

Does the criminal law secure human rights?

I.

Looking at history, the immediate response seems to be a firm no—even to dismiss the question as cynical: What instrument of state coercion has enabled and caused more human rights violations than the criminal law? The inhumane and cruel punishments carried out in the name of ‘retributive justice’ are thoroughly documented.¹

And then there was the inquisitorial process, in which the accused was entirely at the mercy of the authority, which combined the roles of prosecutor and judge, physically and mentally broken, and socially annihilated—how many innocent people fell victim to this? How many false confessions were extracted under torture?

The criminal law has also proved to be a particularly effective tool for tyrants to consolidate their power by persecuting and murdering political opponents and innocent citizens. This was starkly illustrated in the Moscow Trials and the Nazi People’s Court (*Volksgerichtshof*).

It is therefore not surprising that many of the earliest efforts to enshrine fundamental rights—and later, human rights—were aimed precisely at curbing the excesses of the criminal law.² The struggle for the recognition of human rights was,

¹ Consider, for instance, the *Constitutio Criminalis Carolina* of 1532 and the methods of execution prescribed therein (including quartering, burning, drowning, burying alive, impalement and the breaking wheel).

² See for example Habeas Corpus Act 1679, the Bill of Rights 1689, the French Declaration of the Rights of Man and of The Citizens 1789 and the U.S. Bill of Rights of the same year (Amendment V); see also the Magna Charta of 1215 (clauses (28) and (29)).

to a significant extent, a struggle against an arbitrary and brutal system of criminal justice.

Accordingly, the criminal law occupies a prominent position in the ECHR and the ICCPR. Both place essential limits on its potential for arbitrariness and abuse—through the prohibition of torture and inhuman or degrading punishment, fundamental procedural safeguards, and the principle of non-retroactivity.³

What is particularly important and fundamental here is that, according to the unequivocal wording of these conventions, these rights apply to *everyone*, including the worst criminals. And not merely because there is a risk that innocent people might otherwise be affected, but simply because they are *human*. Therefore, even when a person's guilt is beyond doubt and that person has committed horrific, appalling crimes, the rights enshrined in these conventions—including the limits on the forms of punishment—apply fully.

To lawyers, this may now seem self-evident, but this is something that the general public—and sometimes politicians⁴—need to be reminded of. Even within the legal discipline, lawyers must remain vigilant to ensure that this bulwark of freedom and humanity is not eroded, for instance, by questioning legal protections for those who seriously attack society, such as terrorists.⁵

But even a criminal justice system that is constrained by these guarantees and rooted in the rule of law remains in fundamental tension with human rights. For modern punishment also constitutes a serious interference with human rights—primarily with liberty or property, but also with honour, professional and family life,

³ Art. 3, 6 and 7 ECHR; Art. 7, 14 and 15 ICCPR.

⁴ At the time of writing, the US government is seriously considering transferring convicted offenders to prisons in El Salvador—facilities that serve as a prime example of inhumane conditions.

⁵ See, for instance, Günther Jakobs' concept of 'enemy criminal law' (*Feindstrafrecht*), which he has used at times in a purely descriptive manner and at other times in an affirmative, normative sense.

etc. It is a constant thorn in the flesh of the body of human rights and the project of humanism—a heavy burden deliberately inflicted by the state, which therefore requires special justification. In addition, further problems of the criminal law arise in relation to human rights, such as sentencing disparities, which raise equality concerns.

II.

However, the relationship between the criminal law and human rights is not solely one of conflict—it also has a positive dimension, making it *ambivalent* overall. The issues mentioned should not be overlooked, but neither should the fact that the criminal law also serves to secure human rights. For example, if murder were to go unpunished, the right to life would be in serious jeopardy.

While human rights are generally understood as obligations imposed on the state, and as such cannot be directly violated by individual crimes, they also oblige the state to prevent such acts. For example, the right to life, as enshrined in Art. 2 ECHR and Art. 6 ICCPR, not only prohibits the state and its agents from taking lives, but also requires the state to protect this right through legislation. This shows that the state is not only a potential threat to human rights, but also their guarantor. Indeed, lasting peaceful coexistence and the free development of the individual are only possible if people's rights and interests are protected, i.e., if the rule of law prevails, rather than the law of the strongest.

If human rights—and, more broadly, the very legitimate purpose of the state—require the state to protect individual rights not only from its own interference but also from violations by other individuals, then it seems only natural to use the criminal law as a means of protection, at least for the most important rights. Indeed, there seems to be no legal system in the world that does not have a criminal prohibition against killing. The reason for turning to the criminal law is

simple: due to the nature and severity of its sanctions, it serves as a particularly powerful means of protection. I would like to explain this in more detail.

As noted, punishment constitutes a direct and significant interference with an individual's liberty, property, and overall life. In particular, imprisonment is a severe burden—one that restricts far more than just freedom of movement. It curtails many aspects of personal freedom, including social and familial relationships. Furthermore, unlike minor administrative fines—such as a speeding ticket, which one might casually mention to friends—criminal sanctions carry a profound stigma.⁶ A conviction (and often even the mere fact of being investigated) can lead to the loss of friends, estrangement from family members or a partner, and significant difficulties in finding employment or housing due to a criminal record. Even after serving a sentence, individuals often face continued social rejection. The stigma attached to criminal punishment is thus an inherent part of its burden.

III.

How exactly does the particular nature and severity of punishment translate into the widely assumed special protective effect of the criminal law? A first answer might be that an incarcerated offender is physically prevented from re-offending—the so-called incapacitation theory. However, this holds true only to a limited extent, as imprisonment merely prevents offences from being committed *extra muros*.

Moreover, most offenders will eventually be released—even those sentenced to life imprisonment, given human rights requirements such as the right to hope. With regard to this period of regained freedom, prison can be very counterproductive:

⁶ The ECtHR relies on the degree of stigma to determine whether penalties belong to the 'hard core' of the criminal law: *Jussila v. Finland*, no. 7305/01, 23 November 2006, § 43. See also the dissenting opinion of Judge Loucaides, joined by Judges Zupančič and Spielmann, which points out that *any* attribution of criminal responsibility is accompanied by stigma.

rather than rehabilitating, it can foster social disintegration and even increase criminal tendencies, especially when inmates are placed alongside more serious offenders.⁷ It is no coincidence that, in Latin America, prisons are often referred to as ‘universities of crime’ (*universidad del delito*).

The preventive effect of the criminal law on society and potential offenders seems to be more significant and lasting. This applies firstly to general deterrence, i.e., the idea that the threat of punishment deters individuals from committing crimes.

This deterrent effect is frequently questioned, with some arguing that there is no solid empirical evidence to support it,⁸ and others even claiming that it has been disproved.⁹ However, numerous empirical studies, both in law and economics¹⁰ and in criminology¹¹, claim to have found evidence of such an effect. The issue remains controversial. There does, however, seem to be broad agreement that the perceived likelihood of detection and punishment matters more than the severity of the punishment.

That said, it seems reasonable to assume that the severity of the punishment also plays a role—at least up to a certain point, depending on how high the risk of being caught is perceived to be. For instance, if the likelihood of being caught fare-dodging is estimated at 50%, but the penalty is negligible, then from an economic perspective, fare-dodging might still be worthwhile. The people most likely to

⁷ Cf. Edwin Sutherland’s differential association theory of criminology (*Principles of Criminology*, 4th ed. 1947).

⁸ See e.g. Karl-Ludwig Kunz, ‘Grundzüge der heutigen Kriminalpolitik’, 17 *Neue Kriminalpolitik* (2005), 151-156, 152.

⁹ Especially the Italian positivists, e.g. Enrico Ferri, *Sociologia criminale*, vol. I, 5th ed. 1929, 421 et seq.

¹⁰ See e.g. Robert Cooter/Thomas Ulen, *Law and Economics*, 6th ed., 2016, 462 et seq.

¹¹ See, for example, Daniel Nagin, ‘Criminal Deterrence in the Twenty-first Century’, 42 *Crime and Justice* (2013), 199-263.

refrain then would be those with strong moral convictions or a pronounced sense of shame.

I fully acknowledge that this reasoning is based on everyday experience, but given that the deterrent effect of the criminal law remains an empirically disputed issue, I believe such cautious reliance on common sense is warranted. After all, it is a simple matter of life experience that the threat of punishment can have a deterrent effect. To deny any deterrent effect of the criminal law altogether seems detached from reality.¹²

Secondly, it also seems reasonable to assume that the criminal law influences society in a positive way—not only through deterrence but also by reinforcing moral values.¹³ The criminal law signals which behaviours are fundamentally condemned by society, drawing a clear red line. By punishing those who violate these fundamental norms, the state demonstrates to everyone that the system works, that these norms remain valid, and that the example set by offenders is not one to be followed. In this way, the criminal justice system reinforces social compliance with the law.

Beyond this, it has the crucial advantage of preventing victims of harmful acts—and those who sympathise with them—from resorting to revenge or vigilante justice, thereby preserving the state's monopoly on the use of force. This is a key achievement of legal civilisation, historically instrumental in breaking cycles of retaliatory violence. Thus, the criminal law secures human rights and interests not

¹² The occasional objection that the criminal law cannot offer protection because it always comes too late—only applying after a crime has already been committed—falls short. While it is indeed too late to prevent the specific act that has already occurred, the criminal law helps to prevent *other* crimes, which, precisely because they do not happen, never come to our attention.

¹³ This has been especially emphasised by the German functionalists, e.g., Günther Jakobs, *Strafrecht Allgemeiner Teil*, 2nd ed. 1991, sec. 1 mn. 2 et seq.

only through deterrence but also by affirming legal prohibitions and reinforcing the state's authority over the use of force.

IV.

In conclusion, the criminal law has the potential to seriously violate human rights. However, the progress made in national and international human rights protections has significantly reduced this risk. While the tension between the criminal law and human rights should not be overlooked, neither should the fact that the criminal law serves as an effective means of securing these rights. The challenge is to strike the right balance between protecting the rights of potential victims and protecting the rights of the accused and the freedom of all. Finally, it is worth remembering Franz von Liszt's wise observation: *The best criminal policy is a good social policy.*¹⁴

¹⁴ 'Das Verbrechen als sozial-pathologische Erscheinung', in Franz von Liszt (ed.), *Strafrechtliche Aufsätze und Vorträge*, vol. 2, 1905, 230-250, 246.