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Trials and Punishment in the Rule of Law: The Influence of the ECHR on Criminal Law and Process

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A. Introduction

There can be no denying the influence that the European Convention on Human Rights (ECHR) has had on the practice of criminal law generally and more specifically on criminal procedure law. Fairness, in particular, has exerted particular sway and has become the principal normative criterium for regulating and indeed legitimating the actions of state in its pursuit of criminal prosecutions across Europe. Equally, though, and perhaps less well recognised is the importance of the principle of legality, which acts to restrict states in the process of the attribution of criminal liability and the imposition of punishment. These notions of fairness and legality must be understood in the institutional context of a commitment to a liberal constitutional order.

The importance of the ECHR in the criminal law context reflects the significance of the European human rights project more broadly. The European Court of Human Rights (ECtHR) has taken on a dominant role in the development of international human rights law and part of the reason for its success in this regard has been its 'universalism' and focus on interpretative doctrine.[1] Notwithstanding the undeniable success and influence of the ECHR, there can be little doubt that both the ECtHR and the Convention are currently under sustained attack. This is connected to the rise of populism which has put pressure both on the integrity of the rule of law and on democracy.[2] The legitimacy of the ECtHR has been called into question both by those espousing a certain type of (legal) nationalism[3] and by those advocating a narrow, formalistic vision of the rule of law. In this regard, it is important to note that while international supervisory mechanisms, like the ECHR, do sometimes serve to restrict national democratic decision-making processes, the purpose of the Convention is ultimately to protect and uphold democracy. These challenges to the rule of law and to the authority of the ECtHR underscore the importance not just of expressing commitment to constitutionalism[4] but also to emphasising the significance both of the principles developed in the case law of the ECtHR and the values on which these are based.

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1 Robert Spano, Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity, Human Rights Law Review, 14, 2014, 487 ff; see too Tilmann Altwicker, Non-Universal Arguments under the European Convention on Human Rights, European Journal of International Law, 31, 2020, 101 ff.

2 Nicola Lacey, Populism and the Rule of Law, Annual Review of Law and Social Science, 2019, 79 ff.

3 For discussion, see Oliver Diggelmann/Sara Pangrazzi, Die Kritik an der Rechtsprechung des EGMR in»alten«Demokratien, in: Pöschl Magdalena/Wiederin Ewald (Hrsg.), Demokratie und Europäische Menschenrechtskonvention, Wien 2020.

4 See notably Susanne Baer, The Rule of-and not by any-Law. On Constitutionalism, Current Legal Problems 2018, 335; Matthias Mahlmann, Constitutionalism and the Idea of Law, in: Kassner Joshua/Starger Colin (eds), The Value and Purpose of Law. Essays in Honor of MNS Sellers, ARSP Beiheft 160, Stuttgart 2019, 187 ff.

In the criminal justice context, the ECtHR has been developing a distinct understanding of trials and punishment. This vision of criminal justice rests on notions of fairness and legality and importantly on a particular understanding of the rule of law. The task of regulating criminal proceedings in multiple jurisdictions, each with its own particular legal and cultural tradition, is without doubt a challenging one. It is unsurprising, then, that the ECtHR has, on occasion, encountered resistance from domestic courts.[5] Less well recognised, though, is the real potential that the ECtHR's approach provides for theorising about criminal law and procedure. In this regard, the case law of the ECtHR is of particular significance not just because of its contribution to the development of normative, prescriptive principles but also because in developing these principles it has been forced to engage deeply with criminal justice as an empirical phenomenon.

The vision of criminal justice which is critiqued and legitimised in the case law of the ECtHR is rooted in actual practice. In this sense, the foundation of the ECtHR's normative vision differs significantly from other theoretical accounts of criminal law and process, which are sometimes criticised for failing to engage sufficiently with the realities of criminal justice. The failure to take seriously the importance of the definition or conceptualisation of key notions, notions such as 'criminal offence', 'punishment', or 'proceedings', is clearly of methodological relevance. There is not infrequently a sense that practices are 'answering to the theory and not the other way around'; that such theories are based on a type of 'aspirational' (as opposed to 'rational'[6]) reconstruction of the social practice of crime and punishment.[7] This in turn gives rise to important questions about the purpose of theorising, at least to the extent that the purpose of such theories is to be understood as orientated towards the goals of explanation and justification. In the words of Lacey: 'What is at issue here is the relationship between a theory and the phenomena that it seems to present, rationalise or justify.'[8]

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5 Eg *R v Horncastle (and others)* [2009] UKSC 14; *Al-Khawaja and Tahery v United Kingdom* [GC], nos 26766/05 and 22228/06, ECHR 2011; *Al-Khawaja and Tahery v United Kingdom*, nos 26766/05 and 22228/06, 20 January 2009; *Hutchinson v United Kingdom*, no 57592/08, 3 February 2005, *Hutchinson v United Kingdom* [GC], no 57592/08, ECHR 2017; *Von Hannover v Germany*, no 59320/00, ECHR 2004-VI; *Von Hannover* v *Germany (No 2)* [GC], nos 40660/08 and 60641/08, ECHR 2012; *von Hannover v Germany (No 3)*, no 8772/10, 19 September 2013; *VgT Verein gegen Tierfabriken v Switzerland*, no 24699/94, ECHR 2001-VI; *Verein gegen Tierfabriken v Switzerland (No 2)* [GC], no 32772/02, 30 June 2009; *Khoroshenko v Russia* [GC], no 41418/94, ECHR 2015.

6 See Neil MacCormick, Reconstruction after Deconstruction: A Response to CLS, Oxford Journal of Legal Studies, 10, 1990, 539.

7 Nicola Lacey, Approaching or Rethinking the Realm of Criminal Law, Criminal Law and Philosophy, 14, 2020, 307, 310-11: 'this method is characterized by a certain circularity and a lack of clarity about the precise balance between explanation, rationalisation, and prescription'.

8 Lacey (Fn. 7), 313. See also Matthias Mahlmann, Ethics, Law and the Challenge of Cognitive Science, German Law Journal 2007, 577, 578: 'No causal explanation of any kind will be

The disinclination of some theorists to engage with a conceptualisation of criminal law as an institutional practice formed by historical contingencies[9] seems to be due in part to worries that to focus on a particular time and place represents some sort of unnecessary parochialism or relativism.[10] This goes to the very heart of the point of theorising about criminal law and justice. Antony Duff puts it like this: '[S]hould theorists aspire to an a priori-ahistorical, a-geographical, a-contextual-theory of "the criminal law" as such: to, for instance, an account of the concept of criminal law, or of the metaphysical character of criminal law, or of the proper principles and aims of criminal law, that applies to all systems of criminal law whenever and wherever they exist? Or should we aspire only, more modestly, to an account of criminal law as it is or should be in some more local time and place (and if so, just how local must our account be)?'[11]

To some extent, though, the law of the ECHR challenges this dichotomy between universalism and parochialism, precisely because the ECtHR has been developing a normative account of criminal justice which is firmly located in actual practice(s), but which, in view of the different legal cultures and traditions, is necessarily broader than national socio-legal accounts of criminal law and process. In this sense, the ECtHR might be seen to be developing prescriptive principles which are of broader (if not necessarily of 'universal') application, but which are able, indeed which are forced to be able, to take account of the changing regulatory priorities of the modern criminal justice system in seeking explain, legitimise and justify criminal law, punishment and process.

It is common in much of the writing on the ECHR and criminal justice for the focus to lie on the normative values at stake – values such a legality, liberty or fairness. While understandable, this focus overshadows the importance of the criminal processes themselves in the normative undertaking – notions such as hearings or punishment. A proper understanding of the relevance of the

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successful if careful attention is not paid to the descriptive determination of the properties of the entity explained.›

9 There are, of course, a number of important exceptions, see, in particular: Lindsay Farmer, Criminal Wrongs in Historical Perspective, in: Duff RA/Farmer Lindsay/Marshall Sandra E/Renzo Massimo/Tadros Victor (eds), The Boundaries of the Criminal Law, Oxford 2011; Lindsay Farmer, Making the Modern Criminal Law: Criminalization and Civil Order, Oxford 2016; Nicola Lacey, In Search of the Responsible Subject: History, Philosophy and the Social Sciences in Criminal Law Theory, Modern Law Review 64, 2001; Nicola Lacey, 'Historicising Criminalisation: Conceptual and Empirical Issues', Modern Law Review 72, 2009; Nicolas Lacey, In Search of Criminal Responsibility: Ideas, Interests, and Institutions, Oxford 2016; Alan W Norrie, Crime, Reason and History: A Critical Introduction to Criminal Law, 3rd edn, Cambridge 2014.

10 Farmer, Making the Modern (Fn. 9), 116 addresses these concerns directly noting that the fact that while 'in each of the periods examined the form of the law can be linked to specific issues of civil order, to the form of the state, to ideas about individual agency, and so on … this should not be read as an invitation to relativism or moral vacuity'.

11 RA Duff, Theorizing Criminal Law: a 25th Anniversary Essay, Oxford Journal of Legal Studies, 25, 2005, 353, 353.

ECHR for the criminal law must take into account the manner in which notions such as 'fair trials or 'justified punishment' are conceptualised as a whole. We can only understand the importance of the ECtHR's normative project by taking proper account of the process which it sets out to justify and to some extent explain. At the same time, theories of the criminal law and procedure ought to be able to account for the processes and practices, which appear regularly in the case law of the ECtHR.

This article sets out, then, to examine the importance of the ECHR in both criminal law theory and practice. It seeks to make both a methodological argument about theorising about criminal law and procedure and a more substantive point regarding the principles and values underpinning the commitment to trial and punishment in the rule of law. In order to do this, it will first consider the manner in which the phenomena of the criminal justice process are captured in the ECtHR's conceptualisation of 'fair trials' and 'justified punishment' before going on consider the relevance of this understanding of the regulation of the criminal process and punishment for theory and practice.

B. Fair 'Trials'

I. Introduction

The criminal trial may lie at the heart of the criminal process in the public imagination but the reality of the criminal process in Europe – and indeed the USA – is radically different. Only a tiny fraction of criminal cases proceeds to trial; the vast majority are concluded by way of a plea bargain or some other form of summary justice.[12] The trial nevertheless continues to occupy a central role in criminal law theorising.[13] It also sits at the centre of the human rights regulation of criminal proceedings. Article 6(1) ECHR is entitled the 'right to a fair trial',[14] while the text of the provision refers to the right to a fair and public 'hearing' before an independent and impartial tribunal. There can be little doubt that 'trials cast a long shadow over the whole criminal process'.[15]

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12 Richard Lippke, The Ethics of Plea Bargaining, New York 2011; Marc Thommen, Kurzer Prozess/fairer Prozess? Strafbefehls- und abgekürzte Verfahren zwischen Effizienz und Gerechtigkeit, Bern 2013; Felix Bommer, Abgekürztes Verfahren und Plea Bargaining im Vergleich, ZSR 128, 2009 II, 5–124.

13 RA Duff, The Realm of the Criminal Law, Oxford 2018, 35 ff.

14 Although it should be noted that the title was added subsequently by Protocol No 11 and was not intended to substantively alter the scope of the provision, Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby (ETS No 155)

15 RA Duff/Lindsay Farmer/Sandra E Marshall/Victor Tadros, The Trial on Trial 3: Towards a Normative Theory of the Criminal Trial, Oxford 2007, 8: 'In this particular context, it is worth emphasising that when defendants engage in a plea bargain, their bargaining power will be in large part determined by the likely consequences of going to trial. Ensuring that trials

The principal point of reference for the ECtHR in developing its notion of fairness is without doubt the trial. This is particularly evident in relation to the challenges faced in regulating the pre-trial or investigative phases of the proceedings. The regulation of the investigation is very much orientated towards ensuring the fairness of subsequent trial proceedings. Equally, though, the ECtHR has had to consider whether other types of proceedings, which might be said to involve the determination of a criminal charge, are compatible with the idea of the right to a fair trial. In particular, the autonomous definition of 'criminal charge' in Article 6 ECHR[16] has led the ECtHR to class some matters, deemed in national law to have administrative or regulatory character, as essentially criminal in nature for the purposes of Article 6(1) ECHR. It has also had to examine the compatibility of plea-bargaining proceedings with its notion of fairness.

These other types of proceedings might be understood to challenge the idea of the trial as the pinnacle of criminal proceedings. At the same time, they give rise to the question whether a 'universal' notion of fairness can be developed, which is separate from the procedures to which it is to be applied. In order to examine these issues, it is useful to first outline briefly the understanding of fairness as defence rights in Article 6(1) ECHR before going on to consider the manner in which criminal proceedings are conceptualised in the case law. This will provide the basis for considering the importance not just of fairness but of the conceptualisation of 'fair trials' in theory and practice.

II. Fairness

1. Some General Observations on the Notion of Fairness in Article 6 ECHR

It would not be an overstatement to claim that the regulation of criminal proceedings in Europe has been revolutionised by the common commitment to the right to a fair trial as guaranteed by Article 6 ECHR. The provision states that in the 'determination' of a 'criminal charge', the accused is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law and to be 'presumed innocent until proven guilty according to law'. The concept of fairness in the first paragraph is provided further elucidation in the context of criminal proceedings in the third paragraph which refers to a number of 'minimum rights' which are to be upheld. The accused are to be informed promptly, in a language which they understand and in detail, of the nature and cause of the accusation against them; to have adequate time and facilities for the preparation of the defence; to have the right to defend them-

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are fair will be a necessary if not sufficient condition for ensuring that any plea bargaining is fair. A plea bargain could not possibly be fair if the defendant was faced with the prospect of an unfair trial'.

16 *Öztürk v Germany*, 21 February 1984, Series A no 73; *Engel and Others v Netherlands*, 8 June 1976, Series A no 22.

selves in person or through legal assistance of their choosing or, if they have not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; to examine or have examined witnesses against them and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against them; and to have the free assistance of an interpreter if they cannot understand or speak the language used in court.[17]

The right to fair trial and its various constituent elements have been developed in the ECtHR's extensive case law on Article 6 ECHR.[18] It is important to note at the outset that there are (at least) two distinct notions of fairness in the provision.[19] First, the right to a 'fair hearing' as set out in Article 6(1) ECHR, which embodies *inter alia* the right to be heard and the idea of the equality of arms, and second the idea of fairness as a whole. In the early case law, this idea of fairness as a whole was mainly used to allow for a finding of a violation, even if the various specific rights in Article 6 ECHR had technically been respected. In *Barberà*, for instance, the ECtHR noted that: 'Having regard to the belated transfer of the applicants from Barcelona to Madrid, the unexpected change in the court's membership immediately before the hearing opened, the brevity of the trial and, above all, the fact that very important pieces of evidence were not adequately adduced and discussed at the trial in the applicants' presence and under the watchful eye of the public, the Court concludes that the proceedings in question, taken as a whole, did not satisfy the requirements of a fair and public hearing.› Consequently, it held that there had been a violation of Article 6(1) ECHR.[20] The notion of 'fairness as a whole' seemed to offer additional protection to those subject to criminal proceedings rather than operating as a restriction. A violation of any of the individual components of the right to a fair trial would automatically give rise to a violation of Article 6 ECHR. In these cases, any further consideration of the fairness of the proceedings as a whole was considered to be superfluous.[21]

In its more recent case law, though, the ECtHR seems to have fundamentally redefined this idea of 'fairness as a whole' in order to allow the proceedings to be characterised as fair, in spite of evidence of clear procedural defects. In *Ibrahim and Others*, for instance, it noted somewhat confusingly that while the right

17 Art 6(3) ECHR: 'Everyone charged with a criminal offence has the following minimum rights'.

18 For consideration of the right to a fair trial in Article 6 ECHR, see in particular: Jochen A Frowein/Wolfgang Peukert, Europäische Menschenrechtskonvention. EMRK Kommentar, Kehl am Rhein 2022; Frank Meyer, Band X: EMRK, in: Wolter J (Hrsg.), Systematischer Kommentar zur Strafprozessordnung, 5. Aufl., Köln 2019; John D Jackson/Sarah J Summers, The Internationalisation of Criminal Evidence, Cambridge 2012; Stefan Trechsel, Human Rights in Criminal Proceedings, Oxford 2005.

19 Sarah J Summers, Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights, Oxford 2007, ch 4.

20 *Barberà, Messengué and Jabardo v Spain*, 6 December 1988, Series A no 146, § 89.

21 See Trechsel (Fn. 18), 86; see too *Mirilashvili v Russia*, no 6293/04, 11 December 2008, § 165.

to a fair trial in Article 6(1) ECHR was 'an unqualified right', the definition of 'what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case'. In then referred to the centrality of the importance of evaluating the 'overall fairness of the proceedings'.[22] It held that: 'Compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident, although it cannot be excluded that a specific factor may be so decisive as to enable the fairness of the trial to be assessed at an earlier stage in the proceedings'.[23]

The ECtHR held that in evaluating the 'overall fairness of the proceedings', it would take account of the minimum rights in Article 6(3) ECHR, which it characterized as 'specific aspects of the concept of a fair trial in criminal proceedings in Article 6(1)'.[24] It then held, however, that 'those minimum rights' were 'not aims in themselves: their intrinsic aim is always to contribute to ensuring the fairness of the criminal proceedings as a whole'.[25] In addition, it noted not just that in the determination of whether the proceedings as a whole had been fair, it was legitimate for the 'weight of the public interest in the investigation and punishment of the particular offence in issue' to be taken into consideration,[26] but also that 'Article 6 should not be applied in such a manner as to put disproportionate difficulties in the way of the police authorities in taking effective measures to counter terrorism or other serious crimes in discharge of their duty under Articles 2, 3 and 5(1) of the Convention to protect the right to life and the right to bodily security of members of the public'.[27] The reference at the end of this paragraph to the idea that 'public interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights'[28] seems more of an afterthought than any sort of proper reflection on the real dangers associated with this sort of approach.

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22 *Ibrahim and Others v United Kingdom* [GC], nos 50541/08, 50571/08, 50573/08, 40351, ECHR 2016, § 250, citing *Taxquet v Belgium* [GC], no 926/05, ECHR 2010, § 84; and *Schatschaschwili v Germany* [GC], no 9154/10, ECHR 2015, § 101.

23 *Ibrahim and Others v United Kingdom* [GC], nos 50541/08, 50571/08, 50573/08 and 40351, ECHR 2016, § 251.

24 *Salduz v Turkey* [GC], no 36391/02, ECHR 2008, § 50; *Gäfgen v Germany* [GC], no 22978/05, ECHR 2010, § 169; *Dvorski v Croatia* [GC], no 25703/11, ECHR 2015, § 76; and *Schatschaschwili v Germany* [GC], no 9154/10, ECHR 2015, § 100

25 See *Can v Turkey*, no 9300/81 (report), 12 July 1984, § 48; *Mayzit v Russia*, no 63378/00, 20 January 2005, § 77; *Seleznev v Russia*, no 15591/03, 26 June 2008, § 67.

26 Referring to *Jalloh v Germany* [GC], no 54810/00, ECHR 2006-IX, § 97.

27 *Sher and Others v United Kingdom*, no 5201/11, ECHR 2015, § 149.

28 *Ibrahim and Others v United Kingdom* [GC], nos 50541/08, 50571/08, 50573/08 and 40351, ECHR 2016, § 252, referring to *Jalloh v Germany* [GC], no 54810/00, ECHR 2006-IX, § 97; *Bykov v Russia* [GC], no 4378/02, 10 March 2009, § 93; and *Aleksandr Zaichenko v Russia*, no 39660/02, 18 February 2010, § 39.

These dangers are clearly illustrated by the reasoning employed by the ECtHR in this case to restrict what had previously been understood to constitute a bright-line rule on the right to assistance of counsel. The case concerned the prosecution of a number of individuals, who were charged with terrorist offences in connection with the London bombings in 2005. Three of the applicants were interviewed without having had access to a lawyer and their statements were admitted in evidence against them at trial.

The ECtHR held that restrictions on the right to legal advice might be compatible with Article 6 ECHR, providing there were compelling reasons for these restrictions on access to legal advice and that 'the overall fairness of the trial was not irretrievably prejudiced by the restriction'.[29] It then went on to suggest that even in the absence of 'compelling reasons for restricting access to legal advice', restrictions might be permissible. The suggestion that the ECtHR would 'apply a very strict scrutiny to its fairness assessment' is of little consolation here. The ECtHR accepted the Government's argument that 'the potential for loss of life on a large scale, the urgent need to obtain information on planned attacks and the severe practical constraints under which the police were operating' constituted exceptional circumstances and taken together with other factors notably the 'regulation of the restrictions in domestic law, whether the restriction was based on an individual assessment of the particular circumstances of the case and whether the restriction was temporary in nature' constituted compelling reasons for delaying the applicant's access to legal advice.[30]

It then concluded after taking into account the manner in which the restrictions were regulated in law, the discretion of the court to exclude evidence at trial on fairness grounds, the extent of other evidence and the public interest in the investigation and punishment of crime, that that notwithstanding the delay in affording the first three applicants access to legal advice and the admission at trial of statements made in the absence of legal advice, the proceedings as a whole in respect of each applicant were fair.[31]

It is important to approach this judgment carefully. The case was obviously extremely high-profile and political in nature. The applicants were accused of attempting to carry out suicide bombings in London just weeks after a similar campaign had resulted in the deaths of 52 people and injuries to hundreds more. There is no doubt that this was a challenging time for the investigating and prosecuting authorities and that uncertainty about further attacks was of central concern and impacted on the manner in which the investigation was conducted. Nevertheless, this interpretation of 'fairness as a whole' is clearly problematic and the case sets a dangerous precedent. In the context of serious

29 *Ibrahim and Others v United Kingdom* [GC], nos 50541/08, 50571/08, 50573/08 and 40351, ECHR 2016, § 265.

30 Ibid, § 277.

31 Ibid, § 294.

offences, and particularly in challenging times, it is of the utmost importance that the ECtHR stresses the commitment to human rights and the rule of law.[32] The case not only reduces the level of protection developed in the case law in relation to the right to counsel. It also threatens the coherence of the guarantee by framing fairness in terms which allow for some sort of abstract balancing exercise in individual cases between trial rights and effective investigations. The approach can be understood principally as an overt attempt to make space for instrumental, outcome-related concerns. This, though, is difficult if not impossible to reconcile with the understanding of fairness as based on protecting the autonomy of the individual in the rule of law by upholding the commitment to the right to be heard in adversarial proceedings.

2. *Fairness as Guaranteeing the Right to be Heard in Adversarial Proceedings*

The 'right to be heard' lies at the heart of the notion of fairness in Article 6 ECHR.[33] It is fundamentally connected to a specific understanding of proceedings as 'adversarial' in nature: 'The right to an adversarial trial means, in a criminal case, that … [the] defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the [prosecution].'[34] The paradigmatic vision of adversarial proceedings involves an oral, public hearing supervised by an independent and impartial judge: 'the object and purpose of Article 6 of the Convention taken as a whole show that a person charged with a criminal offence is entitled to take part in the hearing. Moreover, sub-paragraphs (c) and (d) of paragraph 3 guarantee to "everyone charged with a criminal offence" the right "to defend himself in person" and "to examine or have examined witnesses", and it is difficult to see how these rights could be exercised without the person concerned being present'.[35]

The right to be heard in this sense should be understood principally as orientated towards treating people as equals, as intelligent agents with an understanding of their own interests and with the ability to respond appropriately to the law's demands.[36] In addition, it protects a variety of instrumental interests, including accuracy, reliability, and acceptance of the verdict. It is important to

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32 See too the dissenting opinion of Judge Sájo attached to the judgment, *Ibrahim and Others v United Kingdom* [GC], nos 50541/08, 50571/08, 50573/08 and 40351, ECHR 2016.

33 See too Trechsel (Fn. 18), 89.

34 *Öcalan v Turkey* [GC], no 46221/99, ECHR 2005-IV, § 146; this has been the standard formulation for the last 30 years, see eg *Brandstetter v Austria*, judgment of 28 August 1991, Series A no 211, §§ 66–67.

35 See eg *Zana v Turkey* [GC], 25 November 1997, Reports 1997-VII, § 68.

36 See on this, in particular: Lon L Fuller, The Morality of Law, New Haven 1964, ch 2; Matthias Mahlmann, Human Dignity and Autonomy in Modern Constitutional Orders, in: Rosenfeld M/Sájo A (eds), The Oxford Handbook of Comparative Constitutional Law, Oxford

note too that the guarantee of the right to be heard is stricter in criminal cases than in civil cases.[37] This reflects recognition of the seriousness of the interference of the state in the rights of the individual criminal cases, of the role and powers of the investigation and prosecution authorities, and of the fact that the accused will likely require assistance in understanding the proceedings and responding to the prosecution case. The case law on the right to a fair trial in criminal cases is extensive. For our purposes, it is useful to consider three distinct issues which are of particular importance in supporting the right to be heard and the values on which it is based: the right to counsel, the privilege against self-incrimination and the right to waive trial rights.

The role of defence counsel has taken on particular importance and this is reflected in the fact that the rights in Article 6 ECHR are commonly characterised as 'defence rights'. Article 6 (3)(c) ECHR guarantees the right of the accused to defend oneself, to receive 'legal assistance' and under certain conditions to be afforded legal aid. As a general rule, an accused will be entitled to choose to defend him or herself, unless the interests of justice require otherwise.[38] Some countries make provision for the mandatory appointment of counsel in certain situations.[39] Providing there are relevant and sufficient grounds for this decision, this will not violate Article 6(3)(c) ECHR.[40] The right to counsel is frequently described as a 'fundamental' feature of criminal proceedings.[41] In *Beuze*, the ECtHR referred to a multitude of aims fulfilled by the right to prompt access to a lawyer, including: preventing 'miscarriages of justice' and ensuring 'equality of arms between the investigating or prosecuting authorities and the accused'; providing 'an important counterweight to the vulnerability of suspects in police custody' and 'a fundamental safeguard against coercion and ill-treatment of suspects by the police'; addressing the fact 'that the vulnerability of suspects may be amplified by increasingly complex legislation on criminal procedure, particularly with regard to the rules governing the gathering and use of evidence'; and ensuring respect for the privilege against self-incrimination and the right to remain silent'.[42]

The right was initially interpreted as guaranteeing, in the first place, the right to the assistance of counsel at trial. There was considerably less certainty as to whether the accused was entitled to be assisted by counsel during the investiga-

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2012, 385; Jeremy Waldron, How Law Protects Dignity, Cambridge Law Journal, 71, 2012, 200, 208 ff.

37 *Moreira Ferreira v Portugal (no 2)* [GC], no 19867/12, 11 July 2017, § 67; *Carmel Saliba v Malta*, no 24221/13, 29 November 2016, § 67.

38 See *Galstyan v Armenia*, no 26986/03, 15 November 2007, § 91.

39 See eg section 131 of the Swiss Code of Criminal Procedure.

40 See *Correia de Matos v Portugal* [GC], no 56402/12, 4 April 2018, § 143.

41 *Salduz v Turkey* [GC], no 56402/12, 4 April 2018, § 51; *Ibrahim and Others v United Kingdom* [GC], nos 50541/08, 50571/08, 50573/08 and 40351, ECHR 2016, § 255; *Beuze v Belgium* [GC], no 71409/10, 9 November 2018, § 123.

42 *Beuze v Belgium* [GC], no 71409/10, 9 November 2018, § 125.

tion phase of the proceedings and in particular to insist on a right to meet counsel in order to prepare, or even be assisted by counsel during, pre-trial hearings conducted by the police or the prosecution authorities. The situation changed dramatically following the judgment in *Salduz*. In this case, the ECtHR noted that the provision did not 'specify the manner of exercising this right' and thus left 'to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems'. The role of the ECtHR was to determine whether the method chosen was consistent with ensuring the 'practical and effective' exercise of the right to a fair trial'.[43] It noted that: National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings. In such circumstances, Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation.'[44] The reference here to decisive 'consequences' seems to be a reference principally to the subsequent reliance on such statements in evidence of guilt at trial. Although the right could be subject 'to restrictions for good cause', such restrictions had to be justified.[45]

It noted expressly 'the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial'[46] It also referred to the fact that 'an accused often finds himself in a particularly vulnerable position at that stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence. In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself.'[47]

It held too that the right to counsel 'presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused'.[48] It concluded that 'the rights of the accused will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.'[49] As dis-

43 *Salduz* v Turkey [GC], no 56402/12, 4 April 2018, § 51.
44 Ibid, § 52.
45 Ibid, § 52
46 Ibid, § 54 citing *Can v Austria* (report), no 9300/81, 12 July 1984, Series A no 96, § 50.
47 Salduz v Turkey [GC], no 56402/12, 4 April 2018, § 54.
48 *Jalloh v Germany* [GC], no 54810/00, ECHR 2006-IX, § 100; and *Kolu v Turkey*, no 35811/97, 2 August 2005, § 51.
49 *Salduz v Turkey* [GC], no 56402/12, 4 April 2018, § 55.

cussed above, the ECtHR rowed back from this conclusion in *Ibrahim and Others* and seemed to allow for the use of such statements to be used in the event of compelling circumstances. For our purposes, it is important to note the connection between the aims of the right to counsel in criminal cases and those of the right to be heard. Counsel is necessary to assist the accused in presenting his or her case and as a direct response to the powers of the investigation and prosecution authorities.

There is a clear connection between the right to counsel and the privilege against self-incrimination.[50] This reflects too the relationship between the right to be heard and the right of an individual to refuse to cooperate or actively participate in the proceedings. Although not expressly mentioned in the ECHR, the right to remain silent and the privilege against self-incrimination have been referred to by the ECtHR as lying at the heart of the notion of a fair procedure under Article 6.[51] The ECtHR has explained that 'by providing the accused with protection against improper compulsion by the authorities', the guarantees contribute both to 'avoiding miscarriages of justice and to securing the aims of Article 6 ECHR'.[52] The privilege against self-incrimination is of essential importance to ensuring that individuals are treated as autonomous agents and more specifically to allowing them to present their case as they see fit in the context of adversarial proceedings. The right has been described as 'relative' in the sense that the determination of whether the very essence of the privilege against self-incrimination was violated will turn on a number of factors including, the nature and degree of compulsion; the existence of any relevant safeguards in the procedure; and the use to which any material so obtained is put.[53]

The ECtHR has recognised, too, the right of those accused of criminal offence to waive their rights, such as the right to counsel or to cross examine witnesses, or even the right to a trial altogether. The ECtHR has developed a number of principles to regulate the validity of a waiver. This reflects too the importance of treating individuals with the competence to present their defence as they see fit. It has held that the waiver of a right guaranteed by the Convention – insofar as it is permissible – must be established in an unequivocal manner'[54] and must be accompanied by 'minimum guarantees commensurate to its

50 *O'Halloran and Francis v United Kingdom* [GC], nos 15809/02 and 25624/02, ECHR 2007-VIII, § 45; *Funke v France*, 25 February 1993, Series A no 256-A, § 44.

51 The right to remain silent is not absolute, *John Murray v United Kingdom* [GC], 8 February 1996, Reports 1996-I, § 47; *Ibrahim and Others v United Kingdom* [GC], nos 50571/08 50573/08 40351/09, 13 September 2016, § 269.

52 See *John Murray v United Kingdom* [GC], 8 February 1996, Reports 1996-I, § 45; *Bykov v Russia* [GC], no 4378/02, 10 March 2009, § 92.

53 *Jalloh v Germany* [GC], 8 February 1996, Reports 1996-I, § 101; *O'Halloran and Francis v United Kingdom* [GC], nos 15809/02 and 25624/02, ECHR 2007-VIII, § 55; *Bykov v Russia* [GC], no 4378/02, 10 March 2009, § 104; *Ibrahim and Others v United Kingdom* [GC], nos 50571/08 50573/08 40351/09, 13 September 2016, § 269.

54 *Oberschlick v Austria (No 1)*, 23 May 1991, Series A no 204, § 51

importance', including in particular that it can be classed as 'voluntary'.[55] Some guarantees in Article 6 ECHR are deemed so important to the notion of a fair trial and to ensuring the effectiveness of the rest of the guarantees set forth in Article 6 – notably the right to counsel – as to 'require the special protection of the "knowing and intelligent waiver" standard.[56] In particular, it must be shown that the accused could reasonably have foreseen the consequences of his or her conduct.[57] This means, for instance, that in those cases in which a person charged with a criminal offence was not notified in person, it cannot simply be inferred that he or she waived the right to appear at the trial.[58] In addition, a waiver must not run counter to any important public interest.[59] Difficult question arise here as to whether the accused can waive certain rights, notably the right to a public trial,[60] to an impartial judge,[61] or to the assistance of an interpreter.[62] This reflects the fact that many individual rights also have an institutional component and that states have certain obligations to ensure compliance with these rights in order to uphold their commitment to the rule of law. In these types of situations, a waiver will not impact on the state's obligation to ensure that the procedural guarantees are upheld.[63]

3. A Uniformly Applicable Conception of Fairness?

The essence of the notion of fairness in Article 6 ECHR is the idea that the accused person is to be made aware of and given the opportunity to respond to the prosecution's case. Although the ECtHR notes that 'various ways are con-

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55 *Pfeifer and Plankl v Austria*, 25 Nov 1992, Series A no 227, § 37; see *Sejdovic v Italy* [GC], no 56581/00, ECHR 2006-II, § 86; *Kolu v Turkey*, no 35811/97, 2 August 2005, § 53; and *Colozza v Italy*, 12 February 1985, Series A no 89, § 28; *Pishchalnikov v Russia*, no 7025/04, 24 September 2009.

56 See *Dvorski v Croatia* [GC], no 25703/11, ECHR 2015, § 101; see *Pishchalnikov v Russia*, no 7025/04, 24 September 2009, §§ 77–79 (right to counsel cases).

57 *Hermi v Italy* [GC], no 18114/02, ECHR 2006-XII, § 74; *Jones v United Kingdom* (dec), no 30900/02, 9 Sept 2003.

58 *Colozza v Italy*, 12 February 1985, Series A no 89, § 28; *Sejdovic v Italy* [GC], no 56581/00, ECHR 2006-II, § 86.

59 *Hermi v Italy* [GC], no 18114/02, ECHR 2006-XII, § 73; *Sejdovic v Italy* [GC], no 56581/00, ECHR 2006-II, § 86; *Dvorski v Croatia* [GC], no 25703/11, ECHR 2015, § 100.

60 For discussion, see Trechsel (Fn. 18), 121–123.

61 *Pfeifer and Plankl v Austria*, 25 Nov 1992, Series A no 227, § 39 in which the ECtHR expresses doubt about whether the right to an impartial judge can be waived.

62 *Cuscani v United Kingdom*, no 32771/96, 24 September 2002, §§ 38–40, where the ECtHR ruled that the trial judge as the 'ultimate guardian' of the fairness of the proceedings had an obligation to ensure that the accused could follow the proceedings, despite the fact that defence counsel had expressly stated that they would manage without an interpreter.

63 For discussion see John Jackson/Sarah Summers, Seeking Core Fair Trial Standards across National Boundaries: Judicial Impartiality, the Prosecutorial Role and the Right to Counsel, in: Jackson John/Summers Sarah (eds), Obstacles to Fairness in Criminal Proceedings: Individual Rights and Institutional Forms, Oxford 2018.

ceivable in which national law may meet this requirement',[64] Article 6 ECHR propagates quite a distinct understanding of the context in which this must occur, namely at an adversarial, oral, public hearing before an independent and impartial judge.

Article 6 ECHR may be concerned with trials, but it is the police and investigation phase which looms large in the case law of the ECtHR. Much of the case law is concerned with determining the relationship between the investigation phase and the trial. It is well established that even if the 'primary purpose' of Article 6 in criminal proceedings is 'to ensure a fair trial by a "tribunal" competent to determine "any criminal charge"', the provision is also important in pre-trial proceedings.[65] In particular, Article 6 ECHR 'may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions'.[66] Difficult questions arise, in particular, regarding the determination of whether and under which conditions access to the various defence rights may be restricted or delayed at the earlier stages of the proceedings. The difficulties in establishing a coherent approach in this regard are exacerbated by the wide variety of different forms of regulation across the continent.

Another challenge faced by the ECtHR, which is of particular relevance in the present context, is that of ensuring the fairness of other forms of proceedings beyond 'ordinary' criminal proceedings. The ECtHR has had to consider the issue of settlement proceedings and in particular the issue of whether and under which circumstances an accused person should be able to waive the right to a trial and accept a plea agreement. It has also had to engage with the legitimacy of restrictions of the rights of the accused in the context of minor road traffic offence. Finally, the ECtHR has had to consider the regulation of administrative proceedings which involve offences not defined in national law as criminal, but which are deemed under the ECtHR's autonomous definition to constitute criminal offences for the purposes of Article 6 ECHR. Its struggle to develop a coherent approach to the regulation of these types of proceedings draws attention to the importance of considering what it is that is distinctive about criminal proceedings. Why is it necessary to develop a distinct regulatory framework for the determination of the 'criminal charge'?

64 *Öcalan v Turkey* [GC], no 46221/99, ECHR 2005-IV, § 146; this has been the standard formulation for the last 30 years, see eg *Brandstetter v Austria*, 28 August 1991, Series A no 211, §§ 66–67.

65 *Salduz v Turkey* [GC], no 36391/02, ECHR 2008, § 50.

66 *Imbrioscia v Switzerland*, 24 November 1993, Series A no 275, § 36.

III. Conceptualising Criminal Proceedings

1. Defining 'Criminal' Offences

Of central importance to the scope of application of Article 6 ECHR is consideration of whether the proceedings are to be understood as involving the determination of a 'criminal charge'. In an early case, *Engel*, the ECtHR set out the criteria which continue to regulate this matter. In this case the ECtHR staked out its case for the development of what it refers to as an 'autonomous' definition of the criminal charge.[67] It noted that if states were permitted unilaterally to determine whether the proceedings were 'criminal' in nature, 'the fundamental clauses of Articles 6 and 7 would be subordinated to the sovereign'.[68] States would be able to use the definition of criminal proceedings to control the scope of application of the guarantees of fairness and legality. This emphasises that the concern here was that a narrow definition of criminal proceedings might result in the circumvention of the right to a fair trial. In addition, allowing states to control the definition of 'criminal offence' would likely interfere with the development of a uniform standard of application across Europe.

The determination of whether proceedings are criminal in nature involves consideration first of whether the offence is classified as criminal in national law. As a rule, if the offence is considered to be criminal in domestic law that is sufficient to bring the matter within the scope of Article 6 ECHR. In this sense, the contracting states have sole competence for the positive definition of proceedings as criminal in nature. If the offence is not classed as criminal in national law, though, the ECtHR will go on to consider two further criteria.

The second criterion is the 'nature of the offence' or perhaps more accurately the character of the legal rule applied.[69] The ECtHR has referred to a variety of factors in its attempt to establish the nature of the offence. These include, whether the rule was directed at a specific group of people or the general population as a whole;[70] whether the rule can be characterised as having a punitive or deterrent character;[71] and the classification of the type of rule in the other contracting states.[72]

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67 *Engel and Others v Netherlands*, 8 June 1976, Series A no 22; see also *Gestur Jónsson and Ragnar Halldór Hall v Iceland* [GC], nos 68273/14 and 68271/14, 22 December 2020, § 75.

68 *Engel and Others v Netherlands*, 8 June 1976, Series A no 22, § 81.

69 Christoph Grabenwarter, Verfahrensgarantien in der Verwaltungsgerichtsbarkeit: eine Studie zu Artikel 6 EMRK auf der Grundlage einer rechtsvergleichenden Untersuchung der Verwaltungsgerichtsbarkeit Frankreichs, Deutschlands und Österreichs, Vienna 1997.

70 *Bendenoun v France*, 24 February 1994, Series A no 284, § 47.

71 *Öztürk v Turkey*, 21 February 1984, Series A no 73, § 53

72 Ibid, § 53; in *Weber v Switzerland*, no 3688/04, 26 July 2007, § 33, for instance, which concerned restrictions set out in the criminal procedure code on disclosing confidential information about criminal proceedings, the ECtHR noted that, 'in the great majority of Contracting States disclosure of information about an investigation still pending constitutes an act incompatible with such rules and is punishable under a variety of provisions'.

The third factor is the degree of severity of the penalty that the person concerned risks incurring. As Trechsel notes: 'The sanction incurred has a decisive importance in the sense that there is no criminal charge unless the possibility of a conviction and sentence exists.' On the other hand, the fact that an offence is not punishable by imprisonment is not by itself decisive for the purposes of the applicability of the criminal limb of Article 6. The ECtHR has stressed on numerous occasions that 'the relative lack of seriousness of the penalty at stake cannot deprive an offence of its inherently criminal character'.[73] The second and third criteria are generally treated as alternative, and not cumulative, although the ECtHR will sometimes take a cumulative approach where this is necessary in order to reach a clear conclusion.[74]

Difficulties exist here principally in separating 'criminal offences' from other types of 'offences', notably those of a disciplinary or administrative nature. In a number of cases, the ECtHR has distinguished disciplinary and criminal proceedings. A good example of the type of reasoning that the ECtHR employs is set out in *Müller-Hartburg v Austria*. In this case, the ECtHR held that disciplinary proceedings against a lawyer fell outside the scope of application of the criminal limb of Article 6 ECHR. It noted first that in domestic law, the offence of professional misconduct was disciplinary in nature. The proceedings were not 'conducted by the public prosecutor's offices and the criminal courts, but by disciplinary authorities under the supervision of the Constitutional Court.' As regards the nature of the rules, the ECtHR noted that they were not 'addressed to the general public but to the members of a professional group possessing a special status, namely practising lawyers and trainee lawyers'.[75] The ECtHR noted that the aim of the offence was 'to ensure that members of the bar comply with the specific rules governing their professional conduct' and to protect 'profession's honour and reputation and at maintaining the trust the public places in the legal profession'. As regards the severity of the sanction, 'written reprimand, a fine of up to ATS 500,000 (approximately EUR 36,000), temporary suspension of the right to practise, or striking off the register', the ECtHR noted that with the exception of the fine, 'these sanctions are typical disciplinary sanctions'. In addition, in contrast to fines in criminal proceedings fines under the Disciplinary Act did not 'attract a prison term in the event of default', as the disciplinary authorities have no power to impose deprivation of liberty. The severity of this sanction in itself was not sufficient

73 Trechsel (fn. 18); *Bimal DD v Bosnia and Herzegovina*, no 27289/17, 31 August 2021; see too *Ramos Nunes de Carvalho e Sá v Portugal* [GC], nos 55391/13, 57728/13 and 74041/13, 6 November 2018 § 122 and *Gestur Jónsson and Ragnar Halldór Hall v Iceland*, [GC], nos 68273/14 and 68271/14, 22 December 2020, § 78.

74 *Jussila v Finland* [GC], no 73053/01, ECHR 2006-XIV, §§ 30–31; *Ezeh and Connors v United Kingdom* [GC], nos 39665/98 and 40086/98, ECHR 2003-X, § 82; and *Gestur Jónsson and Ragnar Halldór Hall*, [GC], nos 68273/14 and 68271/14, 22 December 2020, §§ 77–78.

75 *Müller-Hartburg v Austria*, no 47195/06, 19 February 2013, § 44.

to bring the charges into the criminal sphere.[76] Consequently, the disciplinary proceedings against the applicant did not involve the determination of a 'criminal charge' within the meaning of Article 6(1) ECHR. This illustrates the understanding of the ECtHR of the distinctive nature of criminal proceedings as demanding particular safeguards and the importance of allowing states to have recourse to other types of proceedings, such as disciplinary proceedings without having to respect the guarantees of the criminal limb of Article 6 ECHR.[77]

It has proven more difficult to distinguish criminal and administrative-type proceedings. In an early case involving road traffic offences, *Öztürk*, the German Government argued that minor traffic violations were regulatory, not criminal in nature. It argued that whereas the purpose of the criminal law was to safeguard the 'foundations of society' and 'the rights and interests essential for the life of the community',[78] regulatory rules *(Ordnungswidrigkeiten)* were designed 'to maintain public order'. It argued that: 'As a general rule and in any event in the instant case, commission of a 'regulatory offence' did not involve a degree of ethical unworthiness such as to merit for its perpetrator the moral value-judgment of reproach *(Unwerturteil)* that characterised penal punishment *(Strafe)*.'[79] The Government drew attention to limits on the extent of coercive measures that could be imposed during the investigative phase, the fact that the fine could not be converted into a sentence of imprisonment in the event of default, and the fact that the fine was not listed in the criminal record.[80]

The ECtHR was unconvinced by these arguments. It noted that 'according to the ordinary meaning of the terms, there generally come within the ambit of the criminal law offences that make their perpetrator liable to penalties intended, inter alia, to be deterrent and usually consisting of fines and of measures depriving the person of his liberty.' In addition, it referred to the fact that: 'Whilst the latter penalty appears less burdensome in some respects than Geldstrafen, it has nonetheless retained a punitive character, which is the customary distinguishing feature of criminal penalties.' In addition, it noted that the sanction was 'directed, not towards a given group possessing a special status – in the manner, for example, of disciplinary law –, but towards all citizens in their capacity as road-users' and thus 'prescribes conduct of a certain kind and makes the resultant requirement subject to a sanction that is punitive'.[81] It held that: 'It matters little whether the legal provision contravened by Mr Öztürk is aimed at protecting the rights and interests of others or solely at meeting the demands of road traffic. These two ends are not mutually exclusive. Above all, the general character of the rule and the purpose of the penalty, being both deterrent and punitive,

76 Ibid, § 45.
77 See too Trechsel (Fn. 18), 20 ff.
78 *Öztürk v Germany*, 21 February 1984, Series A no 73, § 52.
79 Ibid.
80 Ibid.
81 Ibid, § 53.

suffice to show that the offence in question was, in terms of Article 6 of the Convention, criminal in nature'.[82]

The case law on the notion of a criminal charge suggests that rules which are punitive in nature, even if they also have a preventive element, will be considered to be criminal. The definition of the criminal charge and of the concept of a penalty are thus inherently linked.[83] In essence, there is a certain circularity here in that the determination of whether the rule is criminal turns on the answer to the determination of whether the sanction imposed for the violation of the norm is really a penalty. At the same time, as we shall see, the determination of whether a sanction is a penalty turns on whether it was imposed for a violation of a criminal offence.

2. *Different Forms of Proceedings and the Challenge of Normative Regulation*

a. *The Relationship between the Notion of the 'Criminal Charge' and the Proceedings*

Do the requirements of Article 6 ECHR apply to all proceedings involving the determination of a 'criminal charge'? The general principle is clear: the requirements of Article 6 ECHR apply to all criminal proceedings irrespective of the type of offence at issue.[84] The reality, though, is somewhat different. The ECtHR has held that the guarantees governing criminal proceedings will not necessarily apply in full in all cases. Of particular relevance in this regard are those offences, which 'do not belong to the traditional categories of criminal law'.[85] This typically involves offences, which the ECtHR has found to fall within the scope of Article 6 ECHR despite the fact that they are not classed as criminal in nature in national law. The ECtHR's insistence on an autonomous notion of the criminal charge, and its refusal to allow punitive regulatory or administrative offences to be classed as falling 'outside the scope of the criminal limb of Article 6 ECHR',[86] give rise to difficult questions regarding the regulation of these types of proceedings. In short, the commitment to an autonomous definition of the criminal charge has put pressure on the notion of the uniform normative regulation of criminal proceedings.

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82 Ibid.

83 See *GIEM Srl and Others v Italy* [GC], App nos 1828/06, 34163/07 and 19029/11, 28 June 2018, joint party dissenting, partly concurring opinion of Judges Spano and Lemmens, attached to the judgment, § 17.

84 See eg *Neguleschu v Romania*, no 11230/12, 16 February 2021, §§ 39–42; *Bulgia v Romania*, no 22003/12, 16 February 2021, §§ 41–44; *Ibrahim and Others v United Kingdom* [GC], nos 50571/08 50573/08 and 40351/09, 13 September 2016, § 252.

85 *Jussila v Finland* [GC], no 73053/01, ECHR 2006-XIV, § 43.

86 See notably *Öztürk v Germany*, 21 February 1984, Series A no 73 and more recently *A Menarini Diagnostics Srl v Italy*, no 43509/08, 27 September 2011.

A separate but related issue concerns the regulation of plea-bargaining proceedings and other forms of summary justice. The ECtHR has held in a long line of case that the accused is entitled to waive the right to a trial altogether and has developed separate principles for ensuring the fairness of these proceeding, which are principally tied up with ensuring the voluntariness of the waiver. The majority of these cases, though, has concerned the imposition of fines in administrative proceedings. In more recent cases, the ECtHR has had to consider the fairness of plea-bargaining proceedings, which involve 'ordinary' criminal offences. Consideration of the manner in which the ECtHR has approached the regulation of these types of proceedings allows for consideration of the meaning of the trial and its relationship to the notion of criminal law.

b. Proceedings not classed as Criminal in Domestic Law

Criminal proceedings in Europe might be viewed as sharing certain core characteristics. Typically, such proceedings are instituted following or to enable investigations conducted by the police and prosecuting authorities. These authorities are afforded a wide range of coercive powers in order to ensure that criminal investigations can be conducted effectively and efficiently.[87] These include *inter alia* powers to detain individuals, subject them to periods of covert surveillance and to conduct (invasive) searches of their person and property. The power of the state authorities in the context of these proceedings, particularly in the investigation or pre-trial phase but also at trial, is of central importance to explaining the need for procedural guarantees designed to regulate and importantly to limit the extent of interferences in the rights of those subject to these proceedings. There is recognition, in particular, of the potential for the manner in which the investigation is conducted to impact on an accused person's right to be heard at trial and the fairness of the subsequent trial more broadly. In the context of punishment, the state authorities typically have considerable powers to impose sanctions, notably imprisonment and financial penalties, which constitute serious interferences with individual rights. In short, the normative regulation of criminal proceedings has developed in direct response to the extent of the powers of the state.

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87 In this regard, it is important to note, too, that states are under a positive obligation from human rights to ensure the effective prosecution of some types of crime, see eg *MC v Bulgaria*, no 39272/98, ECHR 2003-XII; *Gäfgen v Germany* [GC], no 22978/05, ECHR 2010 and for discussion of the 'sword' and 'shield' functions of the criminal law: Françoise Tulkens, The Paradoxical Relationship between Criminal Law and Human Rights, Journal of International Criminal Justice, 9, 2011, 577; Robert Roth, Libres propos sur la subsidiarité du droit pénal, in: (eds), Aux confins du droit: Essais en l'honneur du Professeur Charles-Albert Morand, Basel 2001, 429, 437; Yves Cartuyvels, Les droits de l'homme, frein ou amplificateur de criminalisation?, in: Dumont Hélène/Ost François/Van Drooghenbroeck Sébastien (eds), La responsabilité, face cachée des droits de l'homme, Brussels 2005, 391, 439.

Criminal proceedings thus differ materially not just from civil proceedings, but also from administrative proceedings or proceedings involving financial or competition matters. These types of proceedings are typically conducted by an administrative authority. Characteristically, the administrative authorities have limited investigatory powers and will only be able to impose sanctions of a financial nature. Although the initial decision in administrative cases will usually be taken by an administrative agency, there will generally be a right of appeal against this decision to a court of law.

If an offence is not classed as criminal in domestic law, it is highly likely that it will be regulated in administrative rather than criminal proceedings. The ECtHR has thus had to consider a number of cases in which applicants complained that the prescriptive requirements governing administrative proceedings fell below the more stringent demands of criminal trials and thus violated their right to a fair trial. Difficulties have arisen in relation to the question whether the guarantees of Article 6(1) ECHR must apply in full in those cases in which the accused refuses to accept the decision of the administrative authority. Essentially, the question is whether the appeal against the administrative decision must result in the institution of 'ordinary' criminal proceedings. In this regard, issues have arisen in particular in relation to the importance of oral, adversarial hearings, the right of access to a court with full jurisdiction on both facts and law and the waiver of the right to a review by a court.

aa. The Right to an Oral, Adversarial Hearing

In an important early case on the criminal charge and the rights of accused in proceedings not classed as criminal, *Öztürk v Germany*, the ECtHR set out its approach to these matters. A fine had been imposed on the applicant in administrative proceedings. Here the ECtHR held that: 'Having regard to the large number of minor offences, notably in the sphere of road traffic, a Contracting State may have good cause for relieving its courts of the task of their prosecution and punishment. Conferring the prosecution and punishment of minor offences on administrative authorities is not inconsistent with the Convention provided that the person concerned is enabled to take any decision thus made against him before a tribunal that does offer the guarantees of Article 6'.[88] This was the received approach for many years. In more recent times, the ECtHR has issued a number of judgments which call into question the stringency of this position.

In *Jussila*, the ECtHR had to consider whether the right to a fair trial was violated by the failure to hold an oral hearing following an accused person's refusal to accept a punitive sanction imposed in administrative or regulatory proceedings. The applicant was deemed to have made errors in his tax return and

88 *Öztürk v Germany*, 21 February 1984, Series A no 73, § 56.

the tax office imposed, *inter alia*, a 10% surcharge, which amounted to around 300 Euros. The applicant appealed to the administrative court which rejected his claims in written proceedings. It held that an oral hearing was manifestly unnecessary, and he was refused leave to appeal to the supreme administrative court. The ECtHR determined that the offence was criminal in nature, relying on the fact that the tax surcharges were not intended as pecuniary compensation for damage but as a punishment to deter re-offending and thus were 'imposed by a rule whose purpose was deterrent and punitive'. The fact that the penalty was not particularly severe did not remove the matter from the scope of Article 6.[89] The ECtHR then had to consider whether the failure to hold an oral hearing violated the applicant's right to a fair trial.

The right to an oral and public hearing has consistently been held by the ECtHR to constitute a 'fundamental principle' of Article 6(1) ECHR, particularly in criminal cases at first instance.[90] The ECtHR has repeatedly held that criminal proceedings must as a general rule meet all the requirements of Article 6 ECHR and provide the accused with the right to 'have his case "heard", with the opportunity, inter alia, to give evidence in his own defence, hear the evidence against him, and examine and cross-examine the witnesses.'[91] Prior to the judgement in *Jussila*, the ECtHR had consistently held that the obligation to hold an oral hearing was mandatory in all criminal cases.[92] It had imposed a less stringent standard in civil cases, noting that the right to an oral hearing was not absolute and that in 'exceptional circumstances' it might be acceptable to dispense with the requirement of an oral hearing.[93] Examples of exceptional circumstances have included cases, 'where there are no issues of credibility or contested facts which necessitate a hearing and the courts may fairly and reasonably decide the case on the basis of the parties' submissions and other written materials'.[94]

In *Jussila*, the ECtHR held for the first time that the failure to hold an oral, public hearing in a criminal case did not constitute a violation of Article 6(1) ECHR. It framed this in terms of the importance of looking broadly at the 'overarching principle of fairness' in Article 6 ECHR[95] and affording the na-

89 *Jussila v Finland* [GC], no 73053/01, ECHR 2006-XIV, § 38.

90 See eg *Findlay v United Kingdom*, 25 February 1997, Reports 1997-I, § 79.

91 *Jussila v Finland* [GC], no 73053/01, ECHR 2006-XIV, § 40.

92 See too Trechsel (Fn. 18).

93 See notably *Håkansson and Sturesson v Sweden*, 21 February 1990, Series A no 171-A, §§ 64–66; *Fredin v Sweden (No 2)*, 23 February 1994, Series A no 283-A, §§ 21–22; *Allan Jacobsson v Sweden (No 2)*, 19 February 1998, Reports 1998-I, § 46.

94 See eg *Döry v Sweden*, no 28394/95, 12 November 2002, § 37; *Lundevall v Sweden*, no 38629/97, § 39, 12 November 2002, § 39; *Salomonsson v Sweden*, no 38978/97, 12 November 2002, § 39; *Göç v Turkey* [GC], no 36590/97, ECHR 2002-V, § 51.

95 *Jussila v Finland* [GC], no 73053/01, ECHR 2006-XIV, § para 42, citing *Pélissier and Sassi v France* [GC], no 25444/94, § 52, ECHR 1999-II, § 52 and *Sejdovic v Italy* [GC], no 56581/00, ECHR 2006-II, § 90.

tional authority sufficient scope to 'have regard to the demands of efficiency and economy'.[96] It held that while 'the requirements of a fair hearing are the most strict in the sphere of criminal law, the Court would not exclude that in the criminal sphere the nature of the issues to be dealt with before the tribunal or court may not require an oral hearing.'[97]

It then went on to make a distinction between different types of 'criminal offences', noting that: 'Notwithstanding the consideration that a certain gravity attaches to criminal proceedings, which are concerned with the allocation of criminal responsibility and the imposition of a punitive and deterrent sanction, it is self-evident that there are criminal cases which do not carry any significant degree of stigma. There are clearly "criminal charges" of differing weight.'[98] In addition, it held that the autonomous notion of the criminal charge had 'underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example administrative penalties'.[99] It concluded that: 'Tax surcharges differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency'.[100]

In deciding that the failure to hold an oral hearing in this case did not violate Article 6(1) ECHR, the ECtHR was also swayed by the fact that while Article 6 ECHR applied to the tax-surcharge proceedings, it did not apply to the dispute over the tax itself. It noted though that it: was 'not uncommon for procedures to combine the varying elements and it may not be possible to separate those parts of the proceedings which determine a "criminal charge" from those parts which do not' and thus that it had to 'consider the proceedings in issue to the extent to which they determined a "criminal charge" against the applicant, although that consideration will necessarily involve the "pure" tax assessment to a certain extent'.[101] The ECtHR noted that the applicant's reasons for requesting a hearing 'concerned in large part the validity of the tax assessment, which as such fell outside the scope of Article 6, although there was the additional question of whether the applicant's book-keeping had been so deficient as to justify a surcharge.'[102] The ECtHR concluded that 'the requirements of fairness were com-

96 *Jussila v Finland* [GC], no 73053/01, ECHR 2006-XIV, § 42, citing *Schuler-Zgraggen v Switzerland*, 24 June 1993, § 58, Series A no. 263 and noting 'that the systematic holding of hearings could be an obstacle to the particular diligence required in social security cases and ultimately prevent compliance with the reasonable-time requirement of Article 6(1) ECHR'.

97 *Jussila v Finland* [GC], no 73053/01, ECHR 2006-XIV, para 43.

98 Ibid.

99 Ibid. Referring to prison disciplinary proceedings (*Campbell and Fell v United Kingdom*, 28 June 1984, Series A no 80), customs law (*Salabiaku v France*, 7 October 1988, Series A no 141-A), competition law (*Société Stenuit v France*, 27 February 1992, Series A no 232-A), and penalties imposed by a court with jurisdiction in financial matters (*Guisset v France*, no 33933/96, ECHR 2000-IX).

100 *Jussila v Finland* [GC], no 73053/01, ECHR 2006-XIV, § 43.

101 Ibid, § 45

102 Ibid, § 46.

plied with and did not, in the particular circumstances of this case, necessitate an oral hearing'.[103]

In his dissenting opinion, Judge Loucaides, joined by Judges Zupančič and Spielmann, stated that he was 'unable to join the majority in finding that the requirement of an oral hearing could be dispensed with in this case or any other criminal case'. He noted the 'great difference' between criminal and civil proceedings, referring to the 'the attribution of criminal responsibility with the consequent stigma – a stigma which exists in any event, regardless of the severity of the relevant criminal charge, even though it may be more or less serious depending on the degree of such severity'; the 'confrontation between on the one side the State, exercising its power to enforce the criminal law, and on the other side the individual(s)'; and 'the express terms of Article 6 regarding the minimum rights of persons charged with a criminal offence, under paragraph 3 (c), (d) and (e), clearly imply that the oral hearing is an unqualified and indispensable prerequisite for a fair criminal trial'.[104]

Referring to the decision in *Jan-Åke Andersson*,[105] he noted that the right of the accused to be present in criminal proceedings and to be able to address the court was to be understood 'not only an additional guarantee that an endeavour will be made to establish the truth', but a fundamental means of ensuring that the accused was satisfied that the case has been determined by an independent and impartial and thus that justice was 'from the accused's point of view seen to be done.› He noted that the object and purpose of the right to a fair trial demanded that the person could take part in an oral hearing[106] and that the right to a fair and public hearing was a fundamental principle of democratic societies and designed to ensure that the public was 'informed and that the legal process is publicly observable.'[107]

He noted that: 'The majority in this case accept that "… a certain gravity attaches to criminal proceedings, which are concerned with the allocation of criminal responsibility and the imposition of a punitive and deterrent sanction …", but they proceed to state that "there are criminal cases which do not carry any significant degree of stigma …" and that "[t]ax surcharges [as in the present case] differ from the hard core of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency …" (see paragraph 43 of the judgment). I find it difficult, in the context of a fair trial, to distinguish, as the majority do in this case, between criminal offences belonging to the "hard core of criminal law" and others which fall outside that category. Where does one draw the line? In which category does one place

103 Ibid, § 48.
104 Ibid, § 48.
105 *Jan-Åke Andersson v Sweden* (report), no 11274/84, 15 March 1990, Series A no 212-B, §§ 48–49.
106 *Jussila v Finland* [GC], no 73053/01, ECHR 2006-XIV, § 48
107 Ibid, § 49.

those offences which on their face value do not appear severe, but if committed by a recidivist may lead to serious sanctions? I believe that the guarantees for a fair trial envisaged by Article 6 of the Convention apply to all criminal offences. Their application does not and cannot depend on whether the relevant offence is considered as being in "the hard core of the criminal law" or whether "it carries any significant stigma". For the persons concerned, whom this provision of the Convention seeks to protect, all cases have their importance. No person accused of any criminal offence should be deprived of the possibility of examining witnesses against him or of any other of the safeguards attached to an oral hearing. Moreover, to accept such distinctions would open the way to abuse and arbitrariness.

This led him to conclude that 'judicial proceedings for the application of criminal law, in respect of any offence, by the omnipotent State against individuals require, more than any other judicial proceedings, strict compliance with the requirements of Article 6 of the Convention so as to protect the accused "against the administration of justice in secret with no public scrutiny"' and thus that the failure to meet this requirement violated Article 6 ECHR.

The approach of the ECtHR here is undoubtedly problematic. It seems to make little sense to insist on the characterisation of proceedings as criminal in nature only to suggest that they are not properly criminal when considering the need for normative regulation. Even more problematic is the manner in which the issues are couched in terms of the overall fairness of the proceedings. This gives rise to clear potential for the exceptions developed in the context of regulatory offences to be extended beyond the confines of administrative proceedings to criminal offence expressly defined as such. This is well illustrated by the case of *Sancakli v Turkey.*

In *Sancakli*, the applicant was arrested and taken into the custody of the gendarmerie on suspicion of facilitating prostitution. He was indicted for failing to obey official orders by providing premises for prostitution in his hotels and sentenced by a judge at the magistrates' court in the absence of an oral hearing to an administrative fine of 100 Turkish Lira.[108] The applicant objected to the imposition of the fine; this appeal was rejected by the Assize Court. The applicant complained that the failure to hold a hearing violated his right to a fair trial. The ECtHR noted that an 'oral and public hearing' was of fundamental importance in criminal cases and that it was necessary as a general rule that the court of first instance met the requirements of Article 6 in full in the sense that the applicant had the right 'to have his case "heard", with the opportunity, inter alia, to give evidence in his own defence, to hear the evidence against him, and to examine and cross-examine the witnesses'.[109] The ECtHR held that the proceedings concerned the imposition of 'an administrative fine on the applicant, which, as

108 *Sancakli v Turkey*, no 1385/07, 15 May 2018, § 15.
109 Ibid, § 43.

such, does not belong to the traditional categories of criminal law.' It noted that while the 'proceedings at issue started with an indictment by the public prosecutor in accordance with the former legislation – which prescribed a short-term prison sentence for the offence in question – the Büyükçekmece Magistrates' Court took account of the recent legislation which entered into force only two days after the bill of indictment and sentenced the applicant to a fine of TRY 100 pursuant to section 32 of the Misdemeanours Act.'[110]

The designation of the offence and the proceedings as administrative is clearly questionable. This is emphasized too by Judge Lemmens in his dissenting opinion. He disagreed with the conclusion of the majority that the fine imposed on the applicant was 'merely an "administrative" sanction', noting that the proceedings brought against the applicant were of a '"criminal" nature and that the fine imposed was a "criminal" one'. He noted that the charges were initially brought on the basis of the criminal procedure code and sent to a criminal court. A few days later, new legislation was introduced which allowed an administrative authority to impose an administrative sanction in such cases. Interim regulation following the coming into force of the new legislation allowed for the imposition of an 'administrative' rather than 'criminal' sanction. Judge Lemmens noted that despite the terminology, the fine was not 'administrative' in nature for the purposes of Article 6 ECHR noting that the 'Convention distinguishes between, on the one hand, offences prosecuted before and punished by courts, and on the other, offences, often of a minor nature, which are prosecuted before and punished by administrative authorities'.[111]

He noted that: 'Had the fine imposed on the applicant been handed down by an administrative authority, it would have been a truly "administrative" sanction, and the Convention would then have required that the applicant could challenge that fine before a court.'[112] In the case at issue, the proceedings were entirely judicial in nature: the court examined the charges, found the applicant guilty and imposed a sanction. This led him to conclude not just that the 'only thing that was "administrative" was the name given to the sanction by domestic law' and that 'the charge was "criminal" already under the first of the Engel criteria: the proceedings in question were classified as criminal under domestic law.'

The ECtHR went on to rely on *Jussila* to hold that the obligation to hold a hearing was 'not absolute'. It expressly 'drew a parallel' with its approach in civil cases and held that the determination of whether it was possible to dispense with an oral hearing, was dependent on 'the nature of the issues to be

110 Ibid, § 48.

111 Referring to the principles established in *Öztürk v Germany*, 21 February 1984, Series A no 73, § 56.

112 Citing *Özmurat İnaat Elektrik Nakliyat Temizlik San ve Tic Ltd ti v Turkey*, no 48657/06, 28 November 2017.

dealt with by the competent court – in particular, whether these raise any question of fact or law which could not be adequately resolved on the basis of the case file'.[113] It noted that: An oral hearing may not be required where there are no issues of credibility or contested facts which necessitate an oral presentation of evidence or the cross-examination of witnesses and where the accused has been given an adequate opportunity to put forward his case in writing and to challenge the evidence against him. In this connection, it is legitimate for the national authorities to have regard to the demands of efficiency and economy'.[114] It also held that in accepting that a hearing was not necessary in the circumstances of a particular case, the Court has previously taken into account the modest sum at stake or the minor character of the offence.[115]

The ECtHR noted that the applicant objected to the lack of the oral hearing but 'did not challenge the credibility of statements given by or to the gendarmerie or request evidence to be presented and heard by the court, but merely maintained that there had not been sufficient evidence to prove that he had been aware of the prostitution.'[116] In addition, the ECtHR noted that 'the administrative fine imposed on the applicant was a modest one and did not carry a significant degree of stigma' (§ 49). It rejected the applicant's 'claim that the proceedings were of considerable personal significance to him in that they were concerned with a nefarious crime and had a negative impact on his reputation' noting that 'although the domestic court maintained in its reasoning that the applicant was found to have provided premises for prostitution in his hotel, the offence he was eventually found guilty of was failure to obey the orders of an official authority'. It noted too that administrative fines such as the one at issue were not registered in the criminal records.[117]

It was influenced too by the fact that the court had had the discretion to hold an oral hearing but that in view of the fact that the applicant had not challenged 'the credibility of statements given by or to the gendarmerie or request evidence to be presented to and heard by the domestic court, the case did not raise any factual issues'.[118] The ECtHR thus concluded that the 'domestic court was able to adequately resolve the case on the basis of the case file and therefore did not need to hold an oral hearing' and thus that there had been no violation of Article 6(1) ECHR.[119]

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113 *Sancakli v Turkey*, no 1385/07, 15 May 2018, § 45.
114 Ibid, references omitted.
115 Ibid, § 46 citing *Jussila v Finland* [GC], no 73053/01, ECHR 2006-XIV, § 48, and *Suhadolc v Slovenia* (dec), no 57655/08, 17 May 2011.
116 *Sancakli v Turkey*, no 1385/07, 15 May 2018, § 48.
117 Ibid, § 49.
118 Ibid, § 51 referring to *Hannu Lehtinen v Finland*, no 32993/02, 22 July 2008, § 48; and *Flisar v Slovenia*, no 3127/09, 29 September 2011, § 39.
119 *Sancakli v Turkey*, no 1385/07, 15 May 2018, § 52.

Judge Lemmens agreed that the obligation to hold a hearing 'was not absolute'. In particular, an oral hearing would not be required 'where there are no issues of credibility or contested facts which necessitate a hearing, and the courts may fairly and reasonably decide the case on the basis of the parties'. He disagreed, though, with the finding of the majority that the case did not concern the "hard core of criminal law". He suggested that cases 'not strictly belonging to the traditional categories of the criminal law' had led to 'a gradual broadening of the criminal head' of Article 6(1) and that they were more akin to administrative-law cases, where an administrative court reviews an administrative act.› This led him to conclude that an oral hearing was necessary. Judge Lemmens is probably correct in his characterisation of this case as falling under the first Engel scenario and as expressly criminal in nature. Nevertheless, as will be discussed below, the suggestion that different standards should apply in relation to cases on the basis of whether they are marked as criminal or not in national law is problematic.

bb. Appeal to a Court with Full Jurisdiction on Facts and Law

The ECtHR has consistently held that the body which makes the initial administrative decision need not comply with the requirements of Article 6(1) ECHR provided that this decision can be appealed to a tribunal which affords the accused the safeguards of the provision and which has full jurisdiction to examine the case.[120] In *A Menarini Diagnostics Srl*, the ECtHR seemed, however, to accept a standard of review which fell below the standard of a full review on facts and law. In this case, the applicant company had been investigated by the Italian competition authority, an independent administrative authority, for practices which violated competition law, including the participation in a price fixing cartel.[121] The authority imposed a 'dissuasive' fine on the company of 6 million Euros. The applicant company appealed against this decision arguing that the decision should be annulled, and the penalty reduced. The right of appeal was limited, however, in that the administrative court could only review the relevance and the reasoning of the administrative act but did not have the power to substitute the decision of the authority with its own decision. The ECtHR held that while the offence was not criminal according to national law, the purpose of the rules was to protect the general interests of society normally protected by criminal law.[122] It noted that the fine was essentially intended as punishment for the purpose of deterrence, was both preventive and punitive in nature and thus criminal for the purposes of Article 6(1) ECHR.[123]

120 See *Öztürk v Germany*, 21 February 1984, Series A no 73, § 56; *Schmautzer v Austria*, 23 October 1995, Series A no 328-A, § 34; *Palaoro v Austria*, 23 October 1995, Series A no 329-B, § 41; and *Pfarrmeier v Austria*, 23 October 1995, Series A no 329-C, § 38.

121 *A Menarini Diagnoistics Srl v Italy*, no 43509/08, 27 September 2011.

122 Ibid, § 40.

123 Ibid.

The ECtHR then went on to consider compliance with substantive requirements of Article 6(1) ECHR. It noted that Article 6 did not preclude the imposition of a penalty by an administrative authority, providing that this decision was subject to subsequent review by a court with full jurisdiction.[124] This meant that the court had to have the power to reverse the decision of the lower instance in all respects and in particular to have jurisdiction to consider all questions of fact and law relevant to the dispute before it.[125] It noted in this regard that only a body enjoying full jurisdiction and independence from both the executive and the parties to the proceedings could be defined as a court for the purposes of Article 6(1) ECHR.[126]

Nevertheless, the ECtHR went on to suggest that while criminal in nature, administrative or regulatory proceedings might be subject to different regulation from 'typical' criminal proceedings and still comply with Article 6 ECHR. The ECtHR put it like this: the nature of administrative proceedings may differ in several respects from the nature of criminal proceedings in the strict sense of the term. While these differences cannot relieve the Contracting States of their obligation to respect all the guarantees offered by the criminal law aspect of Article 6, they may nevertheless influence the manner in which they are applied.[127]

The ECtHR rejected the argument that the competence of the administrative courts was limited to a mere review of legality and concluded that the decision of the competition authority had been subjected to a subsequent review by judicial bodies with full jurisdiction.[128] This conclusion seems disputable. In his dissenting opinion Judge Pinto de Albuquerque noted, after reviewing the case law of the Italian courts, that the administrative courts did not exercise 'full jurisdiction' in reviewing the imposition of the sanction, noting that the administrative courts could not 'exercise powers of substitution to the point of applying their own technical assessment of the facts in place of that of the administrative authority' and thus that the crucial issue of the attribution of liability could not be reviewed by the administrative courts. Instead, the review was essentially of a purely formal nature. He noted that 'the "full" nature of jurisdiction necessarily implies its exhaustiveness. In purely logical terms, propositions which have

124 Ibid, § 59.

125 Ibid.

126 Ibid, § 61: citing inter alia *Ringeisen v Austria*, 16 July 1971, Series A no 13, § 95; *Belilos v Switzerland*, 29 April 1988, Series A no 132, § 64 and *Beaumartin v France*, 24 November 1994, Series A no 296-B, §§ 38–39.

127 See *A Menarini Diagnostics Srl v Italy*, no 43509/08, 27 September 2011, § 62: 'Par ailleurs, la Cour rappelle que la nature d'une procédure administrative peut différer, sous plusieurs aspects, de la nature d'une procédure pénale au sens strict du terme. Si ces différences ne sauraient exonérer les Etats contractants de leur obligation de respecter toutes les garanties offertes par le volet pénal de l'article 6, elles peuvent néanmoins influencer les modalités de leur application (Valico Srl.c Italie (déc), no 70074/01, CEDH 2006-II).

128 Ibid, § 67.

incompatible characteristics are contradictory. To give an example: the courts conduct a full review of the administrative decision but may not substitute their own technical findings for those of the administrative decision. According to elementary logic, only one of these propositions is true, while the other is false. In the instant case, it is the second part of the sentence cited as an example that is false.›

To the extent that the judgment can be read as interfering with the requirement of access to a court in criminal cases with full jurisdiction, there can be little doubt that it gives rise to real concerns regards the separation of powers and the lawfulness of the penalties. In the words of Judge Pinto de Albuquerque: 'The acceptance of a "pseudo criminal law" or a "two-speed criminal law" in which the administrative authorities have punitive powers over those whom they administer, sometimes imposing extremely harsh pecuniary sanctions, without the classic safeguards of criminal law and procedure being applicable, would have two inevitable consequences: the usurping by the administrative authorities of the punitive powers which are the courts' prerogative, and the capitulation of individual freedoms before an all-powerful public administration. While considerations pertaining to the efficiency and technical complexity of the modern administrative apparatus may justify the granting of punitive powers to the administrative authorities, they cannot justify giving the last word to those authorities in the exercise of those punitive powers. The moves towards decriminalisation, although welcome, must not result in a blank cheque being handed to the administrative authorities. When the procedure for imposing an administrative sanction has concluded, there needs to be a court to which members of the public can turn, without any restriction, in order to seek justice.'[129]

In view of the conclusion of the majority that the review in the case at issue constituted a full review, the case should not be understood as interfering with the fundamental idea that administrative decisions which concern criminal law must be subject to a full review on facts and law by an independent and impartial court. There can be little doubt, though, that it seems to engage with a vision of criminal law as comprising different classes of crimes.

cc. Waiver of the Right to Judicial Review of Sentence Imposed by an Administrative Authority

In a number of cases, the ECtHR has had to consider whether an accused is entitled to waive the right to a judicial review of the imposition of a sanction by an administrative authority. In *Deweer*, for instance, it noted that the 'right to a court' was 'no more absolute in criminal than in civil matters'[130] and that such

129 Ibid, dissenting opinion of Judge Pinto de Albuquerque attached to the verdict.
130 *Deweer v Belgium*, 27 Feb 1980, Series A no 35, § 49.

proceedings may serve to meet the interests of the individual and of society more broadly.[131] This led it to conclude an accused was entitled in principle to accept the imposition of an administrative fine and this could constitute a waiver of the right to ordinary criminal proceedings.[132] The ECtHR was also alert to the dangers in this regard, noting that, 'in a democratic society too great an importance attaches to the "right to a court" for its benefit to be forfeited solely by reason of the fact that an individual is a party to a settlement reached in the course of a procedure ancillary to court proceedings. In an area concerning the public order (ordre public) of the member States of the Council of Europe, any measure or decision alleged to be in breach of Article 6 calls for particularly careful review'.[133]

It held that the Contracting States had to demonstrate vigilance when assessing, *inter alia*, whether the decision to accept the fine, and thus to waive the judicial review, been made freely: 'Absence of constraint is at all events one of the conditions to be satisfied; this much is dictated by an international instrument founded on freedom and the rule of law'.[134] In the case at issue, failure to accept a settlement – a minor fine (250 euros) – would have led to the applicant's butcher shop being closed down. Under these circumstances, the ECtHR held that the waiver was tainted by constraint, noting that there was '"flagrant disproportion" between the two alternatives facing the applicant'.[135] Cases such as *Deweer* emphasise that the individual may have good reasons for accepting a plea bargain and that a waiver of an oral hearing can be understood as falling within the scope of the rights of the defence. At the same time, it clearly highlights too the crucial importance of the notion of 'access to court' in the rule of law and to the idea that criminal liability ought to be attributed and punishment imposed in oral hearings conducted by an independent and impartial judge.

c. Proceedings Classed as Criminal in National Law

aa. Road Traffic Offences

In a number of cases involving road traffic offences, the ECtHR seems to have accepted lower standards of fairness, despite the fact that the offences were classed as criminal in national law. In *Marčan v Croatia*, for instance, the applicant, who was a lawyer, was stopped by the police for allegedly dangerously overtaking another car and it established that he had inappropriate tyres on his car. He received a penalty notice (1500 HRK) for those two offences. The

131 See too the Recommendation of the Committee of Ministers of the Council of Europe on the Simplification of Criminal Justice R (87), adopted on 17 September 1987.
132 *Deweer v Belgium*, 27 Feb 1980, Series A no 35, § 49.
133 Ibid, references omitted.
134 Ibid.
135 Ibid.

applicant was questioned by a judge in court. The court later found him guilty, cautioned and fined him 500 HRK and 100 HRK costs. The applicant challenged the decision arguing that he had not had the opportunity to cross examine the police officer.

In its judgment, the ECtHR noted that 'minor road traffic offences for which the applicant was convicted, as such, do not belong to the traditional categories of criminal law to which the criminal-head guarantees of Article 6 apply with their full stringency'.[136] It noted that: 'Nevertheless, there might be instances even in the cases concerning minor offences, such as the threat of imprisonment if a fine is not paid, which could legitimately call for stronger guarantees to apply to the proceedings at issue.› But noted that in the present case there was no threat of imprisonment.[137] The case was disposed of via a summary procedure available to deal with objections against mandatory penalty notices issued by the police, with full jurisdiction to entertain questions of facts and law. Although there is no right to an adversarial trial, the trial judge has discretion to question the accused or witnesses.[138] The applicant had the opportunity to be present and argue his points in court.

The Court noted that 'the applicant was able to deny that he had committed the offences and to submit all factual and legal arguments which he considered helpful to his case, firstly in his written objection to the penalty notice by which he sought the judicial review and then during his questioning at the hearing before the Rijeka Minor Offences Court'. It concluded that it was 'unable to conclude that the minor-offence proceedings before the domestic courts fell short of the requirements of a fair trial guaranteed under Article 6 of the Convention'.[139]

Similarly, in *O'Halloran and Francis*, the ECtHR, the applicants complained about fines (£100; £750) imposed on the owner of the car for failing to state who had been driving the car at the time that it was caught speeding on a traffic camera.[140] The applicants were convicted in the magistrates' courts and complained about the violation of their right to remain silent. In holding that Article 6(1) ECHR had not been violated, the ECrHR noted that while the offences were criminal in nature, compulsion 'flowed from the fact … that [a]ll who own or drive motor cars know that by doing so they subject themselves to a regulatory regime' and were thus to 'be taken to have accepted certain responsibilities and obligations as part of the regulatory regime relating to motor vehicles, and in the legal framework of the United Kingdom these responsibilities include the obligation, in the event of suspected commission of road-traffic of-

136 *Marčan v Croatia*, no 40820/12, 10 July 2014, § 37.
137 Ibid, § 38.
138 Ibid, § 39.
139 Ibid, § 47.
140 *O'Halloran and Francis v United Kingdom* [GC], nos 15809/02 and 25624/02, ECHR 2007-VIII.

fences, to inform the authorities of the identity of the driver on that occasion'.[141] In addition, the ECtHR expressly noted ' the limited nature of the inquiry which the police were authorised to undertake', the fact that it did not sanction prolonged questioning about facts alleged to give rise to criminal offences, and that the penalty for declining to answer was 'moderate and non-custodial'.[142]

bb. Plea-Bargaining Proceedings

The ECtHR has held that the accused is entitled to choose to forego a participatory trial altogether: 'the right to a court is no more absolute in criminal than in civil matters'.[143] As we have seen, the ECtHR has accepted in the context of the imposition of fines by administrative authorities, that reaching a settlement and thus dispensing of the need for a public criminal trial might well be in the interests both of the accused and of society more generally. In such cases, fines can be imposed by administrative (as opposed to judicial) authorities, providing that the decision of the administrative authority is subject to the control of a court, which has 'full jurisdiction' in the sense of being able to adjudicate on all aspects of fact and law'.[144] The legitimacy of this process lies in the idea that the individual has chosen to accept the settlement decision and thus the focus is very much on the voluntariness of this decision.[145] It is also connected, though, to the nature of administrative proceedings, in which the authorities have lesser coercive powers than those of the police and prosecuting authorities and which only allow for the imposition of financial penalties.

The question is whether this case law on the extent of judicial supervision in administrative or regulatory settlement proceedings can be transferred analogously to cover plea-bargaining agreements in criminal proceedings. The ECtHR has insisted in the context of plea bargaining in 'normal' criminal proceedings on a stricter level of judicial supervision and has indicated that the possibility of subsequent recourse to judicial review will not suffice.

In *Natsvlishvili and Togonidze* the ECtHR conducted a rudimentary comparative study of the plea-bargaining arrangements of the contracting states[146] and concluded: 'Plea agreements leading to a criminal conviction are, without exception, reviewed by a competent court. In this sense, courts have an obligation to verify whether the plea agreement has been reached in accordance with the applicable procedural and substantive rules, whether the defendant entered into it voluntarily and knowingly, whether there is evidence supporting the guilty plea entered by the defendant and whether the terms of the agreement

141 Ibid, § 56.
142 Ibid, § 58.
143 *Deweer v Belgium*, 27 February 1980, Series A no 35, § 49.
144 *A Menarini Diagnostics Srl v Italy*, no 43509/08, 27 September 2011.
145 See *Deweer v Belgium*, 27 February 1980, Series A no 35.
146 The comparative study displays clear flaws – the Swiss system, for instance, is practically unrecognizable from the description in these paragraphs.

are appropriate'.[147] And that: 'In most countries surveyed, plea agreements are entered into by the prosecution and the defendant, and subsequently reviewed by a court. In this scenario, the courts in principle have the power to approve or reject the plea agreement but not to modify its terms. In Bulgaria courts are allowed to propose amendments to plea agreements they are requested to consider. However, such amendments need to be accepted by the defendant, the defence counsel and the prosecutor. In Germany, Romania and to some extent in the United Kingdom, the terms of the agreement are defined by the competent court (as opposed to being based on a prior agreement between the prosecution and the defence)'.[148]

The ECtHR held that 'there was not anything improper in the process of charge or sentence bargaining in itself'.[149] Nor was there anything inherently problematic about waiving procedural rights 'of his or her own free will' by accepting an 'abridged form of judicial examination'.[150] Such a waiver had to be accompanied by minimum safeguards commensurate with its importance[151] and in the context of plea-bargaining proceedings this meant that any decision to accept a bargain had to be accompanied by two conditions: (a) the bargain had to be accepted by the first applicant in full awareness of the facts of the case and the legal consequences and in a genuinely voluntary manner; and (b) the content of the bargain and the fairness of the manner in which it had been reached between the parties had to be subjected to sufficient judicial review.'[152]

This case highlights the important difference between the regulation of proceedings, depending on the powers of the state. In particular, in cases in which the accused can be subject to coercive measures during the investigation, including the possibility of being detained on remand, and in which the court has the option of imposing non-custodial sanctions, the contracting states must be considered to be under an obligation to ensure that the plea bargain is automatically reviewed by a court.

3. The Concept of 'Fair Trials' in Article 6(1) ECHR

The case law on Article 6 ECHR might be seen as falling into two broad categories: first those cases in which something went wrong in the sense that the proceedings did not meet the standards expected; and second those cases in

147 *Natsvlishvili and Togonidze*, no 9043/05, ECHR 2014, § 66.
148 Ibid, § 69.
149 Ibid, § 90 referring to *Babar Ahmad and Others v United Kingdom* (dec), nos 24027/07, 11949/08 and 36742/08, 6 July 2010.
150 *Natsvlishvili and Togonidze*, no 9043/05, ECHR 2014, § 91, referring to *Scoppola v Italy (No 2)* [GC], no 10249/03, 17 September 2009, § 135.
151 See eg *Poitrimol v France*, 23 November 1993, Series A no 277-A, § 31; and *Hermi v Italy* [GC], no 18114/02, ECHR 2006-XII, § 73.
152 *Natsvlishvili and Togonidze*, no 9043/05, ECHR 2014, § 92.

which, from a national perspective, nothing went wrong.[153] In this second group of cases, the problems stem from the fact that the standards were not met as a result of the classification of the proceedings in national law as administrative or regulatory in nature. These cases demonstrate the complexity involved in regulating different types of proceedings. They also focus attention on the importance of thinking about *why* criminal proceedings call for a distinct type of regulation and thus on the definition of the criminal offence. What is the point of classifying offences as criminal in nature? The reason is presumably to set these offences within some sort of normative framework, to make clear what kind of normative issues they raise in order to allow consideration of the kinds of justification or criticism that is appropriate.

In considering the definition of the criminal offence in Article 6(1) ECHR, some issues are worth stressing. First, states have considerable autonomy, from a procedural perspective, in respect of the designation of an offence as criminal.[154] Second, many types of conduct are considered inherently (morally) wrongful and are classed as criminal in all of the contracting states. Similarly, it is probably correct to say that there is a high degree of similarly between the contracting states in respect of the many types of regulatory offences or *mala prohibita* which are considered criminal. The definition of criminal offence in the case law of the ECtHR seems to be framed in term of culpability and punitiveness, but it is notable that these are not definitional requirements in the context of offences marked as criminal by the state. Traffic violations of the sort in *Öztürk*, for instance, might commonly be understood as criminal in nature, even if they result in the imposition of a fixed penalty which does not take the culpability of the individual into account in establishing the appropriate sentence. The definition of criminal offence might be understood as connected to some sort of intuitive response to certain types of conduct commonly regarded as criminal. This seems to be the tenor of references to consideration of the 'ordinary meaning' of the offence in determining whether it is to be understood as criminal and to consideration of whether the offences are considered in most contracting states to constitute criminal law. In any event, 'difficulties only arise in those areas which lie on the edges of the criminal law'.[155] It is thus important to stress that the complexity in regulating administrative criminal offences does not track the distinction between *mala prohibita* and *mala in se*. In this sense, references in the case law of the ECtHR to some type of differentiation between the 'hard core' of the criminal law and other 'peripheral' regulatory offences seem to miss the point.

153 See further, Trechsel (Fn. 18), 14.

154 There are of course substantive normative limits on what can be criminalised, including those set out in the case law on Articles 2, 3, 8, 10, 11, and Article 1 of Protocol No 1 ECHR.

155 Trechsel (Fn. 18), 15.

Third, the idea of some sort of differentiation in the normative standards to be applied in proceedings involving criminal offences labelled as criminal in national law and those not classed as such, on the basis that the latter fall outside the 'traditional scope of the criminal law' is difficult to reconcile with the need for an autonomous definition of the criminal offence in the first place. The insistence on the development of an autonomous definition of criminal offence clearly reflects an understanding of the importance of the creation of a distinct normative framework for all offences determined to be criminal in nature. In view of this, it makes little sense to argue that offences must be considered as criminal in order to ensure that the states cannot circumvent the application of normative standards to be applied to 'criminal offences', only then to argue that these standards need not be applied because these offences are not really to be properly understood as criminal after all.

In this regard, it is important to consider why the ECtHR has chosen to develop an autonomous notion of the criminal charge. The idea is plainly that in the determination of the criminal charge, the nature of the interference by the state in the rights of individuals is particularly profound. It might be argued that this is connected to the fact that underpinning the need for distinct regulation is the notion of criminal conduct as in some sense particularly problematic or wrongful. It is questionable 'though' whether the criminal law can be distinguished as a matter of definition on the basis of the wrongfulness of the conduct, as distinct from prescriptive claims that criminal offences should be wrongful.[156]

The nature of the state's coercive power in the criminal justice context explains the importance of ensuring that the contracting states are not able to escape their normative obligations in these types of cases by altering the definition of the criminal offence. This explains why the case law of the ECtHR is concerned solely with the argument that the definition of the criminal offence is too narrow or under-inclusive. This differs materially from much theorising about the definition of the criminal offence in punishment theory, which is often more concerned with the issue of over-inclusiveness; about the difficulties of distinguishing criminal sanctions from non-criminal sanctions imposed by the state, such as quarantine. The issue of over-inclusiveness does not arise in the human rights case law on Article 6 ECHR precisely because the marking of offences as criminal means that the proceedings automatically attract the normative guarantees of Article 6 ECHR.

156 See eg Malcolm Thorburn, Criminal Law as Public Law, in: Duff RA/Green Stuart (eds), Philosophical Foundations of the Criminal Law, Oxford 2011, 29: 'criminal wrongdoing does not track moral wrongdoing even remotely'. Equally, though, it might be questioned whether these matters can sensibly be kept apart, see eg Duff, Theorizing criminal law (Fn. 11), 354: 'One reason for doubting whether the 'is' and the 'ought' can be sharply distinguished is that in analysing the law, we are analysing a normative institution'.

The conceptualisation of fair trials in the case law of the ECtHR speaks against an understanding of criminal proceedings as designed to regulate in the first instance hard core criminal laws and only by extension other regulatory crimes. Instead, fairness is designed to operate as a normative constraint on proceedings which are either designated expressly as criminal or which must be treated on the ECtHR's definition as if they were criminal, as de facto criminal proceedings. The relevant factor here is not (principally) the stigma associated with a criminal conviction or any sort of inherent wrongfulness of the conduct, but rather the role and power of the state in the context of prosecution, the determination of culpability and the attribution of criminal liability. The prosecution and conviction of individuals in the rule of law will only be justified if those subject to criminal charges are treated in a particular way and are afforded the procedural protections designed to guarantee these values. The normative constraints on the criminal process from fairness are designed to ensure that individuals are taken seriously as autonomous individuals before the law and demand that the accused is made aware of the changes and is afforded the opportunity to respond to these in adversarial proceedings supervised by a judge.

The case law of the ECtHR suggests that the manner in which these normative principles are to be applied will depend directly on the nature of powers of the state authorities in the prosecuting criminal offences. Here different types of proceedings and competencies can be distinguished. In the context of minor offences, such as minor traffic offences, the proceedings – irrespective of whether the offences are designated as administrative or criminal in national law – will often follow a separate regulatory structure which restricts the coercive powers of the state authorities, involves standardised sanctions and limits the sanction which can be imposed to fines. The restricted competence of the state here allows for consideration of the nature of the application of the right to be heard. This explains why the ECtHR has considered it acceptable to allow the accused to accept a decision issued by a non-judicial authority and waive the right to be heard in adversarial proceedings. This implies 'of course' that the accused is entitled to reject this decision and opt instead for ordinary criminal proceedings. The essence of the autonomous definition of criminal offence is that these offences – irrespective of their designation in national law – should be subject to the same normative regulation. In this sense, judgments such as *Jussila* are simply impossible to reconcile with the normative approach inherent in Article 6 ECHR.

Not all criminal offences labelled as administrative in national law will be by definition minor in nature, as is clearly illustrated by *A Menarini Diagnostics Srl*. Nevertheless, in such cases again the administrative authorities do not have the same coercive powers as the prosecution authorities and are restricted to the imposition of financial penalties. This explains why it is appropriate to allow an accused person to determine whether to accept the fine or to proceed to a trial. Here the accused's right to waive trial proceedings and avoid the asso-

ciated financial and non-pecuniary costs associated with such proceedings is deemed to outweigh the importance of insisting on a public trial. In short, in these cases it is acceptable for the initial decision to be taken by an administrative authority, providing that the accused can insist on the institution of adversarial proceedings if he or she does not accept the decision of the authority.

This type of regulation is appropriate in the context of minor criminal offences, in which the coercive powers of the criminal justice system are considerably less substantial than in ordinary criminal proceedings and in relation to offences dealt within in the context of administrative proceedings. Plea-bargaining or criminal settlement proceedings are quite different and call for separate regulation in order to ensure that the normative demands of fairness are satisfied. The ECtHR's vision of the individual as an autonomous agent before the law suggests that the accused should be permitted to accept a settlement and waive the right to be heard in adversarial proceedings. The extent of the coercive power of the state authorities in these types of proceedings and the potential for the imposition of custodial sanctions means, though, that the initial decision on the bargain or settlement must be sanctioned by a judge and cannot be taken by an executive or administrative agency. The necessity of judicial supervision here is bolstered by the requirements of liberty and legality. According to 5(1)(a) ECHR, detention will only be lawful if imposed following conviction by a competent court. There is no space in the rule of law for any sort of waiver of the right to be lawfully detained. In addition, according to Article 7(1) ECHR, and the distinct understanding of the rule of law on which it is based,[157] criminal liability can only be attributed, and punishment only imposed, by the courts. The systematic determination of criminal charges by the prosecution without automatic judicial control or recourse to the safeguards associated with criminal proceedings is incompatible with the understanding of lawful punishment as defined by Article 7(1) ECHR and with the rule of law.[158]

IV. Relevance of the Conceptualisation of 'Fair Trials' for Theory and Practice

What relevance does the conceptualisation of fair trials in the human rights case law hold for theorising about criminal proceedings? The purpose of theories on criminal proceedings might be understood in terms of the importance of explaining or justifying the system. Here though considerable differences exist as regards the question of the extent to which theories of crime, punishment and process must engage with the realities of the criminal justice system. Some see the purpose of a normative theories not in terms of providing an account of an

157 *Del Río Prada v Spain* [GC], no 42750/09, ECHR 2013, § 77.

158 See further Sarah J Summers, Sentencing and Human Rights: The Limits on Punishment, Oxford 2022, ch 5.

existing system but rather as orientated towards the development of standards against which systems are to be measured. These normative principles can be developed independently of a detailed examination of any particular system. Others argue that only by engaging with the realities of the criminal process will it be possible to develop theories which can explain and justify that system.[159]

The approach of the ECtHR might be said to occupy something of a third way in this regard. Its conceptualisation of fair trials demonstrates both the promise and the vulnerabilities of its approach. The fact that it is forced to engage deeply with current criminal practices allows it to continually develop and reinforce commitment to the values underpinning its normative principles. In applying its fairness principles to different regulatory and procedural situations, particularly outwith the paradigmatic trial context, the ECtHR is able to develop an approach to criminal justice which takes account of the complexity of the nature of procedural forms and regulation in the modern administrative state. At the same time, though, there are clear indications in the case law of the risks of engaging with the practice of criminal justice. Of particular importance in this regard is the danger that the normative principles are sacrificed or compromised in service of the effective functioning of a particular procedural or regulatory form. The nature of the development in the case law of the ECtHR's 'fairness as a whole' doctrine is clear evidence of precisely this sort of problem in that is seems to indicate a willingness to depart from normative principles for essentially irrelevant, instrumental reasons. Similarly, cases such as *Jusilla* suggest that in certain situations, the ECtHR may demonstrate too much willingness to engage with the realities of criminal justice rather than insisting on the proper application of its normative standards.

This underscores the central importance of clearly articulating the normative principles and the values on which they are based. This focuses attention on the relationship between definition and justification and emphasises the difficulties of insisting here on a strict distinction. It seems likely that it is only possible to understand criminal proceedings by understanding – morally and politically – what they are about. To consider proceedings is necessarily to consider the questions of justice, rationality and legitimacy that they raise.[160] At the same time though, by focusing on the realities of the phenomena of criminal justice is it possible not just to develop appropriate accounts of what requires to be justified but also importantly to establish appropriate limits of relevance in practice. This can be illustrated with regard to the issue of plea-bargaining.

In the *Realm of the Criminal Law*, Antony Duff engages in the context of his development of a normative theory of trials as a process of calling to account,

159 For discussion, Duff, Theorizing Criminal Law (Fn. 11), 366; Lacey, Approaching or Rethinking (Fn. 7), 310.

160 See further Duff, Theorizing Criminal Law (Fn. 11), 355.

with the 'pervasive practice of plea bargaining' and with the argument that it might be said to have become 'so central, and pragmatically essential, to the criminal process that we can no longer see the trial as concerned either with truth or with any genuine process of calling to account'.[161] He anticipates the likely criticism of 'realists' of his decision to focus nevertheless on criminal trials noting that: 'From this point of view, the kind of theorizing in which I am engaged here is an exercise in philosophical fantasy: it amounts to the construction of castles in the air that might have their own charm, and that might be connected to features of the rhetorical superstructure of our criminal process, but that have no substantive connection either to what is actual or to what is practically feasible; such theorizing is thus useful neither as an exercise in reconstructive analysis, nor as normative theory that could speak to actual practice.'[162] Nevertheless, he defends his approach as a rational exercise, noting that we should not accept this simply as the 'new reality' of criminal law: 'This is not to say that we should (ideally) ban plea bargaining or guilty pleas – although it might suggest that we should ban any process that is properly described as 'bargaining'; but it is to say that we must ask carefully just how guilty pleas, and inducements to make them, could properly figure in a process through which alleged wrongdoers are to be called to account'.[163]

We can contrast this approach with the normative regulation proposed by the ECtHR. In *Natsvlishvili and Togonidze*, the ECtHR noted that it was a 'common feature of European criminal-justice systems for an accused to obtain the lessening of charges or receive a reduction of his or her sentence in exchange for a guilty or nolo contendere plea in advance of trial or for providing substantial cooperation with the investigative authority'.[164] It also confirmed its earlier position that there was nothing 'improper in the process of charge or sentence bargaining in itself'[165] and noted that such proceedings brought with them certain advantages: 'plea bargaining, apart from offering the important benefits of speedy adjudication of criminal cases and alleviating the workload of courts, prosecutors and lawyers, can also, if applied correctly, be a successful tool in combating corruption and organised crime and can contribute to the reduction of the number of sentences imposed and, as a result, the number of prisoners.'[166]

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161 Duff, Realm of the Criminal Law (Fn. 13), 35.

162 Duff, Realm of the Criminal Law (Fn. 13), 35.

163 Duff, Realm of the Criminal Law (Fn. 13), 36.

164 See the comparative legal study in *Natsvlishvili and Togonidze v Georgia*, no 9043/05, 29 April 2014, §§ 62–75; see also *Slavcho Kostov v Bulgaria*, no 28674/03, 27 November 2008, § 17 and *Ruciński v Poland*, no 33198/04, 20 February 2007, § 12; *Navalnyy and Ofitserov v Russia*, nos 46632/13 and 28671/14, 23 February 2016; *Scoppola v Italy (No 2)* [GC], no 10249/03, 17 September 2009, § 135.

165 *Natsvlishvili and Togonidze v Georgia*, no 9043/05, 29 April 2014, § 90: *Babar Ahmad and Others v United Kingdom* (dec), nos 24027/07, 11949/08 and 36742/08, 6 July 2010.

166 *Natsvlishvili and Togonidze v Georgia*, no 9043/05, 29 April 2014, § 90.

Acceptance of a plea-bargain was characterised as amounting to a waiver of a number of procedural rights. Although the voluntary waiver of rights is permitted,[167] the ECtHR held that it was necessary to ensure that the waiver was 'established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance. In addition, it must not run counter to any important public interest'.[168] It held that any decision to agree to a plea agreement had to be 'accompanied by the following conditions: (a) the bargain had to be accepted by the first applicant in full awareness of the facts of the case and the legal consequences and in a genuinely voluntary manner; and (b) the content of the bargain and the fairness of the manner in which it had been reached between the parties had to be subjected to sufficient judicial review'.[169]

The question here though is what constitutes sufficient judicial review? In its survey of plea-bargaining proceedings in Europe it noted that: 'Plea agreements leading to a criminal conviction are, without exception, reviewed by a competent court. In this sense, courts have an obligation to verify whether the plea agreement has been reached in accordance with the applicable procedural and substantive rules, whether the defendant entered into it voluntarily and knowingly, whether there is evidence supporting the guilty plea entered by the defendant and whether the terms of the agreement are appropriate'.[170] Does this require automatic judicial supervision or is it sufficient that the accused can appeal against the decision to a court with full jurisdiction? The importance of automatic judicial supervision of the plea-bargain is necessitated both by the extent of the powers of the police and prosecution authorities in these cases and the punishment which can be imposed. In *Natsvlishvili and Togonidze*, for instance, the first applicant was accused of embezzlement, detained on remand for many months during the initial criminal investigation before being convicted and fined.[171]

What limits does this impose in practice and what does this reading of the normative limits on plea bargaining tell us about normative theorising in the field of the criminal process more generally? We can look at this issue by briefly considering the compatibility of the Swiss law on plea-bargaining with the normative standards of Article 6 ECHR.

Plea bargaining proceedings are regulated in the criminal procedure code and preceded by the usual criminal investigation. They are of huge significance

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167 Ibid, § 91 citing *Scoppola v Italy (No 2)* [GC], no 10249/03, 17 September 2009, § 135.

168 *Natsvlishvili and Togonidze v Georgia*, no 9043/05, 29 April 2014, § 91 citing *Scoppola v Italy (no 2)* [GC], no 10249/03, 17 September 2009, §§ 135-36; *Poitrimol v France*, 23 November 1993, Series A no 277-A, § 31; and *Hermi v Italy* [GC], no 18114/02, ECHR 2006-XII, § 73.

169 *Natsvlishvili and Togonidze v Georgia*, no 9043/05, 29 April 2014, § 92.

170 Ibid, § 66.

171 Rebecca K Helm, Constrained Waiver of Trial Rights? Incentives to Plead Guilty and the Right to a Fair Trial, Journal of Law and Society, 46, 2019, 423; Lorena Bachmaier, The European Court of Human Rights on negotiated justice and coercion, European Journal of Crime, Criminal Law and Criminal Justice, 26, 2018, 236.

in practice.[172] The prosecutor is permitted to authorise a plea-bargain in cases in which a sentence of up to six months' imprisonment, a financial penalty of up to 180 daily units or a fine is appropriate.[173] The accused person has ten days to decide whether to accept the plea-bargain or to lodge an objection. The filing of an objection results in the instigation of ordinary criminal proceedings. The deadline for lodging an objection is strictly policed, and commentators have drawn attention to a number of problematic issues in this regard, in particular doubts about whether the intellectual and linguistic abilities of accused persons are sufficient to allow them to take appropriate action in a timely manner. Studies have shown that objections are lodged only in a small number of cases.[174] The consequence of this set up is that punishment is imposed in the vast majority of cases in Switzerland by a prosecutor, who certainly cannot be regarded as a judge or tribunal for the purposes of Article 6(1) ECHR.[175]

This regulatory structure seems difficult to reconcile with the normative requirements of fair proceedings in Article 6(1) ECHR. Question arise, in particular, as to whether the waiver of the right to a trial can be said in these cases to be established in an 'unequivocal manner'. In addition, in the majority of these cases there is no review of the plea-bargain, of the unequivocalness of the waiver, or of the appropriateness of the bargain by a court. These proceedings are thus incompatible with the basic understanding of the determination of the charge and the imposition of punishment as a judicial function in the rule of law. At the same time, this overview suggests that it might well be possible to develop a regulatory framework for plea bargaining proceedings which is able to meet the normative demands of Article 6(1) ECHR.

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172 According to the 2020 yearly review of the prosecutor's office of the canton of Zurich, 89.4% of all cases which were not discontinued were determined in plea bargaining proceedings, available at ‹https://www.zh.ch/de/direktion-der-justiz-und-des-innern/staatsanwaltschaft.html› (last visited 25.3.22).

173 Art 352. For discussion, see Christian Schwarzenegger, Art 352, in: Donatsch Andreas/Lieber Viktor/Summers Sarah/Wohlers Wolfgang (Hrsg.), Kommentar zur Schweizerischen Strafprozessordnung, Zürich 2020; Gwladys Gilliéron/Martin Killias, Strafbefehl und Justizirrtum: Franz Riklin hatte Recht, in: Niggli Marcel A/Hurtado-Poso José/Queloz Nicolas (Hrsg.), Festschrift für Franz Riklin, Zur Emeritierung und zugleich dem 67. Geburtstag, Zürich/Basel/Genf 2007, S. 379–398; Thomas Hansjakob, Zahlen und Fakten zum Strafbefehlsverfahren, forumpoenale 2014, 160–164; Ariane Nosetti-Kaufmann, Strafbefehl, abgekürztes Verfahren und fehlende Unmittelbarkeit: Festhalten am Status quo – eine verpasste Chance?, ZStrR 138, 2020, 248–267; Martin Schubart, Zurück zum Grossinquisitor?, Zur rechtsstaatlichen Problematik des Strafbefehls, in: Niggli Marcel A/Hurtado Pozo José/Queloz Nicolas (Hrsg.), Festschrift für Franz Riklin, Zur Emeritierung und zugleich dem 67. Geburtstag, Zürich/Basel/Genf 2007, 527–537; Thommen (Fn. 12); Bommer (Fn. 12)

174 Marc Thommen/David Eschle, Was tun wir Juristinnen und Juristen eigentlich, wenn wir forschen?, Klassische Dogmatik versus empirische Rechtsforschung als innovativer Weg, in: Meier Julia/Zurkinden Nadine/Staffler Lukas (Hrsg.), recht.innovativ, 21. Apariuz-Band, Zürich 2020, 8 ff.

175 See also in the context of Art 5(4) ECHR, Trechsel (Fn. 18), 479: 'It is obvious, for example, that a prosecutor cannot be regarded as a court', referring to a series of Turkish cases and *Varbanov v Bulgaria*, no 31365/96, ECHR 2000-X, § 60.

The point of defining the criminal offence from a human rights perspective is closely linked to an understanding of the criminal proceedings as a process in which the state has considerable power to interfere with the rights of the individual.[176] In this sense, the ECtHR's autonomous definition of the 'criminal offence' is particularly important because it emphasises that the concern is with limits rather than aims. In doing so it underscores the importance of a conceptualisation of fair trials, which engages with the empirical phenomena of the practice of criminal law.

This is certainly not to argue that only empirical accounts can provide the basis for normative theorising about constraints on actual practice, but simply to note that a robust normative theory of the criminal process can benefit from engaging with the empirical realities of criminal proceeding. In this regard it is essential, though, to clearly outline the normative commitments and the values on which they are based in order to avoid the danger of simply accepting new realities of the criminal process and shifting the normative goalposts to accommodate these practices.

C. Justified Punishment

I. Introduction

'Punishment is probably the most awful thing that modern democratic states systematically do to their own citizens'[177] and in view of this clearly calls for justification. In this regard, it should come as little surprise that the focus has been on the purpose(s) of punishment. The literature has been described as being dominated by 'a war of attrition' between the two major schools of thought.[178] While consequentialists see the justification of punishment in the likely consequences of the punishment, such as deterrence or incapacitation,[179] retributivists see punishment as a fitting response to the commission of a wrong regardless of the consequences of punishment. Retributivist views find intrinsic (rather than merely instrumental) value in the imposition of burdens on those guilty of wrongdoing.[180] In addition, some have sought to combine or reconcile

176 Lacey, Approaching or Rethinking (Fn. 7), 311: 'the distinctiveness of criminal law as a set of public co-ordinating norms in countries like England and Wales today has been shaped over time by the inter play of ideas, interests and institutions'.

177 Victor Tadros, The Ends of Harm, Oxford 2011, 1.

178 Thorburn (Fn. 156), 25.

179 See eg Cesare Beccaria, On Crimes and Punishment (first published 1766; R Bellamy ed; R Davies tr) 5th edn, Cambridge 1995; Jeremy Bentham, An Introduction to the Principles of Morals and Legislation (first published 1789; JH Burns and HLA Hart eds), London 1970.

180 See eg Immanuel Kant, Groundwork of Metaphysics of Morals (first published 1785; ed M Gregor and KJ Timmerman), Cambridge 2014; important contemporary accounts include: Michael Moore, Placing Blame: A Theory of Criminal Law, New York 1997; RA Duff, Answer-

elements of these theories in the pursuit of a robust justification of punishment.[181]

It is notable, though, that none of the theories of punishment has been able to establish itself as espousing the principal sentencing rationale in practice. As Frase notes: 'Principles of uniformity and retributive proportionality are now recognised to some extent in almost all systems, but sentences in these systems are also designed to prevent crime by means of deterrence, incapacitation and rehabilitation'.[182] The ECtHR, too, has suggested that punishment may fulfil a number of aims, referring somewhat nebulously to the 'legitimate penological grounds' for detention as including 'punishment, deterrence, public protection and rehabilitation' and noting that while many of the grounds would be 'present at the time when a life sentence is imposed', 'the balance between these justifications for detention is not necessarily static and may shift in the course of the sentence'.[183] This state of affairs clearly calls for consideration. If courts can pick and choose between sentencing aims, how will be impossible to identify the purposes of punishment? In addition, to the extent that limits are usually understood to follow from aims, the variety of sentencing aims seems to call into question the potential for the development of proper restraints on state punishment.

This focuses attention on the importance of consideration of the manner in which state punishment is conceptualized, including, in particular, the definition of state punishment and its relationship to the criminal law, to the reasons why someone should be punished in the first place and to the justificatory burden on the state. In considering these issues, it is useful to examine the manner in which they have been addressed in the human rights case law. In its case law on Article 7(1) ECHR, the ECtHR has outlined an understanding of punishment which emphasises the importance of distinguishing between the scope of application of the guarantee (does a sanction constitute a 'penalty' for the purposes of the provision?) and the normative demands of the provision (was that penalty imposed on a culpable individual for a violation of a prospectively defined criminal act or omission?) for the conceptualisation of justified punishment.[184] This reflects acknowledgment of the close relationship between the de-

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ing for Crime: Responsibility and Liability in the Criminal Law, Oxford 2007; RA Duff, Towards a Theory of Criminal Law, Aristotelian Society Supplementary Vol 84, 2010, 1–28.

181 Notably Andrew von Hirsch, Doing Justice: The Choice of Punishments, New York 1976.

182 Richard S Frase, Comparative Perspectives on Sentencing Policy and Research: in Tony Michael/ Frase Richard S (eds), Sentencing and Sanctions in Western Countries, Oxford 2001, 259, 261.

183 *Vinter and Others v UK* [GC], App nos 66069/09 and 130/10 and 3896/10, ECHR 2013-III, § 111.

184 It is important to note here that justified punishment is broader than respect for legality in the sense of Article 7(1) ECHR. For consideration of the issue of the proportionality from a human rights perspective, see in particular Dirk van Zyl Smit and Andrew Ashworth, Disproportionate Sentences as Human Rights Violations, Modern Law Review, 67, 2004, 541. For an ana-

finition of punishment and its justification. Here, the focus of the human rights case law is on the dangers of an under-inclusive definition. The definition of punishment is of central importance because a narrow definition of punishment might allow states to escape the demands of the justificatory burden. For this reason, the ECtHR has insisted on developing an 'autonomous' notion of punishment. It is important to note at the outset that the ECtHR's concept of 'justified' punishment is restricted to the extent that while it imposes normative constraints on punishment it does not explain *why* a person should be punished, beyond of course the idea that the punishment follows from the fact that he or she committed a criminal offence.

The emphasis of the discussion on the purpose of defining punishment in the human rights case law might be seen to be somewhat different from that discussed in punishment theory. In punishment theory, too, there is recognition of the need to consider carefully issues of definition and justification. Punishment is by definition imposed for an (alleged) criminal offence. The justification is then found in the purposes of responding to the offence, such as imposing burdens on or deterring offenders. The principal concern on such theories might be seen to be with over-inclusion, with explaining how punishment can be conceptually kept apart from other state-imposed sanctions, such as quarantine or taxes.

Central to the definition of punishment on both accounts is its relationship to the criminal law. This means that in one important sense, to the extent that by analysing law we are analysing a normative institution,[185] the definition of state punishment is inevitably tied to its justification.[186] The definition of punishment in terms of law inevitably serves to legitimize it on both legal and moral grounds.[187] Yet, at the same time, in both the punishment literature[188] and in the case law of the ECtHR there is recognition of the fact that the incorporation of elements of justification into the definition of punishment might prove problematic by artificially and improperly narrowing its definition. In order to consider this in more detail it is useful to consider the conceptualization of punishment in the case law of ECtHR on Article 7(1) ECHR.

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lysis of the importance of the limits of human rights guarantees on punishment, see SUMMERS (Fn. 158).

185 See DUFF, Theorizing Criminal Law (Fn. 11), 353.

186 See THOMAS MCPHERSON, Punishment: Definition and Justification, Analysis 28, 1967, 21, 24 who argues that any appearance of separateness between definition and justification is illusory.

187 JOHN RAWLS, Two Concepts of Rules, The Philosophical Review, 64, 1955; DIDIER FASSIN, The Will to Punish, New York 2018, 32; GEOFFROY DE LAGASNERIE, Judge and Punish: The Penal State on Trial, Stanford 2018 and for discussion LINDSAY FARMER, Crime and Punishment, Criminal Law and Philosophy, 14, 2020, 289. For discussion of difficulties of adopting an overly broad notion of state punishment, see DAVID GARLAND, The Rule of Law, Representational Struggles and the Will to Punish, in Fassin Didier, The Will to Punish, New York 2018.

188 See eg HLA HART, Prolegomenon to the Principles of Punishment, in Hart HLA (ed), Punishment and Responsibility: Essays in the Philosophy of Law, 2nd edn, Oxford 2008, 6.

II. Conceptualising Punishment(s)/'Penalties'

1. The Scope of Application of Article 7(1) ECHR

Article 7(1) ECHR prohibits the imposition of 'punishment without law' and states that no one shall be found 'guilty of any act or omission which did not constitute a criminal offence' at the time it was committed. In addition, it prohibits the imposition of a 'heavier penalty' than was applicable at the time the criminal offence was committed. These two requirements have to be read together which means that the notions of penalty and punishment are essentially synonymous for the purposes of Article 7(1) ECHR.[189]

The definition of 'penalty' is characterized as 'autonomous' in the sense that the ECtHR will 'go beyond appearances and assess for itself whether a specific measure amounts in substance to a "penalty" within the meaning of the provision'.[190] The reason for the autonomous character of the definition of penalty is clear. Were the contracting states able to unilaterally decide on the definition of penalty, they would be able to escape their obligations under Article 7(1) ECHR simply by re-labelling conduct as 'non-punitive'.[191] In this sense, the entitlement of the state to define the boundaries of punishment should be understood to be 'asymmetrical'.[192] States have considerable freedom to designate a sanction as 'punitive', in the sense that the designation of a sanction as such will be accepted as such by the ECtHR, but the decision to designate a sanction as non-punitive is subject to tighter control.

There are two issues of particular significance here. First, acceptance of a state's express characterisation of a sanction as punishment draws attention to the relationship between punishment and law; to the idea of state punishment as mediated by law. Second, the need for an autonomous notion of penalty is not just of importance for ensuring the uniform or consistent application of the right in Article 7(1) ECHR in the various contracting states. It is representative of the fundamental importance of the relationship between the scope of the application of the provision and the substantive right(s), which it is designed to protect, in other words between the concept of punishment and the notion of justified punishment.

It is important to note at the outset that the concept of 'penalty' in Article 7(1) ECHR is closely related to the notion of the 'criminal charge' in Article 6(1)

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189 In particular, penalties are not to be understood as constituting a lesser type punishment in the sort of sense discussed by Feinberg, see Joel Feinberg, The Expressive Function of Punishment, The Monist, 49, 1965, 397, 398.

190 *GIEM Srl and Others v Italy* [GC], nos 1828/06, 34163/07 and 19029/11, 28 June 2018, § 210; *Welch v United Kingdom*, 9 February 1995, Series A no 307-A, § 27; and *Jamil v France*, 8 June 1995, Series A no 317-B, § 30.

191 *GIEM Srl and Others v Italy* [GC], nos 1828/06, 34163/07 and 19029/11, 28 June 2018, § 216.

192 For consideration of the parallel discussion of the asymmetry of the right to define the 'criminal charge', see *Engel and Others v Netherlands*, 8 June 1976, Series A no 22, § 81.

ECHR.[193] According to the criteria developed in *Engel*, the determination of whether someone is charged with a criminal offence for the purposes of Article 6(1) ECHR will turn on the classification in domestic law, the very nature of the offence[194] and the degree of the severity of the penalty that the person risks incurring.[195] Similarly, in the context of Article 7(1) ECHR, the starting point of the determination of whether a sanction constitutes a 'penalty' is whether the measure was 'imposed following a decision that a person is guilty of a criminal offence'.[196] There is an inescapable circularity here in that the determination of whether an offence is criminal in nature turns on whether it can be characterised as punitive, while the determination of whether a sanction is punitive turns on whether it was imposed for a violation of the criminal law.[197]

Sanctions, which are expressly imposed as a response to a violation of the criminal law and characterised as such in national law, will obviously constitute punishment. Difficulties arise in relation to the determination of the nature of sanctions, which are not officially classed as punishment in domestic law. Neither the absence of a formal criminal conviction, nor the express classification of the sanction as non-punitive in nature will rule out *per se* the characterisation of the sanction as a penalty for the purposes of Article 7(1) ECHR. In determining whether a sanction constitutes a penalty, the ECtHR will also take into consideration 'the nature and aim of the measure – particularly whether it might be said to be punitive', the procedures linked to its adoption and execution, and its severity.[198] The severity of the measure is of subsidiary importance. Minor sanctions may be classed as punitive in nature and sanctions of a preventative nature, such as to take them outside the scope of Article 7(1) ECHH, might be hugely burdensome on an individual.[199]

The case law dealing with the determination of whether a sanction is to be classed as punitive in nature is confusing, but it is possible to identify some important distinctions. First, the ECtHR has continually insisted that hospital orders and other preventive or therapeutic measures imposed on those found not guilty on the grounds of criminal insanity are not punitive in nature.[200] The

193 Articles 6 and 7 are to be interpreted in the same way, see eg *Žaja v Croatia*, no 37462/09, 4 October 2016, § 86

194 Deemed in *Jussila v Finland* [GC], no 73053/01, ECHR 2006-XIV, § 38 to be the most important criteria; *Ezeh and Connors v United Kingdom* [GC] nos 39665/98 and 40086/98, ECHR 2003-X, § 82: The very nature of the offence is a factor of greater import.

195 *Engel and Others v Netherlands*, 8 June 1976, Series A no 22, § 82.

196 *GIEM Srl and Others v Italy* [GC], nos 1828/06, 34163/07 and 19029/11, 28 June 2018, § 210.

197 Summers (Fn. 158), ch 6.

198 *GIEM Srl and Others v Italy* [GC] (n 35) para 211, citing *Welch v United Kingd*om, 9 February 1995, Series A no 307-A, § 28; *Jamil v France*, 8 June 1995, Series A no 317-B, § 31; *Kafkaris v Cyprus* [GC], no 21906/shy04, ECHR 2008-I, § 142; *M v Germany*, no 19359/04, ECHR 2009, § 120; *Del Río Prada v Spain* [GC], no 42750/09, ECHR 2013, § 82; and *Société Oxygène Plus v France* (dec), no 76959/11, 17 May 2016, § 47.

199 *Del Río Prada v Spain* [GC], no 42750/09, ECHR 2013 § 82.

200 See eg *Berland v France*, no 42875/10, 3 September 2015, §§ 39–47.

principal reason for this is that such sanctions are not imposed 'following a conviction for a criminal offence'.[201] Here there is necessarily a certain degree of divergence between Article 6(1) ECHR and Article 7(1) ECHR. It is quite possible that Article 6(1) ECHR will apply to such proceedings, in that they concern the determination of a criminal charge. In the event that the individual is found not guilty on the basis of criminal insanity, though, any sanctions imposed will not constitute penalties for the purposes of Article 7(1) ECHR.[202]

Second, sanctions imposed for offences – such as disciplinary offences – which are not to be understood as criminal in nature will fall outside the scope of application of Article 7(1) ECHR. In *Platini*, for instance, the applicant complained about the imposition of sanctions imposed by FIFA's Ethics Committee and the Appeal Committee in pursuance of the FIFA Disciplinary Code. The ECtHR held that the provisions of the Disciplinary Code were not criminal in nature (noting that the Code involved 'particular measures taken against a member of a relatively small group of individuals with a special status and subject to specific rules') and thus that the sanctions imposed did not constitute penalties for the purposes of Article 7(1).[203] Similarly, in *Gestur Jónsson and Ragnar Halldór Hall*, the ECtHR held that fines imposed on lawyers for failing to comply with professional duties were disciplinary in nature and thus did not engage Article 6(1) ECHR or Article 7(1) ECHR.[204]

Third, purely preventive measures will not engage the protection of Article 7 (1) ECHR. In *Lawless v Ireland (No 3)*, the applicant had been detained under legislation 'for the sole purpose of restraining him from engaging in activities prejudicial to the preservation of public peace and order or the security of the State'. The ECtHR held that as the detention was a purely preventative measure, it was not imposed 'due to his having been held guilty of a criminal offence within the meaning of Article 7(1) ECHR'.[205] This was not to say that the detention was justified, this was a matter to be determined in accordance with the requirements of Article 5(1) ECHR, only that it could not be understood as punishment in the sense of Article 7(1) ECHR.

These scenarios emphasise the importance of the relationship between the imposition of a sanction and a criminal conviction for the finding that the sanc-

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201 See similarly in the context of Art 5(1) ECHR: *Claes v Belgium*, no 43418/09, 10 January 2013, § 110 and *Moreels v Belgium*, no 43717/09, 9 January 2014, § 43.

202 For discussion, *G v France*, no 27244/09, 23 February 2012, § 46.

203 *Platini v Switzerland*, no 526/18, 11 February 2020.

204 See too eg *Gestur Jónsson And Ragnar Halldór Hall v Iceland*, nos 68273/14 and 68271/14, 22 December 2020, § 112: 'The Court has already held that the proceedings in question did not involve the determination of a "criminal charge" within the meaning of Article 6 of the Convention and that this provision did not apply to those proceedings under its criminal limb. In these circumstances and for reasons of consistency in the interpretation of the Convention taken as a whole, the Court does not find that the fines complained of under Article 7 are to be considered a "penalty" within the meaning of this provision'.

205 *Lawless v Ireland* (No 3), 1 July 1961, Series A no 3, § 19.

tion constitutes punishment. Difficulties arise, in particular, in those cases in which the sanctions, while not characterised in domestic law as punitive in nature, might nevertheless be said to have been imposed following a criminal conviction.

2. *Sanctions Imposed for, following or as a result of a Criminal Conviction*

a. *Distinguishing Punitive and Non-Punitive Sanctions*

Sanctions will sometimes follow a number of aims; they might pursue punitive, preventive and compensatory purposes. A good example of such a sanction is a confiscation order imposed following a criminal conviction. In *Welch*, for instance, the applicant was convicted of drug dealing and sentenced to twenty-two years' imprisonment. In addition, a confiscation order was imposed (£66,914) in pursuance of confiscation of the proceeds of crime legislation. In default of the payment of this sum the applicant was liable to serve a sentence of two years' imprisonment, to be served consecutively. The ECtHR held that the confiscation order, in addition to its clearly preventive, compensatory character, was punitive in nature.[206] This punitive element was sufficient to bring the sanction within the field of application of Article 7(1) ECHR even if it was properly to be described as primarily preventive.

In determining that the sanction was punitive, the ECtHR was not just influenced by the fact that the sanction had been imposed as a response to the criminal offence. It referred also to the 'sweeping statutory assumptions' in the legislation that 'all property passing through the offender's hands over a six-year period' was in fact the fruit of drug trafficking unless proven otherwise; 'the fact that the confiscation order was 'directed to the proceeds involved in drug dealing' and 'not limited to actual enrichment or profit'; the fact that the trial judge had had discretion 'in fixing the amount of the order, to take into consideration the degree of culpability of the accused'; and 'the possibility of imprisonment in default of payment by the offender'.[207] These elements taken together were considered by the ECtHR to constitute 'a strong indication of, inter alia, a regime of punishment'. In its subsequent case law, the ECtHR has relied on this case in particular with regard to the criterium of the trial judge's discretion to determine the degree of the culpability of the offender in the determination of the sentence.

In *Gardel v France*, on the other hand, which concerned the determination of whether a placement on a sex offenders' register constituted a penalty for the

206 *Welch v United Kingdom*, 9 February 1995, Series A no 307-A, §§ 28–35. Fines imposed in administrative proceedings have also been deemed to constitute penalties for the purpose of Article if they have both a preventive and punitive function, see eg *Valico SRL v Italy* (dec), no 70074/01, ECHR 2006-III.

207 *Welch v United Kingdom*, 9 February 1995, Series A no 307-A, § 33.

purposes of Article 7(1) ECHR, the ECtHR held that this sanction was not punitive. Following the applicant's conviction for sexual offences, he was informed in writing by the police that, pursuant to provisions of the criminal procedure code, he would be placed on the sex offenders' register.[208] In this case too, this sanction might be understood to have been imposed *following* a criminal conviction. Here, the ECtHR took a different approach. It noted that the 'the applicant's placement on the Sex Offenders Register was indeed the result of his conviction on 30 October 2003, since placement on the register is automatic in the case of persons who, like the applicant, have been sentenced to a prison term of over five years for a sexual offence.'[209] The ECtHR noted that in domestic law, the sanction constituted a 'public-order measure' rather than a sanction and that according to the criminal procedure code was 'designed to prevent' persons who had committed sexual offences or violent crimes 'from reoffending and to ensure that they can be identified and traced'. It held that the main aim of the provision was to prevent re-offending[210] and the 'fact that a convicted offender's address is known to the police or gendarmerie and the judicial authorities by virtue of his or her inclusion in the Sex Offenders Register constitutes a deterrent and facilitates police investigations'. This led it to conclude that the 'obligation arising out of placement on the register therefore has a preventive and deterrent purpose and cannot be considered to be punitive in nature or as constituting a sanction.› It addition it held that 'the obligation to provide proof of address every six months and to declare any change of address within fifteen days at the latest, albeit for a period of thirty years', was not 'sufficiently severe to amount to a "penalty"'.[211] The placement on the sex offender' register followed automatically as a consequence of the conviction, for preventive reasons and without any judicial consideration of the culpability of the accused.

The ECtHR's case law gives rise to a number of difficult questions. Should a sanction be understood as punitive simply by virtue of the fact that it is imposed following or for a criminal conviction, even if it is not so understood in national law? Does punitiveness imply that the sanction has been imposed as a response to culpability for a criminal offence? Is it appropriate to determine the punitiveness of a sanction simply by reference to the nature of the proceedings (ie administrative or criminal) in which it is imposed? In order to consider these questions in more detail, it is useful first to consider three types of cases which have proved particularly problematic in the ECtHR's case law: the revocation of a

208 *Gardel v France*, no 16428/05, ECHR 2009, §§ 40 et seq; see also *Ibbotson v United Kingdom* (dec), no 40146/98, 21 October 1998, unreported, and *Adamson v United Kingdom* (dec), no 42293/98, 26 Jan 1999 and *Van der Velden v Netherlands* (dec), no 29514/05, ECHR 2006-XV.

209 *Gardel v France*, no 16428/05, ECHR 2009, § 41.

210 Ibid, § 43.

211 Ibid, § 45.

licence or prohibition on the entitlement to engage in some sort of professional activity, the imposition of deportation orders and disqualification from standing for elected office.

aa. Revocation of Licences etc

It is common for a criminal conviction to result in further consequences, such as the revocation of a professional licence. In a number of cases, applicants have argued that the revocation of a professional licence was a direct consequence of the criminal conviction and thus was to be considered punitive in nature. In *Gouarré Patte v Andorra*, for instance, the ECtHR held that a lifetime ban on practising as a doctor constituted a penalty within the meaning of Article 7(1) ECHR. It noted that the ban was set out in the criminal code, was imposed in criminal proceedings and that the domestic courts also considered it to be a penalty.[212]

It is useful to compare this case with *Rola v Slovenia* in which the ECtHR had to consider whether the revocation of the applicant's licence to act as a liquidator in insolvency proceedings following his criminal conviction for financial offences constituted a penalty for the purposes of Article 7(1) ECHR. In *Rola*, the revocation measure was not set out in criminal law but rather in administrative law. The applicant's professional licence was revoked in separate administrative proceedings conducted on completion of the criminal proceedings by the ministry of justice. The reason for the revocation of the licence was that only those who did not have a prior conviction for the type of criminal offence committed by the applicant, were entitled to hold a licence to act as a liquidator. The ECtHR held that the revocation of the licence did not follow punitive and dissuasive aims.[213] It noted that the purpose of the legal provision did not appear to be 'to inflict a punishment in relation to a particular offence of which a person has been convicted but is rather aimed at ensuring public confidence in the profession in question. It is aimed at members of a professional group possessing a special status, specifically liquidators in insolvency proceedings'.[214] This led the ECtHR to conclude that 'the revocation of the licence did not have a punitive and dissuasive aim pertaining to criminal sanctions.› The ECtHR was also influenced by the fact that the measure was imposed 'solely on the basis of a final criminal conviction' and that Ministry of Justice and subsequently the courts reviewing the case' had not had any discretion in deciding whether or not to impose the measure and had not carried out any assessment of the culpability of the applicant.[215]

212 *Gouarré Patte v Andorra*, no 33427/10, 12 January 2016, § 30.
213 *Rola v Slovenia*, nos 12096/14 and 39335/16, 6 June 2019, §§ 60–66.
214 Ibid, § 64. See too *Müller-Hartburg v Austria*, no 47195/06, 19 February 2013, § 45.
215 *Rola v Slovenia*, nos 12096/14 and 39335/16, 6 June 2019, § 65.

Three of the seven judges were unconvinced by this approach arguing that despite being imposed in administrative proceedings, the sanction had been imposed *for* a criminal offence.[216] They noted that the disputed measure had been 'imposed as an automatic consequence of the applicant's final criminal conviction' and that '[n]o assessment of the relevance of the criminal offence in question to the applicant's suitability for the profession of liquidator' had been carried out by the relevant administrative authority and indeed that the applicable legislation left no room for such assessment. Further, while the revocation had been determined in administrative proceedings, the administrative authority merely had to rely on the findings of the criminal court. This led the dissenting judges to conclude that: 'the nature of the proceedings cannot in the present case carry any particular weight in the determination of the existence of a "penalty".› Although the measure was not formally characterized as a criminal sanction in the criminal code and was characterised as a "legal consequence of conviction", this alone was not to be taken to 'detach the impugned measure from the applicability of the provisions of criminal law'. Finally, they noted that 'the applicant was unable to reapply for a licence once the criminal conviction had been expunged from his criminal record'. This was characterized as of decisive importance as it showed 'that the measure's purpose was not merely to ensure the applicant's suitability for the professional activity in question': 'Maintaining an inability to reapply for the licence beyond the time limit of legal rehabilitation clearly indicates that the measure's purpose was essentially punitive, adding another, and in many respects much heavier, legal burden upon the applicant than the imposed criminal sanction itself.'[217] This led them to conclude that: 'the strict and automatic link between the criminal conviction and the contested measure, leaving no room to the competent authorities for an assessment of circumstances or the exercise of discretionary powers, together with the essentially punitive purpose of the measure and its rather severe consequences for the applicant, lead to the conclusion that the impugned revocation of his licence is a "penalty" within the meaning of Article 7.'[218]

These cases demonstrate that culpability is of particular relevance in separating preventive and punitive measures. In the consideration of whether a sanction is punitive, the ECtHR is strongly influenced by whether in imposing the sanction the judge takes the culpability of the accused into account. The concerns of the dissenting judges as regards the severity of the subsequently imposed sanction, however, seem well placed and call for closer consideration.

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216 Ibid, dissenting opinion of Judges Pinto de Albuquerque, Bošnjak and Kūris, attached to the judgment.

217 Referring to *Rivard v Switzerland*, no 21563/12, 24 October 2016, § 24.

218 Dissenting opinion of Judges Pinto de Albuquerque, Bošnjak and Kūris attached to the judgment in *Rola v Slovenia*, nos 12096/14 and 39335/16, 6 June 2019.

bb. Deportation Orders

When thinking about the definition of punishment and specifically the issue of the over-inclusiveness of the definition, it is useful to consider the manner in which the ECtHR has approached the issue of the deportation orders. It is quite common in Europe for non-citizens convicted of crimes to be faced with the imposition of a deportation order. Such orders are imposed *following* a conviction for a criminal offence; should they also be understood as being imposed *for* the commission of that offence?

In *Gurguchiani v Spain*, the criminal code provided the judge responsible for enforcing the sentence with possibility of replacing the eighteen-month sentence of imprisonment imposed on the applicant with the expulsion of the applicant from the territory of Spain and banning him from returning for a period of between three and ten years, depending on the sentence imposed.[219] This judge had the discretion to determine which sanction to impose.[220] The ECtHR held that the replacement of the eighteen-month prison sentence imposed on the applicant by his deportation for a period of ten years was to be considered a penalty on par with the sentence of imprisonment imposed on the applicant when he was convicted.[221] Of crucial importance in this case was the fact that the sanction was imposed by the judge and that the judge had discretion about whether or not to impose it.

Deportation orders issued in administrative proceedings subsequent to the criminal proceedings will as a general rule not be understood as punishment. In *Maaouia*, for instance, the applicant was a Tunisian national who had been living in France since he was 22 in 1980.[222] He was convicted in 1988 of armed robbery and assault for offences committed in 1985 and sentenced to six years' imprisonment. Following his release from prison, the Minister of the Interior made a deportation order against him. Following administrative proceedings, the applicant succeeded in having the deportation order quashed and in regularising his immigration status. He complained though about the length of these proceedings which lasted almost four years and in this context the ECtHR had to consider whether these proceedings involved the determination of a criminal charge for the purposes of Article 6(1) ECHR. The Government contended that deportation and expulsion orders did not concern criminal charges or amount to punishment for the purposes of Article 6 of the Convention. The deportation order was to be understood as an administrative measure rather than punishment for the purposes of Article 7(1) ECHR.

The point here seems to be that to the extent that the decision-making authority in administrative proceedings does not conduct an assessment of per-

219 *Guruchiani v Spain*, no 16012/06, 15 December 2009.
220 Ibid, § 32.
221 Ibid, § 40.
222 *Maaouia v France* [GC], no 39652/98, ECHR 2000-X, § 29.

son's culpability for an offence in determining whether to impose a deportation order or the length of the order, then it cannot be understood to be sufficiently connected to the criminal offence as to constitute punishment. This is obviously different if it is imposed by the trial judge. In those cases, in which a deportation order is imposed in the context of a sentencing decision by a judge in criminal proceedings, the reason for the imposition of the order is so closely connected to the offences as to constitute punishment. Judge Costa, concurring in *Maaouia*, put it like this: 'To my mind, exclusion orders, which the criminal courts may (without obligation) add to a term of imprisonment for a criminal offence, constitute an *ancillary penalty* and thus come within the criminal law.'[223]

cc. Disqualification from Standing for Election

In *Galan*, the applicant complained that he had been prohibited, on account of his conviction for corruption, from standing for election.[224] The ECtHR noted that the aim of the sanction was to preserve the proper functioning and transparency of the administration, and also the free decision-making of elective bodies. It also afforded weight to the approach of the Italian Constitutional Court, according to which the sanctions were not to be regarded as a result of a conviction falling within the scope of the criminal law. Instead, they resulted from: 'the loss of the subjective condition allowing access to and exercise of elective office. An elected official who is stripped of his office following the loss of his passive electoral capacity is not sanctioned according to the seriousness of the acts of which he has been accused and for which he has been convicted by the criminal courts; he is excluded from the elective assembly to which he is answerable because he has lost his moral aptitude, an essential condition for being able to continue to sit as a representative of the electorate.'[225] The ECtHR concluded that neither the prohibition on standing for election nor the disqualification represented a penalty for the purposes of Article 7(1) ECHR.

b. Sanctions Imposed for a Criminal Offence: A Reassessment

The distinction between punitive and non-punitive sanctions is complex and this complexity is related principally to difficulties associated with determining whether and under which circumstances a sanction is to be properly understood as having been imposed *for* a criminal offence. It is useful to distinguish the

223 Ibid, see also the concurring opinion of Judge Costa in *Maaouia*, attached to the judgment. Judge Bratza takes a more procedural take in his concurring opinion: See also the concurring opinion of Judge Bratza attached to the judgment in *Maaouia*: 'However, the situation would be different if the order for deportation were made by a court following a conviction for a criminal offence and formed an integral part of the proceedings resulting in the conviction'.

224 *Galan v Italy* (dec), no 63772/16, 18 May 2021, § 80.

225 Ibid, § 85.

various situations that might arise in this context. First, sanctions might clearly be designated in national criminal law as punishment. Second, sanctions might be expressly provided for in national criminal law but designated as ancillary measures rather than punishment. Finally, sanctions might be imposed in separate (usually administrative) proceedings instituted following a conviction in criminal proceedings.

These cases demonstrate the scope for the same types of sanctions (eg deportation orders or revocation of licences) to be classed differently (ie as punitive or not) in the case law of the court. The reason for this is the asymmetrical nature of the ECtHR's autonomous definition of punishment, which is not designed to set out an authoritative account of punishment but rather to prevent circumvention of the rights in Article 7(1) ECHR.

The overview of the case law of the ECtHR nevertheless allows for some conclusions to be drawn on the question of when a sanction is properly understood to be imposed *for* a criminal conviction. Sanctions which are expressly classed as punishment in national law will be understood as punitive in nature for the purposes of Article 7(1) ECHR.[226] Sanctions which are provided for in the criminal code, even if designated as ancillary measures rather than punishment *per se*, will also be considered to constitute penalties, provided that the judge is able to take the culpability of the accused into account in fixing the penalty.[227] The connection to an offender's culpability for the offence is deemed to lend the sanction punitive character.

In the context of sanctions imposed in subsequent administrative proceedings, on the other hand, there seems to be a presumption against the classification of the sanction as criminal, even if the criminal offence is the sole reason for the imposition of the (administrative) sanction. Here again the fact that the authority is not involved in determining the culpability of the accused plays a central role.[228] The suggestion is that that the administrative authority is permitted to accept the findings of the criminal court in order to uphold other values, such as confidence in the proper functioning of the political system or in a particular profession. Nevertheless, the concerns of the dissenting judges in *Rola* regarding the severity of the sanction are important. The argument that a measure which appears exceptionally severe – particularly when compared with punitive sanctions and in the absence of further justification – ought to be viewed as a criminal sanction seems well founded. In addition, it is notable that the ECtHR has adopted precisely this approach in the context of Article 4 of Protocol No 7 ECHR in which it has repeatedly held that the severity of the measure can in itself be so significant, regardless of the context of his criminal

226 See eg *Gouarré Patte v Andorra*, no 33427/10, 12 January 2016, § 76; *Gurguchiani v Spain*, no 16012/06, 15 December 2009.

227 See eg *Welch v United Kingdom*, 9 February 1995, Series A no 307-A, §§ 29–35.

228 See eg *Rola v Slovenia*, nos 12096/14 and 39335/16, 4 June 2019.

conviction, as to lead to the conclusion that it must be viewed as a criminal sanction.[229]

What does this tell us about the definition of punishment in Article 7(1) ECHR? The determination is not procedural but rather connected to a substantive determination about the connection between the finding of guilt for an offence and the imposition of the sanction. The imposition of a sanction in subsequent administrative proceedings might well constitute a sanction under certain circumstances. This might be the case if the administrative authority is able or called on to make a judgment on the extent of the culpability of the accused for the offence or alternatively if the sanction imposed in these proceedings is disproportionately severe when compared to the punitive sanction imposed by the sentencing judge for the criminal offence.

3. Sanctions imposed in the Absence of a Finding of Guilt as Punitive?

In view of the importance of the issue of culpability in the differentiation of punitive and non-punitive sanctions, it might be to be expected that any sanctions imposed in the absence of a conviction or a finding of guilt would not be considered punitive in nature. In fact, the ECtHR has held that a sanction might be considered to constitute a penalty for the purposes of Article 7(1) ECHR even if it was imposed in the absence of a criminal conviction. In *GIEM Srl and Others v Italy*, the ECtHR held that the question whether the sanctions had been imposed following a conviction for a criminal offence, was 'only one criterion among others to be taken into consideration'.[230] It explained this with reference to the importance of ensuring that states were not free to imposed penalties without classifying them as such and thereby depriving individuals of the safeguards of Article 7(1) ECHR.[231]

The ECtHR followed an earlier decision, *Sud Fondi Srl and Others*, in which it had found that, even though 'no prior criminal conviction [had been] handed down against the applicant companies or their representatives by the Italian courts', the impugned confiscation was nevertheless connected to a criminal of-

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229 See in the context of Protocol 4 Art 7 *Nilsson v Sweden* (dec), no 73661/01, ECHR 2005-XIII: 'What is more, in the view of the Court, the severity of the measure – suspension of the applicant's driving licence for 18 months – was in itself so significant, regardless of the context of his criminal conviction, that it could ordinarily be viewed as a criminal sanction' citing *Mulot v France* (dec), no 37211/97, 14 December 1999 and *Hangl v Austria* (dec), no 38716/97, 20 March 2001.

230 *GIEM Srl and Others v Italy* [GC], nos 1828/06, 34163/07 19029/11, 28 June 2018, § 215 citing *Saliba v Malta* (dec), no 4251/02, 23 November 2004; *Sud Fondi Srl and Others* (dec), no 75909/01, 30 August 2007; *M v Germany*, no 19359/04, ECHR 2009; and *Berland v France*, no 42875/10, § 42, 3 September 2015); *Valico Srl v Italy* (dec), no 70074/01, ECHR 2006-III. The Court has rarely found this aspect decisive in declaring Article 7 inapplicable, see *Yildirim v Italy* (dec), no 38602/02, ECHR 2003-IV, and *Bowler International Unit v France*, no 1946/06, 23 July 2009, § 67.

231 *GIEM Srl and Others v Italy* [GC], nos 1828/06, 34163/07 19029/11, 28 June 2018, § 216.

fence based on general legal provisions.[232] The ECtHR was influenced *inter alia* by the fact that the confiscation order was classified in the criminal code as a criminal sanction (treating sceptically the suggestion of the Italian government that this was merely a drafting error); the Italian courts had themselves referred to the punitive and deterrent aspects of the sanction; the sanction was particularly harsh; the order was imposed by the criminal courts.[233]

This approach gives rise to difficult questions for the definition of punishment in that it seems to allow for Article 7(1) ECHR to be engaged in the absence of criminal proceedings and suggests that an understanding of the definition of punishment as imposed for a criminal offence might be too narrow.[234] It is important, though, not to overestimate the implications of this judgment. In the vast majority of cases, a confiscation order imposed outside criminal proceedings will not, of course, constitute punishment. There will have to be some reason why the sanction calls to be treated as *de facto* punishment, in the sense that there will have to be real grounds for supposing that the state is attempting to circumvent the protections of Article 7(1) ECHR. In *GIEM Srl and Others* this finding was tied to the close connection between the imposition of the sanctions on the applicants and criminal proceedings against third parties. Similarly, in *AP, MP, and TP v Switzerland*, the ECtHR held that 'imposing criminal sanctions on the living in respect of acts apparently committed by a deceased person' was incompatible with Article 6(2) ECHR.[235]

It is notable that in both *GIEM* and in *AP, MP and TP v Switzerland*, the sanctions had in fact been imposed for criminal offences, just not ones which could be legally or normatively attributed to the applicants. There is thus here a conceptual connection between the penalty and *a* criminal offence. This suggests that these cases do not in fact call into question the requirement that punishment as a matter of definition be for an alleged offence. They instead should be understood as reaffirming the idea that the imposition of a sanction for a criminal offence in the absence of a finding of culpability must be understood as punishment, albeit punishment which cannot be justified in the sense of the substantive requirements of Article 7(1) ECHR.

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232 *Sud Fondi Srl and Others v Italy* (dec), no 75909/01, 30 August 2007.

233 *GIEM Srl and Others v Italy* [GC], nos 1828/06, 34163/07 19029/11, 28 June 2018, §§ 210–234.

234 As is expressly recognised by the ECtHR, *GIEM Srl and Others v Italy*, [GC], nos 1828/06, 34163/07 19029/11, 28 June 2018, § 233. 'This conclusion, which is the result of the autonomous interpretation of the notion of "penalty" within the meaning of Article 7, entails the applicability of that provision, even in the absence of criminal proceedings within the meaning of Article 6.›

235 *AP, MP and TP v Switzerland*, no 19958/92, 29 August 1997, § 46.

III. The Substantive Requirements of Article 7(1) ECHR

Article 7(1) ECHR prohibits the imposition of punishment in the absence of law. This means that it is essential that at the time the accused committed an offence there was a legal provision in force 'which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision'.[236] Punishment will only be justified if it meets the substantive demands of legality. For the purposes of Article 7(1) ECHR, the penalty must be clearly and prospectively defined in law. The ECtHR has held that Article 7(1) ECHR 'embodies generally the principle that only the law can define a crime and prescribe a penalty and prohibits in particular the retrospective application of the criminal law where it is to an accused's disadvantage.[237] In a number of cases, the ECtHR has stressed the importance of the criteria of foreseeability in the context of sentencing law.[238]

At the point of attribution of criminal liability, the ECtHR has held that Article 7(1) ECHR imposes constraints on the process of criminalisation by requiring that the accused has committed a clearly defined offence and not for other reasons such as character. The same constraints apply to punishment: punishment must be imposed as a response to a finding of culpability for a clearly defined act or omission.[239] It is a fundamental principle of the criminal law that only those to whom culpability can be normatively attributed can be held liable and punished accordingly.[240] In *Varvara*, the ECtHR put it like this: 'The 'penalty' and 'punishment' rationale and the 'guilty' concept (in the English version) and the corresponding notion of 'personne coupable' (in the French version) support an interpretation of Article 7 as requiring, in order to implement punishment, a finding of liability by the national courts enabling the offence to be attributed to and the penalty to be imposed on its perpetrator. Otherwise the punishment would be devoid of purpose'. It would be inconsistent on the one hand to require an accessible and foreseeable legal basis and on the other to permit punishment where, as in the present case, the person in question has not been convicted.'[241]

Similarly, in *GIEM Srl and Others* the Grand Chamber cited approvingly the position of the ECtHR in *Sud Fondi Srl and Others* to the effect that: 'It would

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236 *Coëme and Others v Belgium*, nos 32492/96, 32547/96, 32548/96, 33209/96, 33210/96, ECHR 2000-VII, § 145; and *Achour v France* [GC], no 67335/01, ECHR 2006-IV, § 43; *Del Río Prada v. Spain* [GC], no 42750/09, ECHR 2013, § 80.

237 See eg *G v France*, no 15312/89, 27 September 1995, § 24.

238 See eg *Achour v France* [GC], no 67335/01, ECHR 2006-IV, § 53; *Alimujac v Albania*, no 20134/05, 7 February 2012, §§ 155–162; *Jamil v France*, 8 June 1995, Series A no 317-B, § 34; *Kafkaris v Cyprus* [GC], no 21906/04 ECHR 2008-I, § 15. For discussion see Summers (Fn, 158), ch 2.

239 See eg *Del Río Prada v Spain* [GC], no 42750/09, ECHR 2013, § 77.

240 *AP, MP and TP v Switzerland*, 29 August 1997, Reports 1997-V.

241 *Varvara v Italy*, no 17475/09, 29 October 2013, § 71 (references omitted).

be inconsistent, on the one hand to require a foreseeable and accessible legal basis and on the other to allow a person to be considered "guilty" and to "punish" him even though he was unable to ascertain the extent of the criminal law because of an error that could not be attributed to him'.[242] In *GIEM Srl and Others*, confiscation measures were imposed on the applicant companies for the actions of third parties. The ECtHR held that 'having regard to the principle that a person cannot be punished for an act engaging the criminal liability of another, a confiscation measure applied, as in the present case, to individuals or legal entities which are not parties to the proceedings, is incompatible with Article 7 of the Convention.'[243]

Punishment must be imposed for a clearly defined criminal offence and not for other reasons such as character. This is well-illustrated by the case of *Parmak and Bakir v Turkey*. In this case, the applicants were convicted of the offence 'of being members of a terrorist organisation'. The notion of a 'terrorist organisation' was dubiously defined on the sole basis of the nature of the organisation's written declarations, its potential for 'moral coercion' and despite the absence of violent acts attributable to that organisation. The applicants were sentenced to two years and six months' imprisonment.[244] The ECtHR held that the failure to specify the conduct parts of the offence violated Article 7(1) ECHR, holding that the domestic courts must exercise 'special diligence to clarify the elements of the offence in terms that make it foreseeable and compatible with its essence'.[245]

This issue can also be demonstrated by consideration of the US Supreme Court case *Robinson v California*. *Robinson* involved the conviction and punishment of an individual on the basis of Californian legislation, which made it an offence to be addicted to the use of narcotics. According to the provision: 'No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics. It shall be the burden of the defense to show that it comes within the exception. Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days nor more than one year in the county jail. The court may place a person convicted hereunder on probation for a period not to exceed five years and shall in all cases in which probation in granted require as a condition thereof that such person be confined in the county jail for at least 90 days. In no event does the court have the power

242 *GIEM Srl and Others v Italy* [GC], nos 1828/06, 34163/07 19029/11, 28 June 2018, § 198. *Sud Fondi Srl and Others v Italy* (dec), no 75909/01, 30 August 2007, § 116.
243 *GIEM Srl and Others v Italy* [GC], nos 1828/06, 34163/07 19029/11, 28 June 2018, § 274.
244 *Parmak and Bakir v Turkey*, nos 22429/07 and 25195/07, 3 December 2019, § 28.
245 Ibid, § 77.

to absolve a person who violates this section from the obligation of spending at least 90 days in confinement in the county jail.'[246]

In *Robinson*, the trial judge had instructed the jury that the statute made it a misdemeanor for a person: 'either to use narcotics, or to be addicted to the use of narcotics … That portion of the statute referring to the "use" of narcotics is based upon the "act" of using. That portion of the statute referring to "addicted to the use" of narcotics is based upon a condition or status. They are not identical … To be addicted to the use of narcotics is said to be a status or condition, and not an act. It is a continuing offense, and differs from most other offenses in the fact that [it] is chronic, rather than acute; that it continues after it is complete, and subjects the offender to arrest at any time before he reforms. The existence of such a chronic condition may be ascertained from a single examination if the characteristic reactions of that condition be found present.› In addition, the judge instructed the jury that the defendant could be convicted under a general verdict if the jury agreed either that he was of the "status" or had committed the "act" denounced by the statute, noting that: "All that the People must show is either that the defendant did use a narcotic in Los Angeles County, or that, while in the City of Los Angeles, he was addicted to the use of narcotics …"'.[247] Robinson was found guilty of the offence charged and sentenced to 90 days of imprisonment.[248] The conviction was subsequently reversed by the Supreme Court.[249]

The absence of a clear definition of a criminal act or omission gives rise to the concern that the criminal law might be utilised to criminalise government opponents or perhaps those deemed socially dangerous. This is precisely the type of arbitrary abuse of power which the idea of legality is designed to prohibit.

The substantive guarantees of Article 7(1) ECHR are clearly based on the idea that all people are to be treated equally as autonomous agents, capable of understanding and responding appropriately to the law. Individuals who were unable to follow law's demands on the grounds of a lack of culpability cannot be punished. Equally, punishment can only be imposed if a person could have been expected to have acted (or refrained from acting) in a certain way. The act requirement lies very much at the heart of the notion of legality.[250] The criminalisation of character is incompatible with Article 7(1) ECHR. Finally, Article 7 (1) ECHR requires that the punishment be imposed in response to an offender's culpability for the offence and not for other reasons.

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246 § 11721 of the California Health and Safety Code.

247 *Robinson v California* 370 US 660, 662f (1962), references omitted.

248 Ibid.

249 Ibid.

250 On the concepts of human action: Hans Joachim Hirsch, Gibt es eine nationale unabhängige Strafrecht?, in: Seebode Manfred (Hrsg.), Festschrift für Günter Spendel zum 70. Geburtstag am 11. Juli 1992, Berlin 1992, 43; Hans Welzel, Das Deutsche Strafrecht: Eine systematische Darstellung, 11. Aufl., Berlin 1969.

IV. The Concept of 'Justified Punishment' in Article 7(1) ECHR

The case law of the ECtHR on the scope of application of Article 7(1) ECHR demonstrates that the ECtHR will first determine whether a sanction constitutes a penalty for the purposes of Article 7(1) ECHR. Only then will it proceed to determine whether the requirements of Article 7(1) ECHR were upheld. This makes it clear that punishment for the purposes of Article 7(1) ECHR is not *by definition* lawful. It also highlights the importance of a 'neutral' definition of punishment to the extent that the normative guarantees of Article 7(1) ECHR (culpability; the act requirement) must be keep apart from the definition. Punishment for the purposes of the ECtHR can thus be understood as a sanction imposed by the state for the commission of an (alleged) criminal offence.

The imposition of a sanction as a response to a violation of a law expressly marked by the state as criminal will automatically constitute a penalty for the purposes of Article 7(1) ECHR. In this regard, the definition of the offence is of no importance. If a state finds a person guilty of a criminal offence and imposes a sanction, this sanction will constitute punishment for the purposes of Article 7(1) ECHR.

The autonomous notion of punishment means that sanctions not labelled as such in national law may nevertheless be considered criminal. This will be the case if they are deemed to be punitive, in the sense of being imposed in accordance with an individual's culpability for an offence. In the cases considered by the ECtHR on the context of Article 7(1) ECHR, there was a link between the sanction imposed and a criminal offence, but the sanction was labelled in national law as preventive or ancillary rather than punitive in nature. As we have seen, though, this resort to an 'autonomous' definition does not result in a uniform understanding of punishment because the ECtHR will automatically accept the designation of sanctions in national law as punishment. The ECtHR control is linked to preventing circumvention of the substantive aspects Article 7(1) ECHR. This means that the same types of sanctions, such as for example the revocation of a licence, may be characterized as punishment or not, depending on the way in which they are regulated in law.

This, though, gives rise to difficult questions in the context of those cases in which the criminal offence itself was not designated as such in national law. Here the designation of whether a sanction is punishment will turn solely on the determination of whether the offence can be understood to be criminal. This though focuses attention again on the issue of how criminal offences are to be identified in the absence of express legal regulation. The overview of the ECtHR's case law makes it clear that punishment for the purposes of Article 7 (1) ECHR is a broad notion which applies to all sanctions imposed for a criminal offence, irrespective of whether this offence is considered *mala in se* or regulatory in nature. In this sense, the court's approach to punishment differs materially from theories, which seek to restrict the definition of punishment by

distinguishing between punishment and penalties.[251] The ECtHR has struggled with these issues in context of Article 6(1) ECHR and seems to have resorted to an approach which focuses on process and on the powers of state authorities, rather than notions of moral wrongfulness in assessing whether an offence is to be understood (conceptually) as criminal in nature.

In determining whether a sanction imposed following a criminal conviction should be defined as punitive, rather than say preventive, a key factor is consideration of whether the authority imposing the sanction had competence or discretion to consider the extent of the culpability of the offender. This gives rise to the question whether a finding of guilt or culpability is central to the definition of penalty in Article 7(1) ECHR. The case of *GIEM* suggests that this is not the case in that it emphasises that a sanction might be considered punitive, even in the absence of a finding of criminal guilt.[252] This indicates that the culpability of the offender should not be considered as part of the definition of penalty. A matter may fall within the scope of application of Article 7(1) ECHR even in the absence of a finding of guilt or culpability, providing that there is a conceptual link to a criminal offence.

The overview of the manner in which punishment is conceptualised in the case law on Article 7(1) ECHR suggests that punishment must purport to be imposed for criminal offence. Cases such as *GIEM Srl and Others* do not materially interfere with this understanding of punishment because in these cases there is a clear conceptual link between the punishment imposed and *a* criminal offence. The issues in these cases stem from the fact that the punishment is imposed as a response to a criminal offence on individuals who have not been found culpable of having committed that offence. From a theoretical perspective, this is normatively but not conceptually problematic. Indeed, this mirrors the type of situation envisaged by Hart in his discussion of sub-standard forms of punishment, such as 'the punishment of persons … who neither are in fact nor supposed to be offenders', as a means of avoiding the 'definitional stop'.[253] He notes that the 'stock retributive argument' to the utilitarian claim that the 'practice of punishment is justified by the beneficial consequences resulting from the observance of the laws which it secures' is that if 'this is the justification of punishment, why not apply it, when it pays to do so, to those innocent of any crime, chosen at random, or to the wife and children of the offender? And

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251 Feinberg (Fn. 189), 398, for instance, argues that 'while there may be a very general sense of the word 'punishment' which is well expressed by this definition … we can distinguish a narrower, more emphatic sense that slips through the meshes: Imprisonment as hard labor for committing a felony is a clear case of punishment in the emphatic sense; but I think we would be less willing to apply that term to parking tickets, offside penalties, sackings, flunkings, and disqualifications. Examples of the latter sort I propose to call penalties (merely), so that I may inquire further what distinguishes punishment, in the strict and narrow sense that interests the moralist, from other kinds of penalties'.

252 *GIEM Srl and Others v Italy* [GC], nos 1828/06, 34163/07 19029/11, 28 June 2018.

253 Hart (Fn. 188), 5.

notes that 'here the wrong reply is: *That*, by definition would not be punishment and it is the justification of punishment that is in issue'.[254] This reply, he notes, 'prevents us from investigating the very thing which modern scepticism most calls into question: namely the rational and moral status of our preference of a system of punishment under which measures painful to the individual are to be taken against them only when they have committed an offence'.[255]

The imposition of a punishment is conceptually tied to the commission of a criminal offence. From a normative perspective, punishment will only be justified for the purposes of Article 7(1) ECHR if imposed on an individual to whom criminal liability can be attributed *for* a clearly defined prior act or omission. There are three distinct aspects of relevance here: first punishment must be imposed for conduct and not for status or character; second, only those to whom culpability can be – legally or normatively – attributed can be punished; and third, punishment is limited by an offender's culpability for the act or omission: the imposition of a higher sentence for other reasons will not be justified.

V. The Relevance of the ECtHR's Concept of 'Justified Punishment' for Theory and Practice

What relevance might this this notion of justified punishment hold for the theory and practice of state punishment? Punishment is conceptualised in human rights law as a sanction imposed by the state for an (alleged) criminal offence. The definition is similar to HLA Hart's 'standard or central case of punishment', which characterises punishment as imposed by 'an authority constituted by a legal system' for 'an offence against legal rules'.[256] On Hart's definition, punishment must be 'of an actual or supposed offender for his offence', although he makes it clear in his discussion of 'sub-standard' forms of punishment, that the punishment of those 'who neither are in fact nor supposed to be offenders' might also constitute punishment. In a similar sense, as we have seen, the ECtHR had defined punishment in Article 7(1) ECHR in such a way as to capture those cases in which innocent individuals have been sanctioned for the criminal activities of others.

The concept of punishment in Article 7(1) ECHR concerns state punishment. Punishment is, of course, conceptually broader than just state punishment

254 Hart (Fn. 188), 6.

255 Hart (Fn. 188).

256 Hart (Fn. 188), 4–5: (1) It must involve pain or other consequences normally considered to be unpleasant; (ii) It must be for an offence against legal rules; (iii) It must be of an actual or supposed offender for his offence; (iv) It must be intentionally administered by human beings other than the offender; (v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed'; see too Antony Flew, The Justification of Punishment, Philosophy, 29, 1954, 291; Stanley I Benn, An approach to the Problems of Punishment, Philosophy, 33, 1958, 325.

in that it can 'turn up in any human relationship'.[257] As Gardner notes, 'Friends, colleagues, spouses, siblings, and business partners regularly punish each other for actual or supposed wrongs that are not legal wrongs. They typically do so by withdrawing favours or cooperation, but there are many other possible ways, some of which are capable of involving the infliction of grave suffering.'[258] In his opinion, state punishment is best understood as a type of punishment in general: 'Doesn't the criminal justice system attempt', he asks, 'in its inevitably clumsy way, to institutionalize certain moral practices, including the practice of punishment with its familiar relationships to wrongdoing and guilt, that already exist quite apart from the law and its institutions?'.[259] On this account, state punishment is simply a variety of punishment more broadly: 'the morality of state punishment is directed first by the morality of punishment in general, and only second (by way of modification) by the rule of law and similar specialized moral considerations.'[260] In this sense, state punishment seems to be characterised both conceptually and normatively as some sort of an institutionalised response to moral wrongdoing.

The regulation in Article 7(1) ECHR emphasises, though, that there is something special about state punishment and that this distinctiveness sets it apart from other types of punishment. The importance of the conceptualisation of state punishment as a practice distinct from notions of punishment in general has enjoyed increasing recognition with the development of important public law accounts of criminal law and punishment.[261] Thorburn, for instance, has argued for a distinct understanding of state punishment on the basis that 'the liberal constitutional order is concerned with protecting our liberty rather than with guiding our moral choices'.[262]

State punishment deserves special attention not just because it is subject to a distinct justificatory burden (characterised in the ECHR context not just by the substantive requirements of Article 7(1) ECHR but also other human rights guarantees, notably those in Articles 3 and 5 ECHR), but also precisely because it must be understood as a practice mediated by and through law.[263] This in turn focuses attention on the process and practice of criminal justice.

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257 McPherson (Fn. 186), 26: 'Lovers punish each other; parents punish their children; the State punishes criminals'.

258 John Gardner, Introduction, in: Hart HLA (ed), Punishment and Responsibility: Essays in the Philosophy of Law, 2nd edn, Oxford 2008, xlix.

259 Gardner (Fn. 258), xlix.

260 Gardner (Fn. 258), xlix. See also notably Leo Zaibert, Punishment and Retribution, London 2006, 22 ff; Leo Zaibert, Rethinking Punishment, Cambridge 2018.

261 Vincent Chiao, Criminal Law in the Age of the Administrative State, Oxford 2019; Thorburn (Fn. 156); A Brudner, Punishment and Freedom, Oxford 2009.

262 Thorburn (Fn. 156), 24. See also Mitchell Berman, Justification and Excuse: Law and Morality, Duke Law Journal, 53, 2003, 1 suggesting that criminal law doctrine and the legal moralist views do not fit well together.

263 Gardner (Fn. 258), xlix, is explicit about his disagreement with Hart's characterisation of punishment as a paradigmatically legal practice ('an offence against legal rules') and punishment

The characterisation of the substantive guarantees of Article 7(1) ECHR as 'side-constraints' on the concept of state punishment might thus be seen as misleading. To the extent that the definition of punishment is fundamentally linked to the criminal law (in the sense that punishment is imposed for a criminal offence), it will necessarily involve an element of normativity. At the same time, the case law on Article 7(1) ECHR demonstrates the importance of paying close attention to the relationship between the definition and the justification of punishment. The definition of punishment must eschew reference to justificatory elements, such as aims of punishment or the substantive requirements of legality as guaranteed in Article 7(1) ECHR, in order to prevent a narrowing of the definition of punishment and a circumvention of the application of the substantive guarantees.

As regards the purposes of punishment, there is widespread acknowledgement that these cannot be incorporated in the definition of punishment. Similarly, there is consensus that the requirement of culpability cannot be understood to comprise part of the definition. There is less acknowledgment, though, of the relevance of the act requirement in this regard. Punishment is defined in terms of the criminal offence, but it is common for the terms 'criminal offence' and 'wrongdoing' to be used interchangeably. This is particularly well-illustrated by Gardner's decision in the introduction to *Punishment and Responsibility* to replace the 'overly legalistic' terminology used by Hart ('offences', 'breaches of rules', etc) with the term 'wrongdoing'.[264] Gardner implies that Hart's reliance on legal terminology is simply to be explained by the fact that he was uncomfortable with 'the excessively moralistic overtones of "wrongdoing" and its cognates'.[265]

One issue with the notion of wrongdoing, though, is that it is strongly indicative of a prior act or omission, of 'an already committed wrong'.[266] The notion of a criminal offence on the other hand is more ambiguous. It is certainly possible to imagine offences, say offences which criminalise status or dangerousness or some characteristic such as ethnicity or sexual orientation, which are not framed in terms of a prior act or omission. There is a risk here that part of the substantive requirements of legality (act requirement) are thus somehow incorporated into the definition of punishment. If punishment is defined in

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otherwise than by officials as a 'sub-standard or secondary case', writing that he does 'not share Hart's conceptual limitation …, or even see where it gets its appeal.›

264 Gardner (Fn. 258), notably at xvii: 'True, by the nature of punishment, all punishment is for a wrong that, at the time of the punishment, has already been committed' and in fn 10 'Again, Hart says 'offence'.

265 Gardner (Fn. 258), i.

266 Gardner (Fn. 258), xvi: To identify certain suffering as suffering-of-the-guilty, and hence as retributively good, one must always identify the already-committed wrong in respect of which the wrongdoer is guilty'; See too Alice Ristroph, Responsibility for the Criminal Law, in: Duff RA/Green Stuart (eds), Philosophical Foundations of the Criminal Law, Oxford 2011, 107.

terms of wrongdoing, there is danger that sanctions imposed for offences which do involve a prior act are essentially excluded from the definition of punishment.

The approach of the ECtHR challenges us to think about the relationship between notions such as offence and (moral) wrongdoing and the relevance of this relationship for thinking about punishment. Some have argued that 'what should count as punishment can only be settled if one understands what punishment, morally speaking, is about'.[267] This reflects the suggestion that as a matter of definition, criminal punishment can be distinguished from other kinds of state imposed sanctions, and criminal offences from other kinds of sanction-backed regulation by way of the fact that criminal offences purportedly specify kinds of conduct that are wrongful, and that criminal punishment thus purports to be for wrongdoing.[268] Others though have called attention to the fact that that 'criminal wrongdoing does not track moral wrongdoing even remotely closely'.[269] The case law of the ECtHR is, in view of the asymmetrical nature of the autonomous definition of criminal charge, of limited assistance on the matter of whether a criminal offence is by definition understood to be (morally) wrongful. The case law does though clearly express the importance of ensuring that the act requirement is not incorporated into the definition of punishment.

The idea that punishment is conceptually imposed for wrongdoing takes on considerable importance in theory, particularly in the context of the idea of proportionality between an offender's liability for the offence and the sentence as a constraint on punishment. There are real questions though about the extent to which this operates as an effective restraint in sentencing practice.[270] The principal problem here is that 'it leaves open what elements are that stand in appropriate relation to each other'.[271] This gives rise to the suspicion that proportionality rather than acting as a restraint, simply reinforces 'existing penal practices or social undertakings'.[272]

This might be said to reflect more generally the fact that the issue of limits has been neglected in theory and practice of sentencing. Article 7(1) ECHR has had, in direct contrast to Article 6(1) ECHR, only a very limited impact on sentencing practice. There are, however, a number of sentencing practices which seem difficult to reconcile with the normative standards set out in Article 7(1) ECHR. Article 7(1) ECHR must be understood as limiting the

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267 For discussion and criticism see Vincent Geeraets, Two Mistakes about the Concept of Punishment, Criminal Justice Ethics, 37, 2018, 21, 22.

268 Duff, Realm of the Criminal Law (Fn. 13).

269 Thorburn (Fn. 156), 29

270 Nicola Lacey and Hanna Pickard, The Chimera of Proportionality: Institutionalising Limits of Punishment in Contemporary Social and Political Systems, Modern Law Review, 2015, 216.

271 Ulfrid Neumann, The Deserved Punishment, in: Neumann U/Simester AP/du Bois-Pedain A (eds), Liberal Criminal Theory: Essays for Andreas von Hirsch, Oxford 2014, 75.

272 L Farmer, Punishment in the Rule of Law, in: Meierhenrich J/Loughlin M, The Cambridge Companion to the Rule of Law, Cambridge 2021.

maximum sentence which can be imposed to that which corresponds to the offender's culpability for the offence. This suggests, for instance, that reliance on other factors, such as previous convictions, a failure to confess, or character, to allow for the imposition of a higher sentence will be difficult to reconcile with Article 7(1) ECHR. In order illustrate this sort of issue, it is useful to briefly consider the treatment of prior convictions in Switzerland.[273]

Previous convictions are of considerable importance in sentencing practice[274] and will result in the automatic imposition of a more severe sentence.[275] They are viewed conceptually as an aggravating factor;[276] the expectation is that people will obey the law and thus the fact that a person does not have a prior record is a neutral, not a mitigating factor.[277]

According to Article 7(1) ECHR, the maximum punishment, which can be imposed, is that which corresponds to an offender's culpability for the offence. There is widespread acknowledgment, however, of the difficulties in establishing any sort of convincing connection between an offender's culpability for the offence and the fact he or she has previous convictions.[278] Indeed the Swiss Federal Supreme Court has on occasion rejected altogether the idea that previous convictions increase an offender's blameworthiness for the offence at issue.[279]

Legality acts as a limit on state punishment by demanding that punishment be imposed for the offence and not for other reasons, such as (bad) character.

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273 For more detailed consideration of this argument, see Summers (Fn. 158), ch 2.

274 See Hans Wiprächtiger and Stefan Keller, Art 47, in: Niggli Marcel A/Wiprächtiger Hans (Hrsg.), Basler Kommentar: Strafrecht I, 4. Aufl., Basel 2019, N 100: 'eine ausserordentlich wichtige Rolle'; Peter Albrecht, 'Die Strafzumessung im Spannungsfeld von Theorie und Praxis, (1991) ZStrR, 108, 1991, 44, 53; See too Gerhard Schäfer/Günther M Sander/Gerhard van Gemmeren, Praxis der Strafzumessung, 6. Aufl., Münich 2017, 650; BGE 121 IV 49, 62, E 2d; BGer 6B_954/2009, 14 Jan 2010, E 2.2: 'Das Vorleben und insbesondere die Vorstrafen haben einen zentralen Stellenwert bei der Strafzumessung'.

275 See eg BGE 136 IV 1, 2, E 2.6.2; see also Hans Mathys, Leitfaden Strafzumessung, 2. Aufl., Basel 2019, 121: '*Die Rechtsprechung bedeutet, dass eine Vorstrafe grundsätzlich automatisch zu einer Straferhöhung führt*'; BGE 136 IV 1, 2, E 2.6.2; See eg BGer 6B_510/2015, 25 Aug 2015 (theft): 50% (from 24 months to 36 months).

276 See BGE 136 IV 1, 3 and for discussion Felix Bommer, 'Die strafrechtliche Rechtsprechung des Bundesgerichts im Jahr 2010' (2015) 151 *Zeitschrift des Bernischen Juristenvereins* 350, 354 f.

277 Mathys (Fn. 275), 150; '*Die Straffreiheit darf ausnahmsweise in die Beurteilung der Täterpersönlichkeit einbezogen werden, wenn sie auf eine aussergewöhnliche Gesetzestreue hinweist. Eine Solche ist wegen der Gefahr ungleicher Behandlung nicht leichthin anzunehmen*'; see too BGE 136 IV 1, 2, E 2.6.

278 See Hans Schultz, Einführung in den Allgemeinen Teil des Strafrechts, Band II, Bern 1982, 84; George Fletcher, Rethinking Criminal Law, New York 2000, 460–466; See also Stefan Trechsel/Martin Seelmann, Art 47, in: Trechsel Stefan/Pieth Marc (Hrsg.), Schweizerisches Strafgesetzbuch, Praxiskommentar, 4. Aufl., Zürich 2021, N 20: '*Bei der Berücksichtigung dieser Strafzumessungstatsache ist wegen ihrer Ambivalenz grösste Zurückhaltung geboten.*›

279 BGer 6B_105/2015, 13 Jan 2016, E 1.3.2: 'Vorstrafen stellen eines von mehreren täterbezogenen Merkmalen dar und steigern das konkrete Tatverschulden nicht'.

This makes it clear that the concern here is not with the purposes of punishment (such as retribution or deterrence) but rather with the *reason* for the imposition of punishment, that is to say on the grounds of culpability for the commission of a criminal offence. The consideration of previous convictions as an aggravating factor seems impossible to reconcile with the legality principle, precisely because in such cases the offender is being punished for reasons unconnected to his or her blameworthiness for the offence at issue. These issues have received little attention in practice and one of the reasons for this might be simply the fact that these practices are so widespread as to be accepted without proper consideration of their lawfulness or legitimacy. In *Achour*, for instance, the applicant expressly accepted that 'increasing the sentences applicable to recidivists was justified by the greater danger they posed on account of their persistence despite warnings from the courts'.[280]

This highlights the importance of engagement with the empirical phenomena of criminal justice in order to establish appropriate limits. Equally, the widespread acceptance of sentencing practices which seem difficult to reconcile with legality, demonstrates the importance of clearly defining and explaining the normative standards and the values on which they are based.

D. Conclusions: Trials and Punishment in the Rule of Law

The point of conceptualising criminal trials and punishment is to situate them within a normative framework to allow for explanation, justification and criticism. This can best be achieved by a process of interpretation that combines a normative and a descriptive or empirical analysis of the law. This approach is clearly evident in the case law of the ECtHR which is forced to try and make sense of the empirical phenomena of the criminal justice system and to assess whether they are able to deal with the requirements of fairness and legality and the political and moral demands of the rule of law more broadly. The depth of engagement with the realities of criminal justice is of considerable value to the development of the normative principles and values of the Convention. In particular, it allows for a focus on the importance of limits as well as aims, which have practical and not just theoretical force.

Equally, though, there are certain dangers with this approach. The case law of the ECtHR demonstrates the potential for normative principles to be compromised by acceptance of the need to adapt to the realities of the process of criminal justice, irrespective of whether these are couched in terms of efficiency, effectiveness or in some sort of notion of emerging threats such as terrorism. This underscores the particular importance of clearly explaining the normative stan-

280 *Achour v France* [GC], no 67335/01, ECHR 2006-IV, § 37.

dards governing trials and punishment, the values on which these standards are based and the demands of the rule of law.

Fairness, defined in terms of protecting the right to be heard in adversarial trials, and legality, understood as demanding that punishment only be imposed on culpable individuals for a clearly defined act or omission are of fundamental importance to and can only be properly understood in the context of the rule of law.[281] In this sense they are clearly tied up with the state's obligation to treat individuals as equals and as autonomous agents able to respond to the law's demands. The ECtHR's case law underlines the importance of the relationship between law and the legal system and to legal adjudication as a process involving independent and impartial courts.[282] This emphasises too that punishment will only comply with the notions of fairness and legality if it is imposed within the context demanded by the rule of law. This might seem self-evident. Yet, it is important to consider that currently the vast majority of criminal punishments are imposed in Switzerland by prosecutors in proceedings without any automatic judicial supervision. This poses a real challenge to the idea of the imposition of punishment as a judicial function in the context of the separation of powers and the rule of law.

Of central importance here, too, is recognition of the relationship between the criminal law and the rule of law and in particular to the manner in which the criminal law supports the possibility of the rule of law.[283] The notions of crime and criminal law are omnipresent in the discussion of trials and punishment.[284] Why do we regulate criminal trials differently and how does punishment differ from other forms of state-imposed sanctions? This calls attention to the importance of the aims of the criminal law. Chiao explains the issue in the following terms: 'If you think the point of the criminal law is to vindicate a person's natural rights, then you will likely expect a concept of moral wrongdoing to figure prominently in its justification. If, on the other hand, you think the primary job of the criminal law is stabilising cooperation under shared public institutions, then you will likely expect instead an account of the value of shared life under such institutions to take center stage in justifying the criminal law'.[285] Unsurprisingly, perhaps, the approach of the ECtHR seems closer to the latter account. The focus is on the process of prosecution and punishment and on the importance of limiting state authority. The limits here are not derived from the aims of punishment or proceedings but are to be seen as a response to the power

281 *Del Río Prada v Spain* [GC], no 42750/09, ECHR 2013, § 77 referring to the fact that the right is non-derogable.

282 *Belilos v Switzerland*, 29 April 1988, Series A No 132, § 64. See also Trechsel (Fn. 18), 48.

283 See Vincent Chiao, What is the Criminal Law For? Law and Philosophy, 35, 2016, 136, 138: 'The criminal law supports the possibility of the rule of law – a collective life under stable public institutions – by providing crucial support to shared attitudes of reciprocity.'

284 For detailed consideration of the importance of definition, see Lindsay Farmer, The Obsession with Definition: The Nature of Crime and Critical Legal Theory, Social and Legal Studies, 5, 1996, 57.

285 Chiao (Fn. 283), 138.

and possibilities of the criminal justice authorities. In this sense, it is essential to carefully consider the nature of criminal justice as a practice in order to ensure the development of effective and appropriate prescriptive principles.

Consideration of the ECtHR's regulation of fairness and legality in the rule of law suggests that these concepts can only be understood in the context of the procedural and institutional setting which they are designed to regulate. The guarantee of fairness has had a substantial impact on the regulation of criminal trials. In the context of legality, and indeed other human rights principles, there is scope for greater consideration and indeed recognition of their potential to act as limits on punishment. Despite scepticism about the role of limits as part of the positive justification of punishment[286] or process they are nevertheless of central importance to a proper understanding of fair trials and justified punishment in the rule of law.

Abstract

There can be no denying the influence that the European Convention on Human Rights (ECHR) has had on the practice of criminal law and procedure law. The distinct understanding of trials and punishment being developed by the European Court of Human Rights (ECtHR) is of significance not just because of its contribution to the development of normative, prescriptive principles but also because in developing these principles the ECtHR has been forced to engage deeply with criminal justice as an empirical phenomenon. The vision of criminal justice which is critiqued and legitimised in the case law is rooted in actual practice. In this sense, the foundation of the ECtHR's normative vision differs significantly from other theoretical accounts of criminal law and process, which are sometimes criticised for failing to engage sufficiently with the realities of criminal justice. The ECtHR might be understood as developing of prescriptive principles which are of broad (if not necessarily of 'universal') application, but which are able to take account of the changing regulatory priorities of the modern criminal justice system in seeking explain, legitimize, and justify criminal trials and punishment. Much of the writing on the ECHR and criminal justice focuses on the normative values at stake – values such a legality, liberty, or fairness. This article proceeds on the basis that this focus has overshadowed the importance of the criminal processes themselves in the normative undertaking – notions such as hearings or punishment. A proper understanding of the relevance of the ECHR for the criminal law must take into account the manner in

286 See Gardner (Fn. 258), xxv; Matt Matravers, Is Twenty-first Century Punishment Post-desert?, in: Tonry M (ed), Retributivism has a Past. Has it a Future?, Oxford 2011, 35; Thorburn (Fn. 156), 25.

which notions such as 'fair trials' or 'justified punishment' are conceptualised as a whole. This article sets out to examine the importance of the ECHR in criminal law theory and practice. It seeks to make both a methodological argument about theorising about criminal law and procedure and a more substantive point regarding the principles and values underpinning the regulation of criminal trials and punishment in the rule of law.

Zusammenfassung

Der Einfluss, den die Europäische Menschenrechtskonvention (EMRK) auf die Praxis des Strafrechts und des Strafverfahrens hat, ist unbestritten. Das vom Europäischen Gerichtshof für Menschenrechte (EGMR) entwickelte eigenständige Verständnis von Verfahren und Strafen ist nicht nur wegen seines Beitrags zur Entwicklung normativer und präskriptiver Grundsätze von Bedeutung, sondern auch, weil der EGMR bei der Entwicklung dieser Grundsätze gezwungen war, sich eingehend mit der Strafjustiz als empirischem Phänomen zu beschäftigen. Die Vision der Strafjustiz, die in der Rechtsprechung kritisiert und legitimiert wird, ist in der tatsächlichen Praxis verankert. In diesem Sinne unterscheidet sich die Grundlage der normativen Vision des Europäischen Gerichtshofs für Menschenrechte erheblich von anderen theoretischen Darstellungen des Strafrechts und des Strafverfahrens, die manchmal dafür kritisiert werden, dass sie sich nicht ausreichend mit den Realitäten der Strafjustiz auseinandersetzen. Man kann davon ausgehen, dass der Europäische Gerichtshof für Menschenrechte präskriptive Prinzipien entwickelt, die weitreichend (wenn auch nicht unbedingt «universell») anwendbar sind, die aber in der Lage sind, den wechselnden regulatorischen Prioritäten des modernen Strafjustizsystems Rechnung zu tragen, wenn es darum geht, Strafprozesse und Strafen zu erklären, zu legitimieren und zu rechtfertigen. Ein Grossteil der Literatur über die EMRK und die Strafjustiz konzentriert sich auf die normativen Werte, die auf dem Spiel stehen – Werte wie Legalität, Freiheit oder Fairness. Dieser Artikel geht davon aus, dass diese Fokussierung die Bedeutung der Strafverfahren selbst für das normative Engagement – Begriffe wie Gerichtsverhandlungen oder Strafe – ausgeblendet hat. Ein angemessenes Verständnis der Bedeutung der EMRK für das Strafrecht muss die Art und Weise berücksichtigen, in der Begriffe wie «faires Verfahren» oder «gerechte Strafe» in ihrer Gesamtheit konzeptualisiert werden. In diesem Artikel soll die Bedeutung der EMRK in der Theorie und Praxis des Strafrechts untersucht werden. Er versucht, sowohl ein methodologisches Argument für die Theoriebildung im Bereich des Strafrechts und des Strafverfahrens vorzubringen als auch ein substantielleres Argument zu den Grundsätzen und Werten zu treffen, die der Regelung von Strafprozessen und strafrechtlichen Sanktionen in einem Rechtsstaat zugrunde liegen.

Résumé

On ne peut nier l'influence que la Convention européenne des droits de l'homme (CEDH) a eue sur la pratique du droit pénal et de la procédure pénale. La compréhension distincte des procès et des peines développée par la Cour européenne des droits de l'homme (CEDH) est importante non seulement en raison de sa contribution au développement de principes normatifs et prescriptifs, mais aussi parce qu'en développant ces principes, la CEDH a été obligée de s'engager profondément dans la justice pénale en tant que phénomène empirique. La vision de la justice pénale qui est critiquée et légitimée dans la jurisprudence est ancrée dans la pratique réelle. En ce sens, le fondement de la vision normative de la Cour européenne des droits de l'homme diffère considérablement d'autres visions théoriques du droit pénal et de la procédure pénale, qui sont parfois critiquées pour ne pas s'engager suffisamment dans les réalités de la justice pénale. La Cour européenne des droits de l'homme peut être considérée comme élaborant des principes prescriptifs d'application large (sans être nécessairement «universelle»), mais capables de tenir compte des priorités réglementaires changeantes du système de justice pénale moderne en cherchant à expliquer, légitimer et justifier les procès et les sanctions pénales. La plupart des écrits sur la CEDH et la justice pénale se concentrent sur les valeurs normatives en jeu – des valeurs telles que la légalité, la liberté ou l'équité. Cet article part du principe que cette focalisation a occulté l'importance des processus criminels eux-mêmes dans l'engagement normatif – des notions telles que les audiences ou la peine. Une bonne compréhension de la pertinence de la CEDH pour le droit pénal doit tenir compte de la manière dont des notions telles que «procès équitable» ou «peine justifiée» sont conceptualisées dans leur ensemble. Cet article se propose d'examiner l'importance de la CEDH dans la théorie et la pratique du droit pénal. Il cherche à présenter à la fois un argument méthodologique sur la théorisation du droit pénal et de la procédure pénale et un argument plus substantiel concernant les principes et les valeurs qui sous-tendent la réglementation des procès pénaux et des sanctions pénales dans l'État de droit.

Literatur

Albrecht Peter, Die Strafzumessung im Spannungsfeld von Theorie und Praxis, (1991) ZStrR, 108, 1991, 44.

Altwicker Tilmann, Non-Universal Arguments under the European Convention on Human Rights, European Journal of International Law, 31, 2020, 101

Bachmaier Lorena, The European Court of Human Rights on negotiated justice and coercion, European Journal of Crime, Criminal Law and Criminal Justice, 26, 2018, 236.

Baer Susanne, The Rule of-and not by any-Law. On Constitutionalism, Current Legal Problems 2018, 335.

Beccaria Cesare, On Crimes and Punishment (first published 1766; R Bellamy ed; R Davies tr) 5th edn, Cambridge 1995.

Benn Stanley I, An approach to the Problems of Punishment, Philosophy, 33, 1958, 325.

Bentham Jeremy, An Introduction to the Principles of Morals and Legislation (first published 1789; JH Burns and HLA Hart eds) London 1970.

Berman Mtchell, Justification and Excuse: Law and Morality, Duke Law Journal, 53, 2003, 1

Bommer Felix, Die strafrechtliche Rechtsprechung des Bundesgerichts im Jahr 2010, Zeitschrift des Bernischen Juristenvereins, 151, 2015, 350.

Bommer Felix, Abgekürztes Verfahren und Plea Bargaining im Vergleich, ZSR 128, 2009 II, 5.

Brudner A, Punishment and Freedom, Oxford 2009.

Cartuyvels Yves, Les droits de l'homme, frein ou amplificateur de criminalisation?, in: Dumont H/Ost F/Van Drooghenbroeck S (eds), La responsabilité, face cachée des droits de l'homme, Brussels 2005.

Chiao Vincent, Criminal Law in the Age of the Administrative State, Oxford 2019.

Chiao Vincent, What is the Criminal Law For? Law and Philosophy, 35, 2016, 136

de Lagasnerie Geoffroy, Judge and Punish: The Penal State on Trial, Stanford 2018.

Diggelmann Oliver/Pangrazzi Sara, Die Kritik an der Rechtsprechung des EGMR in»alten«Demokratien, in: Pöschl M/Wiederin E (Hrsg.), Demokratie und Europäische Menschenrechtskonvention, Wien 2020.

Duff RA, The Realm of the Criminal Law, Oxford, 2018.

Duff RA, Towards a Theory of Criminal Law, Aristotelian Society Supplementary Vol 84, 2010, 1.

Duff RA, Answering for Crime: Responsibility and Liability in the Criminal Law, Oxford 2007.

Duff RA, Theorizing Criminal Law: a 25th Anniversary Essay, Oxford Journal of Legal Studies, 25, 2005, 353.

Duff RA/Farmer lindsey/Marshall Sandra/Tadros Victor, The Trial on Trial 3: Towards a Normative Theory of the Criminal Trial, Oxford 2007.

Farmer Lindsey, Punishment in the Rule of Law, in: Meierhenrich J/Loughlin M, The Cambridge Companion to the Rule of Law, Cambridge 2021.

Farmer Lindsey, Crime and Punishment, Criminal Law and Philosophy, 14, 2020, 289.

Farmer Lindsey, Making the Modern Criminal Law: Criminalization and Civil Order, Oxford 2016.

Farmer Lindsey, Criminal Wrongs in Historical Perspective, in: Duff RA/Farmer L/Marshall SE/Renzo M/Tadros V (eds), The Boundaries of the Criminal Law, Oxford 2011.

Farmer Lindsey, The Obsession with Definition: The Nature of Crime and Critical Legal Theory, Social and Legal Studies, 5, 1996, 57.

Fassin Didier, The Will to Punish, New York 2018.

Feinberg Joel, The Expressive Function of Punishment, The Monist, 49, 1965, 397.

Fletcher George, Rethinking Criminal Law, New York 2000.

Flew Antony, The Justification of Punishment, Philosophy, 29, 1954, 291.

Frase Richard S, Comparative Perspectives on Sentencing Policy and Research, in: Tony M/Frase RS (eds), Sentencing and Sanctions in Western Countries, Oxford 2001.

Frowein Jochen A/Peukert Wolfgang, Europäische Menschenrechtskonvention. EMRK Kommentar, Kehl am Rhein 2022.

Fuller Lon L, The Morality of Law, New Haven 1964.

Gardner John, Introduction, in: Hart HLA (ed) Punishment and Responsibility: Essays in the Philosophy of Law, 2nd edn, Oxford 2008, xlix.

Garland David, The Rule of Law, Representational Struggles and the Will to Punish, in D Fassin, *The Will to Punish* (ed C Kutz) New York 2018.

Geeraets Vincent, Two Mistakes about the Concept of Punishment, Criminal Justice Ethics, 37, 2018, 21.

Gilliéron Gwladys/Killias Martin, Strafbefehl und Justizirrtum: Franz Riklin hatte Recht, in: Niggli MA/Hurtado Poso J/Queloz N (Hrsg.), Festschrift für Franz Riklin, Zur Emeritierung und zugleich dem 67. Geburtstag, Zürich 2007.

Grabenwarter Christoph, Verfahrensgarantien in der Verwaltungsgerichtsbarkeit: eine Studie zu Artikel 6 EMRK auf der Grundlage einer rechtsvergleichenden Untersuchung der Verwaltungsgerichtsbarkeit Frankreichs, Deutschlands und Österreichs, Vienna 1997.

Hansjakob Thomas, Zahlen und Fakten zum Strafbefehlsverfahren, forumpoenale 2014, 160.

Hart HLA, Prolegomenon to the Principles of Punishment, in Hart HLA (ed), Punishment and Responsibility: Essays in the Philosophy of Law, Oxford 2008.

Helm Rebecca K 'Constrained Waiver of Trial Rights? Incentives to Plead Guilty and the Right to a Fair Trial (2019) 46 *Journal of Law and Society* 423.

Hirsch Hans Joachim, Gibt es eine nationale unabhängige Strafrecht?, in: Seebode M (Hrsg.), Festschrift für Günter Spendel zum 70. Geburtstag am 11. Juli 1992, Berlin 1992.

Jackson John/Summers Sarah, Seeking Core Fair Trial Standards across National Boundaries: Judicial Impartiality, the Prosecutorial Role and the Right to Counsel, in: Jackson J/Summers S (eds), Obstacles to Fairness in Criminal Proceedings: Individual Rights and Institutional Forms, Oxford 2018.

Jackson John/Summers Sarah, The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions, Cambridge 2012.

Kant Immanuel, Groundwork of Metaphysics of Morals (first published 1785; ed M Gregor and KJ Timmerman), Cambridge 2014

Lacey Nicola, Approaching or Rethinking the Realm of Criminal Law, Criminal Law and Philosophy, 14, 2020, 307.

Lacey Nicola, Populism and the Rule of Law, Annual Review of Law and Social Science, 2019, 79.

Lacey Nicola, In Search of Criminal Responsibility: Ideas, Interests, and Institutions, Oxford 2016.

Lacey Nicola/Pickard Hanna, The Chimera of Proportionality: Institutionalising Limits of Punishment in Contemporary Social and Political Systems, Modern Law Review, 2015, 216.

Lacey Nicola, Historicising Criminalisation: Conceptual and Empirical Issues, Modern Law Review 72, 2009.

Lacey Nicola, In Search of the Responsible Subject: History, Philosophy and the Social Sciences in Criminal Law Theory, Modern Law Review 64, 2001.

Lippke Richard, The Ethics of Plea Bargaining, New York 2011.

MacCormick Neil, Reconstruction after Deconstruction: A Response to CLS, Oxford Journal of Legal Studies, 10, 1990, 539.

Mahlmann Matthias, Constitutionalism and the Idea of Law, in: Kassner J/ Starger C (eds), The Value and Purpose of Law. Essays in Honor of MNS Sellers, ARSP Beiheft 160, Stuttgart 2019, 187.

Mahlmann Matthias, Human Dignity and Autonomy in Modern Constitutional Orders, in: Rosenfeld M/Sájo A (eds), The Oxford Handbook of Comparative Constitutional Law, Oxford, 2012, 385.

Mahlmann Matthias, Ethics, Law and the Challenge of Cognitive Science, German Law Journal, 2007, 577.

Mathys Hans, Leitfaden Strafzumessung, 2. Aufl., Basel 2019.

Matravers Matt, Is Twenty-first Century Punishment Post-desert?, in: Tonry M (ed), Retributivism has a Past. Has it a Future?, Oxford 2011.

McPherson Thomas, Punishment: Definition and Justification, Analysis 28, 1967, 21

Meyer Frank, Band X: EMRK, in: Wolter J (Hrsg.), Systematischer Kommentar zur Strafprozessordnung, 5. Aufl., Köln 2019.

Moore Michael, Placing Blame: A Theory of Criminal Law, New York 1997.

Neumann Ulfrid, The Deserved Punishment, in: A du Bois-Pedain (ed), Liberal Criminal Theory: Essays for Andreas von Hirsch, Oxford 2014, 75.

Norrie Alain W, Crime, Reason and History: A Critical Introduction to Criminal Law, 3rd edn, Cambridge 2014.

Nosetti-Kaufmann Ariane, Strafbefehl, abgekürztes Verfahren und fehlende Unmittelbarkeit: Festhalten am Status quo – eine verpasste Chance? ZStrR 138, 2020, 248.

Rawls John, Two Concepts of Rules, The Philosophical Review, 64, 1955.

Ristroph Alice, Responsibility for the Criminal Law, in: Duff RA/Green SA (eds), Philosophical Foundations of the Criminal Law, Oxford 2011.

Roth Robert, Libres propos sur la subsidiarité du droit pénal, in Auer A, Delley J-D, Hottelier M, Malinverni G (eds), Aux confins du droit: Essais en l'honneur du Professeur Charles-Albert Morand, Basel 2001.

Schäfer Gerhard/Sander Günther M/van Gemmeren Gerhard, Praxis der Strafzumessung, 6. Aufl., Münich 2017.

Schubarth Martin, Zurück zum Grossinquisitor?, Zur rechtsstaatlichen Problematik des Strafbefehls, in: Niggli MA/Hurtado Pozo J/Queloz N (Hrsg.), Festschrift für Franz Riklin, Zur Emeritierung und zugleich dem 67. Geburtstag, Zürich 2007, 527.

Schultz Hans, Einführung in den Allgemeinen Teil des Strafrechts, Band II, Bern 1982.

Schwarzenegger Christian, Art 352, in: Donatsch A/Lieber V/Summers S/Wohlers W (Hrsg.), Kommentar zur Schweizerischen Strafprozessordnung, 3. Aufl., Zürich 2020.

Spano Robert, Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity, Human Rights Law Review, 14, 2014, 487.

Summers Sarah J, Sentencing and Human Rights: The Limits on Punishment, Oxford 2022.

Summers Sarah J, Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights, Oxford 2007.

Tadros Victor, The Ends of Harm, Oxford 2011.

Thommen Marc, Kurzer Prozess/fairer Prozess? Strafbefehls- und abgekürzte Verfahren zwischen Effizienz und Gerechtigkeit, Bern 2013.

Thommen Marc/Eschle David, Was tun wir Juristinnen und Juristen eigentlich, wenn wir forschen?, Klassische Dogmatik versus empirische Rechtsforschung als innovativer Weg, in: recht.innovativ, Meier J/Zurkinden N/Staffler L (Hrsg.), 21. Apariuz-Band, Zürich 2020.

Thorburn Malcolm, Criminal Law as Public Law, in: Duff RA/Green S (eds), Philosophical Foundations of Criminal Law, Oxford 2011.

Trechsel Stefan/Seelmann Martin, Art 47, in: Trechsel S/Pieth M, Schweizerisches Strafgesetzbuch, Praxiskommentar, 4. Aufl., Zürich 2021.

Trechsel Stefan, Human Rights in Criminal Proceedings, Oxford 2005.

Tulkens Françoise, The Paradoxical Relationship between Criminal Law and Human Rights, Journal of International Criminal Justice, 9, 2011, 577.

van Zyl Smit Dirk and Ashworth Andrew, Disproportionate Sentences as Human Rights Violations, Modern Law Review, 67, 2004, 541.

von Hirsch Andreas, Doing Justice: The Choice of Punishments, New York 1976.

Waldron Jeremy, How Law Protects Dignity, Cambridge Law Journal, 71, 2012, 200.

Welzel Hans, Das Deutsche Strafrecht: Eine systematische Darstellung, 11. Aufl., Berlin 1969.

Wiprächtiger Hans/Keller Stefan, Art 47, in: Niggli MA/Wiprächtiger H (Hrsg.), Basler Kommentar: Strafrecht I, 4. Aufl., Basel 2019.

Zaibert Leo, Punishment and Retribution, London 2006.

Zaibert Leo, Rethinking Punishment, Cambridge 2018.