AIDP-IAPL XXIIth International Congress of Penal Law

concept paper

Core Values for Criminal Justice Systems

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Introduction

Now that the XXIth International Congress of Penal Law of Paris has been concluded, it is time to prepare for the next Penal Congress that will be held in 2029: the XXIIth. Looking back at the themes chosen by our predecessors over the last hundred years, it appears that often issues that had a topical value at the time and posed new questions as to its embedment in criminal law were chosen. For instance, for the IVth Congress in Paris 1937, that posed the question "In what way can penal law of each country contribute to the protection of international peace?". And also ten years later after World War II, the 1947 Vth Geneva Congress raised the issue again. At the 2009 XVIIIth Penal Congress of Istanbul, Section IV dealt with Universal Jurisdiction, which had become quite an issue around the 2000s.

The XVIth Budapest Congress of 1999 was the first to have a common theme for all four sections of the AIDP-IAPL: "The criminal justice systems facing the challenge of organised crime". Also the XIXth Rio de Janeiro Congress of 2014 had a joint topic: "Information society and penal law", as well as the XXth in Rome in 2019: "Criminal justice and Corporate Business". Finally, the most recent XXIst International Congress of Penal Law 2024 in Paris also united all sections under one umbrella: "Artificial Intelligence and Criminal Law".

The history of the AIDP-IAPL thus shows a picture in which both individual topics, as well as common themes have been accepted to steer the studies and activities of the organisation for the new cycle. In other words, it has often been the currency and urgency of the topic and theme that has led to the choice, rather than the format. In this concept paper we build on that history and propose themes for each section that have a certain independent status of its own, but also are related to each other and find themselves under common notions and principles.

Under the title "The Place of Criminal Law in Our Times", Section 1 of the Congress will focus on the general part of substantive criminal law and establish what the role of criminal law is in our times. "Gender and Sexual Identity in Criminal Law" is the theme for Section 2 that will look at the role that criminal justice systems have given to gender, sexual orientation, and identity aspects in criminal law. Section 3 will examine the criminal justice system in

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terms of its capacity of maintaining the rule of law and independence of the judiciary and is therefore titled: “Rule of Law and the Independence of the Criminal Justice System”. “Climate Change and Criminal Law” is for Section 4 of the Congress. This section will examine the international implications of climate change, the dangers caused to the environment, and explore what criminal law means (or could and should mean) in this context.

This concept-paper serves as a tool to launch the debate on the themes for the next cycle in the Scientific Committee, to facilitate decision making in the Board of Directors, as well as allow both National Groups as General and National Rapporteurs to reflect and prepare their research. Traditionally, there has always been quite some discretion for the General Rapporteurs to further fine tune the approach and to draft the Questionnaires for their sections. All topics therefore allow for specific emphasis and approach depending on the expertise of the respective General Rapporteur. In addition, in the past arrangements between the General Rapporteurs of various sections have contributed to the added value and quality of the General Reports and Resolutions of the AIDP-IAPL.

Although each of these themes can be regarded as standalone topic, not necessarily connected to the other sections, they do have in common that they reflect on the basic values of our criminal justice systems. Indeed, they pose the questions of what do we have criminal law for, how the essence of the identity of human beings or moral values is protected or criminalised, how to provide the rule of law in the criminal justice system, and how to protect the environment and our planet with criminal law. All of these questions relate to basic values of the society and are recognised among the goals of the United Nations for a sustainable development.[2] In a catchy way, one might say that with the XXIIth cycle we go back to basics, or, to put it more eloquently, that we reflect on the core values for the criminal justice system. Looking at the themes from that angle, all four sections do fit into a single, cohesive framework: core values for criminal justice systems.

Section 1. The Place of Criminal Law in Our Times

Section 1 of the Congress will focus on the general part of substantive criminal law and establish what the role of criminal law is in our times. Both countries that apply civil law as well as those of the common law tradition have undergone quite some changes in the last century. The current regime of most civil law systems is still based on the foundations drafted in the late 19th or early 20th century.[3] This put a strong emphasis on codification and legal principles that are there to protect the citizen against too much criminal law: the legality principle and the *ultima ratio* principle. The first carries elements to protect the citizen and to give legitimacy to the state intervening. It is based on the presumption that the citizen knew what s/he was not allowed to do because that conduct had previously been explicitly, precisely, and publicly criminalized. This entitles the state to respond and punish. The latter

[2] https://sdgs.un.org/goals

[3] See on the need for reform Marcelo A. Riquert, Los cien años del Código Penal Argentino. Su necesaria actualización en material de delincuencia informática, in: El centenario del Código Penal, Ediar Buenos Aires 2022, p. 111-119.

relates to criminalisation theories that make the use of criminal law conditional to the existence of certain conditions and criteria.[4] One of the most important being that there must be a harm or that the behaviour is morally wrong.[5] By applying criminalisation theories, states do two things at the same time: they provide themselves with a normative standard on the basis of which they can decide whether to criminalise or not *and* by making use of the criteria resulting from the criminalisation theory, they legitimise state intervention. These traditional justifications also challenge phenomena by which a criminal response may contribute to scarcity. States may have declared a "war on drugs" (does this present criminal law as the "final solution"?), may have criminalised illegal entry and stay in another country, but the very fact that they have done so creates a great pull factor as now a lot of money can be earned from such scarcity. One could indeed argue that both the prohibition of alcohol in the United States during the 1920s and the drug policy implemented in the 1980s played a major role in the emergence of organized crime.[6]

One of the features of the substantive criminal law part of common law was that it was not codified but had developed over centuries in case law and relied on precedent. Case law shaped the rules on criminal responsibility, as well as on criminal conduct. As a result of which also common law had developed a general part and a special part. In 2024, this situation has changed dramatically. Whilst most common law states have kept a dominant place for the rule of precedent, more and more states have codified extensively, some even on the general part. For most common law states, the list of common law offences is closed, and no new ones will be added to those that were formulated over centuries.[7] These developments show that the differences between the two dominant systems have decreased and that they have far more in common now than in the 19th century.

For both systems the foundations for the current system of substantive criminal law were laid in times and in societies that were very much different from our own. Times in which most crimes consisted of a physical conduct that could be observed, and for which the physical presence of the perpetrator and/or an object or victim on the same spot was essential.[8] Our society has changed dramatically and that has had consequences for criminal law. We can now swiftly move, travel from one country to another, and can even act on places where we not are. Numerous applications we use in our daily life rely very much on technology, computers, artificial intelligence, and the like.

Apart from technological developments, there are also indications that views on the role of criminal law in society and criminal policy may have changed.

On the one hand, whereas for centuries criminal law created responsibility on the basis of an act, performed by an actor with a guilty mind,[9] modern societies seem to be less ready to

[4] For a comparative study on Anglo-American and German criminalization principles see Nina Peršak, Criminalising Harmful Conduct: The Harm Principle, its Limits and Continental Counterparts, Springer, 2007.
[5] See Andrew Ashworth, Principles of Criminal Law, Oxford University Press, 3rd edition 1999, p. 23-58.
[6] See also Ashworth, p. 54-55. On the (over)use of criminal law in the United States and the suggestion of possible constraints see: Douglas Husak, Overcriminalization: The Limits of the Criminal Law, Oxford University Press, 2007.
[7] However, most common law countries now regard the list of common law crimes as closed and no new crimes can be created by the judiciary. See e.g. on South African criminal law: Jonathan Burchell, Principles of Criminal Law, 3rd edition, Pietermaritzburg 2010, p. 54.
[8] Michele Papa, The Offense Definition as a Screenplay of Evil: The Rise and Fall of Visual Criminal Law, Católica Law Review 2020, p. 145-174.
[9] George P. Fletcher, The Grammar of Criminal Law, Volume One: Foundations, Oxford University Press 2007.

accept that risks materialise without somebody being responsible. Criminal law is now used as a tool to prevent risks, as well as create responsibilities after the risk has materialized.[10] What we can observe is that there is not a single system that has limited the scope of application of its criminal justice system in the last 150 years.[11] Substantive criminal law continuously expands in time, location, and persons. Whereas traditionally, criminal law came after the fact, criminal justice systems have now accepted preparatory offences both in general as well as specific preparatory offences. The statute of limitations is extended by many states and in some cases has been lifted completely.[12] Traditionally, the principle of territorial jurisdiction was the most important claim of a state to extend its criminal law over conduct.[13] Although that principle, as such, is undisputed, many states have given it an extensive interpretation. In addition to that, consequential to international conventions and the establishment of international criminal tribunals, states have expanded or introduced other jurisdictional principles that allow them to apply their substantive criminal law on conduct taking place out of the country: active personality/ nationality; passive personality/ nationality; domicile (active and passive); universality; transfer of proceedings.[14] The expansion of criminal responsibility for the behaviour of others, for conduct performed together with others, and for legal entities, are phenomena that not only apply to international criminal law. Some national systems have even accepted that also branches of the state itself may be prosecuted. All these forms of expansion provoke the question whether criminalisation theories apply only to the creation of new offences or also to other aspects that determine the impact of criminal law on a society: time, space, and responsibility for conduct of others? What are and should be the limitations of criminal law?

On the other hand, one may also see a development to formally decriminalise certain areas and bring their enforcement within the range of administrative law. Traffic offences, competition rules, and other economic regulations are well known examples.[15] It is

[10] On the relationship between criminal law and the "risk society", see e.g. Sjors Ligthart and Jeffrey Waal, Normering van het risicostrafrecht: Over retributie en het "Quarantaine-model", Delikt en Delinkwent 2022, p. 688-707; John Pratt and Michelle Miao; Risk, Populism, and Criminal Law, New Criminal Law Review, 2019; Chiara Perini, Il concetto di rischio nel diritto penale moderno, Giuffrè, 2010; Felix Herzog, Risikogesellschaft, Risikostrafrecht, Risikoregulierung – Über das Strafrecht hinausweisende Perspektive, in Ulfrid Neumann and Cornelius Prittwitz (eds.), Kritik und Rechtfertigung des Strafrechts, Peter Lang, 2005, p. 117-130; Jesús-Maria Silva Sánchez, La expansión del Derecho penal. Aspectos de la Política criminal en las sociedades postindustriales, Civitas, 1999.

[11] The phenomenon of "penal populism" has gained the attention of the global scholarly arena for some time now. See *inter alia*: Zsolt Boda, Mihály Tóth, Miklós Hollán, and Attila Bartha, Two Decades of Penal Populism – The Case of Hungary, Review of Central and East European Law, 2022; Alexandre Audesse and Joane Martel, L'architecture singulière du populisme pénal, Champ pénal/Penal field, 2020; Filippo Sgubbi, Il diritto penale totale. Punire senza legge, senza verità, senza colpa. Venti tesi, Il Mulino, 2019; Vittorio Manes, Diritto penale no-limits. Garanzie e diritti fondamentali come presidio per la giurisdizione, Questione Giustizia, 2019; Frank Nobis, Strafrecht in Zeiten des Populismus, Strafverteidiger 2018; Tim Newburn, "Tough on Crime": Penal Policy in England and Wales, Crime and Justice, Vol. 36, No. 1, Crime, Punishment, and Politics in a Comparative Perspective, 2007; Mariano H. Gutiérrez (ed.), Populismo Punitivo y Justicia Expresiva, Fabiano di Plácido, 2011; John Pratt, Penal Populism, Routledge, 2006; Denis Salas, La volonté de punir. Essai sur le populisme pénal, Hachette, 2005.

[12] See André Klip, Totaalstrafrecht, Delikt en Delinkwent 2010, p. 583-592.

[13] For an overview of the general phenomenon of criminal jurisdiction, see Dan Helenius, The If, How, and When of Criminal Jurisdiction – What is Criminal Jurisdiction Anyway?, Bergen Journal of Criminal Law & Criminal Justice 3, 2015.

[14] This phenomena can also be observed in the increasing role played by interstate entities such as Eurojust, the Genocide Network, Europol, and EPPO.

[15] See e.g., in the field of drug-related offenses: Criminal Justice Innovation Lab, Criminal Justice System Impacts of Cannabis Decriminalization & Legalization, 2021; Thomas F. Barbor and others, 2018; Wayne A.

interesting to see that these areas remain ruled by general part notions imported from criminal law.[16] A more critical voice might say that these are *decriminalisations just in name* and that real decriminalisations can hardly be found.[17]

All of these developments raise the question of whether the rationales and foundations of the criminal law system are still the same today, or if new rationales and expectations have come up. It follows that one should reflect upon whether it may be time to reconsider the basic principles and the foundations underlying the systems and on the role of substantive criminal law altogether. Such an evaluation may lead to formulating new concepts and new forms of criminal responsibility. However, it may also lead to a confirmation that the basic structure and concepts of the past continue to have their values for today. In essence, the main question is: what are the current foundations and rationales of criminal law?

This main question may be followed by a series of sub-questions relating to the expectations of and for criminal law. Is criminal law still regarded as an *ultima ratio* tool or has it been replaced by something else? What criminalisation theories are used, if ever, in our societies? These questions are relevant viewing the use of criminal law to address social crises (ranging from civil unrest and hate speech, to wide-spread corruption) in times of populism, as well as its use during the pandemic. Has criminal law become a tool of political purposes (or has it always been one)? Is there a need for new criminalisation theories or their revision? Is traditional criminal law itself at risk? And if so, what does this mean for the legitimacy of the criminal justice system?

Finally, an association like the AIDP-IAPL should have the ambition to look at what could be the solid foundation for a criminal justice system. This normative question is certainly not the easiest one. What should be the foundation and rationale for the criminal justice system?

Section 2. Gender and Sexual Identity in Criminal Law

Section 2 of the Congress always focuses on the special part of substantive criminal law. In the coming cycle it will look at the role that criminal justice systems have given to gender,[18]

Logan, After the Cheering Stopped: Decriminalization and Legalism's Limits, Cornell Journal Of Law and Public Policy vol. 24, 2014.

[16] For a comparative analysis of the borders between crime, tort, and administrative sanctions, see Matthew Dyson and Benjamin Vogel, The Limits of Criminal Law Anglo-German Concepts and Principles, Intersentia, 2020.

[17] There seems to be a contrast in the definition of the terms decriminalisation and depenalisation. According to the European Monitoring Centre for Drugs and Addiction, decriminalisation refers to the removal of criminal status from a certain behaviour or action (and of criminal sanctions) which could be accompanied by the introduction of civil or administrative sanctions. Depenalisation, instead, refers to the possibility or policy to close a criminal case without proceeding towards punishment. See European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), Models for the legal supply of cannabis: recent developments – Terms and Definitions. Available at: https://www.emcdda.europa.eu/topics/pods/legal-supply-of-cannabis_en. According to this interpretation, the Dutch policy of tolerance (*gedoogbeleid*) would be an example of depenalization. See Thomas F. Babor and others, Criminalization and decriminalization of drug possession, Drug Policy and the Public Good, Oxford Academic, 2nd ed 2018. In Italian, instead, the terms seem to be used in the opposite way: *depenalizzazione* is used to refer the transmigration of a criminal offense into the field of administrative offenses, while *decriminalizzazione* refers to the legalization of the conduct. See Ernesto Lupo, La depenalizzazione tra passato e futuro: un rapido sguardo, Sistema Penale, 2023.

[18] E.g., on gender and Italian criminal law: Francesco Cingari, Genere e diritto penale, Modernidad y transformación del derecho penal. Modernità e trasformazione del diritto penale, Editorial Dykinson, 2023;

sexual orientation,[19] and identity aspects in criminal law. This will be approached both from the angle of how systems protect people of a specific gender, sexual orientation or identity, as well as how systems have criminalised conduct related to these aspects.

Most societies have always recognised two genders, men and women, and more or less presumed (or imposed) that the norm is that people feel sexually attracted to the other gender and thus are all heterosexual. Other approaches were not accepted, neither in the determination of gender and identity, nor in sexual activity. This is reflected in the fact that until the 20th century homosexual activity had been criminalised all over the globe.[20]

Some modern societies allow for more distinctions, both when it comes to the understanding of gender, as well as to sexual orientation.[21] There is more than a man and a woman and heteronormativity. Certain legal systems recognize this in the field of family law. People may choose to be registered as a woman, a man, or a non-binary person. They may marry with a person of the same or another gender, as they please.

Even when the legal assumption was heterosexuality, there have always been women loving women, men loving men, and people loving both. In addition to lesbians and gays, others have claimed recognition of their identity and existence, as a specific category or denomination as LGTB does not capture what they are. We now see often references to LGTBQ+ or LGTBQIA+, referring to lesbian, gay, bisexual, transgender, queer, intersex, asexual/aromantic, and the plus referring to any other category. As is shown by more people claiming the recognition of their specific identity, it will not be possible to list all different categories of people that may exist in these matters. However, what is clear is that there is a desire for recognition and that societies have difficulties in how to deal with this.

If we look at the various steps taken around the world concerning the role of gender, sexual orientation, and identity over the last years, it becomes clear that it has triggered quite some legal initiatives, albeit from rather opposing sides. What these developments have in common is that they see a need to use the criminal justice system as a tool to either protect or criminalise certain groups. It seems as if the theme has triggered a black or white approach. You either protect, or you criminalise, but you do not do both.

The *protective perspective* on gender and identity tries to use criminal law as a means to allow and facilitate people to live their identity in the way they wish.[22] It is a perspective that values the individual freedom of each human being. This may be expressed in criminalising specifically conduct that curtails these freedoms: hate speech, violence, and discrimination

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focusing on homotransphobia, Paolo Caroli, La giurisprudenza penale italiana di fronte alle discriminazioni delle persone LGBTQIA+. Una ricognizione sistematica del diritto vivente, Sistema penale, 2023.

[19] See, for example with regards to same-sex orientation and the Chinese legal system, Jingshu Zhu, Straightjacket: same-sex orientation under Chinese family law – Marriage, Parenthood, Eldercare, PhD Dissertation, Leiden University, 2018.

[20] Section 2 of the IXth Congress at The Hague, 1964 dealt with "Offences against the family and sexual morality" and was very much a sign of its times. The Resolutions of this section called for a decriminalisation of homosexuality and sexual relations out of marriage.

[21] For a comparative analysis of decriminalization of same-sex sexual acts, see: Achim Hildebrandt, Routes to decriminalization: A comparative analysis of the legalization of same-sex sexual acts, Sexualities, 2014.

[22] The European Fundamental Rights Agency has published country reports on the protection against discrimination on grounds of sexual orientation, gender identity and sex characteristics in the EU. Each country report contains a section dedicated to the protection provided by means of criminal law. The reports are available here: https://fra.europa.eu/en/publication/2015/protection-against-discrimination-grounds-sexual-orientation-gender-identity-and#country-related.

in connection to the identity of the victim. There is a call for criminalising feminicide,[23] the Istanbul Convention specifically criminalises conduct in the domestic sphere,[24] and the metoo-outcry also voiced a need for legal steps. Did states criminalise metoo-conduct and how did they do so?[25] Another variety is that already existing provisions on violence, insults, intimidation, murder, and rape are supplemented with an aggravated circumstance when the perpetrator committed the offence with the specific intent to victimise somebody because of their identity. It might also mean that states must do more to combat gender-based sexual violence.[26] We need to know how the various legal systems have done this.[27] Which groups are protected? Who determines,[28] and how, what groups may be recognised and if somebody belongs to a group? How was the protective shield shaped? Were general tools used or were specific offences created? What are the experiences, what are the debates on the use of criminal law as a protective tool for specific identities? However, this is not the only way to look at gender and identity.

The *criminalising perspective* on gender and identity tries to use criminal law as a means to prevent and punish claims for gender and identity other than the mainstream ones. This perspective demonstrates a view on morality and does not regard identity as something to be determined by the individuals themselves. States taking this perspective may punish people who are engaged in sexual activity outside the norm permitted by the state as this is considered to be morally wrong.[29] These states seem to be motivated by protecting children and family values as well as national and/or religious identity. This may be expressed by criminalising the dissemination of information on (trans-)gender and sexual identity, prohibiting public gatherings or closing down organisations,[30] non-recognition of civil status obtained under foreign law, creating LGBT-free zones, criminalising sexual activity other than hetero.[31] As we do know that showing your identity may trigger violence, some states

[23] Isabelle Dianne Gibson Fereira, Histórias Interrompidas. A Necessidade da Incorporação da Perspectiva de Gênero nos Processos de Feminicídios nos Tribunais do Júri, Editora Dialéctica, São Paulo 2022.

[24] Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, CETS no. 210, Istanbul 11 May 2011. The convention sparks emotions and opinions. Whilst Turkey hosted the conference leading to the convention that was signed in Istanbul, it withdrew from the convention in 2021. Available at: https://www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=210&codeNature=10&codePays=TUR.

[25] For an analysis of the #MeToo-movement in the United States and Germany see Tatjana Hörnle, Evaluating #MeToo: The Perspective of Criminal Law Theory, German Law Journal, 2021. See also by the same author The Challenges of Designing Sexual Assault Law, Current Legal Problems, 2024.

[26] ECtHR 13 February 2024, X v. Greece, (no. 38588/21), par. 85-90.

[27] An interesting example of how states deal with this issue are public admissions of responsibility and laws providing for reparations for past discrimination. For example, the French parliament is currently discussing a bill recognizing (and providing reparations for) the harm suffered by homosexual people due to the discriminatory laws in force in France from 1942 to 1982 (which introduced the crime of "homosexuality"). See Sénat, Propositions de loi Personnes condamnées pour homosexualité entre 1945 et 1982, Texte n° 403 (2023-2024). Available here: https://www.senat.fr/dossier-legislatif/ppl21-864.html

[28] Is this done objectively, or through the lens of the perpetrator or of the victim?

[29] For a list of anti-LGBT laws by country (laws that outlaw same-sex relations, as well as laws that criminalize forms of gender expression), see: Human Rights Watch, #OUTLAWED"THE LOVE THAT DARE NOT SPEAK ITS NAME". Available at: https://features.hrw.org/features/features/lgbt_laws/.

[30] E.g. Russian Supreme Court decision of 30 November 2023, labeling the "international LGBT public movement" as extremist. Available at: https://www.theguardian.com/world/2023/nov/30/russia-supreme-court-outlaws-lgbt-movement

[31] Providing an overview of possible applications of criminal law to sexuality and reproduction: Amnesty International, Body Politics, POL 40/7763/2018. Available at: https://www.amnesty.org/en/wp-

may have created exonerations (either in practice or formally) for those who commit violence against people with a different identity.[32] How do states do this? Who determines, and how, what groups may be recognised and if somebody belongs to a group? What selections have been made? To what extent have states created specific offences on gender and identity? Do states have offences or penalties that apply only to (conduct committed by) certain gender and not to another (e.g. abortion, sterilisation, genital mutilation)?

These rather opposing views: criminalisation versus protection will provoke a debate on the justification for criminalisation. As a result, a clear link exists with the themes of section 1, who will deal with the role of criminal law more in general.

Section 3. Rule of Law and the Independence of the Criminal Justice System

Section 3 will examine the criminal justice system in terms of its capacity of maintaining the rule of law and the independence of the judiciary. In the classical trias politica theory of Montesquieu, the legislative, executive, and judicial powers are recognized and distinguished. It is understood that these separation of powers creates a system of checks and balances that allow a state to function properly. Most states in the world in principle subscribe to the need to separate the powers of the state. However, no state is able to evade all potential overlap between the powers and major differences may be noted among countries on how they exactly implement the division of powers.

The focus of Section 3 is on what this means for the criminal justice system with a specific attention for maintaining the rule of law and respecting the independence of the judiciary. For the United Nations: "the rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency".[33]

In the context of the criminal justice system it means that criminal offences are being investigated and prosecuted, and that sentences are being executed, regardless of who is the accused or the victim. In this context it has the element of equal justice for all. We need to know what states do to create the circumstances that their criminal justice systems can

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content/uploads/2021/05/POL4077632018ENGLISH.pdf. On the lack of sexual orientation, gender identity, and gender as protected grounds under hate speech law in Poland: Piotr Godzisz, Dorota Pudzianowska, Do Some Identities Deserve More Protection than Others? the Case of Anti-lgbt Hate Crime Laws in Poland, in Jennifer Schweppe and Mark Austin Walters (eds), The Globalization of Hate: Internationalizing Hate Crime?, Oxford Academic, 2016.

[32] When addressing the Penal Congress of the AIDP-IAPL at the Vatican in 2019, Pope Francis spoke out against the persecution of Jews, gypsies, persons with a homosexual orientation. Available at: https://www.vatican.va/content/francesco/en/speeches/2019/november/documents/papa-francesco_20191115_diritto-penale.html.

[33] United Nations, What is the Rule of Law. Available at: https://www.un.org/ruleoflaw/what-is-the-rule-of-law/.

maintain the rule of law. How do they make sure that decisions on investigations and prosecutions are taken on objective criteria?[34] How do they prevent that corruption or intimidation may affect the rule of law?

Some criminal organisations are so powerful that they may intimidate or pressure the government, parliament or authorities in the criminal justice system to take or not undertake certain steps. In Nigeria, kidnapping of judges and asking ransom occurs quite regularly;[35] in Pakistan, family members of judges may be kidnapped.[36] In 2016 Jo Cox, a member of the United Kingdom House of Commons was shot;[37] in July 2021 journalist Peter R. de Vries was murdered in Amsterdam;[38] witnesses or jurors may be intimidated, kidnapped, and killed. To what extent does parliament interfere with decisions taken by the prosecution to (not) prosecute and what charges are brought? All of these situations may lead to pressure.

Apart from the more general situation of the rule of law, the independence of the judiciary may be under threat.[39] One of the pillars of the trias politica is that judges are independent and impartial.[40] This means that they must be able to work without any pressure from outside. Recently, several examples can be identified in which the state interferes with the independence in the process of selection and appointment of judges (e.g., the US president nominating Supreme Court judges), the creation of a disciplinary chamber,[41] detaining judges,[42] issuing an arrest warrant to judges and prosecutors.[43] As many systems apply juries or mixed panels as a trier of fact in criminal proceedings, it is necessary to zoom in

[34] When it comes to decisions to prosecute, states may either apply the principle of mandatory prosecution (legality) or give discretion to the prosecution (opportunity). How does this play out in their effects to maintain the rule of law?

[35] The Cable, The kidnap of Justice Joy Isaiah Unwana, 22 December 2023, Available at: https://www.thecable.ng/the-kidnap-of-justice-joy-isaiah-unwana.

[36] Aljazeera, Pakistan: Awais Ali Shah, son of top judge, kidnapped, 21 June 2016. Available at: https://www.aljazeera.com/news/2016/6/21/pakistan-awais-ali-shah-son-of-top-judge-kidnapped.

[37] BBC, Labour MP Jo Cox 'murdered for political cause', 14 November 2016. Available at: https://www.bbc.com/news/uk-37978582.

[38] NOS, Misdaadverslaggever Peter R. de Vries neergeschoten in Amsterdam, 6 July 2016. Available at: https://nos.nl/collectie/13868/artikel/2388227-misdaadverslaggever-peter-r-de-vries-neergeschoten-in-amsterdam.

[39] See the worrying reports of the European Network of Councils for the Judiciary: Indicators Independence, Accountability and Quality of the Judiciary, Reenforcing judicial protection ENCJ Report 2022-2023. Available at: https://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-encj2017-p/GA%20Ljubljana/ENCJ%20Report%20Indicators%20IAQ%202022-2023%2025%20May%202023%20with%20links.pdf. See also Open Justice Initiative, Promoting Prosecutorial Accountability, Independence and Effectiveness. Comparative research, 2008. Available at: https://www.justiceinitiative.org/uploads/f3b388fc-c2cc-401a-98e5-9423ccee0e0d/promoting_20090217.pdf; Frans van Dijk and Geoffrey Vos, A Method for Assessment of the Independence and Accountability of the Judiciary, International Journal for Court Administration, 2018.

[40] See *inter alia* Theodor Meron, Judicial Independence and Impartiality, in Standing Up for Justice: The Challenges of Trying Atrocity Crimes, Oxford Academic, 2011, p. 116-142.

[41] See in Poland the Ustawa o Sądzie Najwyższym (Law on the Supreme Court) of 8 December 2017 (Dz. U. of 2018, heading 5, as amended) ('2017 Law on the Supreme Court') which entered into force on 3 April 2018 and established a disciplinary chamber at the Supreme Court.

[42] ICTY Judge Aydin Sefa Akay was arrested and detained in Turkey. See ICTY Appeals Chamber, 31 January 2017, Order to the Government of the Republic of Turkey for the Release of Judge Aydin Sefa Akay.

[43] The Moscow Times, Russia Puts ICC President on Wanted List, 25 September 2023. Available at: https://www.themoscowtimes.com/2023/09/25/russia-puts-icc-president-on-wanted-list-a82556.

specifically at their vulnerabilities.[44] The main question here is how do legal systems protect the (individuals participating in the) criminal justice system from illegitimate interference?[45] How is the independence and the legitimacy of the criminal justice system safeguarded in the selection processes of judges, juries/lay jurors (if applicable) as well as by the selection of the adjudicating body within a court? What do systems do to protect the independence of the judiciary? How are cases assigned to judges? Is this by the ballot or are other criteria used to link a judge to a case? It is especially the context of proceedings concerning organized crime that specific rules have been adopted to make the system and the person of the judge less vulnerable. In addition to a series of security measures, proceedings may take place in closed sessions, bunkers, without the public being present. Judges may not have their names disclosed, their faces may not be recognizable, accused and convicts of organized crime will be placed in prisons with a special regime. The question resulting from this is how criminal justice systems protect the resilience of criminal justice and its actors (judges, prosecutors, lawyers) against pressure and crimes, as well as other forms of unlawful interference.

Such measures are intriguing as they may also create a dilemma: the more is done to protect the safety and independence of the judges and to reduce threats, the less transparent and accessible the proceedings may be. How to remove judges appointed against the rule of law, without breaching the rule of law again? Such developments could potentially endanger the rule of law. That closes the circle and shows how intertwined these notions are.

One of the challenges of this theme is its delineation and limiting it to the criminal justice system. Obviously, both the rule of law and independence of the judiciary have broader ramifications and impact than for the criminal justice system only. However, in the context of our program for the coming years, we will zoom in on the specificities of these principles in the criminal context. In doing so, we will focus on procedural and policy issues rather than make in-depth analyses of the e.g. substantive criminal law to be used to combat corruption.

Section 4. Climate Change and Criminal Law

Section 4 of the Congress will examine the international implications of climate change and the dangers caused to the environment. The question of whether human behaviour has an impact on the climate is, for most, no longer an issue of whether it exists, but of the extent to which it impacts the environment, flora, fauna, and humanity and what needs to be done about it.[46] The scale at which the environment is in danger now raises the question of whether international criminal law may play a role to protect interests that go beyond the borders of

[44] Of course, this could be a most interesting topic for a more sociological study. However, for us in the AIDP-IAPL, the focus is purely on the legal aspects.

[45] For an overview of national mechanisms to ensure judicial independence, see UNODC, The main factors aimed at securing judicial independence. Available at: https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-14/key-issues/1--the-main-factors-aimed-at-securing-judicial-independence.html. For a comparative study on the independence and accountability of the public prosecutor, see Giuseppe di Federico, L'indipendenza e la responsabilità del pubblico ministero italiano in prospettiva comparata. Proposte di riforma, Diritto di Difesa, 2022.

[46] See *inter alia* the UN-IPCC, Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, H. Lee and J. Romero (eds.)], 2023, pp. 35-115.

an individual state.[47] It goes beyond what the AIDP-IAPL does to study what kind of conduct may have what kind of effects and when and where this may occur. This is something for other disciplines than law. However, criminal lawyers must take the expertise of others into account as criminal law is there to prevent and punish harm caused. Phrasing things in this way begs the question whether protecting the environment is a tenet that complies with the criminalization theories that legitimize the use of criminal law.[48] Of course, this is always a question for criminal law, but we may see that the question of what is the harm when it comes to the environment is more complex, as it may not immediately be clear whether there is even harm. In other words, we must consider the use of criminal law on potential and uncertain harm. Does this mean that we are dealing with endangerment offences per se?

The existential questions relating to whether criminal law is the appropriate means also point at the element of time between conduct and its consequences. A perpetrator leaking a substance in the sea may cause immediate damage as the substance kills various species, but this conduct may also not have a short term effect at all, but only come to the surface after decades. The *temporal element* raises interesting questions of causality. Whereas with the immediate starvation of several animals in the sea the causal link may be clear and, as a consequence, attribution of the conduct to the person leaking the substance as well, this is different when years have lapsed since the initial conduct. The more time has gone by, the higher the chance that other conduct, omission or natural causes may contribute to the realization of the damage.

In a case that nuclear waste has been dumped into the sea, it may certainly be so that at the moment of dumping the waste was in a protecting container and no radiation could leave the container. However, whilst the radiation may diminish over the years, so may the protective function of the container. This means that it might be necessary to intervene over time and renovate the protection through a new technique. Some of this may be foreseeable, as the physical effects correspond to the knowledge of science when conduct takes place. There may also be new insights establishing that what was considered to be a safe technique in the past can no longer be considered safe now. This raises questions of responsibility and blameworthiness. Does the blame go the actor initially dumping the waste into the sea, or does it lie with the person not intervening, where, with the knowledge of today, it is absolutely necessary to do so? And, by the way, who is the person that should act now? It follows that one needs to understand whether there is an intergenerational responsibility as a result of the state obligation to mitigate the consequences of climate change. Recently, the ECtHR held that there is a positive obligation for states to do so: "the State's primary duty is to adopt, and to effectively apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change. This obligation flows from the causal relationship between climate change and the enjoyment of Convention

[47] Evidence of this can be found in the fact that on 16 February 2024 the Office of the Prosecutor at the ICC announced a new policy initiative which will result in a comprehensive policy paper on environmental crimes, "aiming to ensure that it takes a systematic approach to dealing with crimes within the Court's jurisdiction committed by means of, or that result in, environmental damage". The press release is available here: https://www.icc-cpi.int/news/office-prosecutor-launches-public-consultation-new-policy-initiative-advance-accountability-0

[48] Delivering a broad discussion on the role of criminal law in the climate crisis: Helmut Satzger and Nicolai von Maltitz (eds.), Klimastrafrecht - Die Rolle von Verbots- und Sanktionsnormen im Klimaschutz, Schriften zum Klimaschutzrecht 3, Nomos, 2024.

rights, (…) and the fact that the object and purpose of the Convention, as an instrument for the protection of human rights, requires that its provisions must be interpreted and applied such as to guarantee rights that are practical and effective, not theoretical and illusory."[49]

This discussion highlights another aspect and that is the *causal element* between conduct and damage to the environment.[50] The example just given of a long term damage scenario triggers the question of how to deal with multiple causes of the consequences. Was it the dumper or the current guardian, or both? Establishing causality may be even more difficult when the harm caused is to the climate as a whole. Global warming leads to higher temperatures in various parts of the world, more often to extreme weather conditions, to melting of the ice of Antarctica and the North Pole, and to the rise of the sea level. This results in expansion of the deserts and more frequent droughts making it impossible to grow plants, in heavy rains that make rivers grow beyond their shores and destroy harvests and villages, and in the disappearance of some islands (the Maldives) and parts of low countries (Bangladesh/ the Netherlands). According to the United Nations, the main causes of climate change are: generating power, manufacturing goods, cutting down forests, using transportation, producing food, powering buildings, and consuming too much.[51] These are activities performed by many in the world, albeit on entirely different scales and dimensions. The individual conduct is so tiny that it does not cause climate change, but the joint performance of whole societies over many years does. In other words, there is a causality on a massive scale and of a multiplicity beyond imagination. What does this mean for foreseeability and blameworthiness as well as for the selection of conduct that ought to be criminalized?

These considerations show that there is a *personal element* that must be discussed. To whom can conduct be attributed? On the basis of what is individual responsibility created? Does it concern the foreseeability of a minor potential contribution to climate change, is it the knowledge that if you do not intervene in circumstances created by past generations, climate change cannot be stopped? In other words: is there responsibility for the conduct of others that may already have passed away? Most criminal justice systems will probably state that extremely remote causality and minor faults cannot establish responsibility. An example of multiple causalities for the environment would be a situation in which in 2024, captain A of a ship transporting nuclear waste through negligence loses several hundreds of containers at the high seas on a spot that they sink 7 kilometers below sea level. The nuclear sea research institution of state B reports that given the quality of the protective shield of the containers it is highly unlikely that leaking will occur in the next 75 years. However, unknown to captain A and the renown research institute of State B, exactly at the same spot State C, in the early 1920s after the First World War, had dumped mines and mustard gas that were no longer to be used. Military historian D of State C has knowledge of the 1920s dumping, but is unaware of the incident of 2024. D informs his colleague E at the Ministry for the Protection of the Environment. Her assessment is that it would be good to lift the 1920s waste, because after

[49] ECtHR, 9 April 2024, Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, (no. 53600/20), par. 545.

[50] The issue is not new in the literature. See, by way of example, Costanza Bernasconi, Il reato ambientale. Tipicità, offensività, antigiuridicità, colpevolezza, Edizioni ETS, 2003, p. 146-151; María Valeria Véase de Onetto, Delitos contra el medio ambiente. El problema de la causalidad en los delitos ambientales y su influencia en la Política Criminal ¿Protección penal del medio ambiente versus in dubio pro reo? Nueva Doctrina Penal, Editores del Puerto, 2003; Paz Mercedes de la Cuesta Aguado, Causalidad de los delitos contra el medio ambiente, Tirant lo Blanch, 1999; Erich Samson, Kausalitäts- und Zurechnungsprobleme im Umweltstrafrecht, ZStW, 1987.

[51] UN, Causes and Effects of Climate Change. Available at: https://www.un.org/en/climatechange/science/causes-effects-climate-change.

more than a hundred years leaking may occur and should the containers get near radiation an uncontrollable chemical reaction will result causing an explosion similar to atomic bombs. Minister F decides that such risks are to be ruled out and that the costs of finding the containers at such a deep sea are astronomic, also in view of the fact that his State C is located at the other side of the planet and will unlikely be affected. The multiplicity of causes may also raise questions as to whether it is individual criminal responsibility that is appropriate or whether other forms, including state responsibility, may be the way to go ahead. It relates to actions and omissions.

The last aspect of the criminal protection of the environment is the *spatial element*. Both major examples show that the consequences of conduct may be felt elsewhere. In our first example of dumping waste, the waste may have been dumped in the territorial waters of one state and over the years ended up in the territorial waters of another state or on the high seas, where the damage is felt. This raises jurisdictional questions as to which state is competent to prescribe, adjudicate and enforce. Where was the conduct committed? Can a locus delicti be determined? States may have different views on whether the location of initiative or result are essential. The cross-border aspect might also lead to a requirement of double criminality that may further complicate the debate. Concerning the example of climate change it is clear that the consequences are globally felt. What does that mean for the jurisdiction of an individual state over the conduct? Can a state claim such jurisdiction if the initial conduct did not take place on its territory and the consequences are globally felt? Should double criminality be required? Some have proposed the crime of ecocide as a new international crime to solve these questions of jurisdictional legitimacy. However, there are many subsequent choices to make.[52] One is to create criminal responsibility based on risks, as the European Law Institute has drafted in Article 3 (2) of its Proposal for a EU Directive: "ecocide means any conduct committed with intent, which may cause, or substantially contribute to causing, severe and long-term damage or severe and irreparable or irreversible damage to an ecosystem or ecosystems in the natural environment."[53] Is that the avenue to go? How foreseeable must consequences be and how much risk could we accept that new technologies may solve the problem later? The choice of the Stop Ecocide Foundation is to add an Article 8ter to the Rome Statute for the International Criminal Court: "For the purpose of this Statute, "ecocide" means unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts."[54]

[52] For an account of the most problematic profiles related to the introduction of a new ecocide crime, see Emanuela Fronza, Sancire senza sanzionare? Problemi e prospettive del nuovo crimine internazionale di ecocidio, La Legislazione Penale, 2021. On ecocide and fair labelling in the Dutch criminal system, Sjoerd Lopik, Ecocide: een fair label? De terminologie van een populaire nieuwe milieustrafbaarstelling met hooggespannen verwachtingen, Nederlands Juristenblad 2022, p. 1676-1682.

[53] European law Institute in its 2023 Report on Ecocide, Model Rules for an EU Directive and a Council Decision.

[54] Stop Ecocide Foundation, proposal prepared by The Independent Expert Panel (IEP), 2021. Available at: https://www.stopecocide.earth/legal-definition. In 2024, Belgium was the first country in Europe to recognize ecocide as an international crime based on the IEP's 2021 definition. The offense is now regulated at art. 94 of the Belgian criminal code (*Le crime d'écocide/Misdaad van ecocide*), which reads: "*De misdaad van ecocide is het opzettelijk plegen, door handelen of nalaten, van een illegale handeling, die ernstige, grootschalige en langdurige schade aan het milieu veroorzaakt, wetende dat deze handeling dergelijke schade toebrengt, voor zover deze handeling betrekking heeft op een inbreuk op federale wetgeving of internationale wetgeving die bindend is voor de federale overheid of zover de handeling niet in België kan gelokaliseerd worden*".

Section 4 may thus focus on how states currently have provided protection of the environment (beyond their national environment only) through criminal law.[55] How did they deal with the elements mentioned above? Does the system protect short term, immediate effects, or also long term effects? Is the responsibility individual or corporate or even with the state and what is the rationale to do so? Does the country provide views on whether and if so to which extent the larger environmental interest (the climate) must be protected by the international criminal justice system? What solutions or responses are given to the questions concerning causality and jurisdiction?

It is not the first time that the environment attracts the attention of the AIDP-IAPL. "The protection of the environment through penal law" was the topic for section 2 of the XIIth Hamburg Congress 1979 and in 1994, "Crimes against the environment" were discussed in Section 1 of the Penal Congress of Rio de Janeiro. Whilst the resolutions of Hamburg 1979 still show some ambivalence as to whether criminal law is the means to respond, looking at what was discussed in Rio de Janeiro, many of the things that were relevant in 1994 are still topical today. However, these congresses were held respectively 50 and 35 years ago and many circumstances have changed dramatically. This was the reason to focus on the environment at the Second AIDP World Conference in Bucharest,[56] and by the Young Penalists in 2019.[57] It is especially the urgency, the scale and the global impact that justifies a fresh attention of the AIDP-IAPL, but now with a focus on what international criminal law could mean to protect the environment. In addition, an element of evaluation must be added. What are the reasons that earlier initiatives have not come to fruition? Could it be that it is exactly the international dimension that makes steps beyond the power of individual states and that only a common international enforcement mechanism may a reasonable chance to combat environmental crime?

Conclusion

Article 2 (1) of the By-Laws of the AIDP-IAPL states as a general principle that: "It is the view of the AIDP-IAPL that criminality, its prevention and the suppression of crime must be considered from the perspectives of scientific study of the causes of crime, of the offender and of the legal safeguards for society and the offender. The AIDP-IAPL tends to promote the development of legislation and institutions with a view towards improving a more humane and efficient administration of justice".

In this statement of principle one may recognise the basic or core values that will be the focus of the activities of the association at the start of the second centenary of its existence. The association will deal with existential questions of criminal law, with the human being, the triers of fact, and the earth. In that sense, the themes of the four sections definitely have a

[55] For an analysis of the development of environmental criminal law in the EU, see Michael Faure, The Development of Environmental Criminal Law in the EU and its Member States, RECIEL 26 (2), 2017. See also Denis Solodov and Elżbieta Zębek, Environmental Criminal Enforcement in Poland and Russia: Meeting Current Challenges, Utrecht Law Review 16, 2020.

[56] José Luis de La Cuesta, Ligeia Quackelbeen, Nina Peršak and Gert Vermeulen (ed)., Protection of the Environment through Criminal Law, 87 Revue Internationale de Droit Pénal 2016, issue 1.

[57] Manuel Espinoza de los Monteros de la Parra, Antonio Gullo, Francesco Mazzacuva (ed.), The Criminal Law Protection of our Common Home, 91 Revue Internationale de Droit Pénal 2020, issue 1.

common thread and allow the association to redefine itself through its topic of studies and of research.

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