification should be accepted without causing any surprise or demand for further justifications and reasons.³⁷ It is true that the above argument re-circulates the question of substantive justification using a procedural tautology. However, the very nature of criminal adjudication rests on the premise that the inquiry into substantive, material truth can be turned into procedural, formal requirements, which, if satisfied, define substantive truth in retrospect.³⁸ This is no surprise because, as far as moral rules are concerned, no possibility exists to establish a discourse:³⁹ every definition is self-reliant, and can be justified through the belief in the procedure by which the definition has been reached.⁴⁰

³³ Ibid, Chapter II.2.4.

³⁴ G. Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht' [1956] *Süddeutsche Juristenzeitung* 83; Also *Rechtswörterbuch* (12th edn, CH Beck 1994, München) 934.

³⁵ Consider the decision of the Hungarian Constitutional Court abolishing the death penalty. Decision 23/1990. (X. 31.) AB of the Constitutional Court of Hungary, ABH 1990, 88. The death penalty was favoured by the majority of the adult population of Hungary.

³⁶ See Alexy (n 13) 178. Discussion Chapter I.2.

³⁷ Compare with the justification of legality in criminal law offered in Chapter II.1.

³⁸ See A. Ashworth, *The criminal process. An evaluative study* (Oxford, Clarendon Press 1994, Oxford) 10-14, for some thoughts on miscarriages of justice. Also consider Glanville Williams' timeless thoughts on mistaken and invented evidence. G. L. Williams, *Criminal law: the general part* (2nd edn, Holmes Beach 1961, Florida) chapters 5-6. Dworkin argues that there is a strong case for maintaining that at all points in criminal justice the procedures should put the proper value on the fundamental harm of wrongful conviction. R. Dworkin, Principle, policy, procedure. in C. Tapper (ed), *Crime, proof and punishment: essays in memory of Sir Rupert Cross*, p. 193. (Butterworths 1981, London) 212.

³⁹ Such a statement seems to be at odds with Habermas's communicative approach to legal reality. Consider J. Habermas, *Theory and practice* (Beacon Press 1973, Boston); J. Habermas, *Legitimation crisis* (Beacon Press 1975, Boston); J. Habermas, *The theory of communicative action. Volume I: Reason and the rationalization of society* (Heinemann 1984, London); J. Habermas, *On the logic of the social sciences* (Polity Press 1988, London); J. Habermas, *Between facts and norms: contributions to a discourse theory of law and democracy* (MIT Press 1995, Cambridge). Habermas, in rejecting traditional correspondence theories of truth (see, for example, A. Tarski, *Introduction to logic and to the methodology of deductive reasoning* (2nd edn, Oxford University Press 1946, New York), accepts as the criterion of truth a consensus of all discourse participants, and identifies the standard to which he measures truth in the 'ideal speech situation', which is defined by formal and procedural characteristics. Habermas (1984), chapter 3. Precisely because of this proceduralisation of the truth criterion it is possible to assert that the validity claims depend on procedural correctness [compare with Alexy (1989), 219ff] precisely what substantive moral discourse is not. Consider Rosenfeld (1995).

⁴⁰ Ibid. Refer to Chapter II. See decision 11/1992. (III. 5.) AB of the Constitutional Court of the Republic of Hungary, ABH 1992, 77. as quoted in Chapter II.1. Consider also BVerfGE 25, 269; but see BVerfGE 23, 98.

This is exactly why, however, Kelsen's Basic Norm is static in a legal sense – that is, its legal validity and meaning remains the same, whereas its moral justification and meaning may change with time – and does not have to confront questions of justification.⁴¹

Indeed, this search for a method which might lead to the identification of extra-legal values has been an ongoing process for a considerable time. According to Pound,

philosophical jurists have devoted much attention to deducing some method of getting at the intrinsic importance of various interests so that an absolute Formula may be reached with which it can be assured that the intrinsically weightier interest shall prevail [...] The quest of such a method [...] grows out of the need of equality of operation, predictability, and assured certainty of result.⁴²

In this context, the issue to be looked at is whether criminalisation or criminal adjudication outweighs or infringes certain values in such a way as to divest the criminal justice system from its a priori justification. One is actually searching for the 'speed of light' in the criminal justice system, against which – it being constant – everything can be measured. It is clear by now that objective truth cannot serve as our speed of light.

II Human Dignity and the Speed of Light

1 The Resurrection of Human Dignity

Starting from the 1990's, criminal law has undergone a tremendous change, challenging some of the most sacred principles of classical legal thinking (whatever they might be). This process (some would recoil from calling it development) had several historical reasons. As a counterpoint to the biased, often politically motivated socialist (communist) criminal justice system, criminal lawyers in the former Eastern Bloc states turned to the classical criminal legal schools representing proportionate punishment, individual accountability, in-determination and retribution, foreseeability etc.⁴³ At the same time the collision of formal justice (rule of law) and the subjective notion of justice posed itself in the form of the question of ex post facto (retroactive) justice for crimes committed during the communist area which went unpunished. More, international and non-international armed conflicts ensued on the territory of the former Yugoslavia and later in Rwanda, in the course of which grave atrocities were committed, re-raising the questions connected to core international crimes. Finally, a duty to criminalise certain acts has been gradually developed by the European Court of Human Rights.

⁴¹ See H. Kelsen, *Introduction to the problems of legal theory: a translation of the first edition of the Reine Rechtslehre or Pure Theory of Law* (Clarendon Press 1934, London) 55ff.

⁴² Pound, *Jurisprudence* (West Publishing 1959, St. Paul) Vol. III, 330.

⁴³ An example could be the parallel opinion of András Szabó in the decision 23/1990. (X. 31.) AB of the Constitutional Court of the Republic of Hungary on the abolition of the death penalty.

To summarise the above: a) the collision between the formal rule of law and subjective justice had to be addressed at a national and also international level; b) national laws and the CHR have recognised an intrinsic duty to criminalise certain activities; c) the development of international criminal law resulted in the recognition of human dignity as a theoretical basis which enables positive law to be overridden in order to protect the human condition. As a result of these changes in both national and international law, human dignity, which can also be derived from 'the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience',⁴⁴ became the fundament of law once again.

2 On the Road

The proponents of any philosophy have to make a choice as to whether it is an absolute or relative theory, in other words, whether it poses a guiding principle as the bases of 'Life, the Universe and Everything'⁴⁵ or whether it believes that any and every rule (be it a rule of nature or moral) is true only in relation in a randomly accepted system or coordinates. Of course even the latter can be labelled as an absolute theory in which the single absolute rule is the non-existence of such a rule.

In this setting, a pure positivist legal system can be described as a relative theory. Accepting that even a meta-legal value-based legal theory can be relativist in the above sense (since the value may not be put forward as a single unchallengeable truth), I can avoid the pointless and nonsensical argument favouring either absolutism or relativism. However, it will not be possible to escape an answer to the question of how I view human dignity in the legal setting, classifying by this my legal theory as absolutist or relativist.

As we have seen, the development of law during the last hundred years has outlined with convincing precision what this underlying principle might be. International humanitarian law through the Martens Clause, for example; international criminal law by giving new meaning to the idea of *obligation erga omnes*, and finally by developing the notion of the duty of criminalisation, which in turn has been interpreted by the European Court of Human Rights as setting standards for national criminal laws even with regard to common crimes have all drawn the contours of the focal point of reference for criminal law in general. One does not have to believe in transcendental beings – at most Albert Einstein's remark 'I believe in Spinoza's God,

⁴⁴ 'Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.' *Laws and Customs of War on Land (Hague IV)*, 18 October 1907.

⁴⁵ The number 42 has received considerable attention in popular culture as a result of its central appearance in Douglas Adams, *The Hitchhiker's Guide to the Galaxy* as the 'Answer to The Ultimate Question of Life, the Universe, and Everything'.

who reveals Himself in the lawful harmony of the world'⁴⁶ may come to mind – but in the equality of people; this is the principle that is reflected in the Radbruch Formula.

But what is the defining ingredient of the equality of people that is relevant for criminal law? People are equal as beings born to other human beings: anyone born to a human being is a human being through the idea of human dignity. Human dignity is the concept which makes it impossible – as Sólyom, the president of the Hungarian Constitutional Court, put it in his concurring opinion on the prohibition of the death penalty – to be treated as objects; that is why nobody may, for example, become the property of another.

The most important case on point is *Ireland v. UK* (1978),⁴⁷ decided by the ECHR. Fawcett, the British member of the European Commission on Human Rights, phrased the question whether Article 3 of the ECHR indeed enshrines an absolute illimitable right.⁴⁸ (The definition of the rights imbedded in Article 3 of the ECHR as absolute has not only appeared slowly in the human rights literature,⁴⁹ but was supported by the judicature of the Strasbourg institutions.)⁵⁰ The Court expressly stated that this Article protects one of the most fundamental values of a democratic state⁵¹ and its application is independent of the acts of the person in question.⁵²

Indeed, both the Commission and the Court have stressed that Article 3 protects absolute rights and this protection is irrespective of what the person under its protection had done or what sort of behaviour he is showing at the time.⁵³

In 1997 the Hungarian courts struggled with the problem of how a situation in which the victims, who had been held hostage and had been threatened with being tortured to death upon the expiry of the deadline, had escaped by killing their unwitting guard, could qualify as self-defence.⁵⁴ The problem lay clearly in the absence of any immediate attack; however, the Supreme Court correctly held that the immediacy of an attack has to be construed more broadly than

⁴⁶ In 1929, Einstein was asked in a telegram by Rabbi Herbert S. Goldstein whether he believed in God. Einstein responded by telegram: 'I believe in Spinoza's God who reveals himself in the orderly harmony of what exists, not in a God who concerns himself with the fates and actions of human beings.' The New York Times, 25 April 1929. Retrieved 8 September 2009. Answer to Rabbi Herbert Goldstein (1929).

⁴⁷ *Ireland v. United Kingdom*, 18 January 1978, Series A no. 25.

⁴⁸ *Com. Rep., Ireland v. UK*, B 23-I, 502. Addo, M. and Grief, N. undertook a detailed analysis of this issue: Addo, M. and Grief, N., 'Does Article 3 of The European Convention on Human Rights Enshrine Absolute Rights?' (1998) 9 European Journal of International Law 510-524. See also Koji Teraya, 'Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights' (2001) 12 (5) Oxford Journals EJIL 917-941.

⁴⁹ D. J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (Butterworths 1995, London.) 55-59; K. Reid, *A Practitioner's Guide to the European Convention on Human Rights* (Sweet & Maxwell 1998, London) 376; F. G. Jacobs and R. C. White, *The European Convention on Human Rights* (2nd edn, Clarendon Press 1996, London)

⁵⁰ *Tyrer v. U.K.* 25 April 1978, Series A no. 26; *Soering v. U.K.*, 7 July 1989, Series A no. 161; *Tomasi v. France*, 27 August 1992, Series A no. 241-A; *Herczegfalvy v. Austria*, 24 September 1992 Series A no. 242-B; *Klass v. Germany*, 22 September 1993, Series A no. 269; *Costello-Roberts v. U.K.*, 25 March 1993 Series A no. 247-C; *Ribitsch v. Austria*, 4 December 1995, Series A, no. 336; *Akdivar v. Turkey*, 16 September 1996.

⁵¹ *Soering*, 88.

⁵² *Tomasi*, 115.

⁵³ *Ireland v. The United Kingdom* (n 47) 163.

⁵⁴ BH 1997. 512.

usually and must encompass situations in which an illegal situation is upheld by the attacker. This judicature has been further ameliorated by the Curia's (the renamed Supreme Court) 4/2013. decision, which is binding on all courts.⁵⁵

In 1997 and 2003 two somewhat similar cases divided legal opinion in Germany.⁵⁶ In both cases, people had been kidnapped and a ransom was demanded but the perpetrators were caught without knowing where the victim was being held. The question was what methods are allowed to the police, when interrogating the perpetrators, in order to establish the whereabouts of the victims before they die of starvation, dehydration and exposure. In the 2003 case, the chief of police in charge of the investigation took it upon himself to officially record that he was threatening the suspect with torture (beating) if he did not disclose the location of the victim.⁵⁷

The practical use of torture seems to be impossible in a democratic society. At the same time, democratic legal systems still find ways to authorise the state to deprive someone of his right to life, be it in the form of the death penalty, the use of armed forces in international relations or simple cases of the legal usage of firearms by representatives of the state [e.g. Article 2 para 2 point c) ECHR]. Obviously the right to be free from torture is not as highly ranked as the right to life. Why is it then that the right not to be tortured must not yield to the right to life? The only answer is that both are rooted in human dignity; the state, which does not have the right to limit human dignity, cannot regulate situations in which human dignities clash.

The road leading to the changes outlined above is known to the well-read lawyer, nevertheless, a few examples shall be put forward to avoid charges of quickly skating on thin ice.

During the existence of the East German state it was a criminal offence to cross or to try to cross the border to the West, and this was prevented by all means, frequently by killing people who dared to attempt such an escape. Since the re-unification, several criminal prosecutions and convictions have resulted from these shootings.⁵⁸ One of these famous cases involved a defendant convicted of shooting a seventeen year old boy who tried to reach West Berlin by swimming across the river Spree in 1962.⁵⁹ The daily briefing given to the border-guards included an order that border violators who do not react to a call and a warning shot have to be 'eliminated': escape to the West must be prevented if necessary, even by aimed deadly shots. Both the defendant and the leader of the unit fired aimed shots at the victim, who was eventually hit and killed by one of the unit leader's bullets. Three days later the defendant received a medal for exemplary border service.

After the re-unification the State Court (*Landgericht*) convicted the defendant as a second principal in a murder and sentenced him to two years' suspended imprisonment.⁶⁰ At the time of the commission of these acts there were no statutory regulations in East Germany on the usage

⁵⁵ 46/2013. BJE.

⁵⁶ Jeßberger, F., 'Wenn Du nicht redest, füge ich Dir große Schmerzen zu' (2003) 25 (10) JA 711.

⁵⁷ Ibid.

⁵⁸ See, for example BGHSt 39, 1, NJW 1993, 141; BGHSt 39, 168, NJW 1993, 1932; BGHSt 39, 199, NJW 1993, 1938; BGHSt 39, 353, NJW 1994, 267; BGHSt 40, 48, NJW 1994, 2237; BGHSt 40, 113, NJW 1994, 2240; BGHSt 40, 218, NJW 1994, 2703; BGHSt 40, 241, NJW 1994, 2708; NJW 1995, 1437; NJW 1995, 2728; NJW 1995, 2732.

⁵⁹ NJW 1995, 2728, BGH, Urt. v. 20.3. 1995 – 5 StR 111/94 (LG Berlin).

⁶⁰ Ibid 2728.

of firearms at the border. The service regulations of the border-guards, however, in conjunction with other ordinances of the Minister of the Interior, stated that firearms have to be used against border violators who cannot be stopped by other means.⁶¹ The State Court's reasoning, which was corrected on appeal by the Federal Court (BGHSt), differed significantly from the latter's argument. The State Court denied that the Minister of the Interior's ordinance was a justification for the conduct, since – as the Court reasoned – it contradicted the East German Constitution in force at that time. This Constitution guaranteed freedom of immigration, which could be limited by statute only.⁶² Similarly the criminal law which prohibited the unauthorised leaving of the state did not provide for such justification. Moreover, the ordinance in question – which was not sanctioned by any statute – grossly violated the basic ideas of justice and humanity. The Court further observed that criminal liability has not lapsed because – according to the judgement of the Federal Court⁶³ – the limitation period in East Germany was dormant during the communist party's rule, as a result of a so-called *quasi-statutory prosecution obstacle* (*quasigesetzliche Verfolgungshindernis*).⁶⁴ This meant that, according to the practice of the East German State, such actions were not prosecuted. The Federal Court found that the State Court erred in stating that, at the time of the killing, there was no statutory foundation for the deadly use of firearms on the borders of East Germany prior to 1982 when the relevant statute was passed.⁶⁵ As the BGHSt had observed in its previous decision,⁶⁶ the relevant orders by the Minister of the Interior – referred to above – could count as sufficient formal legal grounds for satisfying the constitutional requirement. Following 1982, the Border Act came into force, which in Section 27 § 1 provided for the use of firearms at the border. According to these regulations, the use of a firearm should only be the last resort, and could only be utilised if no other method would seem successful. However, lives should be spared as far as possible. The practice followed in East Germany sharply diverged from these rules. In a similar case the Federal Court had previously found first that a justification which gives preference to the enforcement of the prohibition to leave the GDR in comparison to the right to life is

invalid because of the obvious unbearable violation of elementary commandments of justice and human rights protected by international law [...] The breach weighs so heavily in this case that it violates the conviction of justice based on the human values and dignity commonly shared by all nations; positive law (*positives Recht*) must yield to justice (*Gerechtigkeit*) in such a case (the so-called 'Radbruch Formula').⁶⁷

⁶¹ *Dienstvorschrift für den Dienst der Grenzposten* DV III/2 vom 12.9.1958; *Befehl des Ministers des Innern* Nr. 39/60 i.d.F. vom 28.6.1960, 26.8.1961 und 19.3.1962. *Id.*, 2729.

⁶² Article 10 III of the East German Constitution.

⁶³ The court refers to BGHSt 40, 113 (116ff), 7 NJW 1994, 2240; BGHSt 40, 48, NJW 1994, 2237.

⁶⁴ This is in accordance with Article 1 of the Statute about the Resting of the Limitation Period (BGBl I, 392).

⁶⁵ NJW 1995, 2728, BGH, Urt. v. 20.3. 1995 – 5 StR 111/94 (LG Berlin), 2729. In 1982 the East German Border Act came into force.

⁶⁶ *Ibid* 2730 citing BGHSt 40, 241, NJW 1994, 2708 (2709).

⁶⁷ Emphasis added. The first 'Berlin wall sniper' case is of primary importance (BGHSt 39, 1ff, NJW 1993, 141) because later cases followed the same path: BGHSt 39, 168ff, NJW 1993, 1932; BGHSt 40, 218, NJW 1994, 2703.

According to the judgement, these basic principles are made concrete by international documents in force at the time of the act.⁶⁸ Second, the Court observed that, as a consequence, even if a justification had specifically allowed the killing of people who wanted nothing more than to cross the internal German border, and did so without weapons and without endangering or harming anyone else's rights, such justification would have to be disregarded and the punishment of the border guards does not violate Article 103 II of the Basic Law, since the justification would never have acquired legal validity.⁶⁹ Lastly, the Court expressed an opinion that the same was true as regards the East German state's practice which disregarded an interpretation of the relevant law, which would have been possible under the existing rules and which would have been observant of the generally effective and accepted human rights.⁷⁰

The Court then pointed out that the *unbearable injustice* incorporated by the relevant law of East Germany can be deduced from the fact that it placed the escapees' right to life in the background, especially with a view to the special motivation of those people had who tried to escape. Additionally, the general circumstances at the borders were also taken into account.⁷¹ Notwithstanding the critical literature, the Court, whilst acknowledging the incomparability of the cruelty of Nazi laws and the deadly shootings at the East German border, found that the Radbruch Formula is applicable in the present case. In the adjudication of the arising cases, the courts oriented themselves by the Radbruch Formula.⁷² Whilst Radbruch was never a classical positivist, it must be conceded that the traumas of the Fascist regime contributed to a certain change of accent in the relationship between legal certainty and substantive justice in his legal thinking.⁷³ Radbruch defined his Formula as follows:

The conflict between justice (*Gerechtigkeit*) and legal certainty (*Rechtssicherheit*) might be solved in a way that positive law (*positives Recht*), which is ensured by statute and power, takes precedence also in cases when with respect to its content it is unjust and unwise, unless the contradiction between the positive statute (*positives Gesetz*) and justice reaches such an unbearable level, that the law, being a "wrong law", (*unrichtiges Recht*) has to yield to justice. It is impossible to draw a sharper line between cases of lawful injustice (*gesetzliches Unrecht*) and that of laws which are valid despite their incorrect content; a different definition of the borders can be, however, undertaken with full vigour: where justice is not even being aspired to, where equality, which provides the core of justice, has been intentionally denied when creating positive law; there law is not simply "wrong law" (*unrichtiges Recht*) much rather it is deprived totally of its legal nature.⁷⁴

⁶⁸ The judgement refers to the *Covenant of Civil and Political Rights*, and the *Universal Declaration of Human Rights*. This latter concretises the UN Charter's references to human rights. See BGHSt 40, 241, NJW 1994, 2708 (2709).

⁶⁹ BGHSt 40, 218, NJW 1994, 2703, 2730.

⁷⁰ Ibid.

⁷¹ Ibid 2731.

⁷² Consider decisions BGHSt 39, 1ff, 7 NJW 1993, 141; BGHSt 39, 168ff, NJW 1993, 1932; BGHSt 40, 48ff, NJW 1994, 2237 for example.

⁷³ A. Kaufmann, 'Die Radbruchsche Formel vom gesetzlichen Unrecht und vom übergesetzlichen Recht in der Diskussion um das im Namen der DDR begangene Unrecht' [1995] Neue Juristische Wochenschrift 82.

⁷⁴ Radbruch (1956) 83; Radbruch (1973) 352-353.

The German Federal Constitutional Court⁷⁵ upheld the constitutionality of the Federal Court's decisions.⁷⁶ It stated, amongst other things, that

the strict prohibition of retroactivity of Article 103 II GG is justified within the rule of law by the special trust which criminal laws carry if created by a democratic legislature bound by the fundamental rights. This special trust is lacking if those representing the state power excluded criminal liability through justifications in cases of the most serious criminal injustice [...] The strict protection of trust through Article 103 II GG has to yield in these instances.⁷⁷

The ECHR in its judgment *Streletz, Kessler and Krenz v. Germany* (2001)⁷⁸ upheld the above-described decisions of the German courts. It must be mentioned that, first, the Hungarian Constitutional Court declined to allow retrospective criminal liability for acts committed during the communist area;⁷⁹ later, however, by referring to international criminal law and its *ius cogens* concerning war crimes and crimes against humanity, it opened the door to prosecuting those responsible for mass shootings during the '56 revolution.⁸⁰

Article 1 of the ECHR requires the contracting parties to secure the rights and freedoms included in the Convention. This has been interpreted as imposing both negative and positive obligations on the states.⁸¹ A positive obligation is one where a state must take action in order to secure a human right.⁸² Such positive obligations are not limited to the right to life.⁸³ Indeed one of the most significant cases concerning positive obligations of the state is *X. and Y. v. the Netherlands*,⁸⁴ involving a violation of Article 8, the right to respect for private and family life, home and correspondence and specifically a woman's right to effective measures under criminal law against rape. More importantly, however, this case also addressed the issue of the so-called *Drittwirkung*.

⁷⁵ BVerfGE (2. Kammer des Zweiten Senates), Beschl. v. 12. 7. 1995 – 2 BvR 1130/95.

⁷⁶ BVerfGE 95, 96 (140). If this case were to be considered by the European Court of Human Rights, the Court most likely would have to take the view that the GDR laws in the focus of the problem were justifications. On such a basis, in order to maintain the coherence of their jurisprudence, the outcome of such a possible complaint would resemble the cases ECHR, *S.W. and C.R. v. the United Kingdom* (1995) A no. 335-B and C.

⁷⁷ BVerfGE 95, 96 (140).

⁷⁸ *Streletz, Kessler and Krenz v. Germany*, Judgment of 22 March 2001, Reports of Judgments and Decisions 2001-II.

⁷⁹ Decision 11/1992. (III. 5.) AB of the Constitutional Court of Hungary (n 40).

⁸⁰ Decision 53/1993. (X. 13.) AB of the Constitutional Court of Hungary, ABH 1993, 323.

⁸¹ D. J. Harris, M. O'Boyle and C. Warbrick: *Law of the European Convention on Human Rights* (Butterworths 1995, London) 19; M. E. Villiger: *Handbuch de Europäischen Menschenrechtskonvention* (Schulthess Polygraphischer Verlag 1993, Zürich) 102-104.

⁸² D. Feldman, *Civil liberties and human rights in England and Wales* (Clarendon Press 1993, Oxford) 96-97.

⁸³ See, for example, *Marckx v. Belgium*, 13 June 1979, A no. 31. In this case positive obligation was violated because Belgian law did not recognise a child born out of wedlock as a member of the mother's family. Or consider *Young, James and Webster v. the United Kingdom*, 13 August 1981, A no. 44, in which the Court held that it was a breach of the right not to join a trade union when the law permitted the employer to dismiss the applicants on the grounds that they refused to join.

⁸⁴ *X and Y v. the Netherlands*, 26 March 1985, A no. 91.

X. and Y. v. the Netherlands involved a sixteen year-old mentally handicapped girl, who was sexually assaulted in a private institution by an adult male of sound mind. It was not possible to bring a criminal charge against the offender under Dutch law because a criminal procedure for sexual assault could only be started at the request of the victim; this, however, was not valid if it was initiated by a *doli incapax*. The Government's defence that civil remedies were available and guaranteed the respect for private life, as required by Article 8 of the Convention, was brushed aside by the Court: 'fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal law provisions'.⁸⁵ The Court thus declared that the state has a duty to protect women from rape by means of criminal law, and this duty must be enforced.⁸⁶

In 1995 the Court introduced a new conceptual reasoning and indeed principles in its judgements in *S.W. v. the United Kingdom* and *C.R. v. the United Kingdom*.⁸⁷ In essence, they agree with the House of Lords' ruling in *R. v. R*⁸⁸ and effectively find that it was not the 'abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife'⁸⁹ by the House of Lords which violated the Convention, but that the existence of the immunity was not 'in conformity...with a civilized concept of marriage...with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom.'⁹⁰ Properly understood, the underlying reasoning is that the integrity of law – or in other words a timely understanding of the Radbruch Formula⁹¹ – may override the majoritarian/democracy principle when absolute rights are not protected by the state.

Moreover, in *A. v. the United Kingdom*⁹² the nine year-old applicant was beaten by his stepfather with a garden cane with considerable force on several occasions. The stepfather was acquitted following his defence of reasonable chastisement. The Court found a violation of Article 3 and held that 'states were under an obligation to take measures, such as the provision of effective deterrence, to ensure that individuals within their jurisdiction were not subjected to torture or inhuman or degrading treatment or punishment, including that administered by private individuals.'⁹³ Additionally, in *Osman v. the United Kingdom*,⁹⁴ although the Court found no violation of Article 2, it is most significant that it stated that this Article does not only require the state 'to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives

⁸⁵ *X and Y v. the Netherlands* (n 84) A no. 91, para 27.

⁸⁶ Compare with BVerfGE 39, 1 for example in respect of constitutional duty imposed on the state to protect human life. GG Kommentar, Abs. II. Article. 103, Rnd. 176.

⁸⁷ *S.W. and C.R. v. the United Kingdom*, 22 November 1995, A no. 335-B and C.

⁸⁸ (1992) 1 A.C. 599.

⁸⁹ *S.W. and C.R. v. the United Kingdom* (n 87) A no. 335-B and C, paras 44, 42.

⁹⁰ *Ibid.*

⁹¹ Radbruch (1956) 83; Radbruch (1973) 352-353.

⁹² *A. v. the United Kingdom*, 23 September 1998, [1998] Crim. L. R. 892.

⁹³ *Ibid* 892-893. Emphasis by author.

⁹⁴ *Osman v. the United Kingdom*, 28 October 1998, [1999] Crim. L. R. 82.

of those within its jurisdiction, including taking preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual'.⁹⁵

It appears that some rights, amongst them the right to life – which has a representative value as regards criminal law – have a fundamentally different status to other rights: the state is obliged to take positive action in the form of creating and enforcing criminal norms in order to protect these rights even from violation by private individuals. This substantive constitutional duty to criminalise is, therefore, part of legality. The inevitable question is, hence, what happens if two *primary rights* collide?

This is not as easily answered as might be presumed. A workable example was provided by Justice Sólyom's opinion in the Hungarian Constitutional Court's decision on the death penalty.⁹⁶ The majority opinion stated that the right to life and human dignity is an absolute right, indivisible and not limitable and a source and precondition of several other fundamental rights.⁹⁷ The decision relied on the Hungarian Constitution, according to which the right to life and human dignity is innate, inviolable and inalienable, and nobody can be deprived of it arbitrarily.⁹⁸ Justice Sólyom, in his parallel opinion, observes that, because the Hungarian Constitution prohibits the *arbitrary* taking of life, the answer to the question of whether the death penalty is unconstitutional lies in the definition of arbitrariness. However, nobody can be arbitrarily deprived of any of his rights, and therefore the prohibition of arbitrariness, as regards the deprivation of life and human dignity, has to entail some further guarantees which are specific to these rights. One reason for arbitrariness might be if the court which has to decide on whether to inflict the death penalty has too wide a discretion.⁹⁹ Such a formal requirement might be met by adjusting the system by which the death penalty is imposed.¹⁰⁰ The difficulty of potential substantive arbitrariness is, however, not countered by such actions. Sólyom examined the nature of human dignity and found that this is a constant source (that is, 'mother right') of several other rights, with a 'core' prohibiting the use of any man as an object or tool – that is, the dehumanisation of man. Indeed, this core, which is untouchable by the state or other persons, is the legal difference between a natural and a legal person. The abstract right of human dignity can only fulfil its function, however, if it is not separated from the right to life. Since human dignity is innate, everybody possesses the same human dignity which, because of its inseparability from the right to life, means that everybody is equal in death as well as in life. As such, no person is more deserving of life than any other.¹⁰¹

⁹⁵ Ibid 82-83.

⁹⁶ Decision 23/1990. (X. 31.) AB Constitutional Court of Hungary.

⁹⁷ See Horváth (1991).

⁹⁸ 'Article 54 (1) In the Republic of Hungary every human being has the innate right to life and the dignity of man, and no one may be arbitrarily deprived of these rights.'

⁹⁹ Decision 23/1990. (X. 31.) AB of the Constitutional Court of Hungary, Justice Sólyom's parallel opinion. This was basically one of the reasons that death penalty laws have been found unconstitutional in the USA. *Furman v. Georgia*, 408 U.S. 238 (1972), Justice Douglas concurring.

¹⁰⁰ This is exactly what some States did following the Furman decision. This solution was then accepted by the Supreme Court in *Gregg v. Georgia*, 428 U.S. 153.

¹⁰¹ Ibid.

Sólyom's opinion further emphasised that the death penalty is not unconstitutional because it imposes a limitation on the essential content – that is, core – of a fundamental right, but rather that the right to life and human dignity is per se illimitable.¹⁰² A right which is illimitable cannot be outweighed or limited by balancing it against other rights.

Justice Sólyom further suggested that, in those cases in which the defendant kills the attacker in self-defence, the law does not authorise the killing, but rather acknowledges the unregulated character of the situation. As he puts it, the law does not prohibit or allow anything, because the state has no power over human life. It cannot empower the defendant to take the attacker's life, but for the same reason cannot prescribe that the defendant should not protect himself against a deadly attack. In these situations, therefore, the natural state returns, in which pure instinct for survival will direct the course of events.¹⁰³ Only once the collision of the rights to life has been resolved does the law return. It can only address the question of whether a self-defence situation existed and, if yes, whether it really threatened the defendant's life.¹⁰⁴ Hence, in cases involving deadly attacks, only the necessity but not the proportionality of the act of self-defence can be examined.¹⁰⁵

Sólyom's opinion suggests that, in such cases, once again a substantive issue must be dealt with under procedural requirements, as in all cases in which substantive questions lead theorists into a *cul-de-sac*. In other words, without balancing the colliding interests, the circumstances of the collision are defined, and it is their existence which justifies the neutrality of the legal system towards the violation of one of these primary rights.

Security Council resolution 827 (1993)¹⁰⁶ established the International Tribunal for the Former Yugoslavia (ICTY) and 955 (1994) the International Tribunal for Rwanda (ICTR).¹⁰⁷ After a long evolution, international criminal law was finally codified at least to the extent of the statute of an ad hoc tribunal. The justification of retroactively punishing such acts – as was expounded in the Nuremberg judgment – lies with the other side of human dignity.

In summary, it can be observed that the duty of the courts is to see that justice is done, a task best performed by guarding the integrity, that is, the universality, of criminal law. If the legislature has failed by itself to do so (that is, absolute rights are not protected by criminal law, or laws are passed which fundamentally violate the universality of criminal law), it is up to the courts to protect law from undermining itself, if needs be through judicial law-making.

Human dignity as a meta-juristic and metaphysical concept prevailing – at the same time – over legal relevance has a reverse side. This other side not only protects the individual by drawing an inviolable boundary for the state and everybody else, it also places an immovable duty upon the human being. Human existence, which distinguishes us from everything else by birth, not only empowers

¹⁰² Decision 23/1990. (X. 31.) AB Constitutional Court of Hungary (n 35) 96-108 (Judge Sólyom).

¹⁰³ See for the most famous exponent of natural state. Hobbes (1996).

¹⁰⁴ Decision 23/1990. (X. 31.) AB of the Constitutional Court of Hungary (n 35).

¹⁰⁵ Supreme Court, 15th Theoretical Guideline.

¹⁰⁶ S.C.R. 827 (1993).

¹⁰⁷ S.C.R. 955 (1994).

but also commits. This obligation makes it possible to remove the principle of *mens rea* in cases of the most severe violations of human dignity and create a duty to criminalise even retroactively. Someone born as a human being will be criminally liable for acts violating absolute rights (grossly injuring another's human dignity) even if he did not know of the criminal nature of his action.

3 Light Speed

According to Einsteinian physics, it does not matter whether one approaches an object which is traveling at the speed of light at 100 km/h or leaves the same object: the speed in relation to said object is not the speed of light minus or plus 100 km/h; the speed of light will stay constant and absolute. However, even Einstein's general relativity theory cannot as yet be brought into accordance with Heisenberg's theory of probability or Feynman's 'sum over histories'.¹⁰⁸ For the understanding of the seemingly true but inconsistent theories of the 'same objective' Stephen Hawking and Leonard Mlodinow, in their 2010 book, *The Grand Design*¹⁰⁹ coined the term 'model-dependent realism'. Model dependent realism is a view of scientific inquiry which focuses on the role of models of phenomena. It tries to explain why and how contradicting explanations can describe the same events correctly from different points of view; it states that reality should be interpreted based upon these models. Model dependent realism asserts that all we can know about 'objective reality' consists of networks of world pictures that explain observations by connecting them by rules to concepts defined in models. (It is hard to fail to notice the similarities between model dependent realism and the Buddhist parable of the blind men and the elephant.)

It is unquestionable that human thinking can only work in models. Even, for example, in criminal proceedings, when an expert witness establishes that the sample must be from Mr. X because the DNA found on the sample matches the DNA of Mr. X, what he actually says is that a certain number of loci match, and we believe that deoxyribonucleic acid (DNA) is a molecule which encodes the genetic instructions used in the development and functioning of all known living organisms. DNA is located in the cell nucleus, the genetic information in a genome is held within genes, and the complete set of this information in an organism is called its genotype. A gene is a unit of heredity and is a region of DNA that influences a particular characteristic in an organism. We believe this because it is supported by our experience, on the bases of which we created the model of the DNA and its place in the living organism.

Or the idea that a crime must have an *actus reus* and a *mens rea* element is a model as well. The real question for us, therefore, is how we can make a model of human dignity and its functions within the criminal justice system.

¹⁰⁸ Ibid 95-107.

¹⁰⁹ Stephen W. Hawking and Mlodinow Leonard, *The Grand design* (Bantam Books 2010, London) Chapter 3: What Is Reality? 39–59.

4 Corruption and Human Dignity

Then Satan entered into Judas, called Iscariot, who was one of the twelve disciples. 4 So Judas went off and spoke with the chief priests and the officers of the Temple guard about how he could betray Jesus to them. 5 They were pleased and offered to pay him money. 6 Judas agreed to it and started looking for a good chance to hand Jesus over to them without the people knowing about it.¹¹⁰

It is intriguing to compare the betrayal of Judas with the parable of Mary and Martha.¹¹¹ Jesus visits the home of the sisters of Lazarus of Bethany, Martha of Bethany and Mary of Bethany; according to the Gospel of Luke:

As Jesus and his disciples were on their way, he came to a village where a woman named Martha opened her home to him. She had a sister called Mary, who sat at the Lord's feet listening to what he said. But Martha was distracted by all the preparations that had to be made. She came to him and asked, 'Lord, don't you care that my sister has left me to do the work by myself? Tell her to help me!' 'Martha, Martha,' the Lord answered, 'you are worried and upset about many things, but only one thing is needed. Mary has chosen what is better, and it will not be taken away from her.'

The two conflicting types of behaviour depicted by the sisters represent different interpretations of what the norm (behaviour expected by Jesus) requires.

The question first of all is what is the relationship between the perceived rule-following represented by the actions of Martha and Mary? Moreover, what is the motivation of the rule-following?

The parable of the Prodigal Son is one of the most well-known teachings of Jesus. According to the Gospel of Luke, a father gives the younger of his two sons his inheritance before he dies. The younger son, after wasting his fortune, starves during a famine and returns home, where the father holds a feast to celebrate his return. The older son refuses to participate, stating that whilst he always worked hard for the father, he did not even give him a goat to celebrate with his friends. His father, however, reminds him that he – the older – is everything to the father; nevertheless, the return of the younger son has to be celebrated because he had been lost but was found again. This parable is the third and final part of a cycle on redemption, following the Parable of the Lost Sheep and the Parable of the Lost Coin.¹¹² Pope Benedict XVI, in his work *Jesus of Nazareth*, gives a detailed analysis of this allegory.¹¹³ It is striking how the teaching of the Prodigal Son is reflected in the redemption of one of the criminals during the crucifixion,¹¹⁴ when Jesus answers

¹¹⁰ Luke, 22:3-6.

¹¹¹ Luke 10:38-40.

¹¹² Luke 15:11-32.

¹¹³ Pope Benedict XVI, *Jesus of Nazareth: The Infancy Narratives* (Image Books 2012, Colorado Springs).

¹¹⁴ Luke 23:26-43.

one of the criminals and says: 'Truly I tell you, today you will be with me in paradise.' In this scene one is faced again with the act of redemption following and despite of a life of sin, similar to the case of the prodigal son's return to the father.

The antagonisms which oppose each other here (the prodigal son and his brother, Mary and Martha, Judas and Jesus's norm system, the two crucified criminals etc.) represent the opposition of a self-centred, own-good oriented norm setting to a rule system oriented on the common good or even on metaphysical values. If one equates common-good/metaphysical values with a norm system then the violation of these norms (crime) can never be completely comprehended by an individual human. Thus Jung – in this setting at least – rightly observes that human recognition of Sin is not possible,¹¹⁵ since ignorance is the ultimate Sin for the 'Logos', because complete knowledge is impossible and without complete knowledge the metaphysical value (truth) is unattainable. Konrad Lorenz notes that Men's real sin is his genetic instinct which necessarily comes into conflict with moral imperatives.¹¹⁶

The collision of pure self-interest and the common good or metaphysical truth poses daily challenges to us: do we decide as biological or moral beings? The same conflict is depicted with utmost severity in the Old Testament when Abraham is ordered by God to kill Isaac.¹¹⁷

Indeed, does Sigmund Freud commit a crime (bribery), when he pays the SS officer in order to escape from Vienna to London? When criminalising bribery (corruption), we rely on the primacy of moral imperatives as opposed to self-interest. However, the law which is supposed to carry out this comparison might be flawed itself from the moral point of view.

Our problem in relation to the above is the following: if human dignity serves as a point of reference for criminal law, and additionally human dignity is an inalienable characteristic of our human existence, what if our existence collides not with other human dignities but some sort of supposed common good?

III Models of Human Dignity


1 The Spinozan or Global Model of Human Dignity

The first model of human dignity I would call the Spinozan model or Global human dignity model.¹¹⁸ Crudely stated, no individual human being has a personalised human dignity; instead, all mankind possesses a common human dignity. This model does not speak about individual

¹¹⁵ C. J. Jung, *The Archetypes and the Collective Unconscious*. (2nd edn, Collected Works Vol.9 Part 1 1981, Princeton).

¹¹⁶ Konrad Lorenz, *Civilized man's eight deadly sins* (Harcourt Brace Jovanovich 1974, Madison).

¹¹⁷ Gen 22:1-14 KJV.

¹¹⁸ Spinoza argued that God exists and is abstract and impersonal, everything that exists in Nature is part of the same Reality (truth, substance) and there is only one set of rules governing the whole of the reality which surrounds us and of which we are part. God – in his view – does not rule over the universe, but is itself the deterministic system of which everything is part. He held good and evil to be relative concepts, claiming that nothing is intrinsically good 

human dignities which may collide; rather, it treats human dignity as a commonly shared value, something akin to the idea imbedded in the Martens Clause.

2 The Individual Model of Human Dignity

The second model of human dignity – which we might call the individual human dignity model – is quite the opposite. The problem with this model was highlighted above: if absolute rights, which are inextricably linked to human dignity, collide then neither can yield since this would diminish the absolute value of human dignity and would allow for its limitation.

The explanation that, in cases of colliding absolute rights, we have to leave a legal gap in order not to regulate an un-regulatable situation is unsatisfactory.

If a norm is ambiguous it might seem that there is no specific answer to the actual case in question; that is, it might appear that there is a gap in the law. This affects the relationship between inherent ambiguity, interpretation and legal gaps.

Kelsen maintains that genuine gaps do not exist. If they were to exist, it would mean that a legal dispute could not be settled in accordance with the prevailing norms, because the law lacked provisions to address the case in question.¹¹⁹ In an absolutist system of reference Kelsen is right. If there is a Basic Norm then any further rule is an elucidation of the Basic Norm. In an IT and NOT-IT setting, every rule is redefining and detailing IT whilst differentiating IT₂ from IT in which conception IT becomes NOT-IT as regards IT₂ and this latter NOT-IT becomes NOT-IT₂ and so on. However, if Kelsen is right, then this would imply that there is no need for interpretation, or rather every interpretation is a further redefinition if IT.

Kelsen bases his assumption upon his argument that every legal dispute consists of one party making a claim against another party, and that the decision granting or rejecting the claim is dependent upon the law endorsing one or the other position. Since there is no third option, even a decision rejecting the claim on the grounds that the law does not address such questions is made by appealing to the prevailing legal system.¹²⁰

An objection to Kelsen's claim which comes to mind is that even a decision stating that a particular claim has no legal grounds establishes a rule. Whether that will be the first 'brick' with which this rule will be built, or whether it is already an additional element, is beside the point. Since there must be a case of first impression (claim) with respect to every conceivable matter, a *real gap* in the law is exposed until the matter has been decided upon authoritatively.

This, however, only holds true – and in this sense one must agree with Kelsen – if we assume that there is a trans-legal value and the Basic Norm does not and/or its redefinitions do not follow the trans-legal value. In such a case, any departure from the trans-legal value would mean a *real gap*.

or bad except relative to a particularity. [See e.g. S. Nadler, *Spinoza: A Life Paperback* (Cambridge University Press 2001, Cambridge); R. Scruton, *Spinoza: A Very Short Introduction*, (Oxford University Press 2002, Oxford).

¹¹⁹ Kelsen (n 41) 84.

¹²⁰ *Ibid.*

Judges cannot refuse to decide a matter properly brought before them; therefore they either 'employ the explicit concept of the declaratory power',¹²¹ which also means that lacking explicit positive law they have to produce extra legal reasons,¹²² or they have to employ analogy as a form of interpretation, or may – in criminal matters – find that the act in question is not criminal.

Even though a court does not find conduct of a criminal nature for which the defendant was prosecuted,¹²³ the judges decide on the criminality of the conduct brought before them one way or the other.¹²⁴ It is suggested that the most significant consequence of this assertion is that even if the court decides not to create a new crime which would fit the conduct before it, and finds a defendant innocent, it makes law by not criminalising the particular behaviour. This follows from the assertion that the duality of criminal law results in the extension or reduction of behavioural freedom on both sides, regardless of criminalisation or decriminalisation in the traditional sense.¹²⁵ The fact that courts decided to refuse to find an act criminal reveals that there was a *real gap* in the law which became exposed by the prosecution until the matter was decided upon authoritatively.

The theoretical question that such an approach poses is whether 'non-criminalisation' by a court is basically the same as judicial decriminalisation. As already elucidated, there is no difference between the expansion of criminalised behaviour and its reduction. Any narrowing of the limits of the freedom of behaviour simultaneously expands it. This paradox, however, cannot be limited to the *creation* and *abolition* of norms. 'Non-creation', as opposed to creation and abolition, also depends on these latter concepts, without which it would be rendered meaningless.

Returning to Kelsen's argument, it must be conceded that he is correct in an absolute sense. If there is no agreed need to regulate certain conducts then a legal system which is composed of a single rule – namely that there are no rules – and which dismisses every claim by reference to that single rule, will meet Kelsen's description. If, however, one adds only one additional rule – for example, 'thou shalt not kill' – then by the application of this norm it will multiply into numerous sub-rules, thus acknowledging the existence of gaps. These gaps will be legal gaps in the sense that they will refer to areas of human behaviour to which the rule is now applied, even though previously it was not. Additionally, these matters differ from earlier matters, which the rule had been previously used to regulate. Nevertheless, if one presumes – as this work does – that there are states and legal systems which operate in and establish value structures, then the coherence of these value structures demands positive legal regulation of certain relationships.

¹²¹ S. C. Styles, 'Something to declare: a defence of the declaratory power of the High Court of Justiciary' in Hunter, R.F. (ed), *Justice and Crime: essays in honour of The Right Honourable The Lord Emslie, M.B.E., P.C., LL.D., FR.S.E.*, p. 211. (T&T Clark 1993, Edinburgh) 230.

¹²² I. D. Willock, 'Judges at work: making law and keeping to the law' [1996] *The Juridical Review Discussion Chapter V:2.1.* 98.

¹²³ Consider for example *Grant v. Allan* 1988 S.L.T. 11; 1987 S.C.C.R. 402 in which the court held that the making of computer printouts with the intent to supply them to the trade rival of the accused's employer was not recognised as a crime by the law of Scotland.

¹²⁴ Willock (1996) 99.

¹²⁵ See Chapter I.1.1.

This does not preclude the possibility of giving a legal response stating that a certain human behaviour needs to remain unregulated.¹²⁶

It follows from the proposition that every criminalisation simultaneously extends and limits the permitted boundaries of human behaviour that not criminalising certain activities may appear to be a lack of legal protection on the other side of the relationship.¹²⁷

Kelsen, furthermore, claims that when gaps are spoken of it does not mean that a solution is logically impossible because norms are lacking, but rather that decision-makers, whilst such a decision is logically possible, do not find it to be practicable or just.¹²⁸ This extreme form of positivism, although often true is, as argued above, not of general validity, and proves indeed to be quite unhelpful as far as criminal law is concerned. This is especially so when one takes into consideration that Kelsen does not even find a gap in cases where the statute is nonsensical, or even lacking in meaning altogether. He says rather that one cannot extract from a norm by interpretation what the norm never had.¹²⁹ However, in criminal law, such necessities do arise from time to time.

3 Individual-cumulative Model of Human Dignity

The third model of human dignity might be labelled as the individual-cumulative model. As one can imagine different infinities, one may also assume absolute rights of different qualities. In the same way as one may place an infinite number of dots on a line, one may also draw infinite

¹²⁶ The constitutional right to freedom of expression forbids the legislature to pass content based limitations on expression in the United States. Very famous are the 'Skokie cases' [Lawrence (1993), 673, note 2] consisting of two cases arising from the attempt by a group of Nazis to hold a march in the predominantly Jewish Chicago suburb of Skokie, Illinois in 1977 and 1978. The first case is *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977); 366 N.E.2d 347 (Ill. App. Ct. 1977); 373 N.E.2d 21 (Ill. 1978). The more discussed second case is *Collin v. Smith*, 447 F. Supp. 676 (N.D. Ill. 1977), *aff'd*, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978). The court invalidated the ordinances which forbade Nazis to march through a town, reasoning that the legislation was content-based, since 'any shock effect ... must be attributed to the content of the ideas expressed'. *Ibid*.

¹²⁷ For discussion of these cases and the connected legal issues D. Downes, *Contrasts in Tolerance: Post-War Penal Policy in the Netherlands and England and Wales* (Clarendon 1988, Oxford); A. Kinoy, *Rights on trial: the odyssey of a people's lawyer* (Harvard University Press 1983, Cambridge); D. Kretzmer, *Freedom of speech and racism* [1987] *Cardozo Law Review*; A. Neier, *Defending my enemy: American Nazis, the Skokie case, and the risk of freedom* (E. P. Dutton 1979, New York); A. Neier, *An Arthurian tale. Book review of KINOY, A. (1983), Rights on trial: the odyssey of a people's lawyer.* (Harvard University Press 1985, Cambridge). Also consider the Canadian case *Boucher v. R.* (1951) 2 DLR 369, and the English case *R. v. Chief Metropolitan Magistrate, ex parte Choudhury* (1991) 1 All ER 306. For discussion consider M. Tregilgas-Davey, 'Ex parte Choudhury: An opportunity missed' [1991] *Modern Law Review*; Feldman (n 82) 674-683, 811-814. For racial hatred offences see A. T. H. Smith, *The offences against public order (including the Public Order Act 1986)* (Sweet & Maxwell, Police Review Publishing 1987, London) ch 9; G. Robertson, *Freedom, the individual and the law* (7th edn, Penguin Books 1993, London) 95-99. As regards European human rights law see *Glimmerveen v. the Netherlands*, 18 D. R. 187. In Hungary see Constitutional Court decision 30/1992. (V. 26.) AB; B. J. Gellér, 'Hate speech in Hungarian criminal law' (1995) 6 *Acta Juridica Hungarica*; A. I. Wiener, 'The necessity test relevant to the codification of criminal law' (1995) 6 *Acta Juridica Hungarica*.

¹²⁸ Kelsen (n 41) 85.

¹²⁹ *Ibid* 87.

numbers of these dotted lines on a sheet of paper. Moreover, infinite numbers of these sheets might be placed upon each other. If we assume that a dotted line having infinite dots symbolises an individual's human dignity we still may conclude that an infinite number of such lines is qualitatively if not mathematically more than a single – be it infinitely dotted – line.

This model allows us to measure several lives against a single life but still lacks a proper explanation in cases in which single absolute rights have to be weighed against each other.

4 Individual-cumulative Erodible Human Dignity

The question presents itself of how it would be possible to maintain the principle of equality of people and accommodate the collision of absolute rights (human dignities). In connection with this, another question begs answering: is human dignity a concept which accompanies human life without any change or could the behaviour of the individual affect his human dignity?

It is clear that metaphysical thinking may associate human existence with a soul; further it may link human dignity with the human soul and find the possibility to reward or punish human action in – for example – the afterlife. Such thinking might be open to suggestions of ameliorating or diminishing human dignity through human behaviour. For all intents and purposes I would guard against drawing conclusions for legal thinking from metaphysical thoughts, with the exception of postulating the possibility of a metaphysical rule structure.

Nevertheless, the principle of equality of human beings and the principle that it may not be violated by the state does not preclude the extension of this latter model in a way which allows for the erosion of dignity through one's own actions. Plainly put: why would a democratic legal system have to cling to the idea that a person killing thousands of innocent people has the same human dignity as anyone else? If one were to allow for the erosion of human dignity it is possible to settle issues such as self-defence. This would also have a profound effect on the justifications for punishment since, if action can erode, it would be possible to regain human dignity through action.

Finally, it must be conceded that not all remaining problems are swept out of the way. It has to be seen how problems of necessity and armed conflict can be explained under this model, or which different model has to be created in order to maintain a coherent logical system.