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Liber Amicorum in honour
of Prof. Dr. Dr. h.c. Dietrich Rauschning

CURRENT ISSUES OF INTERNATIONAL LAW AND COMPARATIVE LAW

Monograph

Edited by Hans-Detlef Horn, Vadim Voynikov

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This book analyses different aspects of International and Comparative Law. The monograph was prepared in honour of Dietrich Rauschning, Professor Emeritus of Georg August University Göttingen and Honorary Doctor of Immanuel Kant Baltic Federal University.

The contributors of the book are German and Russian scientists who work and cooperate with Professor Rauschning. The analyses carried out in this book have been structured in three complementary parts: International, European and Constitutional Law, International and Comparative Private Law, and Legal Issues of International Cooperation in Combating Crime. In the Part I (Chapters 1—9) the focus shifts to the international dimensions of public law, as well as history and theory of law. The Part II (Chapters 10—11) is focused on issues of the Private International Law and Comparative Private Law. Part III (Chapters 12—14) addresses to particular aspects of international cooperation of combating organized crime.

The book will be of interest to scientists of academic institutions, teachers and students of universities, as well as to everyone who is interested in international law and comparative legal studies.

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Prof. Dr. Dr. h. c. mult. Dietrich Rauschning

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PREFACE

This collection of essays celebrates the work of Dietrich Rauschning, Professor Emeritus of Georg August University Göttingen and Honorary Doctor of Kaliningrad Immanuel Kant Baltic Federal University. Being one of the leading scientists in the field of International Law he instrumentally promoted the modernisation and internationalisation of legal education at the Law Institute of Immanuel Kant Baltic Federal University for decades, also coordinating the cooperation of the partner universities involved.

Dietrich Rauschning was born on January 16, 1931 in the East Prussian village of Klein Steinort (Kreis Angerburg), today located on the territory of Poland named Sztynort Mały, Węgorzewo commune. His father, Friedrich Rauschning was the estate manager of the counts Lehndorf, and later as Dietrich Rauschning lost his father in 1942, manager of the Hindenburg family estate in Langenau. His mother Leonie Rauschning was the daughter of famous German Admiral Guido von Usedom.

Until 1945 Dietrich Rauschning with his family lived in Neukuhren (today Pionersky). In January 1945 the Rauschning's family with the refugees moved from East Prussia to Schleswig-Holstein, and then to the town of Seesen at the north-western part of the central Harz region, where Dietrich graduated from high school in 1950 ("Abitur").

In 1950 Dietrich Rauschning reached in Hamburg by bicycle, where he began his studies at the Faculty of Law. In 1954 he passed the First State Examination in Law followed by a one-year internship at the University of British Columbia in Vancouver. After returning from Canada, Rauschning worked for a short time as a research assistant at the Graduate School of Commerce and Social Sciences in Nürnberg. Back in Hamburg, he trained for the Second State Examination in Law in Hamburg, which he passed in 1960.

Also at the University Hamburg, Dietrich Rauschning successfully defended his dissertation on "The fate of international legal treaties when the status of their parties changes" in 1964 and was awarded the academic degree of "Dr. iur.".

From 1960 to 1969 Dietrich Rauschning served as a Research Fellow at the Institute of International Law at the University Kiel. There, in 1969 he defended his second dissertation ("Habilitation") on the topic "Ensuring the observance of constitutional law".

After short term work at the University Tübingen, in 1970 he accepted the invitation to the Faculty of Law of the University Göttingen, where he took over the directorship of the Institute of International Law until his retirement in 1999. From 1973 to 1974 he held the office of dean there.

In 1976—1982 Professor Rauschning was a Special Rapporteur of the Committee on Legal Aspects of Long Distance Air Pollution of the non-governmental international organization "International Law Association", thereafter he headed the Committee as Chairman (1982—1996). In 1977—1983 he was a member of the board of the German Society of International Law.

After the reunification of Germany, during 1991—1993 Professor Rauschning became the founder-dean of the Law Faculty at the Martin Luther University in Halle, from whom he received Honorary Doctorate in 2003.

In the fall of 1990, an exchange of letters between Professor V. Prokopiev, the dean of the Law Faculty of Kaliningrad State University and Professor Rauschning took place. It was the beginning of a long and fruitful cooperation between today's Immanuel Kant Baltic Federal University and Georg August University Göttingen. In 1994, for special merits in the development of academic cooperation Professor Rauschning was awarded the title of Honorary Doctor of Kaliningrad State University.

In 1996—2003, by decision of the Committee of Ministers of the Council of Europe Professor Rauschning was appointed as a judge at the Human Rights Chamber of Bosnia and Herzegovina in Sarajevo.

In addition to his academic and scientific work, Professor Rauschning has engaged in numerous other social and political tasks, above all in maintaining the intellectual heritage of the Albertus University Königsberg, for example in the context of his leading functions in the Albertinum non-profit society and in the Göttingen Working Group. From 1981 to 1996 he acted as a member of the municipal council of his residence near Göttingen. In 2006, he was awarded the Grand Cross of Merit of the Federal Republic of Germany for his life's work.

Since the early 1990s, Professor Rauschning's work has been closely linked to the Immanuel Kant Baltic Federal University. Here he realized many projects that are beneficial for society in both countries and for mutual understanding, especially among younger generations. Professor Rauschning was the founder and project manager of the Council of the Baltic Sea States' "EuroFaculty" (subproject for the modernization of legal education) in Kaliningrad, which existed from 2000 to 2007. Since then, the subsequent university agreement forms the basis for the active and deepened cooperation between the partner universities Göttingen and Marburg and the Law Institute of the Immanuel Kant Baltic Federal University. Within this framework, Professor Rauschning was the initiator and long-standing coordinator of the traditional summer school for european and international law, the semester exchange programs, master's studies for Kaliningrad law students at universities in Germany, scientific internships for the Russian teachers in Germany etc. More than 300 first-year students from Immanuel Kant Baltic Federal University participated in the 10-day trip to Göttingen University, during which they were able to learn more about legal education and private life in Germany.

Professor Dietrich Rauschning, however, has been not only professionally productive, he is also the head of a large family. Dietrich and Inge Rauschning raised

six children, who became successful in different fields (Law, Medicine, Architecture etc.). Dietrich and Inge Rauschning are guardians of the best family values, and they always try to disseminate it among young generation.

On January 16, 2021 Professor Rauschning has celebrated his 90th anniversary. His life is remarkable, unique, filled with many interesting events and marked by an immense contribution to legal science, education and international cooperation.

With this collection of essays, we would like to thank and honour Professor Rauschning — at the same time on behalf of all contributors — for his many years of fruitful collaboration, always pursued with enormous commitment.

Vadim Voynikov, Hans-Detlef Horn

I. INTERNATIONAL, EUROPEAN AND CONSTITUTIONAL LAW

Three types of constitutional histories

1. The necessity to differentiate between three types of constitutional histories

Significant difficulties for a legal theory of constitution stem from the fact that three things were mixed up for a long time: constitutional orders, constitutional statutes and constitutional law. By the term constitutional order, we understand the fundamental normative structures of a politically integrated community. We define a constitutional statute as the legal text in which these principles are laid down in writing and thus simultaneously specified. Constitutional law comprises the norms of the constitutional order and the constitutional statute which are suitable and intended to serve as a standard for judicial decision-making in the case a legal assertion is disputed. This distinction between constitutional order, constitutional statutes and constitutional law is generally applicable and not bound to a historical context. Where it is utilized, the nature of the respective state and its normative structures can be analyzed more precisely than an undifferentiated approach would allow for. Most importantly, however, a legal theory of the constitution must distinguish as clearly as possible between these three phenomena: Lawyers must be able to recognize law as a distinct category and set it apart from other phenomena — especially from such norms that are not legal norms. When dealing with fundamental provisions within a state, this autonomy of law may be lost if the constitutional order, the constitutional statute and constitutional law are designated by one and the same term 'constitution'. To the extent that constitutional theory claims to be a jurisprudential discipline, it must strive to make distinctions that make law as such stand out.[1]

Therefore, from a historical point of view, there is not only one, but three very different constitutional histories: the history of constitutional orders, the history of constitutional statutes and the history of constitutional law. Out of a general interest in history or the history of ideas, it may be worthwhile to examine these three stories in their context — although they are very different, they have much in common. Depending on how one assembles and assesses the three components

[1] On the importance of constitutional theory as a discipline of law, see *Matthias Jestaedt*, Die Verfassung hinter der Verfassung, 2009.

within such a universal constitutional history, one arrives at different narratives. These are the great narratives of the constitutional concept, as set forward — from a German perspective — for example by Ernst-Wolfgang Böckenförde[1], Dieter Grimm[2] and Ulrich K. Preuß[3] and — from a French perspective — by Olivier Beaud[4]. We don't want to deny the usefulness and appeal of such a universal history of the concept of constitution — nevertheless, it is an impediment when it comes to understanding the historical development of the legal significance of constitutions. The demand for greater differentiation as such is not new: that it is not appropriate to identify the history of the constitutional orders with the history of the constitutional statutes has frequently been pointed out.[5] However, it has often been overlooked that the history of constitutional law cannot be equated with either of these two histories; nor does it amount to their sum.

2. The history of the constitutional orders

2.1. The history of constitutional orders as a history of the fundamental principles of normative state order

The history of constitutional orders is the history of the political order of states (in the broadest sense of the term), more precisely, it is the history of the normative principles on which their specific political order is based. It is interwoven in many ways with other histories and appears in part identical with them, for example with the history of forms of government or with the history of federalism, but especially with the history of the position of an individual within the state and his fundamental rights. All these stories have been told often enough and shall not be repeated here. That every politically integrated community maintains a constitutional order in this sense can be observed and proven across a wide range of epochs.[6] Efforts to conceptualize the phenomenon of fundamental normative structures in the politically integrated community can be traced back to Aristotle, who dealt with the

[1] In: Festschrift für Rudolf Gmür, 1983, p. 7.
[2] In: Isensee/Kirchhof (Ed.), Handbuch des Staatsrechts, 3rd Ed., Vol. I, 2003, § 1.
[3] In: Preuß (Ed.), Zum Begriff der Verfassung, 1994, p. 7.
[4] So for example in his contribution "Verfassung und Konstitutionalismus", Trivium 30/2019.
[5] See for example *Giovanni Sartori*, The American Political Science Review 56 (1962), 853, 856 ("generation after generation, European public law went ahead riding simultaneously two horses: the constitution as any ‚State order' and constitutionalism as a specific ‚content' of guarantees").
[6] See for example *Werner Näf*, Schweizer Beiträge zur Allgemeinen Geschichte 11 (1953), 108 ff.; *Hans Vorländer*, Die Verfassung, 3rd Ed., 2009, p. 21 ff.; furthermore *Olivier Beaud*, Trivium 30/2019, p. 2; *Herbert Schambeck*, in: Festschrift für Hans Kelsen, 1971, p. 211, 212 ff.

principle order of political powers and their purposes.[1] From the perspective of constitutional theory, the history of constitutional orders appears to be interesting right from the moment when the other two histories begin: the history of constitutional law and the history of constitutional statutes. The beginnings of constitutional law in the sense of a juridification of governmental power within a state will be discussed later — as theoretical concepts, the constitutional order and individual elements of juridification initially got along well with each other (which of course does not rule out the possibility that the practical realization of this juridification led to many conflicts). In terms of constitutional theory, things only become complicated with the beginning of the third history, i. e. with the addition of constitutional statutes.[2]

2.2. The supposed collision of theoretical concepts at the time of the French Revolution

Of particular interest here is the clash of different constitutional conceptions at the time of the French revolution[3], which may very well mark the hardest collision of different views on the constitution that could be observed throughout European history.[4] When the intellectual leaders of the Revolution — including Emmanuel Joseph Sieyès[5] — called for a constitution, they meant a document (adopted by the people's representatives) that would establish the basis of the new political order; they thus called for a constitutional statute (traceable back to the will of the people). When on the other hand, the defenders of the Ancien Régime — for example Jacob-Nicolas Moreau[6] and Augustin-Jean-François Chaillon de Jonvil-

[1] See *Ernst-Wolfgang Böckenförde*, in: Festschrift für Rudolf Gmür, 1983, p. 7; *Hasso Hofmann*, Recht — Politik — Verfassung, 1986, p. 261; *Herbert Schambeck*, in: Festschrift für Hans Kelsen, 1971, p. 211, 213; in detail *Hans Vorländer*, Die Verfassung, 3rd Ed., 2009, p. 21 ff. The conceptual differences between Aristotle and the modern constitutional theory are pointed out by *Giovanni Sartori* (The American Political Science Review 56 [1962], 853, 860).

[2] See for example *Werner Näf*, Schweizer Beiträge zur Allgemeinen Geschichte 11 (1953), 108; *Giovanni Sartori*, The American Political Science Review 56 (1962), 853, 855 ff.; *Herbert Schambeck*, in: Festschrift für Hans Kelsen, 1971, p. 211, 214 ff. and *Klaus Stern*, in: Festschrift für Kurt Eichenberger, 1982, p. 197, 199 ff.

[3] The French Revolution is mentioned as "constitutional laboratory" by *Olivier Beaud*, Trivium 30/2019, p. 9.

[4] These considerations are particularly based on *Georges Burdeau*, Traité de science politique, Vol. III, 1950, p. 24 ff., 91 ff.; see also *Olivier Beaud*, Trivium 30/2019, p. 7 ff.; *Werner Näf*, Schweizer Beiträge zur Allgemeinen Geschichte 11 (1953), 108, 113 ff. and *Ulrich K. Preuß*, in: Preuß (Ed.), Zum Begriff der Verfassung, 1994, p. 7, 20 ff.

[5] Qu'est-ce que le Tiers État?, 1789; see also *Olivier Beaud*, Trivium 30/2019, p. 8.

[6] Exposition et défense de notre Constitution monarchique françoise, Vol. I, 1789, p. XVIII et passim.

le[1] — declared that France already had a constitution, they were roughly referring to what we call a constitutional order in the present essay. Should it suffice, then, to differentiate between the terms 'constitutional order' and 'constitutional statute' for both views to appear plausible? Had people talked past each other? Was it all just a big misunderstanding?

A closer examination of the conflicting positions reveals that it would be a great mistake to believe that we are dealing with a conflict between two fundamentally different constitutional concepts. Despite their seemingly different points of reference when they spoke of 'constitutions', revolutionaries and traditionalists understood exactly what the other side meant. When the former demanded a new constitution put into force by the representatives of the people and the latter insisted on an organically grown constitution, the question was whether the previous constitutional order should be overturned and replaced by a new constitutional order. The constitutional statute the revolutionaries demanded was to manifest this new constitutional order. The destruction of the old constitutional order and the creation of a new one alone constituted the essence of the revolution; from the perspective of constitutional theory, these processes — and not the replacement or reshaping of a constitutional statute — define the concept of revolution. The intellectual leaders of the revolution demanded a constitutional statute to the extent and because it corresponded to their concept of an entirely new constitutional order. In times of political upheaval, constitutional statutes function primarily as a kind of blueprint — and thus as instruments — for restructuring the state order.[2] This very idea, according to which a constitutional statute (created out of political expectations) should have a special formative power in relation to the constitutional order (based on tradition and customs), has been repeatedly criticized by skeptical observers of the revolutionary process such as Edmund Burke[3] and Wilhelm von Humboldt[4]. The fact that the idea of a written constitutional statute is more firmly anchored in the concept of a republican-democratic constitutional order than in that of a monarchy,[5] especially when it is the form of government of the absolute monarchy, contributed to the fierceness of the debate over the correct view of the constitution.[6] For the purposes of the present study, the background and arguments of this discussion may be left aside. However, it is important to keep in mind the instrumental character of constitutional statutes, which has been part of the modern understanding of the constitution from its inception and played a decisive role in

[1] Apologie de la Constitution française, Bd. I, 1789, p. 143 (quoted from *Georges Burdeau*, Traité de science politique, Vol. III, 1950, p. 24 [at Fn. 3]).

[2] *Hasso Hofmann*, Recht — Politik — Verfassung, 1986, S. 290 ff. („Verfassung als Bauplan"). In general, see *Hans Vorländer*, Die Verfassung, 3rd Ed., 2009, p. 9, 15 f.).

[3] Reflections on the Revolution in France, 5th Ed., 1790, p. 66 f.

[4] See the quotes from *Wilhelm von Humboldts'* letters quoted at *Hasso Hofmann*, Recht — Politik — Verfassung, 1986, p. 291 f. (at Fn. 137).

[5] An interesting exception ist the Polish constitution from 03.05.1791; cf. *Hasso Hofmann*, Recht — Politik — Verfassung, 1986, p. 279.

[6] Cf. *Ernst-Wolfgang Böckenförde*, Staat Nation Europa, 2. Ed., 2000, p. 127.

the constitutional debate of the French revolutionary period. We will return to it when it comes to the legal nature of what was laid down then and now in constitutional statutes.[1]

3. The history of the constitutional statutes

3.1. Constitutional statutes – an invention of modern times

The history of the constitutional statutes, too, is an excerpt from a more comprehensive history: in this case it is the multifaceted history of legal positivism.[2] The various problems associated with this history can to a large extent be left out of consideration here. It is generally agreed that constitutional statutes in the modern sense were unknown to antiquity and the Middle Ages. At best, one could speak of a "prehistory" when one thinks of the codified city constitutions[3] and the constitutions of the medieval religious orders;[4] occasionally, in this context, reference is also made to constitution-like elements in the state utopias.[5] Regardless of the significance assigned to this late medieval or early modern prehistory, it is undeniable that constitutional statutes are a political instrument of modern times. Oliver Cromwell's "Instrument of Government" of 1653 is often regarded as the first written constitution.[6] Others consider the statutes of the American states[7] and the USA itself to be the first constitutions in the modern sense.[8] In any case, it is clear which states in the late 18th century were the first to have constitutional statutes: besides the USA, these were France and Poland[9].

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[1] See below: 4.2. und 4.3.

[2] *Hasso Hofmann*, Recht — Politik — Verfassung, 1986, p. 282; *Werner Kägi*, Die Verfassung als rechtliche Grundordnung des Staates, n. d., p. 60 f.; *Niklas Luhmann*, Rechtshistorisches Journal 9 (1990), 176, 185 ff.

[3] Cf. *Hasso Hofmann*, Recht — Politik — Verfassung, 1986, p. 270 (at Fn. 39) with reference to the work of *Gerald Stourzh*.

[4] *Hans Vorländer*, Die Verfassung, 3rd Ed., 2009, p. 29 f.

[5] Cf. *Görg Haverkate*, Verfassungslehre, 1992, p. 17.

[6] *Hasso Hofmann*, Recht — Politik — Verfassung, 1986, p. 271; *Karl Loewenstein*, Verfassungslehre, 4th Ed., 2000, p. 136; see also *Carl J. Friedrich*, Der Verfassungsstaat der Neuzeit, 1953, p. 150; *Werner Kägi*, Die Verfassung als rechtliche Grundordnung des Staates, n. d., p. 52; *Ulrich K. Preuß*, in: Preuß (Ed.), Zum Begriff der Verfassung, 1994, p. 7, 12.

[7] Their development is treated by *Georges Burdeau*, Traité de science politique, Vol. III, 1950, p. 88 f. The Basic Laws of the North American colonies are partly regarded as precursors of these constitutional statutes; cf. *Christoph Schönberger*, in: Vesting/Korioth (Eds.), Der Eigenwert des Verfassungsrechts, 2011, p. 7, 10 and *Hans Vorländer*, Die Verfassung, 3rd Ed., 2009, p. 39.

[8] *Max Lerner*, The Yale Law Journal 46 (1937), 1290, 1298; *Herbert Schambeck*, in: Festschrift für Hans Kelsen, 1971, p. 211, 215; cf. also *Hasso Hofmann*, Recht — Politik — Verfassung, 1986, p. 279.

[9] In detail *Hasso Hofmann*, Recht — Politik — Verfassung, 1986, p. 279.

3.2. Constitutional statutes in the 19th century

In the first half of the 19th century, the idea prevailed that every progressive state should have a constitution, which meant a constitutional statute in the present sense.[1] When one looks at what was laid down in these constitutional statutes, a colorful, if not to say contradictory picture emerges.[2] There were constitutional statutes with fundamental right provisions[3] as well as constitutional statutes without such guarantees.[4] There were constitutional statutes that established a democratic form of rule[5], as well as statutes that would contribute to the greater acceptance and better functioning of a constitutional monarchy.[6] In addition, the political benefits of constitutional statutes were very quickly recognized by despots and autocrats as well — we are dealing with a remarkable line of development that runs from Napoléon Bonaparte and the Latin American dictators of the 19th century to Lenin and Stalin.[7] Even when it comes to how and by whom the constitutional statutes were adopted and put into effect, the constitutional practice of the 19th century presents itself as rich in variations: one knew constitutional statutes that were based on a contract between the ruler and the estates or the representation of the people,[8] and those that were imposed by the ruler alone.[9] Occasionally, constitutional statutes were confirmed by plebiscites.[10]

Given the complexity and diversity that characterize constitutional development in the 19th century, it is hardly surprising that the categories of constitutional law, constitutional order and constitutional statute have been constantly confused and equated. The clearest evidence for this thesis is the much-discussed concept of "pouvoir constituent", which is usually referred to in German literature as "verfassungsgebende Gewalt" and in English as "constituent power". Two questions arise with reference to this concept, which was coined in its current meaning by the time

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[1] Cf. *Dieter Grimm*, in: Isensee/Kirchhof (Eds.), Handbuch des Staatsrechts, 3rd Ed., Vol. I, 2003, § 1 mn. 52; *Werner Kägi*, Die Verfassung als rechtliche Grundordnung des Staates, n. d., p. 13 f.

[2] *Herbert Schambeck*, in: Festschrift für Hans Kelsen, 1971, p. 211, 217 f.

[3] For example, the Federal Constitution of the Swiss Confederation of 1874.

[4] So among others the constitution of the German Reich of 1871; cf. Hans Vorländer, Die Verfassung, 3rd Ed., 2009, p. 54 f. (on French constitutional history).

[5] For example, the Constitution of the United States of America of 1787.

[6] For example, the Prussian constitution of 1848/50.

[7] See *Dieter Grimm*, in: Isensee/Kirchhof (Eds.), Handbuch des Staatsrechts, 3rd Ed., Vol. I, 2003, § 1 mn. 56; *Karl Loewenstein*, Verfassungslehre, 4. Ed., 2000, p. 149 ff.

[8] These include the Württemberg constitution of 1819, the Saxon constitution of 1831 and the constitution of the North German Confederation of 1867; cf. *Ernst-Wolfgang Böckenförde*, in: Festschrift für Rudolf Gmür, 1983, p. 7, 12.

[9] For example the „Reichsverfassung für das Kaisertum Oesterreich" of 1849.

[10] For example, the French constitution of 1799 („Constitution du 22 frimaire an VIII"). For the Napoleonic constitutional plebiscites see *Carl J. Friedrich*, Der Verfassungsstaat der Neuzeit, 1953, p. 151 f.

of the French Revolution and by Sieyès in particular.[1] On the one hand, this is the often discussed question of who is the subject of this power.[2] In order to find an answer to this question, however, one must be able to determine what the constituent power "gives", i. e. what the pouvoir constituant "constitutes". Both questions are directly linked to each other: when it has been recognized what is being given as "constitution", it is simultaneously clear who is able to give such a work designated as "constitution". Upon closer examination, the concept of the constituent power — the pouvoir constituant — can only refer to the constitutional order that is adopted by the people and put into effect day in, day out[3], so that one can speak of the people as the subject of the constituent power. From the outset, it makes little sense to relate such a concept to the drafting and formal enactment of the constitutional statute by a group that is creating the constitution[4] — and thus to occurrences and actors whose form and effect depend on historical coincidences. To regard the people as subject of the constitutional order and holders of the constituent power in this very sense in no way precludes recognizing that individual strata of the population participate in such activity and the affirmation of the constitutional order with varying intensity and in different ways. From this point of view, it is justifiable (but not unproblematic) to say that the propertied bourgeoisie was the actual bearer of the liberal constitutional order of the 19th century. As parts of the pouvoir constituant, all strata of the population supported the order — except for those who, as revolutionaries, openly fought for its elimination.

The widespread talk of the monarch's constituent power is, in contrast, a terminological error which — at least with regard to its circulation in German-language literature — might stem from the ambiguous treatment of this problem in Carl Schmitt's "Verfassungslehre". When reading Schmitt's only textbook, it is noticeable that he draws a sharp, conceptual distinction between the "constitution" and the "constitutional law"[5] (whereby his understanding of "constitutional law" comes close to what is understood by "constitutional statute" in the present essay[6]), while — when dealing with the constituent power — it remains opaque to a certain degree which of the two he refers to.[7] If we speak of a constituent power of the mon-

[1] Supra Fn. 12.
[2] See *Dieter Grimm*, in: Festschrift für Paul Kirchhof, Vol. I, 2003, § 12 mn. 14.
[3] In reference to *Ernest Renan*, in a much-cited passage of his major work "Verfassung und Verfassungsrecht" (1928), *Rudolf Smend* regarded the state (which is directly related to the constitutional order) as a daily plebiscite (p. 18). Cf. *Stefan Haack*, Der Staat 51 (2012), 57, 85 (with further references).
[4] Of such a "constitution-creating group" speaks *Carl J. Friedrich*, Der Verfassungsstaat der Neuzeit, 1953, p. 148.
[5] Verfassungslehre, 3rd Ed., 1957, p. 20 ff.
[6] The essential difference can be seen in the fact that *Carl Schmitt* uses the term "constitutional law" to refer to the individual provisions and consequently understands the written constitution (in the present sense: the constitutional statute) "as a series of written constitutional laws" (Verfassungslehre, 3rd Ed., 1957, p. 16). In later literature, the term 'constitutional law' often corresponds to what is called "constitutional statute" in this paper; for example by *Peter Badura*, in: Festschrift für Ulrich Scheuner, 1973, p. 19.
[7] Verfassungslehre, 3rd Ed., 1957, p. 75 ff.

arch, the contradiction becomes clear: how can a monarch enact a constitution "on the basis of the monarchical principle"[1], when the monarchical principle itself should be the content of this fundamental constitutional decision[2]? In other words, how can the constitution be understood as an "overall decision on the nature and form of political unity"[3], if a monarch already exists to make and legitimize this decision? These inconsistencies disappear when the concept of constituent power is applied not to the constitutional statute but to the constitutional order and the people are seen as its bearer. What the monarchs of the 19th century could give and, in many cases, have given were constitutional statutes. By contrast, the constitutional order can never be given by a single person[4] — its subject is always the politically integrated community. Significantly, at the time of absolutism — and thus before the triumph of constitutional statutes — no one even thought of considering the ruler (who was exempt from laws) as subject of the constituent power.[5]

3.3. Constitutional statutes in the 20th century and today

As the territorial state as a form of political order became established worldwide with the end of colonialism[6], constitutional statutes also became ubiquitous as instruments for manifesting the constitutional order.[7] With a few exceptions (most

[1] Verfassungslehre, 3rd Ed., 1957, p. 23, 53.
[2] Verfassungslehre, 3rd Ed., 1957, p. 23.
[3] Verfassungslehre, 3rd Ed., 1957, p. 20.
[4] This was also conceded by the advocates of monarchical sovereignty, although they were anxious to play down the importance of this fact. Significant in this regard are the statements of *Joseph de Maistre* in his fragment (directed against *Jean-Jacques Rousseau*) „Etude sur la souveraineté": „Il est très-vrai, dans un sens inférieur et grossier, que la souveraineté est fondée sur le consentement humain: car si un peuple quelconque s'accordait tout il coup pour ne pas obéir, la souveraineté disparaîtrait; et il est impossible d'imaginer l'établissement d'une souveraineté sans imaginer un peuple qui consent à obéir." (quoted after: The French Revolution Research Collection — Les Archives de la Revolution Française, n. d., p. 310, 312 f.).
[5] *Carl Schmitt*, Verfassungslehre, 3rd Ed., 1957, p. 77 f. *Carl Schmitt* explains the lack of such a doctrine by saying that the Christian theological idea of the potestas constituens of God "was still too strong and alive in the 18th century, despite all Enlightenment". While this may be true, the attempts of the 19th century to ascribe to the monarch something like a constituent power seem strange in the face of a doctrine discussed over centuries, according to which the power of rule is given by God to the people and by the people to the monarch. For the contemporary discussion of the time about the origin and the transmission of ruling authority see *Jaime Balmes*, El protestantismo comparado con el catolicismo en su relación con la civilización europea, Vol. III, 4th Ed., 1857, p. 178 ff., which in particular refers to the teachings of *Robert Bellarmin* and *Francisco Suarez*, according to which the rights of dominion were only indirectly assigned to their rightful holder by God.
[6] See *Stefan Haack*, Jahrbuch des Öffentlichen Rechts 63 (2015), 167, 168 f.
[7] Cf. also *Dieter Grimm*, in: Isensee/Kirchhof (Eds.), Handbuch des Staatsrechts, 3rd Ed., Vol. I, 2003, § 1 mn. 52 f.; *Werner Kägi*, Die Verfassung als rechtliche Grundordnung des Staates, n. d., p. 14 f.

notably Great Britain, Israel and New Zealand), all states today have constitutional statutes. The appearance and content of these statutes were even more multifaceted in the 20th century than in earlier times — in addition to the constitutions of liberal democracies, there were now the "basic laws" and "constitutions" of communist dictatorships, of Islamic republics as well as of monarchies, which in some cases — one may think of the kingdoms and sultanates on the Arabian peninsula[1] — resembled absolute monarchies. From a legal point of view, these phenomena are only partially of interest, that is, precisely to the extent that the emergence of constitutional statutes has brought real constitutional law into force. The third history is about this process, which in turn should be rather sketched than carried out in detail.

4. The history of constitutional law

4.1. The earliest manifestations of constitutional law in the form of sovereign contracts and Reichsgrundgesetze (Fundamental Laws of the Empire)

The history of constitutional law is probably the most difficult of the three histories of the constitution to tell. Essentially, it is a history of the justiciability of constitutional orders and statutes that apparently has not yet been told in this particular form. It cannot be the aim of this essay to present it in such detail that one can expect to gain in-depth insights into legal history. Instead, we will be content to compile some aspects of this history. If one looks for its beginnings, one should consider that the relations of power in the European Middle Ages were by their very nature legal relationships[2] — this also applied to the rights of the emperor and the highest ranking rulers. In other words: a juridification of the basic political structures was not unknown to the Middle Ages. Nevertheless, it would be wrong to ascribe the quality of constitutional law in the modern sense of the term to individual parts of the medieval legal order. For reasons of conceptual consistency, one should speak of constitutional law only where one is dealing with the juridification of supreme authority within a state. Its history can therefore only begin with the emergence of the modern territorial state, which was unknown to the Middle Ages as a form of political order. Even after the emergence of the territorial state order in the 15th and 16th centuries, it is still difficult to determine the exact point in time, after which constitutional law can be spoken of. Paradoxically, the reason for this can once again be found in the pronounced juridification of the political order of the Middle Ages. Because the forms and formulas of the medieval legal order — especially the institutes of feudal law — were used for a long time, the supreme

[1] For the classification of these states as absolute monarchies see for example *Burkhard Schöbener/Matthias Knauff*, Allgemeine Staatslehre, 4th Ed., 2019, § 5 mn. 80.

[2] *Dieter Grimm*, in: Isensee/Kirchhof (Eds.), Handbuch des Staatsrechts, 3rd Ed., Vol. I, 2003, § 1 mn. 4; *Werner Näf*, Schweizer Beiträge zur Allgemeinen Geschichte 11 (1953), 108, 110.

power within the emerging states emerged only slowly.[1] Accordingly, it seems difficult to distinguish the first approaches to their juridification from the earlier, more traditional forms of legal binding.

If one wants to report on when and how the juridification of the supreme power within the emerging world of states began, one must rightly begin with the electoral capitulations and social contracts between the sovereign and the people.[2] These represented a central legal figure in the early modern process of institutionalizing statehood.[3] Essentially, these were contractually agreed regulations for the exercise of sovereign power, which could be enforced in court to a certain extent by the rulers and estates involved. In addition, there were the so-called Reichsgrundgesetze (leges fundamentales)[4], which were also based on agreements between the imperial estates and the emperor — these included legal acts such as the Golden Bull (1356), the Eternal Public Peace (1495), the Imperial and Religious Peace of Augsburg (1555) and the Peace of Westphalia (1648). Comparable lois fondamentales were also known in France.[5] Like the sovereign contracts, the Fundamental Laws of the Empire served to limit the power of the rulers; the rights arising from them could also be enforced in court to a certain extent. The constitutional character of these regulations became all the more apparent the more the idea of their supremacy over other provisions prevailed.

Shortly after, the natural law doctrine contributed to the development of the modern conception of the constitution[6] by postulating a law that is valid everywhere and at all times and precedes the political order.[7] In addition to the assumption that the ruler also appears to be bound by natural law, it was above all the idea

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[1] See from the vast literature for example the intuitive presentation of *Ernst Forsthoff*, Deutsche Verfassungsgeschichte der Neuzeit, 2nd Ed., 1961, p. 9 ff; cf. *Stefan Haack*, Theorie des öffentlichen Rechts II, 2019, p. 21 ff. (with further references).

[2] See *Ernst-Wolfgang Böckenförde*, in: Festschrift für Rudolf Gmür, 1983, p. 7 f.; *Hasso Hofmann*, Recht — Politik — Verfassung, 1986, p. 272; *Werner Näf*, Schweizer Beiträge zur Allgemeinen Geschichte 11 (1953), 108, 112; cf. *Georges Burdeau*, Traité de science politique, Vol. III, 1950, p. 49 ff.

[3] *Hasso Hofmann*, Recht — Politik — Verfassung, 1986, p. 272.

[4] See *Ernst-Wolfgang Böckenförde*, in: Festschrift für Rudolf Gmür, 1983, p. 7, 8 f.; *Hasso Hofmann*, Recht — Politik — Verfassung, 1986, p. 275 ff.; *idem.*, Jahrbuch des Öffentlichen Rechts 51 (2003), 1, 6; *Klaus Stern*, in: Festschrift für Kurt Eichenberger, 1982, p. 197, 198; *Hans Vorländer*, Die Verfassung, 3rd Ed., 2009, p. 31.

[5] Cf. *Olivier Beaud*, Trivium 30/2019, p. 6; *Georges Burdeau*, Traité de science politique, Vol. III, 1950, p. 25 (which misleadingly distinguishes these regulations from a legal concept of the constitution); *Hasso Hofmann*, Recht — Politik — Verfassung, 1986, p. 275 f.; *Hans Vorländer*, Die Verfassung, 3rd Ed., 2009, p. 31; on the constitutional character of the lois fondamentales, see also *Christoph Schönberger*, in: Vesting/Korioth (Eds.), Der Eigenwert des Verfassungsrechts, 2011, p. 7, 11.

[6] *Georges Burdeau*, Traité de science politique, Vol. III, 1950, p. 81; *Klaus Stern*, in: Festschrift für Kurt Eichenberger, 1982, p. 197, 201; *Hans Vorländer*, Die Verfassung, 3rd Ed., 2009, p. 31.

[7] *Hans Vorländer*, Die Verfassung, 3rd Ed., 2009, p. 31.

of the higher rank of these norms that proved fruitful for the development of a constitutional thought (leaving the Middle Ages behind). Against this backdrop it is easy to understand that numerous modern constitutional statutes — from the French revolutionary constitutions[1] to the Basic Law for the Federal Republic of Germany[2] — bear resemblances and reminiscences of natural law.

4.2. Constitutional law in the imposed or agreed constitutional statutes of the 19th century

The imposed or agreed upon constitutional statutes, which can be found in the individual German states in the 19th century[3], also contained constitutional law in the sense of the present definition. They thus enjoyed the quality of constitutional law to the extent that they were intended and appeared suitable to serve as a normative basis for making judicial decisions on legal disputes. Of course, this was the case only to a limited extent: fundamental rights were often understood as program sentences without legal binding effect.[4] In the area of law related to the organization of the state, too, the possibility of bringing disputes before a court was an exception — a significant example from this period is the regulation on the prosecution of ministers.[5] The legal irrelevance of many provisions in the constitutional statutes of the 19th century was quite obvious to the contemporary authors. Particularly famous was the fundamental criticism by Ferdinand Lassalle, who saw the true constitution in the actual power relations of the state and in the written constitution nothing more than a "piece of paper".[6] At its core, however, it was not, as has often been said, a weakness of the law compared to the strength of actual power relations, but rather a lack of legalization of political life, that is, the absence of any real law. What does not exist cannot suffer from weaknesses either.

The imposed or agreed upon constitutions of the 19th century thus joined a line of tradition that goes back to the time of absolutism: what is meant is the traditional line of an instrumental-programmatic view of the constitution, which from the beginning stood in opposition (sometimes openly, but usually only subtly discernible)

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[1] Among these, the Declaration of Human and Civil Rights of 1789 must be mentioned first.

[2] Concepts of natural law are expressed in particular in Article 1 (2) of the Basic Law; see from the literature *Christian Hillgruber*, in: Epping/Hillgruber (Eds.), BeckOK Grundgesetz, 43rd Ed., mn. 54 f. to Art. 1.

[3] See above: 3.2.

[4] Cf. *Claus Dieter Classen*, Staatsrecht II, 2018, § 2 mn. 21; *Horst Dreier*, in: Dreier (Ed.), Grundgesetz-Kommentar, 3rd Ed., Vol. 1, mn. 13 before Art. 1; *Matthias Herdegen*, in: Maunz/Dürig, Grundgesetz-Kommentar, loose-leaf (updateted February 2020), mn. 6 to Art. 1 Abs. 3 (which speaks of an „unclear subjective substance").

[5] For this and further examples see *Rainer Wahl/Frank Rottmann*, in: Conze/Lepsius (Eds.), Sozialgeschichte der Bundesrepublik Deutschland, 2nd Ed, 1985, p. 339, 347 ff.

[6] *Ferdinand Lassalle*, Über Verfassungswesen (1862), Special edition 1958. See *Olivier Beaud*, Trivium 30/2019, p. 14.

to an original legal concept of constitutional law. Already Emer de Vattel, to whom the first modern definition of the term 'constitution' is often ascribed,[1] regarded it as „plan sur lequel la Nation a resolu de travailler à son bonheur."[2] The point here is precisely not the quality of the constitution as a legal norm, but the quality of the constitution as an instruction and program. Where such a view prevails, it influences both the drafting as well as the interpretation of constitutional statutes, a fact that could easily be demonstrated by looking at German constitutional developments during the 19th century. It is precisely this traditional line of an instrumental-programmatic view of the constitution that achieved its full degree of maturity in the totalitarian systems of the 20th century.

4.3. Constitutional law in the totalitarian systems of the 20th century

The distinction between the concepts of constitutional law, constitutional order, and constitutional statute proves particularly helpful when it comes to analyzing the state of the constitution during the totalitarian dictatorships of the 20th century. For example, it can be argued that the National Socialist Führer state, like any other political community, had a constitutional order. However, it did not arrive at a constitutional statute that fixed the principles of National Socialism. Above all, however — and this deserves to be emphasized in the present context — there is no way around the realization that National Socialism had no constitutional law from an inherently legal point of view. Quite the contrary, the constitutional doctrine of National Socialism sought to present a legalization of political life as ridiculous — for example, Ernst Rudolf Huber, in a paper from 1935, spoke of a widespread tendency in Germany to dress constitutional issues in the guise of private legal transactions and to clarify them in the forms of civil proceedings.[3] It is of particular interest for the purpose of this essay that the same representative of National Socialist jurisprudence believed that the goal of democratic constitutions was to bind all expressions of political life by objective norms and to ensure their observance through instruments of control; the whole bourgeois constitution was — according to Huber — nothing more than a large, complicated mechanism of control.[4] It is particularly revealing how the legalization of political power is equated with objective control over it. Huber seeks to ascribe to the bourgeois constitutional state ex-

[1] For the importance of *Emer de Vattel* for the development of the modern concept of constitution see also *Hasso Hofmann*, Recht — Politik — Verfassung, 1986, p. 277 f.; *idem*, Jahrbuch des Öffentlichen Rechts 51 (2003), 1, 6, 14; *Klaus Stern*, in: Festschrift für Kurt Eichenberger, 1982, p. 197, 200; *Hans Vorländer*, Die Verfassung, 3rd Ed., 2009, p. 14.
[2] Droit des gens, Vol. I, 1758, Liv. I Chap. IV § 47 (recte: § 46).
[3] *Ernst Rudolf Huber*, Wesen und Inhalt der politischen Verfassung, 1935, p. 9; similar from the perspective of communist legal theory *János Beér*, Acta Juridica Academiae Scientiarium Hungaricae 2 (1960), 227, 231.
[4] *Ernst Rudolf Huber*, Vom Sinn der Verfassung, 1935, p. 23.

actly what the National Socialist doctrine did: to pass off total control of political life as its legalization. Wouldn't it be a bitter irony if, almost a century later, the constitutional theory of the bourgeois constitutional state had forgotten to distinguish between control and juridification?

Things were somewhat different with regard to the constitutional theory of the communist states.[1] In contrast to the National Socialist dictatorship, they had constitutional statutes in which the principles of the socialist social order were anchored. Authoritative representatives of communist jurisprudence regarded the regulations of these statutes as a kind of supreme directive, whose disregard could justify disciplinary measures[2]; accordingly, they assumed that the constitution must be binding for all citizens.[3] In addition, they saw it as progress that compliance with the constitution was to be monitored by state authorities such as the Council of Ministers, the Attorney General, or the Parliament[4] — and exactly not by courts. Where, if not here, the distinction between legal and non-legal needs to become apparent if legality is to remain identifiable and distinguishable as a special form of normativity? If such constitutional provisions were not designed to serve as a normative standard for decision-making before specialized courts or a constitutional court from the outset, they were simply not legal norms (even though then, as now, many legal scholars are convinced of the opposite). Rather, the normativity of such constitutional provisions was similar to the normativity of housing programs, labor standards or five-year plans, whose compliance was monitored by ministries, councils and commissions.[5]

For the constitutional theory of democratic states, such an unquestioned equalization of essentially different phenomena still poses a danger today. If one is not prepared to develop the quality of law consistently from the contested legal claim and thus from subjective law, the opponents of the liberal-democratic constitutional order will find it all the easier to reverse the connection between constitutional law and the protection of freedom. In some cases, the representatives of communist legal theory denied the fundamental rights provisions in the constitutional statutes

[1] See *Peter Badura*, in: Festschrift für Ulrich Scheuner, 1973, p. 19, 32 f.; *János Beér*, Acta Juridica Academiae Scientiarium Hungaricae 2 (1960), 227; *Ferdinand O. Kopp*, in: Festschrift für Günther Küchenhoff, 2nd Half Vol., 1972, p. 573.

[2] Cf. *János Beér*, Acta Juridica Academiae Scientiarium Hungaricae 2 (1960), 227, 233.

[3] In this vein, *János Beér*, Acta Juridica Academiae Scientiarium Hungaricae 2 (1960), 227, 246; see also *Ferdinand O. Kopp*, in: Festschrift für Günther Küchenhoff, 2nd Half Vol., 1972, p. 573, 597.

[4] Cf. *János Beér*, Acta Juridica Academiae Scientiarium Hungaricae 2 (1960), 227, 237 ff.

[5] The representatives of communist legal theory certainly saw this similarity and sometimes even stressed it; cf. *János Beér*, Acta Juridica Academiae Scientiarium Hungaricae 2 1960), 227, 234. On the programmatic-instrumental character also *Peter Badura*, in: Festschrift für Ulrich Scheuner, 1973, p. 19, 33 and *Ferdinand O. Kopp*, in: Festschrift für Günther Küchenhoff, 2nd Half Vol., 1972, p. 573, 589 f., 594 ff.

of the Western states their normativity and binding force.[1] From the point of view of a liberal state and legal thought it can be explained of course that one is dealing with a transparent trick. In order to be able to challenge it, one must focus on the enforceability of the basic rights and thus on their nature as subjective legal norms (according to current doctrine). Instead of asserting the legal character of their own constitutional statutes with this argumentation and denying the legal quality of constitutional statutes in totalitarian systems for the same reason, the constitutional doctrine of democratic states has sought to construct an opposition of normativity and arbitrary rule that is based on an error and leads to misunderstandings. Normativity is involved even when the will of the leader is the highest law. According to Görg Haverkate, this is virtually the "frightening figure of the normative": woe to anyone who wants to doubt the normative character of such a regulation.[2] Rule-of-law thinking and a liberal understanding of the constitution cannot do without a corresponding distinction between legal norms and other norms.[3] What is the purpose of a — more and more widespread — theory of law that nevertheless equates norm and law? And above all: cui bono?

Regardless of whether one considers the legal doctrine (or what has been called law) under National Socialism, in the communist states of the Eastern Bloc, or in other totalitarian regimes, it was always the nature of the constitution as a legal norm in the present sense that one has sought to eliminate as quickly as possible and consistently negate thereafter. It was possible to come to terms with program sets and state goals — they were found to a large extent in the constitutional statutes of the communist states. If the Third Reich had ever succeeded in drafting a constitutional statute suitable for itself[4], there would have been hardly anything other than a program — there can be no doubt about that. Given the division of the concept of constitution represented here, a clear conclusion emerges: In contrast to the constitutional order and the constitutional statute, the category of constitutional law is not compatible with a totalitarian state.[5]

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[1] Cf. *János Beér*, Acta Juridica Academiae Scientiarium Hungaricae 2 (1960), 227, 230 (on the normative power of the Basic Law for the Federal Republic of Germany); see also *Ferdinand O. Kopp*, in: Festschrift für Günther Küchenhoff, 2nd Half Vol., 1972, p. 573, 574.

[2] *Görg Haverkate*, Verfassungslehre, 1992, p. 9.

[3] See *Stefan Haack*, Theorie des öffentlichen Rechts, 2017, p. 29 ff.

[4] *Adolf Hitler* repeatedly held out such a prospect; see *Klaus Stern*, Das Staatsrecht der Bundesrepublik Deutschland, Vol. V, 2000, p. 812 (with references). In part, National Socialist legal doctrine assumed that a written constitution was unnecessary or inappropriate for the Nazi state; in this direction *Ernst Rudolf Huber*, Vom Sinn der Verfassung, 1935, p. 19; *idem,* Wesen und Inhalt der politischen Verfassung, 1935, p. 16 f.

[5] This does not preclude the possibility that individual provisions of the constitutional statute may have legal significance even in totalitarian regimes — such as the definition of different forms of property in the constitutional statutes of socialist states. See the examples at *János Beér*, Acta Juridica Academiae Scientiarium Hungaricae 2 (1960), 227, 243 ff. Insofar as constitutional norms could become of criminal relevance, one also had to deal

4.4. Constitutional law in a democratic constitutional state

One of the few states, which knew real constitutional law to a significant extent already in the 19th century, was the USA — in this respect it is justified to regard the USA as the motherland of a modern constitutional law independent from all remnants of the medieval tradition.[1] It is not for nothing that the "constitutional lawyer" was described as a product of the American constitutional system.[2] In many other democratic states, what has been defined here as constitutional law only emerged in the course of the 20th century. Since then it has been an essential characteristic of modern constitutional statehood.[3] The decisive factor is that the contents of constitutional statutes and the basic structures of the constitutional order are understood as legally binding norms that take precedence over all other domestic legal systems. They have legal quality if they function as the (supreme) normative standard by which courts decide on legal conflicts. This can be a genuine constitutional jurisdiction, as it exists in Germany and numerous other states. However, the constitutional character of those norms that derive from constitutional statutes or from the principles of the constitutional order must also be assumed in cases where the civil, criminal and administrative courts — with a Supreme Court at their head — base their decisions on these provisions.

The aforementioned is especially true where basic and human rights are guaranteed in constitutional statutes. If the idea of basic and human rights is to have any legal effects, it amounts to a highly ranked, subjective legal position that can be asserted before the state courts[4] — and thus to the existence of constitutional law in the sense of the present definition. It were precisely these fundamental and human rights ideals that, after the two world wars and after the end of the Cold War, led in most European states to a comprehensive legalization of constitutional life and sovereign power.[5] Today we must warn against a reversal of these interconnections: Anyone who diverts attention from the subjective-legal nature of every genuine constitutional law risks — or wants — the renewed supremacy of the political over the protection of basic and human rights.

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with legal norms (in the present sense). For the significance of criminal sanctions for the question of legalization and the legal nature of state norms, see *Stefan Haack*, Theorie des öffentlichen Rechts, 2017, p. 72 ff.

[1] Cf. *Dieter Grimm*, in: Isensee/Kirchhof (Eds.), Handbuch des Staatsrechts, 3rd Ed., Vol. I, § 1 mn. 35; *Ulrich K. Preuß*, in: Preuß (Ed.), Zum Begriff der Verfassung, 1994, p. 7, 15 ff.; reserved *Christoph Schönberger*, in: Vesting/Korioth (Eds.), Der Eigenwert des Verfassungsrechts, 2011, p. 7, 9 f.

[2] See the quote of *Edwin S. Corwin* at *Max Lerner*, The Yale Law Journal 46 (1937), 1290, 1301 (at Fn. 34).

[3] Relativizing *Christoph Schönberger*, in: Vesting/Korioth (Eds.), Der Eigenwert des Verfassungsrechts, 2011, p. 7, 13 ff.

[4] *Klaus Stern*, in: Festschrift für Kurt Eichenberger, 1982, p. 197, 202; cf. also *Görg Haverkate*, Verfassungslehre, 1992, p. 7.

[5] See *Görg Haverkate*, Verfassungslehre, 1992, p. 7; *Klaus Stern*, in: Festschrift für Kurt Eichenberger, 1982, p. 197, 202.

Impact of international justice on the constitutional law of the Russian Federation

In the modern world in any state, constitutional law, as a branch of national law, actively interacts with international law. First of all, this is due to the fact that many constitutions were adopted under the influence of international acts on human rights and therefore the constitutional norms on rights and freedoms correspond to international human rights standards. The bodies of international justice play an important role in the process of implementing the norms of international law into national law. For the Russian Federation, the practice of the European Court of Human Rights has played a great role in the development of national legislation. The courts of the Russian Federation and, in particular, the Constitutional Court of the Russian Federation can be called the guides of decisions of the European Court of Human Rights in the system of judicial protection.

We shall consider some directions of influence of decisions of bodies of international justice, on the example of the European Court of Human Rights, on the institutions of constitutional law in Russia. The main spheres of influence of the practice of interstate bodies could be called the protection of human, civil rights, freedoms, increasing the effectiveness of protection, bringing Russian legislation in line with international standards for the protection of rights, and freedoms. The normative basis for this is Article 46 of the Constitution, which guarantees everyone the right to judicial protection both by the courts of the Russian Federation and the right to appeal to supranational courts. Everyone shall have the right in accordance with international treaties of the Russian Federation to appeal to interstate bodies for the protection of human rights and freedoms if all available internal means of legal protection have been exhausted[1]. The right to judicial protection can be exercised by the person when applying to the national courts, including the Constitutional Court of the Russian Federation and to the European Court of Human Rights.

We can start with an example of the positive impact of the practice of the European Court of Human Rights on the practice of the Constitutional Court of Russia and national legislation.

The European Court of Human Rights examined P. V. Shtukaturov's complaint and in its judgment of 27 March 2008 in the case *Shtukaturov v. Russia* found violations of the applicant's rights to liberty and security of person, to a fair trial, and to respect for private and family life set out in the Convention for the Protection of Human Rights and Fundamental Freedoms (Articles 5, 6 and 8).

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[1] The Constitution of the Russian Federation adopted by popular vote on 12 December 1993, with amendments approved by all-Russian vote on 1 July 2020. (Nov. 30, 2020), http://www.ksrf.ru/en/Info/LegalBases/Pages/default.aspx.

After that, in 2009, the Constitutional Court of the Russian Federation considered the case on the complaint of P. V. Shtukaturov and other applicants[1]. The applicants were declared legally incompetent by court decisions. None of the applicants were invited to the court session and notified of the decision taken by the court. They all learned by chance that they were declared incapacitated. Applicant Shtukaturov on the initiative of his guardian was forcibly hospitalized in a psychiatric hospital. But the applicants' attempts to challenge the court decision on recognizing them as incapacitated did not lead to anything, because from the moment the court decision entered into legal force, the citizen is deprived of the opportunity to defend himself on his own. The right to defend an incapacitated citizen was granted only to his guardian, that is, in the case of Shtukaturov and others, can be done by the very relatives who initiated the deprivation of the applicants of their civil rights. The applicants argued that the guardians acted for selfish purposes in an effort to take possession of the applicants' property.

The applicants considered that the legislation contradicted Part 3 of Art. 123 of the Constitution of the Russian Federation: “Legal proceedings are carried out on the basis of equality of the parties”, as well as article 19 of the Constitution: “All are equal before the law and the court”. They also believed that these norms deprived them of access to justice and violated Art. 46 of the Constitution of the Russian Federation. According to the applicant Shtukaturov, the norm of the Federal Law “On psychiatric care and guarantees of the rights of citizens in its provision” violates Art. 22 of the Constitution of the Russian Federation: “everyone has the right to liberty and security of person” and “detention in custody is allowed only by a court decision”[2].

The Constitutional Court indicated in its judgment that any discrimination against people with mental disorders is unacceptable. Moreover, given the severity of the consequences of recognizing a person as incapacitated, when he loses many fundamental rights and freedoms and becomes completely dependent on the guardian, the interests of such a citizen should be especially protected.

Citizens whose legal capacity is being considered by the court are equal participants in court proceedings and have the right to defend their rights, which is impossible without their personal participation in the case. Depriving them of the opportunity to defend their position in court violates the principles of fairness of justice, adversarial nature and equality of parties in a judicial process.

However, as noted by the Constitutional Court, the law does not provide an answer to the question of whether the court is obliged to notify the relevant citizens

[1] Constitutional Court of the Russian Federation. Judgment of 27 February 2009 №4-П. (Nov. 30, 2020). URL: http://www.ksrf.ru/en/Decision/Judgments/Documents/2009%20February%2027%204-P.pdf (accessed 03.04.2020).

[2] The Constitution of the Russian Federation adopted by popular vote on 12 December 1993, with amendments approved by all-Russian vote on 1 July 2020 (Nov. 30, 2020). URL: http://www.ksrf.ru/en/Info/LegalBases/Pages/default.aspx (accessed 03.04.2020).

of the upcoming hearing of their case, and whether the court is required to provide such citizens with other opportunities to protect their rights, for example, by appointing a lawyer for them. The law also lacks clear and clear criteria for determining what state of health is sufficient for recognition of incapacity.

In this situation, the role of the court in considering such cases cannot be reduced only to formal confirmation of the conclusions of psychiatrists. The judge is obliged to make a decision based on his inner conviction about the mental state of the citizen and, in case of doubts about the reliability, authenticity and completeness of the doctors' opinion, to appoint a repeated psychiatric examination.

The Constitutional Court pointed out that a citizen who has been declared legally incompetent by a court should have the right to appeal against the court's decision to higher instances. Other means limiting the right of citizens to judicial protection.

The Constitutional Court recognized that forced hospitalization in a psychiatric hospital is an unconditional restriction of freedom, which, according to the Constitution of the Russian Federation, is possible only by a court decision[1]. And it is unacceptable to apply forced hospitalization only on the basis of a guardian's request, especially in the presence of a conflict situation between an incapacitated person and his guardian. Any risk of restriction of liberty must be resisted by the right to judicial review. Otherwise, the dignity of the individual is infringed, freedom and personal inviolability of a person, as well as the right to judicial protection, are disproportionately limited.

In this case, the Constitutional Court of the Russian Federation actually followed the decision of the European Court of Human Rights, referred to the norms of international law on the protection of persons with mental illness. Having recognized the norms of legislation as unconstitutional, the Court thereby instructed the legislator to make the necessary changes that correlate with international standards for the protection of human rights and freedoms.

Thus, we have before us an example of the influence of the decision of the European Court of Human Rights on the legislation and judicial practice of Russia, which helped to guarantee the personal rights of citizens.

Another relevant case of interaction between the Constitutional Court of the Russian Federation and the European Court of Human Rights, which influenced the protection of rights and freedoms, concerns the right to privacy. In 2016, the Constitutional Court of Russia considered the complaint of the court of first instance and applicant N. V. Korolev[2]. The court of general jurisdiction recognized the refusal to grant a spouse of convict a long visit as unlawful and referred to the judgment of the Grand Chamber of the European Court of Human Rights of June 30, 2015 in the case of "*Khoroshenko v. Russia*".

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[1] Constitutional Court of the Russian Federation. Judgment of 27 February 2009 №4-П. (Nov. 30, 2020). URL: http://www.ksrf.ru/en/Decision/Judgments/Documents/2009%20February%2027%204-P.pdf (accessed 03.04.2020).

[2] Constitutional Court of the Russian Federation. Judgment of 15 November 2016 №24-П/2016 (Nov. 30, 2020). URL: http://www.ksrf.ru/en/Decision/Judgments/Documents/2016_November_15_24-P.pdf (accessed 03.04.2020).

The European Court ruled that while guaranteeing everyone the right to respect for his private and family life, Article 8 of the Convention, however, allows public authorities to interfere with the exercise of this right. Such interference should be prescribed by law and necessary in a democratic society in the interests of the national security and public order, in order to prevent disorder or crime, to protect health or morality, or to protect the rights and freedoms of others.

In its practice of applying this article, the European Court of Human Rights proceeds from the fact that detention, like any other measure of deprivation of liberty, entails natural restrictions on private and family life, but an essential component of a prisoner's right to respect for family life is permission or, if necessary, assistance from the authorities in maintaining contact with close relatives.

Accordingly, the regulation of the issues of granting visits to convicts sentenced to imprisonment, including for long or life sentences, should not lead to the establishment of inflexible, stereotyped restrictions, and therefore the States parties to the Convention are expected to develop a technique for assessing proportionality that would allow balancing competing individual and public interests and take into account the specifics of each specific case.

The Constitutional Court of the Russian Federation recognizes the fundamental importance of the European system for the protection of human and civil rights and freedoms, of which the judgments of the European Court of Human Rights are a part. It tried to find a legitimate compromise in order to maintain this system, but reserves the right to determine the degree of its readiness for it, since the boundaries of a compromise in this matter are outlined precisely by the Constitution.

Thus, the Constitutional Court ruled that the legislation do not conform to the Constitution, its Articles 15 (Section 4), 17 (Section 1), 21, 23 and 55 (Section 3) in the interconnection with Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms in its interpretation by the European Court to the extent. It was a violation to exclude the possibility to grant long-lasting visits to life sentence prisoners during first 10 years of serving sentence.

Moreover, the Constitutional Court of Russia referred to the practice of the European Court of Human Rights not only in the reasoning part of the decision, but also in the concluding part. This example is unique, since in the concluding part of the decision, the constitutional justice body refers only to the Constitution of the Russian Federation. The practice of the European Court of Human Rights and the Constitutional Court of Russia led to a change in legislation and an improvement in national standards for regulating the rights of prisoners to private life.

In addition to positive examples of interaction and adoption of international standards from the practice of international justice bodies, one should consider case that is more complex. Thus, it seems important to analyze the situation when the positions of national and international bodies did not coincide.

In 2016, the UN Committee on the Elimination of Discrimination against Women (the CEDAW) adopted its views in the case against Russia brought by Ms. Medvedeva who had been banned from becoming a motorist with a river navigation company in Samara[1].

Svetlana Medvedeva challenged the rejection of her application in court, seeking a judicial order to compel the company to establish the safe working conditions required for her employment. She relied on the equality provisions in the Constitution and the Labor Code of Russia, noting that the latter specifically provided for equal treatment of men and women and prohibited gender discrimination in labor relations. On 20 August 2012, the Samarskiy District Court dismissed her case, holding that the contested decision did not violate the right to employment because it was intended to protect the author from harmful labor factors that had an injurious effect on women and their reproductive health.

The District Court relied on the position of the Constitutional Court in a case concerning a prohibition on women becoming assistant subway train operators. Previously, in 2012, the Constitutional Court of Russia refused to recognize Article 253 of the Labor Code of the Russian Federation as discriminatory. The Court explained this by the fact that the psychophysiological characteristics of the body of workers were taken into account when establishing certain restrictions on the use of women's labor, introduced in connection with the need for their special protection from harmful production factors that negatively affect the female body, primarily on the reproductive function[2]. This conclusion was made in the case of Anna Klevets who wanted to work as a subway train operator. The Constitutional Court further pointed out that the implementation of the principle of legal equality cannot be carried out without taking into account the generally recognized social role of women in procreation, which obliges the state to establish additional guarantees for women, including in the field of labor relations, aimed at protecting motherhood.

Despite the approach of the national courts, the UN Committee criticized as discriminatory the list of prohibited jobs for women, which included over 400 professions. The CEDAW acknowledged that the prohibition was motivated by the need to protect women from harmful work conditions.

The Committee notes that the refusal to employ the applicant as a helmsperson-motorist and the confirmation of that decision by the courts demonstrated that she was de facto prohibited from exercising her right to employment in accordance with her education. At the same time, her qualification as a navigation officer would in any case automatically entail work in conditions deemed hazardous for

[1] Committee on the Elimination of Discrimination against Women. Communication №60/2013. Views adopted by the Committee at its sixty-third session (15 February — 4 March 2016). Date of adoption of decision: 25 February 2016 (Nov. 30, 2020). URL: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/63/D/60/2013&Lang=en (accessed 03.04.2020).

[2] Constitutional Court of the Russian Federation. Decision of 22 March 2012 №617-O (Nov. 30, 2020). URL: http://doc.ksrf.ru/decision/KSRFDecision98697.pdf (accessed 03.04.2020).

women by the State party. The Committee underlined that the denial of employment puts the applicant in a position that she cannot earn a living through the profession for which she was educated and therefore results in adverse economic consequences for her.

The Committee notes the State's party's argument that the list of industries, professions and jobs with unhealthy and/or dangerous work conditions with restricted female labor was approved through a procedure established by the Government, taking into account the opinion of the Russian Trilateral Committee on Social and Labor Relations. It also notes the State party's assertion that the psychophysiological characteristics of workers are taken into consideration when establishing particular limitations on the use of women's labor and that such limitations are introduced in relation to the need for them to be specially protected from harmful production factors that have a negative influence on the female body, in particular on its reproductive function. In establishing a list of arduous jobs and jobs with harmful or dangerous working conditions forbidden to women, the State party claims to have acted on the basis of an assessment of the working conditions, the level of influence of those conditions on the body of the working woman and its reproductive function. The Committee further takes note of the State party's submission that section 404 (1) of the list establishes that women can be employed in the listed positions if the employer creates safe working conditions[1].

Thus, we can see the difference in approaches to understanding discrimination against women between the CEDAW Committee and the Russian Constitutional Court. Obviously, the Committee's approach is more balanced. Nevertheless, such a constitutional value as motherhood in the understanding of the Constitutional Court of Russia should get constitutional protection.

Only in 2020, the Ministry of Labor and Social Protection of Russia agreed to reduce the list of professions prohibited for women. Professions where the employer can guarantee labor safety will be removed from the list. Thus, the practice of the UN Committee still influenced, albeit in part, the legislation of the Russian Federation.

After the adoption of amendments to the Russian Constitution in 2020, traditional values — marriage, family, motherhood — received even greater protection[2]. We believe that in this area could arise a potential conflict between future decisions of the Constitutional Court of the Russian Federation and the bodies of international justice.

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[1] Committee on the Elimination of Discrimination against Women. Communication №60/2013. Views adopted by the Committee at its sixty-third session (15 February — 4 March 2016). Date of adoption of decision: 25 February 2016 (Nov. 30, 2020). URL: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/63/D/60/2013&Lang=en (accessed 03.04.2020).

[2] The Constitution of the Russian Federation adopted by popular vote on 12 December 1993, with amendments approved by all-Russian vote on 1 July 2020 (Nov. 30, 2020). URL: http://www.ksrf.ru/en/Info/LegalBases/Pages/default.aspx (accessed 03.04.2020).

It is necessary to separately emphasize the importance of the past constitutional reform for considering the role of decisions of international justice bodies in the legal system of Russia. The 2020 constitutional reform introduced some clarifications on the impact of international justice on national law.

Article 79 of the Constitution of the Russian Federation was supplemented by the following provision: "Decisions of international bodies, taken on the basis of provisions of international treaties of the Russian Federation in their interpretation that contradicts the Constitution of the Russian Federation shall not be executed in the Russian Federation". This provision was further developed within the amended competence of the Constitutional Court of the Russian Federation. The federal constitutional law has already enshrined the authority of the Constitutional Court to verify the possibility of executing the decision of an interstate body.

After amending Article 125 of the Constitution, the Constitutional Court shall resolve the issue of possibility to execute decisions of interstate bodies, adopted on the basis of international treaties of the Russian Federation in their interpretation contradicting the Constitution of the Russian Federation, as well as of possibility to execute decision of foreign or international (interstate) court, foreign or international mediation court (arbitrage) imposing obligations on the Russian Federation, in the event if this decision contradicts the basis of public order of the Russian Federation.

As we can see, the Constitutional Court of the Russian Federation can consider the issue of executing the decision of almost any interstate body of justice[1]. Thus, the primacy of the Russian Constitution and national law is emphasized in the case of a conflict between national and supranational values.

To summarize, it can be mentioned that the practice of international justice bodies had a significant impact on national law. The application of the decisions of the European Court of Human Rights has enriched the decisions of the constitutional justice body. The system of judicial protection of human and civil rights and freedoms has become more in line with international standards. This is also the merit of the European Court and the Constitutional Court of Russia. At the same time, in the future, if there are collisions in the understanding of standards for the protection of human rights, cases are possible when the Constitutional Court of Russia decides that it is impossible to execute the decision of an international justice body.

We believe that the range of such situations will not be overly broad, and most likely will affect the issues of equality of men and women, the institution of family and motherhood. At the same time, we hope that the Constitutional Court of Russia will continue to apply the practice of international courts when making decisions and thereby influence the development of constitutional law of Russia.

[1] Federal Constitutional Law of 21 July 1994 № 1-ФКЗ "On the Constitutional Court of the Russian Federation" (Nov. 30, 2020). URL: http://www.ksrf.ru/en/Info/LegalBases/Pages/default.aspx (accessed 03.04.2020).

The right to freedom of peaceful assembly: European standards and Russian legal practices

1. The freedom of assembly and an imperative requirement of prior authorisation

As first systemic problem relating to the implementation of the freedom of peaceful assembly in Russia could be regarded an absolute imperative requirement of prior authorisation. In principle it is not contrary to provisions of Article 11 European Converntion if, for reasons of public order and national security the state authorities require that the holding of meetings be subject to prior authorisation.[1] The European Court has previously considered that notification (and even authorisation procedures) for a public event do not violate the essence of the right to freedom of peaceful assembly as long as the purpose of the procedure is to allow the authorities to take reasonable and appropriate measures in order to guarantee the smooth conduct of any assembly, meeting or other gathering; normally the organizers of public events should abide by the rules governing that process by complying with the regulations in force in the national legislation.[2] As the European Court stated the prior notification serves not only the aim of reconciling the right of assembly with the rights and lawful interests (including the freedom of movement) of others, but also the aim of preventing disorder or crime.[3] In order to balance these conflicting interests, the institution of preliminary administrative procedures appears to be common practice in states when a public demonstration is to be organised. However, regulations of this nature should not represent a hidden obstacle to freedom of peaceful assembly as protected by the European Convention.[4] Thus, according to the European Court, the unlawful situation (such as the organizing of a demonstration without prior authorisation) does not justify an interference with a person's right to freedom of peaceful assembly.[5] In general, rules in national legis-

[1] Bukta and Others v. Hungary, no. 25691/04, § 35, ECHR 2007-III; Balçık and Others v. Turkey, no. 25/02, § 49, 29 November 2007; Nurettin Aldemir and Others v. Turkey, nos. 32124/02, 32126/02, 32129/02, 32132/02, 32133/02, 32137/02 and 32138/02, § 42, 18 December 2007.

[2] Sergey Kuznetsov v. Russia, no. 10877/04, 23 October 2008, § 42; Primov and Others v. Russia, no. 17391/06, 12 June 2014, § 117.

[3] Éva Molnár v. Hungary, no. 10346/05, 7 October 2008, § 37; Berladir and Others v. Russia, no. 34202/06, 10 July 2012, § 39—42.

[4] Samüt Karabulut v. Turkey, no. 16999/04, 27 January 2009, § 35.

[5] Barraco v. France, no. 31684/05, 5 March 2009, § 29; Cisse v. France, no. 51346/99, ECHR 2002-III, § 50; Oya Ataman v. Turkey, no. 74552/01, ECHR 2006-XIII, § 39.

lation governing public assemblies, such as the system of prior notification, are essential for the smooth conduct of public demonstrations, since they allow the authorities to minimise any possible disruption to traffic and take safety measures, their enforcement cannot become an end in itself. In particular, where demonstrators do not engage in acts of violence it is important for the public authorities to show a certain degree of tolerance towards peaceful assemblies guaranteed by Article 11 European Convention.[1] According to the position of the European Court the absence of prior authorisation and the "unlawfulness" of the action do not give carte blanche to the authorities; they are still restricted by the proportionality requirement of Article 11 of the Convention. Therefore, the provisions of the Russian public assembly legislation cause the automatic and inflexible application of the time-limits for notification of public events without taking into account that it was impossible to comply with the time-limit because of public holidays or spontaneous nature of the event — and it can be considered as a violation of the requirements of Article 11 § 2 of the European Convention. According to standards of European Convention the practice of dispersing the participants of peaceful public events, while the public authorities fail to show the necessary degree of tolerance towards peaceful, albeit unlawful, assemblies, is also in breach of Article 11 § 2 of the Convention.

Thus, due to this de-facto absolute imperative requirement of prior authorisation with regard to any public event the Russian legislation makes illegal any peaceful spontaneous assembly, which can be dispersed by the police or other law-enforcement authorities in automatic way. However, due to the case-law of the European Court in special circumstances where a spontaneous demonstration might be justified, for example in response to a political event, to disperse that demonstration solely because of the absence of the requisite prior notice, without any illegal conduct on the part of the participants, might amount to a disproportionate restriction on their freedom of peaceful assembly.[2] The Court has also clarified that the principle established in the case of Bukta and Others cannot be extended to the point where the absence of prior notification of a spontaneous demonstration can never be a legitimate basis for crowd dispersal. The right to hold spontaneous demonstrations may override the obligation to give prior notification of public assemblies only in special circumstances, namely if an immediate response to a current event is warranted in the form of a demonstration. In particular, such derogation from the general rule may be justified if a delay would have rendered that response obsolete.[3] On the other hand, it should be pointed out that even a lawfully authorised demonstration may be dispersed, for example when it turns into a riot.[4]

[1] Oya Ataman, cited above, § 42; Bukta and Others, cited above, § 37; Éva Molnár, cited above, § 36; Barraco, cited above, § 43; Berladir and Others, cited above, § 38.
[2] Bukta and Others v. Hungary, no. 25691/04, ECHR 2007-III, §§ 35 and 36.
[3] See Éva Molnár, cited above, §§ 37—38.
[4] See Primov and Others, cited above, § 137.

2. The freedom of peaceful assembly and public authorities in Russia

As second systemic problem relating to freedom of assembly in Russia is that the Russian domestic law creates an unduly wide discretion for the executive authorities to propose a change of the location, time or manner (type) of conduct of public events which was not restricted by the requirements of proportionality or necessity in a democratic society or by effective judicial control. Investigating this systemic problem we have to understand the approach of the European Court with regard to the control in this sphere of restrictions: the Court noted that the national authorities in any particular case have the right to check valid reasons against holding a public assembly at a specific location.[1] The European Court would have serious difficulties to assess concrete locations in terms of their size, security, traffic density, closeness to the target audience, and so on. Indeed, a multitude of local factors are implicated in managing the locations, time, and manner of conduct of public assemblies. Hence, by contrast to content-based restrictions on freedom of assembly which should be subjected to the most serious scrutiny by the European Court, in the sphere of restrictions on the location, time or manner of conduct of an assembly the Contracting States must be allowed a wider margin of appreciation. That margin of appreciation, although wide, is not unlimited and goes hand in hand with European supervision by the European Court, whose task is to give a final ruling on whether the imposed restrictions were compatible with Article 10 or 11 of the Convention.[2]

Thus, due to the case-law practice of the European Court a wide margin of appreciation is afforded to the national authorities, the procedural safeguards available to the individual will be especially material in determining whether the concrete respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. In particular, the European Court have to examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by the European Convention.[3] The Russian Public Events Act[4] empowers the competent regional or municipal authorities to make "well-reasoned" proposals to the organisers for changes in the location, time or manner of conduct of a public event. However, due to the opinion of the European Court the Russian Public Event Act does not provide for any substantive criteria on the basis of which to determine whether the

[1] See Berladir and Others, cited above, § 59.
[2] See Primov and Others, cited above, § 135.
[3] Chapman v. the United Kingdom [GC], no. 27238/95, § 92, ECHR 2001I; Buckley v. the United Kingdom, 25 September 1996, §§ 74—76, Reports of Judgments and Decisions 1996IV; and Liu v. Russia (no. 2), no. 29157/09, §§ 85 and 86, 26 July 2011.
[4] The Federal Law on Gatherings, Meetings, Demonstrations, Processions and Pickets, no. FZ-54 of 19 June 2004 ("the Russian Public Events Act"). URL: http://www.consultant.ru/document/cons_doc_LAW_48103/ (accessed 03.04.2020).

executive authorities' proposals are "well reasoned". In its common meaning "well reasoned" means no more than giving "valid" or "sound" reasons. There is no requirement that the proposal be considered "necessary in a democratic society", and therefore no requirement of any assessment of the proportionality of the measure. The Russian Constitutional Court controlled the constitutionality of these provisions of the Public Events Act and it came to conclusion that the authorities must give "weighty" reasons for such proposals and identified certain general principles by which they are to be guided when using this power.[1] On the other hand, the Russian Constitutional Court has also stressed that the executive's discretion in the matter may not be unjustifiably restricted. The Constitutional Court of Russia found that both the Constitution and the European Convention on Human Rights provided for restrictions on freedom of assembly in certain cases. Section 5 paragraph 5 of the Russian Public Events Act did not give the executive the power to ban a public event. It only permitted the executive to make reasoned proposals as to the location or time of the public event. It required the executive to give weighty reasons for their proposals. Such reasons might include the need to preserve the normal, uninterrupted functioning of vital public utilities (infrastructure) or transport services, to protect public order or the safety of citizens (both the participants in the public event and any other persons present at the location during the public event), or other similar reasons. In opinion of the Russian Constitutional Court it was impossible, however, to make an exhaustive list of permissible reasons, as this would have the effect of unjustifiably restricting the executive's discretion.

The Russian Constitutional Court also held that the authorities' refusal to agree to a public event could not be justified by logistical or other similar reasons. The fact that a public event might cause inconvenience was not sufficient to justify a proposal to change the location or time. The authorities had to show that public order considerations made it impossible to hold the public event. The term "agreed upon" contained in section 5 paragraph 5 of the Public Events Act meant that in such circumstances the authorities had an obligation to propose for discussion with the organisers of the public event a location and time compatible with the public event's purposes and its social and political significance. In particular, it should be taken into account that for a public event to fulfil its purposes some feedback (including via the media) between the participants in a public event and the targets of its message was necessary. The organisers, in their turn, were also required to make an effort to reach agreement with the executive. If it is impossible to reach an agreement, the organisers are entitled to defend their rights and interests in court;

[1] Decision of the Constitutional Court of the Russian Federation on 2 April 2009 №484-О-П on the complaints of citizens Lashmankin Alexander Vladimirovich, Shadrin Denis Petrovich and Shimovolos Sergey Mikhailovich on violation of their constitutional rights by the provision of part 5 of Article 5 of the Federal Law on Gatherings, Meetings, Demonstrations, Processions and Pickets. URL: http://doc.ksrf.ru/decision/KSRFDecision29386.pdf (accessed 03.04.2020).

and the courts should be required to examine these type of complaints as quickly as possible, and in any event before the intended public event, otherwise the judicial proceedings would be deprived of any meaning. Thus, the Russian Constitutional Court came to final conclusion that the provisions challenged by the applicants in this case were clear and compatible with the Russian Constitution.

The law-enforcement practice in Russia with regard to implementation of the freedom of peaceful assembly demonstrates that the public authorities tend to refer to a wide variety of reasons to justify their proposals for a change to the location, time or manner of conduct of a public event. The reasons most frequently used by public authorities were: other public events scheduled at the same location and time; risk of various disruptions to ordinary life, such as interference with vehicle or pedestrian traffic, with the normal functioning of public authorities or public utility services, with maintenance works, or even more generally 'interference with the everyday life of residents', such as obstruction of access to parks or shops; safety or national security considerations, such as for example a risk of terrorist attacks; or negative attitudes of others to the views expressed at the public event and the consequent risk of violence. On the one hand, these reasons were undoubtedly relevant, but on the other hand the public authorities in vast majority of cases did not proved that these reasons were sufficient to justify concrete restriction of the freedom of peaceful assembly, in particular authorities failed to bring evidence that restrictions were necessary and adequate in a democratic society and proportionate to any legitimate aim pursued.

For instance, a widespread practice in Russia is the reference of public authorities to the fact that another public event had earlier been notified to take place at the same location chosen by the organisers; thus, the responsible authority consider this simple fact as valid reason for a proposal to change the location and de facto this can be regarded as prohibition of the event on the notified location. In almost all cases the responsible authorities (executive power) and the Russian courts do not examine whether, in view of the size of the venue and the expected number of participants, it might be feasible to hold the two events simultaneously on the same location; whether there is a real risk of clashes between participants of these two simultaneous events and, where such a risk existed, whether it could be managed by taking appropriate security measures and police forces. However, due to the Universal and European standards 'the refusal to approve the venue of a public assembly solely on the basis that it is due to take place at the same time and at the same location as another public event and in the absence of a clear and objective indication that both events cannot be managed in an appropriate manner through the exercise of policing powers, is a disproportionate interference with the freedom of assembly'.[1]

[1] The Report of the Special Rapporteur on the right to freedom of peaceful assembly and freedom of association of 21 May 2012 (A/HRC/20/27), § 30; The Compilation of Venice Commission Opinions Concerning Freedom of Assembly", issued by the European Commission for Democracy through Law (the Venice Commission) on 1 July 2014 (CDL-PI(2014)0003), point

As it was said, quite often the reasons used by the public authorities for their refusals to approve the location, time or manner of a public event have related to different types of 'disruptions of ordinary life'— for example, interference with, or hindrance to, traffic (*вмешательство в движение транспорта или воспрепятствование ему*), municipal utility services (*деятельность коммунальных служб*), commercial activities (*предпринимательская деятельность*), everyday life of citizens (*повседневная жизнь граждан*), and maintenance works (*ремонтные работы*). Due to the position of the European Court any assembly in a public place is likely to cause a certain level of disruption to ordinary life, and that this in itself does not justify an interference with the right to freedom of assembly, as it is important for the public authorities to show a certain degree of tolerance.[1] As a general rule, the Russian public authorities responsible for notification procedure are not considering ways of minimising disruption to ordinary life, for example by organising a temporary diversion of traffic on alternative routes or by taking other similar measures, and at the same time accommodating the organisers' legitimate interest in peaceful assembling within sight and sound of their target audience.

Therefore, the next problem is that the Russian Public Events Act does not require that the location or time proposed by public authorities as an alternative to the location chosen by the organisers should be such that the message which they seek to convey is still capable of being communicated. Indeed, the responsible public authorities are usually proposing locations outside the city centre, far from any government officers and with limited passage of people, that is not within sight and sound of the target audiences. With regard to well-established European standards of the freedom to peaceful assembly it is necessary to note that the practice whereby the authorities allow an assembly to take place, but only at a location which is not within sight and sound of its target audience and where its impact will be muted, is incompatible with the requirements of Article 11 of the European Convention on Human Rights.[2]

3. Prohibited area for the freedom of peaceful assembly in Russia

So-called no-go area for freedom of peaceful assembly as third systemic problem for the freedom of assembly in Russia. The Russian Public Events Law prohibits holding public events at certain locations, such as in the immediate vicinity of

2.3; The 2010 Guidelines on Freedom of Peaceful Assembly (CDLAD(2010)020), prepared by the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Cooperation in Europe (OSCE) in consultation with the European Commission for Democracy though Law (the Venice Commission) of the Council of Europe, § 122.

[1] Kudrevičius and Others v. Lithuania [GC], no. 37553/05, ECHR 2015, § 91, §§ 155—57.

[2] See, in § 40 of the Report of the UN Special Rapporteur on the right to freedom of peaceful assembly and freedom of association of 21 May 2012, cited above; point 4.2 of the Compilation of Venice Commission Opinions Concerning Freedom of Assembly of 1 July 2014, cited above; and point 3.5 and §§ 45 and 101 of the 2010 Guidelines on Freedom of Peaceful Assembly by the ODIHR in consultation with the Venice Commission, cited above.

court buildings, detention facilities, the residences of the President of the Russian Federation, dangerous production facilities, railway lines and oil, gas or petroleum pipelines. Moreover, the procedure for holding public events in the vicinity of historic or cultural monuments is determined by the regional executive authorities, with due regard to the particular features of such sites and the requirements of this Act (section 8 paragraph 3 of the Russian Public Events Law). Since 2012 the regional legislatures may designate other locations where public events are prohibited if a public event there can interfere with the normal functioning of public utility services, transport, social or communications services, or hinder the passage of pedestrians or vehicles or the access of citizens to residential buildings, transport or social facilities (section 8 paragraph 2.2 of the Russian Public Events Law). The Public Events Act does not define the term "in the immediate vicinity"; what is considered to be "in the immediate vicinity" is determined for each location by the local executive authorities. On top of that there is also a special procedure for holding public events in Moscow — in the Kremlin, Red Square and the Alexandrovsky Gardens — the exceptional prerogative to allow any public event on this location in the heart of Moscow and the last word in this question has the Russian President (section 8 paragraph 4 of the Russian Public Events Law).

These regulations have been cause for the legal proceedings when a significant number of Russian citizens complained that they had not been allowed to hold a public event at a location chosen by them because of a blanket statutory ban on holding public events in the vicinity of court buildings. According to the position of Russian public authorities, the purpose of this ban on holding public events in the vicinity court buildings and other buildings and facilities mentioned in the Public Events Act is to ensure the security of these sensitive locations. According to the position of the Russian Government the Public Events Act set up a list of locations where holding of public events was prohibited and that prohibition was justified by the special legal regime of those locations and the need to ensure their security. In particular, the aim of the prohibition on holding public events in the vicinity of court buildings was to protect the independence of the judiciary and to prevent pressure on judges. The Russian Government argued this blanket blanket statutory ban on holding public events in the vicinity of court buildings by the position of the Russian Constitutional Court, which has confirmed the constitutionality of these legal provisions.[1] The restriction was therefore justified, and did not breach citizens' constitutional rights. The Russian authorities also appealed to the judgement

[1] The Decision of the Russian Constitutional Court No 428-O-O of 29 May 2007 (Определение Конституционного Суда Российской Федерации №428-О-О от 29.05.2007 г. «Об отказе в принятии к рассмотрению жалобы Уполномоченного по правам человека в Российской Федерации на нарушение конституционных прав гражданина Шаклеина Владимира Андреевича положениями пункта 9 статьи 2 Федерального закона "О собраниях, митингах, демонстрациях, шествиях и пикетированиях" и пункта 7 статьи 36 Земельного кодекса Российской Федерации»). URL: http://doc.ksrf.ru/decision/KSRFDecision16497.pdf (accessed 03.04.2020).

of the European Court that the acknowledged importance of freedom of expression did not require the automatic creation of rights of entry to private property, or even necessarily to all publicly owned property, provided that interested parties had an alternative opportunity to exercise their freedom of expression in a meaningful manner.[1]

Analysing this restrictions with regard to the location for public events it is necessary to note that only a minority of member-states of the Council of Europe establish statutory restrictions on holding public assemblies at certain locations which are normally publicly accessible, and none provides for a general ban on public assemblies near court buildings. All States except Ukraine impose certain restrictions on the location, date or time of an assembly. Some States (Germany, Greece) however emphasise that the choice of the location and time of the assembly is the right of the organisers. Restrictions may be set out in law or be imposed by the administrative authorities on a case by case basis. In ten States (Azerbaijan, Bosnia and Herzegovina, Estonia, the former Yugoslav Republic of Macedonia, Greece, Latvia, Montenegro, Romania, Serbia, and Turkey) the domestic law provides for a prohibition to hold public events at certain locations, for example in the vicinity of some governmental or military buildings, detention facilities, dangerous areas, such as mines, railways or construction sites, in the vicinity of hospitals or kindergartens, etc. Time or date restrictions may be found in the domestic law of six States (Azerbaijan, Greece, Lichtenstein, Monaco, Romania and Serbia). A majority of the States however do not provide for any statutory restrictions on the location, date or time of the assembly. Instead they allow the authorities to impose such restrictions on a case by case basis. The UN Special Rapporteur on the right to freedom of peaceful assembly and freedom of association, the OSCE and the Venice Commission all recommend that blanket bans on assemblies in specific locations, such as in the vicinity of government institutions or courts, be avoided, since they tend to be over-inclusive and disproportionate, because no consideration can be given to the specific facts of each case.[2]

Due to the position of the European Court any member-state of the Council of Europe can, consistently with the Convention, adopt general measures which apply to pre-defined situations regardless of the individual facts of each case, even if this might result in individual hard cases. However, a general ban on demonstrations can only be justified if there is a real danger of their resulting in disorder which cannot be prevented by other less stringent measures. In this connection, the authority must take into account the effect of a ban on demonstrations which do not by themselves constitute a danger to public order. Only if the disadvantage of such

[1] Appleby and Others v. the United Kingdom, no. 44306/98, §§ 47 and 48, ECHR 2003VI.

[2] See § 39 of the Report of the UN Special Rapporteur on the right to freedom of peaceful assembly and freedom of association of 21 May 2012; point 4.2 of the Compilation of Venice Commission Opinions Concerning Freedom of Assembly of 1 July 2014; and §§ 43 and 102 of the 2010 Guidelines on Freedom of Peaceful Assembly by the ODIHR in consultation with the Venice Commission.

demonstrations being caught by the ban is clearly outweighed by the security considerations justifying the issue of the ban, and if there is no possibility of avoiding such undesirable side effects of the ban by a narrow circumscription of its scope in terms of territorial application and duration, can the ban be regarded as being necessary within the meaning of Article 11 § 2 of the European Convention.[1]

Questioning the proportionality of the general ban on holding all public events in the vicinity court buildings and other buildings and facilities mentioned in the Public Events Act there is no evidence and neither any official explanation what kind security considerations justified it, except by vaguely referring to the "special legal regime" of the locations mentioned in the Public Events Act. The Russian Constitutional Court was also not able to explain why a general ban was a more feasible means of achieving the legitimate aim than a provision allowing case-by-case examination and targeting only those assemblies which presented a danger of disorder; or why the general ban could not be relaxed without a risk of abuse, significant uncertainty, discrimination or arbitrariness.[2]

The Russian legislation and legal practice in contrast to the European legal practice — for example Christians against Racism and Fascism case, which concerned the prohibition for two months of all public processions in London[3], establish restrictions which are not limited in time, and applies to the entire territory of Russia and to all types of public events in the vicinity court buildings and other buildings and facilities mentioned in the Public Events Act. Moreover, wide discretion is afforded to the local executive authorities in determining what is considered to be "in the immediate vicinity" of the locations specified in the Public Events Act. Thus, the general ban on holding all public events in the vicinity court buildings and other buildings and facilities is therefore not specifically circumscribed to address a precise risk to public safety or a precise risk of disorder with the minimum impairment of the right of assembly.[4]

Questioning the official argument that the general prohibition on peaceful assemblies in the immediate vicinity of court buildings has the aim of protecting the independence of the judiciary and of preventing pressure on judges. In spite of this

[1] See Christians against Racism and Fascism v. the United Kingdom, no. 8440/78, Commission decision of 16 July 1980; Animal Defenders International v. the United Kingdom [GC], no. 48876/08, § 106, ECHR.

[2] Decision of the Russian Constitutional Court of 17 July 2007 no. 573-O-O (Определение Конституционного Суда РФ от 17.07.2007 г. №573-О-О об отказе в принятии к рассмотрению жалобы Уполномоченного по правам человека в Российской Федерации на нарушение конституционных прав гражданина Шаклеина Владимира Андреевича положениями пункта 9 статьи 2 Федерального закона «О собраниях, митингах, демонстрациях, шествиях и пикетированиях» и пункта 7 статьи 36 Земельного кодекса Российской Федерации). URL: http://doc.ksrf.ru/decision/KSRFDecision16642.pdf (accessed 03.04.2020).

[3] Christians against Racism and Fascism v. the United Kingdom, no. 8440/78, Commission decision of 16 July 1980.

[4] Animal Defenders International v. the United Kingdom [GC], no. 48876/08, §§ 108 and 114—117, ECHR 2013.

first sight important aim, the European Court has many times stated that exceptions to freedoms of association and assembly must be narrowly interpreted, such that the enumeration of them is strictly exhaustive and the definition of them necessarily restrictive.[1] The European Court also underlines that, unlike the second paragraph of Article 10, paragraph 2 of Article 11 of the European Convention does not allow restrictions whose aim is maintaining the authority and impartiality of the judiciary. And the European Court has already payed attention in its practice to the question of holding public assemblies in front of court buildings: due to reiterated and very important position of the European Court of Human Rights the 'judiciary cannot be immune from criticism, and that very strong reasons are required for justifying restrictions on assemblies the purpose of which is to criticise alleged dysfunctions of the judicial system'.[2] On the other hand, it is necessary to note, that the European Court accepts that a ban on holding public events in the immediate vicinity of court buildings may serve a legitimate interest, namely that of protecting the judicial process in a specific case from outside influence, and thereby protecting the rights of others, namely the parties to judicial proceedings. The ban should however be tailored narrowly to achieve that interest. In Russia the prohibition on holding public events in the vicinity of court buildings is formulated in absolute terms. It is not limited to public assemblies held with the intention of obstructing or impeding the administration of justice. It prohibits all assemblies, including those unrelated to any judicial proceedings. Therefore, taking into account the absolute nature of the ban, coupled with the local executive authorities' wide discretion in determining what is considered to be "in the immediate vicinity" of court buildings, the European Court considered that the general ban on holding public events in the vicinity of court buildings is so broadly drawn that it cannot be accepted as compatible with Article 11 § 2 of the Convention.

4. Russian Public Events Act v. spontaneous and urgent peaceful assemblies

The Russian notification system is the reason of the next systemic problem for the realization of freedom of peaceful assembly in Russia. Analysing the particularity of the Russian notification system, it is necessary to note the unusually long, as compared to other member-states of the Council of Europe, 10 day period between the end of the notification time-limit and the planned date of the assembly. The only exception for this rule is a "picket", which may be notified three days before the planned date. The Russian Public Events Act makes no exceptions for special circumstances, where an immediate response to a current event is warranted in the

[1] See Sidiropoulos and Others v. Greece, 10 July 1998, § 39, Reports 1998IV, and Svyato-Mykhaylivska Parafiya v. Ukraine, no. 77703/01, § 132, 14 June 2007.
[2] Sergey Kuznetsov v. Russia, no. 10877/04, 23 October 2008, § 47; Kakabadze and Others v. Georgia, no. 1484/07, 2 October 2012, § 88.

form of a spontaneous assembly.[1] De-facto, in such cases the delay caused by compliance with the ten-day notification time-limit may render that response obsolete and the possibility of holding a "picket" does not always constitute an adequate substitute solution. Firstly, "picket" is a particular type of assembly, allowing for limited methods of expression only. Secondly, it must be notified three days before, which in some cases requiring an immediate reaction may be too long a delay.

For example, in 2012 a number of Russian citizens wanted to protest against a draft law prohibiting the adoption of Russian children by US citizens.[2] The date of the parliamentary examination of the draft law was announced 2 days before, making it impossible for the protesters to comply even with the shorter three-day notification time-limit for "pickets", let alone with the normal ten-day time-limit for other types of public event. The failure to inform the public sufficiently in advance of the date of the parliamentary examination of the draft law therefore left the protesters with the option of either foregoing their right to peaceful assembly altogether, or of exercising it in defiance of the administrative requirements.

Analyzing the above mentioned case of Mr. Tarasov, the European Court noted 'that when convicting the applicant of participating in a public event held without prior notification, the domestic courts limited their assessment to establishing that the applicant had taken part in a "picket" which had not been notified within the statutory timelimit. They had not examined whether there were special circumstances calling for an immediate response to a current event in the form of a spon-

[1] Kudrevičius and Others v. Lithuania [GC], no. 37553/05, § 91, §§ 152 and 153, ECHR 2015.

[2] Here are key facts of case Tarasov v. Russia (application no. 37038/13): on 10 December 2012 the State Duma adopted at first reading a draft law which, prohibited adoption of children of Russian nationality by US citizens. On 17 December 2012 the official daily newspaper Rossiyskaya Gazeta announced that the second reading was scheduled for 19 December 2012. Therefore, due to the limited time for notification many people intended to stage solo "pickets" on 19 December 2012 in front of the State Duma to express their opposition to the draft law. The format of solo "pickets" was chosen because there was no longer time to observe the minimum statutory three-day notification period for other types of public events. Therefore, Mr. Tarasov has also decided to hold his own solo "picket", and at around 9.15 a. m. positioned himself, holding a banner, in the vicinity of the State Duma at some distance from other protesters. Several minutes later he was arrested by the police and brought to the police station, where Mr. Tarasov was charged with participating in a public event held without prior notification, in breach of Article 20.2 § 2 of the Code of Administrative Offences. On 15 January 2013 the justice of the peace of 369 Court Circuit of the Tverskoy District of Moscow convicted Mr. Tarasov as charged and sentenced him to a fine of RUB 20,000 (about EUR 495). The justice of the peace found it established, on the basis of police reports, that the applicant had taken part in a "picket" involving fifty people. That "picket" had been unlawful, because no notification had been submitted by the organisers, as required by Russian law. The applicant had waved a banner, thereby attracting the attention of passers-by and journalists assembled for the occasion. He had not complied with the police order to stop picketing. On 20 February 2013 the Tverskoy District Court of Moscow upheld the judgment on appeal.

taneous assembly and justifying a derogation from the strict application of the notification time-limits. Indeed, the domestic legal provisions governing notification time-limits are formulated in rigid terms, admitting of no exceptions and leaving no room for a balancing exercise conforming with the criteria laid down in the Court's case-law under Article 11 of the Convention'.[1] Thus, due to the position of the European Court the Russian public authorities, as law-enforcement bodies, as well as Russian courts have failed to undertake a proper examination and a proper judicial review of all special circumstances of this case to answer the question whether an immediate assembly — a peaceful spontaneous assembly — were only one adequate and possible response of the applicant to the legislative activities of the State Duma. Therefore, in the opinion of the European Court the automatic and inflexible application of the time-limits for notification of public events as a general rule without taking into account that in special cases the Russian citizens were not able to comply with time-limit because of urgent or spontaneous nature of the event is not justified under Article 11 § 2 of the Convention and can not be regarded as being "necessary in a democratic society".

5. Freedom of peaceful assemblies and positive obligations of domestic authorities

The next systemic problem of the public assembly law is that often very strict security measures taken by the police other law-enforcement authorities during peaceful public events impede ability of participants of these peaceful assemblies to communicate their message to the public. Due to the case law of the Euroean Court of Human Rights the domestic public authorities have a positive obligation to take appropriate measures with regard to lawful demonstrations in order to ensure their peaceful conduct and the safety of all citizens. The public authorities have a wide margin of appreciation in the choice of the means to be used.[2] Thus, applying security measures in the course of a public peaceful assembly is, on one hand, a part of the authorities' positive obligations to ensure the peaceful conduct of the assembly and the safety of all citizens, but, on the other hand, it also constitutes a restriction on the exercise of the right to freedom of peaceful assembly.[3] Thus, often applied by security forces an unusually long security checks of participants at the so-called 'entrance to the public event' lead to the delay of a peaceful assembly and represent an unjustified interference with the applicants' freedom of assembly.

For instance, among security measures available to public authorities policing peaceful assemblies in Russia are searches of participants and their belongings at

[1] Lashmankin and others v. Russia (Applications nos. 57818/09 and 14 others). 7 February 2017 (29/05/2017). § 454.
[2] Kudrevičius and Others v. Lithuania [GC], no. 37553/05, §§ 158—60, ECHR 2015.
[3] Frumkin v. Russia, no. 74568/12, § 102, 5 January 2016.

the entry to the public event, which unavoidably leads to cordoning or fencing off the location to prevent the entry of those who have not yet been searched or who refuse to be searched.[1] Analyzing this legal provisions it is necessary to state that these norms are formulated in general terms and give no indication of the circumstances in which the police may use the power conferred on them. In particular, there is no requirement that the security measures in question be considered "necessary in a democratic society", and therefore no requirement for any assessment of the proportionality of the measure. Therefore, in the view of the European Court stated in cases against other member-states of the Council of Europe, there is a serious risk of arbitrariness in such a broad discretion to the police.[2]

There are typical set of measures which are quite often applied and which illustrate how the police powers are used in practice in order 'to protect' the peaceful public event. Thus, as general rule, in the case of peaceful assembly the police will fence off the location of an approved public event with metal barriers, also with parked buses or other police vehicles along the barriers, diverting all passers-by to alternative roads, searching all the participants 'at the entrance to public event' before letting them enter the fenced-off location, and closing the entry as soon as the number of participants reached the number indicated in the notification (for example, if organizes of public event would indicate 50 participants in the notification than the police would 'close the entrance' to the public event exactly after arrival of 50th participant). Thus, the combination of the above mentioned measures could result in creating a shielded enclosure where only small group of people would be allowed to express their protest surrounded by the police and hidden from public view. Therefore, participants' effective ability to communicate the message which they sought to convey would be seriously undermined and the impact of the assembly would be significantly muted.

It is also a general practice that these invasive security measures described above are applied by the public authorities on a pretext of a vague reference to possible terrorist or extremist acts. However, quite often there is no evidence corroborating the reality and seriousness of the security risk referred to by the authorities or the necessity of reinforced security measures at the time of the peaceful public event. Moreover, it is also a wide spread practice that the reality of risks of possible terrorist or extremist acts is not examined in the domestic judicial proceedings. Under standards of the right to fair trial (Article 6 of the Convention) it is necessary to investigate the circumstances of the concrete case as a whole in order to

[1] According to legal provisions of the section 13 § 1 (18) of the Police Act no. 3-FZ of 7 February 2011 the police has the duty to ensure the public safety and public order at public events. Thus, in order to achieve this aim the police forces are empowered to search citizens and their belongings, if necessary using technical equipment, at the entry to buildings, territories or public areas where public events are held. If a citizen refuses to undergo a police search, the police may refuse to let him or her enter the building, territory or public area in question.

[2] Singartiyski and Others v. Bulgaria, no. 48284/07, § 43—45, 18 October 2011; Gillan and Quinton v. the United Kingdom, no. 4158/05, §§ 80 and 85, ECHR 2010.

identify strong and concordant indications which confirm the authorities' allegation that public security considerations are the true reason for the security measures in question. And if the public authorities have indeed sufficiently serious and credible information about a security risk, than this conclusion would require to apply very strict security measures to all public events held at the time (without any exceptions with regard to other so-called 'loyal public events'). Nevertheless, there is quite often a situation when the police do not apply any security measures to loyal public events and at the same time with regard to 'disloyal' public events the police forces undertake very serious security measures. Therefore, taking into account all these elements — the lack of evidence capable of substantiating the reality and seriousness of the alleged security risk, viewed in the light of the fact that security measures had been adopted solely during opposition meeting, whereas no such measures had been taken during official or loyal public events — the European Court came to the conclusion that, in adopting the exceptionally drastic security measures during the peaceful assemblies of political opposition, the Russian public authorities acted in an arbitrary and discriminatory manner.[1] And regarding the police's decision to stop admitting new participants to the peaceful assembly, it is necessary to admit that this 'security measure' was not in accordance with the Russian Law. Thus, according to the Public Events Act the authorities have the rights to stop the admission only if the maximum capacity of the venue is exceeded.[2] Therefore, if the only ground to stop admission of new participants would be the fact that the number of participants mentioned in the notification had been reached, than it would be contrary as well to constitutional standards of the freedom of assembly (Article 31 of the Russian Constitution), as well as to European standards of this freedom provided in the Article 11 of the Convention.

6. Freedom of peaceful assembly and reasons for dispersals of public events

According to the Russian Public Event Act the representative of the competent regional or municipal authorities present at the public event is empowered to order termination of that event if, among others, the organisers or participants have committed unlawful acts or have breached the procedure for the conduct of public events — for example, even by not submitting a notification or by failing to comply with the elements indicated in the notification or agreed upon after a proposal from the authorities to change its location, time or manner of conduct. If the event is not terminated as ordered, it may be dispersed by the police. The police also have wide powers to escort to the police station or administratively arrest any person suspected of an administrative offence, including the offence of breaching the established procedure for the conduct of public events.

[1] Makhmudov v. Russia, no. 35082/04, §§ 69—73, 26 July 2007.

[2] Sections 13 paragraph 2 and 14 paragraph 3 and section 14 paragraph 2 (1) of the Federal Law on Gatherings, Meetings, Demonstrations, Processions and Pickets.

It is necessary to notice that any breach of the procedure for the conduct of public events or any unlawful act by a participant, no matter how small or innocuous, may serve as a ground for the authorities' decision to terminate a public event. Similarly, the participants may be escorted to the police station or administratively arrested in connection with an administrative offence of breaching the established procedure for the conduct of public events, which is widely formulated and covers any breach of procedure, even a minor one. In particular, Russian Law permits dispersal of a public event and arrest of the participants for the sole reason that *no notification has been lodged* or that the event is taking place at a location or time that has not been approved by the authorities, regardless of the existence of any disorder or of any real nuisance to the rights of others. Therefore, the current law-enforcement practice in Russian shows that the public authorities demonstrate zero tolerance towards unlawful assemblies, even if they are peaceful, involve few participants and create only minimal or no disruption of ordinary life.[1] It is also general practice, as all the above cited cases have showed, that the domestic authorities made no attempt to verify the extent of the risks posed by the protestors, or to verify whether it had been necessary to disperse them. However, according to well-established position of the European Court if demonstrators do not engage in acts of violence it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance.[2]

7. General conclusions

Summarizing all systemic problems analyzed by the European Court of Human Rights with regard to the implementation of the freedom of peaceful assembly in Russia we have to note that very often the public authorities do not provide relevant and sufficient reasons for their proposals to change the location, time or manner of conduct of the public events. The Russian Public Assembly Law still do not consist enough guarantees for adequate and effective legal safeguards against arbitrary and discriminatory exercise of the wide discretion of the executive bodies and which did not therefore meet the European Convention "quality of law" requirements. In addition, the refusal to approve the public event by reference to the general ban on holding public events in the vicinity of court buildings could not be regarded as being "necessary in a democratic society" because the general ban

[1] Malofeyeva v. Russia, no. 36673/04, § 130 and 140, 30 May 2013; Kasparov and Others v. Russia, no. 21613/07, § 95, 3 October 2013; Navalnyy and Yashin v. Russia, no. 76204/11, § 65, 4 December 2014; Novikova and Others v. Russia, nos. 25501/07, 57569/11, 80153/12, 5790/13 and 35015/13, §§ 136, 171,175 and 179—83, 26 April 2016.

[2] On the chilling effect that a disproportionately severe sanction may have on the sanctioned person and other persons taking part in protest actions — see: Kudrevičius and Others v. Lithuania [GC], no. 37553/05, ECHR 2015, § 150—151, §§ 155—57; Novikova and Others, cited above, § 175; Taranenko v. Russia, no. 19554/05, §§ 75 and 95, 15 May 2014.

lacked convincing justification and was so broadly drawn that it could not be accepted as compatible with Article 11 § 2. Also, there is an obvious lacuna in the Russian Public Assembly Law with regard to the legal regulation of spontaneous or urgent public events; it is also very evident that the Russian legal practice demonstrates an automatic and inflexible application of the time-limits for notification of public events without taking into account any important circumstances of the concrete case and this can not be justified under Article 11 § 2 of the Convention. Moreover, by dispersing of oppositional peaceful public events, the authorities failed to show the necessary degree of tolerance towards peaceful, albeit unlawful, assemblies, in breach of the requirements of Article 11 § 2 of the Convention. Last but not least, general practice when exceptionally drastic security measures are used during the public event by the domestic authorities (police) quite often lead to abuse of discretion and discrimination of citizens peacefully realizing the freedom of assembly. In view of the above considerations, we have to state that often the interferences with the freedom of assembly are based on legal provisions which did not meet the Convention's "quality of law" requirements, and which are not "necessary in a democratic society".

Russian-German academic cooperation: pages of history and lessons of the "Eurofaculty in Kaliningrad"

In the middle of the XVI century Baron Sigismund von Herberstein, a former ambassador of the Holy Roman Empire of the German nation, opened to Europe its eastern neighbor — Muscovy. Such was the resonance of Herberstein's "*Notes on Muscovite Affairs"* (first issue on 1649). The book were republished many times, including in Russian. An thoughtful and meticulous diplomat, in addition to his main mission, noticed various aspects of the life of ordinary Muscovites and the court of Grand Prince Vasili III, studied various documents, and also made a selection of legislative acts of the Grand Duchy of Moscow. For many years, the content of the Sudebnik (Code of Law) of Grand Prince Ivan III (1497) was known only from a fragmentary Herberstein's translation. Only in 1817 this monument of russian law was discovered in the Moscow archive by Russian historians Konstantin F. Kalaydovich and Pavel M. Stroyev.[1]

I begin the story about the history of Russian-German academic cooperation in the field of jurisprudence from this long-standing episode but I do not claim that it is a reliable starting point. Strictly speaking, there is no question of academic cooperation. But the fact fixed by Herberstein was waiting in the wings, when Russian science, firstly, would appear, and secondly, make its discovery. A tip from time immemorial, which has rendered a service to science, proves to us that scientific research has no form either in time or in space and academic interaction can take different forms.

Russian jurisprudence until the 18th century developed as an applied field. Legal knowledge was required primarily in the bureaucratic system — where law-making and law enforcement were the essence of the activity. In the absence of universities where systematic knowledge could be obtained, Russian clerks learned the craft empirically. Tsar Boris Godunov (the turn of the 16th-17th centuries) planned to send young officers to study abroad. But on a regular basis this process was launched by Peter the Great, Emperor of Russia (1682—1725). In June 1697 an agreement was concluded in Königsberg between Peter the Great and Frederick III, Elector of Brandenburg, where, in particular, it was agreed that the Russian Tsar "would deign to send his subjects to the German land for science", and the Elector would provide them with all kinds of support.[2] Russia needed, first of all, qualified engineers, doctors — the state spent money on their training first of all. But Russians also went to study law.

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[1] YUshkov, S., 1989. Sudebnik 1497 g. (k vneshnej istorii pamyatnika). In: *Serafim Vladimirovich YUshkov (Trudy vydayushchihsya yuristov).* Moskva: YUridicheskaya literatura, p. 370.

[2] *Polnoe sobranie Rossijskoj imperii. Sobranie 1.* Tom 3, №1589.

In the 18th century University "Albertina" in Königsberg was one of the five most popular universities among Russian students. In 1716 a group of young Russian bureaucratic clerks was sent to Königsberg to study the German language. They did not complete the course due to financial difficulties, but most of them, upon returning to their homeland, were assigned to diplomatic and other civil service. Russian subject Ivan Khmelnitsky graduated from the "Albertina" and defended his doctoral dissertation on the topic "Refutation of slavery according to the law of Nature and the law of the People". In 1767—1768 he read there a course on natural law. Subsequently, Khmelnitsky worked in the Legislative Commission of Catherine II (1767) and served as a Chief Secretary of the Governing Senate.[1]

The institutional basis for the Russian legal science was the establishment of Academy of Sciences (with the University) and University of Moscow in the 18th century Already in the first quarter of the 19th century the Imperial Lyceum and School of Jurisprudence was established and the university network was expanded. The influence of German jurisprudence on Russian law was exerted both through the academic tradition, the German model of university education and through the training (internships) of future Russian professors at German universities.[2]

At the beginning of its existence the Faculty of Law in University of Moscow consisted of only one young doctor of law from the University of Vienna, Philip Dilthey. He did not bother with his studies. The few students enrolled in the faculty fled. In 1765 there was only one student, in 1770 there were two students.[3] Even by the end of the 18th century the situation did not improve much: three teachers and eleven students. Only the 19th century will make a real revolution in legal education in Russia — first because of reforms of Mikhail M. Speransky, then — thanks to the Great reforms of Alexander II.

I will show the influence of German scientific thought on Russian jurisprudence in the field of history and theory of law. That field is close to me.

The definition of the subject of the Legal History by pre-revolutionary Russian historians of law goes back to the German Historical School of jurisprudence. Before the revolution Russian historical and legal science studied mainly legal institutions, more precisely — the history of laws (positive law). This is the basis of one of the first Russian specialized historical and legal studies of the professor of law Alexander P. Kunitsyn "Historical image of ancient legal proceedings in Russia".[4]

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[1] Andreev, A., 2005. *Russkie Studenty V Nemeckih Universitetah XVIII — Pervoj Poloviny XIX Veka.* Moskva: Znak, p. 170—171.

[2] Kodan, S., 2013. Formirovanie vneshnej istorii rossijskogo zakonodatel'stva kak istochnikovedcheskogo razdela otechestvennoj nauki istorii prava (vtoraya chetvert' XIX V.). *Antinomii. Nauchnyj ezhegodnik Instituta filosofii i prava Ural'skogo otdeleniya Rossijskoj akademii nauk*, 13 (1), p. 135—145; Timoshina, E., 2001. Rukopisnoe nasledie M.M. Speranskogo kak istochnik issledovaniya ego pravovogo mirovozzreniya. *Izvestiya vuzov. Pravovedenie.* 3 (236), p. 221; Budilov, V., 2014. Savin'i i stanovlenie russkogo nacional'nogo pravovedeniya v pervoj polovine XIX v. *Izvestiya vuzov. Pravovedenie.* 3 (314), p. 156—187.

[3] YAshchuk, T., 2005. *Ocherki Po Istorii YUridicheskogo Obrazovaniya*. Omsk: Omskij gosudarstvennyj universitet, p. 31—33.

[4] Kunitsyn, A., 1843. *Istoricheskoe Izobrazhenie Drevnego Sudoproizvodstva V Rossii.* Sankt-Peterburg: 2 otdelenie Sobstvennoj Ego Imperatorskogo Velichestva kancelyarii, p. 151.

One of the founders of Russian jurisprudence, Konstantin A. Nevolin, trained at the University of Berlin. His teacher was Friedrich Karl von Savigny. In 1851 Nevolin defined the subject of the Legal History as follows: "The history of any positive legislation should present us both the history of its sources and the history of its content. Therefore, it is always divided into external and internal history".[1] In this division Nevolin followed the outstanding predecessor of his teacher — the founder of the German Historical School of jurisprudence, professor at the University of Göttingen Gustav Hugo.

At the end of the XIX century another Russian historian of law, Mikhail F. Vladimirsky-Budanov, trained at the University of Heidelberg where he listened to lectures by Karl Vangerov, Karl Mittermeier, Johann Bluntschli. Then Vladimirsky-Budanov worked in the library of the Königsberg University where he collected materials on the history of Russian-Lithuanian law.[2] The founder of Soviet historical and legal science, Serafim V. Yushkov, also trained in Germany — at the University of Freiburg.

In 1887 the Russian Institute of Roman Law ("Russian Seminar") was established at the University of Berlin. Funds for its maintenance were allocated from the Russian treasury; 26 people have completed the full course over the years of its existence (17 completed the full course). Among the graduates of the Russian Seminar are outstanding Russian (later — Soviet) professors L. I. Petrazhitsky, I. A. Pokrovsky, M. Ya. Pergament, D. D. Grimm.[3]

From apprenticeship Russian legal science has made a fast way to its own original ideas. A completely independent phenomenon is the Russian neo-Kantian school (B. A. Kistyakovsky, P. I. Novgorodtsev, etc.). One of the Russian neo-Kantians L. I. Petrazhitsky is the creator of the Psychological theory of law.

During the Soviet period, Russian jurisprudence was dominated by positivism and the Marxist paradigm. Law was defined in Marxist terms as "the will of the ruling class", but at the same time a formal approach to law clearly reproduced the main ideas of Hans Kelsen.

So, academic contacts in the field of jurisprudence have accompanied Russia and Germany for many years. There were both academic exchanges and scientific reception.

With the beginning of the post-Soviet period (the end of the XX century), jurisprudence in Russia freed itself from homogeneity and uniformity in the methodology of studying law. This has led to a certain crisis, when the variety of choice confronts uncertainty. At the same time, socio-humanitarian science found itself in crisis on a global scale, which also sought itself in Postmodernity. In addition, we

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[1] Nevolin, K., 1857. *Istoriya Rossijskih Grazhdanskih Zakonov. CH. 1: Vvedenie. Kn. 1: O Soyuzah Semejnyh.* Sankt-Peterburg: Tipografiya Eduarda Praca, p. 9.

[2] Krakovsky, K., 1995. Predislovie. In: M. Vladimirsky-Budanov, *Obzor istorii russkogo prava*. Rostov-na-Donu: Feniks, p. 14.

[3] Rudokvas, A., 1999. I. A. Pokrovskij i ego "Istoriya rimskogo prava" In: I. Pokrovsky, *Istoriya rimskogo prava*. [onlain] Sankt-Peterburg: Letny sad. URL: http://civil.consultant.ru/elib/books/25/page_1.html#1 (accessed 27.11.2020).

add here the crisis of university education — this institutional pillar of science: the mission of universities and their future also found themselves in the conditions of transformation and uncertainty. Against this background, the United Europe adopted the Magna Charta of the European Universities (Bologna, 1988), and on the eve of the Millennium — the Bologna Declaration (1999). Russia joined the Bologna Process in 2003 in Berlin.

On October 21, 1998, at a meeting of the Committee of Senior Officials of the Council of the Baltic Sea States (CBSS) in Stockholm (Sweden) an initiative was put forward to implement the "Eurofaculty in Kaliningrad" project on the basis of the Kaliningrad State University. The project was approved by the CBSS Working Group on the Support of Democratic Institutions at a meeting on January 26, 1999 in Helsinki (Finland). The Ministry of Foreign Affairs of the Russian Federation and the Ministry of Education of the Russian Federation, as well as representatives of the state authorities of the Kaliningrad region spoke in favor of the project and promised support from their side. At a meeting in Bergen (Norway) on June 22, 2000, the CBSS Foreign Ministers made a final decision on the implementation of the "Eurofaculty in Kaliningrad" project to support the Faculty of Economics and Faculty of Law of Kaliningrad State University. Departments of the Faculties had the same status and operated independently of each other. The project was starting from September 1, 2000. Originally designed for three years, the project was extended until 2007. In fact, the project was implementing the Bologna Declaration principles even before Russia's official accession to the Bologna Process.

The overall project management was carried out by a consortium of several European universities. The consortium of the Faculty of Law at different times included the University of Göttingen (Germany), University of Bergen (Norway), University of Uppsala (Sweden), University of Turku (Finland), University of Aalborg (Denmark). All these are high-class universities, they were represented by respected authorities. But, I think, everyone has been involved in the Eurofaculty at the Faculty of Law of Kaliningrad University will agree that the engine of the project, its inspirer, and personification has always been the project contractor, Professor Dietrich Rauschning.

Professor Rauschning is a longtime friend and partner of the Faculty of Law of Kaliningrad University. The history of the Faculty of Law in Kaliningrad of the 1990s — 2000s will be incomplete if we keep silent about the figure of the Professor. Undoubtedly, he made his contribution to the development of the law school in Kaliningrad — both personal and institutional. One can sincerely admire his energy, perseverance and passionateness to his beloved work, which were fully revealed in various relationships with the Faculty of Law in Kaliningrad. We argued with him a lot, sometimes fiercely, our points of view did not always coincide, and in many respects they do not agree even now. However, despite serious differences, a mismatch on some issues (eventually, the professor and I are people from different generations), I always retain deep personal and professional respect and

sympathy for Professor Rauschning as an outstanding person, a sincere and decent person and a wise senior colleague... Almost thirty years ago, they found each other: Professor Dietrich Rauschning and my teacher, Professor Viktor P. Prokopyev. Their personal friendship and cooperation had a significant impact on a whole generation of graduates of the Kaliningrad law school.

The main declared task of the Eurofaculty was to support Kaliningrad State University in reforming the curriculum in order to bring them in line with international educational standards. But in parallel with the reform of the curriculum, other areas of cooperation developed: improving teaching methods; in-depth and specialized study of foreign languages; implementation of academic exchanges of students and teachers of partner universities; expansion and increase of the library fund; providing free access to the Internet for teachers and students; development and implementation of joint scientific projects. The volume, intensity, effectiveness of these areas were different. Each can be devoted to a separate article. Professor Rauschning has already presented his assessment of the Eurofaculty in a special essay,[1] to which many strokes could be added from our, Russian side. However, here I would like to reflect not on this. Today, when twenty years have passed since the beginning of the work of the Eurofaculty, one can look back and understand what the lessons of this large project are for us, what we have received from its legacy and what we will carry into the future.

The curriculum reform in the early 2000s was very painful for us. It was especially acute due to the fact that the reshaping of the curriculum contradicted the state educational standard — a rather rigid document that defines the structure and content of the educational process in Russia. And, remind, we started the reform even before Russia entered the Bologna process. We received the status of an experimental platform on which the concepts of credit units (ECTS) were tested, an increase in students' independent work by reducing classroom hours, etc. We had to get out of our comfort zone and constantly be in a state of uncertainty: no one knew what the curriculum for next year would be. This tempered us, and we were more prepared for the deafening changes in higher education that took place in subsequent years. Reducing workload, intensifying classroom work, modules, etc.: we met with all this earlier than other Russian colleagues. This is the first thing that the Eurofaculty prepared us for, giving us *a lesson in readiness for change.*

Without exaggeration, Professor Rauschning can be called a co-author of the reformed curricula of the Faculty of Law in Kaliningrad in the first half of the 2000s. Through long discussions (and sometimes very tense), we moved forward and nevertheless found the most satisfactory solutions, without breaking everything to the ground.

[1] Rauschning, D., n. d. *25 Jahre Verbindung Zwischen Der Juristischen Fakultät Kaliningrad Und Deutschen Partnerfakultäten*. [ebook] URL: https://www.uni-goettingen.de/de/document/download/be12b69086faa5e976bfa506a8503df4-en.pdf/Kaliningrad%20Heft%20-%20deutsche%20Version.pdf (accessed 27.11.2020).

Second, the Eurofaculty opened up opportunities for academic mobility for students and teachers. Like many years ago, Russian teachers and students went to European universities for study and training. This helped too much in their further academic and practical careers: the defense of dissertations, diplomas, professional contacts, articles, the tenure in leading universities in Russia and other countries, etc. Summer schools in Kaliningrad, lectures and whole training courses of guest professors from European universities — these are the institutional framework for academic cooperation and it is also a legacy of the Eurofaculty. But mobility "from within" has always been more intense than "from the outside": a student from Europe is still a rare guest in Kaliningrad. Joint research and scientific projects are also weak for various reasons. But maybe *the experience gained in academic mobility* will still be useful.

I cannot fail to note: Göttingen was always ready to receive teachers and students — both for the academic semester, and for a short-term study visit, and for work in the grandiose university library, and for preparing for a master's or doctoral degree. And the house of the Rauschnings was invariably open and hospitable.

Reforming the curriculum forced a revision of teaching methods. We conducted methodological seminars, participated in the educational process at partner universities and observed their methods, shared our developments, and even more — continued to come up with new things. The Eurofaculty coincided with the growing influence of the Internet and information technology on education. We kept pace with the times, and here, perhaps, we were ahead of it. *Always being in the trend of new methods and technologies* is one of the most important lessons of the Eurofaculty.

By the way, it should be noted here that Professor Rauschning always follows with interest various technical innovations and uses them. I remember Professor personally brought the first overhead projector to the Faculty of Law in Kaliningrad from Germany.

The academic community is going through a particularly difficult time right now. Universities and higher education are looking for a new place in a changing world, the pandemic has turned didactics upside down, new forms of communication and cooperation are entering our lives. But the experience we have acquired gives us grounds to look at these transformation processes with optimism. Professor Dietrich Rauschning sincerely devoted a third of his glorious and long life to the matter of Russian-German academic cooperation; he did a lot in this field. The title of *Dr Honoris Causa* of the Immanuel Kant University for Professor Rauschning is a sign of our gratitude and recognition of his services. I think the Eurofaculty helped Professor to realize his ideas as much as possible. The Eurofaculty is the good example of academic cooperation. Let me confess that in those years I often said to my colleagues: "Professor Rauschning Eurofaculty". I think if it remains so for history, it would be fair.

International Anti-Doping Law

1. The Olympic Charter – the hub of international sports law

The OCh aims at regulating all aspects of the Olympic Games and, therefore, applies to all activities and institutions related to the organization of and participation in the Olympic Games. To that end, in recent years, based upon the OCh as a kind of constitution, many implementing or complementing regulations such as the Ethics Code were adopted by the IOC and other major sets of rules and regulations, such as the WADA Code, included by reference.

As determined by Rule 1 OCh, the IOC

> *is an international non-governmental organisation, of unlimited duration, in the form of an association with the legal status of a legal person, recognized by the Swiss Federal Council in accordance with an agreement entered into on 1 November 2020.*

It follows that the IOC enjoys the status of a private legal person under Swiss law and, thus, the OCh is to be considered a private statute with no capacity to issue binding rules outside its own membership or otherwise established binding effect.[1]

1.1. Scope of application: Olympic Movement

Rule 1 OCh defines its scope of application of the OCh through the intermediary term „*Olympic Movement*“ and the role of the IOC, in particular:

> *Under the supreme authority and leadership of the (IOC), the Olympic Movement encompasses organisations, athletes and other persons who agree to be guided by the (OCh).*

According to that provision, the application of the OCh arises from agreement and, under that condition, extends also to individuals such as athletes and their support personnel.

To the Olympic Movement belong the IOC, the International Federations (IFs) and the National Olympic Committees (NOCs) as its „*main constituents*“ and the Organizing Committees for the Olympic Games (OCOGs) as well as

> *the national associations, clubs and persons belonging to the IFs and NOCs, particularly the athletes, whose interests constitute a fundamental element of the Olympic*

[1] Vedder, The International Olympic Committee: An Advanced Non-Governmental Organization and the International Law, German Yearbook of International Law 1984, p. 233.

Movements action, as well as the judges, referees, coaches, and the other sport officials and technicians. It also includes other organisations and institutions as recognized by the IOC.

Abundantly, Rule 1.4 OCh sets fourth:

Any person or organisation belonging in any capacity whatsoever to the Olympic Movement is bound by the provisions of the Olympic Charter and shall abide by the decisions of the IOC.

The term „decisions" includes any regulations or other legally binding acts adopted by the IOC.

The OCh[1], according to its „*Introduction*" represents "*the codification of the Fundamental Principles of Olympism, Rules and Bye-laws*" adopted by the IOC and „*governs the organization, action and operation of the Olympic Movement and sets forth the conditions for the celebration of the Olympic Games.*" As „*a basic instrument of a constitutional nature*" it defines the „*fundamental Principles and essential values of Olympism*", serves as statutes for the IOC and „*defines the main reciprocal rights and obligations of the three main constituents of the Olympic Movement*", i. e. the IOC, the International Federations (IF) and the National Olympic Committees (NOC) as well as the Organizing Committees for the Olympic Games (OCOG), „*all of which are required to comply with the Olympic Charter*".

Such scope of application, claimed by the IOC, is reiterated in the OCh at various occasions and eventually accepted by the NOCs, the IFs, the OCOGs and others by way of their recognition or a contract.[2] Par. 7 of the Fundamental Principles generally stipulates:

Belonging to the Olympic Movement requires compliance with the Olympic Charter and recognition by the IOC.

1.2. Olympic Charter: Rules, Bye-Laws, Regulations, Codes and other rules adopted by the IOC

The proper law of the IOC in the narrow sense consists of the Rules of the OCh and the Bye-Laws thereto. The Bye-Laws mainly implement the Rule to which they are attached by setting forth more detailed provisions and are legally binding.

Furthermore, the IOC has the capacity to adopt, by way of decision of its respective bodies, „*regulations of the IOC*". According to Rule 19.3.10 OCh, the IOC Executive Board has the general and extensive power to issue

regulations of the IOC, which are legally binding, in the form it deems appropriate, such as, for instance, codes, rulings, norms, guidelines, guides, manuals, in-

[1] Olympic Charter, as in force since 17 July 2020. URL: https://stillmedab.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf (accessed 23.05.2020).
[2] See below under I. 8.

structions, requirements, and other decisions, including, in particular, but not limited to, all regulations necessary to ensure the implementation of the Olympic Charter and the organisation of the Olympic Games.

Quite a number of major significant regulations have been adopted by the Executive Board and form a set of secondary IOC law. Highly significant examples are the IOC Anti-Doping Regulations applicable specifically to each of the editions of the Olympic Games.[1] The authority to amend the OCh and to adopt and amend the *Athletes' Rights and Responsibilities Declaration*[2], however, pursuant to Rule 18. 2.1 and 2.10 OCh, is reserved for the Session which, according to Rule 18.1 OCh, is „*the supreme organ*" of the IOC.

By virtue of Rule 22 OCh, the IOC Code of Ethics[3], which even forms an „*integral part*" of the OCh, and other ethics-related regulations were adopted. Modifications of those legal instruments are proposed by the IOC Ethics Commission and be approved by the IOC Executive Board in accordance with Bye-Law to Rule 22 par. 2.

1.3. The IOC Ethics Code

As a consequence of the corruption scandal related to the awarding of the Winter Games 2002 in Salt Lake City which arose in 1998, the IOC, in 1999, established an Ethics Commission, adopted a Code of Ethics and started a far-reaching overhaul of the OCh. Today, the Ethics Code which itself forms an integral part of the OCh is accompanied by a package of ethics-related regulations and other legal instruments.

The Ethics Commission is responsible for investigating complaints related to no-respect of the Ethics Code or ethical principles and to propose sanctions to the IOC Executive Board. The composition, procedures etc before the Ethics Commission are sets forth in the

— *Statutes of the IOC Ethics Commission* and
— *Rules of Procedure Governing Cases of Possible Breach of Ethical Principles.*

In substance the IOC ethic standards are codified in the Code of Ethics while particular ethical requirements related to various actions which proved to be prone to manipulation are provided for in specific legal instruments:

[1] See below under I. 5.
[2] Adopted by the IOC Session in 9 October 2018, "*inspired by the Universal Declaration of Human Rights and other internationally recognized human rights standards, principles and treaties*" the IOC "*outlines a common set of aspirational rights and responsibilities for athletes within the Olympic Movement and under the jurisdiction of its members.*" URL: https://d2g8uwgn11fzhj.cloudfront.net/wp-content/uploads/2018/10/09134729/Athletes-Rights-and-Responsibilities-Declaration_2018.10.07.pdf (accessed 30.06.2020).
[3] URL: https://www.olympic.org/code-of-ethics (accessed 30.06.2020).

— *Directions Concerning the Election of the IOC President*
— *Rules Concerning Conflicts of Interest Affecting the Behaviour of the Olympic Parties*
— *Future Host Election, Rules of Conduct for Continous Dialogue*
— *Future Host Election, Rules of Conduct for Targeted Dialogue*
— *Rules for the Register of Consultants*
— *Rules of Conduct for the Recognized International Federations seeking inclusion in the Olympic Games Organising Committees proposal on additional sports.*

Other Ethics-related legal instruments are of broader relevance:

— *The Basic Universal Principles of Good Governance of the Olympic and Sports Movement*
— *Olympic Movement Code on the Prevention of the Manipulation of Competitions*

and with regard to the upcoming Olympic Games

— *Rules for the Application during the Olympic Games Tokyo 2020 (and 2021) of Articles 7 to 10 of the Code of Ethics and of Olympic Movement Code on the Prevention of the Manipulation of Competitions.*

However, the IOC Ethics Code does not include the anti-doping rules as some IFs chose to do in overarching „*Integrity Rules*". As a forerunner, the IAAF — since 2019 World Athletics (WA) — in 2019 adopted its *World Athletics Integrity Code of Conduct* procedurally overarching also the doping offences under the *World Athletics Anti-Doping Rules* and delegated its powers to oversee these matters to an *Athletics Integrity Unit* and a *Disciplinary Tribunal*.[1] Also in 2019, the IBU adopted its Integrity Code[2]. The IBU Integrity Code combines provisions to prevent and sanction both unethical misconduct and doping in the same code. Both Integrity Units and the WA Disciplinary Tribunal are created as structurally independent institutions within the framework of their respective IF.[3]

1.4. Incorporation of the WADA Code

The „*amateur rule*" provided for in Rule 26 OCh was replaced with the new „*Eligibility Rule*" in 1981. The new Rule 26 simply stated that „*Doping is prohibited*" and the participation in the Olympic Games was linked to the compliance with an IOC Medical Code prohibiting doping more precisely. In the late 1990s, the

[1] Integrity Code of Conduct of November 2019, WA Anti-Doping Rules of 2020, Integrity Unit Rules of 2019, all reproduced in WA Book of Rules. URL: www.worldathletics-otg/abiut.iaaf/documents/book-of-rules (accessed 30.06.2020).
[2] IBU Integrity Code of19 October 2019, in: IBU (ed.), IBU Rules, 2019, p. O2—1 et seq.
[3] See below under II. 2. b. (8) (b).

IOC took the initiative to harmonize the anti-doping rules and eventually the WADA was founded in 1999. At the second *World Conference on Doping in Sports* in March 2003 at Copenhagen the first edition of the WADA Code was adopted.[1] As one of the „*signatories*" of the Code, the IOC was bound to implement the WADA Code within its legal instruments.

Therefore, Rule 40 OCh provides that

> *(t)o participate in the Olympic Games, a competitor, team official or other team personnel must respect and comply with the Olympic Charter and the World Anti-Doping Code* (https://stillmedab.olympic.org/media/Document%20Library/OlympicOrg/Games/Summer-Games/Games-Tokyo-2020-Olympic-Games/Anti-Doping-and-Medical-Rules/IOC-Anti-Doping-Rules-Tokyo-2020.pdf).

More generally and beyond the eligibility of individuals to compete in the Olympic Games, Rule 43 OCh sets forth that.

> *(c)ompliance with World Anti-Doping Code and the Olympic Movement Code on the Prevention of Manipulation of Competitions is mandatory for the whole Olympic Movement.*

1.5. The IOC Anti-Doping Regulations

As of the entry into force of the WADA Code 2003 before the Torino Olympic Winter Games in 2006, the IOC adopted Anti-Doping Regulations applicable to each of the editions of the Games. These Anti-Doping Regulations incorporate the substantial and procedural provisions of the WADA Code with, however, adaptations necessary to meet the particular conditions of the Olympic Games[2].

The IOC Anti-Doping Regulations exclusively apply to a specific edition of the Olympic Games. Hence, the *IOC Anti-Doping Rules applicable to the Games of the XXXII Olympiad Tokyo 2020*[3] will apply to the Olympic Games at Tokyo 2021[4]. These Rules are based on the *Model Major Events Organisations Anti-Doping Code* issued by the WADA[5]. The IOC Anti-Doping Rules implement the whole of the WADA Code with, however, some remarkable specific features which are in line with the requirements of the WADA Code.

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[1] WADA Code 2003: https://www.wada-ama.org/sites/default/files/resources/files/wada_code_2003_en.pdf (accessed 30.01.2021).

[2] IOC Anti-Doping Rules applicable to the Games of the XXXI Olympad in Rio de Janeiro 2016. URL: https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Games/Summer-Games/Games-Rio-2016-Olympic-Games/Anti-Doping-and-Medical-Rules/Anti-Doping-Rules-Rio-2016.pdf (accessed 30.01.2021).

[3] Of 11 July 2019. https://stillmedab.olympic.org/media/Document%20Library/OlympicOrg/Games/Summer-Games/Games-Tokyo-2020-Olympic-Games/Anti-Doping-and-Medical-Rules/IOC-Anti-Doping-Rules-Tokyo-2020.pdf (accessed 30.01.2021); as the Games were rescheduled for 2021, the Regulation must be adapted to the WADA Code 2021 and the WADA Prohibited List 2021.

[4] The period of application of the Anti-Doping Rules will be from the day of the opening of the Olympic village to the day of the Closing Ceremony.

[5] See below under II. 2. c. (3).

While the IOC remains the Anti-Doping Organization responsible under the WADA Code, in 2018 for the first time, it delegated some of its responsibilities related to doping control to the predecessor of the *International Testing Agency (ITA)* which itself became fully operational in 2019[1]. Pertaining to a contract between the IOC and the ITA, the Agency is in charge of the test distribution planning, the therapeutic use exemptions, doping control and the results management. The ITA will carry out doping-testing and the results management on behalf of the IOC. Furthermore, in case an anti-doping rule violation is asserted, it will be the ITA to file an application to the Anti-Doping Division of the CAS (ADD) in the name of the IOC. The CAS ADD also became operational in 2019 and will be present at the venue during the Games[2].

With those features, the IOC acts as the forerunner of a new policy in the fight against doping. With the establishment of the ITA and, in parallel, the creation of the CAS ADD by the ICAS — both initiated by the IOC -, independent institutions were made available to conduct all aspects of doping control, including the results management — the ITA — and to serve as the first-instance doping hearing panel, according to Art. 8 WADA Code — the CAS ADD — in lieu of the IOC or the IFs concerned.

1.6. Dispute Settlement by the CAS, Code of Sport-related Arbitration

By reference, also the Code of Sport-Relates Arbitration[3] is included in the realm of the Olympic Law. Rule 61.2 OCh provides:

> *Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sport-Related Arbitration.*

IOC regulations, in particular the Anti-Doping Regulations, more specifically establish the CAS as dispute settlement institution, either as second-instance appeals arbitration or — only recently — as first instance adjudication.[4]

1.7. Other instruments issued by the IOC

The IOC constantly issues a large number of Regulations, Guidelines, rules of procedure, Protocols and other documents related to many Rules of the OCh partly for each edition of the Olympic Games, such as Media Guides, Protocol Guides, the Rule 50 Guidelines and many more.[5]

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[1] See below under II. 3. D.
[2] See below under II. 3. E.
[3] Code of Sports-related Arbitration as in force from 1 July 2020. URL: https://www.tas-cas.org/fileadmin/user_upload/CAS_Code_2020__EN_.pdf (accessed 30.01.2021).
[4] See below under II. 3. e.
[5] See URL: www.olympic.org/documents (accessed 30.01.2021).

8. Extension of the Olympic Charter on the IFs, the NOCs, the OCOGs and Host Cities

Rule 1.4 OCh generally extends the applicability of the OCh and the „*decisions of the IOC*“ — „decisions“ include all legal acts adopted by the IOC — to all members of the Olympic Movement[1]. More specifically, in respect of the IFs, Rule 25.2 OCh provides that

> (*t)he statutes, practice and activities of the IF within the Olympic Movement must be in conformity with the Olympic Charter, including the adoption and implementation of the (WADA Code) as well as the Olympic Movement Code on the Prevention of Manipulation of Competitions.*

According to the wording of that provision, the statutes and regulations of the IFs must be in conformity only with the OCh itself and, in addition, with the WADA Code and the Anti-Manipulation Code[2]. That obligation pertains, as the Ethics Code forms an integral part of the OCh, to the whole set of integrity rules but not to other regulations of the IOC such as the Anti-Doping Regulations. That is consequent because the IFs, as signatories of the WADA Code implement that Code in their own Anti-Doping Regulations.[3]

However, these parts of the IOC rules and regulations are mandatory for the IFs only to the extent of their activities „*within the Olympic Movement*“, i. e. notably at, or in connection with, the Olympic Games. Beyond that sphere of application, the IFs govern their respective sports independently but, however, with identical rules.[4]

Except for the general provision of Rule 1.4 OCh, there is no specific provision which expressly binds the NOCs to comply with the OCh. According to Rule 27.2.2 and 27.2.8 OCh, the NOCs have to “*ensure the observance of the Olympic Charter in their countries*“ and to adopt and implement the WADA Code.

The OCOGs and the Host Cities are bound by the Host City Contract, according to Rules 35 and 36 OCh. The Olympic Host Contracts[5] which are concluded between the IOC, on the one hand, and the host city elected, the NOC of the coun-

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[1] See above under I. 1.

[2] Olympic Movement Code on the Prevention of the Manipulation of Competition of December 2015. URL: https://www.olympic.org/prevention-competition-manipulation/regulations-legislation (accessed 30.01.2021); see above under I. 3.

[3] See below under II. 3. b.

[4] See below under I. 9.

[5] Contract between the Tokyo Metropolitan Government, the Japanes Olympic Committee and the International Olympic Committee signed in 2013 and addendums: www.2020 games,metro.tokyo.lg.jp/eng/taikaijyunbi/taikai/hcc/indxex.html; Host City Contract Principles, Games of the XXXIII Olympiad in 2024. URL: https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Documents/Host-City-Elections/XXXIII-Olympiad-2024/Host-City-Cont ract-2024-Principles.pdf (accessed 30.01.2021).

try concerned, the OCOG, as well as, as far as appropriate, the local, regional, state or national authorities in the country, on the other hand, stipulate, amongst many details, the adherence to the OCh and the IOC regulations.

1.9. Extension of the IOC law to non-Olympic matters

As the Olympic Games represent the major event in world sports the rules and regulations established by IOC, as a matter of fact also apply in the non-Olympic framework because it would not make sense to exercise sports and organize events outside Olympic Games — by the IFs — under different rules and conditions.

2. The World Anti-Doping Code

The World Anti-Doping Code („WADA Code") constitutes the second pillar of the international sports law. The foundation of the World Anti-Doping Agency (WADA) in 1999 resulted of various international conferences convened by the IOC with the aim of creating anti-doping rules which were applicable globally in all countries for all sports. The WADA is a foundation under Swiss law with its legal seat in Lausanne and its headquarters in Montreal, Canada.

The WADA Code was adopted by the second *World Conference on Doping in Sport* at Copenhagen on 5 March 2003 and became effective at the eve of the Olympic Winter Games 2006 at Torino. Since then, the WADA Code represents the single and uniform set of anti-doping rules for all sports with global application. The original WADA Code 2003 has been amended by the WADA Codes 2009, 2015 and will be replaced by the WADA Code 2021[1] as of 1 January 2021.

2.1. Legal Nature of the WADA Code

As set forth by Article 23.1.1, the WADA Code was signed and is binding upon various categories of sports organizations, including the IOC, the IFs, the NOCs, the Major Event Organizations, the National Anti-Doping Organizations and others which became „*signatories*" of the Code. Beyond the sports organizations, very particularly the states are involved, too. According to Articles 22 and 22.1 of the 2021 WADA Code[2], the „*governments*" are committed to the WADA Code through the intermediary of the International Convention against Doping in Sports adopted within the framework of the UNESCO in 2005 („UNESCO Convention")[3].

The WADA Code, although mandatory for the signatories, is itself not directly applicable, i. e. does, as such, not establish rights and obligations for the athletes

[1] The 2021 World Anti-Doping Code. URL: www.wada.ama.org/en/resources/the-code/2021-world-anti-dpoing-code (accessed 30.01.2021).

[2] Article 22 of the 2003 version of the WADA Code was differently worded in order to, first, create the involvement of states.

[3] International Convention against Doping in Sports of 19 October 2005, in force as of 1 February 2007, German Law Gazette (BGBl.) 2007 II, p. 355; see below under II. 4.

and other individuals concerned. It rather obliges, according to Article 23.2.1, the signatories to implement the Code within the statutes and regulations governing their particular realm of sports-related activities. The signatories are bound to enact „*Code-compliant*“ anti-doping rules for their particular areas of responsibilities[1]. Only those anti-doping regulations directly apply to the athletes and other persons concerned under the jurísdiction of each of the signatories. In accordance with Article 21.1.1 WADA Code, it is the athletes' responsibility

> *to be knowledgeable of and comply with all applicable anti-doping policies adopted pursuant to the Code.*

That provision clearly refers to the anti-doping rules „*adopted*“ by the signatories in accordance with Article 23.2.1 of the Code.

As a result, the IOC, the IFs and other sport governing bodies abandoned their individual anti-doping rules in favour of almost uniform Code-compliant anti-doping regulations which mainly copy the rules of the WADA Code with, however, mostly organisational adaptations necessary to meet the requirements of the particular signatory. Thus, the aim of the WADA Code to establish a universally applicable anti-doping law was achieved by the core of anti-doping rules which are uniform both in substance and procedure. Article 23.2.2 of the Code lists a great number of Articles of the Code which must be implemented without changes[2].

By way of this two-step law-making process — comparable to but more stringent than the law-making through directives and implementing domestic laws of the Member States within the European Union — the IFs and other signatories did create not only harmonized but to a large extent uniform law.

2.2. The Elements of the WADA Code

Over the time, under the auspices of the WADA the anti-doping law expanded into an elaborated web of various kinds of rules which by way of providing detailed regulations for the application of the Code itself, aim at utmost uniformity and procedural and legal certainty.

a. The WADA Code

As set out in its „*Introduction*“

> *Part One of the Code sets forth specific anti-doping rules and principles that are to be followed by organizations responsible for adopting, implementing or enforcing anti-doping rules within their authority...*

[1] See below under II. 3.

[2] See below under II. 3. c. (3).

These *Anti-Doping Organizations* (ADOs) are the IOC, the IPC, the IFs, the NOCs, the NIPCs, Major Event Organizations and the National Anti-Doping Organizations (Nados).

Part One on doping control, which constitutes the core of the WADA Code, provides in Articles 1 through 17 for the definition of the various anti-doping rule violations; establishes the burdens, standards and methods of proof; stipulates the conditions for listing prohibited substances and methods in the WADA Prohibited List; sets out rules on doping testing and investigation; provides for fundamental rules related the laboratory analysis; provides for rules for the results management, including the decision on the anti-doping rule violation, to be followed by the ADOs; and establishes the right to and conditions for a fair doping hearing following the results management decision. Detailed rules on sanctions and the right to appeal from doping-related decisions before national independent tribunals of the CAS, follow.

Parts Two, Three and Four of the Code contain provisions on doping-related education and research, on the roles and responsibilities of the signatories of the Code and the athletes and other persons concerned as well as the governments and on acceptance, compliance, modification and interpretation of the Code.

Most of the articles of the Code are annotated by „*Comments*“ which, according to Article 26.2 of the Code „*shall be used to interpret the Code*“.

b. The International Standards

For different doping-related technical and operational areas, the WADA adopted *International Standards* (IS). They aim at harmonization amongst the ADOs in the execution of the WADA Code. According to the introduction to the WADA Code

> *adherence to the International Standards is mandatory for compliance with the Code.*

That means that, through the intermediary of the Code, the International Standards are legally mandatory. The IS are intended to complete particular rules of the Code in more details. In contrast to the Code itself, the IS are adopted and revised from time to time by the WADA Executive Committee outside the procedure for amending the Code. Eight IS have been adopted so far.

Today, International Standards exist for all key areas of the WADA Code. The majority of them were updated in line with the 2021 WADA Code while two new IS become effective with the new edition of the WADA Code by 1 January 2021, i. e. the International Standard for Education and the International Standard for Results Management.[1]

[1] For details see: FEI, Wada Code & International Standards 2021. Summary and Significant Changes. URL: https://inside.fei.org/system/files/Summary%20of%20significant%20changes%20WADA%20Code%20and%20Standards%202021.pdf (accessed 30.01.2021).

(1) The WADA Prohibited List

The most-known of the IS is the Prohibited List[1] which, according to Art. 4.1 WADA Code, is at least annually „*published... as an International Standard*" and must be given effect by the ADOs under their anti-doping regulations. The Prohibited List identifies the prohibited substances and the prohibited methods classified by different categories and thus forms the core of the various anti-doping rule violations under the Code. The Prohibited Lists are published by end of September and apply as of 1 January of the following year. Compared to its predecessors, the 2021 Prohibited List underwent major changes and has been redesigned in a new format in order to improve the usability for the athletes and their support personnel.

(2) International Standard for Testing and Investigation (ISTI)

The ADOs conduct testing and investigations to obtain analytical or other evidence as to the athletes' compliance or non-compliance with the WADA Code's prohibition of prohibited substances and methods or anti-doping rule violations in accordance with Art. 5 WADA Code. As authorized in Art. 5.3.2, 5.4.1, 5.5 and 5.7 WADA Code, the ISTI[2] provides for detailed rules on planning and conducting testing; notification of sample collection to athletes; conducting sample collection; maintaining the integrity and identity of the samples taken; and the transport of samples to the laboratory. Some of the areas previously covered by the ISTI have been relocated to the new ISRM[3].

(3) International Standard for Laboratories (ISL)

The ISL provides for detailed requirements to be met by the WADA accredited laboratories to ensure the production of valid analytical results and evidentiary data. Compliance by the laboratories with the ISL is specifically related to the burden and standard of proof under Art. 3 WADA Code. According to Art. 3.2.2 WADA Code, laboratories are presumed to have conducted the whole procedure of the sample analysis in accordance with the ISL. However, pursuant to Art. 3.2.3 WADA Code, the athletes concerned may rebut this presumption by establishing that a departure from the ISL occurred which could reasonably have caused a positive analytical result. Then, the burden of proof shifts back to the ADO which must prove that such departure did not cause the positive result. According to Art. 3.2.3 WADA Code, the same mechanism applies to departures from any other IS.

The 2021 edition of the ISL[4] which is referred to in Articles 6.4, 6.6 and 6.7 WADA Code, sets out requirements for laboratories to operate technically compe-

[1] International Standard 2021 Prohibited List of 30 September 2020. URL: https://www.wada-ama.org/sites/default/files/resources/files/2021list_en.pdf (accessed 30.01.2021).

[2] ISTI of 1 March 2020. URL: https://www.wada-ama.org/en/resources/world-anti-doping-program/international-standard-for-testing-and-investigations-isti (accessed 30.01.2021).

[3] See below under II. 2. b (8).

[4] ISL of 1 October 2020. URL: https://www.wada-ama.org/en/media/news/2020-10/wada-issues-2021-international-standard-for-laboratories (accessed 30.01.2021).

tent and are able to produce valid results. To that end, the ISL also includes the conditions for obtaining, maintaining or revocation of the WADA accreditation and operating standards for the laboratory operation, including in particular, requirements for security and the confirmation of the A and B sample confirmation as well as a code of ethics. Further details are set forth in related Technical Documents[1].

(4) International Standard for Therapeutic Exemptions (ISTUE)

Also of pivotal importance for an anti-doping rule violation related to prohibited substances or methods is the possession or non-possession of a therapeutic use exemption (TUE). According to Art. 4.4.1 WADA Code, no anti-doping rule violation based on prohibited substances or methods is given if the situation is consistent with the provision of a TUE and refers to the ISTUE. The ISTUE[2] ensures that the process of granting TUEs is harmonized across sports and countries and provides for rules on applying for and obtaining a TUE as well as for the recognition of a TUE and the review of TUE decisions by the WADA.

(5) International Standard for the Protection of Privacy and Personal Information (ISPPI)

The anti-doping law and procedures have a deep impact on privacy and personal data of the athletes and other persons concerned. Art. 14 WADA Code provides for detailed rules related to collecting, storing, processing and disclosing personal information and, in Art. 14.6, refers to the IS, in general, and, specifically, to the ISPPI. Regarding the whereabout information to be delivered by the athletes, Art. 5.6 WADA Code refers specifically to the ISPPI. In order to comply with the General Data Protection Regulation of the EU the 2021 edition of the ISPPI was seriously amended.[3] The ISPPI focuses on proportionate data processing, disclosure and security of personal data, and retention in particular regarding the biological passport.

(6) International Standard for Code Compliance by Signatories (ISCCS)

The WADA monitors the compliance with the WADA Code, including the IS[4], and the UNESCO Convention, too, by the signatories in accordance with Articles 23. 3 and 24.1 WADA Code. The signatories are obliged to report on their compliance. The ISCCS[5] provides for detailed rules that ensure that Code-compliant anti-doping rules are consistently and effectively applied and enforced, so that clean athletes can have confidence in fair competition and level playing field and public confidence in the integrity of sports can be maintained.

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[1] See below under II. 2. c (2).

[2] ISTUE of 15 June 2020. URL: https://www.wada-ama.org/en/resources/the-code/2021-in terna tional-standard-for-therapeutic-use-exemptions-istue (accessed 30.01.2021).

[3] ISPPI of 24 September 2020. URL: https://www.wada-ama.org/en/media/news/2020-09/wada-issues-revised-2021-international-standard-for-the-protection-of-privacy-and (accessed 30.01.2021).

[4] See above under II. 2. b.

[5] ISCCS of 15 June 2020. URL: https://www.wada-ama.org/en/resources/the-code/2021-international-standard-for-code-compliance-by-signatories-isccs (accessed 30.01.2021).

For that purpose, the ISCCS, inter alia, provides for the responsibilities and procedures of the various bodies involved in the WADA compliance monitoring system and to support the signatories to ensure compliance. Particularly important is that the CAS is the sole authority to hear and adjudicate on compliance as well as determine consequences and sanctions. The CAS alone has the authority to impose sanctions for non-compliance on a signatory of the WADA Code.

(7) International Standard for Education (ISE)

The ISE is a new IS and, based on Article 18.1 WADA Code, complements Art. 18 WADA Code on education. The ISE establishes mandatory standards and principles rather than contents and details. Chiefly, the athletes must receive anti-doping education which are tailored for the local cultural and sporting environments and the NADOs and the IFs are responsible for education plans within their areas.

(8) International Standard for Results Management (ISRM)

The most recent IS is the ISRM[1] which was adopted in November 2019 by the WADA Executive Committee and became effective as of 1 January 2021 together with the 2021 WADA Code. The ISRM is an example for the law-making process within the WADA: since October 2014 the matter was dealt with in non-mandatory *Results Management, Hearings and Decisions Guidelines*[2].

With the WADA Code 2021, the results management is profoundly amended. The results management process which was, and still is, governed by Art. 7 WADA Code, now extends to the doping hearing process, set forth in Art. 8 WADA Code, and as a last step the right to appeal in Art. 13 WADA Code, and includes two stages, i. e. the *pre-adjudication phase* and the *adjudication phase*. While the sparse provisions on the hearing previously contained in Art. 8 underwent no substantial amendments, Art. 7 WADA Code has been changed fundamentally.

According to Art. 7 WADA Code,

> *a process designed to resolve anti-doping rule violation matters in a fair, expeditious and efficient manne*r

is established by Art. 7, 8. and 13 WADA Code. Art. 7 acknowledges that each ADO „*is permitted*“ to implement its own results management process which, however, must „*respect the principles*“ set forth in Art. 7 WADA Code. For that purpose, the processes established by the ADOs

> *shall at a minimum meet the requirements set forth in the International Standards for Results Management*.

[1] ISRM of 15 June 2020. URL: https://www.wada-ama.org/en/resources/the-code/2021-international-standard-for-results-management-isrm (accessed 30.01.2021).

[2] Guidelines of 6 October 2014. URL: https://www.wada-ama.org/en/resources/world-anti-doping-program/guidelines-results-management-hearings-and-decisions (accessed 30.01.2021).

In the same way, Art. 8.1 WADA Code, as a minimum standard, provides for

> *a fair hearing within a reasonable time by a fair, impartial and operationally independent hearing panel in compliance with the International Standard for Results Management.*

Based on these authorizations, the ISRM constitutes the most important of the IS under substantive and procedural aspects related to the handling of and decision-making in doping cases. It completes the whole range of Art. 2 through 15 except for Art. 4 — the Prohibited List — and 6 — laboratory analysis, the ISL — of the WADA Code and, thus, provides for detailed rules applicable to the results management process.

That process, according to the definition contained in Art. 3.1 ISRM, encompasses the timeframe between the notification of an adverse analytical finding, i. e. a positive result of the laboratory, or other indications of a doping offence through the „*charge*", i. e. the decision that a doping offence was committed „*until the final resolution of the matter, including the end of the hearing process at first instance or on appeal*". As a general rule, the whole result management procedures are confidential and must be terminated within 6 months.

With the ISRM in force, from 1 January 2021 onwards the provisions of the Code on doping control are accompanied and completed by International Standards in that order: the Prohibited List, the ISTI, the ISL the ISTUE, the ISRM, and overarching the ISPPI.

Though the ISRM including its annexes is „*mandatory*" pursuant to its Art. 1.0 and Art. 3.7.8, a departure from the ISRM only „*may give rise to compliance consequences under the (ISCCS)*" but

> *shall not invalidate analytical results or other evidence of an anti-doping rule violation and shall not constitute a defense to an anti-doping rule violation, except as expressly provided for under Code Article 3.2.3.*

As the WADA Code itself, the ISRM is annotated by „*Comments*" which, by virtue of its Article 3.7.3, *shall be used to guide its interpretation*. As a general rule of interpretation Article 3.7.2 ISRM sets forth that the ISRM

> *shall be interpreted and applied in (the) light of the principle of proportionality, human rights, and other applicable legal principles.*

In conformity with Articles 7, 8, and 13 of the 2021 WADA Code, the ISRM subdivides the result management into two major parts: *pre-adjudication phase* (Articles 5 through 7 ISRM) and *adjudication phase* (Articles. 8 through 10 ISRM) and provides for mandatory requirements to be complied with by the ADOs acting as *Results Management Authorities* (RMAs) in a particular case.

(a) Pre-adjudication phase

For the first results management phase, i. e. the *pre-adjudication phase*, Article 5.1 ISRM sets forth detailed provisions for the *initial review* of a positive analysis result: i. e. review whether a TUE has been granted or a departure from the ISL occurred that caused the positive result and whether the positive result was caused by the ingestion of the prohibited substance through a permitted route. Article 5.1.2 ISRM specifies the elements of the notification to the athlete, including but not limited to the right to the opening of the B-sample and to provide an explanation. With respect to the scheduling and conduct of the B sample, the ISRM grant more rights and options than before to the athletes concerned.

Furthermore, Article 5.2 ISRM, for the first phase of the results management, establishes requirements applicable to *atypical findings*, i. e. when the laboratory results need further investigation, or to other potential doping offences, such as *whereabout failures* or findings on the *athlete's biological passport*. Article 6 ISRM provides detailed requirements for the notification of the mandatory provisional suspension or related to an optional or voluntary suspension.

If, after receipt of an explanation by the athlete or after the expiry of the deadline to provide such explanation, the RMA is still satisfied that a doping offence was committed the RMA shall promptly charge the athlete with that anti-doping rule violation. Article 7.1 ISRM sets out the elements of such a *letter of charge* in detail, in particular regarding the right to a hearing.

(b) Adjudication phase

That leads to the *adjudication phase* of the results management which consists of the hearing process and the decision emanating thereof. Compared to the scarse rules in Article 8 of the 2015 WADA Code on the right to a fair hearing, Article 8 of the 2021 WADA Code and the implementing Article 8 ISRM establish detailed provisions on that first-instance hearing process which considerably improve that process including the rights of the athletes. All in all, the conditions set forth in the ISRM related to the *adjudication phase* significantly develop and enhance the legal standards of resolving doping-related disputes from the first instance adjudication onwards.

The ADOs

> *shall confer jurisdiction on hearing panels to hear and determine whether an athlete... has committed an anti-doping rule violation and, if applicable, to impose the relevant consequences*.

Hereafter, the RMA acts as a party to the proceedings and the ADO may delegate that task to a third party, such as the ITA.[1]

[1] See below under II. 3. d.

The hearing panels must consist of *a wider pool of panel members* with „*anti-doping experience, including legal, sports, medical and/or scientific expertise*." The relevant rules of the ADOs

> *shall provide for an independent person or body to determine in their discretion the size and composition of a particular hearing panel to adjudicate an individual case.*

That provision, at least, opens the avenue for a regime where the particular panels were to be appointed by an independent third person or institution. However, according to the *Comment to Article 8.2*, „*the independent person may be a designated chairperson of the pool*." Such a system seems to be the one regularly chosen by the ADOs.[1] Upon appointment, the designated panel members have to sign a declaration of independence and the parties may challenge an appointed panel member.

The hearing panels, under the rules of the ÌSRM, can, and most likely will, be established within the framework of the ADOs, in particular the IFs, but, in accordance with Articles 8.6 and 8.7 ISRM, the ADOs

> *shall guarantee the operational independence*" of the hearing panels and „*provide adequate resources to ensure that hearing panels are able to fulfill their tasks efficiently and independently...*

As a matter of fact, the institutional requirements set forth in Articles 8.1 through 8.7 ISRM, were met by the Anti-Doping Hearing Panel set up by the IBU[2] in 2008 and operational until 2019 which was a forerunner of independent hearing panels of IFs. The same applies to the Integrity Units recently established by the WA, formerly IAAF, and the IBU in 2019. The Athletics Integrity Unit is completed by a Disciplinary Tribunal of the WA[3] whereas the IBU delegated its power to first instance adjudication to the CAS ADD.[4]

Article 8.8 ISRM sets out minimum principles for the hearing process: fair, impartial and independent hearing; the hearing must be accessible and affordable and must be conducted within a reasonable time; the right to be informed of the asserted doping offence, to be represented by counsel, to have access to and to present

[1] According to Rule 8.1.5 of the Anti-Doping Rules of the IBU as in force until October 2019, the chairman of the IBU Anti-Doping Hearing Panel, which existed from 2008 until 2019, appointed the particular panels for each case.

[2] IBU Anti-Doping Hearing Panel; Article 8 of the IBU Anti-Doping Rules, in: IBU (ed.), IBU Rules 2016, p. 5—33.

[3] WA 2019 Constitution, Articles 70 (Athletics Integrity Unit) and 75 (Disciplinary Tribunal); Integrity Code of Conduct of 1 November 2019, Anti-Doping Rules of 29 March 2020, AIU Rules of 2020, reproduced in WA Book of Rules. URL: https://www.worldathletics.org/about-iaaf/documents/book-of-rules (accessed 30.01.2021).

[4] IBU Integrity Code of 19 October 2019, Chapter E; Article 28 IBU Constitution, in: IBU (ed.), INU Rules 2019, p. 01—1 and 02—1.

evidence; the right to present written and oral submissions, to call and examine witnesses; and the right to an interpreter at the hearing; even a schedule for the course of the hearing is given; and the right to request a public hearing[1].

Furthermore, the ISRM, in its Article 9, stipulates that, in the panel decisions, the following issues must be addressed and determined: the panel's jurisdiction and the applicable law; the factual background; the anti-doping rule violation committed; the applicable consequences and the appeal routes and deadlines. The decisions shall be promptly notified by the RMA to the athlete or other persons concerned and other ADOs with a right of appeal — the WADA in particular — and reported to the ADAMS system.

Article 13 WADA Code on appeals from doping-related decisions emanating from the results management has become part of the results management process under the WADA Code 2021 with, however, little changes. Therefore, as authorized by Article 13.1 WADA Code 2021, the ISRM, in its Article 10, contains a few principles to be met.

National appeal hearings are governed by Article 8 and 9.1 ISRM and the national hearing institutions must be „*fully institutionally independent*" from the RMA. With respect to appeals before the CAS, Article 10.3 ISRM contains a few rules about the notification of proceedings before and decisions rendered by the CAS.

Annex A and Annex B to the ISRM, which have the same legal nature as the ISRM itself, collect rules which, before 2021, were comprised in the ISTI and now transferred to the ISRM. Annex A provides specific rules for the review on cases of *failures to comply*, i. e. doping offences under Article 2.3 WADA Code — evading, refusing or failing to submit to sample collection — and Article 2.5 WADA Code — tampering with doping control. Annex B sets forth particular rules related to anti-doping rule violations in the form of *whereabout failures* under Article 2.4 WADA Code.

c. Guidelines, Model Rules, Technical Documents, Best Practices

Guidelines and models of best practice based in the Code or IS, as well as Technical Documents are adopted and provide solutions in different areas of anti-doping action.

According to the „*Purpose, Scope... of the Code*" at the beginning of the 2021 WADA Code, guidelines and models of best practice which are based on the Code or IS „*to provide solutions in different areas of anti-doping*"

> *are recommended by WADA... to the signatories and other relevant stakeholders, but will not be mandatory.*

[1] ECtHR, aff. 40575/10 and 6747410, Mutu & Pechstein v Switzerland, Judgement of 2 October 2028. URL: https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=EGMR&Datum=02.10.2018&Aktenzeichen=40575/10 (accessed 30.01.2021).

Technical Documents, however, are adopted for the implementation of ISs and

> *are mandatory for compliance with the Code*

thus creating a third level of binding rules.

The wide range of those instruments are addressed to the signatories of the WADA Code and, even though not mandatory, may entail legal effects which depend on their specific aim and content. Generally, they aim at facilitating compliance with and implementation of the WADA Code and the IS.

(1) Guidelines

Guidelines provide the signatories with bests practices for various aspects of the anti-doping action and offer technical guidance to the ADOs for the implementation of the anti-doping programs and procedures. Presently, WADA issues Guidelines on a great variety of subjects: privacy protection; information gathering and intelligence sharing; major events; a collaboration between IFs and NADOs as well as between international ADOs; implementing effective testing programs; various guidelines on conducting and reporting doping analysis related to specific aspects such as human growth hormones; blood sample collection; urine sample collection; alcohol testing; sample collection personnel; therapeutic use exemptions; the Athlete Biological Passport; and, together with the IS for Education guidelines for education.

(2) Technical Documents

At present 13 Technical Documents are in place which apply to various aspects of the sample analysis and reporting as well as the athlete's biological passport.[1]

(3) Model Rules

Model Rules issued by WADA, however, have a different quality. Based on Art. 23.2 WADA Code, WADA made revised Model Rules available for the signatories to implement the 2021 WADA Code: Model Rules for the NOCs, the IFs, the Major Event Organizers and NADOs.[2] According to Art. 23.2.2. WADA Code, many of the Code provisions must be reproduced without substantive changes or even verbatim while other clauses may be amended or reworded in order to fit best to the needs of the signatories. These Model Rules, in principle, reiterate the provisions of the Code.

2.3. Implementation of the WADA Code

The WADA Code including its related legal instruments, according to Article 23.2 WADA Code, compel the signatories

> *to implement applicable Code provisions through policies, statutes, rules or regulations according to their authority and within in their relevant spheres of responsibility.*

[1] Index Technical Documents of 11 November 2019. URL: https://www.wada-ama.org/en/resources/science-medicine/technical-documents-index (accessed 30.01.2021).

[2] 2021 Model Rules: https://www.wada-ama.org/en/model-rules-guidelines-and-protocols.

Only through the intermediary of the statutes and regulations adopted by the signatories, the WADA law becomes binding and directly applicable upon the athletes and other persons concerned. Art. 23.1.1 lists as signatories: the IOC and the IPC, the IFs, the NOCs and the NPCs, as well as the major event organizations and the NADOs.

The „*roles and responsibilities*“ of the various categories of signatories under the WADA Code are clarified in Art. 20 of the Code. Article 23.2 of the Code sets out a list of Code provision which must be complemented by the signatories mandatorily and „*without substantial change*“[1]. That list includes the whole of Part One of the Code dealing with „*Doping Control*“ with the exception of Articles 5 through 8 (on testing, investigation, laboratory analysis, results management and first-instance hearing[2]) and Articles 12, 14, and 16 (on sanctions against sports bodies, confidentiality and animals). According to Article 23.2.3, the signatories are „*encouraged*“ the use the Model Rules recommended by the WADA[3].

Article 24 WADA Code provides for detailed rules on the monitoring and, if needed, enforcing the signatories' compliance with the Code.[4]

a. IOC, IPC, NOCs, and other parts of the Olympic Movement

Articles 20.1, 20.2 and 20.4 clarify the particular responsibilities of the IOC and NOCs as well as the IPC and NPC under the WADA Code. How the WADA Code is implemented by the IOC and, thus, for the Olympic Movement in its entirety is described above under I. 4, 5, 8 of this essay.

However, those regulations are in the process of revision in order to be adapted to the WADA Code 2021.

b. International Federations

Article 20.3 WADA Code clarifies the particular responsibilities of the IFs under the WADA Code. How the WADA Code is implemented by the IFs is described above under I. 8 of this essay in relation to their role in the Olympic Games. The relevant anti-doping regulations of the IFs, of course, apply to their non-0lympic activities in the same way. However, those regulations are in the process of revision in order to be adapted to the WADA Code 2021.

c. Nados

Article 20.5 WADA Code clarifies the responsibilities of the NADOs under the WADA Code. As signatories of the WADA Code pursuant to Article 23.1.1, the NADOs *"shall implement"* the Code. In Germany, implementation is accomplished by the NADA by adopting a NADA Code which, partly verbatim, replicates Art. 1 through 21 of the WADA Code in German language According to its *Intro-*

[1] See above under II. 2. c (3).
[2] See above under II. 2. b (8).
[3] See above under II 2. c.
[4] See above under II. 2. b (6).

duction, the NADA Code 2021[1] constitutes *"the fundamental, general and binding"* legal anti-doping instrument in Germany and the national sports federations and other sports bodies are required to implement the NADA Code and the International Standards within their areas of responsibilities, respectively.

Interestingly, in Austria the implementation of the WADA Code is achieved under a different approach. The NADA Austria does not adopt a national anti-doping code for Austria; it confines itself to publish a WADA-certified German translation of the WADA Code for information purposes only. Instead of an Austrian NADA Code the main rules of the WADA Code are incorporated through a domestic statute; the *Federal Act on Combatting Doping in Sports*[2]. The Austrian anti-doping statute also provides the establishment and functioning of the Austrian NADA and the various, however structurally independent, dispute settlement bodies under its umbrella.

d. International Testing Agency

Beginning in the late 1990s, the IOC launched the creation of the WADA with the goal to establish a set of anti-doping rules uniformly applicable to all sports worldwide and an international agency for amending and monitoring compliance with those rules. At that time, the CAS was already available for adjudication of last resort in doping-related matters.

However, experience showed, and still shows, that the efforts to properly apply the WADA Code may differ from IF to IF or other sports governing bodies responsible for the fight against doping. Therefore, in cooperation with the WADA the IOC took the initiative to take testing, results management including possibly first-instance doping hearing out of the hands of the responsible sports bodies to be outsourced to an institution independent of the sport governing bodies and other anti-doping institutions.

After a forerunner at the Olympic Winter Games at PyeongChang in 2018 the International Testing Agency was established as a foundation under Swiss law domiciled in Lausanne in January 2018 and became fully operational in July 2018. The ITA offers to manage the anti-doping programs of the international sports federations, major event organizers and any other entity with responsibility in the fight against doping. These anti-doping organizations, however, remain responsible but may delegate the execution of their anti-doping programs to the ITA by way of agreement. Until present a great number of IFs, the IOC and some other organizations delegated their doping-related responsibilities to the ITA.

[1] NADA Code 2021 of 22 September 2020. URL: https://www.nada.de/fileadmin/user_upload/2021_NADC21.pdf (accessed 30.01.2021).

[2] Of 2007, as amended on 4 July 2018, Federal Law Gazette no. 37/2018; presently under revision in order to comply with the WADA Code 2021, draft bill of 18 November 2020. URL: www.parlament.gv.at/PAKT/VHG/XXVII/ME/ME/-00063/index.shtml (accessed 30.01.2021).

In accordance with the definition of *Testing Authority* attached to the WADA Code, ISTI[1] and ISRM, the ADOs

> *may authorize a Delegated Third Party to conduct testing pursuant to the authority of and in accordance with the rules of the Anti-Doping Organization.... The Anti-Doping Organization remains the Testing Authority and ultimately responsible under the Code to ensure the Delegated Third Party conducting the testing does so in compliance with the Requirements of the (ISTI).*

More generally, Article 20 of the WADA Code stipulates a large authority to delegate:

> *each Anti-Doping Organization may delegate aspects of doping control... for which it is responsible but remains fully responsible for ensuring that any aspect it delegates is performed in compliance with the Code.*

and indirectly provides for an obligation of any delegated third party to apply the WADA Code and the IS:

> *To the extent such delegation is made to a delegated third party that is not signatory, the agreement with the delegated third party shall require its compliance with the Code and International Standards.*

As a result, the ITA, though not signatory, is bound by the WADA law when it acts by the delegation on behalf of an IF, the IOC or another sporting body.

e. Anti-Doping Division of the Court or Arbitration for Sport

For the first time, the CAS, on an ad-hoc basis, had established an Anti-Doping Division in charge of doping-related disputes arising on the occasion of the Olympic Games 2016 at Rio de Janeiro[2] and, thus, replacing the IOC Disciplinary Commission which formerly was competent for such disputes. Also, for the Olympic Winter Games 2018 at PyeongChang an Anti-Doping Division was created. These CAS ADD acted as first instance authority for doping-related matters.

For that purpose, the IOC Executive Committee delegated its power to decide upon any violation of the WADA Code arising on the occasion of Olympic Games, based on Rule 59.2.4 OCh, as a first instance authority. Consequently, the CAS ADD had jurisdiction to apply the Anti-Doping Regulations of the IOC. This occurred in the more general context of removing the anti-doping activities from the IOC, the IFs and other sports bodies and transferring them to independent institutions.

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[1] See above under II. 2. b (2).

[2] Arbitration Rules applicable to the CAS Anti-Doping Division 2016. URL: https://www.tas-cas.org/fileadmin/user_upload/Arbitration_Rules_for_the_Anti-doping_Division__final_.pdf (accessed 30.01.2021).

These temporary anti-doping divisions were replaced by a permanent CAS ADD[1] which is operational as of 2019. It exercises its jurisdiction as the first instance hearing body by delegation from the sports bodies responsible for anti-doping policies. Therefore, the CAS ADD represents a doping hearing body according to Article 8 WADA Code and must comply with the WADA ISRM.

Pursuant to A 1 of its Arbitration Rules, the ADD

> *has been established to hear and decide anti-doping cases as a first instance authority pursuant to the delegation of powers from the International Olympic Committee (IOC), International Federations of sports on the Olympic program (Olympic IFs), International Testing Agency (ITA) and any other signatories of the World Anti-Doping Code (WADAC).*

According to A 2 of its Arbitration Rules, the CAS ADD

> *has jurisdiction to rule as first instance authority on behalf of any sports entity which has formally delegated its powers to CAS ADD to conduct anti-doping proceedings and impose applicable sanctions.*

In line with its jurisdiction by delegation the CAS ADD applies the Anti-Doping Regulations of the delegating sports body and, thus accomplishes the duty to provide a doping hearing under Article 8 WADA Code of those signatories which delegated this task to the CAS ADD. At present, the IOC and some IFs have accepted the CAS ADD as first instance doping tribunal by agreement.

The CAS ADD, though part of the CAS, operates organizationally independent from other CAS Divisions with a distinct list of arbitrators, under its own Managing Counsel, at a distinct location.

2.4. The Role of Governments in Anti-Doping policies

For the fight against doping in sports a remarkable and unique cooperation between the sports governing bodies and the governments evolved. That cooperation reflects the delimitation of responsibilities between the world of sports and their primary regulatory autonomy, on the one hand, and the overall political responsibility of the State governments, on the other hand. The IOC and the UNESCO joined forces on their way to a global anti-doping policy.

The UNESCO has instituted itself as the global intergovernmental forum responsible for Olympic and top-level sports since its *World Conference of Ministers Responsible for Physical Education and Sports* (MINEPS) 1976 at Paris. The IOC convened the first *World Conference on Doping in Sport* which, in its final *Decla-*

[1] Arbitration Rules — CAS Anti-Doping Division, of 2019. URL: https://www.tas-cas.org/fileadmin/user_upload/CAS_ADD_Rules__final_version_2019._.pdf (accessed 30.01.2021).

ration of Lausanne of 2 February 1999 called for a worldwide convention against doping[1]. That Declaration led to the foundation of the WADA on 10 November 1999 and, in December 1999, the third MINEPS conference put an anti-doping convention of the agenda of the UNESCO. After the Additional Protocol to the *European Convention against Doping* of 16 November 1989 of the Council of Europe was adopted on 12 September 2002[2] and the second *World Conference on Doping in Sport* convened by the IOC and the WADA had approved the WADA Code on 5 March 2003, the fourth MINEPS Conference in December 2004 decided to draw up an international convention. As soon as on 19 October 2005 the General Conference of the UNESCO unanimously adopted the *UNESCO Convention against Doping in Sports*[3] which entered into force on 1 February 2007 and includes 193 State parties in 2020.

a. Involvement of governments under the WADA Code

For obvious reasons, States could not become parties to the WADA Code set up by private sports governing bodies. Article 20 of the WADA Code does not define governments as Code signatories. However, according to the Copenhagen Declaration of 3 March 2003 adopted by the second *World Conference on Doping in Sports* with the participation of representatives of governments, the governments shall *"support"* the WADA Code and create an international convention in order to implement the Code.

Accordingly, Article. 22 of the 2003 WADA Code stated,

> *each governments commitment to the Code will be evidenced by signing a Declaration... to be followed by a process leading to a convention... to be implemented as appropriate to the constitutional and administrative contexts of each government.*

As of its 2009 versions, Article 22 of the WADA Code establishes a direct link to the UNESCO Convention which already had become effective in 2007:

> *Each governments commitment to the Code will be evidenced by its signing the Copenhagen Declaration... and by ratifying, accepting approving or acceding to the UNESCO Convention.*

Article 22 goes on and expresses „*the expectations of the signatories"*, amongst them that

> *each government should take all actions and measures necessary to comply with the UNESCO Convention.*

[1] Lausanne Declaration on Doping in Sport of 4 February 1999. URL: https://www.wada-ama.org/sites/default/files/resources/files/lausanne_declaration_on_doping_in_sport.pdf.
[2] European Anti-Doping Convention of 16 November 1989, ETS No. 135, Additional Protocol of 12 September 2002, ETS No. 188. URL: www.Coe.int/en/web/sport/anti_doping.
[3] See above p. 59.

Each government should respect arbitration as the preferred means of resolving doping-related disputes, subject to human rights and fundamental rights and applicable national law...

Each government should respect the autonomy of a (NADO)...

Finally, Article. 22.10 WADA Code provides that

Failure by a government... to comply with the ÙNESCO Convention... as determined by the UNESCO, may result in meaningful consequences by UNESCO and WADA as determined by each organization

and Article 24.6 WADA Code stipulates:

Compliance with the commitments reflected in the UNESCO Convention will be monitored as determined by the Conference of Parties to the UNESCO Convention following consultation with the State Parties and WADA.

According to that provision, WADA is involved in the surveillance of compliance by governments with the UNESCO Convention as far as it „*reflects*", i. e. incorporates, the WADA Code.

As a conclusion of the above, throughout the WADA Code and related legal instruments, close legal connections are established between the WADA Code and the UNESCO Convention.

b. The UNESCO Convention

Beginning with its preamble, the UNESCO Convention displays the close and narrow interrelation with the WADA Code. Most of the definitions given in Art. 2 are taken from the WADA Code and Art. 3 of the Convention provides:

In order to achieve the purpose of the Convention, States Parties undertake to:

(a) adopt appropriate measures at the national and international levels which are consistent with the principles of the Code...

(c) foster international cooperation between State Parties and leading organizations in the fight against doping in sport, in particular with the World Anti-Doping Agency.

Though according to Article 4 par. 2 of the Code, the WADA Code is not an integral part of the Convention, Articles 4 and 5 express a clear commitment to the „*principles of the Code*". Article 4 par. 1 provides that

...State Parties commit themselves to the principles of the Code as the basis for the measures provided for in Article 5...

and Article 5 par. 1 sets forth that

In abiding by the obligations contained in this Convention, each State Party undertakes to adopt appropriate measures, Such measures may include legislation, regulation, policies or administrative practices.

The second part of the Convention, in Articles 7 through 12, contains specific obligations for anti-doping activities of the governments at the national level: co-operation with anti-doping organizations and sports authorities; financial support and sanctions for sports and anti-doping organizations; facilitating doping control. Most relevant is the obligation, set forth in Article 8 par. 1,

> *to adopt measures to restrict the availability of prohibited substances and methods in order to restrict their use in sport by athletes... These include measures against trafficking to athletes and, to this end, measures to control production, movement, importation, distribution and sale.*

Pursuant to Article par. 2, the States shall „*encourage*“ the sport organizations to adopt measures to prevent and to restrict the use and possession of prohibits substances and methods by athletes. Article 9 extends these obligations beyond the athletes to athletes' support personnel.

c. National anti-doping legislation

Based upon the general commitment set forth in Articles 3, 4, and 5 and the specific obligation under Article 8 of the UNESCO Convention, the states are required and legally bound to enact national anti-doping legislation. In its explanatory statement to the German Federal Anti-Doping Statute of 2015[1], the German government stated that Germany is bound to implement the UNESCO Convention by public international law. Article.1 par. 1 of the Austrian Federal Anti-Doping Act of 2007[2] refers to the Convention by stating that ten Convention „*obliges Austria to support the measures... laid down by the Convention*”.-

Essentially, the national anti-doping laws provide for penal provisions which enable the state authorities to prosecute anti-doping violations and to imposed criminal sanctions[3] independent of and in addition to the sports anti-doping organizations under the WADA law.

As a result, in the pyramidal hierarchy of the world-wide anti-doping law, at the foot we recognize domestic legislation of the States in the field of doping. In accordance with binding obligations under public international law emanating from the UNESCO Convention, which establishes the legal link to the WADA Code, domestic law is put into the service of genuine sports law created by private entities.

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[1] Federal Anti-Doping Statute of 10 December 2015 as amended on 8 July 2016, German Federal Law Gazette (BGBl.) 2016 I p. 1624.

[2] Federal Act on Combating Doping in Sports 2007, as amended on 4 July 2018, Austrian Federal Gazette no. 37/2018; Draft Federal Anti-Doping Act 2021 of 18 November 2020. URL: www.parlament.gv.at/PAKT/VGH/XXVII/ME/ME/_00063/index.shtml.

[3] Article 2, 3, and 4 German ADG; Article 22a Austrian Federal Anti-Doping Act.

The Role of trans-regional law in protecting states' constitutional order

The COVID-19 coronavirus pandemic has shown how fragile is the world we live in. It has revealed with force how many and how complex are all the problems that humanity faces.

In order to cope with them, to preserve life on the planet and to save the remnants of humanism and solidarity in everyday life the broadest possible international cooperation, honesty, ability to compromise, be guided not only by one's own needs but also to consider the interests of partners are required. An unconditional imperative is respect for contemporary international law and strict adherence to its prescriptions.

In practice, contrary to the normal logic of global political and economic development and common sense, in recent years there has been an erosion of existing international law. Scattered attempts are being made to push it aside, to replace it with all sorts of restrictive measures and other unilateral actions that nullify efforts to promote international cooperation, to assert their national law as binding on all subjects of international communication and as a universal standard that all others should follow.

In these circumstances, the number one task is to protect international law from all kinds of encroachments, restore respect for the normative prescriptions developed with the participation of all or the overwhelming majority of States and groups of States, and mobilize the healthy forces of the planet to fight for compliance by all countries with their international obligations. Regional systems for regulating integration processes and the emerging trans-regional law, which serves as an increasingly popular bridge between them, could play an extremely important role in this regard.

However, instead of discussing how to achieve this, lawyers from different countries continue to argue about how national, supranational and international, and now trans-regional law relate to each other, and what is the legal nature of supranational law. The dispute is increasingly divorced from real life. It has largely acquired a scholastic character.

In order to get away from it, to leave it in the past, the authors propose the conceptual approach developed below, which allows to present trans-regional law as absorbing all the best that is in supranational and international law. The advantage of this approach is that it helps to position trans-regional law as a safety net for existing international law, as an effective tool for preserving its key features: orientation against someone's hegemony in international affairs, acceptability for all subjects of international communication, a guarantor of peaceful life, stability and equality of States.

At the same time, trans-regional law comes to the rescue in solving those tasks that are particularly acute in the face of growing geopolitical risks for the national legislator and consist in protecting the constitutional legal order of the state from an unfriendly destabilizing external influence.

Criticism of standard approaches to determining the legal nature of integration communities and legal systems

The phenomenon of regional integration has been around for many decades. The law of the European Union as an independent legal system, separate from both national and international law, has long been established. However, controversy continues in the EU, its member States and third countries over their legal nature.

In Russia, it has acquired additional relevance due to the acceleration of integration processes in the Eurasian Economic Union, which Moscow actively supports, and the similarity of many legal structures used by the EU and the EAEU. The governing institutions of the EAEU have just approved an extensive program to strengthen the Eurasian integration community, aimed at further eliminating obstacles to the free movement of goods, labor, services and capital[1]. In many respects, as is emphasized by the EAEU governing bodies, it "is ‘a road map’ for the further development of integration”[2].

As before, a large group of lawyers insists that the EU and, to an even greater extent, the EAEU are international organizations, albeit with some or even a great deal of specificity. In their opinion, they are quite correctly described by the term "international organizations of regional integration". Accordingly, experts adhering to such views are trying to qualify the law of the EU and the EAEU as subsystems of general international law, albeit with significant autonomy[3]. All of them, though with a certain degree of schematization, can be attributed to the conservative school of legal thought.

This approach is immensely popular. However, it has serious flaws. With such a legal construction, it turns out that the law regulating integration processes blows up general international law from inside, giving the latter features that are not at all peculiar to it. At the same time, the concept of international organizations begins to

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[1] Утверждена стратегия развития ЕАЭС на пять лет // Агентство экономической информации «Прайм». 11.12.2020. URL: https://1prime.ru/state_regulation/20201211/832563179.html (accessed 12.05.2020).

[2] *Главы* государств ЕАЭС утвердили Стратегические направления развития евразийской экономической интеграции до 2025 года // Евразийская экономическая комиссия. 11.12.2020. URL: http://www.eurasiancommission.org/ru/nae/news/Pages/11-12-2020-02.aspx (accessed 12.05.2020).

[3] *Региональные* аспекты интеграции: Европейский союз и Евразийское пространство : монография = Regional aspects of integration: European Union and Eurasian space: monograph / K. Malfliet, А. И. Абдуллин, Г. Р. Шайхутдинова [и др.] ; отв. ред. Р. Ш. Девлеткильдееве. М. : Статут, 2019. 239 с. URL: https://core.ac.uk/download/pdf/197480567.pdf (accessed 12.05.2020).

cover such categories that make any options for generalization and systematization inconsistent and internally contradictory. In turn, the system-forming characteristics of the law of the EU and the EAEU are given an interpretation that is unable to explain either the specifics of integration processes, or the originality of legal regulation in this area[1].

Another group of scientists, more numerous in the EU, and less representative in the EAEU countries, reasonably points out that the EU and the EAEU are connected only by their origin with international law, since they are established by interstate treaties. However, since their creation, and especially as a result of evolution, they have become separate from all other international organizations and general international law. They solve the problem of forming a single harmonized economic, legal, humanitarian, and civilizational space without internal borders, like a federal / confederate state, while preserving the status and powers of a full-fledged subject of international law and international relations for the participants of the integration project.

As a result, integration communities and the law governing their functioning become sui generis systems, requiring them to be separated into a specific type of international entities and regulatory systems. The lawyers belonging to this group can be attributed to the school of realists and pragmatists. Not adherents of the realistic method, but the realists and pragmatists. They proceed from what is, what exists, and not some invented schemes and theorizing, no matter how logical and attractive they may look[2].

All other lawyers occupy, in essence, intermediate positions between scientists belonging to these two schools. They cannot fail to see the specifics of integration communities and the law governing integration processes, but they also do not believe that integration communities and supranational law "tear the umbilical cord" connecting them with classical international organizations and general international law. There are many interesting findings and considerations in their monographs, educational texts and other publications, but the vector of evidence they set, due to the desire to combine the incompatible, can be directed in virtually any direction[3].

Thus, one of the variants of the conditionally half-hearted approach is the classification of the EU and EAEU law as an autonomous legal subsystem of general international law since, on the one hand, constituent treaties are acts of the highest order in the system of the EU and EAEU law, and on the other hand, everything else is different. However, such a compromise position still leads to a logical impasse.

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[1] *Лифшиц И. М.* Международное финансовое право и право Европейского союза: взаимодействие и взаимовлияние : монография. М. : Юстицинформ, 2020. 548 с. URL: https://www.izdat-knigi.ru/product/mezhdunarodnoe-finansovoe-pravo-i-pravo-evropejskogo-soyuza-vzaimodejstvie-i-vzaimovliyanie-monografiya-i-m-lifshits/ (accessed 12.05.2020).

[2] *Европейское* право. Основы интеграционного права Европейского союза и Евразийского экономического союза / под ред. Л. М. Энтина, М. Л. Энтина. М. : НОРМА, 2018.

[3] The Law of the European Union. Fifth Edition / ed. by Pieter Jan Kuijper, Fabian Amtenbrink, Deirdre Curtin [et al.]. Wolters Kluwer, 2018.

It turns out that scientists who adhere to it analyze integration communities through the prism of their special nature. At the same time, they deny that all international organizations and general international law should then be considered from the point of view of the peculiarities of integration communities. Nor do they agree that the latter should then have the features of international organizations and general international law. After all, autonomy means that integration communities, like supranational law, are part of a broader whole. But if so, the whole cannot deny or ignore the features inherent in its parts, and the parts cannot be opposed to the whole. This is nonsense.

An interesting attempt to remove the contradiction was made by lawyers who emphasize that the dispute is about the notions that describe integration processes, and not the integration itself, its specifics and the regulatory system that serves it. Indeed, all the terms used to explain integration projects are usually taken from constitutional (federalization, constitutionalization, autonomization, etc.) or classical international law (international organizations, constituent treaties, subjects of international law, etc.). But after all, all these terms are closely tied to domestic and interstate relations, and this fact is rightly emphasized by them. Their application to the phenomena occurring within the framework of integration communities only confuses the matter. And as for the integration processes themselves, there is no discrepancy among specialists, they believe. Everything is obvious here.

The idea of reconciling the various schools of thought in this way is noble. It evokes natural sympathy. It would be worth supporting. But, unfortunately, it is untenable. Yes, old terms, taken from constitutional and international law, are very conditionally applicable to the phenomena of integration. However, new ones, the subject of which is directly integration communities, have long been included in everyday circulation and are self-explicit.

These are the EU and the EAEU; institutions, bodies, organs of the EU and the EAEU; EU and EAEU law; the law regulating integration processes, in a slightly different plane — integration law; the integration of supranational law into the internal legal orders of the Member States, direct action and direct application, jurisdictional protection; the legal system sui generis and acquis communautaire, etc. And disputes over the legal nature of integration communities and the law governing integration processes are explained either by ideological differences, or by political considerations (the dichotomy of Eurosceptics — Euroenthusiasts), or, even more often, by specific mercantile interests.

At the same time, an undifferentiated approach to the components of international law, the EU and EAEU law is one of the most serious reasons that impede giving a verified assessment of the legal nature of integration communities and the law governing integration processes. All these legal systems have a complex composite structure. Their parts have fundamentally different subjects of regulation. They have different characteristics. The underestimation of the composite structure of international law, the EU and EAEU law explains the deep inner scholasticism of the dispute analyzed above and the judgments expressed.

The EU and EAEU law as predominantly common national law of the Member States, its distinctive features and characteristics

The general parameters of current international law and international legal order in modern conditions are set by the Charter of the United Nations. It states that no other international legal acts and practical actions/behavior of States and other subjects of international relations should contradict the provisions, goals and principles of the world security organization included in it. In addition, it imposes on all States the obligation to strictly follow the decisions taken by the UN Security Council on the maintenance of international peace and security. These requirements of the highest order, the norms of international law, which are recognized as peremptory, acting erga omnes, give consistency to current international law and international legal order.

But this does not mean that international law is uniform, identical in all its parts and forces the choice of only one legal regime for regulating specific relations, turning it into a universal one. It is clearly divided into a metasystem of legal regulation that prohibits the use of armed force, except for self-defense and in pursuance of UN Security Council resolutions and comprise the entire set of principles of law and international law, and a variable part.

Submission to the metasystem is unconditional. It does not allow any deviations. Violations give rise to formal legal and material responsibility (such as Iraq's responsibility for the aggression against Kuwait). But when it comes to private legal regimes, States are free to choose. Thus, the EU and its Member States played a proactive role in the emergence and formation of the International Criminal Court. Other leading global players, such as Russia, the United States and China, for several reasons refused to support it and did not join the legal regime created by the Rome treaty that established it. In addition, having become convinced of the shortcomings and flaws in the law enforcement practice, which they considered "biased" and "irritant"[1], African countries began to withdraw from the legal regime based on the Rome treaty, one after another[2].

There are hundreds of such examples. Some of them are of purely opportunistic nature. Thus, under pressure from the United States and the EU, about sixty UN Members recognized the self-proclaimed Republic of Kosovo as a sovereign State. However, then, thanks to the successes of Serbian diplomacy, their number significantly decreased. Others can be classified as fundamental. Thus, most countries of

[1] Belle Wang Ntui. African Countries to Quit the International Criminal Court // The African Exponent. 19.10.2016. URL: https://www.africanexponent.com/post/8063-african-countries-to-quit-the-international-criminal-court (accessed 12.05.2020).

[2] Powell Ellen. Why is South Africa pulling out of the International Criminal Court? // The Christian Science Monitor. 21.10.2016. URL: https://www.csmonitor.com/World/Africa/2016/1021/Why-is-South-Africa-pulling-out-of-the-International-Criminal-Court (accessed 12.05.2020).

the world, including Russia, joined the legal regime formed by the 1982 UN Convention on the Law of the Sea. However, the main naval power of the world — the United States chose to stay outside it.

The same United States, together with Russia, other space powers and all other countries, established an innovative, honest, noble and purely democratic regime for the exploration and use of outer space and celestial bodies. Its core, forged by the 1967 Outer Space Treaty, is the regime of non-appropriation of celestial bodies and the common heritage of mankind. However, the Donald Trump administration withdrew the United States from the Treaty and the legal regime it establishes. This was done in order to provide their high-tech companies operating in this field with commercial advantages.

Unfortunately, the case of Washington letting collapse (with the support or connivance of NATO allies) the basic nuclear arms limitation regimes designed to stop and prevent an arms race in the future, fraught with the death of all mankind, has already become a classical example.

Similarly, the EU law (as well as the EAEU law) is of composite nature. It includes the part concerning the competence of the integration community, delegation of powers, internal structure, positioning of the Member States in relation to the EU institutions, and decision-making mechanisms. It is regulated mainly by acts in the form of international treaties. They are called constituent treaties. This makes it possible for the supporters of the first of the law schools discussed above to defend reasonably their point of view on the initially international legal nature of the integration communities.

However, the entire huge, immense array of the EU law (as well as the EAEU law) regulates mainly relations arising at the national level, and all aspects of the life of a modern State. Being in this part purely integrative, it does so in such a way that regulation is always either the same and uniform, or, at least, similar and harmonized. Thus, the EU law is mostly the common national law of the Member States, jointly created, implemented and enforced by them.

The widely used term "supranational law" cannot be taken literally, as meaning that it acts as standing above the national State or created by supranational authorities without the participation of the latter, without coordinating wills and interests and descending from above. The notion “supranational” in this case means only that the law, jointly developed by the participants of the integration project, has primacy and supremacy in the framework of their legal orders.

It cannot be otherwise if a project is really of an integration type, and not a doomed to failure attempt to repeat what was done by others or just launch it. After all, this is a common internal law — it replaces the one created individually, based on national specifics, traditions, history and interests. The supreme task, mission and purpose of the common internal law is to replace it.

In addition, the EU also ensures the uniform application of common national law. The EAEU is only striving for this. Therefore, the law governing integration processes cannot but supplant and replace national law.

At the same time, it simultaneously replaces that part of international law that has features of variability, in other words, almost all international law, except for its imperative part. This situation in no way contradicts applicable international law. Several universal and regional treaties that enjoy everybody's recognition and are to some extent the hallmark of modern international law, for example in the field of human rights, explicitly indicate its possibility and desirability.

The 1964 Human Rights Covenants and the 1950 European Convention on Human Rights deliberately emphasize that they set a minimum standard. Accordingly, nothing prevents the participating States from securing for all persons under their jurisdiction a broader range of rights and freedoms and ensuring their better protection.

This is the approach that the EU and its Member States have chosen. The EU Charter of Fundamental Rights goes much further than the world-renowned universal Bill of Human Rights or Council of Europe acts — the ECHR and the Revised European Social Charter, which previously served as beacons for the entire region and beyond. The Charter is assigned the highest place in the hierarchy of the EU internal law. It has been given the status of one of the constituent treaties of the integration community, along with the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

It enshrines the widest possible list of rights and freedoms guaranteed to EU citizens. Their classification is given in a new way. It allows to overcome shortcomings of their attribution to rights of different generations that enjoy unequal levels of protection: the first (civil and political), second (social and economic), third (collective) or the fourth (which protect against threats caused by the progress of science and technology). In fact, it mixes the deepest differences that exist between them. Finally, much has been done to ensure the rights and freedoms proclaimed by the Charter in practice, including their effective judicial protection.

This example provides a key to understanding the mechanism of ousting provisions of international law from the legal regulation of the internal life of integration communities. Their replacement with norms of supranational law occurs because the latter are of better quality and are more advanced and effective. They set a higher standard.

This is particularly evident in the case of the freedom of movement granted by the EU to its citizens and the freedom of movement of workers within the territory of integration community. General international law cannot offer anything comparable, even close. The same applies to the freedom to establish companies, to the so-called European passports, which can be obtained by companies of third countries to work in the domestic market not only of a single Member State, but also of the entire integration community.

Other areas where there is no need to prove the advantage of supranational law include: customs regulation, the exemption of the economic space of the integration community from equivalent measures that impede the free, unhindered and

non-discriminatory movement of goods across the internal borders of the EU; care for the cleanliness of water, air, everything that surrounds a person, and the prevention of environmental pollution, based on a much more advanced supranational environmental law; suppression of abuse of monopoly position in the market and merging of local and regional authorities with business in accordance with well-established legal procedures for ensuring fair competition.

The Eurasian economic Union in 2020 was only 5 years old. Due to its youth, it is still lagging far behind the EU in terms of the quality and consistency of legal regulation of integration processes, the degree of compliance with the general national law created by the Member States, and the smoothness of procedures. Institutional building in the EAEU is also far from complete. The expansion of the powers of the Eurasian Economic Commission and the Court of the EAEU is considered overdue. The legal community raises the issue of creating a Consultative Assembly ("Veche"), composed by representatives of national parliaments. But the EAEU is solving mostly the same problems as the EU, and basically in the same ways. It forms a single economic space without internal borders, within which the free movement of goods, labor, services and capital is ensured. In general, the EAEU is moving faster in achieving these tasks than the EU did in its time, including thanks to the opportunity to use the experience of the EU's mistakes and achievements[1].

In terms of the depth of convergence through the formation of a single economic space and common national law, integration associations created in Latin America, Africa and Asia are far behind the EU and the EAEU. However, both MERCOSUR, ASEAN, and the Regional Comprehensive Economic Partnership (RCEP[2]) rely on the formation of such legal regimes that would give its participants more favorable terms for trade, creation of value chains, investments, and overall economic interaction, than general international law.

In practical terms, it turns out that the internal life of States, their relations with other countries and the conduct of business are largely determined by:

— belonging to a particular regional grouping and the nature of the common national (in some cases simultaneously supranational) law developed by it;

— the mediating role that systems of regional regulation of integration processes are beginning to play, acting as an intermediary between national and international law;

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[1] *Дьяченко Е., Энтин К.* Свойства права Евразийского экономического союза сквозь призму практики Суда ЕАЭС [Dyachenko Ekaterina, Entin Kirill. Properties of the EAEC law through the prism of the practice of the Court of the Eurasian Economic Union] // Журнал российского права. 2018. №10. С. 123—133. URL: https://publications.hse.ru/mirror/pubs/share/direct/252264112 (accessed 12.05.2020) ; *Козлов Д.В.* Право Евразийского экономического союза (Право ЕАЭС). М., 2020 ; *Конкурентное* право в Евразийском экономическом союзе / под общ. ред. М.А. Кусаинова [и др.]. М., 2019.

[2] URL: https://rcepsec.org (accessed 12.05.2020).

— the multiplicity of legal regimes in which they are forced to exist, with the understanding that the norms of international law, replaced by more advanced regional ones, are being applied more and more often only on a residual basis;

— what needs are brought to life by the course of implementation of transregional projects, and the reaction to them of interested States and interstate (integration) associations.

Basic models of embedding States and groups of States in a multi-level governance system

The way in which individual States manage to integrate themselves into a multi-level system of regulating world economic relations is clearly seen in the example of Vietnam. This country is one of the fastest growing economies on the planet. It is located in its most dynamic region. It learned a lot from China. Their models of combined political and socio-economic development are similar. In addition, as confrontation intensifies between Washington, which Brussels is forced to join, and Beijing, many Western companies will move production lines and value chains here.

Vietnam became the first country with which the EAEU concluded a free trade agreement[1]. The mutual opening of markets, which it envisaged, immediately had a positive effect. The mutual reduction of duties, administrative and other barriers made it possible to raise the volume of mutual exports and imports, diversify the nomenclature of commodity flows, and "significantly increase trade turnover"[2].

Following the EAEU, the EU concluded a free trade agreement with Vietnam. Immediately (as after some time also with Serbia), a situation arose when Vietnam entered the free trade zone, which the EAEU had begun to form, and received free access to the EU internal market. The only thing is that the agreement between the EU and Vietnam covers a much broader set of issues.

In addition, it should be taken into account that Vietnam is a member of ASEAN. This regional grouping is considered an example of the new regionalism. The new regionalism is understood as a movement towards achieving the goals of integration without creating supranational institutions, delegating some of sovereign powers to them, forming supranational law and relying on a large bureaucratic apparatus.

Vietnam's integration into the multi-level governance system has become even more complex since the establishment of the Regional Comprehensive Eco-

[1] Free Trade Agreement Between the Eurasian Economic Union and its Member States, of the One Part, and the Socialist Republic of Viet Nam, of the Other Part // Eurasian economic commission. URL: http://www.eurasiancommission.org/ru/act/trade/dotp/sogl_torg/Documents/EAEU-VN_FTA.pdf (accessed 12.05.2020).

[2] Наибольшую отдачу от создания зоны свободной торговли ЕАЭС с Вьетнамом получили Казахстан и Беларусь — эксперт // Евразия Эксперт. 18.04.2020. URL: https://eurasia.expert/zona-svobodnoy-torgovli-s-eaes-pridala-partnerstvu-vetnama-i-belarusi-novyy-impuls-ekspert-/ (accessed 12.05.2020).

nomic Partnership. As can be seen even from the name, it is not only about reducing customs duties and eliminating other restrictions on the movement of commodity flows. It provides the creation of a privileged legal regime for the participation of companies of the RCEP countries in value chains and everything related to it. And these countries include, along with ASEAN members, also China, Japan, South Korea, Australia, and New Zealand, i. e. all the leading economies of the world and the Indo-Pacific region, with the exception of the United States and India.

Thus, Vietnam is involved in at least four major integration projects, some of which are regional and some of which are trans-regional in nature. Some of them are more profitable for the country and its business, while others are less profitable. But all of them provide more favorable conditions for trade and doing business, in comparison with the legal regimes provided for by general international law, in particular the GATT/WTO rules.

Vietnam and its businesses use them as flexibly as possible. It decides for itself whether to act directly or through its participation in a regional association. Such flexibility, as far as it is concerned, does not interfere with anyone, does not limit anyone and does not create difficulties for anyone.

The EU and its Member States have opted for a different mechanism for their inclusion in the multi-level governance system. The EU has monopoly rights to represent Member States in several areas of activity. Brussels has exclusive competence over everything related to the functioning of the single internal market, whether it is internal or external competence. Accordingly, Member States are prohibited from enacting legislation and concluding external agreements on matters governed by the EU law. In addition, the EU institutions are vigilant about its uniform interpretation and application.

The intermediate form of involvement in the multi-level governance system was chosen by the EAEU countries. On the one hand, the EAEU, following the EU, is forming its own independent legal system designed to ensure the protection, satisfaction and promotion of their economic interests[1]. On the other hand, the Member States, despite their obligations under the EAEU, are free to conclude economic agreements with third countries and act completely independently.

Such a decision may seem illogical, because it frankly contradicts the rich experience of legal regulation and organization of interaction accumulated by the EU. It provokes the emergence of a situation in which the Member States assume obligations or grant rights to third countries that are poorly consistent with their obligations under the EAEU. Such a situation is fraught with unregulated competition between the legal regimes defended by the EAEU and provided by the member states. It weakens the EAEU and hinders the progressive course of integration processes.

[1] Международная конференция Суда ЕАЭС «Новые вызовы интеграции ЕАЭС: правовое измерение» online, Минск, 25—27 ноября 2020 г. // Суд ЕС. Запись конференции. URL: https://conf-courteurasian.org (accessed 30.01.2021).

In fact, it is the only correct one, because it gives economically weaker Member States one more guarantee that integration does not threaten their national interests, does not negate State sovereignty. That the EAEU does not deprive them of their independence in regulating foreign economic relations. That it does not subordinate them to the influence of an economically much stronger Member State — Russia. On the contrary, it expands the arsenal of economic development tools at their disposal. Adds weight to them in their relationships with the outside world. According to the calculations of research centers working with the EAEU, in the case of consistent liberalization, it can bring incredibly significant economic dividends to the member states[1].

It is organically combined with the procedure established in the EAEU for making political, strategic and legislative decisions. The principle of unanimity applies to all formats at all levels. This decision-making procedure, as well as the freedom to conclude agreements with third countries, contributes to the cohesion of the Member States. It prevents their majorization, stopping the very possibility of imposing someone else's will on them. Thus, in fact, it turns out that it does not encourage centrifugal tendencies but serves as a kind of counterbalance to them.

Brussels tried to take advantage one hundred percent of the opportunity offered by the freedom to conclude international agreements and the right of veto, belonging to the EAEU countries. At a high political level, it ignores the existence of the EAEU. In every possible way it avoids its recognition as an equal partner. It maintains relations only with Member States[2]. In other words, the EU acts exactly the same as the Soviet Union had been doing before the beginning of the Mikhail Gorbachev era in relation to the European Communities. It tries in every possible way to belittle the significance and dynamics of Eurasian integration and present it as hopeless and harmful to the national interests of the Member States, allegedly forced to obey the dictates of Moscow[3].

In fact, the EU is aware of the advantages of establishing direct ties with the EAEU[4]. It knows very well how interested in this are the Association of European Businesses in Russia and, in general, the business of the EU countries. It realizes that trans-regional projects that unite the EU and the EAEU into an infrastructure whole have already become a reality, as well as the economic expansion of the Ce-

[1] Knobel A., Lipin A., Malokostov A. et al. Deep Integration in the Eurasian Economic Union: What are the Benefits of Successful Implementation or Wider Liberalization? Central Bank of the Russian Federation Working Paper Series No. 41 / June 2019. 72 p. URL: https://www.cbr.ru/Content/Document/File/107528/wp_41e.pdf (accessed 12.05.2020).

[2] Togt T. van der. EU & Eurasian Economic Union: A Common Chinese Challenge // Netherland Institute of International Relations 'Clingendael'. 30.04.2020. URL: https://www.clingendael.org/publication/eu-eurasian-economic-union-common-chinese-challenge.

[3] Russell Martin. Eurasian Economic Union. The rocky road to integration // European Parliament Brief. European Parliamentary Research Service. April 2017. 12 p. URL: https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599432/EPRS_BRI(2017)599432_EN.pdf.

[4] Togt T. van der. Op. cit.

lestial Empire that challenges them[1]. After all, the volume of container transportation of goods by rail from China to the EU is growing rapidly. One of the reasons for their commercial viability is that once they enter the common customs territory of the EAEU, goods are further transported without hindrance and any delays through Kazakhstan, Russia and Belarus and end up in the common customs territory of the EU. Subsidizing rail transport also contributes to growth[2].

This tacit position is reflected in the fact that the European Commission maintains intensive technical contacts with the EAEU and has instructed some of its research centers to work out options for trans-regional agreements that would be appropriate and desirable to conclude with the EAEU. The Russian Union of Industrialists and Entrepreneurs, whose representatives they consult with from time to time, is well acquainted with a couple of the proposals they have prepared.

They usually recommend that Brussels conclude a general free trade agreement with the EAEU — it is more profitable for the EU, since the business of the EU countries is stronger and more competitive and ready to conquer the EAEU market. An alternative option is to conclude a series of industry agreements, including, first, an agreement on technical standards, because a technical standard is a key that opens foreign markets. This option, but without focusing on technical standards, has been worked out since the establishment of the EAEU by research structures focused on servicing the processes of Eurasian and pan-European integration[3].

For its part, the EAEU is open to cooperation and interaction with the EU, despite the latter's imperial policy. It is interested in establishing direct mutually beneficial ties. It tirelessly declares it and recalls that the Eurasian integration was conceived and is being implemented as part of a more ambitious project of integration of integrations, which implies that in the future some forms of integration between the EAEU and the EU could be launched.

The Eurasian Economic Commission actively supports European businesses behind the research project to build a common economic space from the Atlantic to the Pacific Ocean. The project is being carried out in several areas. The working groups created within its framework deal with issues of customs and trade regulation, building a single digital market, facilitating the visa regime, etc. More and

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[1] Togt T. van der. Op. cit.

[2] Китай — Европа: сухопутный контейнерный прорыв вопреки «экономиксу» // Transeuropean Logistic Services. 28.01.2019. URL: https://yandex.ru/turbo/telsgroup.ru/s/media_center/tels_in_the_press/4691.html (accessed 12.05.2020).

[3] Vinokurov E., Balas P., Emerson M. et al. European Union and Eurasian Economic Union: Long-Term Dialogue and Perspectives of Agreement // International Institute for Applied Systems Analysis Synthesis Report 2016. 36 p. URL: https://eabr.org/upload/iblock/caf/iiasa_edb_eec_project_synthesis_report_draft.pdf (accessed 12.05.2020) ; Vinokurov E., Pereboyev V. Mapping The Potential EU-EAEU Cooperation Agenda: readmission agreements, visa-free regime, labour migration, mobility of pensions, large-scale educational exchanges, recognition of professional diplomas and certificates // International Institute for Applied Systems Analysis Working Paper WP 16-013. September 2016. 15 p. URL: https://eabr.org/upload/iblock/22d/wp_vinokurov_pereboev_mapping_the_potential_eu_eaeu_cooperation_agenda.pdf (accessed 12.05.2020).

more stakeholders from Russia, the EAEU countries and the EU are constantly joining their activities. In 2020, for example, the Russian Chamber of Commerce and Industry became one of them[1].

However, if for the EAEU negotiations on a regulatory mechanism with associations of States are a relatively distant future, it still has only memorandum of understanding with ASEAN and MERCOSUR, then for the EU this is a matter of practical policy. Since the turn of the millennium, Brussels has been negotiating with MERCOSUR to conclude a trans-regional free trade agreement, in addition to dozens of other agreements it has with Latin American countries and their other associations.

The negotiations were tough. They repeatedly were on the verge of collapse. The left-wing governments of the MERCOSUR countries believed that the EU was seeking unilateral advantages, trying to include in the agreement what is beneficial to European manufacturers of equipment and not to include provisions that are fraught with a threat to European agricultural producers. They insisted on greater equality and a more balanced balance of interests.

With the change of governments and political regimes in a number of MERCOSUR countries, the situation has changed. Having found themselves in an extremely difficult situation, when it was necessary to save national economies and find a way out of the aggravating economic crisis, the right-wing governments that came to power took a course towards speeding negotiations. As a result, the text was agreed at the level of the European Commission and representatives of the MERCOSUR countries. Now the latter are ready to make additional concessions to have it approved by the European Council and then the European Parliament. The COVID-19 coronavirus pandemic has put them in a desperate situation. The population, economy and social sphere have suffered from it much more than the global average[2]. They need the European market and European investment more than ever[3]. How much, is demonstrated by Brazil. For their sake, the country's leadership even accepted to negotiate with the EU on the policy that it will pursue in relation to the Amazon selva[4].

Thus, trans-regional law, which regulates interaction between groups of States engaged in integration projects of different types and intensity, is rapidly turning from general theorizing and forecasting assumptions into a legal reality. Economic

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[1] ТПП поддержала инициативу единого экономического пространства от Лиссабона до Владивостока. Проект подразумевает гармонизацию европейских и евразийских интеграционных процессов, отметил глава Торгово-промышленной палаты России Сергей Катырин // ТАСС. 04.03.2020. URL: https://tass.ru/ekonomika/7898333.

[2] Behsudi Ad. Latin America's COVID plight // International Monetary Fund WR. 18.12.2020. URL: https://content.govdelivery.com/accounts/USIMF/bulletins/2b1a5ec.

[3] Ibid.

[4] Boffey D. EU seeks Amazon protections pledge from Bolsonaro in push to ratify trade deal. Brazilian president's stance on deforestation remains stumbling block for South America agreement // The Guardian. 20.10.2020. URL: https://www.theguardian.com/world/2020/oct/20/eu-seeks-amazon-rainforest-protections-pledge-from-bolsonaro-in-push-to-ratify-trade-deal

interaction between regions (precisely as regions, and not countries belonging to different regions) is already underway. It is growing. It becomes more and more significant. Accordingly, it creates the need for special, specific regulation.

It can only be effectively provided by trans-regional law. International law is not suitable for this role. It, as shown above, sets only a minimum standard acceptable to all. Integration groups, replacing it with a more efficient and advanced regulatory array, cannot and should not lower the standard in their interregional ties. As we remember, it was the threat of lowering the standard in the field of ecology, health, competition and consumer protection that sparked a powerful protest movement against the conclusion of the EU-US transatlantic partnership agreement in the EU countries and doomed the negotiations to failure. It means that trans-regional law, in theory, if it is properly designed, should absorb the best of what common national (supranational) law can offer.

Its creation cannot be delayed. There is already a request for it. The world economy really needs it. What it should look like, taking into account the relationship between national, supranational and international law discussed above, is already clear. Scattered efforts in its formation are being made in various organizational frameworks.

New, and the most favorable ones, are set by the Russian initiative, put forward in 2016, on building a Comprehensive Greater Eurasian Partnership. Such a partnership is designed as a combination of the activities of the EAEU and the Chinese initiative "Belt and Road" and the involvement of all interested countries and groups of states in Asia, Europe and the Greater Middle East. The Shanghai Cooperation Organization (SCO) and, to some extent, the BRICS are intended to serve as the supporting pillars of the partnership, along with the international structures separately established by Russia and China.

At the same time, in addition to the objective need for trans-regional law and the existing request for it, the need for its accelerated formation is also caused by factors of a subjective nature. They are the increasing attacks on the current international law and the unfolding trade, information and other wars in the world.

Risks of undermining the global regulatory system

The offensive against current international law is no secret to anyone. It is enough to recall the worried statements of foreign ministers and politicians of different countries, all that was published in the European, Chinese and American media and thick scientific journals throughout the years of Donald Trump's presidency.

Given the above explanations, it is important to find out which parts of international law are being attacked. The answer to this question is relatively obvious. The attack is being carried out against those provisions of international law that restrict arbitrariness, resist attempts to subjugate other countries, force them to follow generally binding standards of behavior, and subordinate national law to jointly created by States.

Since the time of the Peace of Westphalia, the following main function has been assigned to international law — to exclude the possibility of hegemony of any great Power over all others, ensuring that the collective solution of current and future European and world problems is mandatory and has no alternative.

Napoleonic France tried to break the established order of things and assert its sole rule. It failed. As a result of the Napoleonic Wars and the defeat of France, the mission of international law to prevent the monopoly of any Power in world affairs was strengthened. The victorious powers, having wisely included the defeated France in their ranks (after the restoration), created the European Concert[1]. They accounted then for more than half of the continent's population, territory and economic potential.

The next two attempts to establish hegemony resulted in the First and Second World Wars. They took away millions of human lives, left behind pain and devastation. They caused enormous damage to human civilization.

And yet, recovering each time like a phoenix, international law has withstood all these monstrous tests. It came out of them stronger, more consistent and structured, even more focused on collective management and preventing anyone from dominating over others. All the provisions of the UN Charter relating to the maintenance of international peace and security, its goals and principles are about this.

For the sake of fulfilling such a mission — the provisions of the UN Security Council, its special powers, the obligations of all States to strictly follow its resolutions and the veto power of its permanent members. The emergence of the nuclear club and consolidation of its privileged status in the Treaty on the Non-proliferation of Nuclear Weapons served as an additional justification for the composition of the UN Security Council and its special responsibility for maintaining international peace and security.

Preventing the monopoly on power in the world, preventing domination and subordination are the core of international law. Over several centuries of difficult tests as a result of evolution, it has been strengthened by a system of requirements for States of a higher order, including those related to the legitimate use of force, the settlement of disputes, international cooperation, and the fulfilment of obligations assumed. It has become much more democratic, giving freedom and independence to the former colonial peoples. It was filled with provisions that put the care for a person, his rights and freedoms at the forefront of international cooperation[2].

As a result, contemporary international law has become the main asset of mankind. It can be safely called the highest value of human civilization. It is extremely beneficial to small and weak countries, as it protects them from the dictates and interference of larger and stronger ones. At the same time, it serves the interests of world and regional powers, since it ensures that all others automatically comply

[1] Jeannesson S. The Concert of Europe // EHNE — Digital Encyclopedia of European History. URL: https://ehne.fr/en/encyclopedia/themes/europe-europeans-and-world/organizing-international-system/concert-europe (accessed 11.11.2020).

[2] Толстых В. Л. Курс международного права : учебник. М. : Проспект, 2018.

with normative prescriptions that suit them, without the need for them to constantly resort to force and coercion, thereby delegitimizing their political course in the international arena[1].

As a result of these features of contemporary international law, any attacks directed against its individual parts and components hit the entire international law as a whole. Although all of them pursue, in the end, the same goal: to weaken the humanistic, democratic content of contemporary international law, to take oneself out of its operation and remove obstacles that hinder acquisition of privileges and subordination of others.

Thus, the US withdrawal from the system of nuclear weapons limitation treaties with Russia is by no means a private matter of these two countries. Washington needed it in order to rid itself of any restrictions standing in the way of establishing military dominance in the world. However, in modern conditions, it is impossible. The steps taken by the United States are only pushing the arms race. They undermine strategic stability. They create a threat of uncontrolled development of events. Thus, they reduce the potential of all contemporary international law to ensure international peace and security. In general, they weaken its regulatory capabilities. They call into question the analyzed mission of international law to prevent the establishment of anyone's hegemony. It is a shame that the EU countries do not understand this or turn a blind eye to it. The collapse of the international arms control treaty system is detrimental to the interests of all. And it actually happens with their complicity.

The most real undermining of the current international law was the advancement of the concept of a world order based on rules, and not on international law. This concept has become an official doctrine of the United States and the EU and a significant element of the strategic line pursued by them in the international arena, relatively recently. As far as the EU is concerned, the thesis of the need to promote and uphold a rules-based world order is organically woven into the 2016 Global Strategy for the European Union's Foreign and Security Policy[2]. Subsequently, it found anchorage in the EU documents describing its policy on connecting Europe and Asia, the course towards China, Central Asia, etc.[3]

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[1] Entin M., Entina E. Back to the Legal Middle Ages? // Russian Politics & Law. 2019. Vol. 57, iss. 1—2. P. 41—56. https://doi.org/10.1080/10611940.2020.1835079.

[2] Глобальная стратегия Европейского союза по внешней политике и политике безопасности // European Union External Action Service. 15.12.2016. URL: https://eeas.europa.eu/headquarters/headquarters-homepage_ru/27890/Глобальная%20стратегия%20Европейского%20Союза%20по%20внешней%20политике%20и%20политике%20безопасности =AGlobal Strategy for the European Union's Foreign and Security Policy // European Union External Action Service. 15.12.2016. URL: https://eeas.europa.eu/headquarters/headquar ters-homepage_en/17304/A%20Global%20Strategy%20for%20the%20European%20Union's%20Foreign%20and%20Security%20Policy (accessed 11.11.2020).

[3] Butler W.E., Entin M.L., Entina E.G., Torkunova E.A. Greater Eurasia: In Search of a Legal Order // Polis. Political Studies. 2020. No. 4. P. 9—23. https://doi.org/10.17976/jpps/2020.04.02.

If everything is clear with the legal nature of international law — this is what states agree on among themselves, then there is no such clarity about the rules on which the world order should be built. The US and the EU avoid anything that would help to bring it in. The concept is not deciphered anywhere in the EU documents. The EU representatives are very evasive and cautious in their statements. Most often, they pretend that there are no problems with the normative range that the rules cover. Sometimes they try to insist that the rules include both hard (i. e., mandatory) law, and soft (i. e., dispositive or not enshrined in binding international legal acts), or even obligations assumed unilaterally. All this makes things even more confusing.

In any case, the concept of a rules-based world order seriously weakens contemporary international law, implying that, in addition to it, there is some other regulatory system that States should be guided by. It creates a situation of nervousness and uncertainty, and, as you know, there is nothing that weakens the law more strongly than uncertainty.

It turns out that the US and the EU are tearing general international law into two parts, which are unclear what they consist of. They snatch what they prefer out of it, calling it rules. Everything else — what holds them back, restricts them, or does not suit them — is left out.

Another version of what the US and the EU mean by rules is to project outside their internal legal order, its specific prescriptions and value orientations. If this is the case, a rules-based world order appears as an attempt to impose on everyone else "rules of the game" other than those established by current international law, and thereby subjugate them and put them in a dependent position. Naturally, this concept was met with suspicion and hostility by Russia, China and, in general, the entire non-Western world[1].

The practical expression of the concept of a rules-based world order is the total transition of the United States and the EU to a policy of sanctions and other unilateral measures which contradict the letter and spirit of contemporary international law. The latter insists on cooperation, multilateralism, the search for joint solutions, and compliance with the assumed international obligations. The policy of sanctions and other unilateral measures breaks with them, replacing the coordination of wills with the imposition of their own will on others and establishing their own domestic law, not international law, as a measure of legitimacy.

By resorting to the policy of sanctions and other unilateral measures, the US and the EU are seeking to consolidate in their hands the powers of the prosecutor, judge, police officer and bailiff at the same time, which contradicts the essence of modern international law and is rejected by all other countries. In doing so, they refer to the pretention that they are acting in the interests of protecting international law, international peace and security[2].

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[1] Butler W. E., Entin M. L., Entina E. G., Torkunova E. A. Greater Eurasia: In Search of a Legal Order // Polis. Political Studies. 2020. No. 4. P. 9—23. https://doi.org/10.17976/jpps/2020.04.02.

[2] Russell M. The EU and Russia. Locked into confrontation // European Parliament Briefing. European Parliamentary Research Service. July 2020. 12 p. URL: https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652030/EPRS_BRI(2020)652030_EN.pdf.

Using either special legal regimes related to security issues or the flexibility of conditionality clauses that allow them to refuse to fulfil their obligations under the pretext that others violate essential provisions of multilateral and bilateral treaties, they take themselves out of legal regimes created by the UN Charter, GATT/WTO rules, trade, partnership and cooperation agreements.

There could be only one result as a consequence of undermining the global regulatory system — an increase of chaos in international relations and a slide from confrontation to full-scale military action. This is exactly the situation that many non-governmental organizations, politicians, experts, research centers, and rating agencies state. On the conditional Doomsday clock, launched by nuclear physicists, which warn of the approaching end of the world — a nuclear war, there is extraordinarily little time left before it begins, literally seconds[1]. Trade, information, and hybrid wars have acquired unprecedented scale and intensity. Conflicts are now raging all over the world. Even in a peaceful Europe. In Africa, for example, their numbers have doubled in just a few years after the assassination of Muammar Gaddafi and the collapse of Libya. Radicalism, polarization, instability, inequality, fear and hopelessness increasingly characterize what is happening on the planet. This is without mentioning the nightmare of the coronavirus pandemic.

Therefore, the protection and restoration of confidence in the legal regulation of international relations is the most important imperative. In words, many countries and associations of States set themselves such a task. But what matters is not appeals, but concrete actions.

States and civil society have at their disposal a wide variety of means and methods which may be used to struggle for strengthening the global regulatory system and multi-level governance of global processes. In the case of their combined application, it is likely that very encouraging results would be obtained.

The main components of the strategy to counter the undermining of international law at the interstate level

It seems that first one should turn to the following ones. At the level of universal international organizations and forums:

1. Consistently, without missing a single case, express disagreement with any unacceptable actions aimed at undermining international law and generally accepted legal regimes; with actions bypassing the UN Security Council and universal organizations of the UN system; sanctions and other unilateral acts that in essence contradict prescriptions of the UN Charter and GATT/WTO rules and international obligations assumed by States under multilateral and bilateral treaties, even if they allow derogation in case of certain emergency circumstances; decisions that endow

[1] Mecklin J. (Ed.) Closer than ever: It is 100 seconds to midnight. 2020 Doomsday Clock Statement // Science and Security Board Bulletin of the Atomic Scientists. 23.01.2020. URL: https://thebulletin.org/doomsday-clock/current-time (accessed 12.05.2020).

national normative acts with extraterritorial effect, all the more so decisions that threaten third States and foreign businesses with criminal prosecution, fines, and financial and economic restrictions if they are violated.

There should be no condoning of such actions by the international community. It is necessary to do everything possible to resist such practices, to prevent the occurrence of situations that could later be referred to as a precedent and, using informal football vocabulary, "continuation of the game after violation as if it had not happened".

Even when international organizations and multilateral forums fail to pass resolutions condemning these actions, it is important that as many States as possible speak out in explanation of vote and record their rejection, giving arguments in support of the position they have taken.

2. To launch the broadest work to explain the perniciousness of attacks on contemporary international law; the inadmissibility of the substitution of international law by acts that national legislators and executive authorities have the free hand to adopt; the danger, profound wrongfulness and illegality, and disastrous consequences of destroying the architecture of international cooperation and multi-level governance by unilateral voluntaristic actions and arbitrary policy of sanctions pressure. To connect to it all countries capable of acting on the international stage as independent players. Promote non-profit organizations, human rights bodies, and associations of lawyers to the forefront of the struggle in defense of contemporary international law. To make it a top priority for public diplomacy.

A natural partner in this respect can be Western, first, European public opinion. Yes, it is held captive by clichés and dogmas that are far removed from reality. It is the victim of a long-term propaganda campaign to discredit all those forces that can resist foreign dictates and desire for hegemony. It lives in an inverted world, where the attack on general international law is presented as a protection of the established international legal order, and Russia and China, which do not allow the United States and the EU to usurp international mechanisms for the formation and maintenance of international law, are declared revanchists and revisionists[1]. But such a situation, of course, must be broken.

3. To create, scale and multiply platforms for free communication between statesmen, civil society representatives, journalists, scientists of various specializations, politicians and lawyers. To assign this role to a new generation of international organizations that connect regions of the planet and non-Western countries, such as the BRICS, the Shanghai Cooperation Organization, other economic and military-political organizations established at the initiative of Russia, and global financial structures focused mainly on China.

[1] Энтин М. Л. Краеугольные основы послевоенного мироустройства и современного международного права: взгляд из Москвы и Пекина // Московский журнал международного права. 2016. №3. С. 19—30. doi: https://doi.org/10.24833/0869-0049-2016-3-19-30.

The idea of creating under BRICS, SCO, etc. or on their initiative non-Western international news agencies, rating agencies and any other alternative to the existing ones, which would be able to convey truthful unbiased information, objective and diverse judgments to people, has been discussed for many years. It is long overdue to turn them into practical solutions.

Then the work of networked educational, research, and popularizing structures created by the non-Western world will not stay in tuna. The voice of Russia, China, India, Brazil, South Africa, developing countries of various regions of the world will sound louder. It will be listened to more and more.

4. To participate in all open negotiation formats, positioning yourself as a convinced adherent and staunch supporter of contemporary international law and its defender, and speak at them from the most constructive positions. To use all ongoing negotiations to advance an agenda of universal commitment to strengthening existing international legal regimes and to condemn all and any unilateral actions that are essentially contrary to them and aimed at obtaining unilateral advantages.

In fact, there are a lot of such negotiation formats, although they are rarely considered in the information space from this perspective. Almost all international organizations serve as such formats. In addition, almost all the structures that have been created to specify the most general guidelines laid down in the constituent acts and international conventions of the framework type, and to continue the previously initiated cooperation in order to solve common problems, work in this mode.

The systematic promotion of this agenda in all the variety of international formats can give a multiplying effect and turn it into the mainstream of global politics. On many occasions Moscow succeeded in doing this. Suffice it to recall the decisive role that the Russian Empire played in convening and ensuring the success of the First and Second Hague Peace Conferences of 1899 and 1907, which left a noticeable imprint on contemporary international law[1].

5. To proactively launch new negotiation formats and use them, among other things, for the described purposes.

The creation of new negotiation formats is an imperative of our time. The world has changed. Thanks to the achievements of scientific and technological progress, humanity has completely different opportunities. At the same time, threats that haunt it have also become much acute.

There is an urgent need to form a fundamentally different legal basis for improving not very convincing cooperation in the field of health, especially

[1] Final Act of the International Peace Conference. The Hague, 29 July 1899 // International Committee of the Red Cross. URL: https://ihl-databases.icrc.org/ihl/INTRO/145; Hayashi Nobuo. The Role and Importance of the Hague Conferences: A Historical Perspective // UNIDIR. 2017. URL: https://www.unidir.org/files/publications/pdfs/the-role-and-importance-of-the-hague-conferences-a-historical-perspective-en-672.pdf (accessed 12.05.2020).

considering a failure of international efforts to save the world population from the coronavirus pandemic, for creating early warning systems and new frameworks to get ready for joint fight against future pandemics. Without that, national efforts are much less viable, and many countries are left without assistance at all[1].

It is necessary to create a regulatory framework for: improvement of the Internet and social networks, which are clogged with information waste and are transformed into an arena of information warfare and false propaganda campaigns; creating a barrier to the use of cyberspace for attacks on critical infrastructure and government agencies; developing a uniform criteria for the whole planet for the transmission to artificial intelligence systems of the functions that were previously the exclusive prerogative of a human being, and were exercised under his constant vigilant supervision; establishing a common set of rules for the smooth movement Big Data across national borders, from one user to another, on commercial and non-commercial terms; revision of all kinds of restrictions on research and commercial use of the results obtained related to cloning, operations on the human genome, eugenics, and etc.[2]

The number of such areas of effort into which ordinary investment activity shifts is growing. The backlog of internationally agreed legal regulation is becoming more damaging. It creates the preconditions for abuse and reduces the safety of society as a whole and of everyone.

6. To form a united multi-regional front of States in support of contemporary international law and numerous alliances of like-minded States that would serve as its backbone. The nucleus of such a front and numerous alliances has already largely formed. It is formed by BRICS and its Member States, representing all political continents of the planet, which are called upon to play a decisive role in initiating relevant movements in the regional context. A similar algorithm of actions, only in a more general sense, is already being discussed by BRICS experts[3].

Such a front would take upon itself the solution of the entire range of tasks discussed above, from conducting explanatory work and promoting a common agenda to directly countering crude unilateral measures that undermine international law and international cooperation.

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[1] Bobylev S, Grigoryev L. In search of the contours of the post-COVID Sustainable Development Goals: The case of BRICS // BRICS Journal of Economics. 2020. Vol. 1, №2. P. 4—24. Vol. 1, №2/1. https://doi.org/10.38050/2712-7508-2020-7.

[2] Российская правовая система в условиях четвертой промышленной революции. XVI Международная научно-практическая конференция (Кутафинские чтения) : матер. конф. : в 3 ч. М. : РГ-Пресс, 2019. Ч. 1. URL: https://eulaw.edu.ru/wp-content/uploads/2019/10/VI-Moskovskij-yuridicheskij-forum.pdf (accessed 12.05.2020).

[3] Арапова Е., Лисоволик Я. Антикризисные импульсы БРИКС+: от стран БРИКС к региональным партнерам // Доклад Дискуссионного клуба «Валдай». Сентябрь 2020. URL: https://ru.valdaiclub.com/files/34960 (accessed 12.05.2020).

Opportunities for countering the transformation of international law from an instrument of cooperation to an instrument of diktat at the national level

At the national level, no less can be done, because international efforts to protect contemporary international law become effective only when they are made up of national ones. Each of the directions discussed above must have a national equivalent. At the same time, at the national level, somewhat different tasks should be solved as well, primarily related to ensuring legal security.

Not so long ago, the Russian legal theory was dominated by the opinion that legal tools are needed only to properly formalize the normative foundations of military, economic, energy, environmental and other types of security. The fact that legal security is an independent concept and requires a special set of rules both for its description and achievement, was understood by the legislator and the legal community, at least in our country, only under the influence of the rapid deterioration of international situation, the escalation of tension in international relations and the refusal of Western powers led by the United States from multilateralism in favor of unilateral actions[1].

New, mostly unfavorable, external conditions called for the adoption of countermeasures. They have resulted in the invention of a legal antidote against the use by other countries and groups of States of a misinterpreted norm of existing international law to damage the normal functioning of the domestic legal order. At the first stage, it was composed of a legislative clarification of the powers of the Constitutional Court to protect the country's constitutional order from external interference and a doctrinal rethinking of the spirit and letter of the 1993 Constitution in its previous version. At the next stage, amendments have been introduced directly into the text of the Constitution[2].

Legislatively, a mechanism has been created, turning to which the executive branch of power is able now to request the opinion of the Constitutional Court on the limits and parameters of the implementation of international decisions rendered against the Russian Federation, seemingly based on existing international law, but contrary to the basic requirements of the Constitution and fraught with their violation.

In doctrinal terms, if earlier part 4 of Article 15 of the Constitution was emphasized, which establishes that the principles of international law and treaties with the participation of Russia are an integral part of domestic law and take precedence, now its understanding has been brought into line with part 1 of Article 15. It enshrines the supremacy of the Constitution in the country's legal system.

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[1] Энтин М. Л., Энтина Е. Г., Торкунова Е. А. Современные требования к национальной правовой системе // Журнал зарубежного законодательства и сравнительного правоведения. 2019. №2. С. 11—24.

[2] Entin M., Entina E., Osokina E. A Balanced Approach to the Protection of National Law and Order and the European Court of Human Rights // The Journal of Comparative law. 2019. May. Vol. 14, iss. 1.

Finally, when amendments were introduced into the text of the 1993 Constitution in 2020, some of its articles were supplemented with provisions explicitly clarifying the effect of part 1 of Article 15 in specific cases. Thus, the current version of the Constitution emphasizes that decisions of international instances and decisions of international judicial bodies that change the previously adopted interpretation of the norm of international law in force on the territory of Russia are subject to compliance to the extent that their application does not contradict the foundations of the country's constitutional order and does not entail a violation of human rights guaranteed by the Constitution[1].

In principle, the constitutional, legislative and doctrinal changes that have reformatted the legal space of the Russian Federation do not contain anything new in comparison with the usual practice of other European states. They only adjusted it to take into account generally accepted approaches to ensuring the supremacy of the national constitutional order.

In this regard, suffice it to recall the recent decisions of the Federal Constitutional Court of Germany, which recognized that by repurchasing securities the European Central Bank went beyond its competence provided for by the constituent treaties of the EU and committed extra vires actions. Thus, it ruled out the possibility of Berlin's participation in their financing. Prior to this, the Federal Constitutional Court prohibited Germany from ratifying the EU treaty establishing a system of courts for the settlement of intellectual property disputes due to its inconsistency with the country's constitution and ordered Berlin to amend its current text in order to remove this obstacle[2].

At the same time, the undertaken constitutional, legislative and doctrinal changes discussed above serve as a good indication of the vast capabilities of the national State in resisting attempts to subordinate the internal legal order to external influence and force national legal systems to operate in a regime that is detrimental to national interests.

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[1] Law on amendment to the Russian Federation Constitution // President of Russia. Documents. 14.03.2020. URL: https://www.en.kremlin.ru/acts/news/62988 (accessed 12.05.2020).

[2] ECB decisions on the Public Sector Purchase Programme exceed EU competences. Press Release No. 32/2020 of 05 May 2020. Judgment of 05 May 2020. 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15. The Federal Constitutional Court — Bundesverfassungsgericht. 05.05.2020. https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg20-032.html; Arnold M., Stubbington T. German court calls on ECB to justify bond-buying programme. Bundesbank told to halt participation unless central bank shows policy is 'proportionate' // FT. 05.05.2020. https://www.ft.com/content/a1beda5e-5c2d-429e-a095-27728ed2d72b; Botti F. I dubbi della Corte costituzionale tedesca sul Quantitative easing // Affarinternazionali. 06.05.2020. https://www.affarinternazionali.it/2020/05/dubbi-corte-costituzionale-tedesca-quantitative-easing/; Karnitschnig M. German high court warns ECB that bond buying could be illegal // Politico. 06.05.202. https://www.politico.eu/article/german-high-court-warns-ecb-that-bond-buying-could-be-illegal.

Advantages of trans-regional law and benefits it may provide

However, when building a strategy for the struggle for the preservation and strengthening of contemporary international law, it must be borne in mind that the efficiency of legal tools available at international and national level is not quite the same as we expect. At the international level, the unfolding struggle will encounter resistance from those Powers that seek to undermine existing international law and replace it with their own internal law and / or unilateral measures and supplant universal legal regimes with private ones.

In turn, efforts made at the national level are easily offset by their biased criticism and distortion of facts. To do this, it is enough to accuse the nation-state of protectionism, fencing off from the rest of the world, alleged violations of international law and rejection of multilateralism.

Trans-regional law lacks all these shortcomings. First, in terms of the quality of legal regulation, it goes further than the national and international ones and offers (or at least should offer) such legal solutions that are certainly beneficial to all participating States. Secondly, it opens up additional opportunities for the nation-state, connecting it to the implementation of large infrastructure and other projects, rather than limiting it. Thirdly, a limited circle of participants involved in the formation of trans-regional law allows it to be removed from external malicious pressure and the influence of destructive forces.

The legitimate question of how trans-regional law can strengthen international law if it goes beyond it and provides better regulation is also relatively easy to answer. On the one hand, nothing prevents the inclusion in the system of trans-regional law of a set of norms that form the metasystem of modern international law, thereby confirming and strengthening it. On the other hand, it is much easier to saturate trans-regional law than general international law with provisions that develop such norms.

The number of such provisions is gradually increasing. These include, in particular, all those aimed at excluding external interference in the internal affairs of the nation-state in order to change the political regime and undermine agreements reached at the regional or multi-regional level. The last of these aspects is enshrined in the multilateral treaty on the Caspian Sea, which was reached by the Caspian States after many years of negotiations. It not only made it possible to delineate the waters and bottom of the largest lake on the planet, thereby opening them to legitimate commercial exploitation, but also established a special protective legal regime. In accordance with it using the territory of any of the participating States for hostile activities is prohibited. In addition, the treaty explicitly put a barrier to external malicious interference in the affairs of the subregion[1].

[1] Статья 3. Конвенция о правовом статусе Каспийского моря от 12.08.2018 // Президент России. URL: https://www.kremlin.ru/supplement/5328 (accessed 12.05.2020).

Another group of provisions of trans-regional law that support and strengthen the imperative nature of the norms of the metasystem of international law are all those that have the goal of rejecting unilateral measures as an instrument of foreign policy. These provisions have not yet become an integral part of hard law. It takes time. However, as an element of soft law, they are included in numerous documents jointly prepared by Russia and China, as well as adopted within the BRICS framework.

These provisions also explain why trans-regional law turns out to be an organic element of the legal security of participating States, an integral and particularly important part of the mechanisms for protecting their constitutional order.

Instead of a conclusion. The future lies with the Comprehensive Greater Eurasian Partnership

As mentioned above, the initiative to form such a Partnership as a trans-regional space of soft integration was put forward by Moscow in 2016. Conceptually, it is based on the agreements reached between Moscow and Beijing on connecting the EAEU activities with the Chinese "Belt and Road" initiative. The authority to build the interface, as far as the EAEU is concerned, is entrusted to its executive supranational body — the Eurasian Economic Commission.

It has taken years since its nomination for the Russian initiative to gain universal recognition and support. To date, this initiative is actively supported by the ASEAN countries, the EAEU's neighbors across the continent, all those countries with which the EAEU has concluded or is negotiating trade and free trade agreements. They became convinced of how serious a help the Comprehensive Great Eurasian Partnership can be for them, and what a significant added value it brings. It is characteristic that despite the reduction in international trade because of the coronavirus pandemic, the amount of goods transported from China to Central Europe in 2020 alone increased almost one and a half times.

From 2021, a new stage begins in the implementation of the initiative to form a Comprehensive Greater Eurasian Partnership. International and governmental structures are starting to work out concrete steps for its implementation.

The most important of them is intended to be the launch of negotiations on specific aspects of the trans-regional law, designed to facilitate, simplify and make more effective interaction within this huge super-region. In this regard, as already suggested in the scientific literature, the development and adoption of a declaration in favor of Partnership with the widest possible range of participants could play a useful role[1].

At the same time, the proposals already made concerning a possible organizational design of the Partnership, its establishment, the creation of a secretariat and /

[1] Butler W. E., Entin M. L., Entina E. G., Torkunova E. A. Op. cit.

or other bureaucratic structures, seem premature so far. This is a bit of a leap forward. First, specific economic projects and projects in the field of culture, education, health care, cooperation between ministries and departments of interested States should be launched, sectoral and leading trans-regional business associations should be created so that the benefits of institutionalization of Partnership become obvious.

The same applies to the trans-regional law. It accelerated formation will push all the other positive processes of trans-regionalization of international cooperation. It will stimulate them. The trans-regional law has a lot of advantages analyzed above. Participating States should use them. After all, the future belongs to the trans-regional law.

European Legal Culture and the Legal Cultures in Europe*

1. Legal Culture to Complete a Legal System

With the following considerations I want to address the role of legal culture in the integration processes of the European legal area. By legal culture we understand,[1] instrumentally seen the social functional system that determines the functioning of law in reality, since positive law is not able to guarantee its functionality itself. Therefore, legal culture contains what we call the "legal order" in a broader sense — the sum of all secondary rules, principles and values that undergird the intersubjective understanding of the primary rules of regulatory law. Thus, having a look at legal culture does not focus on the institutional structure and decisional process of a legal system. Instead, the view turns towards the reasons and preconditions that explain its successes and failures, its acceptance and rejection in social practice knowing that legal culture is "prior" in an ontological sense.[2] It fundamentally forms the characteristic feature of a legal system.

The relevance of legal culture is not only, but in particular obvious in liberal and democratic states. There is a famous quote saying,[3] "A liberal secularized state lives by prerequisites which it cannot guarantee itself." Why? Because "as a liberal state it can only endure if the freedom it bestows on its citizens takes some regulation from the interior, both from a moral substance of the individuals and a certain homogeneity of society at large". A liberal state cannot procure these interior forces of regulations by itself, meaning not with its own means such as legal compulsion and authoritative decree. If doing so, the state would surrender its liberal character and fall back into the claim of totality, fundamentalism and repressive ideolo-

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* This part is based on a speech given by the author at Immanuel Kant Baltic Federal University Kaliningrad on the occasion of „II Prokoviev Readings: Constitution and Social Progress", 06—08 December 2018.

[1] Concerning the term and meaning of "legal culture" cf. *R. Michaels*, Rechtskultur, in: Handwörterbuch des Europäischen Privaztrechts, 2009, available under http://hwb-eup 2009.mpipriv.de/index. php/Rechtskultur; *I. v. Münch*, Rechtskultur, in: Neue Juristische Wochenschrift 49 (1993), p. 1673 ff.; *G. Helleringer / K. Purnhagen*, On the Term, Relevance and Impact of the European Legal Culture, in: G. Helleringer / K. Purnhagen (eds.), Towards a European Legal Culture, 2014, p. 3, 4; see also *P. Mastronardi*, Recht und Kultur: Kulturelle Bedingtheit und universaler Anspruch des juristischen Denkens, in: Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 61 (2001), p. 61 ff.

[2] *J.H.H. Weiler*, The political and legal culture of European integration, in: International Journal of Constitutional Law 9 (2011), p. 678.

[3] *E.-W. Böckenförde*, Die Entstehung des Staates als Vorgang der Säkularisation (1967), in: Staat, Gesellschaft, Freiheit, 1976, p. 42 (60).

gies. This dilemma, after the author the so-called *Böckenförde*-dilemma, is also reflected by the famous quote of *Joseph de Maistre* that every nation has the government it deserves.[1] As a result, we need to admit: "This is the great adventure the liberal secularized state has undertaken for freedom's sake."[2]

Nonetheless, the question arises of how such a society can secure its continued existence and defend itself against threats, from inside as well as from outside. As its legal order is depending on a unifying cultural ethos we need to know about the elements and factors that form this underlying culture. And how should we deal with deviating convictions and expectations?

The issue challenging social stability on the national level, however, is no less affecting the inter-national level of Europe. Europe as meant here is a mature legal community of nations that are basing their collaboration on a constitutional-like framework of treaties and conventions in the European Union and in the Council of Europe. With regard to this area, reflection on the role of a legal order beyond its legal norms deserves the more interest, the more the European construct seems in these times to be searching for its secondary rules of cohesion to an extent that cannot be remembered for many decades.

Europe has doubtlessly accomplished many commonalities over the centuries of its development. A mainly congruent social structure, an economic, basic value and legal system has been achieved what is nowhere better apparent than in contrast to other cultures of Africa or Asia. And there is no doubt that Russia also belongs to this European cultural area, although due to its geographic position at the centre of the Eurasian continent its identity is co-characterized by particular byzantine influences. The jubilarian to whom these lines are dedicated has rightly emphasized this again and again. The experiences of destructive forces like totalitarism and Word War II in the 20th century drew the European countries closer together, as well as the challenges of globalization in the 21st century.

However, the European identity must not be misunderstood like unity. There has always been and there will always be different cultures and, for that matter, different legal cultures throughout Europe. Each European country has its own and peculiar understanding of law due to its respective historic and socio-cultural background.[3] But the fact of these divergences doesn't argue against the existence of a relatively homogenous European legal culture. This is, for example what the motto of the European Union is upholding: "United in diversity" proves that although these differences are not intended, they belong to the concept of a consistent legal order in Europe. But again, a way to deal with these differences must be found.

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[1] *J. M. de Maistre*, Letter 76, on the topic of Russia's new constitutional laws (27 August 1811), published in Lettres et Opuscules, p. 264.

[2] *E.-W. Böckenförde,* Die Entstehung des Staates als Vorgang der Säkularisation (1967), in: Staat, Gesellschaft, Freiheit, 1976, p. 42 (60).

[3] *R. Zimmermann*, Römisches Recht und europäische Kultur, in: Juristenzeitung 62 (2007), p. 1 (9).

In the following I will initially outline some elements the European legal culture is fundamentally based on (2). Afterwards some differences in the legal cultures that can be observed throughout Europe will be examined (3). In a final step we will ask for instruments providing both the abilities to preserve individual nations' values and to support a European legal culture at the same time (4).

2. The Characteristics of a European Legal Culture

Reflecting the concept of a legal culture "of" and "in" Europe, seven attributes can be gathered: the historical background (2.1), legalism (2.2), professionalization (2.3), secularity (2.4), personalism (2.5), constitutional values (2.6) and the openness to international influences (2.7).[1]

2.1. The Historic Background of the Roman Law

The historic roots of European legal culture date back to the Roman law and to the Christian values of the Canon law.[2] Beside the influences of both the Roman Catholic and Byzantine Orthodox Church, the most important institution for the development of a European legal thinking has been the University of Bologna. Starting in the 11th century, a European legal scholarship emerged from there providing the circulation of both the Roman *ius commune* and the humanism of the Renaissance all over Europe. Later, the Era of Enlightenment formed further main sources of the European legal culture, first of all causing the formation of human rights. It went on with the "*volonté générale*" (the overall will) of *Jean-Jacques Rousseau* leading to the revolutionary ideas of republicanism (*Immanuel Kant*) and democracy (*John Locke*): the "government of the people, by the people, for the people" (*Abraham Lincoln*).

2.2. Rationality by Legalism

Then, the enforcement of these ideas went along with the increase of legalism. Legalism shall be understood as the general concept that social conflicts and relationships should be mainly and above all regulated by law. Thus, legal-

[1] On the following cf. *P. Häberle/M. Kotzur*, Europäische Verfassungslehre, 8th ed., 2016, p. 181 ff.; *A. Voßkuhle*, Das Leitbild des „europäischen Juristen", in: Rechtswissenschaft 1 (2010), p. 326 ff.; *P. Häberle*, Der europäische Jurist, 2002, p. 26 ff. (also in: Jahrbuch des Öffentliches Rechts, NF 50, 2002, p. 123 ff.); *R. Böttcher*, Der europäische Jurist, in: Jahrbuch des Öffentlichen Rechts, NF 49 (2001), p. 1 ff.; *P. Häberle*, Europäische Rechtskultur, 1997, p. 21 ff. See also G. Helleringer/K. Purnhagen (eds.), Towards a European Legal Culture, 2014.

[2] *F. Wieacker*, Foundation of European Legal Culture, in: The American Journal of Comparative Law 38 (1990), No. 1, p. 1 ff.; *R. Zimmermann*, Römisches Recht und europäische Kultur, in: Juristenzeitung 62 (2007), p. 1 ff.

ism does not only mean the use of law as an instrument of social regulation, but also as a legal system representing an autonomous normative order beside others like morality, religion, or politics. Its validity does not arise from any extrinsic sources but is only based on the intrinsic factors of the dignity of pure reason and rationality. Although the emergence of law as a single normative system can be traced back to ancient and medieval times, too, the legacy only took full effect since the 19th century.

2.3. Scientification and Professionalization of the Handling of the Law

This leads to a third characteristic of the European legal culture: Legalism goes hand in hand with professionalization as legalism gives rise to a scientification of law. All over Europe we are used to deal with legal issues in a scientific manner. Starting from the University of Bologna, which was the first and most important institution among many others that followed, a European legal science emerged that shaped most continental European legal systems. Jurisprudence deals with the dogmatic of law as well as with the methods for the interpretation of rules;[1] further specific knowledge is provided by the philosophy of law and legal theory, by comparative law, and legal sociology.

Consequently, the care and administration of law becomes a matter of specialists. In modern times more than ever, the functioning of the legal system depends on legal specialists trained in the proper handling of the law responsible for both the fair application and the rational law-making. Simultaneously former authorities like kings, landlords or bishops lost their historic right to dispense justice, as well as the role of lay judges, jurymen or other laymen has been reduced.

To maintain this legal professionalism, the Faculty of Law, as one of the classic faculties alongside Theology, Philosophy and Medicine, has been the place for professional legal education since the foundation of the first universities in Europe.[2]

2.4. Secularity and the Divide of Law and Religion

Corresponding with the concept of legalism separating the legal system from morality and religion, secularity provides a further element of European legal culture.

According to it, the law claims equal application on everybody without any discrimination or privileged treatment for reason of religious, moral or ideological convictions. Therefore, state power is linked to the principle of neutrality or non-

[1] With various national perspectives on the interpretation of rules cf. K. Riesenhuber [ed.], European Legal Methodology, 2017, p. 591—740.

[2] *W. Schmitt Glaeser*, Die Juristen-Fakultäten als Hüter des Rechtsstaats, in: Neue Juristische Wochenschrift 48 (1995), p. 2597 ff.

identification; there must be no state religion. Instead, religion is a private issue protected by human rights law, and the churches are institutionally separated from state authorities.

It is, however, worth to note that this concept does not necessarily result in a distancing and rejecting neutrality of the nature of strict laicism. It may include a respectful neutrality,[1] which firstly, imposes on the state a duty to safeguard a sphere of activity both for the individual and for religious or ideological communities, and secondly, which recognizes the churches as powerful intermediary institutions helping to stabilize social integration and cultural homogeneity by providing different answers and dogmas to the question of the meaning of life.

2.5. Personalism or the Primacy of the Individual

Privatization and individualization of religion leads to the next characteristic of the European legal culture: the personalism. Personalism means the concept that focuses on the individual as the subject of law. The modern European positive law attributes inalienable rights and private and political claims to the individual person. Whereas previously, the general welfare was the foremost precept of the nation, the maxim of state has shifted to safeguarding the individual life, liberty and the right of political participation. With this, the liberal state ties in with historic milestones such as the Greek idea of free men living together in the antic *polis*, the principle of autonomy in Roman law or the Christian idea of men made in the image and likeness of God. Since the epochs of natural law and Enlightenment the idea prevailed considering all humans as equally free by nature and capable of reason, thus being able to responsibly structure and govern the world.

However, European legal culture does not view the individual as an isolated being. Its idea of man is rather that of a human being living in and through the community. The freedom of the individual person therefore finds its limits in the conditions of social coexistence and the freedom of all, as long as proportionality is maintained and the inherent dignity of the individual is not impaired.

2.6. Constitutional Values

Sixth, one can look at a range of material values involved in the shaping of European legal culture. This certainly includes the rule of law, fundamental rights, democracy, separation of powers, the independence of courts and the due process of law including the right to a legally competent judge.

The rule of law in general describes the authority of law in state and society, that no rulers stand above the law and all individuals are equally subject to the law.

[1] Cf. Federal Constitutional Court of Germany, Judgment of 24.09.2003, 2 BvR 1436/02, BVerfGE 108, 282 (298 ff.).

The law, which applies equally to all, is legitimized by a democratic process from which it emerges by majority decision in the legislative bodies elected by the people. Inherent to the ideas of fundamental rights, rule of law, and democracy is the concept of the separation of powers providing checks and balances between state branches of legislature, executive and judiciary, first to prevent the abuse of concentrated state power, second to increase the efficiency of exercise of state power. As for the judiciary it is indispensable under the rule of law that the judges to decide a case are determined by general law and independent in their decisions. Despite all differences in detail, these material and organizational value decisions are recognized as fundamental standards in the legal systems of all European countries. They characterize the type of modern constitutional state of the European and Western cultural area.

2.7. Openness to International Norms

Finally, attention should be drawn to a seventh factor of the European legal culture, which is historically more recent: this is the openness of the national legal order to the international law.

Embedded in the development of international law into an international cooperation law it is throughout Europe that domestic constitutions, on the one hand, authorize state organs to take part in the formation and development of international law and, on the other hand, give international law a gateway into the national legal order. Regarding the latter, all European legal systems follow the common denominator of a moderate dualistic system in contrast to monism. According to it, international law must be incorporated into the body of the national legal system by a domestic law in order to take effect within the country.

In details, however, the scope of incorporation varies, and especially as far as direct applicability of international laws and court sentences is concerned, there are differences to such an extent that the issue reflects one example, in which European legal culture is challenged by legal cultural differences.

3. Legal Culture Differences in Europe

Although a basic legal culture within the European area can be identified, there are also undeniable differences between national legal cultures in Europe. The national legal orders are also shaped by domestic particularities and single-social expectations.

I will outline four differences. The first concerns the principle of the rule of law (3.1), the second deals with the scope and substance of fundamental rights (3.2). Thirdly, the acceptance of the primacy of supranational law is considered (3.3), and lastly national reservations towards international law (3.4) are examined.[1]

[1] On the following cf. *S. Simon*, Rechtskulturelle Differenzen in Europa, in: Archiv des Öffentlichen Rechts 143 (2018), p. 597 ff.; C. Tomuschat/H. Kötz/B. von Maydell (eds.), Europäische Integration und nationale Rechtskulturen, 2013.

3.1. The Rule of Law Principle

Every country in Europe acknowledges the rule of law principle, although the shape shifts according to the national context. Formalist views do not count the "justness" of law but define specific procedural attributes that a legal order must have. Substantive conceptions go beyond this and include certain substantive rights into the rule of law understanding which the law needs to be based on or derived from. Formalist approaches prevail rather in the Anglo-Saxon legal sphere. Thus, the due process of law and procedural fairness are the core guarantees of the rule of law in the United Kingdom understood as the absence of arbitrariness. Continental legal cultures, on the other hand, additionally demand the compliance with substantive standards and legal values.

Accordingly, the relationship between politics and law appears in different forms. While in the United Kingdom, for example, the "sovereignty of parliament" traditionally holds the function and capacity for constitutional conflict resolutions, other nations tend to legalize and to juridify every political and social (dispute) issues. Germany provides the prominent example for the latter by pursuing the maxim that all politics shall strictly occur by law and within the law, which again is not at all known like this in France. Consequently, the Federal Constitutional Court of Germany also decides on important political issues of the legislature according to the yardstick of the constitution, while other supreme courts are much more reserved in this regard.

And if one looks at the institution of the third power at all, there are sometimes considerable differences in the court's jurisdictional powers, in the understanding of the independence of judges and in the possibilities of access to the courts for citizens.

3.2. Scope and Substance of Fundamental Rights

Even though fundamental rights are overall accepted, their respective scope and interpretation vary with respect to different historic backgrounds and socio-cultural attitudes. In other words, they are particularly susceptible to being influenced by extra-legal elements. The so-called path dependency in law is even clearer here than elsewhere. Countless examples could be cited for this, ranging from the concept of privacy and freedom of religion, political liberties and right to democracy, video surveillance, data retention and informational self-determination, migration and immigration, gender equality, biogenetics, surrogacy, euthanasia, to the particular recognition of minority identities like gay marriage and the LGTBQ-scene.

Especially in Western Europe, the law driven above all by the right to equal treatment is increasingly focused on protecting individual peculiarities and social

marginal groups. Although the European legal culture must be aware of its humanitarian heritage by preserving an indispensable level of legal protection of dignity of man, individual identities and social minorities, there are, however, countries rooting in the byzantine-greek cultural tradition who, concerned about an imbalance are stronger emphasizing the importance of the social consensus on the normal and the average.

3.3. The Primacy of Application of EU Law

Third, we can record a further indication of legal cultural differences which concerns the core mechanism of the legal community of the European Union. It's about the relationship between supranational and national law. Among the Member States different approaches can be found on the handling with the concepts of the direct applicability and the primacy of application of the EU law within the domestic legal sphere.

For example, whereas Austria absolutely recognizes the primacy of application of European Union law, other Member States like Poland don't accept it in general but gives respect to it by conceding exceptions from the national law. Others, like Italy, the Czech Republic or Germany, while regularly considering EU law as an integrating part of the own legal system point out specific boundaries that uphold national law's primacy. And insofar as the unavailable national constitutional identity or even the absolute protection of human dignity runs counter to the precedence of EU law, there are again different views on its content and scope. In any case, it is obvious that EU law, even in harmonized areas, is not implemented or complied with in the same effective way in the Member States.

3.4. National Reservations against International Law

Such national reservations against alien influences on the national legal system do also exist regarding the international law. Comparing the European legal systems, firstly, international law possesses different rankings in the national hierarchy of norms ranging from the status of a simply-majority law to constitutional level.

In many European countries, e. g. in Belgium, Bulgaria or the Czech Republic international treaties take general precedence even over a constitutional act in the event of a norm conflict. International law has supra-legal but sub-constitutional status in Spain, France, Portugal, Estonia, Slovenia and Switzerland, for example. International agreements have the same hierarchical ranking as the legal instrument used to implement them in Finland and Germany.

Although the human rights guarantees of the ECHR are now relatively deeply rooted in the national law of all Member States, the Convention rights and the judgments of the ECtHR are also treated differently depending on the framework conditions in the respective national legal system. This not only concerns the rank — only in Austria the ECHR has constitutional rank — but in connection with it also

the relationship to the *lex posterior*-rule. On the one hand, there are states that give the ECHR only the primacy of application, e. g. Belgium and the Netherlands. In other states that grant the ECHR derogational effect in most cases, e. g. in Germany, a derogation by a later law of the same rank does not take place.

Second, as far as last constitutional reservations towards the national validity of international law including the ECHR are concerned, they occur all over Europe. However, even though the constitutional identity here again marks the most common limit according to respective Constitutional Court's case law, the concept of it varies due to legal culture differences. The same applies to the understanding of the guarantee of human dignity eventually limiting the domestic application of international law or international courts sentences respectively.

4. Mechanism and Strategies of Balancing Legal Cultural Diversities in European Legal Culture

Here we can come back to the question raised at the beginning: How to deal with those differences in legal culture taking into account that both the preservation of commonalities and the respect for diversity should perform as integral parts of a European legal culture?

Starting point must be the conviction that cultural differences do not affect the concept of a common culture in general as diversity to a certain extent should also be considered as an enriching factor. Nonetheless, differences always mean challenges and can cause concern for turning into serious divergences. If the law is no longer based on a concordant inner understanding of what is right in terms of cultural factors like imaginations and expectations of justice, reason, ethics, and morals its integrative power and acceptance diminishes. The law because of being itself culturally dependent is not able to produce such integration factors by its own. For this reason, the European legal culture conceptionally seen has the task to provide for appropriate balancing between commonalities and differences.

Insofar, I would like to address only four promising approaches: the concept of the margin of appreciation (4.1), numerous conceivable strategies within in the EU (4.2), the internationalization of legal education (4.3), and the institutionalization of a legal culture dialogue (4.4).[1]

4.1. Margin of Appreciation

The first instrument providing the constructive handling of legal culture peculiarities is the legally acceptance of a margin of appreciation that we know from the jurisprudence of the ECtHR. The doctrine allows the Court to reconcile legal and

[1] On the following also see *S. Simon*, Rechtskulturelle Differenzen in Europa, in: Archiv des Öffentlichen Rechts 143 (2018), p. 597 ff.; *A. Voßkuhle*, Das Leitbild des „europäischen Juristen“, in: Rechtswissenschaft 1 (2010), p. 326 ff.; G. Helleringer / K. Purnhagen (eds.), Towards a European Legal Culture, 2014.

cultural differences in implementing the articles of the Convention by taking into account differences between domestic legal orders of the Member States. Within the margin national authorities are permitted to enjoy the freedom of applying the Convention in accordance with their own unique legal and cultural traditions.

The existence and scope of the doctrine is case-specific and therefore varies according to the circumstances of a case. But the decision as to whether or not a margin of appreciation is granted to the Member States remains a European one. Therefore, it is not a question of justifying unilateral national approaches, but a question of respecting regionally different solutions for controversial issues in which no uniform European conviction can be found.

However, as far as the European Union is concerned the transfer of the doctrine would cause the apprehension lowering the effectiveness of supranational law and therefore providing more disintegration than integration. Insofar other instruments of balancing must work.

4.2. Strategic possibilities within the EU

Within the European Union numerous approaches could be considered. Just to mention a few keywords:

Union politics could increase the way of directives instead of regulations. Opening-clauses and possibilities for an opt-out or derogation according to the treaties might be used more extensively. The principle of subsidiarity should gain real effect. The tendency to interpret European competences widely should be pushed back. The attitude of the CJEU apologetically justifying most of European legal acts need to be shifted towards a responsibility for balancing out national and supranational competences. The duty to respect national identity must be taken seriously, and similar more.

If at least some of these approaches were to work better than they do, this could indeed strengthen the general acceptance of the European Union, which is currently at stake. The integrationist currents that want to push integration further and further currently seem to push too much pressure on their opponents who support the intergovernmental concept, leading to tendencies to tear apart from the consensus of the Union. True to the EU's motto “Unity in Diversity”, national identities should not be lumped together, but differences in legal culture and national reservations should be recognized as inner values. They should be given space as long as this does not harm the idea of the Union.

But here too, the above-mentioned applies: It cannot be a question of allowing individual states to deviate arbitrarily from the *aquis communautaire*. The framework and the possibilities for deviations must be defined at European level. But this requires a consensus that deviations do not fundamentally damage the common legal culture. This is part of the task of intensifying the debate between the Member States on what constitutes Europe and where differences exist. If the result of

these consultations is an agreement on partial disagreements, this is already part of the solution. Even if Europe is more coherent than ever before in its history, it is not a question of building "one size fits all"; the finality of the Union remains open.

4.3. Internationalization of Legal Education

As a crucial factor to improve the common understanding of the various legal cultures the internationalization of the legal education throughout the European countries must be forced. Although it is difficult to obtain an in-depth knowledge of all the particularities of another legal system, it is highly recommendable to gain at least an overview of one foreign legal system. This does not only help to broaden one's horizon with foreign legal knowledge and, thus to increase one's capability to legally accompany cross-border life circumstances. By comparing the solutions offered by one's own legal system with the advantages and disadvantages of other legal systems, the understanding of one's own legal system also improves.

However, this goal requires a profound change in ordinary legal education. Knowledge of at least one foreign legal system should be made an indispensable prerequisite for acquiring a degree in law. This does not only serve scientific interests in comparative law, but at the same time meets the needs of practice. Acting in the European multi-level system, it becomes more and more likely that a lawyer, in his career, will be confronted with various legal systems. In particular through exchange programs, international summer schools, and long-term study visits abroad, students can acquire the necessary professional skills. And by doing so, the acquisition of foreign language skills and social competences in foreign surrounding also contributes to intercultural understanding.

4.4. Institutionalization of Legal Culture Dialogue

The proposal to establish permanent forums for jurisprudential dialogue and comparative legal culture research aims in the same direction. In order to sustainably promote awareness of European legal culture, both of its connecting factors and its stimulating diversity, it is important to provide an institutionalized framework of long-term nature for developing a mutual understanding of the cultural foundations of national legal orders. This may take place on a larger or smaller scale. Cooperation between courts and law enforcement agencies is just as desirable here as between universities, research institutes or associations of lawyers. These can be programs at a highly professional level or those embedded in academic education.

Here, new legal matters could offer a special opportunity. Modern developments in the globalized world are confronting all legal systems in European countries with the same new challenges. Examples may include climate change, internet and digitalization, migration, pandemics, terrorism or cybercrime. At the same time, however, the legal strategies solving these problems differ from state to state.

At this point, joint programs could be set up to analyze the cultural backgrounds of the different approaches in order to overcome inefficiencies in combating these essentially transnational challenges. To look for sector-specific common cultural legal areas does not contradict the idea of European legal culture but promotes it.

Conclusion

If we draw a conclusion from these brief considerations, then it must be emphasized first and foremost that remembering the European legal culture in the European legal area does not mean speaking out for a doctrinaire legal culture unit in Europe. The European legal culture does not prescribe unity, but discovers unity in diversity. It stores the common legal convictions, the idealistic and ethical-moral expectations of the reason and the justice of the law. They constitute the Europe of nations as a community of law and values in a fundamental sense and thus give it its own political-cultural identity in the midst of the cultural areas of the world. But this unifying character grows dialectically from the manifold. The European legal culture is formed by the contributions of national legal cultures, in the confrontation of their particularities, in a constant process of reflection and reception that creates approximations and preserves differences. European legal culture can therefore only ever be conceived in a plural and open manner, receptive to others and flexible to new ideas. But its canon gives us the compass on the way to a humane and wise shaping of the future of a multilateral Europe. In this sense we need the inter-culturally competent and sensitive “European lawyer”.

Georg Friedrich von Martens, der Positivismus und der Recueil

Vor mehr als 30 Jahren hat *Dietrich Rauschning* in dem von *Fritz Loos* herausgegebenen Sammelband „Rechtswissenschaft in Göttingen — Göttinger Juristen aus 250 Jahren" einen Beitrag zu *Georg Friedrich von Martens* verfasst.[1]

Es gibt viele Gründe, auf diesen Beitrag zurückzukommen. Einerseits war *von Martens* nach Leben, Wirken und Werk eine faszinierende und weithin prägende Persönlichkeit, sodass es naheliegt, dreißig Jahre und damit eine Menschengeneration später auf *Rauschnings*' Würdigung zurückzukommen.

Über *Rauschnings* offensichtliche persönliche Wertschätzung hinaus bietet zu einer Betrachtung aus heutiger Sicht Anlass, dass auch das Institut für Völkerrecht und Europarecht, dem *Dietrich Rauschning* seit 1970 verbunden ist, *von Martens* und sein Werk zu seinen Traditionslinien zählt. Das Institut hat sich zwar nach einzelnen Überlegungen nicht zu einer programmatischen Änderung des Institutsnamens verstanden, wie das Walter-Schücking-Institut an der Christian-Albrechts-Universität zu Kiel, dem *Dietrich Rauschning* und eine Generation später auch der Autor dieses Beitrages angehört haben, vollzogen hat. Das Göttinger Insitut pflegt aber sehr wohl die Tradition von *von Martens*. Die Gestaltung der Feier des 75-jährigen Bestehens bringt das deutlich zum Ausdruck. So steht die Festveranstaltung und die aus ihr hervorgegangene Veröffentlichung unter dem programmatisch gemeinten Titel: „Von der Diplomatie zum kodifizierten Völkerrecht"[2] die sich auf Martens, sein Denken und Wirken und sein Vermächtnis bezieht. Ihm galt auch der Festvortrag, für den *Martti Koskenniemi* als eminenter Kenner gewonnen werden konnte.[3]

Über die persönliche Wertschätzung und institutionelle Bezüge hinaus gibt aber der bemerkenswerte Aufsatz von *Rauschning* deswegen Anlass, weil neuere Perspektiven, Forschungsansätze und Fragen zu *Georg Friedrich von Martens* und seinem Werk führen und seine fortdauernde Relevanz und Aktualität unterstreichen.

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[1] *Dietrich Rauschning*, Georg Friedrich *von Martens* (1756—1821), Lehrer des praktischen europäischen Völkerrechts und der Diplomatie zu Göttingen, in: *Fritz Loos* (Hrsg.), Rechtswissenschaft in Göttingen. Göttinger Juristen aus 250 Jahren, Göttingen, 1987, Seite 123—145.

[2] *Christian Calliess, Georg Nolte, Peter-Tobias Stoll* (Hrsg.), Von der Diplomatie zum kodifizierten Völkerrecht. 75 Jahre Institut für Völkerrecht der Universität Göttingen (1930—2005) Köln, 2006.

[3] *Koskenniemi*, *Martti*. "Georg Friedrich von Martens (1756—1821) and the Origins of Modern International Law," in: Calliess/Nolte/Stoll (Hrsg.) (Fn. 2), S. 13—29. Im folgenden zitiert nach der später weiter ausgearbeiteten Fassung: *Koskenniemi*, *Martti*, Into Positivism: Georg Friedrich von Martens (1756—1821) and Modern International Law." Constellations 15, no. 2 (2008): 189—207.

1. Georg Friedrich von Martens: Person und Werk im Überblick

In seinem Beitrag schildert *Rauschning* den glänzenden Werdegang und das breite und nachklingende Wirken von *von Martens*. Dieser war akademischer Lehrer, Forscher und Praktiker zugleich. Daneben wirkte er als Dekan der Juristischen Fakultät — einer der Gründerfakultäten der Universität — und als Vizepräsident dieser Universität selbst, deren Präsidentschaft damals niemand anders als König Georg August selbst innehatte. *Rauschning* schildert als Studien- und Wirkungsstätte die damals noch junge Georgia Augusta als eine Universität, die sich schon einen internationalen Ruf erarbeitet hatte. Er hebt hervor, dass in dieser Universität im Geiste der Aufklärung die Staatswissenschaften breit vertreten waren und dass dort eine junge Elite für die deutschen und europäischen Höfe und Kanzleien ausgebildet wurde. Als Beleg sei hier auf die Widmung der 2. Auflage seines Lehrbuches verwiesen, die den Prinzen Großbritanniens galt, die namentlich aufgeführt werden.[1]

Rauschning beschreibt eingehend das glückliche Umfeld und die kollegiale Nähe zu dem akademischen Lehrer und späteren Kollegen *Johann Stephan Pütter* (1725—1807) und *Gottfried Achenwall* (1719—1772), in dem sich *von Martens* entfalten konnte. Die Fakultätskollegen hatten bereits eine vielbeachtete Schrift zum Natur- und Völkerrecht veröffentlicht.[2] Unter diesen günstigen Ausgangsbedingungen konnte sich Martens im öffentlichen Recht und Völkerrecht entfalten und eine öffentlich-rechtlich fundierte völkerrechtliche angelegte diplomatische Ausbildung entwickeln, die in Deutschland nicht ihresgleichen fand.[3]

Rauschning führt uns auch vor, wie eng das akademische Amt mit der Praxis verknüpft war. Er weist darauf hin, dass die Fakultät damals auch ein Spruchkörper war, in den *von Martens* bald aufgenommen wurde.[4]

Daneben wurde er 1789 zum „königlich-großbritannischen und kurfürstlich-hannoverschen Hof- und Kanzleirat“ ernannt[5] und bereits 1783 geadelt. Er war zu napoleonischen Zeiten für das Königreich Westfalen und danach für das Königreich Hannover ab 1814 Delegationsmitglied beim Wiener Kongress und danach Gesandter beim Bundestag in Frankfurt, wo er am 21. Februar 1821 starb.[6]

Eine ausführliche Würdigung hat *von Martens* früh in dem Werk von *Bailby* von 1904[7] und dann durch die Dissertationen von *Figge* (1914)[8] und *Habenicht* (1934)[1] erfahren.

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[1] Précis du droit des gens moderne de l'Europe: fondé sur les traités et l'usage, 2. Aufl. Göttingen 1821, Vorblatt.
[2] *Johann Stephan Pütter / Gottfried Achenwall*, Elementa Ivris Natvrae Additis Ivris Gentivm Evropaearvm Practici Primis Lineis, Göttingen: Bibliopolium Academicum, 1753.
[3] *Rauschning* (Fn. 1), S. 127 ff.
[4] *Rauschning* (Fn. 1), S. 126.
[5] *Rauschning* (Fn. 1), S. 127.
[6] *Rauschning* (Fn. 1), S. 144.
[7] *Henri Bailby*, Étude sur G.-F. de Martens, 1756—1822, Paris: V. Giard & E. Brière, 1904.
[8] *Robert Figge*, Georg Friedrich von Martens: Sein Leben und seine Werke. Ein Beitrag zur Geschichte der Völkerrechtswissenschaft, Hill, 1914.

Diese Lebensumstände sind wichtig, um das Werk *von Martens* zu würdigen, das auch nach heutigen Vorstellungen monumental ist. Eine Annäherung zum Werk gibt das WorldCat-Projekt — ein weltweites Netzwerk von Bibliotheken. Dort werden von und über Georg Friedrich *von Martens* von 1760 bis heute mehr als 1000 Arbeiten in fast 2200 Ausgaben in sechs Sprachen und in fast 7700 Bestandsnachweisen geführt. Eine große Verbreitung fand danach *von Martens*' Völkerrechtsbuch, das zwischen 1789 und 2016 in vier Sprachen herausgekommen ist und allein in der englischen Übersetzung in 100 Ausgaben in 727 angeschlossenen Bibliotheken geführt wird.[2]

Es beruht auf einer Vorläuferpublikation in lateinischer Sprache[3] und erschien dann erstmalig in Göttingen auf Französisch im Jahre 1789.[4] Eine deutsche Ausgabe folgte.[5] Eine englische Übersetzung erschien erstmalig 1829[6] und war durch eine Anfrage der amerikanischen Regierung veranlasst.[7]

Neben diversen weiteren Schriften zum ausländischen öffentlichen Recht[8] und Völkerrecht und den internationalen Beziehungen[9] und zu dem durchgängig in Lehre und Schrifttum gepflegten Seehandels- und Wechselrecht[10] ist *von Martens*

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[1] *Walter Habenicht*, Georg Friedrich von Martens: Eine Biografische und völkerrechtliche Studie, Göttingen, 1934.

[2] „Martens, G. F. de (Georg Friedrich) 1756—1821", WorldCat Identities. URL: http://www.worldcat.org/identities/lccn-n85370203/ (zuletzt besucht am 22.2.2021).

[3] Primae lineae ivris gentivm Evropaearvm practici in vsvm avditorivm advmbratae: accedit praecipvorvm qvorvndam foedervm ab anno 1748 inde percvssorvm index et repertorivm, Göttingen, 1785.

[4] Précis du droit des gens moderne de l'Europe fondé sur les traités et l'usage: Auquel on a joint la liste des principaux traités conclus depuis 1748 jusqu'à présent avec l'indication des ouvrages où ils se trouvent, 2 Bände, Göttingen, 1789.

[5] Einleitung in das positive Europäische Völkerrecht auf Verträge und Herkommen gegründet, Göttingen, 1796.

[6] The law of nations: being the science of international law, covenants, power, etc., founded upon the treaties and customs of modern nations in Europe, by G. F. von Martens translated from the French by William Cobbett, to which is added, a list of the principal treaties, declarations, and other public papers, from the year 1731 to 1738, by the author; and continued by the translator down to November, 1815, London 1829.

[7] *Koskenniemi* (Fn. 3), S. 194.

[8] Abriß des Staatsrechts der vornehmsten Europäischen Staaten. Erster Theil, erste Abtheilung — Dänemark, Schweden, Großbritannien, Göttingen, 1795.

[9] Versuch über Caper, feindliche Nehmungen und insonderheit Wiedernehmungen: nach den Gesetzen, Verträgen und Gebräuchen der Europäischen Seemächte, Göttingen: Dieterich, 1795; Grundriß einer diplomatischen Geschichte der europäischen Staatshändel und Friedensschlüsse seit dem Ende des 15. Jahrhunderts. Berlin, 1807.

[10] Versuch einer historischen Entwickelung des wahren Ursprungs des Wechselrechts: Ein Beytrag z. Geschichte d. Handels d. Mittelalters. Nebst e. Sammlung alter u. neuer bisher in Teutschland wenig bekannter insonderheit italien., span., portugis. u. engl. Wechselgesetze u. einiger anderen Urkunden mit nöthigen Uebersetzungen, Göttingen, Dieterich, 1797; Grundriß des Handelsrechts, insbesondere des Wechsel- und Seerechts, Göttingen, 1798.

vor allem auch als Erstherausgeber und Namensgeber einer monumentalen Sammlung völkerrechtlicher Dokumente in Erinnerung geblieben — den *Receuil de Traités* — auf die noch zurückzukommen ist (III.).

Es ist wichtig darauf hinzuweisen, dass alle diese Werke in engerem oder ferneren Zusammenhang mit *von Martens*‘ Göttinger Lehrtätigkeit standen. Ein besonders enger Zusammenhang bestand zwischen seinem Lehrbuch und der Dokumentensammlung und begründete seinen weltweiten und bis heute wirkenden Ruhm als „Vater des positiven Völkerrechts“. Es ist zutreffend, dass *von Martens*, dessen Lehrstuhl noch auf das „Naturrecht und Völkerrecht“[1] denominiert war, eine Vorstellung vom Völkerrecht hatte, die von den bisherigen naturrechtlichen Vorstellungen und Herleitungen löste und sich stattdessen auf die Anschauung der Völkerrechtspraxis gründeten, wie sie überwiegend in Verträgen zum Ausdruck kam. Nicht zuletzt deswegen bezeichnet er sein Lehrbuch als „Einleitung in das Positive Europäische Völkerrecht“, das „auf Verträge und Herkommen gegründet“ ist.“[2] Obwohl schon das Lehrbuch und auch spezielle für den Unterricht geschaffene Fallsammlungen[3] die diplomatische Praxis und die geltenden Verträge reichlich nachwiesen, war es am Ende wohl der Receuil, der als monumentale Sammlung der diplomatischen Praxis und der Verträge einen wuchtigen Beleg dafür bot, dass Staaten untereinander in Formen des Rechts verkehrten und dass sich dieses Recht aus sich heraus und eigenständig verstehen lässt, ohne dass es dafür naturalistischer Herleitungen bedarf.

2. Der „Vater des positiven Völkerrechts“

Es erscheint im Nachhinein als großer Glücksfall, dass es dem Göttinger Völkerrechtsinstitut gelungen ist, für die Feier seines 75-jährigen Bestehens und den Vortrag über Martens *Martti Koskenniemi* gewonnen zu haben. Das war schon deswegen ein großer Erfolg, weil *Koskenniemi* damals Mitglied der Völkerrechtskommission der Vereinten Nationen war und damit eines der höchsten Ämter innehatte, dass das organisierte und verfasste Völkerrecht der Vereinten Nationen zu vergeben hat. [4] Es war aber vor allem ein Glücksfall, weil *Koskenniemi* kurz zuvor mit seiner Studie *The Gentle Civilizer of Nations: The Rise and Fall of Interna-*

[1] *Rauschning* (Fn. 1), S. 127.

[2] G.F. v. Martens, Einleitung in das positive Europäische Völkerrecht auf Verträge und Herkommen gegründet, Göttingen, 1796.

[3] G. F. v. Martens, Erzählungen merkwürdiger Fälle des neueren Europäischen Völkerrechts in einer practischen Sammlung von Staatsschriften aller Art in teutscher und französischer Sprache: Nebst einem Anhange von Gesetzen und Verordnungen, welche in einzelnen Europäischen Staaten über die Vorrechte auswärtiger Gesandten ergangen sind, Göttingen, 1802.

[4] Dort hat er vor allem den wegweisenden Bericht zur Fragmentierung des Völkerrechts verantwortet: Fragmentation Of International Law: Difficulties Arising From The Diversification And Expansion Of International Law, Report of the Study Group of the International Law Commission, Finalized by *Martti Koskenniemi*, UN Doc. A/CN.4/L.682, 13. April 2006.

tional Law 1870—1960 weltweites Aufsehen erregt hatte [1] und sein Werk *From Apology to Utopia* kurz vor der Veröffentlichung stand.[2] Aufeinander aufbauend stehen beide Werke für eine Wende des völkerrechtlichen Denkens, die sich von dem Fortschrittsglauben verabschiedet, die das Völkerrecht und seine Deutung von 1870 bis vielleicht zum Millennium angetrieben hatte. Er gewinnt den Abstand, den er für seinen Paradigmenwechsel braucht dadurch, dass er insbesondere im *Gentle Civilizer of Nations* die Großen des Fachs Revue passieren lässt und dabei auch *Georg Friedrich von Martens* würdigt.[3]

A. Positivismus und Naturrechtslehre

Für den Göttinger Festvortrag vertieft er die Betrachtung und spricht vom Begründer des positiven Völkerrechts".[4] Insbesondere versteht er das positive Völkerrecht nicht mehr pejorativ:

> *In conventional histories, Martens is uniformly presented as a leading "positivist" and a turning point from the era of natural law to "positivism" in international law. I have no quarrel with this. But I do wish to nuance our understanding of "positivism" and to claim that instead of being ideologically or methodologically opposed to natural law, positivism emerged as a logical development of natural law in order to answer those practical questions that arose once a naturalist worldview had consolidated as part of educated European common sense. In the 20 th century, "positivism" has received a uniformly negative connotation to mean a particularly "narrow" and "formalistic" type of legal doctrine, uncritical deference to sovereign power, nonchalance about humanitarian ideals. ... But if any naturalism is always pregnant with a "positivist" view of what it might mean in practice, then it cannot be exonerated by such critiques. Far from being opposed to each other, their relationship is better seen as that between framework and routine. If natural law provides an overall image of the world, positivism labours with its details. To this extent the old jurisprudential controversy especially lively in international law — between naturalism and positivism is beside the point.*[5]

Er charakterisiert am Ende den Ansatz von *von Martens* in der Tradition des deutschen öffentlichen Rechts:

> *This is German public law, too, in its formalistic and its sociological mode; the awareness of the gulf between what is and what ought to be and the feel of an imperative sense that to get to the latter one must first know, and master, the former.*[6]

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[1] *Koskenniemi*, *Martti*. The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870—1960. Cambridge, 2001.
[2] *Koskenniemi*, *Martti*. From Apology to Utopia: The Structure of International Legal Argument. Cambridge, 2006.
[3] *Koskenniemi*, *Martti*. The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870—1960. Cambridge, 2001 mit Bezügen zu Martens u. a.: S. 19 f., 31, 112 f.
[4] So auch schon *Ferdinand von Martitz*, "Der Recueil Martens. Ein Beitrag zur Literärgeschichte des Völkerrechts." Archiv des öffentlichen Rechts 40, Nr. 1 (1921) 22—72, S. 22.
[5] *Koskenniemi* (Fn. 3), S. 190.
[6] *Koskenniemi* (Fn. 3), S. 203.

B. Martens und Kant

In dieser Sicht erschließt er auch das Verhältnis zu *Kant*, zu dem Martens in der 2. Auflage seines Lehrbuches selbst schreibt:

> *...il était reservé à Kant de frayer une route nouvelle pour mieux régir le limites du* droit *et de la* morale*, et pour deployer l'insuffisance des simples principes du droit naturel et la necessité qu'il y a pour les états même d'en venir à des arrangements positifs capables à remédier aux inconveniens de l'état naturel.*[1]

Offensichtlich teilt er die kantianische Unterscheidung zwischen Recht und Moral. *Kants* Vorstellung von einem Weltbürgertum hätte *von Martens* allerdings vermutlich dem Reich der Philosophie zugeschlagen.[2] Gelegentlich werden auch heute wieder diese beiden Positionen als Zwiegespräch inszeniert gegenübergestellt.[3]

C. Mehr als ein Namensvetter: Friedrich Fromhold Martens

In der aktuellen Völkerrechtswissenschaft verbindet sich allerdings mit dem Namen „Martens" oft eher der fast hundert Jahre später geborene estnisch-russische Kollege und Namensvetter *Friedrich Fromhold von Martens* (*Fyodor Fyodorovich Martens*, 1845—1909)[4], Erfinder der „Martensschen Klausel"[5], der das Andenken an Georg Friedrich geradezu verschattet hat. Gelegentlich sind beide auch verwechselt worden[6]. *Friedrich Fromhold von Martens* lebte und wirkte in anderen Zeiten und wird oft zu Recht als prominente Figur des Haager Völkerrechts und als Teilnehmer an den beiden Haager Konferenzen geschildert. Ähnlich wie Georg Friedrich verfasste auch er ein Lehrbuch — in dem er auf seinen Namensvetter Bezug nahm, den er offenbar schätzte.[7] Ebenso gab er für das russische Außenministerium eine Sammlung von Verträgen heraus, die sich auf russische Verträge beschränkte.[8]

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[1] Précis du Droit des Gens Moderne de l'Europe: Fondé sur les Traités et l'Usage, Göttingen: Dieterich, 1801, S. 18.
[2] *Koskenniemi* (Fn. 3), S. 197.
[3] Christoph Brendel. "Debating Cosmopolitan Law. An Interview With Immanuel Kant and Georg Friedrich von Martens (Part I+II)." Völkerrechtsblog, 3 August 2015, doi: 10.17176/20170920-120831.
[4] *Lauri Mälksoo*, Friedrich Fromhold von Martens (Fyodor Fyodorovich Martens) (1845—1909), *Bardo Fassbender / Anne Peters* (eds), The Oxford Handbook of the History of International Law, online edition, 2012.
[5] *Jochen von Bernstorff*, „Martens Clause", in: *Anne Peters* (ed.), Max Planck Encyclopedia of Public International Law online, 2009.
[6] *Miloš Vec*, Grundrechte der Staaten. Die Tradierung des Natur- und Völkerrechts der Aufklärung, Rechtsgeschichte Rg 18 (2011), S. 66—94, 74 f.
[7] Siehe *Vladimir Vasilevich Pustogarov*, Our Martens. F. F. Martens: International Lawyer and Architect of Peace, übersetzt von W. E. Butler, Haag, London, Boston 2000, S.82.
[8] Recueil des Traités et Conventions conclus par La Russie avec les Puissances Étrangères, St. Petersburg, 1974—1909, ca. 20 Bände.

Der berühmte estnische Schriftsteller *Jaan Kross* hat *Friedrich Fromhold* einen Roman gewidmet,[1] in dem dieser sich fiktiv seinem fast hundert Jahre älteren Göttinger Namensvetter anverwandelt.[2]

Trotz der ganz unterschiedlichen Umstände und Zeiten, in denen Georg Friedrich und Friedrich Fromhold lebten, sind die Parallelen doch deutlich. Der Biograph von Friedrich Fromhold, *Pustogarov*, überschreibt seine Schrift mit „*Unser* Martens".[3] Und von der verdienstvollen Vertragssammlung von Friedrich Fromhold wird angemerkt, dass sie auf eine Anregung zurückgeht, einen eigenen „Martens" zu schaffen. Hier wird deutlich, dass beide Namensvetter einen so prominenten Ruf hatten, dass sie in den Sog nationaler Aneignung gerieten.

D. Martens und die Geschichte der Völkerrechtswissenschaft

Einige Beachtung findet *Georg Friedrich von Martens* im Kontext eines Forschungsvorhabens, das zwischen 2007—2012 in dem größeren Forschungsverbund der Goethe-Universität Frankfurt am Main mit dem Namen „Normative Orders" unter der Leitung von *Michael Stolleis* am Frankfurter Max-Planck-Institut für Rechtsgeschichte zu dem Thema „das Völkerrecht und seine Wissenschaft, 1789—1914" durchgeführt wurde. Aus ihm ist ein bemerkenswerter Sammelband hervorgegangen,[4] in dem die Herausgeber, *Luigi Nuzzo* und *Milos Vec*, in ihrem Vorwort *Georg Friedrich von Martens* als „founder of the modern ‚positivist' tradition of the discipline" sehen und sich dabei auf *Koskenniemi* beziehen.[5] Die hier verfolgte Perspektive der Verwissenschaftlichung, als einer Disziplinengeschichte des Völkerrechts ist neu und originell.[6]

Sie wird von *Vec* in einem gesonderten Beitrag fortgeführt, der sich mit den „Grundrechten der Staaten" beschäftigt und dabei nachzeichnet, wie sich die Vorstellung von den Rechten, die man heute im weitesten Sinne mit der Souveränität verbindet über die Zeit herausgebildet und wie sie gerechtfertigt, gedeutet und konzeptualisiert worden sind.[7] Dabei zeichnet *Vec* anschaulich nach, wie sich die Vorstellungen über solche Grundrechte der Staaten in deutlicher Parallele zu der Entwicklung und Deutung von Individualrechten herausgebildet haben.[8]

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[1] *Jaan Kross*, Professor Martens' Departure, Translated from the Estonian by Anselm Hollo. N. Y. ; London, 1994.

[2] Siehe *Christian Calliess*, "Das Institut für Völkerrecht der Universität Göttingen — Eine kleine (auch literarische) Zeitreise von Herbert Kraus zu Georg Friedrich Martens," in: *ders./Nolte/*Stoll (Hrsg.) (Fn. 2), 1—7 (2).

[3] Siehe oben, Fn. 38. Hervorhebung hinzugefügt.

[4] *Luigi Nuzzo/ Miloš Vec* (Eds), Constructing International law — The Birth of a Discipline, Studien zur europäischen Rechtsgeschichte 273, Frankfurt/M., 2012.

[5] AaO, S. x.

[6] Luigi Nuzzo, "History, Science and Christianity. International Law and Savigny's Paradigm," in *ders./*Vec (Eds)(Fn. 43)S. 25—50 (27).

[7] Vec, Miloš. "Grundrechte der Staaten. Die Tradierung des Natur- und Völkerrechts der Aufklärung", Rechtsgeschichte — Legal History, 18 (2011), S. 66—94.

[8] Vec, a. a. O., S. 66 ff.

Das fügt sich gut zu der Beobachtung von *Koskenniemi*,[1] dass sich die Völkerrechtswissenschaft in Deutschland aus dem (nationalen) öffentlichen Recht und seiner wissenschaftlichen Betrachtung entwickelt hat. Dazu passt auch die enge Verbindung *von Martens* zu *Pütter* als Lehrer und Kollege und seine Lehrtätigkeit im öffentlichen Recht[2] und sein Interesse am ausländischen öffentlichen Recht, die man heute als Rechtsvergleichung öffentlich-rechtlicher Art bezeichnen würde.[3]

Aufschlussreich ist diese Sicht auf die Grundrechte der Staaten im Kontext der Herausbildung einer Völkerrechtswissenschaft aber auch, weil an dieser Stelle ein Brückenschlag zwischen dem Naturrecht und dem „positiven Völkerrecht" sichtbar wird. Es lässt sich nämlich zeigen, dass die Kategorisierungen eines „Grundrechts der Staaten" als Naturrecht auch bei „Positivisten" wie *von Martens* wieder aufscheinen.[4]

3. Der Recueil

Obwohl das Lehrbuch eine größere Verbreitung erfahren hat, wird Martens heute doch überwiegend zunächst mit dem nach ihm benannten *Receuil des Traités* in Verbindung gebracht.[5] Das ist biografisch gesehen zutreffend, weil die Arbeit daran sein ganzes wissenschaftliches Leben und seine Veröffentlichungstätigkeit begleitet hat. Der erste *Receuil* hat mit den ersten sieben Bänden von 1791—1801 zehn Jahre in Anspruch genommen und es dauerte noch einmal sechs Jahre, bis die vier Zusatzbände abgeschlossen waren. Vier Jahre vor seinem Tod hat er 1817 dann den auf 16 Bände angelegten *Nouveau Recueil* in Angriff genommen, der bekanntlich erst 1842, also ein Vierteljahrhundert später abgeschlossen war und an dem schon zu seinen Lebzeiten als Nachfolger andere Herausgeber mitgewirkt haben. Eine dritte Ausgabe wurde von 1909 bis 1975 zunächst von *Heinrich Triepel* in Kiel herausgegeben. Ab Band 38, veröffentlicht im Jahre 1941, wurde der Zusatz „in Berlin" hinzugefügt, weil die Herausgabe inzwischen auf das 1924 gegründete Berliner Institut für ausländisches öffentliches Recht und Völkerrecht, ab 1935 ein Kaiser-Wilhelm-Institut und nach dem Krieg das Max-Planck-Institut übergegangen war. *Steiner* hat als Direktor der Bibliothek des Max-Planck-Instituts das Vorhaben bis 1975 abgeschlossen.

Der *Recueil* war ein Vorhaben, das in seinen drei Ausgaben einen Berichtszeitraum von 1761 bis 1945 umspannte und 1791 mit der Ausgabe der ersten drei Bände begann und 1975 mit der Veröffentlichung einer letzten *Table générale* abgeschlossen wurde.[6] Mit mehr als 100 Bänden enthält der *Recueil* über völker-

[1] Siehe oben, Fn. 3, S. 192.
[2] AaO, S. 193.
[3] AaO, S. 194.
[4] Vec, a. a. O., 74 f.
[5] Siehe die Beschreibung und bibliographische Übersicht von *Peter Macalister-Smith* und *Joachim Schwietzke*: "Jus Gentium and Globally-Conceived General Treaty Collections." Jus Gentium: J. Int'l Legal Hist. 1 (2016): 235—316 und die Besprechung von Ferdinand von Martitz (Fn. 29), die man als Geschichte der Herausgabe lesen kann.
[6] Macalister-Smith / Schwietzke (Fn. 53), S. 247 f.

rechtliche Verträge im eigentlichen Sinne hinaus auch andere Dokumente, wie Verlautbarungen von internationalen Konferenzen und Schiedssprüche und ist damit aus heutiger Sicht eher eine Dokumentensammlung. Er ist chronologisch gegliedert und auf eine kontinuierliche Fortführung angelegt. Als Quellen benutzt das Werk mit sorgfältigem — oft auch mehrfachem Nachweis — amtliche Sammlungen von Staatskanzleien und zu einem erheblichen Anteil auch andere Dokumentensammlungen, die es zu jener Zeit schon gab. Es also nicht so, dass *von Martens* der erste gewesen wäre, der sich an einer solchen Textsammlung versuchte. Es hatte Vorläufer gegeben und der *Recueil* weist in seinem Untertitel sogar ausdrücklich darauf hin, dass er sich auf „amtliche Quellen, andere Vertragssammlungen und die bekanntesten Autoren" bezogen hat. So heißt es im Untertitel des Werkes:

> *Tiré des copies publiées par autorité, des meilleures collections particulières des traités, et des auteurs les plus estimés.*

Man kann sogar sagen, dass diese Sammlungen in einem engen Bezug zueinander standen."[1] Das gilt insbesondere für die Sammlung von *Wenck*,[2] deren Aktualisierung Martens offenbar bei seinen eignen Veröffentlichungsplänen im Blick hatte.[3] Ebenso gilt dies für die Sammlung von *Dumont*[4]. Hier weist Martens in seinem Ergänzungsband zu der ersten Ausgabe schon im Untertitel darauf hin, dass der Band Quellen enthalte, die bei *Dumont* nicht enthalten seien. Entsprechend heißt es im Untertitel:

> *Précédé de traités du XVIIIème siècle antérieurs à cette époque et qui ne se trouvent pas dans le Corps universel diplomatique de Mrs. Dumont et Rousset et autres recueils généraux de traités.*[5]

Schließlich sind die ab 1828 erschienenen *British and Foreign State Papers Series*[6] zu nennen, die für den Recueil zunächst eine wichtige Quelle waren und ihn dann wohl später an Bedeutung abgelöst haben. Als amtliche Quelle gingen die *Papers* der späteren Vertragssammlung von Völkerbund und den Vereinten Nationen voraus, mit denen die durch den *Receuil* geprägte Literaturgattung akademisch oder privat veröffentlichter Dokumentensammlungen mit Anspruch auf Vollständigkeit und Periodizität wohl endgültig zu Ende ging.

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[1] *Von Martens*, Recueil des Principaux Traités, Preface (1791), I, p. iii.
[2] *Friedrich August Wilhelm Wenck*, Codex iuris gentium recentissimi, e tabulariorum exemplorumque fide dignorum monumentis compositus, Leipzig, 1781.
[3] *Macalister-Smith / Schwietzke* (Fn. 53), S. 246:„Martens doubtlessly had not expected that Wenck would bring his Codex iuris gentium quickly up to date" und *von Martitz* (Fn. 29), S. 25.
[4] *Jean Dumont de Carelscroon*, Corps universel diplomatique du droit des gens, Amsterdam und Den Haag, 1726, siehe *Macalister-Smith / Schwietzke* (Fn. 53), S. 270 f.
[5] Siehe *Macalister-Smith / Schwietzke* (Fn. 53), S. 280.
[6] Siehe *Macalister-Smith / Schwietzke* (Fn. 53), S. 247, 249 und 288 ff.

A. Von der Einzelausgabe zur Jahrhundertaufgabe

Betrachtet man dieses epochale Werk, das im Ganzen nach Berichtszeitraum und Bearbeitungsdauer jeweils fast 200 Jahre und mehr als 100 Bände umspannt, so werden eine Reihe von Entwicklungslinien deutlich und auch Fragen aufgeworfen. So fällt auf, dass aus dem ursprünglich wohl nur auf eine bestimmte Zeit und einen bestimmten Berichtszeitraum angelegte Unternehmen irgendwann ein auf Dauerhaftigkeit und Periodizität angelegtes Vorhaben geworden ist. Ursprünglich hatte *von Martens* wohl im Auge, die Sammlungen nach ihren drei Bänden und vier Ergänzungsbänden als vollständig anzusehen, was darin zum Ausdruck kommt, dass er den letzten Ergänzungsband als „letzten" Band bezeichnete.[1] Vielleicht war es die freundliche Aufnahme des Werkes[2] und sicher die Entwicklung der internationalen Beziehungen mit ständig neuen Dokumenten, die zu einem gewissen Zeitpunkt dazu führten, das Werk als ein solches in ständiger Fortsetzung zu betrachten. Außerdem wurden offenbar Überlegungen, das Werk nach Berichtszeitraum oder Gegenstand zu begrenzen, nie wirklich weiterverfolgt.

Es ist zwar richtig, dass das Werk im Zusammenhang mit *von Martens*' Wirken als Rechtslehrer in einer Art Göttinger Diplomatenschule seinen Anfang genommen hat. Allerdings wäre es wohl verfehlt, es in seinen Anfängen als eine Art Sammlung ausgewählter Texte für den Unterricht im engeren Sinne anzusehen, wie sie heute geläufig ist. Es lag wahrscheinlich gerade in dem engen Zusammenhang von Wissenschaft und Praxis und von Unterricht und Expertengespräch, dass schon die erste Ausgabe einen gewissen Grad von Vollständigkeit anstrebte und neben den Studierenden in den Semesterveranstaltungen auch den praktischen juristischen Dienst in der Rechtsberatung, in zahlreichen Kanzleien und im Auswärtigen Dienst ansprechen sollte. Abgesehen davon wäre eine Auswahl wohl auch kaum einfach möglich gewesen. Für eine kategorisierende Auswahl etwa nach „universeller" oder „konstitutioneller" Bedeutung bot das damals kleinteilige Völkerrecht kaum eine Grundlage. Es ist insoweit bezeichnend, dass Martens den damals öffentlich gewordenen Entwurf des *Abbé Grégoire* zu einer *Déclaration du droit des gens* ausführlich diskutierte, aber ablehnte und für undurchführbar hielt.[3]

B. Vorbedingungen eines Jahrhundertwerkes

Mit der Hinwendung zu einem kontinuierlichen Werk und dem damit verbundenen Anwachsen des Umfangs stellen sich weitere Fragen, von denen viele noch unbeantwortet sind.

1. Verlag, Bibliotheken und Leser

Das beginnt schon bei der Frage, wie die Herausgabe der Sammlung personell zu organisieren und zu unterstützen war, wie die Strukturen geschaffen waren, in denen die ständig anwachsende Zahl von Bänden verlegerisch betreut und gedruckt

[1] *Von Martitz* (Fn. 29), S. 25.
[2] Ibid.
[3] *Koskenniemi* (Fn. 3), S. 199.

und vertrieben werden konnte. Hier wäre ein Blick in die offenbar erhaltenen Archive des Verlags von *Johann Christian Dieterich* weiterführend. Ebenso fragt man sich, wer im Laufe der Zeit die ständig umfangreicher werdende und teurere Sammlung erworben und wer in welcher Form dazu Zugang hatte und wie die Sammlung genutzt und zitiert worden ist. Ebenso wäre aufschlussreich, mit welchen Erwägungen der Verlag Dieterich die Herausgabe des Werkes ursprünglich übernommen hat und weswegen es später zu Verlagswechseln kam.

2. Personale Kontinuität und akademische Berufung

Interessant ist auch die Wandlung der Herausgeberschaft, die Martens schon in der ersten Ausgabe nach der alleinigen Betreuung der ersten Bände in den Zusatzbänden mit seinem Neffen *Karl von Martens* (1798—1862) geteilt hat. Betrachtet man kursorisch die weitere Entwicklung der Herausgeberschaft, war zunächst weiterhin *Karl von Martens* tätig[1] der den fünften Band dieser zweiten Ausgabe herausbrachte. Für die weiteren Bände konnten der Göttinger Kollege *Saalfeld* (Bände 6—9) und *Murhard* (Bände 10—16) offenbar ein nahestehender Gleichgesinnter — nach heutigem Verständnis wohl vermögenden Privatgelehrter — für eine Mitarbeit gewonnen werden. Wiederum später haben nacheinander verschiedene Professoren des Völkerrechts und ganz am Ende das Max-Planck-Institut mit seinem Bibliotheksdirektor die Herausgabe übernommen.

Das wirft ein Bild auf die sich wandelnde Struktur der „Expertenkultur“[2] im Völkerrecht und ihre zunehmende Verwissenschaftlichung und Professionalisierung. Es spricht viel dafür, dass die Sammlung, Kategorisierung und Herausgabe völkerrechtlicher Quellen mit der Zeit als legitime Aufgabe akademischer Professuren und entsprechender Institute angesehen wurde. Man kann vermuten, dass sich so der „Positivismus“ gleichsam in der „Expertenkultur“ und damit in den *epistemic communities* widerspiegelt und die Sammlung und Edition von Dokumenten Teil der gemeinschaftsbildenden Wertschätzung geworden ist.

C. Sammlungen als konstituierender Apparat der jungen Völkerrechtswissenschaft

Eine weitere Entwicklungslinie betrifft das Völkerrecht und seine Wissenschaft selbst. Das Aufkommen von Vertragssammlungen ist für diesen Bereich des Rechts und seine wissenschaftliche Betrachtung von großer Bedeutung und hat mit dem Bericht zu seiner endgültigen Form und zur Herausbildung eines Referenzwerkes geführt.

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[1] *Rauschning* (Fn. 1), S. 139.

[2] Siehe zu diesem Begriff etwa: *Marian Füssel / Frank Rexroth / Inga Schürmann* (Hrsg), Praktiken und Räume des Wissens: Expertenkulturen in Geschichte und Gegenwart, Göttingen, 2019.

1. Vom privilegierten Quellenzugang zum gemeinsamen Apparat

Das Aufkommen von Vertragssammlungen stellt für die junge völkerrechtliche Wissenschaft, aber ebenso für die Praxis zweifelsohne einen Wendepunkt dar, weil nunmehr die wissenschaftliche Betrachtung und Rechtspraxis nicht mehr auf die jeweils eigene Recherche und den mehr oder minder privilegierten Zugang zu Kanzleien und Archiven angewiesen war, sondern solche Sammlungen konsultieren konnte, die zunehmend leistungsfähiger wurden. Im wissenschaftlichen Diskurs und in der Praxis verlor damit der privilegierte Zugang an Bedeutung und wurde durch einen gemeinsamen Apparat ersetzt, der für die weitere Entwicklung der Fachdisziplin prägend war. Es ist noch weitgehend unerforscht, für das Verständnis *von Martens* Werk und die Völkerrechtsgeschichte aber höchst bedeutsam, wie die junge Disziplin der Völkerrechtswissenschaft in den Sammlungen und in ihrer Anschauung einen gemeinsamen, Gemeinschaft stiftenden und Identität vermittelnden Apparat fand, an den sich die weitere Entwicklung der Methode anknüpfen ließ.

2. Der Receuil als Standardreferenz

In diesem Rahmen liegt die Bedeutung des *Receuil* darin, dass er sich unter verschiedenen in- und ausländischen Konkurrenzprojekten als eine Art Referenz oder Standard durchgesetzt hat. Vermutlich war dafür entscheidend, dass Martens es mit seinen frühen Erfolgen für die Sammlung verstanden hat, die Kontinuität und Vollständigkeit, entgegen seinen am Anfang noch sehr begrenzten Plänen dadurch zu sichern, dass er mit dem wachsenden Erfolg der Sammlung andere zu einer Mitarbeit gewinnen konnte.

Diese „Standardisierung“ zugunsten der Sammlung *von Martens* wurde vermutlich auch durch das Interesse der wachsenden Völkerrechtswissenschaft begünstigt, eine eindeutige Referenz und einen gemeinsamen Apparat nutzen zu können. Mit der Zeit wurde insofern der Verweis auf die Sammlung zu einer zunächst legitimen und später sogar erwarteten Quellenangabe, was die Referenzqualität des Werkes unterstreicht.

3. Akademische Leistung und wachsender hoheitlicher Einfluss

Es fügt sich in dieses Bild, dass ab Mitte des 19. Jahrhunderts mit den englischen *Papers* zunächst das Vereinte Königreich als Regierung eine Sammlung herausgab.

Damit traten hoheitliche Institutionen aus ihrer begrenzten Rolle als bereitwillige Quellenlieferanten[1] heraus und übernahmen eine Herausgeberrolle. Erstaunlich früh werden damit internationale Ansätze sichtbar. Das wird an dem am Ende ergebnislosen Versuch deutlich, eine Vertragssammlung durch das *Institut de Droit*

[1] Siehe *von Martitz* (Fn. 29), S. 45.

International mit einem Sekretariat in Bern herauszugeben.[1] Das Institut ist eine der frühen und bedeutenden internationalen wissenschaftlichen Vereinigungen, die sich der Entwicklung des Völkerrechts verschrieben hatten und wegen ihrer Expertise und Sachautorität in der Völkerrechtspolitik eine große Rolle spielen und nicht selten beratende Aufgaben für Staaten und internationale Organisationen wahrgenommen haben. Trotz der vorgesehenen Beteiligung einer Reihe von Staaten an dem Projekt könnte man dieses Vorhaben wegen des privaten Charakters des Instituts jedenfalls nach außen noch als „privat" und „akademisch" einordnen. Aber es folgte rasch die Vertragssammlung des Völkerbundes, die später in die Sammlung der Vereinten Nationen überging.[2]

Damit ging die Sammlung, der Nachweis und die Veröffentlichung völkerrechtlicher Verträge als hoheitliche Aufgabe auf internationale Organisationen über, die eine entsprechende Depositarfunktion ausüben. Für das Völkerrecht war damit ein in dieser Form selten gewürdigter, wichtiger Schritt getan: mit der Verfügbarkeit der Verträge hatte das Völkerrecht als normative Ordnung einen Fundus von Texten gefunden, der — ganz in einem positivistischen Sinne — sein Wesen ausmachte. Völkerrechtliche Verträge gingen nunmehr nicht mehr nur ihre einzelnen Vertragsparteien an: sie wurden zugleich als Teilelemente einer gemeinsamen Ordnung gesehen und sichtbar gemacht. Letztlich wurde damit eine Art internationaler öffentlicher Raum geschaffen.

Weniger deutlich und kaum je tiefergehend erwogen sind freilich die Auswirkungen, den dieser Übergang von Aufgabe und Verantwortung auf die Völkerrechtswissenschaft als Disziplin hatte. Es ist aber kaum zu übersehen, dass die Quellenkunde, Systematisierung und Herausgabe von Dokumenten in den einschlägigen epistemischen Gemeinschaften heute deutlich weniger Wertschätzung genießt, als dies in früheren Zeiten der Fall gewesen ist. Unzweifelhaft hatte damit die Disziplin die Aufgabe der Herausgabe akademischer Sammlungen als Arbeitsfeld mitsamt den daran geknüpften Fertigkeiten und der daraus erwachsenen „epistemischen" und auch exklusiven Verfügung über das Wissen verloren. Daran schließt sich die Frage an, ob das zu einem anderen Blick der Disziplin auf ihren Gegenstand, zu anderen Fragen und zur Entwicklung neuer Methoden und am Ende auch zu einem anderen Selbstbild geführt hat.

4. Ausblick

Dietrich Rauschning hat vor 30 Jahren Georg Friedrich *von Martens* in einem Sammelband gewürdigt, der herausragenden Persönlichkeiten der Juristischen Fakultät der Georg-August-Universität Göttingen galt. Das geschah zu einer Zeit,

[1] *Von Martitz* (Fn. 29), S. 51: geplant war eine *Union Internationale Pour la Publication des Traités entre États*, die einen *Recueil International des Traités* herausgeben sollte.

[2] League of Nations Treaty Series (5 July 1920—3 October 1948). URL: https://treaties.un.org/Pages/Content. aspx?path=DB/LoNOnline/pageIntro_en.xml (zuletzt besucht am 20.02. 2020); United Nations Treaty Series. URL: https://treaties.un.org/Pages/Home.aspx?clang=_en (zuletzt besucht am 20.2.2020). Siehe auch *Koskenniemi* (Fn. 3), S. 195.

in der sich das Völkerrecht rasch entwickelte und doch noch jedenfalls als Projektion kaum hinterfragt als *gentle civilizer of nations* galt, wie es bei *Koskenniemi* heißt. Trotz aller auch schon damals sichtbar werdender Defizite wurden die Vereinten Nationen oft als Ausgangspunkt für eine Entwicklung hin zu einer verfassten Weltgemeinschaft gesehen, in deren Zentrum man sich die *international bill of rights* — die Menschenrechte — gut vorstellen konnte. Das schien in eine Zukunft zu weisen, in der die Postulate der französischen Revolution, wie sie Martens einst in der zweiten Ausgabe seines Lehrbuches angesprochen hatte, für die ganze Welt verwirklicht sein könnten. Es ist kein Zufall, dass *Koskenniemi* in seiner epochemachenden Abrechnung mit diesem Fortschrittsglauben unter dem Titel *from apology to utopia* auf die Reihe der Gelehrten des Völkerrechts rekurriert, die er in *gentle civilizer of nations* zuvor hatte Revue passieren lassen und zu denen auch mit einer Einzelstudie *Georg Friedrich von Martens* gehört. Kritik, Wandel und Neubeginn rufen nach einer Vergewisserung in der Geschichte und bei deren Deutern. So ist das Werk Martens' auch heute vielleicht aktueller als es zu den Zeiten von *Rauschnings* Beitrag war. Hier stellen sich weitere aufschlussreiche Fragen, die auch mit weiter fortgeschrittenen Ansätzen und Methoden der Geschichtswissenschaft zu neuer Forschung und Klärung einladen. Dafür hat *Dietrich Rauschning*, der wahrlich eine große Zeitspanne der Geschichte der internationalen Beziehungen und des Völkerrechts und seiner Wissenschaft überblickt, mit seinem Beitrag eine wichtige Grundlage gelegt.

To Professor, Dr., Dr h. c. Dietrich Rauschning, my academic supervisor and a teacher, whom I will be always grateful both for professional skills, knowledge, and wisdom, he generously shared with me, and for his friendly support which was ubiquitous and full of the warmth of his very big heart.

Compatibility of Mass Surveillance with the Convention on the Protection of Human Rights and Fundamental Freedoms[1]

This Chapter represents a legal commentary on one of the milestone decisions of the European Court of Human Rights (ECHR) related to electronic mass surveillance — the judgment on *Big Brother Watch and Others v. United Kingdom,* where the Court expressly acknowledged that mass surveillance *per se* does not violate the Convention on the Protection of Human Rights and Fundamental Freedoms. The author reveals whether this approach follows from the previous jurisprudence of the ECHR, how plausible the argumentation of this court is and how legalization for the bulk interception of data relates to the stance taken by the Court of Justice of the European Union (CJEU).

1. Introduction

'Mass surveillance *per se* does not violate the Convention on the Protection of Human Rights and Fundamental Freedoms'. This citation is not taken from the *Weber and Saravia v. Germany*[2] judgment issued by the European Court of Human Rights (ECHR) a decade ago, just at the dawn of the development of technical capacities for the interception, storage and processing of 'big data'. Instead, it is a crosscutting theme of two judgments of this court's Chambers rendered in 2018: *Big Brother Watch and Others v. UK*[3] and *Centrum för Rättvisa v. Sweden*[4]. These judgments have been referred to the Grand Chamber, which confirmed a previous stance[5]. The approach of this court deserves critique from many perspectives.

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[2] ECHR, *Weber and Saravia v. Germany*, Application no. 54934/00, Decision on Admissibility of 29 June 2006.

[3] ECHR, *Big Brother Watch and Others v. The United Kingdom*, Applications nos. 58170/13, 62322/14 and 24960/15, Judgment of 13 September 2018.

[4] European Court of Human Rights (ECHR), *Centrum för Rättvisa v. Sweden*, Application no. 35252/08, Judgment of 19 June 2018.

[5] ECHR, Big Brother Watch and Others v. The United Kingdom, Applications nos 58170/13, 62322/14 and 24960/15, Judgment of 25 May 2021 (hereinafter: Big Brother Watch case (2021)).

This Chapter reveals whether this approach follows from the previous jurisprudence of the ECHR, how plausible the argumentation of this court is and how legalization for the bulk interception of data relates to the stance taken by the Court of Justice of the European Union (CJEU). The Chapter discloses what precise content in terms of the protection of the right to respect for private life lies behind the main findings on the compatibility of bulk interception *per se* with the Convention on the Protection of Human Rights and Fundamental Freedoms (EConvHR), namely, in which part this court has refused to examine the measures undertaken by states in compliance with Article 8 and in which part it has strengthened (or relaxed) already inferred criteria. Finally, taking into account the current position of the ECHR at this crossroads, the article dwells on causes that influenced the decisions of its Chambers.

The ECHR judgments in both cases, although examples of regional human rights jurisprudence, because of their binding character and epistemic force, serve an important brick in the universal legal framework of human rights protection as a stance of one of the most progressive international human rights bodies and as a pattern for 47 state parties to the EConvHR. Despite being a minimum standard of human rights protection, the approach taken by this court can be predicted to be used by states as 'permission' for mass surveillance, granted at the international level and will be even accompanied with a critique that a determined threshold is too high and time consuming, to be easily reached.

The judgments on the Centrum för Rättvisa and Big Brother Watch because of their importance urge the reevaluation of the legitimacy of the approach to one of the principle issues of mass surveillance against its determinacy, coherence and adherence[1]. Such an analysis, presupposing a search for a change of paradigm, seeks to reveal whether this approach follows from the jurisprudence of the ECHR, how plausible its argumentation is and how this approach relates to the stance taken by the CJEU, which until that time was dealing with questions of the protection of the right to respect for private life and personal data using the general paths initially paved by the ECHR. An evaluation of the impact of the acknowledgment by the ECHR of mass surveillance per se to be compatible with the Convention can occur only on the basis of an inquiry disclosing what precise content, in terms of the protection of the right to respect for private life, lies behind this finding, namely, in which part this court has refused to examine measures undertaken by the states on compliance with Article 8 and in which part it has strengthened (or relaxed) already inferred criteria. Finally, the current position of the ECHR at this crossroads requires investigating the causes that made the ECHR to acknowledge the permissibility of bulk interception of data per se. This article, being one of the commentaries on the ECHR jurisprudence on mass surveillance cases, constitutes an attempt to meet all these aims.

[1] Franck, Fairness in International Law and Institutions (1998).

2. The emergence of a progressive European approach to the protection of privacy in the age of mass surveillance

A few years ago, thanks to the activity the ECHR and the CJEU, which started to steadily require from states party to the Council of Europe or the European Union, a thorough compliance with the right to respect for private life and the protection of personal data, a sufficiently progressive approach to the maintenance of such values as human rights, the rule of law and democracy against a backdrop of the growing desire of states to apply technology under the guise of national security, became visible. An overview of this practice shows how much the stance taken by the ECHR Chambers in Centrum för Rättvisa and Big Brother Watch not only deviates, but reverses the progressive approach which had already started to emerge.

2.1. The steady development of the ECHR case-law

Judgments on Centrum för Rättvisa and Big Brother Watch were not the first decisions delivered after the Weber and Saravia v. Germany case, where the ECHR was seized with the issue of mass surveillance as a measure adopted in the fight against terrorism and state security. In order to track this practice and analyze the extent to which the facts of the two cases considered in 2018 differ from previous decisions, it is necessary to shed light on what is understood by 'mass surveillance'. This is not a legal term, but is used to characterize the scope of data collection. Thus, 'mass surveillance' can be used in criminal law — e. g. while investigating crimes or searching for missing persons — and in intelligence gathering — protecting state security. However, the borderline between these paradigms is conjectural for the fight against terrorism. 'Mass surveillance' is not exhausted by general or bulk measures, when all communications are subject to interception, and can be represented even by targeted measures, provided that the scope of persons, whose data are collected is not sufficiently determined or limited[1].'Mass surveillance' can be targeted at foreigners only, or catch communications with the participation of foreigners, or be indiscriminate. Finally, 'mass surveillance' can be either governmental or corporate.

The decision on admissibility in Weber and Saravia v. Germany of 2006 can be taken as a reference point for the formation of the ECHR's approach to mass surveillance. In this case the court examined the domestic legislation on 'strategic monitoring', allowing the intercept of communications in order to 'identify and avert serious dangers facing the Federal Republic of Germany, such as an armed attack on its territory or the commission of international terrorist attacks and certain other serious offences', and thereby assessed the use of surveillance as a general

[1] Venice Commission, Report of 2015 at para 64.

measure[1]. Although the ECHR did not find any grounds why this 'strategic surveillance' could be regarded as violating Article 8 of the EConvHR and rejected the application as ill-founded, it has accumulated criteria, which should be applied to examine the predictability of the legal basis governing these secret measures[2].

Conclusions made in Weber and Saravia v. Germany were confirmed in 2008 in Liberty and Others v. the United Kingdom, where the ECHR was confronted with a situation connected with the mass interception of telephone, facsimile and email communications, carried on microwave radio between the two British Telecom's radio stations by the Ministry of Defense in the 1990s[3]. In this judgment, the court expressly stressed, that it 'does not consider that there is any ground to apply different principles concerning the accessibility and clarity of the rules governing the interception of individual communications, on the one hand, and more general programs of surveillance, on the other'[4].

In Weber and Saravia and in Liberty and Others, the ECHR did not require the existence of suspicion as a criterion, allowing the widest possible interception of data. This criterion had been used by the court only in respect of secret surveillance in criminal law[5]. The situation changed on the December 4, 2015 when the ECHR rendered its judgment on the Roman Zakharov v. Russia case, where it analyzed Russian legislation empowering law-enforcement bodies and intelligence agencies to wiretap phone communications.

Being the chair of a regional branch of the Glasnost Defense Foundation, a watchdog NGO monitoring the state of media freedom, the applicant in this case supposed his calls to be intercepted, as the providers of the mobile services had installed equipment allowing different governmental agencies to wiretap all telephone communications[6]. Insofar as Russian law on operational-search activities includes 'obtaining information about events or activities endangering the national, military, economic or ecological security of the Russian Federation'[7] as grounds for the application of wiretapping, the court did not limit the examination to a criminal law paradigm connected with the investigation of specific crimes. Albeit acknowledging that for the protection of national security, 'predictability' does not reach far enough to require the existence of legal norms enlisting in details of

[1] Weber and Saravia v. Germany at para 4.
[2] Ibid. at para 95.
[3] ECHR, Liberty and Others v. the United Kingdom, Application no. 58243/00, Judgment of 1 July 2008, at para 5.
[4] Ibid. at para 63.
[5] See ECHR: Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria, Application no. 62540/00, Judgment of 28 June 2007, at paras 79, 80; *Iordachi and Others v. Moldova*, Application no. 25198/02, Judgment of 10 February 2009, at para 51.
[6] ECHR, *Roman Zakharov v. Russia*, Application no. 47143/06, Judgment [GC] of 4 December 2015, at para 10.
[7] Article 7 (2) of the Operational-Search Activities Act of 12 August 1995 №144-FZ, (1995) 33 Sobranie zakonodatelstva 3349.

which behavior can provoke secret surveillance, the ECHR stressed, that such a formulation — and it should be noted that its content had not been disclosed in any legal acts — gives the government 'an almost unlimited degree of discretion', that opens wide possibilities for abuse[1].

Dealing with the question of the authorization of wiretapping, the ECHR came out for the applicability of 'reasonable suspicion' against a person concerned not only in respect of planning, committing or having committed criminal acts, but also in respect of other acts, which may give rise to surveillance, directly pointing out at 'acts endangering national security'[2]. In the Roman Zakharov v. Russia case it was revealed that the sphere of court's scrutiny was restricted: without having access to the evidence, Russian courts were not able to check, whether there was a 'sufficient factual basis' for reasonable suspicion of the individual[3]. As a result, the ECHR criticized the practice where courts granted interception authorizations without mentioning a specific person or telephone number, extending these measures to all telephone communications in the area where a criminal offense has been committed[4].

A slightly different but comparable approach to the legitimacy of the restriction of the right to respect for private life permeates the subsequent judgment on Szabó and Vissy v. Hungary[5]. In this case the ECHR, acting on the application of staff members of an opposition NGO, who suspected they were subjected to surveillance, examined the Hungarian legislation in part, in which it allowed the use of this measure to collect the information for the purposes of the 'prevention of terrorist acts or in the interests of Hungary's national security'[6]. Although domestic legislation scrutinized by the court did not explicitly provide for the applicability of mass surveillance, ECHR in this decision dwelt upon this situation, finding that individuals against whom an interception can be applied were allowed to be defined in terms of a 'range of persons', which can be interpreted as meaning anybody, subsequently extending surveillance measures to a large number of citizens[7]. The use of this legal technique made it sufficient for the national authorities to appeal to the reasons, justifying the necessity of this measure without the individualization of its targets. This aspect of Hungarian law has been heavily criticized by the ECHR as not corresponding to the principle of 'strict necessity', which requires that the identification of a range of persons subjected to surveillance should be based on an 'individual suspicion', provided that there are sufficient supporting materials[8].

'Secret surveillance can be found as being in compliance with the Convention… only if it is strictly necessary… for the safeguarding of democratic institu-

[1] Roman Zakharov v. Russia at para 246—248.
[2] Ibid. at para 260.
[3] Ibid. at paras 261—262.
[4] Ibid. at para 265.
[5] See Pásztor 'Secret Intelligence Gathering — a Low Threshold Still Too High to Reach' (2017) 1 ELTE Law Journal 99 at 104—112.
[6] ECHR, Szabó and Vissy v. Hungary, Application no. 37138/14, Judgment of 12 January 2016, at paras 7, 10—11.
[7] Ibid. at para 67.
[8] Ibid. at para 71.

tions and, moreover, if it is strictly necessary, as a particular consideration, for the obtaining of vital intelligence in an individual operation', and required from the domestic authorities to verify whether sufficient reasons for intercepting a specific individual's communications existed in each case[1]. Among the guarantees, which should be respected during interception operations, the ECHR included judicial authorization, adding that only in exceptional circumstances it can be permissible on the authority of executive bodies, subject to a subsequent court review[2]. The subsequent notification of persons targeted by an interception was highlighted by the ECHR as another safeguard against the abuse of power[3]. Such strict ramifications of secret surveillance for the purposes of obtaining the information necessary for the protection of national security brought the possibility of using the bulk interception of data almost to zero.

The emergence of the strict attitude of the ECHR to interference into the private life in mass surveillance can be traced to the critique expressed by Judge de Albuquerque in his Concurring Opinion where he contested the argumentation used in the Szabó and Vissy judgment as being not tough enough due to the lowering of the threshold for the applicable standard to the level of an 'individual', instead of a 'reasonable suspicion', as it was done by the Grand Chamber in the Roman Zakharov case[4].

Thus, notwithstanding the slight decrease of the requirements of suspicion, at the beginning of 2016 the ECHR remained a proponent of the permissibility of surveillance, which is targeted and subject to a number of safeguards against possible state abuses. A steady development of the jurisprudence of this court inspired confidence that the direction of dealing with cases connected with a bulk interception of data was generally determined for the Council of Europe members[5]. This confidence, as the Chamber judgments on Centrum för Rättvisa and Big Brother Watch cases have shown, was just an illusion.

2.2. The promise of CJEU jurisprudence

The crystallization of the CJEU position in respect of the bulk interception of data began in 2014, when it heard the Digital Rights Ireland case[6]. The court was seized with the issue of the validity of Directive 2006/24 in light of the Charter of Funda-

[1] ECHR, Szabó and Vissy v. Hungary, Application no. 37138/14, Judgment of 12 January 2016, at para 73.
[2] Ibid. at paras 77, 80, 81.
[3] Ibid. at para 86—87.
[4] Szabó and Vissy v. Hungary: Concurring Opinion of Judge Pinto de Albuquerque at para 18—20.
[5] See: Golubok 'Roman Zakharov v. Russia: Big Brother Under Control?' 2015 3—4 (8) Journal for Constitutionalism and Human Rights 20 at 25.
[6] Court of Justice (Grand Chamber), Requests for a preliminary ruling from the High Court of Ireland and the Verfassungsgerichtshof — Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources, Minister for Justice, Equality and Law Reform, The Commissioner of the Garda Síochána, Ireland and the *Attorney General, and Kärntner Landesregierung, Michael Seitlinger, Christof Tschohl and Others*, Joined cases C-293/12 and C-594/12, Judgment of 8 April 2014. (Digital Rights Ireland).

mental Rights of the European Union, which required telephone communications service providers to retain traffic and location data relating to those providers. The court ruled this Directive invalid by having qualified measures imposed thereby to be a disproportional interference into the rights of respect for private life and of the protection of personal data (Art. 7, 8 and 52 (1) of the Charter)[1]. The key premises at the heart of this decision were that, however fundamental the aim of combatting crime may be, it does not by itself justify general measures on the interception of data, and that derogations and limitations in relation to the protection of personal data should be 'strictly necessary'[2]. Moreover, citing the case-law of the ECHR, the CJEU built on the necessity for clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards making it possible for the targeted persons to effectively protect their rights[3].

Based on these principles, the CJEU, first of all, criticized the general scope of the interception of data: the Directive extended it over 'all persons and all means of electronic communication as well as all traffic data without any differentiation, limitation or exception being made in the light of the objective of fighting against serious crime',[4] or preventing threats to public security[5]. As pointed by the court, this legal act neither offered an objective criterion, or substantive or procedural conditions, limiting the access of national authorities to the retained information and subjecting this access to judicial or independent administrative review, nor required to set such limits from the Member States[6]. Finally, the data retention period, being set between 6 and 24 months was not made dependent upon the categories of data and any objective criteria ensuring that they are limited to what is strictly necessary[7].

Hereafter, these conclusions were repeated and developed in the Tele2 Sverige AB and Watson case (Tele2), the judgment on which was issued by the CJEU on December 21, 2016. The subject of consideration in this case was prejudicial requests of two courts on the interpretation of Art. 15 (1) of Directive 2002/58, and, in particular, on the extent to which findings made in Digital Rights Ireland are applicable to the national legislation implementing Directive 2006/24, which was declared void in the latter judgment. The Swedish Administrative Court of Appeal addressed the CJEU in the framework of the proceedings in which 'Tele2 Sverige AB', a communications service provider contested an order on the bulk intercep-

[1] Court of Justice (Grand Chamber), Requests for a preliminary ruling from the High Court of Ireland and the Verfassungsgerichtshof — Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources, Minister for Justice, Equality and Law Reform, The Commissioner of the Garda Síochána, Ireland and the *Attorney General, and Kärntner Landesregierung, Michael Seitlinger, Christof Tschohl and Others*, Joined cases C-293/12 and C-594/12, Judgment of 8 April 2014. (Digital Rights Ireland) at paras 69, 71.
[2] Ibid. at paras 51, 52.
[3] Ibid. at para 54.
[4] Ibid. at para 57.
[5] Ibid. at para 59.
[6] Ibid. at paras 60—62.
[7] Ibid. at paras 63—64.

tion of traffic and location data of its subscribers and users[1]. The second request was brought by the Court of Appeal of England and Wales, seized with the issue of conformity with EU law of Section 1 of the British legislation concerning data retention.[2] After having repeated all the tenets formulated in the Digital Rights Ireland case, the CJEU concretized that they did not ban use of the interception of metadata as a preventive measure, provided that this retention is of a targeted, not mass, character, and subject to a number of safeguards[3]. The interception should, moreover, correspond to the purpose of fighting serious crimes and be subordinated to the principle of strict necessity[4]. In particular, national legislation should be based on 'objective evidence, which makes it possible to identify a public whose data are likely to reveal a link, at least an indirect one, with serious criminal offenses, and to contribute in one way or another to fighting serious crime or preventing a serious risk to public security'[5]. The principle of 'strict necessity', according to the CJEU, ought to be respected at the stage of the regulation of the substantial and procedural conditions under which national authorities can get access to the intercepted data[6]. Among these requirements were highlighted a prior review from the courts or independent administrative bodies; the retention of the intercepted data within the CJEU; the irreversible destruction of the data at the end of the data retention period and the notification of affected persons as soon as that notification is no longer liable to jeopardize the investigations[7]. Finally, the CJEU proscribed member-states to set up a review of the compliance of the national legal regime to the level of protection guaranteed by EU law[8].

Without doubt, this judgment is a piece of unprecedentedly firm resistance to any attempt to lower the threshold of the protection of right for respect of private life and personal data in the face of new technological opportunities. It is conspicuous, how close it echoes the ECHR judgment on Roman Zakharov v. Russia. Alongside this, an answer to the question of whether the judgment on Tele2 sent the national legislation legitimizing bulk interception on a 'knock-out'[9], remains unclear.

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[1] Court of Justice (Grand Chamber), Requests for a preliminary ruling under Article 267 TFEU, made by the Kammarrätten i Stockholm (Administrative Court of Appeal, Stockholm, Sweden) and the Court of Appeal (England & Wales) (Civil Division) (United Kingdom) — Tele2 Sverige AB v. Post- och telestyrelsen, and Secretary of State for the Home Department v. Tom Watson, Peter Brice, Geoffrey Lewis, Joined Cases C-203/15 and C-698/15, Judgment of 21 December 2016 at para 2 (*Tele2*).

[2] Ibid.

[3] Ibid. at para 108.

[4] Ibid.

[5] Ibid. at para 111.

[6] Ibid. at paras 114, 116—119.

[7] Ibid. at paras 120—123.

[8] Ibid. at para 123.

[9] Verbruggen, Royer, Severijns, 'Reconsidering the Blanket-Data-Retention-Taboo, for Human Rights' Sake?' *European Law Blog* (1 October 2018). URL: http://europeanlawblog.eu/author/frankverbruggen/ (accessed 13.03.2020).

The point is that both prejudicial requests subject to consideration in Tele2 related to data interception in the framework of 'fighting crime'[1] and did not touch upon such aims as the maintenance of defense or the protection of state security. However, mass surveillance is applied, as a rule, not in a criminal law model. In the text of Directive 2002/58 'activities concerning public security, defense, State security (including the economic well-being of the State when the activities relate to State security matters) and the activities of the State in areas of criminal law' are expressly excluded from its scope of application[2]. Conversely, Article 15 (1) of this Directive permits member states to adopt legislative measures limiting the scope of both the rights and obligations for the protection of 'national security (i. e. state security), defense, public security, and the prevention, investigation, detection and prosecution of criminal offenses or of the unauthorized use of the electronic communication system'[3]. Not only parties to the proceedings, but also states disagreed between themselves in respect of the applicability of this Directive even in the case of the introduction of measures to fight crime[4].

Addressing this issue, the CJEU found that, should these types of activity fall outside the scope of the application of Directive 2002/58, the provision envisaged in Article 15 (1) would be 'deprived of any purpose'[5]. What must be highlighted is that the court did not confine this conclusion to the measures aimed at fighting crime by pointing out that the Directive authorizes states to introduce limitations, only provided that all requirements set up in this legal act are met[6]. Hence, the CJEU confirmed the applicability of Directive 2002/58 to measures undertaken for the protection of public security, defense and state security.

Despite the fact that the Tele2 judgment is dedicated only to those measures that are taken in the course of fighting crime, the text implies the general stance of the CJEU in respect of mass surveillance undertaken for the other purposes. By stressing that data interception should be limited to persons suspected of having planned or committed or otherwise been involved in a serious crime, the court formulated — as a matter of exception — that 'in particular situations, where for example vital national security, defense or public security interests are threatened by terrorist activities, access to the data of other persons might also be granted where there is objective evidence from which it can be deduced that that data might, in a specific case, make an effective contribution to combating such activities'[7]. Of

[1] *Tele2*. at para 62 et seq.
[2] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 Concerning the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector, Article 1 (3), OJ L 201, 31.7.2002 at 37—47. URL: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32002L005 (accessed 13.03.2020).
[3] Ibid.
[4] *Tele2*. at paras 63, 65.
[5] Ibid. at para 73.
[6] Ibid.
[7] Ibid. at para 119.

course, it should be borne in mind that this conclusion is obiter dictum, but, taking into account, that the judgment on Tele2 case was issued by the Grand Chamber and remains until now, the first and only statement of the CJEU on bulk interception for the purposes of national and state security and public safety, one cannot exclude that it draws a vector for the consideration of the cases belonging to this field in future. Among the key elements of this position are the extraordinary character of such measures, the necessity of objective evidence and a link to a specific case.

Nonetheless, this judgment left a number of principled questions unanswered. Firstly, it is not clear, how far the notion of 'other persons' used by the CJEU in the above quotation can be stretched: can it mean 'all' or does the linkage to objective evidence the mention of a specific case and the highlighting of the 'effectiveness' of the contribution that surveillance might have in fighting of terror, exclude this scenario? Secondly, the statement of the CJEU relates to access to data, not to interception per se, and the part of the judgment dedicated to interception deals exclusively with a criminal law model. Expressing its opinion on the parameters of access to data and allowing an extension of the circle of persons to 'others', the court could not have overlooked that these data are somehow intercepted, but which requirements should guide this interception remains outside the Tele2 judgment. The CJEU only acknowledged that Directive 2002/58 is applicable to both the interception and access to the data and construed its provisions in light of the Digital Rights Ireland judgment. However, the latter decision was also limited to the consideration of measures to fight crime. Therefore, it remained a matter of conjecture, how strict the CJEU will treat the issue of the interception of data for the purposes of the protection of state security and public safety.

On October 6, 2020, the Grand Chamber of the CJEU delivered judgments on the requests for preliminary rulings in two cases — the Privacy International v. Secretary of State for Foreign and Commonwealth Affairs and Others and the La Quadrature du Net and Others v. Premier Ministre and Others — where it found that the general and indiscriminate retention and transmission of traffic data by providers of electronic communications services to a state authority violated EU law.[1] Therefore, what remained intriguing was whether the Strasbourg court will

[1] Court of the European Union (the Grand Chamber), Privacy International v Secretary of State for Foreign and Commonwealth Affairs and Others, Request for a preliminary ruling from the Investigatory Powers Tribunal — London, Judgment, 6 October 2020. URL: http://curia.europa.eu/juris/document/document.jsf?text=&docid=232083&pageIndex=0 &doclang=EN&mode=lst&dir=&occ=first&part=1&cid=14724754 (accessed 01.11.2020) (hereinafter: Privacy International case); Court of the European Union (the Grand Chamber), La Quadrature du Net and Others v. Premier ministre and Others, Requests for a preliminary ruling from the Conseil d'État (Council of State, France) and from the Cour constitutionnelle (Constitutional Court, Belgium), Judgment, 6 October 2020. URL: http://curia.europa.eu/juris/document/document.jsf?docid=232084&doclang=en (accessed 01.11.2020) (hereinafter: *La Quadrature du Net case*).

correct the previous deviation and thereby confirm the illegality of general mass surveillance for the members of the Council of Europe or whether the 'red light' will apply only within the EU.

3. Judgment of the ECHR on the Big Brother Watch case: time to dispel the illusions?

The judgment of the ECHR Chamber on the Big Brother Watch case was intended to play a central role in the jurisprudence of the court well before its pronouncement on September 13, 2018. This process was strategic for a number of human rights NGOs, which thought to persuade the ECHR to strengthen its approach to the evaluation of mass surveillance[1]. In this case, arising from the applications lodged by NGOs, companies and individuals, the ECHR was seized with the question of whether three aspects of the UK legislation on mass surveillance are compatible with the EConvHR: first, the bulk interception of communications under Section 8(4) of the Regulation of Investigatory Powers Act 2000; secondly, intelligence sharing; and, thirdly, the acquisition of communications data by providers of telecommunication services.[2] The applicants — not without the incentive of the 'Snowden factor' — aimed to make the ECHR take into account the qualitative leap in the technical capacities of states allowing the interception, storage and processing of big data.

Expectations from the Big Brother Watch case were met, at least, in the sense that the ECHR Chamber rendered a very detailed judgment, which along with paving a direction for the consideration of similar cases in the future, is designed to provide the governments of the Members of the Council of Europe with a 'road map' for the legal regulation of the mass interception of data. Being incomparable in detail, this decision has overshadowed the judgment of the ECHR on the Centrum för Rättvisa v. Sweden case[3], which was adopted three months earlier and was the first to deviate from the emerging progressive approach to the evaluation of mass surveillance.

In the Big Brother Watch case, answering the question whether mass surveillance is lawful in the light of the Convention, the ECHR Chamber repeated its gambit tested in the Centrum för Rättvisa v. Sweden by refusing to follow the line defined in the cases on Roman Zakharov and Sabo and Vissy cases, and coming back to the approach articulated in the Weber and Saravia case almost a decade earlier. A key approach, used in both the Big Brother Watch and the Centrum för Rättvisa cases, is that states enjoy a wide margin of appreciation at the introduction of the interception regime for the protection of national security, but the discretion afforded to them in operating such a regime is narrower and should cor-

[1] See *Big Brother Watch v. UK,* Appendix at 186.
[2] *Big Brother Watch v. UK* at para 269.
[3] Centrum för Rättvisa v. Sweden at para 112.

respond to the criteria to minimize the risk of the misuse of power.[1] Thus, the lengthy text of the judgment presents a rigorous elaboration of the content and applicability of these criteria to different types and stages of activities on bulk interception, including co-operation with the intelligence agencies of foreign states.

Substantially, the approach of the Chamber to the compatibility of mass surveillance with the EConvHR, and, in particular, with Article 8, is based on the combination of an acknowledgement that the bulk interception regime is permissible per se (which is embodied in the exemption of a number of key parameters of these measures from the test of 'lawfulness', 'necessity in a democratic society' and 'proportionality') and some specificities of the applicability of this test in respect of other elements of this regime. The Court distinguishes four stages of mass surveillance technology: the interception of data, the filtering, the selection by search criteria, and the examination by the analysts, — and, at least, promises that the discretion given to states at the first stage will be accompanied by control at other stages.[2] Reading this judgment gives, however, a slightly different picture of what was exactly excluded from the examination and how complete the court's scrutiny of the remaining parameters was.

3.1. The parameters of mass surveillance exempted from an 'ordinary' Article 8 test

As a consequence of the acknowledgment of the lawfulness of mass surveillance per se, the ECHR has used multiple parameters of mass surveillance from the applicability of the well-established test under Article 8 of the Convention. It is noteworthy, that the Chamber has explicitly marked not all, but only two of these exceptions: it disabled the 'reasonable suspicion' criterion in respect of persons whose data are intercepted and the consequent notification of surveillance[3].

A refusal of the applicability of the 'reasonable suspicion' standard should be read as a refusal of the application of any kind of suspicion and, thereby, an obvious deviation from the ECHR's own position, formulated in the cases of Roman Zakharov and Szabo and Vissy. By exempting the requirement of ex post facto notification, the court has even relaxed the approach taken in the first case concerning mass surveillance — Weber and Saravia[4]. Before 2018, the ECHR had, on numerous occasions, reiterated that the 'subsequent notification of surveillance measures is inextricably linked to the effectiveness of remedies before the courts and, hence, to the existence of effective safeguards against the abuse of monitoring powers, since there is in principle little scope for recourse to the courts by the individual concerned unless the latter is advised of the measures taken without his or her

[1] *Big Brother Watch v. UK* at paras 315, 329; *Centrum för Rättvisa v. Sweden* at para 113.
[2] *Big Brother Watch v. UK* at paras 315, 329.
[3] Ibid. at para 317.
[4] *Weber and Saravia v. Germany* at para 135.

knowledge and thus able to challenge their legality retrospectively'; and that a notification should be carried out as soon as it does not jeopardize the purpose of these measures.[1] Although the court did not assume the absolute character of this requirement in Weber and Saravia, it was far from renouncing it.

As another exception, the Chamber ceased to consider as imperative the requirement for prior judicial authorization of bulk interception. By doing so, the court noted that this decision does not follow from the non-compatibility of this requirement with a conclusion on lawfulness of mass surveillance per se.[2] In respect of the bulk interception of data, the ECHR Chamber found prior judicial authorization to be no more than 'best practice'.[3] This stance is tinged with mischief. The Chamber based its conclusion on the argument that a judicial decision authorizing such an operation does not guarantee the absence of abuse. However, this line of reasoning suffers from inconsistency when the ECHR appeals to the cases where national courts gave prior authorizations, but because of the limited scope of the judicial scrutiny, they could not evaluate the proportionality and necessity of this measure. This reduced the authorization procedure to a mere formality, which was thereby not enough to prevent abuse[4]. On these grounds, the Chamber is right in its conclusion that judicial authorization by itself 'can neither be necessary nor sufficient to ensure compliance with Article 8 of the Convention'[5]. Though this inference must be appraised against the conclusions the ECHR drew from it. Instead of interpreting the requirement for prior judicial authorization as including an examination of its "quality", the court decided to refuse from its application altogether[6]. The Chamber, following an opinion of the Venice Commission, concludes that 'independent oversight may be able to compensate for an absence of judicial authorization'[7].

It seems that this is a conclusion about the compatibility of mass surveillance per se with the Convention — no matter that the court was trying to disavow it — which truly backs this argumentation. The requirement for judicial authorization for interception operations, if not carried out as a formality, is conjunct with the necessity for the courts to use a standard of review that would not be possible without an examination of the evidence. The absence or lack of evidence (as it is an absolutely blanket character of suspicion — if not its complete absence — which

[1] *Weber and Saravia v. Germany* at para 135; *Szabó and Vissy v. Hungary* at para 86.
[2] *Big Brother Watch v. UK* at para 317.
[3] Ibid. at paras 318—320.
[4] *Roman Zakharov v Russia* at para 319; ECHR: *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, Application no. 62540/00, Judgment of 28 June 2007 at para 85; *Mustafa Sezgin Tanrikulu v. Turkey*, Application no. 27473/06, Judgment of 18 July 2017 at para 64.
[5] *Big Brother Watch v. UK* at para 320.
[6] See *Big Brother Watch v. UK*, Partly Concurring, Partly Dissenting Opinion of Judge Koskelo, Joined by Judge Turkovic at para 25.
[7] Ibid. at para 318.

usually forms the basis for mass surveillance), restricted judicial access to the evidence because of its 'below the water-line' secrecy status, multiplied by the volume and number of cases are the key characteristics of bulk interception.

In the examination of the 'predictability' of national legislation, the Chamber also made other withdrawals. In relation to the nature of offenses that might serve as the basis for the initiation of bulk interception, the court pointed out that the accent of control should be shifted to the selection for the examination stage[1]. How much the ECHR weakened this requirement becomes apparent when it admits that the general reference in the applicable legal acts about threats to national security is sufficient enough. The mere fact that this term can embrace almost everything was evaluated by the court as its strength, not a weakness[2]. As a matter of argument, the Chamber appealed to the fact that the term 'national security' 'was frequently employed in both national and international legislation and constituted one of the legitimate aims to which Article 8 § 2 referred' and added that its flexibility allows states to address threats which are not predictable[3]. Neither was the court strict in respect of the determination of the scope of offences in warrants or certificates for concrete interception operations. The judgment contains examples of such formulations, including 'material providing intelligence on terrorism […] including, but not limited to, terrorist organizations, terrorists, active sympathizers, attack planning, fund-raising'[4]. The Chamber confined itself to a remark that the use of 'more specific terms' 'would be highly desirable', thus finding this level of generalization acceptable[5]. The striking readiness of the court to settle for this may be dictated by the previous decision on the widest possible discretion of states on the launch of bulk interception.

In respect of the ability to define categories of people against whom the interception measures will be applied, which is another part of the foreseeability test, the Chamber dryly noted, 'it is clear that this category is wide'[6]. A distinction between 'external communications' (where one of the parties is known to be outside the British Isles) and 'internal communications' and the exemption of the latter from bulk interception[7] were not an attempt to restrict and differentiate the scope of the applicability of these measure, and appeared in the argumentation of the ECHR only because such an approach had been used in the legislation of the UK.

The court further implied that intelligence agencies are proceeding according to the principle of self-restriction and, thus, 'while anyone could potentially have their communications intercepted under the section 8(4) regime, it is clear that the intelligence services are neither intercepting everyone's communications, nor exercis-

[1] *Big Brother Watch v. UK* at para 329.
[2] Ibid. at paras 333, 332.
[3] Ibid. at para 333.
[4] Ibid. at paras 342, 156.
[5] Ibid. at para 342.
[6] Ibid. at para 336.
[7] Ibid. at paras 336, 337.

ing an unfettered discretion to intercept whatever communications they wish'.[1] Describing the limits of this discretion, the Chamber pointed at the proportionality of measures for bulk interception[2]. Taking into account a stance of this court in respect of formulation of the aim, it is clear that determining the categories of persons whose data is liable to be intercepted is not required at all.

The comprehensive character of mass surveillance also predetermined that the ECHR refused to use a rule previously inferred in the case of Weber and Saravia[3], according to which the selectors and search criteria applicable to the intercepted data should be listed in the warrant ordering the operation. Recalling the Liberty case, the court noted that it would 'unnecessarily undermine and limit the operation of the warrant and be in any event entirely unrealistic'[4], and arguing that instead of such disclosure, these selectors and search criteria should be subject to independent oversight[5]. The absence of such oversight served in the Big Brother Watch case as grounds for the Chamber to find a violation of Article 8[6].

Hence, using the logical course of acknowledging that mass surveillance per se does not violate the Convention, the ECHR Chamber restricted the application of the right to respect for private life to an even larger extent than in 2006 in the Weber and Saravia case.

3.2. The examined parameters of mass surveillance: severity or mercy?

Turning to the parameters of mass surveillance examined by the ECHR, in the Big Brother Watch case the Chamber did not suggest any new criteria. Firstly, the judgment was based on six requirements, set in the Weber and Saravia case, except first two — the nature of offences that might give rise to an interception order and a definition of the categories of people liable to have their communications intercepted[7] — which were abandoned as a consequence of the compatibility of mass surveillance per se with the Convention. The remaining four requirements included: a limit on the duration of the interception; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which intercepted data may or must be erased or destroyed[8]. Secondly, the judgment added requirements inferred in the Roman Zakharov v. Russia case: the supervision of secret surveillance measures, the use of notification mechanisms and the existence of the remedies provided for by national law[9].

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[1] *Big Brother Watch v. UK* at para 337.
[2] Ibid.
[3] *Weber and Saravia v. Germany* at para 32.
[4] *Big Brother Watch v. UK* at para 340.
[5] Ibid. at para 340.
[6] Ibid. at paras 347, 387.
[7] Ibid. at paras 424, 423.
[8] Ibid.
[9] *Roman Zakharov v. Russia* at para 238.

The first novelty of the Big Brother Watch judgment, which many commentators hastened to call a victory in the fight for privacy[1], consisted in the enlargement of the ambit of information, the interception of which can constitute interference in the right to respect for private life from the content of communications to their metadata[2]. The Chamber justified its position in respect to metadata arguing that 'the patterns that will emerge could be capable of painting an intimate picture of a person through the mapping of social networks, location tracking, internet browser tracking, the mapping of communication patterns, and insight into who a person interacted with'[3]. Whereas protection of the EConvHR was extended to this type of data, there is, at least, one 'wrinkle', which seriously offsets this otherwise progressive step. The point is that after having repeated cherished phrases, for which the NGOs were so intensively fighting, the ECHR did not equal the examination algorithms for the content of communications and their metadata. The Court did not step forward to apply requirements from the Weber and Saravia case to metadata, having just pointed out that it is not justified in exempting this type of data from the guarantees provided for by national legislation[4]. Consequently, it seems too early to mark an end of the endeavors to acknowledge the collection of metadata as not less intrusive, than the interception of the content of communications.

The appearance of another novelty in the Big Brother Watch judgment presented not a change of an already applied approach, but arose from the fact that a question on the use of intercepted data received by intelligence exchange from foreign agencies was begged before this court for the first time[5]. Having excluded the stage of data interception from the scope of the examination because it cannot be attributed to the respondent state[6], the Chamber concentrated on the regime for obtaining such material from foreign governments, its subsequent storage, examination and usage[7]. The validity of this exception provokes doubts. The ECHR Chamber itself distinguished situations depending on how the information is obtained and, having excluded cases when material was provided to the UK intelligence services unsolicited (following the position of the respondent that it was 'implausible and rare') and when the information was gained not upon a request (because the applicants failed to elaborate what that meant), the court dealt only with the case when the information was intercepted or already intercepted information was conveyed to the authorities of the respondent state upon their request [8]. The Chamber, by making reference to the Articles on the Responsibility of States for Internationally Wrongful Acts[9], firmly claimed that this situation did not fall under any rule

[1] See, for instance, Milanovic, 'ECHR Judgment in Big Brother Watch v. UK', Op. cit.
[2] Note, that the ECHR made use of a term «related communications data».
[3] *Big Brother Watch v. UK* at para 356.
[4] Ibid. at paras 352—357.
[5] Ibid. at para 416.
[6] Ibid. at para 420.
[7] Ibid. at para 421.
[8] Ibid. at paras 418, 420.
[9] Draft articles on Responsibility of States for Internationally Wrongful Acts, Article 8. URL: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

invoking the responsibility of the state obtaining the intercepted data. Acting under instructions, or under the direction or control of another state could have been a relevant rule, if not a very high threshold in respect of inter-state relations — an 'actual direction of an operative kind'[1]. A solution might have been found in the application of shared responsibility, but it still lacks a normative character[2]. Another problem is jurisdiction under Article 1 of the EConvHR[3]. Hence, both the current stage of the law of responsibility and the scope of application of the Convention impede moving on to the examination of the interception of data in intelligence sharing. According to the judgments of Chambers in both Centrum för Rättvisa v. Sweden and Big Brother Watch v. UK, interception is left at the wide discretion of states. According to this logic, obtaining information collected by foreign states, falls out from the analysis of the compatibility with the Convention. It leaves a significant gap in the protection of human rights, which may be well exploited or has been already exploited by parties to the Convention.

However, this exception was not the only one in the examination under Article 8 applied by the ECHR in respect of the co-operation of intelligence agencies. It might seem that the Chamber was using criteria (except first two) implied in Weber and Saravia and Roman Zakharov, but though explicitly pointing out a relaxation of the requirement to set out the circumstances in which intercept material can be requested from foreign intelligence services[4], it, nonetheless, did not apply any criterion related to the duration of the interception, which prescribes a necessity to terminate this process. Moreover, what is striking is that whilst examining the use of intercepted data acquired from abroad, the court, though evaluating the same domestic legal norms on the second turn, decided not to repeat its finding on the lack of oversight of the entire selection process and the absence of safeguards applicable to the selection of related communications data for examination[5]. One can only guess, how conciseness such an omission was.

Several aspects of the Chamber judgment on Big Brother Watch relaxed the previous position taken by the ECHR. First, it is the decision to lower the previous threshold for oversight. The judgment of the Grand Chamber on the Roman Zakharov v. Russia case clarified that if this competence is granted not to a judicial body, it still can be compatible with the EConvHR, 'provided that that authority is sufficiently independent from the executive'[6]. In the Big Brother Watch judgment the

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[1] Crawford, The International Law Commission's Arti*cles on State Responsibility. Introduction, Text and Commentaries* (2002) at 154; Draft articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries 2001, (2001) Yearbook of the International Law Commission Vol. II. Part Two at 68—69.

[2] See Nollkaemper, Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 *Michigan Journal of International Law* at 363.

[3] Milanovic, 'Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age' (2015) 56 *Harvard International Law Journal* at 124—129.

[4] *Big Brother Watch v. UK*. at para 424, 428—430.

[5] Ibid. at para 387.

[6] *Roman Zakharov v. Russia* at para 258.

court went backwards by arguing that it had required it 'generally', and by saying so disavowed the sense of the requirement, claiming that the 'actual operation of a system of interception as a whole, including the checks and balances on the exercise of power, and the existence (or absence) of any evidence of actual abuse […], such as the authorization of secret surveillance measures haphazardly, irregularly or without due and proper consideration'[1]. Secondly, notwithstanding the acknowledgment of the general character of permissible bulk interception, in previous cases the ECHR insisted on the applicability of a necessity test. In Big Brother Watch, by analyzing the UK legislation, the Chamber revealed that one of the cases when the intercepted data can be disclosed and copied was formulated as 'likely to become necessary' for an 'authorized purpose'[2]. This finding did not lead to the acknowledgment of a violation of the Convention, as the Court took into consideration that the scope of persons, authorized to obtain this information is limited to those having the appropriate level of security clearance, who has a 'need to know', and, thus, ended up with a recommendation to define the term 'likely to become necessary' more clearly[3].

3.3. The Grand Chamber's corrections of 2021

The judgments in cases Big Brothers Watch and Centrum för Rättvisa were transferred to the Grand Chamber, thus, leaving a chance that this approach still may be revisited. However, the Grand Chamber in its judgment of May, 25, 2021 has confirmed the previous stance[4]. In comparison to the Chambers' judgments, the Court has clarified that the bulk interception should be limited by time, it should be authorized by an independent body, and the authorization should identify the types or categories of selectors to be used[5], and that all procedural safeguards should apply to the data acquaried by intelligence sharing with other states[6].

4. Looking behind the ECHR Chamber judgments on mass surveillance

The ECHR was more than laconic in exploring, in the Big Brother Watch judgment, the grounds of its strategic choice to acknowledge the legitimacy of mass surveillance per se. First of all, not denying the quantum leap in information technology, the court, nevertheless, emphasized, that it had been used by 'terrorists and criminals', whom it helps 'to evade detection on the internet'[7]. The court justified the use of bulk interception by pointing to the 'unpredictability of the routes via which elec-

[1] *Big Brother Watch v. UK* at para 377.
[2] Ibid. at para 368.
[3] Ibid.
[4] *Big Brother Watch (2021)* at para. 340.
[5] Ibid. at paras. 348, 351, 354.
[6] Ibid. at para. 363.
[7] Ibid. at para 314.

tronic communications are transmitted'[1]. And, finally, arguing on effectiveness of this measure and praising its proactive function, the Chamber stressed the lack of alternatives or even combination of alternatives able to substitute for mass surveillance[2]. These arguments seem to be obviously one-sided: taking into account the advancement of technology, the court noticed only 'terrorists and criminals', preferring to remain silent about the appetites of states for collection and analysis of information about individuals, which are increasing at an exponential pace. Less than ten years ago these expectations were technologically restrained by a lack or the ineffectiveness of big data storage and operating systems. In its last argument the court did not even mention measures of targeted surveillance, nor did it speak about any comparison with bulk interception. A glaringly too frequent use of expressions like 'it is clear that' in the reasoning of the ECHR, which might mean either common sense, or the effectiveness of the measures, technical abilities or both, in the majority of cases are just a thinly disguised renvoi to the general tenet, that the bulk interception of data per se does not violate the Convention.

In its reliance on these grounds the court directly linked its reasoning to the doctrine of the 'margin of appreciation'[3]. However, the strikingly general character of the arguments and an appeal to only one mode of state behavior, reveal that the ECHR was neither emphasizing why national authorities are better placed to decide upon the question of mass surveillance, nor addressing the existence of different national approaches. Thereby, the use of the margin of appreciation doctrine as a 'substantive' concept[4] can hardly camouflage the application of the proportionality principle and trade-off between individual rights and collective goals. Taking into account, that in this form the doctrine provides no normative added value, its use in this judgment is superficial and misleading[5].

What stood behind this judgment was not a lack of consensus between parties to the EConvHR, but the opposite — a wide unanimity in respect of the principled question of the legality of the bulk interception of communications and their metadata. Both public opinion and the attitude of the Council of Europe (and the European Union) to the permissibility of 'mass surveillance' has repeatedly changed[6].

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[1] *Big Brother Watch (2021)* at para 314.
[2] Ibid. at para 384.
[3] Ibid. at para. 314.
[4] See Letsas, A Theory of Interpretation of the European Convention on Human Rights (2007) at 80—81, 84—90.
[5] Janneke, 'Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights', (2018) 18 *Human Rights Law Review* 495 at 500—502.
[6] European Parliament, Resolution on the First Report on the Implementation of the Data Protection Directive (95/46/EC) (COM(2003) 265 — C5-0375/2003-2003/2153(INI)). URL: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A5-2004- 0104+0+DOC+XML+V0//EN&language=en; European Council, Declaration on Combating Terrorism of 25 March 2004 at para 11, https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/79637.pdf (accessed 01.11.2020); *Maras,* 'The Social Consequences of a Mass Surveillance Measure: What Happens When We Become the 'Others'?, (2012) 40 International Journal of Law, Crime and Justice at 65—66.

The pendulum swung once again following the revelations Edward Snowden made in 2013, which having opened eyes to the magnitude of mass surveillance programs, catalyzed political and legal attempts to call state authorities on their responsibility and formalized an appeal, to significantly shorten and restrict, if not to prohibit, governmental abilities on bulk interception. However, following the wave of terrorist acts which swept through Europe (Paris, Brussels, Nice, Berlin, Manchester, London, Barcelona), public opinion swung back, and many states have not failed to make use of this by introducing appropriate legislation to regulate and thereby from the one side to limit and from the other to legalize the bulk interception of data at the national level.

Immediately after the terrorist acts in Paris, a new Law on the surveillance of international electronic communications[1] was introduced in France which allows the interception of all communications sent or received abroad[2], and to store their content for one year and their metadata for six years[3]. In the Federal Republic of Germany on December 23, 2016 a law on the interception of foreign communications by the Federal Intelligence Service was adopted[4], governing surveillance over foreign citizens[5]. In 2016, a referendum on amendments significantly broadening powers to introduce the bulk interception of data took place in Switzerland and obtained approval from 65.5 % of its participants[6]. The same year a Polish law on police and legal acts governing the use of secret surveillance came into force[7].

Therefore, taking the judgments on the cases of Centrum för Rättvisa v. Sweden and Big Brother Watch and Others v. United Kingdom, the ECHR deviated from its own approach and moved in the direction of the development of national legislation and the approaches of European states. As a confirmation, the judgment on the Big Brother Watch case is abundant in references to the Report of the European Commission for Democracy through Law (Venice Commission) on the Democratic Oversight of Signals Intelligence Agencies adopted in 2015[8]. In particular,

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[1] Loi n° 2015—1556 du 30 novembre 2015 relative aux mesures de surveillance des communications électroniques internationals. URL: https://www.legifrance.gouv.fr/eli/loi/2015/11/30/DEFX1521757L/jo/texte (accessed 01.11.2020).

[2] Ibid. Article 1.

[3] Ibid.

[4] Gesetz zur Ausland-Ausland-Fernmeldeaufklärung des Bundesnachrichtendienstes vom 23. Dezember 2016, (2016) Bundesgesetzblatt Teil I. № 67 at 3346.

[5] See also Wetzling, Simon, 'Eine kritische Würdigung der BND-Reform'. URL: https://verfassungsblog.de/eine-kritische-wuerdigung-der-bnd-reform (accessed 01.11.2020).

[6] URL: https://www.theguardian.com/world/2016/sep/25/switzerland-votes-in-favour-of-greater-sur veillance. See Bundesgesetz betreffend die Überwachung des Post- und Fernmeldeverkehrs vom 18. März 2016 (stand am 1. März 2018). URL: https://www.admin.ch/opc/de/classified-com pilation/20122728/index.html (accessed 01.11.2020).

[7] See European Commission for Democracy through Law (Venice Commission), Opinion on the Act of 15 January 2016 Amending the Police Act and Certain Other Acts of 10—11 June 2016. URL: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)012-e (accessed 01.11.2020).

[8] Venice Commission, Report of 2015.

the conclusion of the ECHR Chambers on the permissibility of mass surveillance per se was based on the stance of this Commission, which acknowledged that the 'main interference' into the right to respect for private life occurs not at the stage of collection, but at the stages of access and the subsequent processing of the intercepted data[1]. It ought to be highlighted that the Commission preceded this conclusion by a reference to a 'European perspective'[2]. Albeit this notion is not disclosed in the report, the Venice Commission appears to have meant a somewhat common approach evolved from the national level, and not the practice of the ECHR or the CJEU. This follows from the fact that in the report there is a tacit shift of the emphasis to the access and processing of the collected data, which was not squared with the differentiation between the purposes of surveillance, whereas at the time of the adoption of this report both European courts demanded states to carry out secret surveillance in the framework of fighting crime, including data collection only on the basis of a reasonable suspicion[3].

Moreover, deciding on the Big Brother Watch case, the ECHR might have not been released from its implied institutional bias, encompassing, inter alia, the reverse impact of the skepticism of the European states to implement the judgments of international judicial bodies related to the restriction of governmental powers in the use of the bulk interception of data. For instance, a majority of EU member states did not execute or did not fully execute the judgment of the CJEU on the Digital Rights Ireland case[4]. There is also a general tendency in the European states whose legislation has changed in the aftermath of this judgment, that such legislation was not launched by state bodies, but resulted from the lawsuits initiated by non-governmental entities[5]. The Russian Federation and Hungary still have not adopted general measures to implement the judgment on Roman Zakharov and Zabo and Vissy[6]. It can be supposed that for the ECHR, whose albeit not 'authority', but 'power' has been challenged by the so called 'strategic non-execution' of

[1] Venice Commission, Report of 2015 at para 60.
[2] Ibid.
[3] See ECHR: Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria, Application no. 62540/00, Judgment of 28 June 2007 at paras 79, 80; *Iordachi and Others v. Moldova*, Application no. 25198/02, Judgment of 10 February 2009 at para 51; *Digital Rights Ireland* at para 57.
[4] Privacy International, National Data Retention Laws since the CJEU's Tele-2/Watson Judgment (September 2017) at 12. URL: https://privacyinternational.org/sites/default/files/2017- 12/Data%20Retention_2017.pdf (accessed 01.11.2020).
[5] Ibid. at 13.
[6] UN Human Rights Committee, Concluding Observations on the Sixth Periodic Report of Hungary of 29 March 2018, CCPR/C/HUN/CO/6 at para 43. URL: ttps://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/HUN/CO/6&Lang=En; Council of Europe, Committee of Ministers, 1302nd meeting, 5—7 December 2017 (DH), H46-26 Roman Zakharov v. Russian Federation (Application No. 47143/06), Supervision of the execution of the European Court's judgments. URL: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168076d500 (accessed 01.11.2020).

its judgments by several member states[1], the ability and readiness to go against an approach that has emerged at the national level might be limited, at least due to the institutional survival instinct.

5. Concluding remarks

Many scholars who have analyzed the application of International Human Rights Law in the digital age both before and after the ECHR issued judgments on Centrum för Rättvisa v. Sweden and Big Brother Watch and Others v. United Kingdom proceeded from the premise that electronic mass surveillance does not per se constitute a violation of the international legal obligations of states related to the sphere of privacy[2]. However, by marginalizing the possibility to declare the use of bulk interception illegal in light of international law, and considering it as utopian (according the well-known dichotomy used by Martti Koskenniemi), we cannot notice a gradual transformation of our states to dystopia.

The ECHR is not the sole international body competent to examine the compliance of states with human rights, but it cannot be excluded that its judgments will have a significant impact. The voices of the UN Human Rights Committee and UN Special Rapporteurs, notwithstanding their very critical attitude towards 'mass surveillance', has been neglected because of its lack of binding force. Besides this, a long-awaited General Comment to Article 17 of the International Covenant on Civil and Political Rights has not yet been adopted[3].

Finally, protection provided to citizens of democratic states by their constitutions can be rendered insufficient. It can be demonstrated using the example of the judgment of the German Federal Constitutional Court of 2016, where it found that a refusal to disclose to the special parliamentary commission the selectors and search words applied by bulk interception in co-operation of German and US intelligence agencies (BND and NSA), when, probably, the communications of German citizens were intercepted, does not qualify as a violation of the Constitution (Grundge-

[1] *Madsen,* 'The Challenging Authority of the European Court of Human Rights: from Cold War Legal Diplomacy to the Brighton Declaration and Backlash' (2016) 79 Law And Contemporary Problems at 175. See also *de Londras, Dzehtsiarou,* 'Mission Impossible? Addressing Non-Execution Through Infringement Proceedings in the European Court of Human Rights' (2017) 66 International and Comparative Law Quarterly 467 at 467—490.

[2] Lubin, Op. cit. at 545—546, Milanovic, Op. cit. at 82, 132, Margulies, 'The NSA in Global Perspective: Surveillance, Human Rights, and International Counterterrorism' (2014) 82 Fordham Law Review 2137 at 2166; Georgieva, 'The Right to Privacy under Fire — Foreign Surveillance under the NSA and the GCHQ and Its Compatibility with Art. 17 ICCPR and Art. 8 ECHR' (2015) 31 Utrecht Journal of International and European Law 104 at 128; Verbruggen, Royer, Severijns, Op. cit.

[3] Joyce, 'Privacy in the Digital Era: Human Rights Online?' (2015) 16 *Melbourne Journal of International Law* 1 at 7.

setz)[1]. The basic tenet of this decision is the interest in maintaining the ability of governments to pursue foreign policy and policy in the field of security which 'overrides' the right of the parliamentary commission to get acquainted with the list of selectors and search words[2]. Even provided that the mass surveillance programs of democratic states exclude their own citizens, constitutional protection can still be illusory, as 'we are all foreigners'[3], because a prohibition on the surveillance of a state's own citizens can be easily circumvented by means of international co-operation of intelligence agencies.

Reading the ECHR Chamber judgments on both Centrum för Rättvisa v. Sweden and Big Brother Watch and Others v. United Kingdom exposes how with 'eyes wide shut' society is moving towards a 'global panopticon', word for word substantiating a scenario described by Foucault. In particular, in 'Discipline and Punish: The Birth of a Prison', published in 1975, he was very precise in characterizing the role played by states in surveillance over their citizens: 'We must cease once and for all to describe the effects of power in negative terms: it 'excludes', it 'represses', it 'censors', it 'abstracts', it 'masks', it 'conceals'. In fact power produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production'[4]. The opinion of the ECHR Grand Chamber can become fatal.

[1] Bundesverfassungsgericht, Beschluss des Zweiten Senats vom 13. Oktober 2016, 2 BvE 2/15. URL: http://www.bverfg.de/e/es20161013_2bve000215.html (accessed 01.11.2020).
[2] Ibid. at para 5 (Leitsätze).
[3] Cole, 'We Are All Foreigners: NSA Spying and the Rights of Others', *Just Security Blog* (29 October 2013), https://www.justsecurity.org/2668/foreigners-nsa-spying-rights.
[4] Foucault, *Discipline and Punish: the Birth of a Prison* (1991) at 194.

II. INTERNATIONAL AND COMPARATIVE PRIVATE LAW

Verträge im Bereich der Erbbeziehungen: Rechtliche Modelle in Deutschland und Russland

1. Die Rechtsnatur des Erbvertrags. Antike römische Anwälte hielten vertragliche Regelung der Erbfolge für unzulässig. Sie betrachteten die vertragliche Einschränkung der testamentarischen Freiheit des Erblassers durch einen Vertrag als unmoralisches Hindernis für die Veräußerung des Eigentums[1].

Der Erbvertrag hat einen germanischen Ursprung. Neben Deutschland selbst besteht ein solches Abkommen in den Rechtssystemen Österreichs, der Schweiz, Ungarns, Lettlands und einiger anderer Länder.

In vielen Ländern der romanischen Rechtsfamilie sind Erbschaftsverträge noch unbekannt oder gelten als unmoralisch (Frankreich, Spanien, Italien, Portugal usw.). Obwohl es in einigen dieser Staaten zugelassen wurde, Erbverträge zwischen Familienmitgliedern abzuschließen[2].

Am 1. Juni 2019 trat in Russland ein neuer Artikel 1140.1 des Zivilgesetzbuches der Russischen Föderation über Erbschaftsverträge in Kraft. Die Reform des russischen Erbrechts basiert auf der Aufnahme der Bestimmungen des deutschen BGB[3]. Um die Aussichten für die Umsetzung neuer Rechtsstrukturen in Russland zu analysieren, sollten sie daher mit ähnlichen Modellen in der Gesetzgebung, Lehre und Rechtspraxis Deutschlands verglichen werden.

1.1. Deutschland. Das deutsche Recht (§ 2302 BGB) verbietet Verpflichtungen im Zusammenhang mit der Auferlegung oder Nichtauferlegung von Verfügungen post mortem, erlaubt jedoch vertragliche Anordnungen für den Todesfall4.

Das Gesetz verwendet den Begriff „Erbvertrag“ unterschiedlich, da er sowohl einen Vertrag als auch einen erbschaftrechtlichen Akt (z. B. §§ 2274—2278, 2298 BGB) sowie eine vertragliche Verfügung (z. B. § 2281, § 2293 BGB)[5] bedeutet.

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[1] Lange K. W. Erbrecht. 2. Auflage. München: C.H. Beck, 2017. S. 122.

[2] Schmoeckel M. Erbrecht. 5. Auflage. Baden-Baden: Nomos, 2019. S. 134; Frank R., Helms T. Erbrecht. 7. Auflage. München: C.H. Beck, 2018. S. 165; Süß *R. Erbrecht in Europa. 3 Auflage.* Bonn: zerb verlag, 2015. S. 711—712, 736—737, 1007, 1037—1038, 1309; Nasledstvennoe pravo: postatejnyj kommentarij k stat'jam 1110—1185, 1224 Grazhdanskogo kodeksa Rossijskoj Federacii [Inheritance law: article-by-article comment to articles 1110—1185, 1224 of the Civil Code of the Russian Federation] / Otv. red. E. Ju. Petrov. M.: M-Logos, 2018. P. 605—606.

[3] §§ 2274—2302 Bürgerliches Gesetzbuch, BGB. URL: http://www.gesetze-im-internet.de/bgb (accessed 01.11.2020).

[4] Frank R., Helms T. Op. cit. S. 165.

[5] Palandt Bürgerliches Gesetzbuch. *69 Auflage. München: Verlag C.H. Beck, 2010.* S. 2171.

In Deutschland ist ein Erbvertrag ein sui generis-Vertrag. Es ist keine regulatorische Vereinbarung, da der sachenrechtliche Status lebender Personen sich nicht ändert. Der Erblasser schließt keinen gegenseitigen Verpflichtungsvertrag ab, da die Verpflichtung zur Feststellung von Anordnungen für den Todesfall gem. § 2302 BGB nichtig wäre. Dies sind solche posthumen Anordnungen, die tatsächlich direkt ausgeführt werden und im Vertrag enthalten sind[1]. Ein Erbvertrag ist ein Vertrag, weil eine Partei das Verfügungsangebot des Erblassers annimmt. Auf diese Weise wird die Verbindlichkeit der Anordnungen erreicht. Der Erbvertrag hat einen doppelten Charakter: eine Anordnung für den Todesfall und einen Vertrag. Als Vertrag bindet der Erbvertrag die Parteien, als Anordnung für den Todesfall begründet er jedoch auch für die andere Vertragspartei keine Verpflichtungen, beispielsweise ist der Erbe nicht verpflichtet, die Erbschaft anzunehmen[2].

Ein solcher Vertrag ist absolut erblicher Natur, aber die Vereinbarung ist bereits zu Lebzeiten der Parteien verbindlich. Eine Erbschaftsvereinbarung ist keine Vereinbarung zugunsten Dritter, auch wenn sie nur Bestimmungen an Dritte enthält, was möglich und zulässig ist[3].

So ist in Deutschland eine Erbschaftsvereinbarung nicht Bestandteil des traditionellen Systems der Verpflichtungs- und abstrakt-verfügenden Rechtsgeschäfte[4], sondern bildet eine einzigartige Anordnung auf den Todesfall, die von zwei oder mehr Parteien vereinbart wurde. Eine solche Vereinbarung bindet den Erblasser, verpflichtet ihn aber nicht.

1.2. Russland. Gemäß Artikel 1140.1 Satz 1 des Zivilgesetzbuches der Russischen Föderation hat der Erblasser das Recht, eine Erbschaftsvereinbarung mit einer der Personen abzuschließen, die zur Erbschaft berufen werden können (Artikel 1116 des russischen Zivilgesetzbuches). Die Vertragsbedingungen bestimmen den Erbenkreis und das Verfahren für die Übertragung von Rechten an dem Eigentum des Erblassers nach seinem Tod an die überlebenden Parteien des Erblassers oder an die überlebenden Dritten. Ein Erbvertrag kann auch eine Klausel über den Testamentsvollstrecker enthalten und den Vertragsparteien die Verpflichtung auferlegen, rechtliche oder immaterielle rechtliche Schritte durchzuführen, einschließlich der Erfüllung testamentarischer Ablehnungen oder testamentarischer Abtretungen.

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[1] Gursky K.-H., Lettmaier S. Erbrecht. 7. Auflage. Heidelberg: C.F. Müller, 2018. S. 77.

[2] Frank R., Helms T. Op. cit. S. 164—165; Lange K.W. Op. cit. S. 121; Palandt Op. cit. S. 2171.

[3] Burandt W., Rojahn D., Balomatis A. Erbrecht. Kommentar. 3. Auflage. München: C.H. Beck, 2019. S. 146.

[4] Jennekcerus L. Kurs germanskogo grazhdanskogo prava: Vvedenie i obshhaja chast'. Perevod s nemeckogo [German Civil Law Course: Introduction and General Part. Translation from German]. T. 1: Polut. 2 / Pod red., s predisl.: Genkin D.M., Novickij I.B. (Per.) M.: Inostr. lit., 1950. P. 88—89, 96—98.

Laut Artikel 1118 Satz 1 des russischen Zivilgesetzbuches, können die Regeln des Zivilgesetzbuches über ein Testament auf einen Erbschaftsvertrag angewendet werden, sofern sich aus dem Wesen dieser Vereinbarung nichts anderes ergibt. Eine solche Regelung bestimmt nicht den doppelten Charakter des Erbvertrags, was die Anwendung allgemeiner Bestimmungen des (vertraglichen) Verpflichtungsrechts erschweren kann.

Der Erblasser hat das Recht, einseitig vom Erbvertrag zurückzutreten und kann nach Abschluss einer solchen Vereinbarung über sein Eigentum frei verfügen. Die zweite Seite der Erbschaftsvereinbarung kann anderen Risiken ausgesetzt sein: dem Vorhandensein von Pflichterben, dem Erscheinen von Gläubigern, dem frühen Tod des Erben. Diese Faktoren ermöglichen es russischen Zivilisten[1], den Erbschaftsvertrag nicht als eine verbindliche Vereinbarung zu bewerten, sondern als Testament mit einer Schadensersatzklausel im Falle einer Stornierung.

2. Erbschaftsvertrag und verschiedene Arten von Testamenten: das Problem der Wahl. Bei der Wahl der Form der postmortalen Veräußerung von Eigentum bieten deutsche Juristen den Erblassern einige Richtlinien an:

1) Wenn es um Erbschaft einer Körperschaft oder einer GmbH geht, ist ein Testament nicht immer angemessen, da die Freiheit, es zu widerrufen, gegen das wichtige Prinzip eines erfolgreichen Unternehmens verstoßen kann, und zwar gegen die Rechtssicherheit für alle Gründer. Der Erbvertrag ermutigt Kinder, bessere Stellenangebote aufzugeben und in einem Familienunternehmen zu arbeiten, in der Zuversicht, dass sie es erben werden. Eine solche Vereinbarung zwischen Geschäftspartnern minimiert oder schließt mögliche Rechtsstreitigkeiten aus.

2) Für Personen, die nicht verheiratet sind, ist nur ein Erbvertrag geeignet, wenn im Todesfall gemeinsame Anordnungen erforderlich sind.

3) Ehepartnern wird empfohlen, einen Erbschaftsvertrag zu schließen, wenn nur ein Ehepartner beabsichtigt, den Willen als Erblasser auszudrücken, da beide Ehepartner in einem gemeinsamen Testament Verfügungen treffen müssen.

4) Ein Erbvertrag ist eine geeignete Form, wenn der Erblasser Dritte in die Erbschaftsverpflichtungen einbezieht. Der Vertrag eignet sich zur Festlegung der lebenslangen Aufrechterhaltung (Altersvorsorge) älterer Erblasser, da er im Gegensatz zu einem Testament, das erst nach dem Tod des Erblassers in Kraft tritt, ab dem Zeitpunkt seiner Unterzeichnung wirksam wird[2].

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[1] Nasledstvennoe pravo: postatejnyj kommentarij k stat'jam 1110—1185, 1224 Grazhdanskogo kodeksa Rossijskoj Federacii. Op. cit. P. 606—607.

[2] Frank R., Helms T. Op. cit. S. 164; Brox H., Walker W.-D. Erbrecht. 28. Auflage. München: Verlag Franz Vahlen, 2018. S. 91; Schmoeckel M. Op. cit. S. 134; Scherer S. Münchener Anwalts-Handbuch Erbrecht. 5. Auflage. München, 2018. S. 228; Burandt W., Rojahn D., Balomatis A. Op. cit. S. 146; Osnovy nasledstvennogo prava Rossii, Germanii, Francii [Fundamentals of inheritance law of Russia, Germany, France] / Pod obshh. red. E. Ju. Petrova. M.: Statut, 2015. P. 59, 68.

In Russland können diese Kriterien angewendet werden, aber es ist unwahrscheinlich, dass Erben und Legatarier (Vermaechtnisnehmer) Sicherheit für die Zukunft gewinnen, da sowohl das Testament als auch das gemeinsame Testament der Ehegatten und sogar der Erbvertrag vom Erblasser jederzeit kraft Gesetzes ohne jegliche Einschränkungen einseitig gekündigt werden können oder Einschränkungen (Art. 1130, Satz 4 Art. 1118 Abs. 4, Art. 1140.1 Satz 10 des russischen Zivilbuches).

3. Gegenstand des Erbschaftsvertrags und Arten von Aufträgen. In Deutschland ist der Erblasser nur durch vertragliche Bestimmungen gesetzlich gebunden, deren Gegenstand streng begrenzt ist: die Ernennung des Erben; testamentarische Ablehnung; testamentarische Aufgabe; Rechtswahl für die Erbschaft (§§ 1941 I, 2278 II BGB).

Bestellungen sind nicht nur vertraglich, weil sie im Erbvertrag enthalten sind, sondern auch, weil sie wirklich notwendig sind. Aus Gründen der Klarheit müssen sie im Vertrag als vertragliche Bestellungen genannt werden[1].

Enthält der Vertrag keine vertragliche Erbschaftsbestellung, so bedeutet dies nicht seine Ungültigkeit, da der Vertrag aus testamentarischen Verfügungen bestehen kann, die jederzeit gemäß § 2253 BGB frei widerrufen oder geändert werden können. Aufträge außerhalb des Gegenstandes des Erbvertrags sind einseitig und werden jederzeit ohne Annahme durch die Gegenpartei in den Vertrag aufgenommen (§ 2299 BGB). Diese Anordnungen umfassen insbesondere Erbschaftsentzug (§ 1938 BGB); die Ernennung eines Vormunds (§ 1777 Abs. 3); Ausschluss der Eltern des Begünstigten von der Verwaltung des Kindesvermögens (§ 1638); die Reihenfolge der Ausführung des Testaments (§ 2197); Entzug eines Pflichtanteils (§ 2333 BGB). Solche Aufträge unterliegen nicht der Regel der Unwirksamkeit nachfolgender Testamente nach Abschluss des Nachfolgevertrags gemäß § 2289 BGB[2].

Artikel 1140.1 des russischen Zivilgesetzbuches enthält solche komplexe deutsche „Matrix“ von Verfügungen des Erblassers nicht. Das Gesetz sieht die Zulässigkeit einseitiger Aufträge im Vertrag nicht. Wir sind der Ansicht, dass postmortale Aufträge als vertraglich definiert werden sollten, wenn sie die Hauptverbindung zwischen den Vertragsparteien bilden (Ernennung von Erben und Auferlegung von Verpflichtungen für die Vertragsparteien). Andere Anordnungen im Text des Erbschaftsvertrages müssen Hilfsanordnungen sein und müssen in Form eines Testaments bewertet werden, beispielsweise die Ernennung eines Nachlassverwalters (Testamentsvollstreckers).

4. Parteien des Erbvertrags. In Deutschland können Parteien eines Erbvertrags Außenseiter, Verwandte oder Ehepartner sein. Im Gegensatz zu einem allgemeinen Testament müssen die Parteien eines Erbvertrags keine Ehepartner oder eingetra-

[1] Palandt. Op. cit. S. 2171.
[2] Scherer S. Op. cit. S. 230, 235; Burandt W., Rojahn D., Balomatis A. Op. cit. S. 146.

genen Partner sein. Die Anzahl der Testatoren innerhalb einer Vereinbarung ist nicht begrenzt. Die Vertragsparteien müssen uneingeschränkt rechtsfähig sein (§ 2275 BGB). Der Erbvertrag kann vom Erblasser nur persönlich abgeschlossen werden[1].

Zum Vergleich: In Österreich kann ein Erbvertrag nur von Ehegatten, eingetragenen Partnern und Verlobten gemäß § 602 ABGB geschlossen werden[2] Ein grundlegender Unterschied zwischen den Ländern der deutschen Rechtsfamilie und Russland besteht darin, dass Lebenspartner oder verlobte Personen in Russland einen Erbvertrag abschließen können, der jedoch nicht mit einem Vertrag zwischen Ehegatten gleichgesetzt wird.

Nach Satz 8 der Art. 1140.1 des russischen Zivilgesetzbuches hat der Erblasser das Recht, einen oder mehrere Erbverträge mit einer oder mehreren Personen abzuschließen, die zur Erbschaft berufen werden können. Aufgrund des testamentarischen Charakters des Erbvertrags muss der Erblasser ihn nur persönlich abschließen. Der Partner im Rahmen dieser Vereinbarung, der keine Aufträge von Todes wegen erteilt, sondern diese nur vom Erblasser akzeptiert, kann höchstwahrscheinlich eine Vereinbarung durch einen Vertreter abschließen, sofern sich aus dem Wesen der Vereinbarung nichts anderes ergibt.

Zur Erbschaft kann auch Nasciturus, also ein Kind, das vor dem Tod des Erblassers gezeugt und nach dem Erbfall lebend geboren wird, berufen werden (Art. 1116 des russischen Zivilgesetzbuchs). Die Teilnahme solcher Erben an einem Nachfolgevertrag als Partei oder Dritter ist gesetzlich nicht ausgeschlossen. Um formale Hindernisse zu beseitigen, sollten in der deutschen Rechtsordnung bestehende juristische Fiktionen übernommen werden, nach denen das Gezeugte noch vor der Eröffnung der Erbschaft als vor dem Erbfall geboren gilt (§ 1923 BGB) und das Nicht-Gezeugte von den ernannten Erben in der Reihenfolge der Erbschaftssubstitution berücksichtigt wird, wenn dies nicht dem Willen des Erblassers widerspricht (§ 2101 BGB).

In der modernen Welt entwickeln sich In-vitro-Fertilisationstechnologien, und es wird möglich, einen Fötus jederzeit in einer künstlichen Gebärmutter zu tragen. Daher ist es notwendig, die Erbschaft des Kindes des Erblassers zu fordern, das nach seinem Tod gezeugt wurde, wenn der Wille des Erblassers für eine solche Empfängnis bewiesen ist[3].

5. Form des Erbvertrags. In Deutschland kann ein Erbvertrag gem. § 2276 BGB nur in Anwesenheit der Parteien notariell ausgehandelt werden. Der Vertragsschluss richtet sich nach den BGB-Testamentsregeln (§ 2231—2233)[4].

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[1] Scherer S. Op. cit. S. 230; Süß *R.* Op. cit. S. 392

[2] Burandt W., Rojahn D., Balomatis A. Op. cit. S. 1642; Süß *R.* Op. cit. S. 972.

[3] Zhuravleva E. M. Status nasciturusa v grazhdanskom prave Rossijskoj Federacii [The status of Nazciturus in the civil law of the Russian Federation]: avtoreferat dis. … kand. yurid. nauk. M., 2014. P. 8—26.

[4] Süß *R.* Op. cit. S. 392; Frank R., Helms T. Op. cit. S. 166.

In Russland kann ein Erbschaftsvertrag nicht geheim sein, der kann nicht unter außergewöhnlichen Umständen und in einer Form abgeschlossen werden, die einer notariellen entspricht (Art. 1126, 1127, 1129 des russischen Zivilgesetzbuches). Der Erbvertrag ist notariell beglaubigt. Der Notar zeichnet das Verfahren zum Abschluss einer Erbschaftsvereinbarung auf Video auf, wenn die Parteien keine Einwände dagegen erhoben haben (Art. 1140.1 Satz 7 des russischen Zivilgesetzbuches).

In der russischen Literatur wird die Position zum Ausdruck gebracht, dass die Nichteinhaltung der Anforderung für die Videoaufzeichnung zur Nichtigkeit der Erbschaftsvereinbarung führen sollte (Art. 1124, 1131 des russischen Zivilgesetzbuches)[1].

Wir möchten darauf hinweisen, dass in Punkt 11.3 der Methodischen Empfehlungen der Föderalen Notarkammer zur Registrierung von Erbrechten[2] bei der Feststellung der Nichteinhaltung der Form und der Regeln für die Erstellung eines Testaments und eines Erbvertrags nur auf Teil 1 Satz 7 von Artikel 1140.1 des russischen Zivilgesetzbuches Bezug genommen wird. Die Regel zur Videoaufzeichnung ist jedoch im Teil 2 dieser Norm enthalten. Dies bedeutet, dass keine Klärung hinsichtlich der Folgen eines Verstoßes gegen die Regeln für die Videoaufzeichnung des Erbvertrags erfolgt. Gleichzeitig ist die Aufzählung der Verstöße gegen die Anforderungen des russischen Zivilgesetzbuches, die die Ungültigkeit des Willens- und Erbvertrags zur Folge haben, in den methodischen Empfehlungen nicht erschöpfend und wird offen gelassen. Dementsprechend sollte das Gericht in jedem Fall feststellen, ob das Fehlen einer Videoaufzeichnung, wenn dies obligatorisch war, das Verständnis des Willens des Erblassers beeinträchtigte und ob dies die Rechte und berechtigten Interessen des Klägers verletzte.

6. Veräußerungsfreiheit des Erblassers und Garantien der Erben. In der russischen Doktrin ist die Ansicht vertreten, dass die freie Veräußerung seines Eigentums durch den Erblasser, welches der Gegenstand des Erbvertrags ist, dem verfassungsmäßigen Prinzip der Unverletzlichkeit des Eigentums entspricht[3].

Gemäß Satz 12 Art. 1140.1 des russischen Zivilgesetzbuches steht es dem Erblasser nach Abschluss der Erbschaftsvereinbarung frei, über sein Eigentum in irgendeiner Weise zu verfügen, und eine Vereinbarung ist ansonsten nichtig. Diese Norm offenbart nicht die Rechtsnatur solcher Anordnungen des Erblassers. Die

[1] Nasledstvennoe pravo: postatejnyj kommentarij k stat'jam 1110—1185, 1224 Grazhdanskogo kodeksa Rossijskoj Federacii. Op. cit. P. 618.

[2] Metodicheskie rekomendacii po oformleniyu nasledstvennyh prav (utv. resheniem Pravleniya Federal'noj Notarial'noj Palaty ot 25.03.2019, protokol № 03/19) [Guidelines for registration of inheritance rights (decision Of the Board of the Federal Notary Chamber of 25.03.2019, Protocol No. 03/19)].

[3] Grebenkina I. A. Sovershenstvovanie nasledstvennogo prava: vse li predlagaemye izmenenija obosnovanny? [Improvement of inheritance law: are all the proposed changes reasonnable?]. Lex Russica, 2016, No. 11 (120). P. 138.

notarielle Praxis ist jedoch bereit, sie weitestgehend bis zu Testamenten auszulegen, mit denen der Erbvertrag gekündigt oder geändert werden kann[1]. Im russischen Zivilgesetzbuch ist das Verhältnis von Erbverträgen zu Testament nicht direkt definiert. Zwischen verschiedenen Erbverträgen wird die Priorität des früheren festgelegt (Art. 1140.1 Satz 8 des russischen Zivilgesetzbuches). Das Gegenteil gilt für Testamente. Ein nachfolgendes Testament hebt das vorherige in einem widersprüchlichen Teil auf oder kann eine direkte Anweisung zum Widerruf enthalten (Art. 1130 Satz 2 des russischen Zivilgesetzbuches). Im Gegensatz zum deutschen Modell (§§ 2289, 2291 BGB) sieht das russische Zivilgesetzbuch die Ungültigkeit früherer und nachfolgender Testamente nicht vor, die dem Erbvertrag widersprechen und die Rechte der Erben verletzen, und begründet auch nicht die Notwendigkeit der Zustimmung des Kontrahenten, den Erbvertrag durch Testament aufzuheben. Die Missachtung dieser angemessenen Erfahrung in Russland führt zu Praktiken, die nicht mit dem vertraglichen Charakter der Erbschaftsvereinbarung vereinbar sind.

Im russischen Zivilgesetzbuch gilt die Norm, dass ein Erbschaftsvertrag unter Beteiligung von Ehegatten ihren früheren gemeinsamen Willen aufhebt (Artikel 1140.1 Satz 5). Obwohl nicht angegeben ist, wie sich der Erbvertrag auf andere Testamente jedes Ehegatten auswirkt, die sie auch nach der Erstellung eines gemeinsamen Testaments (Art. 1118 Abs. 5, Satz 4) jederzeit frei machen können oder die sie vor der Eheschließung erstellt haben, oder vor dem gemeinsamen Willen. Es ist nicht ganz klar, ob es in Russland mit einem späteren gemeinsamen Willen der Ehegatten möglich ist, den früheren Erbvertrag zwischen ihnen aufzuheben. In Deutschland erlaubt das Gesetz dies (§ 2292 BGB). Es ist auch nicht klar, ob Ehepartner mit ihrem gemeinsamen Willen andere Erbverträge aufheben können, die jeder Ehepartner mit anderen Personen geschlossen hat. Wie wirkt sich ein späterer Erbvertrag zwischen einem Ehegatten und einem Dritten auf den gemeinsamen Willen der Ehegatten aus? Solche Lücken sollten gesetzlich beseitigt oder mit Rechtspraxis gefüllt werden.

Die Freiheit, während seines Lebens über Eigentum zu verfügen, kann vom Erblasser als indirekte Möglichkeit vom Erbvertrag zurückzutreten genutzt werden, um das Gesetz zu umgehen und andere Parteien nicht für die in Art. 10 vorgesehenen Verluste zu entschädigen. 1140.1 des Bürgerlichen Gesetzbuches der Russischen Föderation.

In Deutschland schränkt der Erbvertrag gemäß § 2286 BGB auch die Freiheit der lebenslangen Verfügungen des Erblassers nicht ein. Dies ist darauf zurückzuführen, dass die vertraglichen Erben während des Lebens des Erblassers keine gesetzlich gesicherte Erwartung haben, sondern es besteht nur die tatsächliche Aussicht auf einen Erwerb. Der vertragliche Erbe hat kein Erbrecht in der Form, wie es bei

[1] Paragraph 11.5.6 Metodicheskie rekomendacii po oformleniyu nasledstvennyh prav (utv. Resheniem Pravleniya Federal'noj Notarial'noj Palaty ot 25.03.2019, protokol №03/19) [Guidelines for registration of inheritance rights (decision Of the Board of the Federal Notary Chamber of 25.03.2019, Protocol No. 03/19)].

Abschluss des Erbvertrags der Fall war. Aus diesem Grund kann beispielsweise ein Vermächtnis in Bezug auf ein in einem Erbschaftsvertrag enthaltenes Grundstück vor der Eröffnung der Erbschaft nicht durch die Klausel im Grundbuch durch vorherige Eintragung der Eigentumsübertragung gesichert werden[1]. Gleichzeitig sind in der BRD angemessene Maßnahmen entwickelt worden, um den Missbrauch des Erblassers einzudämmen.

Die Rechtspraxis in Russland kann den Weg beschreiten, den Erben das Risiko einer Verminderung der Erbschaft aufgrund des aleatorischen Charakters der Erbschaftsvereinbarung aufzuerlegen, wenn die Parteien grundsätzlich einer Nicht-Warenbeziehung zustimmen. Um die Interessen der Erben zu wahren, können Sie auch Auslandserfahrungen ausleihen:

1) Ein Unterlassungsvertrag. In Deutschland besteht ein Unterlassungsvertrag (§ 137 S. 2 BGB)[2]. In Russland könnten die Parteien des Erbvertrags auch ohne Aufhebung der Verfügungsfreiheit eine Verpflichtung eingehen, weitere Aufträge zu unterlassen. Ein Verstoß gegen einen solchen Vertrag verpflichtet den Erblasser, den Schaden der Erben zu ersetzen.

2) Schutz vor Schikanebetreibungen. In Deutschland ist die Rückgabe des Eigentums oder die Rückerstattung seines Wertes nach Eröffnung der Erbschaft für den Fall garantiert, dass der Erblasser zuvor eine böswillige Schenkung zum Nachteil der Erben und Legaten begangen hat (§§ 2287, 2288 BGB)[3].

Das Zivilgesetzbuch der Russischen Föderation verfügt jedoch bereits jetzt über Rechtsinstrumente, mit denen die Interessen von Erben und Legaten geschützt werden können:

1) Der Erbe kann eine Änderung oder Kündigung des Vertrages gerichtlich verlangen, wenn die Veräußerung des Eigentums durch den Erblasser als wesentliche Änderung der Umstände beurteilt wird, die Satz 9 Abs. 1140.1. des russischen Zivilgesetzbuches entspricht.

2) Der Erbe kann vor der Veräußerung des Eigentums durch den Erblasser die Erstattung der tatsächlichen Kosten für die Erfüllung seiner Verpflichtungen aus dem Erbschaftsvertrag verlangen, diese Möglichkeit muss jedoch in Satz 9 Art. 1140.1 des russischen Zivilgesetzbuches direkt angegeben werden, da die Verpflichtung des Erben von ihrer Natur aus nicht wechselseitig und gegenseitig ist. Daher können die Normen der Art. 328 und Satz 4 Art. 453 des Zivilgesetzbuches der Russischen Föderation über ungerechtfertigte Bereicherung in solchem Fall nicht direkt angewendet werden.

Die Zusicherung des Erblassers im Erbschaftsvertrag, dass er nicht über die Erbschaft verfügen wird, könnte seine Verpflichtung zum Ersatz von Verlusten rechtfertigen (Art. 431.2 des Zivilgesetzbuches der Russischen Föderation). Die

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[1] Brox H., Walker W.-D. Op. cit. S. 91—92; Lange K. W. Op. cit. S. 121; Burandt W., Rojahn D., Balomatis A. Op. cit. S. 1705.

[2] Scherer S. Op. cit. S. 237; Brox H., Walker W.-D. Op. cit. S. 92.

[3] Süß *R.* Op. cit. S. 392; Scherer S. Op. cit. S. 229; Burandt W., Rojahn D., Balomatis A. Op. cit. S. 1705.

rechtliche Institution der Zusicherungen garantiert jedoch, dass nur vorhandene Tatsachen vorliegen und nicht in der Zukunft auftreten. Entschädigung für Verluste (indemnity) kann gemäß von Art. 406.1 des russischen Zivilgesetzbuches ebenfalls nicht angewendet werden, da der Erbvertrag kein Unternehmensvertrag ist.

7. Arten von Erbverträgen.

7.1. Systematik von Erbverträgen. In der deutschen Rechtsdoktrin werden Erbverträge je nach Rolle der Teilnehmer und Art ihrer Anweisungen in folgende Typen eingeteilt:

1) ein zweiseitiger Vertrag (beide Parteien sind Erblasser, ihre vertraglichen Anordnungen sind jedoch unabhängig);

2) gegenseitiger Vertrag (die vertraglichen Anordnungen der Erblasser sind miteinander verbunden, daher führt die Ungültigkeit einer Anordnung im Todesfall gem. § 2298 BGB zur Unwirksamkeit des gesamten Vertrages);

3) einseitiger Vertrag (nur eine Partei trifft eine vertragliche Vereinbarung und die andere Partei als Gegenpartei akzeptiert den Vorschlag des Erblassers)[1].

Im Artikel 1140.1 des Zivilgesetzbuches der Russischen Föderation werden gemeinsame Anordnungen von Erblassern in einem Vertrag nicht in miteinander verbundene und nicht aufeinander abgestimmte Anordnungen unterteilt, die im Falle der Ungültigkeit oder Aufhebung einer der Anordnungen die Einheitlichkeit der Rechtspraxis verletzen können.

Gemäß Art. 1140.1 des Zivilgesetzbuches der Russischen Föderation können Erbverträge in Russland klassifiziert werden:

1) je nach Gegenstand: a) einfache Verträge (Ernennung eines Erben oder Festlegung eines Legaten, testamentarische Aufgabe); b) komplexe (Ernennung von Erben und Auferlegung von pflichten materieller und nicht materieller Art);

2) nach Anzahl der beteiligten Parteien: a) zweiseitige; b) vielseitige Verträge;

3) nach dem Status der begünstigten Partei: a) den Vertrag zugunsten einer Partei; b) zugunsten eines Dritten;

4) nach der Rangordnung: a) nachfolgender Vertrag; b) ein früherer Vertrag.

7.2. Das Problem der Entgeltlichkeit des Erbvertrags. Artikel 1140.1 Satz 1 des Zivilgesetzbuches der Russischen Föderation erlaubt es, die Arten von Verpflichtungen der Gegenparteien des Erblassers und Dritter zu unterscheiden:

1) lebzeitige;

2) nach dem Tod: a) erbliche (Festlegung eines Legaten und Auferlegung der Pflichten) und b) nicht erbliche (sonstige Pflichten, deren Erfüllung nicht durch die Größe der Erbschaft beschränkt ist)[2].

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[1] Gursky K.-H., Lettmaier S. Op. cit. S. 78; Frank R., Helms T. Op. cit. S. 169; Scherer S. Op. cit. S. 235.

[2] Nasledstvennoe pravo: postatejnyj kommentarij k stat'jam 1110—1185, 1224 Grazhdanskogo kodeksa Rossijskoj Federacii. Op. cit. P. 612.

Es wäre angemessen, Verpflichtungen nach dem Tod des Erblassers auf den Gegenstand des Erbvertrags zu verweisen. Die lebzeitigen Verpflichtungen zur Pflege, Versorgung und Sicherheit des Erblassers bilden eine Art „Zahlung“ in der Vereinbarung, die einer Rente ähnelt.

Das Vorhandensein oder Nichtvorhandensein von lebenslangen Verpflichtungen des künftigen Erben, die vor der Eröffnung der Erbschaft entstehen (Artikel 1118 Satz 6 des Zivilgesetzbuches der Russischen Föderation), gilt als Grundlage für die Untergliederung der Erbschaftsverträge in bezahlbare und unentgeltliche Verträge. Wenn man diese Verpflichtungen in den Inhalt des Erbvertrags einbezieht, sollte man den rechtlichen Charakter solcher Beziehungen im deutschen Modell des Erbvertrags nicht vergessen.

Im Allgemeinen unterscheiden deutsche Zivilisten häufig zwischen bezahlbaren und unentgeltlichen Erbverträgen. Die Juristische Literatur aber zeugt davon, dass einige Juristen in dieser Hinsicht im Unklaren bleiben. Der Bundesgerichtshof stellt unter Bezugnahme auf seine Rechtsprechung klar, dass eine Vereinbarung über die Ausführung von Leistungen zugunsten des Erblassers kein Bestandteil des Erbvertrags ist, auch wenn die Pflichten des Erben in demselben Dokument enthalten sind, in dem sich die Anordnungen des Erblassers befinden[1]. Der Erbvertrag selbst ist aufgrund von Leistungen kein gegenseitiger Vertrag, für den die Regeln des § 320 BGB über die Gegenleistung gelten. Die teilweise Erfüllung der Ausgleichsverpflichtungen (z. B. Pflegedienste) durch den Erben hindert den Erblasser nicht daran, von seinen vertraglichen Aufträgen zurückzutreten, da ein solches Recht in einer besonderen Regelung vorgesehen ist (§ 2295 BGB)[2]. Der Dienstleistungsvertrag ist, obwohl er einen Kausalzusammenhang mit dem Erbvertrag hat, ein eigenständiges Rechtsgeschäft zwischen den Lebenden und erfordert daher gemäß § 2276 BGB[3] keine notarielle Form.

Die vertragliche Verfügung des Erblassers als abstraktes Geschäft rechtfertigt somit das Erbversprechen und hängt nicht von der Erfüllung der Verpflichtung des Kontrahenten ab, was die Gegenseitigkeit der Beziehung im Sinne von § 320 BGB ausschließt[4].

Die Umsetzung solcher dogmatischen Grundlagen in Russland wird zur ordnungsgemäßen Qualifizierung der Bedingungen des Erbvertrags beitragen, da die Gegenseitigkeit der Anordnungen der Erblasser oder die Bestimmung der Gegenpartei diese Vereinbarung nicht im klassischen Sinne kompensatorisch und wechselseitig macht, da die Anordnung des Erblassers im Todesfall an sich abstrakt ist und keiner gegenseitigen Ausführung unterliegt.

Die Klassifizierung von Erbverträgen kann für die Festlegung der Bedingungen für den Herausgabeanspruch von Eigentum nach Art. 302 des Zivilgesetzbuches der Russischen Föderation bedeutsam sein, wenn der Erblasser über das Eigentum

[1] BGH 36, 65 (Palandt. Op. cit. S. 2171).
[2] Gursky K.-H., Lettmaier S. Op. cit. S. 77—78; Lange K. W. Op. cit. S. 122.
[3] Frank R., Helms T. Op. cit. S. 169.
[4] Scherer S. Op. cit. S. 235.

eines Anderen verfügte. Wenn der Erbe im Rahmen eines Erbvertrags das Erbe im guten Glauben erworben hat, kann der Erwerber des Eigentums im Falle seiner Rückforderung durch den tatsächlichen Eigentümer nicht auf die Entschädigung des Erwerbs verweisen, indem er das Bestehen eines Gegenzuschusses zugunsten des verstorbenen nicht berechtigten Erblassers nachweist. Die Übernahme der Verpflichtung zum lebenslänglichen Unterhalt des Erblassers durch den Erben macht den Erbvertrag nicht zu einem zweiseitigen oder gegenseitigen Vertrag, da die Verfügung für den Todesfall nur von einer Partei verfasst wurde, daher ist die Vereinbarung einseitig. Die Gegenseitigkeit von Anordnungen für den Todesfall macht den Vertrag auch nicht entgeltlich, da eine postmortale Gegenverfügung keine Gegenausführung im Sinne eines Erbvertrags ist.

8. Änderung und Aufhebung des Erbvertrags.

8.1. Widerruf des Erbvertrags durch Vereinbarung oder Testament. Das Zivilgesetzbuch der Russischen Föderation sieht keine Möglichkeit vor, einen Erbvertrag durch Testament aufzuheben. Der Gesetzgeber gestattet die Änderung und Aufhebung eines solchen Vertrags durch Zustimmung seiner Parteien (Artikel 1140.1 Satz 9 des Zivilgesetzbuches der Russischen Föderation).

In Deutschland können ein Erbvertrag sowie eine einzelne vertragsmäßige Verfügung mit Zustimmung der Vertragsparteien aufgehoben werden (§ 2290 BGB Abs. 1). Nach dem Tode einer dieser Personen kann die Aufhebung nicht mehr erfolgen (Satz 2 Abs. 1 § 2290 BGB). Die Doktrin erkennt jedoch an, dass sich die Vertragsparteien das Recht vorbehalten können, vertragliche Bestellungen einseitig zu ändern[1].

Die Bundesrepublik Deutschland sieht die Aufhebung von durch einen Erbvertrag angeordneten Vermächtnissen oder durch ein Testament festgelegten Auflagen vor, wenn der andere Vertragschließende dem zustimmt (§ 2291 BGB), und es ist auch möglich, einen Erbvertrag zwischen Ehegatten durch ihren gemeinsamen Willen zu kündigen (§ 2292 BGB).

8.2. Bedingungsloser einseitiger Rücktritt vom Erbvertrag. In Deutschland hat der Erblasser nach § 2293 BGB das Recht, einseitig vom Erbvertrag zurückzutreten, wenn der Vertrag eine entsprechende Klausel enthält.

Gemäß Satz 10 Art. 1140.1 des russischen Zivilgesetzbuches ist in Russland das Recht des Erblassers, einseitig vom Erbvertrag zurückzutreten, gesetzlich vorgesehen, daher ist eine zusätzliche Abstimmung eines solchen Rechts nicht erforderlich. Nach Satz 15 des Beschlusses des Plenums des Obersten Gerichtshofs der Russischen Föderation vom 22.11. 2016 №54 „Über einige Fragen der Anwendung der allgemeinen Bestimmungen des Zivilgesetzbuches der Russischen Föderation über Verpflichtungen und deren Erfüllung“ sollte der Schluss gezogen werden, dass es in Russland unmöglich ist, für den Erblasser eine Gebühr im Erbvertrag für seinen Rücktritt vom Vertrag festzulegen, d. h. für waiver, den Verzicht

[1] Süß *R.* Op. cit. S. 392.

(Art. 310 des Zivilgesetzbuches der Russischen Föderation). Darüber hinaus verhindert der nicht unternehmerische Charakter des Erbvertrags die Festlegung einer solchen Zahlung auch für den Erben, wenn ihm der Vertrag das Recht einräumt, vom Vertrag zurückzutreten.

8.3. Verletzung der vertraglichen Pflichten durch den Erben. Die Nichterfüllung der Verpflichtung des Erben zum Unterhalt des Erblassers, ist in Deutschland eine Grundlage für den einseitigen Rücktritt des Erblassers vom Vertrag (§ 2295 BGB).

Die Folgen eines Verstoßes des Erben gegen seine Verpflichtungen werden in Russland nicht festgelegt. Diese Tatsache kann jedoch Grundlage für die Änderung oder Aufhebung des Vertrags auf dem Gerichtswege sein, wenn dies als wesentliche Änderung der Umstände bewertet wird (Art. 1140.1 Satz 9 des Zivilgesetzbuches der Russischen Föderation). Die böswillige Verletzung des Erben der Erfüllung seiner vertraglichen Unterhaltungspflicht gegenüber dem Erblasser kann als unwürdiges Verhalten angesehen werden. Aus diesem Grunde soll Art. 1117 Satz 2 des russischen Zivilgesetzbuches erweitert werden, damit das Gericht nicht nur gesetzliche Unterhaltspflichten, sondern auch vertragliche Verpflichtungen berücksichtigen kann.

8.4. Erbenunwürdigkeit. In Deutschland ist das Fehlverhalten des Erben ein Sondergrund für den Rücktritt des Erblassers vom Vertrag (§ 2294 BGB).

Das Zivilgesetzbuch der Russischen Föderation sieht ein allgemeines Erbverbot für unwürdige Erben vor (Art. 1140.1 Satz 6), aber die spezifischen Konsequenzen einer Änderung der persönlichen Beziehungen zwischen dem Erblasser und dem Erben in Russland werden nicht bestimmt. Die Gerichte können dies unterschiedlich interpretieren: die Kündigung des Erbvertrags, seine Ungültigkeit oder andere nachteilige Folgen für den Erben.

Die Gesetzgebung zu unwürdigen Gegenparteien spiegelt das Wesentliche des Erbvertrags wider, das sich nicht nur in der Übertragung von Eigentum an eine andere Person äußert, sondern auch in der Ernennung von Erben. Beispielsweise ist die Person des Käufers dem Verkäufer im Allgemeinen unwichtig. Im Gegensatz dazu setzt der Erbe die Persönlichkeit des Erblassers selbst fort, der im Erben seinen würdigen Nachfolger sehen will. Ein Erbvertrag kann ungültig werden, wenn Umstände eintreten, die den Erben diskreditieren[1].

8.5. Pflichtteil beim Erben. In Deutschland ist die Missachtung der Person, die Anspruch auf einen Pflichtanteil hat, ein Grund für die Anfechtung des Erbvertrags (§§ 2281, 2079 BGB). In Russland wird die Feststellung eines Pflichtanteils nach Abschluss eines Erbschaftsvertrags als wesentliche Änderung der Umstände angesehen, die die Grundlage für die Änderung oder Beendigung des Vertrags durch eine gerichtliche Entscheidung darstellt (Art. 1140.1 Satz 9 des Zivilgesetzbuches

[1] Osnovy nasledstvennogo prava Rossii, Germanii, Francii [Fundamentals of inheritance law of Russia, Germany, France]. Op. cit. P. 71—72.

der Russischen Föderation). In einer solchen Situation kann der vertragliche Erbe eine Verringerung des Umfangs seiner Verpflichtungen im Verhältnis zur Verringerung der Erbschaft verlangen (Art. 1140.1 Satz 6 des Zivilgesetzbuches der Russischen Föderation).

9. Unwirksamkeit des Erbvertrags. Besondere Folgen eines Gesetzverstoßes beim Abschluss eines Erbvertrags nach Art. 1140.1 des Zivilgesetzbuches der Russischen Föderation sind nicht vorgesehen, das bedeutet, dass in diesem Fall allgemeine Bestimmungen des russischen Zivilgesetzbuches über unwirksame Rechtsgeschäfte angewendet werden sollten.

Wird der Erbvertrag von den Ehegatten abgeschlossen, so verliert der Vertrag gemäß Abs. 2 Satz 5 Art. 1140.1 des Zivilgesetzbuches der Russischen Föderation im Falle der Auflösung der Ehe vor dem Tod eines der Ehegatten, sowie Anerkennung einer Ehe als nichtig, seine Gültigkeit. Die Rechtsnorm ist sehr kategorisch formuliert, daher wäre es aufgrund des Prinzips der Vertragsfreiheit sinnvoll, den Ehepartnern die Möglichkeit zu geben, andere Auswirkungen in Betracht zu ziehen. Die Gerichte müssen von einer dispositiven Feststellung der Folgen einer Scheidung oder ihrer Unwirksamkeit ausgehen, wenn dies aufgrund des Interessenausgleichs der Parteien des Erbvertrags erforderlich ist.

Zum Vergleich: In Deutschland ist ein Erbvertrag zwischen Ehegatten, Partnern oder Verlobten im Falle einer Scheidung oder Auflösung einer Verlobung ungültig (§§ 2077, 2279 BGB) und auch nichtig. Der Bundesgerichtshof geht jedoch davon aus, dass nach § 2268 BGB miteinander verbundene Anordnungen auch nach einer Scheidung oder einem Scheidungsantrag miteinander verbunden bleiben, wenn die Absicht, die Anordnung beizubehalten, im Erbvertrag klar angegeben ist[1].

In Russland gibt es praktische Erfahrungen einen Ehevertrag als gültig zu erklären, um einen gutgläubigen Ehegatten zu schützen (Art. 30 Satz 4 des Familiengesetzbuches der Russischen Föderation). Der Gesetzgeber könnte eine ähnliche Regel im russischen Zivilgesetzbuch formulieren, die es im Falle der Auflösung oder Ungültigkeit einer Ehe ermöglicht, den Erbvertrag aufrechtzuerhalten, so dass ein gutgläubiger (unschuldiger) Ehegatte eine Erbschaft erhält, die ihm im Falle des Todes eines zweiten Ehegatten zustehen würde. Und der schuldige Ehegatte muss die Rechte aus dem Erbvertrag verlieren (das Estoppel-Prinzip im Erbrecht). Dies wird dem Pt. 28 des Beschlusses des Plenums des Obersten Gerichtshofs der Russischen Föderation vom 29.05.2012 Nr. 9 „Zur Rechtspraxis in Erbschaftsfällen“ nicht widersprechen, da ein gutgläubiger ehemaliger Ehegatte nicht als gesetzlicher Erbe erster Ordnung berufen wird (er ist kein Ehegatte mehr), sondern als Vertragserbe.

Der Schutz eines gewissenhaften Ehegatten sollte auch in den Normen des Zivilgesetzbuches der Russischen Föderation über gemeinsame Testamente von Ehe-

[1] Scherer S. Op. cit. S. 236.

gatten vorgesehen werden, die auch bei Auflösung einer Ehe oder deren Nichtigerklärung vor und nach dem Tod eines der Ehegatten an Kraft verlieren (Abs. 3 Satz 4 Art. 1118 des Zivilgesetzbuches der Russischen Föderation).

10. Erbverzichtvertrag. Die Auslegung der Gesetzesnormen über den Erbvertrag in Russland lässt keine eindeutige Schlussfolgerung über die Möglichkeit zum Verzicht auf die gesetzlich zustehende und (oder) testamentarische Erbschaft vor ihrer Eröffnung durch eine Vereinbarung zwischen dem Erblasser und dem Erben zu. Die Reform der Erbrechtsgesetzgebung in Art. 1159 des Zivilgesetzbuches der Russischen Föderation hat keine Änderungen vorgenommen. Die einzige Möglichkeit der Ausschlagung der Erbschaft ist die Einreichung durch den Erben (persönlich oder durch einen Vertreter) einer Erklärung der Ausschlagung der Erbschaft. Eine solche Erklärung soll am Ort der Eröffnung der Erbschaft bei einem Notar oder einem anderen Beamten eingereicht werden, der befugt ist, eine Bescheinigung über das Erbrecht auszustellen.

Die neuen Methodischen Empfehlungen der Föderalen Notarkammer zur rechtlichen Gestaltung von Erbrechten geben für solchen Fall keine direkte Lösung[1].

Wenn eine Erbverzichtvereinbarung in Russland zulässig ist, sollte man für die Wahl eines effektiven Modells zu deren praktischen Umsetzung den rechtlichen Charakter und den Inhalt des Erbverzichtvertrags im Ausland analysieren.

In Deutschland ist ein Erbverzichtvertrag gesetzlich zulässig, aber deutsche Zivilisten vertreten die Meinung, dass es sich dabei nicht um eine Art Erbvertrag handelt, denn der enthält keine Anweisungen des Erblassers für den Todesfall[2]. Die Normen der §§ 2346—2352 BGB über das Erbverzicht befinden sich im Abschnitt 7 des 5. Buches. Die Regelungen zum Erbvertrag sind im Abschnitt 4 angegeben.

Durch Vertrag mit dem Erblasser können seine Verwandten sowie der Ehegatte des Erblassers auf ihr gesetzliches Erbrecht verzichten. Der Verzichtende wird gesetzlich von der Erbschaft ausgeschlossen, wie wenn er zur Zeit des Erbfalls nicht mehr lebe. Der Verzicht kann durch das Recht auf einen Pflichtanteil beschränkt werden (§ 2346 BGB). Jeder testamentarische Erbe oder Vermächtnisnehmer kann durch einen Vertrag mit dem Erblasser auf die Zuwendung verzichten. Das Gleiche gilt für eine Zuwendung, die in einem Erbvertrag einem Dritten gemacht ist (§ 2352 BGB), d. h., der Dritte, dem nach dem Erbvertrag etwas zusteht, kann im Rahmen eines unabhängigen Vertrags mit dem Erblasser darauf verzichten.

Der Erbverzichtsvertrag (§ 2348 BGB) und der Vertrag über dessen Aufhebung (§ 2351 BGB) bedürfen einer notariellen Beurkundung.

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[1] Metodicheskie rekomendacii po oformleniyu nasledstvennyh prav (utv. resheniem Pravleniya Federal'noj Notarial'noj Palaty ot 25.03.2019, protokol № 03/19) [Guidelines for registration of inheritance rights (decision Of the Board of the Federal Notary Chamber of 25.03.2019, Protocol No. 03/19)].

[2] Burandt W., Rojahn D., Balomatis A. Op. cit. S. 146; Gursky K.-H., Lettmaier S. Op. cit. S. 77.

Wenn das deutsche Modell eines Erbverzichtvertrags in Russland übernommen werden soll, können folgende Besonderheiten hervorgehoben werden:

Erstens, solch eine Vereinbarung sollte aufgrund ihres rechtlichen Charakters nicht als eine Art Erbvertrag qualifiziert werden.

Zweitens, der Erbe hat nach dem Verzicht auf den gesetzlichen Erbteil nicht einmal das Recht auf einen Pflichtanteil, gleichzeitig räumt der Gesetzgeber ein, dass der Erbverzicht durch das Recht auf einen Pflichtanteil beschränkt werden kann.

Drittens, der Gegenstand des Verzichts bezieht sich nicht nur auf den obligatorischen Anteil an der Erbschaft, sondern kann sich auch auf die testamentarische Erbfolge und einen Erbvertrag beziehen.

Viertens, der Erbschaftverzicht sowie der Verzicht auf Vermächtnis sind durch einen Vertrag mit dem Erblasser möglich.

Die Reform des Erbrechts legte im Satz 6 der Art. 1140.1 des Zivilgesetzbuches der Russischen Föderation fest, dass die Bedingungen des Erbvertrages in dem Teil gelten müssen, der nicht den Regeln des Zivilgesetzbuches der Russischen Föderation über den obligatorischen Anteil an der Erbschaft widerspricht (einschließlich des obligatorischen Anteils an der Erbschaft, worauf das Recht nach Abschluss des Erbvertrages aufgetreten ist).

Auch wenn ein Erbvertrag in Russland keinen Erbvertrag darstellt, stellt die bestehende Beschränkung des Inhalts des Erbvertrags durch den obligatorischen Anteil an der Erbschaft die absolute Freiheit des Vertrages, auf einen solchen Anteil zu verzichten, infrage. Aufgrund der Neuheit dieser Rechtsstruktur und des Fehlens ihrer gesetzlichen Regelung besteht die Gefahr des Missbrauchs durch Teilnehmer an erblichen Rechtsbeziehungen.

11. Verträge von Todes wegen und Verträge mit Erbschaft.

Nachdem in Russland ein Erbvertrag zustande kam, ist das Testament nicht mehr das einzige Rechtsgeschäft causa mortis (Art. 1118 Abs. 1 des Zivilgesetzbuches der Russischen Föderation), d. h. ein Rechtsgeschäft, wenn infolge der Verfügung über das Vermögen die Rechtswirkung mit dem Todesfall einer bestimmten Person eintritt. Es bestand Bedarf an der Entwicklung dieser Rechtsinstitution, um die Möglichkeit und Zulässigkeit des Abschlusses verschiedener anderer Verträge für die Veräußerung von Eigentum nach dem Erbfall sowie Verträge für die Veräußerung einer künftig erwarteten Erbschaft von den Erben sicherzustellen.

Die Normen der aktuellen Zivilgesetzgebung der Russischen Föderation lassen keine Schlussfolgerung über die Möglichkeit für den Abschluss der Rechtsgeschäfte in Russland ziehen, bei denen die rechtlichen Folgen mit dem Tod des Veräußerers des Vermögens oder seiner Gegenpartei verbunden sind. Möglich wäre nur die Anschließung eines Erbvertrages. Das Zivilgesetzbuch der Russischen Föderation enthält auch keine Rechtsnormen, die das Schicksal der künftigen Erbmasse auf vertraglicher Basis zwischen Erben ohne Beteiligung des Erblassers bestimmen.

Derzeit ist in der russischen Rechtsordnung eine Reihe von Hindernissen festzustellen, welche die Abschließung von oben genannten Verträgen erschweren oder sogar unmöglich machen:

1. Gemäß Abs. 3 Art. 572 des Zivilgesetzbuches der Russischen Föderation ist ein Vertrag, der die Übertragung einer Schenkung an den Empfänger nach dem Tod des Schenkers vorsieht, nichtig. Für solche Art Schenkung gelten die zivilrechtlichen Regeln des Erbrechts. Dies bedeutet, dass für das Zustandekommen einer Vertragsstruktur, die es den Parteien ermöglichen würde, eine unentgeltliche Veräußerung des Eigentums von Todes wegen vorzunehmen, die Ungültigkeit des Schenkungsvertrags auf den Todesfall aus dem Zivilgesetzbuch der Russischen Föderation ausgeschlossen oder mit anderen Worten das sogenannte „testamentarische Schenkung" zugelassen werden muss.

2. Teilnehmer am zivilen Umsatz können das Ziel haben, einen Entschädigungsvertrag auf den Todesfall abzuschließen, beispielsweise einen Kaufvertrag unter der Bedingung über den Zeitpunkt zur Erfüllung der Verpflichtung zur Übergabe der Ware „nach dem Tod des Verkäufers". Der Tod einer Partei kann als Zeitpunkt für obligatorische Rechtsgeschäfte oder als Sachverhalt im Zusammenhang mit der Übertragung des Eigentumsrechts auftreten. In der russischen Doktrin sind entgeltliche Rechtsgeschäfte wenig geprüft, deren vollständige oder teilweise Ausführung dem Lebenshorizont der Vertragsparteien zugeschrieben wird. Daher wird häufig die Ansicht vertreten, dass solche Rechtsgeschäfte als ungültig anerkannt werden. Gleichzeitig vertreten die modernen Autoren des Kommentars zum Zivilgesetzbuch der Russischen Föderation die Auffassung, dass es notwendig ist, dem wahren Willen der Bürger Vorrang einzuräumen und keine Rechtsgeschäfte auf den Todesfall in ein Testament umzuwandeln. Artikel 1118 des russischen Zivilgesetzbuches soll die Freiheit der Verteilung von Eigentum nach dem Todesfall schützen, sollte jedoch nicht die Rechtsgeschäfte unter Lebenden beeinträchtigen, auf deren Grundlage die Zusammensetzung der Erbschaft geändert wird[1].

3. Rechtsgeschäfte zukünftiger Erben untereinander oder mit Dritten bezüglich der Veräußerung der erwarteten Erbschaft vor ihrer Eröffnung können in der Praxis ebenfalls viele Fragen aufwerfen. Erstens, gemäß Absatz 4 der Artikel 1140.1 des Zivilgesetzbuches der Russischen Föderation sind die Rechte und Pflichten der Parteien eines Erbvertrags unveräußerlich und auf keine andere Weise übertragbar. Zweitens, die Möglichkeit der Veräußerung einer künftigen Erbschaft, die einer Person gesetzlich oder willentlich zusteht, ist überhaupt nicht gesetzlich geregelt. Artikel 1165 des Zivilgesetzbuches der Russischen Föderation erlaubt nur die Aufteilung in das gemeinsame Teileigentum an dem Erbgut, das bereits nach dem Tod des Erblassers durch Vereinbarung zwischen den Erben angenommen wurde.

Also, die tatsächliche Erwartung einer Erbschaft stellt in Russland aus einem der Gründe kein subjektives Recht dar, das vor dem Tod des Erblassers auf andere Personen übertragen werden kann.

[1] Nasledstvennoe pravo: postatejnyj kommentarij k stat'jam 1110—1185, 1224 Grazhdanskogo kodeksa Rossijskoj Federacii. Op. cit. P. 110—111, 606—607.

Um den rechtlichen Charakter von Erbverträgen oder verschiedenen Vereinbarungen über die Veräußerung von Vermögen im Todesfall zu verstehen, sollte die deutsche Erfahrung analysiert werden.

In der deutschen Rechtslehre kommen Zivilisten aufgrund der Systematisierung von Verträgen zwischen lebenden Personen zu dem Schluss, dass insbesondere folgende Rechtsgeschäfte keine Erbverträge sind:

1. Kaufverträge, bei denen die Leistung, beispielsweise die Zahlung von Waren, bis zum Tod einer der Vertragsparteien verschoben wird.

2. Schenkung von Todes wegen ist ein Rechtsgeschäft unter lebenden Personen. Es unterliegt nur dann den Vorschriften über den Todesfall, wenn ein solches Rechtsgeschäft nicht während des Lebens des Schenkenden ausgeführt wird (§ 2301 I BGB), d. h. die Schenkung soll einvernehmlich sein, sonst gelten die Regeln für die Schenkung unter Lebenden.

In Deutschland werden die Folgen der Konkurrenz zwischen Erbschaftsvertrag und Schenkung von Todes wegen desselben Eigentums an verschiedene Personen nicht direkt geregelt. Wenn der Erblasser nach Abschluss des Erbvertrags Schenkungen von Todes wegen macht, sollten die Interessen der Erben und der Vermächtnisnehmer offenbar durch allgemeine Sanktionen für böswillige Spenden zum Nachteil der Erben und Vermächtnisnehmer garantiert werden: die Rückgabe von Eigentum oder die Entschädigung für seinen Wert nach Eröffnung der Erbschaft (§§ 2287, 2288 BGB).

Die Besonderheit der deutschen Praxis der Vererbung von Firmen und Unternehmen zeigt sich darin, dass es Fälle gibt, wobei der Schenkungsgegenstand nach dem Tod des Schenkenden zur Verwendung unter Nießbrauchsbedingungen mit der Übertragung des Eigentums an den Betroffenen übertragen wird. Darüber hinaus ist eine Schenkung während des Lebens aufgrund zukünftiger Erbschaft zulässig, d. h. der Schenkungsgegenstand geht mit der Bedingung des Abzugs vom künftigen Anteil seines Erbes in das Eigentum des Erben über[1].

3. Im Rahmen des Erbschaftskaufvertrags verpflichtet sich der Erbe, die erworbene Erbschaft nach Eröffnung der Erbschaft auf den Käufer zu übertragen (§§ 2371 BGB usw.). Gemäß § 2385 BGB gelten die Regeln für den Kauf einer Erbschaft für den Kauf einer Erbschaft, die ein Verkäufer im Rahmen eines Vertrages erworben hat, sowie für andere Verträge zur Veräußerung einer Erbschaft, die dem Veräußerer eröffnet oder anderweitig von ihm erworben wurden. Bei der Schenkung einer Erbschaft ist der Schenker nicht verpflichtet, den Wert von Gegenständen aus der Erbschaft, die vor dem Zeitpunkt der Schenkung unentgeltlich ausgegeben oder veräußert wurden, zu erstatten oder vor dem Zeitpunkt der Schenkung kostenlos festgestellte Belastungen zu ersetzen. Die Verpflichtung des Verkäufers nach § 2376

[1] Emel'kina I. A. Perspektivy nasledovaniya biznesa na osnovanii nasledstvennogo dogovora v rossijskom prave [Prospects of succession to the business on the basis of the hereditary contract in Russian law] (pod obshch. red. S. D. Mogilevskogo, M. A. Egorovoj) // Rossijskaya akademiya narodnogo hozyajstva i gosudarstvennoj sluzhby pri Prezidente RF. Yuridicheskij fakul'tet im. M. M. Speranskogo. «YUsticinform», 2016. URL: www.garant.ru.

BGB, dafür zu sorgen, dass die Erbschaft nicht belastet wird (z. B. Vermächtnis), gilt nicht für den Schenker. Wenn der Schenker den Mangel arglistig verschweigt, ist er verpflichtet, dem Beschenkten den daraus entstehenden Schaden zu ersetzen.

4. Zukünftige Erben können gesetzlich Verträge über den Anteil an der Erbschaft per Gesetz oder den Pflichtanteil eines davon abschließen (§ 311 b V BGB). Solche Rechtsgeschäfte unter lebenden Personen haben keine direkte erbrechtliche Wirkung. Diese Rechtsgeschäfte mit einer zukünftigen Erbschaft haben eine Besonderheit, da die Mortis Causa eine dritte Person (lebender Erblasser) und nicht die Vertragsparteien (gesetzliche Erben) betrifft. Eine solche Beziehung stellt eine Ausnahme dar, da der Erbvertrag einer lebenden dritten Person in der Regel ungültig ist. Diese Nichtigkeitsklausel gilt auch für einen Vertrag über einen Pflichtanteil oder ein Vermächtnis aus dem Erbe einer lebenden dritten Person (§ 311 b IV BGB).

Zum Vergleich: In Österreich besteht ein Verbot der Veräußerung der erwarteten Erbschaft einschließlich der erbrechtlichen Zuwendungen, da Verträge, die während des Lebens des Erblassers über die Veräußerung seines Eigentums durch andere Personen als Erbschaft geschlossen wurden, gemäß § 879 Abs. 2 Ziff. 3 ABGB nichtig sind[1]. Es gibt jedoch keine Ausnahmen für Rechtsnachfolger dieser Regelung, im Gegensatz zu § 311 b V des Deutschen BGB.

5. Das Gesetz erlaubt die Veräußerung von Erbschaftsanteilen (§ 2033 I BGB).

6. Ein Sondergesetz sieht Verträge über die Übertragung der Höfe vor (§7, 17 HöfeO). Solche Verträge sind nicht erblich, sondern Rechtsgeschäfte unter Lebenden. Aufgrund der Klausel über die angebliche Erbschaft, welche sie enthalten, wirken sie sich jedoch auf das Erbrecht aus und entsprechen daher einer Verfügung von Todes wegen.

7. Unternehmensnachfolgeverträge, in denen die Rechte und Pflichten der Betroffenen unmittelbar festgelegt sind, sind kein Erbvertrag, auch wenn sie erst im Todesfall in vollem Umfang in Kraft treten (BGH WM 66, 367)[2].

Wenn also ein Vertrag auf den Todesfall geschlossen wird, handelt es sich nicht unbedingt um einen Erbvertrag. Nicht jeder Vertrag mit Erbgut ist ein Vertrag von Todes wegen seiner Parteien.

Schlussbestimmungen. Im Zivilgesetzbuch der Russischen Föderation sind die Garantien von Erben und Vermächtnisnehmer im Rahmen eines Erbschaftsvertrages äußerst schwach, daher handelt es sich bei dieser Vereinbarung um ein besonderes „Testament“ mit der Möglichkeit von Schadensersatz im Falle einer einseitigen Ablehnung des Erblassers aus dem Vertrag. Der „Erblasser“ kann die Verpflichtung zum Mängelersatz durch die Freiheit umgehen, das Eigentum während seines Lebens ohne direkten Verzicht auf den Erbvertrag zu veräußern. Um die Konkurrenz zwischen Testamenten, gemeinsamen Testamenten von Ehepartnern und Erbschaftsverträgen in Russland zu verhindern, sollte das Gesetz klare Regeln für die Korrelation dieser Rechtsgeschäfte formulieren. Um das Interesse der russischen Bürger am

[1] Süß *R.* Op. cit. S. 974.

[2] Palandt. Op. cit. S. 2172; Brox H., Walker W.-D. Op. cit. S. 92; Gursky K.-H., Lettmaier S. Op. cit. S. 77; Burandt W., Rojahn D., Balomatis A. Op. cit. S. 146.

Abschluss eines Erbschaftsabkommens zu erhöhen, sollte sein Modell auf der Grundlage deutscher Erfahrungen verbessert werden, und zwar:

1) im Gesetz die Zulässigkeit und die Grenzen der Anwendung der allgemeinen Bestimmungen des Verpflichtungs- und Vertragsrechts auf einen Nachfolgevertrag festlegen;

2) die Möglichkeit der Aufnahme testamentarischer Verfügungen in den Erbvertrag und die Regeln für deren Aufhebung bestimmen;

3) ohne gegen die Norm des Zivilgesetzbuches der Russischen Föderation über die Nichtigkeit zu verstoßen, dem Erblasser zu verbieten, sein Eigentum zu Lebzeiten nach Abschluss einer Erbschaftsvereinbarung zu veräußern, die Einschränkung dieser Freiheit durch einen Vertrag über die Unterlassung der Anordnungen zuzulassen sowie Erben vor böswilliger Schenkung des Erblassers seines Eigentums an Dritte zu schützen;

4) die Erbrechte eines gutgläubigen Ehegatten zu schützen, falls der Erbvertrag aufgrund der Auflösung oder Nichtigkeit der Ehe ungültig geworden ist;

5) im Gesetz die Bedingungen für die Verweigerung der Erbschaft im Rahmen eines Vertrags mit dem Erblasser zu formulieren, auch aus dem Pflichtanteil[1].

Das rechtliche Wesen einer Erbschaftsverzichtsvereinbarung ist einzigartig, da der Erbe die Erbschaft selbst ablehnt, obwohl sie ihm bis zum Tod des Erblassers noch nicht gehört. Dies ist eine Art juristische Fiktion, wenn das Bestehen einer Verweigerung eines nicht existierenden subjektiven Rechts, die in Zukunft entstehen könnte, zulässig ist.

Nach der Festlegung in Russland der Regeln zum Erbvertrag ist es notwendig geworden, andere Verträge über die Veräußerung von Eigentum von Todes wegen zu regeln. Auf der Grundlage der Entlehnung der Bestimmungen des deutschen BGB sollte das Zivilgesetzbuch der Russischen Föderation die Regeln für Verkauf, Kauf und Schenkung von Eigentum des Todes wegen, Verkauf und Kauf und Schenkung von Erbschaften sowie Verträge zwischen Erben über die Veräußerung künftiger Erbschaften vorsehen.

Der Erbvertrag allein ist von seiner Natur aus in Bezug auf die Erbschaft ein Vertrag mortis causa. Andere Veräußerungsverträge in Bezug auf die Erbschaft (Vereinbarung zwischen Erben über die künftige Erbschaft oder deren Ablehnung, Verkauf und Schenkung einer angenommenen Erbschaft) sind keine Mortis-Causa-Rechtsgeschäfte, da sie keine Anweisungen der Parteien auf den Fall ihres Todes enthalten. Andere Verträge (Kaufvertrag sowie Schenkung von Eigentum von Todes wegen) sind ein Mortis-Causa-Rechtsgeschäft, es handelt sich jedoch nicht um Erbschaft, sondern um Eigentum während des Lebens der Parteien[2].

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[1] Lorenz D.V. Nasledstvennyj dogovor: podhod kontinental'nogo prava [The Hereditary Contract: Roman and German Approaches]. Pravo. Zhurnal Vysshey shkoly ekonomiki, 2020, No. 2, pp. 105—129.

[2] Lorenz D.V. Dogovor ob otkaze ot nasledstva: modeli v evropejskoj pravovoj sisteme [The contract on renunciation of inheritance: a model in the European legal system.]. Notarial'nyj vestnik, 2019, No. 9. pp. 34—47; Lorenz D.V. Dogovory mortis causa i dogovory v otnoshenii nasledstva [Mortis causa contracts and inheritance contracts]. Notarius, 2019, No. 5. pp. 28—32.

Die Berufung auf „nationale Sicherheitsinteressen“ im Kontext des internationalen und europäischen Wirtschaftsrechts

1. Einleitung

Der vorliegende Beitrag, der Herrn Kollegen Dietrich Rauschning anlässlich seines 90. Geburtstags herzlich zugeeignet ist, wirft einen Blick auf die gegenwärtigen Tendenzen im internationalen, europäischen und deutschen Wirtschaftsrecht. Unverkennbar ist, dass sich die Ideen des Freihandels und Binnenmarktes — zumindest in unseren Breiten — nicht mehr uneingeschränkter Beliebtheit erfreuen. In jüngerer Zeit wurde das unter anderem daran sichtbar, als eine heftig geführte Debatte um sog. „Chlorhühnchen“ und die Akzeptanz internationale Schiedsgerichte dazu geführt hat, dass die Verhandlungen über die Transatlantische Handels- und Investitionspartnerschaft (TTIP) zu Beginn des Jahres 2017 nach dreieinhalb Jahren auf Eis gelegt wurden. Im Kontrast dazu vermeldete die Presse Mitte November 2020, dass China und 14 Asien-Pazifik-Staaten[1] den weltgrößten Freihandelspakt Regional Comprehensive Economic Partnership (RCEP) abgeschlossen haben, sodass in Ostasien die weltgrößte Freihandelszone entsteht. In der deutschen Presse wird von einem „Weckruf für Europa“[2] gesprochen und ängstlich gefragt, ob die Europäische Union den Anschluss an die Weltmacht China verlieren könnte. Chinas Regierungschef Li Keqiang sprach nach dem Abschluss des RCEP von einem „Hoffnungsschimmer“, der beweise, dass Multilateralismus der „richtige Weg“ sei.[3] Der Premierminister Singapurs, Lee Hsieng Loong, fasste die Bedeutung des RCEP wie folgt zusammen: „In einer Zeit, in der der Multilateralismus an Boden verliert und sich das globale Wachstum verlangsamt, zeigt das RCEP, dass die asiatischen Länder für offene und vernetzte Lieferketten, freien Handel und engere gegenseitige Verflechtung stehen.“[4] Diese positive Einschätzung ist durch-

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[1] Australien, Brunei, Indonesien, Japan, Kambodscha, Laos, Malaysia, Myanmar, Neuseeland, Philippinen, Singapur, Südkorea, Thailand und Vietnam. Indien und die USA haben sich hingegen letztlich nicht beteiligt, da sie ihre Interessen nicht als hinreichend gewahrt ansahen.

[2] Ein Weckruf für Europa, RP online, 15.11.2020. URL: https://rp-online.de/politik/ausland/rcep-das-asiatische-freihandelsabkommen-ist-ein-weckruf-fuer-europa_aid-54626821 (accessed 20.10.2021).

[3] *felt/AfP*, In Ostasien entsteht die weltgrößte Freihandelszone, RP online, 15.11.2020. URL: https://rp-online.de/wirtschaft/rcep-in-ostasien-entsteht-die-weltgroesste-freihandelszone_aid-54627937 (accessed 20.10.2021).

[4] *Stocker*, Diese drei Länder sind die Gewinner der größten Freihandelszone der Welt, Die Welt online, 16.11.2020. URL: https://www.welt.de/finanzen/geldanlage/article22026950/Freihandelsabkommen-ist-eine-Chance-fuer-Anleger.html (accessed 20.10.2021).

aus plausibel, denn das Abkommen führt z. B. zu einer systematischen Reduzierung der Zölle zwischen wirtschaftlich starken Mitgliedern wie China, Japan und Südkorea; außerdem wird es zu einer Vereinheitlichung der Ursprungsregeln führen und auf diese Weise die bestehenden Handelshemmnisse zwischen den Ländern Ost- und Südostasiens beseitigen.

Pikanterweise war dieses Abkommen als Gegengewicht zum TTIP gedacht, das nach dem Rückzug der Trump-Administration aus den Verhandlungen bis dato nicht verwirklicht werden konnte und mittelfristig vermutlich keine Chance auf Umsetzung hat — zu groß sind die Bedenken gegen den Inhalt des Abkommens diesseits wie jenseits des Atlantiks. Vorläufig haben die USA und Europa also das Nachsehen im Wettlauf um die besten Wirtschaftsbedingungen im Welthandel.

1.1. Die Krise der WTO (2008–2020)

Etwas mehr als 25 Jahre nach ihrer Gründung[1] befindet sich die WTO in einer veritablen Krise,[2] die verschiedene Ursachen hat.[3] Diese Krise dauert mindestens seit dem Scheitern der 2001 begonnenen Doha-Handelsrunde im Jahr 2008 an.[4] Seither sind erhebliche handelspolitische Verwerfungen festzustellen. An die Stelle des Systemwettbewerbs zwischen „Ost“ (scil. sozialistische Staaten mit Zentralverwaltungswirtschaft) und „West“ (scil. marktwirtschaftlich orientierte, demokratische Staaten) ist nicht die erwartete Konvergenz hin zu einem mehr oder weniger einheitlichen System demokratischer Marktwirtschaften getreten. Vielmehr findet der Systemwettbewerb zwischen den demokratischen, marktorientierten Staaten des „Westens“ und dem autokratischen Staatskapitalismus Chinas und anderer Schwellenländer des „Südostens“ statt.[5] Es fällt schwer, die 164 Mitglieder der WTO unter den gegebenen politischen, gesamtgesellschaftlichen und wirtschaftlichen Umständen als Mitglieder einer supranationalen Organisation zu begreifen, die „an einem Strang“ ziehen. Die Heterogenität wird sicherlich auch dadurch verstärkt, dass die „großen“ Wirtschaftsmächte wie China und die USA besonders stark rivalisieren; die Verhängung von Strafzöllen ist äußerer Ausdruck der bestehenden wirtschaftspolitischen Spannungen. Dieses handelspolitische In-

[1] Die Mitglieder des GATT hatten sich am 15. April 1994 auf die Erklärung von Marrakesch geeinigt, die zur Gründung der Welthandelsorganisation (WTO) zum 1. Januar 1995 führte.

[2] *Mildner/von Unger/Tepper*, WTO — die Hüterin des Welthandels in der Krise, Wirtschaftsdienst 2020, 332 (332 f.) sprechen von einer „ernsthaften Effektivitäts- und Legitimitätskrise“.

[3] *Mildner/Tepper/von Unger*, WTO — die Hüterin des Welthandels in der Krise, Wirtschaftsdienst 2020, 332 ff.

[4] *Kolev/Matthes*, Multilaterale Abkommen: Enthusiasmus und Enttäuschung, Wirtschaftsdienst 2020, 320.

[5] *Felbermayr*, 25 Jahre WTO — Ursachen des Zerfalls und Reformvorschläge für die Zukunft. URL: https://www.ifw-kiel.de/de/publikationen/kiel-focus/2019/25-jahre-wto-ursachen-des-zerfalls-und-reformvorschlaege-fuer-die-zukunft-0/ (accessed 20.10.2021).

strument wurde seit Januar 2018 von dem damaligen US-Präsidenten Donald Trump vermehrt angewendet, um auf diese Weise die Verringerung des Handelsbilanzdefizits zwischen den USA und China zu erreichen.[1] In der Literatur wird diesbezüglich die Vermutung angestellt, dass die USA und vermutlich auch europäische Staaten dem Beitritt der Volksrepublik China zur WTO zum 11. Dezember 2001 nicht zugestimmt hätten, wenn sie damals gewusst hätten, dass dieses Land sie binnen eines Vierteljahrhunderts hinsichtlich der gesamten Wirtschaftskraft überholen könnte;[2] ebenso wenig dürfte man damit gerechnet haben, dass China dabei auf ein ganz anderes, rivalisierendes Wirtschaftssystem (nämlich dasjenige des gelenkten Handels, engl. managed trade, oder auch Staatskapitalismus) setzen würde anstatt auf die Integration in die Welthandelsordnung der WTO. Spätestens seit der Wirtschafts- und Finanzkrise von 2009 hat China aufgehört, sein Wirtschaftssystem dem westlichen Modell anzugleichen. Die Unvereinbarkeiten des chinesischen Staatskapitalismus mit dem westlichen Wirtschaftsmodell treten zunehmend deutlicher zutage, zumal sich China überdies befleißigt, sein Wirtschaftsmodell mittels der sog. Belt and Road Initiative (BRI) zu exportieren.[3] Mit dem liberalen Wirtschaftsmodell, das dem GATT von 1948 und der WTO von 1995 zugrunde liegt, ist das chinesische Wirtschaftsmodell kaum zu vergleichen und schwerlich in Einklang zu bringen.[4] Zudem widersprechen die gegenwärtigen geostrategischen Rivalitäten dem liberalen Wirtschaftsmodell und den Prämissen der WTO, namentlich den Prinzipien der Meistbegünstigung (Art. I:1 GATT), der Nichtdiskriminierung (Art. III GATT) und der Reziprozität (Art. XI:1 GATT).

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[1] Zunächst wurden im Januar Einfuhrzölle i. H. v. 20—50 % auf Solarzellen, Panels und Waschmaschinen aus China verhängt. Im März wurden sodann Einfuhrzölle auf Stahl (25 %) und Aluminium (10 %) verhängt. Derartige Importe stellten aus Sicht der US-Regierung angeblich ein Sicherheitsrisiko für die USA dar. Die Stärkung der nationalen Sicherheit war ein wesentlicher Bestandteil der Handelsagenda von Präsident Trump vom April 2020. Als Reaktion auf die US-Zölle für Stahl und Aluminium verhängte China seinerseits Anfang April 2018 eigene Importzölle auf amerikanische Waren in Höhe von insgesamt drei Milliarden Dollar; siehe dazu *Mildner/von Unger/Tepper*, WTO — die Hüterin des Welthandels in der Krise, Wirtschaftsdienst 2020, 332 (333 f.).

[2] Der Anteil der Volksrepublik China (ohne Hongkong) am weltweiten Warenexport ist vom Jahr 2002 bis zum Jahr 2008 von circa 7 % auf 17 % gestiegen. Im gleichen Zeitraum sanken die Anteile der Europäischen Union und der Vereinigten Staaten (USA) von circa 18,3 % bzw. 15,2 % auf circa 15,6 % bzw. 11,3 %. China ist nach den USA der zweitgrößte Handelspartner der Europäischen Union und die Europäische Union ist ihrerseits der größte Handelspartner Chinas, siehe „Chinas Staatskapitalismus: Herausforderung für die europäische Marktwirtschaft“, in: *Monopolkommission*, XXIII. Hauptgutachten der Monopolkommission, „Wettbewerb 2020“, Kapital IV, S. 235 (236).

[3] *Felbermayr*, 25 Jahre WTO — Ursachen des Zerfalls und Reformvorschläge für die Zukunft, abrufbar unter: https://www.ifw-kiel.de/de/publikationen/kiel-focus/2019/25-jahre-wto-ursachen-des-zerfalls-und-reformvorschlaege-fuer-die-zukunft-0/ (accessed 20.10.2021).

[4] Siehe dazu auch *Monopolkommission*, XXIII. Hauptgutachten der Monopolkommission „Wettbewerb 2020“, Kapitel IV „Chinas Staatskapitalismus: Herausforderung für die europäische Marktwirtschaft“, S. 235 ff.

Ein weiteres wesentliches Problem besteht im Bereich der Streitbeilegung innerhalb der WTO. Die Verweigerungshaltung des US-Präsidenten Donald Trump hat dazu geführt, dass das Streitbeilegungsorgan der WTO, der Dispute Settlement Body (DSB), mangels erforderlicher Neubesetzungen im Berufungsgremium, dem Appellate Body, nicht mehr handlungsfähig ist.[1] Als Begründung für dieses Verhalten wird vorgebracht, dass die Regierungen den Streitschlichtungsmechanismus dazu nutzten (bzw. missbrauchten), um dort neues Recht zu schaffen, wo es bislang keine Regeln gab.[2] Der Vorwurf lautet, dass es erhebliche Mandatsüberschreitungen des Berufungsgremiums gegeben habe, was wiederum zu als untragbar empfundenen Souveränitätsverlusten geführt habe.[3]

Somit ist zu konstatieren, dass der „ökonomische Nationalismus" dem Welthandelssystem der WTO als ernstzunehmender, ja aggressiver Gegner gegenübersteht. Die WTO befindet sich derzeit ohne Zweifel in einer Sackgasse. Die erhebliche Zunahme bilateraler Präferenzabkommen in den letzten 20 Jahren belegt zwar eindrucksvoll, dass die Grundsätze der Meistbegünstigung, der Nichtdiskriminierung und der Reziprozität nach wie vor „lebendig" sind und in der bilateralen Staatenpraxis Beachtung finden. Letztlich kann man sich aber mit einem Flickenteppich an bilateralen bzw. plurilateralen Abkommen, die in ihrer Gesamtheit eine „WTO light" ergeben, nicht zufriedengeben, weil die zentralen Ideen des Welthandelsrechts universeller Natur sind und deshalb auf eine multilaterale Wirtschaftsordnung abzielen. Die gegenwärtige „Balkanisierung" ist ein Rückschritt gegenüber dem mit der Gründung der WTO im Jahr 1995 erreichten Rechtsstand. Es sei im Übrigen daran erinnert, dass die oben genannten Grundsätze darauf angelegt sind, auch Mitglieder mit geringer Marktgröße gleichberechtigt partizipieren lassen.[4]

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[1] Seit dem 10.12.2019 ist der Appellate Body nur noch mit einem Mitglied (statt sieben Mitgliedern) besetzt (i. e. *Hong Zhao*, Amtsperiode vom 1.12.2016—30.12.2020); siehe dazu auch *Glöckle/Würdemann*, Die Appellate Body-Krise der WTO — eine Analyse der US-Kritikpunkte, EuZW 2018, 976 ff.; *Loesewitz*, Das WTO Dispute Settlement System in der Krise, in: Tietje/Kraft/Kumpan (Hrsg.), Beiträge zum Transnationalen Wirtschaftsrecht, Heft 165, 2019, passim.

[2] *Mildner/von Unger/Tepper*, WTO — die Hüterin des Welthandels in der Krise, Wirtschaftsdienst 2020, 332 (333).

[3] Konkret ging es um die umstrittene Methode des „Zeroing" als Grundlage für die Berechnung von Einfuhrzöllen in den USA sowie die Praxis der Verhängung von sog. *double remedies* (Kombination aus Antidumping- und Ausgleichszöllen gegenüber chinesischen Importen); siehe dazu *Mildner/von Unger/Tepper*, WTO — die Hüterin des Welthandels in der Krise, Wirtschaftsdienst 2020, 332 (333); *Diekmann*, Globale Handelsordnung — mit den oder ohne die USA?, Wirtschaftsdienst 2020, 324 (325); *von Daniels/Dröge/Bögner*, WTO-Streitschlichtung: Auswege aus der Krise. Drei Optionen für die EU, mit der US-Blockade umzugehen, SWP-Aktuell Nr. 1 2020, 1 (4), abrufbar unter: https://www.swp-berlin.org/fileadmin/contents/products/aktuell/2020A01_dns_dge_boegner.pdf; siehe ferner *Trusa*, NMEs and the Double Remedy Problem, World Trade Review (2017), 16:4, 619 et seqq. (accessed 20.10.2021).

[4] Zutreffend *Diekmann*, Globale Handelsordnung — mit den oder ohne die USA?, Wirtschaftsdienst 2020, 324 (327).

Das Fehlen einer funktionsfähigen einheitlichen Streitbeilegung ist ebenfalls beklagenswert. Ob Musterpanels, wie die Europäische Union und Kanada eines eingerichtet haben, die bisherige einheitliche Streitbeilegungspraxis des DSB werden ersetzen können, ist eine offene Frage; Zweifel daran sind wohl erlaubt. Vielleicht darf man nach dem Amtswechsel in den USA zumindest in dieser Hinsicht hoffen, dass mittelfristig Abhilfe geschaffen wird und es zu Neubesetzungen in der Berufungsinstanz des Streitbeilegungsorgans kommt. Das freilich setzt voraus, dass man sich ein Stück weit von der „America first"-Strategie befreit, die freilich sowohl von Ex-Präsident Donald Trump als auch seinem — letztlich erfolgreichen — Herausforderer Joe Biden im Wahlkampf 2020 verfolgt wurde. Die WTO sollte ihrerseits nicht untätig bleiben und bloß abwarten. Dem Vernehmen nach arbeitet man bereits an einem „Plan B", d. h. an einer WTO ohne die USA (so der ehemalige WTO-Generaldirektor und EU-Handelskommissar Pascal Lamy).[1] Eine Weiterentwicklung der Welthandelsordnung ohne die USA ist allerdings kaum vorstellbar.[2]

Als Alternative wird die Etablierung eines „Klubsystems" diskutiert, innerhalb dessen ein Kern von Mitgliedern mit demokratischen Marktwirtschaften und aneinander angepassten Wertesystemen die wirtschaftliche Integration vertieft und eine gemeinsame Streitbeilegung praktiziert.[3] Derzeit wird in der WTO über vier plurilaterale Initiativen verhandelt (E-Commerce, Dienstleistungen, Investitionen und KMU).[4] Auch für die Streitschlichtung hat die EU mit 15 anderen WTO-Mitgliedern Anfang April 2020 eine — vermutlich provisorische — Ersatzstreitschlichtung vereinbart, um die Lähmung des Appellate Body zu überwinden.[5]

Derartige Vereinbarungen bzw. Regelungsvorschläge laufen auf eine Welthandelsordnung mit verschiedenen Akteuren bzw. mehreren Geschwindigkeiten im Sinne einer „zweitbesten Lösung" hinaus.[6] Aus pragmatischen Erwägungen mag

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[1] Siehe Die Zeit vom 22. Februar 2018, «Plan B: Eine WTO ohne die USA». URL: http://institutdelors.eu/wp-content/uploads/2018/02/ZEIT_2018_09_00026.pdf (accessed 20.10.2021); siehe ferner *Diekmann*, Globale Handelsordnung — mit den oder ohne die USA?, Wirtschaftsdienst 2020, 324 ff.

[2] *Diekmann*, Globale Handelsordnung — mit den oder ohne die USA?, Wirtschaftsdienst 2020, 324 (327).

[3] *Felbermayr*, 25 Jahre WTO — Ursachen des Zerfalls und Reformvorschläge für die Zukunft. URL: https://www.ifw-kiel.de/de/publikationen/kiel-focus/2019/25-jahre-wto-ursachen-des-zerfalls-und-reformvorschlaege-fuer-die-zukunft-0/ (accessed 20.10.2021).

[4] *Mildner/von Unger/Tepper*, WTO — die Hüterin des Welthandels in der Krise, Wirtschaftsdienst 2020, 332 (334 f.).

[5] *Diekmann*, Globale Handelsordnung — mit den oder ohne die USA?, Wirtschaftsdienst 2020, 324 (327); zu möglichen Alternativen in Bezug auf die Streitschlichtung siehe von *Daniels/Dröge/Bögner*, WTO-Streitschlichtung: Auswege aus der Krise. Drei Optionen für die EU, mit der US-Blockade umzugehen, SWP-Aktuell Nr. 1 2020, 1 (6 ff.). URL: https://www.swp-berlin.org/fileadmin/contents/products/aktuell/2020A01_dns_dge_boegner.pdf (accessed 20.10.2021).

[6] Zu konkreten weiteren Vorschlägen einer möglichen Reform der WTO siehe *Mildner/von Unger/Tepper*, WTO — die Hüterin des Welthandels in der Krise, Wirtschaftsdienst 2020, 332 (333).

man dem — mangels echter Alternativen — zustimmen, zumal anderenfalls ein „Systemausfall“ droht, der viel schlimmer wäre.[1] Theoretisch betrachtet vermögen diese Aussichten für den Welthandel jedoch nicht zu befriedigen, da sie der von David Ricardo (1772—1823) im frühen 19. Jahrhundert erstmals formulierten und in der Sache bis heute anerkannten Lehre vom comparative advantage widersprechen.[2] Statt aller sei hier Paul A. Samuelson zitiert, der dazu im Jahr 1980 Folgendes festgehalten hat: “There is essentially only one argument for free trade or freer trade, but it is an exceedingly powerful one, namely: Free trade promotes a mutually profitable division of labour, greatly enhances the potential real national product for all nations, and makes possible higher standards of living all over the globe.”[3]

Zudem ist fraglich, ob die WTO als Hüterin des Welthandels wird auftreten können, wenn dessen Aufspaltung in verschiedenste bilaterale und plurilaterale Abkommen und eine auf wenige Mitglieder beschränkte Ersatzstreitschlichtung voranschreitet. Das beste Mittel gegen protektionistische Maßnahmen ist eine einheitliche und effizient durchsetzbare multilaterale Welthandelsordnung — also gerade dasjenige Regelungsprogramm, das mit der Gründung der WTO 1995 zu schaffen beabsichtigt war.

1.2. Die Bekämpfung von Unternehmensübernahmen durch ausländische Unternehmen mittels der Verschärfung des deutschen Außenwirtschaftsrechts

Ein zweites „Krisenphänomen“ stellt die Veränderung des politischen Umfelds für die Übernahme deutscher Unternehmen aus dem Ausland dar. In diesem Bereich verfolgt die deutsche Bundesregierung (konkret: Bundeswirtschaftsminister Peter Altmaier) seit einigen Jahren eine neue wirtschaftspolitische Strategie, die sich stärker an nationalen Interessen ausrichtet als zuvor. Dabei geht es konkret um die Rolle chinesischer Investoren, seit das Augsburger Robotik-Unternehmen KUKA AG im August 2016 von dem chinesischen Midea-Konzern übernommen wurde; diese Übernahme hat hierzulande regelrechte Schockwellen bei einigen führenden Vertretern von Politik und Wirtschaft ausgelöst.

Sowohl auf europäischer wie auch auf nationaler Ebene kam es in der Folge zu Verschärfungen beim Prüfungsmaßstab bei Investitionsprüfungen gemäß den Bestimmungen des Außenwirtschaftsrechts. Für eine Investitionsprüfung reicht es nunmehr bereits aus, wenn ein Unternehmenserwerb zu einer „voraussichtlichen Beeinträchtigung“ der öffentlichen Ordnung oder Sicherheit führt; bisher war dafür eine „tatsächliche Gefährdung“ erforderlich. Die Begründung des Bundeswirtschaftsministeriums für diese Änderung des deutschen Außenwirtschaftsrechts lau-

[1] *Felbermayr*, 25 Jahre WTO — Ursachen des Zerfalls und Reformvorschläge für die Zukunft. URL: https://www.ifw-kiel.de/de/publikationen/kiel-focus/2019/25-jahre-wto-ursachen-des-zerfalls-und-reformvorschlaege-fuer-die-zukunft-0/ (accessed 20.10.2021).
[2] *Ricardo*, Principles of Political Economy and Taxation, 1817.
[3] *Samuelson*, Economics, 11th ed. 1980, p. 651.

tet: „Mit der Novelle des Außenwirtschaftsgesetzes wollen wir unsere Sicherheitsinteressen besser schützen und Prüfverfahren transparenter machen. Deutschland ist und bleibt ein offener Investitionsstandort, aber wir müssen dort, wo nationale und europäische Sicherheitsinteressen berührt sind, genauer hinschauen können. Gleichzeitig erhöhen wir die Transparenz und fassen Prüffristen klarer und transparenter, um so den Unternehmern und der Wirtschaft mehr Rechtsklarheit zu geben.“[1]

2. Der Rechtsrahmen für die Berufung auf nationale Sicherheitsinteressen

2.1. Ausnahmen zur Wahrung der Sicherheit gemäß Art. XXI GATT und Art. XIV GATS

Art. XXI lit. b UAbs. iii), 2. Alt. GATT (Ausnahmen zur Wahrung der Sicherheit, engl. Security Exceptions) bestimmt, dass die Vertragsparteien des GATT nicht daran gehindert sind, „Maßnahmen zu treffen, die nach ihrer Auffassung zum Schutz ihrer wesentlichen Sicherheitsinteressen notwendig sind… bei sonstigen ernsten Krisen in den internationalen Beziehungen“ (engl. other emergency in international relations). Funktional entspricht dem Art. XIV Abs. 1 lit. b UAbs. iii 2. Alt. GATS, der die Ausnahmen hinsichtlich der Gewährleistung der Sicherheit im Bereich des internationalen Dienstleistungshandels regelt.

Fraglich ist, was unter nationalen Sicherheitsinteressen der Mitglieder konkret zu verstehen ist. Die zweite Alternative des Satzes ist, wie in der Literatur behauptet wird, in der Tat “significantly more vague”[2] als die erste, die von „Kriegszeiten“ (engl. times of war) spricht. Die zweite Alternative soll nach der Kommentarliteratur vor allem Bedrohungen gleichen Gewichts erfassen.[3]

Wie sich aus dem Analytical Index der WTO zu Art. XXI GATT ergibt, hat die Vorschrift in historischer Hinsicht unter anderem Relevanz bei dem Boykott der Arabischen Liga gegenüber Israel im Jahr 1970 und den Unwillen, diese politische Frage im Rahmen der WTO zu verhandeln, gehabt.[4] Die weitere dort dargestellte

[1] URL: https://www.bmwi.de/Redaktion/DE/Pressemitteilungen/2020/20200618-altmaier-wir-wollen-unsere-sicherheitsinteressen-besser-schuetzen-und-pruefverfahren-transparenter-machen.html (accessed 20.10.2021).

[2] *Hestermeyer*, in: Max Planck Institute for Comparative Public and International Law, WTO — Trade in Goods, 2011, Article XXI, para. 34.

[3] *Hestermeyer*, in: Max Planck Institute for Comparative Public and International Law, WTO — Trade in Goods, 2011, Article XXI, para. 35: “The wording of the provision indicates that war is an example of such an emergency, but threats of war also amount to an emergency, as do situations of similar gravity.”

[4] Analytical Index of the GATT. p. 602 f. URL: https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art21_gatt47.pdf (accessed 20.10.2021). Zur Entstehungsgeschichte der Norm siehe im Übrigen *Hestermeyer*, in: Max Planck Institute for Comparative Public and International Law, WTO — Trade in Goods, 2011, Article XXI, para. 6 et seq.

Entwicklung zeugt davon, dass die vereinzelt recht fadenscheinige Berufung auf nationale Sicherheitsinteressen praktisch im Wege von Konsultationen bereinigt werden konnte.[1] Vor diesem Hintergrund ist es nachvollziehbar, dass die Russische Föderation, die der WTO am 22. August 2012 als 156. Mitglied beigetreten ist, im Rahmen der Ministerkonferenz von Nairobi (15. — 18. Dezember 2015) die Mitglieder zur Schaffung von mehr Klarheit in Bezug auf die Security Exceptions des Art. XXI GATT aufforderte.[2] Diese Bemühungen sind allerdings offenbar fruchtlos geblieben.

Die Auslegung von Art. XXI GATT hat sogar den Wissenschaftlichen Dienst des Deutschen Bundestages beschäftigt.[3] Die Frage ist nämlich zuletzt praktisch geworden wegen des zwischen den USA und China geführten Handelskriegs um Stahl- und Aluminiumimporte von China in die USA und die Erhebung von Zusatzzöllen von 25% auf Stahl- und 10% auf Aluminiumprodukte im Frühjahr 2018, d.h. im Kontext eines Dumpingvorwurfs, der gemäß Art. XIX GATT zu Schutzmaßnahmen (Notstandsmaßnahmen bei der Einfuhr bestimmter Waren) berechtigt.

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[1] Siehe z.B. den Analytical Index of the GATT, a.a.O., p. 603: "In November 1975 Sweden introduced a global import quota system for certain footwear. The Swedish Government considered that the measure was taken in conformity with the spirit of Article XXI and stated, inter alia, that the 'decrease in domestic production has become a critical threat to the emergency planning of Sweden's economic defence as an integral part of the country's security policy. This policy necessitates the maintenance of a minimum domestic production capacity in vital industries. Such a capacity is indispensable in order to secure the provision of essential products necessary to meet basic needs in case of war or other emergency in international relations'. In the discussion of this measure in the GATT Council, 'Many representatives… expressed doubts as to the justification of these measures under the General Agreement… Many delegations reserved their rights under the GATT and took note of Sweden's offer to consult'. Sweden notified the termination of the quotas as far as leather and plastic shoes were concerned as of 1 July 1977." Siehe zu diesem Fall noch *Hestermeyer*, in: Max Planck Institute for Comparative Public and International Law, WTO — Trade in Goods, 2011, Article XXI, para. 23.

[2] PROPOSAL ON MC10 MINISTERIAL DECLARATION — PART III, WT/MIN(15)/W/14. URL: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN15/W14.pdf&Open=True (accessed 20.10.2021). p. 2: "1.5. With reference to the "Decision Concerning Article XXI of the General Agreement" adopted by the CONTRACTING PARTIES on November 30, 1982 and with the view to ensure clarity and predictability of implementation of Security Exceptions Provisions of the WTO Agreements Members shall develop a General Council decision on joint understanding on the interpretation of the scope of the rights and obligations of the WTO Members under these Provisions."

[3] Siehe den Sachstandsbericht mit dem Titel „Auslegung des Artikel XXI GATT (Ausnahmen zur Wahrung wesentlicher nationaler Sicherheitsinteressen durch den Dispute Settlement Body der Welthandelsorganisation", WD 2-3000-073/18. URL: https://www.bundestag.de/resource/blob/568260/a49a1c6e972e4f9852d8a0d6ef536646/WD-2-073-18-pdf-data.pdf (accessed 20.10.2021).

Am 6. Oktober 2017 beantragte Katar die Einsetzung eines Streitbeilegungsgremiums (scil. Panels) bezüglich der von den Vereinigten Arabischen Emiraten gegen Katar verhängten Maßnahmen, die angeblich den Handel mit Waren und Dienstleistungen und den Schutz der Rechte des geistigen Eigentums beeinträchtigten.[1] Das Streitbeilegungsgremium wurde nach dem Einspruch der Vereinigten Arabischen Emirate vom Streitbeilegungsgremium allerdings zunächst zurückgestellt.[2] Am 22. Oktober 2017 wurde das Panel dann doch errichtet, am 3. September 2018 schließlich zusammengesetzt.[3] Allerdings finden sich unter den „Key Facts" zu diesem Fall weder Art. XXI GATT noch Art. XIV GATS gelistet.[4] Auch in der letzten Mitteilung des Panels vom 30. September 2019 findet sich kein Hinweis auf diese Vertragsbestimmungen.[5] Dort wird lediglich angekündigt, dass der Abschlussbericht des Panels in der zweiten Jahreshälfte 2020 vorgelegt werden soll. Im Rahmen der Diskussion um die Errichtung des Panels hatten die USA vorgetragen, dass "national security issues were political and not appropriate for the WTO dispute system".[6] Dem Sachstandsbericht des Wissenschaftlichen Dienstes des Deutschen Bundestages ist zu entnehmen, dass alle sonstigen Streitigkeiten im Zusammenhang mit Art. XXI GATT bereits in der Konsultationsphase beigelegt werden konnten.[7] Man hat also dasselbe Prinzip angewendet, das schon 1977 im schwedischen Schuhwerk-Fall praktiziert worden war: Konsultationen statt Rechtskontrolle.

2.2. Bewertung

Die Begründung dafür, dass den WTO-Mitgliedern nach Art. XXI GATT bzw. Art. XIV GATS die Berufung auf nationale Sicherheitsinteressen möglich sein soll, ist auf den ersten Blick einleuchtend: Es sind die Staaten selbst, die am besten beurteilen können, wann ihr Bestand gefährdet ist oder ihre sonstigen Sicherheits- oder Verteidigungsinteressen berührt sind. Außerdem sind die Streitbeilegungsorgane der WTO möglicherweise weniger geeignet, die außerhalb der welthandelsrechtlichen Kernprobleme liegende Frage nach dem Vorliegen von nationalen Verteidigungs- oder Sicherheitsinteressen zu beurteilen. Der Dispute Settlement Body soll mit derartigen politischen Fragestellungen nicht belastet werden.

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[1] DS526.

[2] Pressemitteilung zum Fall DS526 vom 23.10.2017. URL: https://www.wto.org/english/news_e/news17_e/dsb_23oct17_e.htm (accessed 20.10.2021).

[3] Pressemitteilung zum Fall DS526. URL: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds526_e.htm (accessed 20.10.2021).

[4] Zusammenfassung des Falles. URL: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds526_e.htm (accessed 20.10.2021).

[5] Zusammenfassung des Falles. URL: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/526-4.pdf&Open=True (accessed 20.10.2021).

[6] Pressemitteilung zum Fall DS526 vom 23.10.2017. URL: https://www.wto.org/english/news_e/news17_e/dsb_23oct17_e.htm (accessed 20.10.2021).

[7] Sachstandsbericht WD 2-3000-073/18. URL: https://www.bundestag.de/resource/blob/568260/a49a1c6e972e4f9852d8a0d6ef536646/WD-2-073-18-pdf-data.pdf, S. 6 m.w.N. (accessed 20.10.2021).

Das ist freilich nur eine Seite der Medaille. Deren Kehrseite liegt in der evidenten Missbrauchsanfälligkeit einer solchen diskretionären Ausnahmeregelung zugunsten der WTO-Mitglieder; das ist ein Punkt, der vom Wissenschaftlichen Dienst in seinem Sachstandsbericht aus dem Jahr 2018 zu Recht kritisiert wird. Es gibt nämlich keinen sachlichen Grund, warum nicht zumindest eine weitherzige Plausibilitätskontrolle durch das WTO-Streitbeilegungsorgan, verstanden im Sinne eines Umgehungsschutzes oder einer Wesentlichkeitsprüfung, sollte stattfinden können.[1] Bislang aber haben die Begrenzungen im Wortlaut der Vorschrift („wesentliche" Sicherheitsinteressen, „notwendige" Maßnahmen) wegen des weiten Ermessensspielraums der Vertragsparteien („nach ihrer Auffassung") keine begrenzende Funktion gehabt.[2]

Derzeit erscheint es ausgeschlossen, dass in näherer Zukunft eine gefestigte schiedsgerichtliche Praxis der WTO zu Art. XXI GATT und Art. XIV GATS etabliert werden wird, da der politische Wille der Vertragsparteien hierzu fehlt.[3] Diese Ausnahmebestimmungen stellen somit die „Trumpfkarte" schlechthin für jene WTO-Mitglieder dar, die sich entgegen dem liberalen Geist des Welthandelsrechts aus mehr oder weniger protektionistischen Gründen aus ihrer Verantwortung für den freien Welthandel stehlen wollen.[4] Diese Ausnahmen sind demnach nach dem derzeitigen Rechtsstand nicht geeignet, protektionistischen Strategien einzelner Vertragsparteien (scil. America first usw.) wirksam entgegenzutreten. Sobald sich eine Vertragspartei im konkreten Fall auf die Belange der nationalen Sicherheit beruft, droht das WTO-Recht somit zum sprichwörtlichen „zahnlosen Tiger" zu werden. Da die Vertragsparteien dies selbst genauso beabsichtigt haben, liegt jedenfalls aus deren Sicht keine Rechtsschutzlücke vor, die beseitigt werden müsste. In konzeptioneller Hinsicht ist es kritikwürdig, wenn eine weit gefasste Ermessensvorschrift die Möglichkeit dazu gibt, die elementaren Regeln des Welthandelsrechts ganz leichtfüßig zu umgehen.

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[1] So schon *Fahner*, Quatar under Siege: Chances for an Article XXI Case? URL: https:// www.ejiltalk.org/qatar-under-siege-chances-for-an-article-xxi-case/ (accessed 20.10.2021).

[2] *Hestermeyer*, in: Max Planck Institute for Comparative Public and International Law, WTO — Trade in Goods, 2011, Article XXI, para. 35.

[3] Vgl. auch *Hestermeyer*, in: Max Planck Institute for Comparative Public and International Law, WTO — Trade in Goods, 2011, Article XXI, para. 43: "…it is highly unlikely that Members will accept any limitation beyond Article XXI of their discretion to avoid GATT scrutiny of measures concerning national security…"

[4] Siehe *Alford*, The Self-Judging WTO Security Exception, Utah Law Review 2011, p. 697 (698). URL: https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1336&context= law_faculty_scholarship: "Given this impressive record, it is surprising to find in the WTO an unreviewable trump card, an exception to all WTO rules that can be exercised at the sole discretion of a Member State—the WTO security exception" (accessed 20.10.2021); siehe auch *Fahner*, Quatar under Siege: Chances for an Article XXI Case? URL: https:// www. ejiltalk.org/qatar-under-siege-chances-for-an-article-xxi-case/, wo es heißt: "On the other hand, a formal decision concluding that security measures are outside the scope of WTO review will confirm interpretations of Article XXI as a carte blanche, which could also threaten the credibility of the system" (accessed 20.10.2021).

2.3. Das Unionsprimärrecht

a) Art. 346 AEUV als Dreh- und Angelpunkt der Berufung auf nationale Sicherheitsinteressen im Unionsrecht

Auf der Ebene des Unionsprimärrechts bestimmt Art. 346 Abs. 1 lit. a AEUV, dass ein Mitgliedstaat nicht dazu verpflichtet ist, Auskünfte zu erteilen, deren Preisgabe seines Erachtens seinen wesentlichen Sicherheitsinteressen widerspricht. Gemäß Art. 346 Abs. 1 lit. b AEUV kann jeder Mitgliedstaat diejenigen Maßnahmen ergreifen, die seines Erachtens für die Wahrung seiner wesentlichen Sicherheitsinteressen erforderlich sind, soweit sie die Erzeugung von Waffen, Munition und Kriegsmaterial oder den Handel damit betreffen; diese Maßnahmen dürfen auf dem Binnenmarkt die Wettbewerbsbedingungen hinsichtlich der nicht eigens für militärische Zwecke bestimmten Waren nicht beeinträchtigen.

Nach der Rechtsprechung des EuGH ist Art. 346 AEUV eng auszulegen; derjenige Mitgliedstaat, der sich auf Abs. 1 lit. a oder b beruft, trägt unter Berücksichtigung des ihm nach dem Wortlaut der Regelung zustehenden Ermessens die Beweislast für das Vorliegen der tatbestandlichen Voraussetzungen.[1] Es gilt zudem der Grundsatz der Verhältnismäßigkeit.[2]

Obgleich die Norm ähnlich strukturiert ist wie Art. XXI GATT und auch hier den Mitgliedstaaten ein weit gefasster Ermessensrahmen zugebilligt wird, handelt es sich bei der Vorschrift nicht etwa um „totes Recht", sondern um eine äußerst praxisrelevante Norm. Die Vorschrift spielt beispielsweise eine wichtige praktische Rolle bei staatlichen Auftragsvergaben in den Bereichen Verteidigung und Sicherheit, die seit Mitte 2009 im Sinne einer grundsätzlichen Ausschreibungspflicht unter Akzeptanz von weit gezogenen sicherheitsbezogenen Ausnahmen sekundärrechtlich geregelt ist.[3]

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[1] Vgl. EuGH, Urt. v. 4.3.2010 — Rs. C-38/06, ECLI:EU:C:2010:108 Rn. 63 = Slg. 2010, I-1569 — Kommission/Portugal.

[2] EuGH, Urt. v. 8.4.2008 — Rs. C-337/05, ECLI:EU:C:2008:203 Rn. 55 ff. = Slg. 2008 I-2195 = EuZW 2008, 372 = NZBau 2008, 401 — Kommission/Italienische Republik (= Agusta und Agusta Bell); EuGH 7.6.2012 — Rs. C-615/10, ECLI:EU:C:2012:324 = NZBau 2012, 509 Rn. 45 — InsTiimi Oy; siehe dazu *Höfler*, Beschaffung und Betrieb von Waffensystemen im Spannungsfeld von Vergabe- und Beihilfenrecht, NZBau 2015, 736 (739).

[3] Richtlinie 2009/81/EG des Europäischen Parlaments und des Rates vom 13. Juli 2009 über die Koordinierung der Verfahren zur Vergabe bestimmter Bau-, Liefer- und Dienstleistungsaufträge in den Bereichen Verteidigung und Sicherheit und zur Änderung der Richtlinien 2004/17/EG und 2004/18/EG, ABl. EG Nr. L 217/76 v. 20. August 2009. Die Bezugnahme auf Art. 346 AEUV erfolgt im nationalen Umsetzungsrecht in § 107 Abs. 2 Satz 1 Nr. 1 und Nr. 2 GWB. Mit Wirkung vom 2. April 2020 wurden Konkretisierungen bezüglich „verteidigungsindustrielle Schlüsseltechnologien" (§ 107 Abs. 2 Satz 2 GWB) bzw. „sicherheitsindustrielle Schlüsseltechnologien" (§ 107 Abs. 2 Satz 3 Nr. 1 GWB) vorgenommen.

Der EuGH hat dazu entschieden, dass den Mitgliedstaaten bei der Entscheidung über die Maßnahmen, die sie als für den Schutz ihrer wesentlichen Sicherheitsinteressen erforderlich erachten, zwar ein Ermessensspielraum zukommt. Sie können jedoch „nicht als Ermächtigung der Mitgliedstaaten ausgelegt werden, durch bloße Berufung auf diese Interessen von den Bestimmungen des AEU-Vertrags abzuweichen. Ein Mitgliedstaat, der sich auf diese Ausnahmen beruft, muss nämlich nachweisen, dass ihre Inanspruchnahme zur Wahrung seiner wesentlichen Sicherheitsinteressen erforderlich ist. Dies muss auch gelten, soweit er sich darüber hinaus auf Art. 346 Abs. 1 Buchst. a AEUV beruft…“.[1]

Ein Mitgliedstaat, der die besagten Ausnahmen geltend macht, muss nach dieser Rechtsprechung nachweisen, dass eine Ausschreibung dem Erfordernis des Schutzes solcher Interessen nicht hätte gerecht werden können.[2] Zu diesem Zweck bedarf es der sorgfältigen Dokumentation der Umstände, die die wesentlichen Sicherheitsinteressen begründen, durch den Auftrags- bzw. Konzessionsgeber.[3]

Das bedeutet konkret, dass auch in jenen Fällen, in denen Ausnahmen aus Gründen der öffentlichen Sicherheit oder zum Schutz wesentlicher Sicherheitsinteressen eines Mitgliedstaats ernstlich in Betracht kommen — anders als bei Art. XXI GATT — eine ernstzunehmende Rechtskontrolle stattfindet. Diese bezieht sich sowohl auf die Ausübung des Ermessens durch den Mitgliedstaat („seiner Ansicht nach“) als auch auf die Verhältnismäßigkeit der Maßnahme. Die Ausübung des Ermessens ist somit nicht gänzlich kontrollfrei.[4] Auf unionsrechtlicher Ebene gibt es dafür ein gesondertes Verfahren der Missbrauchskontrolle, das in Art. 348 Abs. 2 AEUV geregelt ist.[5] Die Möglichkeit, von solchen Ausnahmen Gebrauch zu

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[1] EuGH, Urt. v. 20.3.2018 — Rs. C-187/16, ECLI:EU:C:2018:194 Rn. 77 = NZBau 2018, 478 = VergabeR 2018, 409 — Kommission/Österreich (= Staatsdruckerei) mit Anm. *Braun*, VergabeR 2018, 419 f.; siehe dazu *Mösinger/Juraschek*, Keine Flucht in Sicherheitsinteressen! Art. 346 AEUV als Ultima Ratio, NZBau 2019, 93 ff.; siehe ferner EuGH, Urt. v. 4.9.2014 — Rs. C-474/12, ECLI:EU:C:2014:2139 Rn. 34 — Schiebel Aircraft GmbH/Bundesminister für Wirtschaft, Familie und Jugend.

[2] EuGH, Urt. v. 20.3.2018 — Rs. C-187/16, ECLI:EU:C:2018:194 Rn. 78 = NZBau 2018, 478 = VergabeR 2018, 409 — Kommission/Österreich (= Staatsdruckerei); EuGH, Urt. v. 8.4.2008 — Rs. C-337/05 ECLI:EU:C:2008:203 Rn. 53 = Slg. 2008 I-2195 = EuZW 2008, 372 = NZBau 2008, 401 — Kommission/Italien.

[3] EuGH, Urt. v. 4.9.2014 — Rs. C-474/12, ECLI:EU:C:2014:2139 Rn. 34 — Schiebel Aircraft GmbH/Bundesminister für Wirtschaft, Familie und Jugend.

[4] EuGH, Urt. v. 4.3.2010 — Rs. C-38/06, ECLI:EU:C:2010:108 Rn. 64 = Slg. 2010, I-1569 — Kommission/Portugal.

[5] Siehe zu diesem besonderen Missbrauchsverfahren *Heintschel von Heinegg*, in: Vedder/Heintschel von Heinegg, Europäisches Unionsrecht, 2. Auflage 2018, Art. 348 Rn. 7 ff., insbesondere Rn. 10: „Ein Missbrauch wird grundsätzlich zu bejahen sein, wenn die Ausübung der Ausnahmerechte nicht den durch die Art. 346 und 347 AEUV anerkannten Interessen zu dienen bestimmt ist, sondern es dem MS allein um die Verschaffung von Vorteilen gegenüber anderen MS geht. Ebenso verhält es sich, wenn der MS auf der Grundlage bloßer Vermutungen von den Ausnahmerechten Gebrauch macht, mithin von einer nicht tragfähigen Tatsachenbasis ausgeht.“

machen, soll im Übrigen „nur soweit in Anspruch genommen werden, wie dies zur Wahrung der… als legitim anerkannten Interessen unbedingt erforderlich ist".[1]

Bei einem öffentlichen Auftrag über Rüstungsgüter, der zur Wahrung wesentlicher Sicherheitsinteressen des Staates vergeben werden soll, ist daher zu prüfen, „ob der Mitgliedstaat… nachweisen kann, dass eine Inanspruchnahme der dort geregelten Abweichung erforderlich ist, um seine wesentlichen Sicherheitsinteressen zu wahren, und ob dem Bedürfnis, diese wesentlichen Interessen zu wahren, nicht im Rahmen einer Ausschreibung… hätte Genüge getan werden können".[2] Dafür genügt eine lediglich pauschale Berufung auf den Ausnahmetatbestand allerdings nicht.[3]

Als Beispiel diene das Urteil des EuGH im Fall „Österreichische Staatsdruckerei" aus dem Jahr 2018:[4] Ausweislich dieses Urteils verstieß die Österreichische Republik gegen die seinerzeit gültigen europäischen Vergaberichtlinien, indem sie Dienstleistungsaufträge über die Herstellung amtlicher Ausweisdokumente[5] ohne vorherige Ausschreibung auf Ebene der Europäischen Union unmittelbar an die Österreichische Staatsdruckerei GmbH vergab und indem sie nationale Vorschriften beibehielt, nach denen die öffentlichen Auftraggeber diese Dienstleistungsaufträge ohne vorherige Ausschreibung auf Unionsebene unmittelbar an diese Gesellschaft vergeben mussten. Nach diesen Regelungen stand den Mitgliedstaaten bei der Entscheidung über die Maßnahmen, die sie als für den Schutz ihrer wesentlichen Sicherheitsinteressen erforderlich erachten, zwar ein Ermessensspielraum zu. Sie konnten jedoch nicht als Ermächtigung der Mitgliedstaaten ausgelegt werden, durch bloße Berufung auf diese Interessen von den Bestimmungen des AEU-Vertrags abzuweichen. Ein Mitgliedstaat, der sich auf diese Ausnahmen beruft, muss nach der Rechtsprechung des EuGH nämlich nachweisen, dass ihre Inanspruchnahme zur Wahrung seiner wesentlichen Sicherheitsinteressen erforderlich ist. Dies müsse auch dann gelten, soweit er sich darüber hinaus auf Art. 346 Abs. 1 lit. a AEUV beruft.[6] Somit war der — in casu nicht zu führende — Nach-

[1] Erwägungsgrund 17 der Richtlinie 2009/81/EG, ABl. EG Nr. L 216, S. 76 unter ausdrücklicher Bezugnahme auf „die Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften".

[2] EuGH 7.6.2012 — Rs. C-615/10, ECLI:EU:C:2012:324 = NZBau 2012, 509 Rn. 45 — InsTiimi Oy.

[3] *Dreher*, in: Immenga/Mestmäcker, GWB, 6. Aufl. 2020, § 107 Rn. 57; VK Bund 20.12.2012 — VK 1-130/12, bei II. 2. a) = NZBau 2013, 400 (LS) — Körperschutzausstattungen.

[4] EuGH, Urt. v. 20.3.2018 — Rs. C-187/16, ECLI:EU:C:2018:194 = ZfBR 2018, 498 — Kommission/Österreich (= Österreichische Staatsdruckerei).

[5] Scil. die Herstellung von Reisepässen mit Chip, Notpässen, Aufenthaltstiteln, Personalausweisen, Führerscheinen im Scheckkartenformat und Zulassungsbescheinigungen im Chipkartenformat.

[6] EuGH, Urt. v. 20.3.2018 — Rs. C-187/16, ECLI:EU:C:2018:194 Rn. 78 = ZfBR 2018, 498 — Kommission/Österreich (= Österreichische Staatsdruckerei) mit Hinweis auf Rn. 34 des Schiebel Aircraft-Urteils.

weis erforderlich, dass eine öffentliche Ausschreibung des betreffenden Auftrags dem Erfordernis des Schutzes dieser Interessen nicht hätte gerecht werden können.[1] Die Republik Österreich hatte zwar ihre wesentlichen Sicherheitsinteressen, deren Schutz sie für notwendig hielt, und die mit dem Schutz dieser Interessen einhergehenden Garantien, als Rechtfertigungsgrund benannt.[2] Diese Sicherheitsinteressen betrafen erstens das Interesse an der Zentralisierung der Aufträge über den Druck der amtlichen Dokumente,[3] zweitens die Sicherstellung wirksamer Verwaltungskontrollen,[4] drittens das Erfordernis der Versorgungssicherheit[5] sowie viertens die Notwendigkeit, die Vertrauenswürdigkeit des Auftragnehmers sicherzustellen.[6] Gleichwohl wurde die Nichteinhaltung der in den Richtlinien vorgesehenen Auftragsvergabeverfahren vom EuGH letztlich als „unverhältnismäßig" qualifiziert,[7] weil es für Österreich andere, mildere Mittel zur Erreichung der legitimen Zielsetzungen gegeben hätte.

Die Literatur folgert daraus zutreffend, dass der EuGH „den Einschätzungsspielraum der Sicherheitsinteressen der Mitgliedstaaten bei der Berufung auf den Ausnahmetatbestand im Sinne einer Verhältnismäßigkeitsprüfung erheblich eingeschränkt und zugleich der Kontrolle im Vergabenachprüfungsverfahren unterworfen [habe]".[8]

b) Nationale Sicherheitsinteressen als rechtfertigende zwingende Gründe des Allgemeinwohls im Rahmen der Grundfreiheiten

Die Grundfreiheiten des AEU-Vertrags werden bekanntlich nicht schrankenlos gewährleistet, sondern ihre Ausübung steht unter dem Vorbehalt der Einschlägigkeit geschriebener und ungeschriebener Rechtfertigungsgründe, den sog. zwingenden Gründen des Allgemeinwohls oder -interesses. In diesem Zusammenhang kann die Berufung auf nationale Sicherheitsinteressen eines Mitgliedstaats relevant werden, insbesondere nach Art. 36, Art. 45, Art. 52 oder Art. 65 AEUV, welche (neben anderen Aspekten) die „öffentliche Sicherheit" als Rechtfertigungsgrund für poten-

[1] EuGH, Urt. v. 20.3.2018 — Rs. C-187/16, ECLI:EU:C:2018:194 Rn. 79 = ZfBR 2018, 498 — Kommission/Österreich (= Österreichische Staatsdruckerei) mit Hinweis auf Rn. 53 des Augusta und Augusta Bell-Urteils.
[2] EuGH, Urt. v. 20.3.2018 — Rs. C-187/16, ECLI:EU:C:2018:194 Rn. 80 = ZfBR 2018, 498 — Kommission/Österreich (= Österreichische Staatsdruckerei).
[3] EuGH, Urt. v. 20.3.2018 — Rs. C-187/16, ECLI:EU:C:2018:194 Rn. 81 ff. = ZfBR 2018, 498 — Kommission/Österreich (= Österreichische Staatsdruckerei).
[4] EuGH, Urt. v. 20.3.2018 — Rs. C-187/16, ECLI:EU:C:2018:194 Rn. 84 ff. = ZfBR 2018, 498 — Kommission/Österreich (= Österreichische Staatsdruckerei).
[5] EuGH, Urt. v. 20.3.2018 — Rs. C-187/16, ECLI:EU:C:2018:194 Rn. 87 ff. = ZfBR 2018, 498 — Kommission/Österreich (= Österreichische Staatsdruckerei).
[6] EuGH, Urt. v. 20.3.2018 — Rs. C-187/16, ECLI:EU:C:2018:194 Rn. 88 ff. = ZfBR 2018, 498 — Kommission/Österreich (= Österreichische Staatsdruckerei).
[7] EuGH, Urt. v. 20.3.2018 — Rs. C-187/16, ECLI:EU:C:2018:194 Rn. 95 = ZfBR 2018, 498 — Österreichische Staatsdruckerei.
[8] *Dreher*, in: Immenga/Mestmäcker, GWB, 6. Aufl. 2020, § 107 Rn. 58.

tiell diskriminierende oder beschränkende Maßnahmen erfassen. Es handelt sich — wie bei Art. 346 AEUV — um Ausnahmen für den Fall der Gefährdung der öffentlichen Sicherheit, „die begrenzte außergewöhnliche Tatbestände regeln“ und die wegen „ihres begrenzten Charakters… sich… nicht für eine extensive Auslegung [eignen]“.[1]

Die Europäische Union achtet gemäß Art. 4 Abs. 2 Satz 2 EUV den Schutz der nationalen Sicherheit. Des Weiteren bestimmt Art. 72 AEUV, dass die Zuständigkeiten der Mitgliedstaaten für die Aufrechterhaltung der öffentlichen Ordnung und den Schutz der inneren Sicherheit unberührt bleiben. Es gibt also auf unionsprimärrechtlicher Ebene beachtliche Freiräume für die Berufung der EU-Mitgliedstaaten auf nationale Sicherheitsinteressen. Nicht von ungefähr musste sich die Rechtsprechung des Öfteren mit der Frage befassen, ob die geltend gemachten Sicherheitsinteressen Ungleichbehandlungen und Beschränkungen im Rahmen der grundfreiheitlichen Gewährleistungen rechtfertigen konnten.

Pars pro toto sei hier zunächst die Entscheidung des EuGH im Fall „Campus Oil“ angeführt, der eine nationale Regelung Irlands betraf, welche die Wirtschaftsteilnehmer dazu verpflichtete, einen bestimmten Prozentsatz der von ihnen benötigten Erdölerzeugnisse im Inland zu erwerben.[2] Auf diese Weise sollte die Aufrechterhaltung einer Raffineriekapazität in der Republik Irland sichergestellt werden. Der EuGH hielt diese Regelung für mit dem Unionsprimärecht vereinbar und begründete seine Ansicht damit, „daß Erdölerzeugnisse wegen ihrer außerordentlichen Bedeutung als Energiequelle in der modernen Wirtschaft wesentlich sind für die Existenz eines Staates, da nicht nur das Funktionieren seiner Wirtschaft, sondern vor allem auch das seiner Einrichtungen und seiner wichtigen öffentlichen Dienste und selbst das Überleben seiner Bevölkerung von ihnen abhängen. Eine Unterbrechung der Versorgung mit Erdölerzeugnissen und die sich daraus für die Existenz eines Staates ergebenden Gefahren können somit seine öffentliche Sicherheit, deren Schutz Artikel 36 ermöglicht, schwer beeinträchtigen.“[3] Nach Ansicht des EuGH handelte es sich dabei nicht um einen unzulässigen Rechtfertigungsgrund rein wirtschaftlicher Art. Denn angesichts „der umfangreichen Folgen, die eine Unterbrechung der Versorgung mit Erdölerzeugnissen für die Existenz eines Staates haben kann“, sei davon auszugehen, dass „die Absicht,

[1] EuGH, Urt. v. 16.9.1999 — Rs. C-414/97, ECLI:EU:C:1999:417 Rn. 21 = Slg. 1999, I-5585 — Kommission/Spanien; EuGH, Urt. v. 15.5.1986 — Rs. 222/84, ECLI:EU:C:1986:206 Rn. 26 = Slg. 1986, 1651 — Marguerite Johnston/Chief Constable of the Royal Ulster Constabulary.

[2] EuGH, Urt. v. 10.7.1984 — Rs. 72/83, ECLI:EU:C:1984:256 = Slg. 1984, 2727 — Campus Oil Limited u. a./Minister für Industrie und Energie; siehe dazu auch *Lengauer*, Die Wahrung wesentlicher Sicherheitsinteressen der Mitgliedstaaten im Unionsrecht zwischen Recht und Kooperation, in: Völkerrecht — Europarecht — Menschenrechte, Festschrift für Torsten Stein, 2015, S. 696 (699).

[3] EuGH, Urt. v. 10.7.1984 — Rs. 72/83, ECLI:EU:C:1984:256 Rn. 34 = Slg. 1984, 2727 — Campus Oil Limited u. a./Minister für Industrie und Energie.

jederzeit eine Mindestversorgung mit Erdölerzeugnissen sicherzustellen, über Erwägungen rein wirtschaftlicher Art hinausgeht und somit ein Ziel darstellen kann, das unter den Begriff der öffentlichen Sicherheit fällt".[1] Im Übrigen stellte der EuGH klar, dass eine Rechtfertigung unter dem Aspekt der öffentlichen Sicherheit mit Zielen wirtschaftlicher Art zusammentreffen kann, ohne dass daran die Rechtfertigung gemäß Art. 36 AEUV scheitern würde.[2] Der Aspekt der Versorgungssicherheit wird von den Mitgliedstaaten relativ häufig geltend gemacht, wenn diese sich auf den Rechtfertigungsgrund der öffentlichen Sicherheit berufen. Deutschland hat das z. B. in Bezug auf sog. „Kritische Infrastrukturen"[3] sowie unlängst hinsichtlich bestimmter Arzneimittel, Impfstoffe und Medizinprodukte (sog. „persönlichen Schutzausrüstungen" — PSA)[4] getan.

Die Relevanz der Grundfreiheiten unter dem Gesichtspunkt der nationalen Sicherheitsinteressen wird in der neueren Rechtsprechung des EuGH unter anderem an dem Urteil im Fall „Schiebel Aircraft" aus dem Jahr 2014 deutlich, das sowohl das allgemeine Diskriminierungsverbot des Art. 18 AEUV als auch die Regelungen zur Niederlassungsfreiheit (Art. 49 AEUV) und zur Arbeitnehmerfreizügigkeit (Art. 45 AEUV) berührte; da die letztgenannten gegenüber Art. 18 AEUV spezieller sind, prüfte der EuGH zu Recht nur diese. In dem konkreten Fall hatte der österreichische Bundesminister für Wirtschaft, Familie und Jugend sich geweigert, dem Unternehmen Schiebel Aircraft GmbH die Genehmigung zur Ausübung von Tätigkeiten im Waffengewerbe zu erteilen, da einer der Geschäftsführer die britische Staatsangehörigkeit besaß und somit die gesetzlichen Voraussetzungen für die Ausübung des Waffengewerbes nicht erfüllt waren. Der EuGH entschied, dass die Art. 45 AEUV und 49 AEUV einer mitgliedstaatlichen Regelung entgegenstehen, wonach Organmitglieder und geschäftsführende Gesellschafter von Gesellschaften, die das Gewerbe des Handels mit militärischen Waffen und militärischer Munition und der Vermittlung des Kaufs und Verkaufs militärischer Waffen und militärischer Munition ausüben wollen, die Staatsangehörigkeit dieses Mitgliedstaats besitzen müssen.[5] Es handele sich dabei um eine verbotene Ungleichbehandlung aufgrund der Staatsangehörigkeit.[6] Das Staatsangehörigkeitserfordernis hindere nämlich die Staatsangehörigen anderer Mitgliedstaa-

[1] EuGH, Urt. v. 10.7.1984 — Rs. 72/83, ECLI:EU:C:1984:256 Rn. 35 = Slg. 1984, 2727 — Campus Oil Limited u. a./Minister für Industrie und Energie.

[2] EuGH, Urt. v. 10.7.1984 — Rs. 72/83, ECLI:EU:C:1984:256 Rn. 36 = Slg. 1984, 2727 Rn. 36 — Campus Oil Limited u. a./Minister für Industrie und Energie.

[3] Begründung zur Neunten Verordnung zur Änderung der Außenwirtschaftsverordnung v. 14.7.2017, BAnz AT 17.07.2017 V1, abrufbar unter: https://www.bmwi.de/Redaktion/DE/Downloads/V/neunte-aendvo-awv.pdf?__blob=publicationFile&v=6 (accessed 20.10.2021); siehe dazu die einschlägige Regelung in § 55 Abs. 1 Satz 2 Nr. 1 AWV.

[4] Fünfzehnte Verordnung zur Änderung der Außenwirtschaftsverordnung, BR-Drucks. 315/20, S. 1.

[5] EuGH, Urt. v. 4.9.2014 — Rs. C-474/12, ECLI:EU:C:2014:2139 Rn. 49 und Tenor — Schiebel Aircraft GmbH/ Bundesminister für Wirtschaft, Familie und Jugend.

[6] EuGH, Urt. v. 4.9.2014 — Rs. C-474/12, ECLI:EU:C:2014:2139 Rn. 29 — Schiebel Aircraft GmbH/ Bundesminister für Wirtschaft, Familie und Jugend.

ten unmittelbar daran, in Österreich als Mitglieder der zur gesetzlichen Vertretung berufenen Organe oder als geschäftsführende Gesellschafter einer das Gewerbe des Handels mit militärischen Waffen und militärischer Munition und der Vermittlung des Kaufs und Verkaufs militärischer Waffen und militärischer Munition ausübenden Gesellschaft tätig zu werden oder ein solches Gewerbe als Arbeitnehmer in diesem Mitgliedstaat auszuüben.[1]

Fraglich war überdies, ob Art. 346 AEUV im vorliegenden Fall ein abweichendes Ergebnis rechtfertigen konnte. Der EuGH stellt zunächst klar, dass es die Sache des vorlegenden Gerichts sei, zu prüfen, ob der Mitgliedstaat, der sich auf Art. 346 Abs. 1 lit. b AEUV beruft, nachweisen kann, dass eine Inanspruchnahme der dort vorgesehenen Ausnahme erforderlich ist, um seine wesentlichen Sicherheitsinteressen zu wahren.[2] Diese Regelung sei allerdings „im Einklang mit der ständigen Rechtsprechung zu Abweichungen von den Grundfreiheiten eng auszulegen".[3] Art. 346 Abs. 1 Buchst. b AEUV könne „nicht als Ermächtigung der Mitgliedstaaten verstanden werden, durch bloße Berufung auf diese Interessen von den Bestimmungen des Vertrags abzuweichen…".[4] Vielmehr müsse ein Mitgliedstaat, der sich auf diese Bestimmung beruft, nachweisen, dass eine Inanspruchnahme der dort vorgesehenen Ausnahme erforderlich ist, um seine wesentlichen Sicherheitsinteressen zu wahren.[5] In dem konkreten Fall ergab sich weder aus der Vorlageentscheidung noch aus der dem Gerichtshof vorliegenden Akte, dass die Regierung der Republik Österreich den Beweis erbracht hätte, dass zur Wahrung ihrer wesentlichen Sicherheitsinteressen das dieser Gesellschaft auferlegte Staatsangehörigkeitserfordernis erforderlich war.[6] Zudem stand auch die Verhältnismäßigkeit der Regelung in Zweifel. Denn selbst wenn das Staatsangehörigkeitserfordernis zur Verwirklichung der legitimen Ziele geeignet gewesen wäre, „hätten diese Ziele im konkreten Fall durch weniger einschränkende Maßnahmen wie etwa regelmäßige Kontrollen der Waffenproduktion und des Waffenhandels, eine verwaltungsrechtlich auferlegte Pflicht zur Vertraulichkeit oder auch die strafrechtliche Ahndung der Preisgabe strategischer Informationen erreicht werden können".[7] Nach alledem kam eine Rechtfertigung des Staatsangehörigkeitserfordernisses nicht in Betracht.

Der Fall „Schiebel Aircraft" verdeutlicht, dass Art. 346 AEUV keine „Allzweckwaffe" zur Umgehung der Grundfreiheiten des Unionsprimärrechts jenseits

[1] EuGH, Urt. v. 4.9.2014 — Rs. C-474/12, ECLI:EU:C:2014:2139 Rn. 30 — Schiebel Aircraft GmbH/ Bundesminister für Wirtschaft, Familie und Jugend.
[2] EuGH, Urt. v. 4.9.2014 — Rs. C-474/12, ECLI:EU:C:2014:2139 Rn. 49 und Tenor — Schiebel Aircraft GmbH/ Bundesminister für Wirtschaft, Familie und Jugend.
[3] EuGH, Urt. v. 4.9.2014 — Rs. C-474/12, ECLI:EU:C:2014:2139 Rn. 33 — Schiebel Aircraft GmbH/ Bundesminister für Wirtschaft, Familie und Jugend.
[4] EuGH, Urt. v. 4.9.2014 — Rs. C-474/12, ECLI:EU:C:2014:2139 Rn. 34 m.w.N. — Schiebel Aircraft GmbH/ Bundesminister für Wirtschaft, Familie und Jugend.
[5] EuGH, Urt. v. 4.9.2014 — Rs. C-474/12, ECLI:EU:C:2014:2139 Rn. 34 m.w.N. — Schiebel Aircraft GmbH/ Bundesminister für Wirtschaft, Familie und Jugend.
[6] EuGH, Urt. v. 4.9.2014 — Rs. C-474/12, ECLI:EU:C:2014:2139 Rn. 36 — Schiebel Aircraft GmbH/ Bundesminister für Wirtschaft, Familie und Jugend.
[7] EuGH, Urt. v. 4.9.2014 — Rs. C-474/12, ECLI:EU:C:2014:2139 Rn. 38 — Schiebel Aircraft GmbH/ Bundesminister für Wirtschaft, Familie und Jugend.

der geschriebenen und ungeschriebenen Rechtfertigungsgründe ist. Die Verwirklichung der Binnenmarktidee wird somit nicht unter einen allgemeinen nationalen Sicherheitsvorbehalt gestellt, der es den 27 Mitgliedstaaten der Europäischen Union ermöglichen würde, nach eigenem Ermessen die grundfreiheitlichen Gewährleistungen über die geltenden Rechtfertigungsgründe hinaus weiter einzuschränken. Auch hier zeigt sich der Vorzug der Justiziabilität des Art. 346 AEUV im direkten Vergleich mit einer Regelung wie Art. XXI GATT und Art. XIV GATS, die aus politischen Gründen zur Unwirksamkeit verdammt wurden, obwohl der Wortlaut der Vorschriften durchaus darauf hindeutet, dass eine Wesentlichkeits- bzw. Verhältnismäßigkeitsprüfung stattfinden könnte und sollte. Aus diesen Gründen läge es eigentlich nahe, bei der Auslegung des Art. XXI GATT ebenso zu verfahren wie bei Art. 346 AEUV. Den WTO-Mitgliedern würde damit die Berufung auf berechtigte Interessen der nationalen Sicherheit keineswegs verweigert; aber es würden fadenscheinige, protektionistisch motivierte Regelungen der nationalen Handels- und Industriepolitik als unzulässig gebrandmarkt, um auf diese Weise die zentralen Gewährleistungen des Welthandelsrechts (namentlich die Nichtdiskriminierung) zu effektivieren. Die derzeitige Praxis, im Rahmen von Konsultationen zu tragfähigen Ergebnissen zu gelangen, mag politisch betrachtet opportun sein, stellt aber aus juristischer Sicht keinen gleichwertigen Ersatz dar.

2.4. Die Industriestrategie 2030 und das deutsche Außenwirtschaftsrecht

Neuerdings ist das deutsche Außenwirtschaftsrecht erneut in den Fokus der Regierungspolitik geraten. Wie eingangs dargestellt, gibt es von Seiten der Bundesregierung erhebliche politische Bedenken gegen die Übernahme deutscher Unternehmen aus bestimmten „Schlüsselindustrien“ durch Investoren aus dem Ausland. Der maßgebliche Gegner im Wettbewerb um die Technologieführerschaft ist eindeutig die Volksrepublik China, der man unter anderem vorwirft, massiv gegen das Reziprozitätsprinzip des Außenwirtschaftsrechts zu verstoßen, indem sie ihre Märkte nicht für ausländische Wettbewerber öffnet, dort aber konsequent investiert. Kritisch beäugt wurden zudem die Übernahme des deutschen Roboterherstellers KUKA AG durch Midea, der chinesische Einstieg bei Daimler[1] sowie die Beteiligung am deutschen Netzwerkbetreiber 50Hertz. Insbesondere hegt man in Berlin die Befürchtung, dass ausländische Investoren gezielt in deutsche „Schlüsseltechnologien“[2] investieren und sich diese aneignen könnten.[3] In früheren Zeiten

[1] Die chinesische Tenaciou3 Prospect Investment Limited (Einstieg im Jahr 2018) hält 9,7 % der Anteile, die chinesische BAIC Group (Einstieg im Jahr 2019) 5 % der Anteile an Daimler, siehe https://www.daimler.com/investoren/aktie/aktionaersstruktur/ (Stand: 30.09. 2020). Insgesamt sind asiatische Anleger mit 15 % an Daimler beteiligt. Der Staatsfonds von Kuweit hält demgegenüber 6,8 % der Anteile (Einstieg im Jahr 1974).

[2] Vgl. für das Vergaberecht die Neuregelungen in § 107 Abs. 2 Satz 2 und Satz 3 Nr. 1 GWB.

[3] Siehe statt aller den Artikel des BDI, Zunehmende staatliche Investitionskontrollen — in Deutschland und weltweit, abrufbar unter: https://bdi.eu/artikel/news/investitionskontrollen-in-deutschland-und-europa/ (accessed 20.10.2021). Der Artikel sieht einen „Trend zum Investitionsprotektionismus“. Deutschland dürfe sich „nicht an der Beschleunigung einer Spirale des Investitionsprotektionismus beteiligen“.

wurden Direktinvestitionen aus dem Ausland wohl positiver beurteilt, als das heute der Fall ist. Die von dem Bundeswirtschaftsminister Peter Altmaier propagierte neue Handels- und Industriepolitik („Industriestrategie 2030“)[1] richtet sich vor allem gegen die Volksrepublik China, nicht aber gegen die ostasiatischen Länder an sich. Fraglich ist deshalb, ob wir vor einem „neuen Nationalismus in der Wirtschaftspolitik“ stehen, wie das ein Mitglied der Monopolkommission, der Ökonom Achim Wambach, unlängst in einem Interview prophezeit hat.[2] Werden künftig „nationale Sicherheitsinteressen“ Unternehmensübernahmen und Investitionen aus dem Ausland erheblich beschränken oder ganz verhindern? Wambach moniert, dass die Vorteile von Globalisierung und Güterhandel aus dem Blick gerieten. Die „nationale Welle“ in der Wirtschaftspolitik bereite ihm Sorgen. Er sehe „sehr große Vorteile in Weltoffenheit, grenzüberschreitenden Investitionen und globalem Handel“; die Chancen einer Auslandsbeteiligung seien fast immer größer als die Risiken, was „der Wirtschaftsnationalismus“, der „inzwischen in aller Welt auf dem Vormarsch ist“, jedoch nicht sehe.[3]

Tatsächlich wurden die neuen Regelungen zur Investitionsprüfung nach dem AWG und der AWV (§§ 55 ff.) „so strukturiert, dass grundsätzlich bei jedem Erwerb eines Unternehmens in Deutschland geprüft werden kann, ob im Einzelfall die öffentliche Sicherheit und Ordnung beeinträchtigt sein kann“.[4] Die Prüfung ist normalerweise bei Stimmrechtsanteilen ab 25 % (§ 56 Abs. 1 Nr. 2 AWV) möglich, in besonderen Fällen (z. B. bei sog. Kritischen Infrastrukturen, Software, Cloud Computing usw.) schon ab 10 % (§ 56 Abs. 1 Nr. 1 i. V. m. § 55 Abs. 1 Satz 2 Nr. 1 AWV).[5]

Ausweislich der von der Bundesregierung gegebenen Begründung soll die durch die COVID-19-Pandemie ausgelöste Entwicklung deutlich gemacht haben, „dass der Kreis der bei der außenwirtschaftlichen Prüfung von Unternehmenserwerben bislang besonders berücksichtigten Unternehmen unzureichend ist“.[6] Es muss allerdings die Frage erlaubt sein, ob hier nicht Dinge vermengt werden, die wenig miteinander zu tun haben, oder anders gewendet: ob nicht die Corona-Pandemie lediglich ein willkommener Anlass für die Bundesregierung war, um Regelungen zur „Beteiligungsbremse“ zu schaffen, die im Vorjahr noch als Teil der „Industriestrategie 2030“

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[1] URL: https://www.bmwi.de/Redaktion/DE/Dossier/industriestrategie-2030.html (accessed 20.10.2021).

[2] „Ich fürchte jedoch, dass die Eingriffe zum Dauerzustand werden“, Interview mit Michael Sauga, SPIEGEL online v. 30.7.2020. URL: https://www.spiegel.de/consent-a-?targetUrl=https%3A%2F%2Fwww.spiegel.de%2Fwirtschaft%2Fachim-wambach-chef-der-monopolkommission-kritisiert-nationale-welle-in-der-wirtschaftspolitik-a-c2f0ecba-511c-40ae-a1a1-3e84f9403056&ref=https%3A%2F%2Fwww.google.com%2F (accessed 20.10.2021).

[3] Siehe die vorige Fußnote.

[4] Fünfzehnte Verordnung zur Änderung der Außenwirtschaftsverordnung, BR-Drucks. 315/20, S. 1 (5).

[5] Die Beteiligungsschwelle von 25 % (scil. Sperrminorität) ist im Gesellschaftsrecht von großer Relevanz, da sie ggf. die Verhinderung wesentlicher Entscheidungen in der Gesellschaft ermöglicht. Ob damit aber zugleich auch die Versorgungssicherheit mit bestimmten Gütern oder Leistungen beeinträchtigt ist, darf zumindest bezweifelt werden.

[6] Fünfzehnte Verordnung zur Änderung der Außenwirtschaftsverordnung, BR-Drucks. 315/20, S. 1 (5).

scharf kritisiert worden waren, nunmehr aber auf breitere Zustimmung hoffen dürfen.[1] Es wurde regierungsseitig insoweit zwar versichert, dass die außenwirtschaftsrechtliche Prüfung von Investitionen in inländische Industriebereiche „ausschließlich mit dem Ziel [erfolgt], einen noch wirksamen Schutz der öffentlichen Ordnung oder Sicherheit der Bundesrepublik Deutschland im Falle von kritischen Unternehmenserwerben durch Ausländer gewährleisten".[2] Die vorgebrachten Sorgen betreffend die öffentliche Ordnung und Sicherheit in unserem Land sind freilich nicht auf virologische oder medizinische Aspekte beschränkt, sondern es wird ganz allgemein eine „Verbesserung der Prüfmöglichkeiten im Falle von ausländischen Anteilserwerben an deutschen Unternehmen, die aufgrund der Herstellung oder Nutzung kritischer Technologien besonders ordnungs- oder sicherheitsrelevant sind" angestrebt.[3] Wäre die gegenwärtige Pandemie die Quelle aller Regelungsaktivität, hätte man wohl erwarten dürfen, dass die neuen Regelungen sich auf Unternehmen der Pharma- und Medizinproduktebranche (z. B. die Hersteller von Impfstoffen, Beatmungsgeräten und Gesichtsmasken) beschränkten. Das ist, wie gezeigt, aber nicht der Fall.[4] Immerhin soll nach den Ausführungen der EU-Kommission zur Screening-Verordnung 2019/452/EU[5] dem Gesundheitssektor im Rahmen der nationalen Investitionsprüfungen besonderes Augenmerk zukommen.[6]

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[1] Insoweit sei ergänzend auf den Stenographischen Bericht zur 173. Sitzung des Deutschen Bundestages vom 10. September 2020, Plenarprotokoll 19/173, S. 21634 ff. („TOP 10 Vorfahrt für die Marktwirtschaft — Einführung einer Beteiligungsbremse") verwiesen.

[2] Fünfzehnte Verordnung zur Änderung der Außenwirtschaftsverordnung, BR-Drucks. 315/20, S. 1 (6).

[3] Ebd. (vorige Fußnote).

[4] Das gilt auch für die europäische Ebene, siehe EU-Kommission, Leitlinien für die Mitgliedstaaten betreffend ausländische Direktinvestitionen, freien Kapitalverkehr aus Drittländen und Schutz der Vermögenswerte Europas im Vorfeld der Anwendung der Verordnung (EU) 2019/452 über die Überprüfung ausländischer Direktinvestitionen, C(2020), 1981 final, ABl. EU Nr. C 99 I/1 v. 26.3.2020, S. 1: „Zu den möglichen Folgen des aktuellen wirtschaftlichen Schocks zählt ein erhöhtes potenzielles Risiko für strategisch wichtige Industriezweige, insbesondere für die Gesundheitsindustrie, aber keineswegs nur für sie…"

[5] Verordnung (EU) 2019/452 des Europäischen Parlaments und des Rates vom 19. März 2019 zur Schaffung eines Rahmens für die Überprüfung ausländischer Direktinvestitionen in der Union (EU-Screening-Verordnung), ABl. EU Nr. L 79 I/1 v. 21.3. 2019. Diese Verordnung ist am 11. April 2020 in Kraft getreten. Ein wesentliches Element ist der durch die Artt. 6 ff. der Verordnung geschaffene unionsweite „Kooperationsmechanismus im Zusammenhang mit ausländischen Direktinvestitionen, die einer Überprüfung unterzogen werden", der seit dem Wirksamwerden der Verordnung am 11. Oktober 2020 Anwendung findet (Art. 17 Satz 2 der Verordnung).

[6] EU-Kommission, Leitlinien für die Mitgliedstaaten betreffend ausländische Direktinvestitionen, freien Kapitalverkehr aus Drittländen und Schutz der Vermögenswerte Europas im Vorfeld der Anwendung der Verordnung (EU) 2019/452 über die Überprüfung ausländischer Direktinvestitionen, C(2020), 1981 final, ABl. EU Nr. C 99 I/1 v. 26.3.2020, S. 4: „Besonderes Augenmerk gilt daher allen Projekten im Rahmen von Horizont 2020, die den Gesundheitssektor betreffen, einschließlich künftiger Projekte zur Bekämpfung der COVID-19-Pandemie."

Das Schutzgut der öffentlichen Sicherheit umfasst — nach Auffassung der Bundesregierung — angeblich auch den Schutz von individuellen Rechtsgütern wie dem Leben und der Gesundheit sowie die Volksgesundheit als Gemeinschaftsgut.[1] Im Rahmen der unionsprimärrechtlichen (und zwar sowohl der geschriebenen wie der ungeschriebenen) Rechtfertigungsgründe wird bei den Grundfreiheiten indessen zwischen den Schutzgütern der öffentlichen Ordnung, der öffentlichen Sicherheit und der öffentlichen Gesundheit genauer unterschieden (siehe statt aller Art. 36 AEUV: „aus Gründen der öffentlichen Sittlichkeit, Ordnung und Sicherheit, zum Schutze der Gesundheit und des Lebens von Menschen, Tieren oder Pflanzen“ usw.); die drei genannten Rechtfertigungsgründe finden als zwingende Gründe des Allgemeininteresses unstreitig auch auf die Kapitalverkehrsfreiheit des Art. 63 AEUV als jener Freiheit, die bei der Regulierung von ausländischen Direktinvestitionen betroffen ist, Anwendung.[2] Die Rechtfertigungsgründe der öffentlichen Sicherheit und Ordnung sind in Art. 65 Abs. 1 lit. b AEUV ausdrücklich normiert, während die öffentliche Gesundheit hier vom EuGH als ungeschriebener Rechtfertigungsgrund anerkannt wurde.[3]

In der Gesetzesbegründung zum 13. Gesetz zur Änderung des Außenwirtschaftsgesetzes (AWG) und der Außenwirtschaftsverordnung (AWV), das mit Wirkung zum 24. April 2009 in Kraft trat, wurde betont, dass den Mitgliedstaaten bei der Ausfüllung dieser Begriffe ein Beurteilungsspielraum innerhalb der vertraglich gesetzten Grenzen zustehe. Das Verständnis der Begriffe der „öffentlichen Ordnung oder Sicherheit“ könne von Mitgliedstaat zu Mitgliedstaat unterschiedlich und zudem einem zeitlichen Wandel unterworfen sein. Von diesem Auslegungsspielraum sei bei der Änderung des AWG und der AWV Gebrauch gemacht worden.[4]

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[1] Fünfzehnte Verordnung zur Änderung der Außenwirtschaftsverordnung, BR-Drucks. 315/20, S. 1 (9).

[2] EuGH, Urt. v. 14.3.2000 — Rs. C-54/99, ECLI:EU:C:2000:124 Rn. 17 = Slg. 2000 I-1335 — Association Eglise de scientologie de Paris und Scientology International Reserves Trust/Premier ministre; EuGH, Urt. v. 4.6.2002 — Rs. C-503/99, ECLI:EU:C:2002:328 Rn. 47 = Slg. 2002 I-4809 — Kommission/Belgien; EuGH, Urt. v. 13.5.2003 — Rs. C-463/00, ECLI:EU:C:2003:272 Rn. 72 = Slg. 2003 I-4581 — Kommission/Spanien; EuGH, Urt. v. 19.5.2009 — Rs. C-531/06, ECLI:EU:C:2009:315 Rn. 51 = Slg. 2009 I-4103 — Kommission/Italien; siehe ferner die Leitlinien der EU-Kommission betreffend ausländische Direktinvestitionen, freien Kapitalverkehr aus Drittländen und Schutz der Vermögenswerte Europas im Vorfeld der Anwendung der Verordnung (EU) 2019/452 über die Überprüfung ausländischer Direktinvestitionen, C(2020), 1981 final, ABl. EU Nr. C 99 I/1 v. 26.3.2020, S. 4 f.

[3] EuGH, Urt. v. 19.5.2009 — Rs. C-531/06, ECLI:EU:C:2009:315 Rn. 51 = Slg. 2009 I-4103 — Kommission/Italien (zur Anerkennung der öffentlichen Gesundheit als zwingender Grund des Allgemeininteresses): „Zweitens gehört der Schutz der Gesundheit der Bevölkerung zu den zwingenden Gründen des Allgemeininteresses, die Beschränkungen der vom Vertrag gewährleisteten Verkehrsfreiheiten wie der Niederlassungsfreiheit (vgl. u. a. Urteil Hartlauer, Randnr. 46) und des freien Kapitalverkehrs rechtfertigen können.“

[4] BT-Drucks. 16/10730, S. 10 f.

Ungeachtet dessen mutet es etwas seltsam an, wenn der Schutz der öffentlichen Gesundheit nunmehr, 10 Jahre später, auf der Ebene des Außenwirtschaftsrechts als Teilaspekt der öffentlichen Ordnung bzw. der öffentlichen Sicherheit begriffen und nicht als selbständiger Rechtfertigungsgrund eingeordnet wird. Die Bundesregierung argumentiert bezüglich der Begründung zu § 55 Nr. 9 AWV[1] in Bezug auf „versorgungsrelevante Arzneimittel und Impfstoffe", dass „besonders in Krisenzeiten (Pandemien, Epidemien von nationaler Bedeutung)… die Gefahr einer unzureichenden Versorgung… und damit ein hohes Gefahrenpotenzial für die öffentliche Ordnung oder Sicherheit [besteht]. Um die Deckung eines lebenswichtigen Bedarfs… im Inland zu sichern, ist sicherzustellen, dass die Verordnung durch inländische Unternehmen gewährleistet werden kann."[2]

Möglicherweise wollte man nicht in Widerspruch zu Art. 65 lit. b AEUV oder zur EU-Screening-Verordnung geraten, die als zulässige Ausnahmen vom freien Kapitalverkehr zwar die Gründe der öffentlichen Sicherheit und der öffentlichen Ordnung mehrfach benennt, nicht aber den ungeschriebenen Rechtfertigungsgrund der öffentlichen Gesundheit. Wie bereits dargelegt, hatte das 13. Gesetz zur Änderung des Außenwirtschaftsgesetzes (AWG) und der Außenwirtschaftsverordnung (AWV) von 2009 die Schaffung einer Möglichkeit zur Kontrolle ausländischer Investoren mit möglichen Gefährdungen der öffentlichen Ordnung oder Sicherheit der Bundesrepublik begründet.[3] Seinerzeit hatte man den Begriff der öffentlichen Sicherheit zutreffend wie folgt definiert: „Die öffentliche Sicherheit betrifft das Funktionieren des Staates und seiner Einrichtungen, d. h. die Sicherung der Existenz eines Mitgliedstaates gegenüber inneren und äußeren Einwirkungen."[4] Außerdem hatte der deutsche Gesetzgeber in Übereinstimmung mit der Rechtsprechung des EuGH zu den zwingenden Gründen des Allgemeininteresses klargestellt, dass die Berufung auf die öffentliche Ordnung oder öffentliche Sicherheit eine „tatsächliche und hinreichend schwere Gefährdung" voraussetzt, „die ein Grundinteresse der Gesellschaft berührt".[5]

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[1] § 55 Abs. 1 Satz 2 Nr. 9 AWV: „Eine voraussichtliche Beeinträchtigung der öffentlichen Ordnung oder Sicherheit kann insbesondere vorliegen, wenn das inländische Unternehmen… 9. für die Gewährleistung der gesundheitlichen Versorgung der Bevölkerung wesentliche Arzneimittel im Sinne des § 2 Absatz 1 des Arzneimittelgesetzes, einschließlich deren Ausgangs- und Wirkstoffe, entwickelt, herstellt oder in Verkehr bringt oder Inhaber einer entsprechenden arzneimittelrechtlichen Zulassung ist".

[2] BT-Drucks. 16/10730, S. 10 f.

[3] Siehe BT-Drucks. 16/10730, S. 1, wo es unter „Probleme und Ziele" heißt: „Schaffung eines besonderen Verfahrens, um den Erwerb von gebietsansässigen Unternehmen durch Erwerber aus Ländern außerhalb des Gemeinschaftsgebiets und der Europäischen Freihandelsassoziation im Einzelfall prüfen und untersagen zu können, wenn dies unerlässlich ist, um die öffentliche Ordnung oder Sicherheit der Bundesrepublik Deutschland zu gewährleisten."; siehe ferner *Müller/Hempel*, Änderungen des Außenwirtschaftsrechts zur Kontrolle ausländischer Investoren, NJW 2009, 1638 ff.

[4] BT-Drucks. 16/10730, S. 11.

[5] BT-Drucks. 16/10730, S. 11.

3. Ergebnis

Die Berufung auf nationale Sicherheitsinteressen ist sowohl nach WTO-Recht als auch nach Unionsrecht in weitem Umfang zulässig. Ein wesentlicher Unterschied besteht allerdings: Die Berufung von EU-Mitgliedstaaten auf Art. 346 AEUV und die Geltendmachung von zwingenden Gründen des Allgemeininteresses (z. B. der Rechtfertigungsgründe der öffentlichen Sicherheit, öffentlichen Ordnung und öffentlichen Gesundheit) sind justiziabel; insbesondere die Beachtung des elementaren Grundsatzes der Verhältnismäßigkeit unterliegt dabei der gerichtlichen Kontrolle. Demgegenüber führt die Berufung auf Art. XXI GATT (bzw. Art. XIV GATS) nach derzeitigem Rechtsstand nicht zu einer Überprüfung durch das Streitbeilegungsorgan der WTO; vielmehr sind Konsultationen zwischen den Mitgliedern des GATT das Mittel der Wahl zur Beseitigung von Handelskonflikten, in deren Rahmen nationale Sicherheitsinteressen eine zentrale Rolle spielen. Nach hier vertretener Ansicht sind Konsultationen zwar gut, aber die gerichtliche Kontrolle ist eindeutig besser. Denn selbst wenn eine „politische“ Lösung des Falles am Ende gelingen sollte, kann dieser unklare Rechtszustand auf Dauer nicht befriedigen. Ohne die Möglichkeit zur Überprüfung der Tragfähigkeit der geltend gemachten Gründe bei der Berufung auf nationale Sicherheitsinteressen droht die Gefahr einer umfassenden Renationalisierung des Welthandels. Nationalismus und (Investitions-)Protektionismus drohen die wesentlichen Errungenschaften der WTO und der Europäischen Union — hohe(s) Wachstum und Wettbewerbsfähigkeit, Beschäftigung, Innovation, wechselseitige Durchdringung der Märkte — zu marginalisieren; das gilt namentlich auch für die Beschränkung ausländischer Direktinvestitionen aus sicherheitspolitischen, häufig aber bloß protektionistischen Motiven. In Südostasien setzt man demgegenüber — wie an dem jüngst unterzeichneten RCEP deutlich wird — weiterhin auf die Prinzipien des Multilateralismus. Die USA und die Mitgliedstaaten der Europäischen Union müssen sich nach Jahrzehnten des großen wirtschaftlichen Erfolgs die Frage gefallen lassen, ob der Rückfall in protektionistisches Denken der richtige Weg ist, um den erreichten Wohlstand zu erhalten und für die Zukunft abzusichern. Für den „Exportweltmeister“ Deutschland gilt das in ganz besonderem Maße. Die Konkurrenz in Südostasien schläft nicht, und sie hat derzeit die besten Voraussetzungen, ihre günstige Position im Welthandel weiter auszubauen. Die USA und Europa sind daher aufgerufen, den Stillstand in der Doha-Handelsrunde zu beenden und bei der anstehenden WTO-Ministerkonferenz im Sommer 2021 eine aktive Rolle bei der überfälligen Modernisierung der WTO einzunehmen.

III. LEGAL ISSUES OF INTERNATIONAL COOPERATION IN COMBATING CRIME

Legal aspects of combating human trafficking in EU

1. Introduction

Trafficking in Human Beings (THB) is considered as one of the most serious criminal offences in the European Union (EU). Moreover the THB is a wide spread phenomena in EU Member States. The THB became a serious worldwide challenge, which is considered a "new slave trade"[1].

The EU started the activity on combat THB in 2002 by adoption the Council Decision 2002/629/JHA[2], which obliged the EU Member States to criminalize THB.

After entering into a force the Lisbon Treaty the EU's activity on combating THB has received the new impetus. Moreover the Lisbon Treaty gave the legally binding character to the EU Charter of Fundamental Rights[3], which prohibits the Trafficking in human beings, slavery and forced labour.

At the moment the EU policy on combating THB is covered by provisions of two articles of the TFEU. According to the art. 79 (1) TFEU the Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.

Moreover according to the art. 83 (1) TFEU the Parliament and the Council may establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime including trafficking in human beings and sexual exploitation of women and children.

Thus, according to the EU Law the THB is considered as a serious crime, which normally connected with an illegal transborder movement. In this sence the combating THB is a part of the EU policy on prevention illegal migration, as well as policy on combating serious crime.

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[1] Hintjens H. Failed Securitisation Moves during the 2015 'Migration Crisis'. International Migration Vol. 57 (4) 2019. P. 188. doi: 10.1111/imig.12588.

[2] 2002/629/JHA: Council Framework Decision of 19 July 2002 on combating trafficking in human beings. OJ L 203, 1.8.2002, p. 1—4

[3] Charter of Fundamental Rights of the European Union. OJ C 326, 26.10.2012, p. 391—407.

It should be noted that THB is not always associated with the external border crossing, but most often human trafficking is transnational crime, and therefore associated with the illegal migration.

2. Definition and types of human trafficking

Depending on the nature of the border crossing, as well as the degree of participation of the migrant himself we can be identify two types of illegal border crossing: Illegal entering and Human smuggling.

Illegal entry is characterized by the fact that an immigrant alone, as a rule, without external assistance, carries out illegal border crossing. An immigrant may use third-party assistance for obtaining visas, making false documents, renting vehicles, etc. However, these acts do not constitute an offense related to illegal border crossing, but are autonomous offenses or an activity, which don't constitute an offence. The main feature of illegal entry is the absence of the external assistance directly related to the organization of illegal border crossing.

The distinguishing feature of Human smuggling is that the immigrant does not cross the border himself, he (she) is in fact the object of movement across the border. At the same time, the operation of Human smuggling of an immigrant is carried out mainly not by himself, but by an organized criminal group specializing in this type of criminal activity. When smuggling, the immigrant himself is a passive participant in the process of crossing the border, considered either as a customer or as a victim.

Depending on the nature of the immigrant's attitude towards his (her) movement across the border, the Human smuggling is divided into two types: Human smuggling, carried out according to the will of the immigrant and Human smuggling, carried out against the will of the immigrant (trafficking in human beings)[1].

According to the Proposal for a comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union (par. 88)[2] smuggling means helping with an illegal border crossing and illegal entry. Smuggling, therefore, always has a transnational element. This is not necessarily the case with trafficking, where the key element is the exploitative purpose. Trafficking involves the intent to exploit a person, in principle irrespective of how the victim comes to the location where the exploitation takes place. This can involve, in cases where borders are crossed, legal as well as illegal entry into the country of destination. Illegal immigration can also include trafficking aspects, but has indeed a wider scope and relates more to the general illegal entry and residence of persons.

In other words human smuggling has always the transnational character. From the other hand the transnational character is not the necessary element of the human trafficking. The necessary element of the human trafficking is exploitation of the humans.

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[1] Potemkina O. Yu. Immigration Policy of European Union: Problems and Perspectives. M., 2010. (In Russ.) (Потемкина О.Ю. Иммиграционная политика Европейского Союза: проблемы и перспективы. М., 2010. С. 38.)

[2] Proposal for a comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union, Official Journal. C. 142 of 14.06.2002.

A distinctive feature of THB is that the immigrant does not have the necessary autonomy of the will, since his (her) movement across the border takes place against the will of the person.

The legal regime of the differentiation between Human smuggling and THB established by UN convention against Transnational Organized Crime and Additional Protocols thereto[1]. EU is a member state of the UN Convention[2] and Additional Protocol[3].

The practical significance of this classification is that the Human smuggling is an offence against the interests of the state, but THB is a crime against the person. In other words Human Smuggling is illegal activity, but not always be qualified as a crime. On the basis of this observation certain scholars believe that "Human Smuggling is morally permissible under some conditions even if it is illegal"[4].

Despite the fact that Human Smuggling and Human Trafficking are two different offences, they were drafted in a vague and open-ended manner that inevitably creates an overlap between the two[5]. The activity on prevention of Human Smuggling has its own legal framework, presented by the Directive 2002/90/EC[6] and the Council framework Decision 2002/946/JHA[7].

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[1] United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000. URL: https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/united_nations_convention_against_transnational_organized_crime_and_the_protocols_thereto.pdf (accessed 11.11.2020).

[2] 2004/579/EC: Council Decision of 29 April 2004 on the conclusion, on behalf of the European Community, of the United Nations Convention Against Transnational Organised Crime OJ L 261, 6.8.2004, p. 69—69.

[3] 2006/618/EC: Council Decision of 24 July 2006 on the conclusion, on behalf of the European Community, of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women And Children, supplementing the United Nations Convention Against Transnational Organised Crime concerning the provisions of the Protocol, in so far as the provisions of this Protocol fall within the scope of Articles 179 and 181a of the Treaty establishing the European Community. OJ L 262, 22.9.2006, p. 44—50.

2006/619/EC: Council Decision of 24 July 2006 on the conclusion, on behalf of the European Community, of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women And Children, supplementing the United Nations Convention Against Transnational Organised Crime concerning the provisions of the Protocol, in so far as the provisions of the Protocol fall within the scope of Part III, Title IV of the Treaty establishing the European Community. OJ L 262, 22.9.2006, p. 51—58.

[4] Aloyo E. & Cusumano E. Morally evaluating human smuggling: the case of migration to Europe, Critical Review of International Social and Political Philosophy, 2018. P. 1. doi: 10.1080/13698230.2018.1525118.

[5] Chetail V. International Migration Law. Oxford University Press, 2019, p. 258.

[6] Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence. OJ L 328, 5.12.2002, p. 17—18.

[7] 2002/946/JHA: Council framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence. OJ L 328, 5.12.2002, p. 1—3.

According to Hughes taking into account the origin of victims we can distinguish two types of trafficking: internal and external trafficking[1]. Internal Trafficking (Intra-EU trafficking) takes place when victim came to EU country from another EU Member State. When the victim is trafficked outside of EU this type of THB we can be distinguished as an External trafficking. The majority of victims of THB in EU came from another Member States[2].

The THB is gendered, it means that women and men are often trafficked for different reasons. The EU data demonstrates, that of the total number of identified victims of THB were women (80 %). According to the Eurostat about 62 % of the victims have been trafficked for the purpose of sexual exploitation. Labour exploitation, including THB in domestic works[3] accounts for around 25 % and the category "other" around 13 %. Eurostat shows that victims of sexual exploitation are predominantly female (96 %) whereas the majority of victims of labour exploitation are male (77 %)[4].

3. The EU legislation on combating THB.

3.1. Overview of the legal framework

The policy on combating THB is a part of the EU area of Freedom, Security and Justice (AFSJ), where EU realizes the shared competence with Member States.

The EU legislation on combating THB has an intermediate place between the generally recognized norms of international law and the national norms of the Member States. The international norms establishes the general principles on combating THB, the national legislation contains the norms of Substantive and Procedural Criminal Law, which has direct effect in Member State concerned. The role of EU legislation is to provide the criminalization of the THB in all Member States, the proper level of penalties, effective cooperation between national law enforcement agencies and minimal rules concerning the rights and guarantee of the victims of crime.

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[1] Hughes D. M. Trafficking in Human Beings in the European Union: Gender, Sexual Exploitation, and Digital Communication Technologies // Sage Open. October-December 2014. P. 3. https://doi.org/10.1177/2158244014553585.

[2] Hughes D. M. Trafficking in Human Beings in the European Union: Gender, Sexual Exploitation, and Digital Communication Technologies // Sage Open. October-December 2014. P. 3. https://doi.org/10.1177/2158244014553585.

[3] See more: Ricard-Guay A. & Maroukis T. (2017) Human Trafficking in Domestic Work in the EU: A Special Case or a Learning Ground for the Anti-Trafficking Field?, Journal of Immigrant & Refugee Studies, 15:2, p. 109—121, doi: 10.1080/15562948.2017.1310340.

[4] Eurostat. Methodologies and Working Papers. Trafficking in human beings 2013—86 pp. URL: https://ec.europa.eu/eurostat/documents/3888793/5856833/KS-RA-13-005-EN.PDF/a6ba0 8bb-c80d-47d9-a043-ce538f71fa65 (accessed 11.11.2020).

Thus, in a broad sense, the System of combating the THB in EU is presented in the form of a three-level system: international law, supranational legislation of the EU and national legislation of the Member States.

The main method of legal regulation at the EU level in the field of combating THB is harmonization of national legislation.

The EU system of anti-trafficking legal acts is presented in the form of several directives, the key of which is Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims[1]. Apart from Directive 2011/36/EU it should be mentioned another important legal act, which will be considered later in this work (Council Directive 2004/81/EC on the residence permit and Directive 2011/93/EU on combating sexual exploitation of children).

At the moment the Directive 2011/36/EU is the fundamental EU legislative act addressing THB. It establishes robust provisions on victim's protection, assistance and support, but also on prevention and prosecution of the crime.

Directive 2011/36/EU has an interdisciplinary nature[2], since it is aimed at harmonizing the norms related to various branches of law: criminal, administrative, and criminal procedure. In this connection it must be noted, that the legal basis of the Directive 2011/36/EU are provisions of Article 82(2), establishes the rules on judicial cooperation in criminal matters (procedural criminal law) and Article 83(1), which concerns the harmonization of substantive criminal law.

Moreover, the Directive 2011/36/EU contains provisions on cooperation with EU Anti-Trafficking Coordinator (ATC), who is responsible for improving coordination and coherence among EU institutions, EU agencies, Member States and international actors, and for developing existing and new EU policies to address THB. The Member States shall collect and transmit to the ATC the relevant information, on the basis of which the ATC shall produce the report to the Commission on the progress made in the fight against THB.

The EU legal framework on combating THB has a different application across the Union, it has no application in the Kingdom of Denmark, moreover Ireland is not bound by Directive 2004/81/EC or subject to its application.

The different application of the EU legislation on combating THB across the Union could create a situation of inequality and a risk of less favourable conditions, depending on the standard of internal legislation, as well as on the lack of jurisprudence by the EU Court of Justice[3].

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[1] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, Official Journal L 101, 15/04/2011 P. 0001—0011.

[2] См. Mitsilegas V., Vavoula N. Criminal Law: institutional rebalancing and jurisdiction as drivers of policy change // Policy change in the Area of Freedom, Secutity and Justice: How EU institutions matter/ edited by Florian Trauner and Ariadna Ripoll Servent, Routledge, 2015. P. 146.

[3] Borraccetti M. Human Trafficking, Equality, and Access to Victims' Rights // The Principle of Equality in EU Law edited by L. S. Rossi, F. Casolari. Springer, 2017. P. 284.

3.2. The Substantive Criminal law

Being adopted within the framework of EU policy on criminal law harmonization (Article 83 TFEU), the Directive 2011/36/EU introduces a general definition of a crime related to the organization and implementation of trafficking in persons, and minimum requirements are set for the highest limit of criminal punishment in the form of imprisonment.

As it was mentioned early the Directive 2011/36/EU is not the first attempt of the EU to legislate the activity on combating THB. The first legal act in combating THB was Council Framework Decision 2002/629/JHA of 19 July 2002, adopted within former third pillar.

In accordance with article 2 of the Directive, trafficking in persons is defined as acts carried out for the purpose of exploitation and associated with the recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person.

The definition of THB used in the Directive 2011/36/EU is broader than the one adopted under the Framework Decision 2002/629/JHA. It now expressly includes begging, and "the exploitation of criminal activities, or the removal or organs". Forced labour illegal adoption or forced marriage in so far as they fulfil the constitutive elements of THB[1].

Based on the analysis of definition of THB, used in the Directive 2011/36/EU, it follows that it is largely based on the definition contained in the UN Protocol of November 15, 2000.

The Directive 2011/36/EU (Article 2) establishes the criminal liability only for the activity, directly connected to the THB, in other words it provides the sanctions only against traffickers, but not against victims' exploiters[2]. Moreover the activity of exploiters could not be covered by provisions of Article 3 Directive 2011/36/EU (inciting, aiding and abetting or attempting to commit a THB).

In terms of crime definition the Directive 2011/36/EU brings clarity to the nature of the crime, and gives clear indications as to how it is to be tackled[3], but it doesn't cover all chain of THB, including the exploitation.

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[1] O'Neill M. (2015) Trafficking in Human Beings: an EU and UK legal challenge. http: http://aei.pitt.edu/79455.

[2] Borraccetti M. Human Trafficking, Equality, and Access to Victims' Rights // The Principle of Equality in EU Law edited by L. S. Rossi, F. Casolari. Springer, 2017. P. 285.

[3] O'Neill M. The EU Legal Framework on Trafficking in Human Beings: Where to from here — the UK Perspective. Journal of Contemporary European Research. 2011. 7. P. 466.

The maximum penalty for the offences, related to the THB should be at least five years of imprisonment. The offences, regarded as committed with aggravating circumstance are punishable by a maximum penalty of at least 10 years of imprisonment.

According to the Article 5 of the Directive 2011/36/EU Member States shall take the necessary measures to ensure the punishment of the legal entities in case of their participation in activities related to THB.

The Directive 2011/36/EU aimed at harmonization of provisions not only special part of the Substantive Criminal Law, but also a general part.

The analysis of parts 1 and 2 of Article 83 TFEU allows us to conclude that EU founding treaty provides for the possibility of harmonizing criminal law rules relating not only to specific offenses (a special part of criminal law), but also to more general issues[1], as a rule contained in the general part of criminal law. In other words, TFEU does not exclude the possibility of adopting acts aimed at harmonizing the provisions of the general part of national criminal law. One of the example of harmonization of the certain rules in general Part of criminal law is Directive 2014/42/EU[2] on the freezing and confiscation of instrumentalities and proceeds of crime in the EU. The Directive 2011/36/EU also establishes rules on seizure and confiscation. According to the Article 7 Directive 2011/36/EU Member States shall take the necessary measures to ensure that their competent authorities are entitled to seize and confiscate instrumentalities and proceeds from the offences related to THB. Confiscation in national law can be of a different nature, in particular, act as a form of criminal punishment or as another measure of a criminal legal nature. It should be noted that the issue of the need to develop a general (common) Part of criminal Law of the EU has been the subject of scientific discussion for several years[3].

3.3. The procedural criminal law

In the field of procedural criminal law the Directive 2011/36/EU establishes certain rules concerning the investigation and prosecution, as well as jurisdiction. According to the Article 9 Directive 2011/36/EU Member States shall ensure that the offences related to THB should be investigated and prosecuted irrespective reporting or accusation by a victim of crime, even if the victim has withdrawn his or her statement.

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[1] Franssen V. EU criminal law and effet utile: a critical examination of the use of criminal law to achieve effective enforcement // EU Criminal Law and Policy: Values, Principles and Methods. Edited by: Joanna Beata Banach-Gutierrez, Christopher Harding. Routledge, 2016. 273 p. 87.

[2] Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union. OJ L 127, 29.4.2014, p. 39—50.

[3] См. Ambos, Kai. Is the Development of a Common Substantive Criminal Law for Europe Possible — Some Preliminary Reflections, Maastricht Journal of European and Comparative Law. 2005. Vol. 12. P. 173—191.

As far as jurisdiction apart of the general rules, established by the Council Framework Decision 2009/948/JHA[1], the Directive 2011/36/EU contains the special ones. The Directive 2011/36/EU distinguishes two types of jurisdiction in terms of THB crimes: general jurisdiction (article 10 (1); supplement jurisdiction (article 10 (2); extraterritorial jurisdiction (article 10 (3). As a general rule the Member State is responsible for investigation and prosecution in case where offence is committed within their territory or the offender has nationality of this Member State. The Directive 2011/36/EU provides for the possibility for Member States to expand the scope of the national criminal law through the prosecution of crimes in other countries.

The Directive 2011/36/EU also aims on crime prevention. According to the Article 84 TFEU the European Parliament and the Council may establish measures to promote and support the action of Member States in the field of crime prevention, excluding any harmonisation of the laws and regulations of the Member States. In the area of fighting against THB the Directive 2011/36/EU (Article 18) establishes the duty of the Member States to take appropriate measures to discourage and reduce the demand that fosters all forms of exploitation related to THB, as well as reduce the risk of people, especially children, becoming victims of trafficking in human beings. This activity could be also realized on the basis European Crime Prevention Network (EUCPN))[2]. Thus, crime prevention is an area in which the EU only assists Member States but does not establish any uniform or harmonized rules. In other words, the role of the EU in this area seems very limited. But this is a relatively independent area of activity in the field of judicial cooperation in criminal matters.

The special emphasis is put on the training of THB law enforcement authorities within activities on investigation and prosecution (Article 9 Directive 2011/36/EU), as well as crime prevention (Article 18).

3.4. Victim's protection within the context of THB

The protection of victims plays a special role in legal and political framework on combating THB. The protection of the victims of THB is multilevel activity, which is realized not only within cooperation in the field of criminal procedural law. The protection of victims of THB in criminal investigation and proceedings is only one type of such activity.

The THB is a serious and complex crime, which victims need for immediate and effective protection. The current EU legislation on combating THB provides

[1] Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, OJ L 328, 15/12/2009. P. 0042—0047.

[2] Council Decision 2009/902/JHA of 30 November 2009 setting up a European Crime Prevention Network (EUCPN) and repealing Decision 2001/427/JHA. OJ L 321, 8.12.2009, p. 44—46.

different types of support to the victims of crime. In contrast to previous Framework Decision 2002/629/JHA the Directive 2011/36/EU contains significant changes in terms of victim's protection.

The Directive 2011/36/EU provides more serious guarantees for the protection of victims of trafficking. In particular, Member States are obliged to provide measures aimed at preventing the reuse of these persons as victims of crime.

The victims of THB are subjects of general measures of victim's protection, established by national legislation in accordance with EU standards. These measures apply to victims of all crime, irrespective of its nature. The EU legislation in this area consists from the Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime[1], and Council Directive 2004/80/EC relating to compensation to crime victims[2]. The Directive 2012/29/EU was adopted within EU competence in judicial cooperation in criminal matters and establishes the minimum standards in criminal procedural activity. The Council Directive 2004/80/EC is a part of European Community's competence in the former first pillar.

Taking into account the special nature and special needs of the THB victims the Union legislation provides the special set of measures for protection of the victims of THB. Such measures could be distinguished as a special.

In the context of EU legislation on fight against THB we can distinguish three types of special measures for support the victims of THB: substantive measures; criminal procedural measures; issuing the resident permits.

In the area of Substantive Criminal law the Directive 2011/36/EU manifests the principle of Non-prosecution or non-application of penalties to the victim of THB even in the case of unlawful acts (for example, the use of false documents, etc.).

According to the Article 8 of the Directive 2011/36/EU Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of THB for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts of THB.

This provision is an example of the negative harmonization of criminal law, which allows the Union to adopt rules that exclude the establishment of criminal liability at the national level or exempt from criminal liability for certain acts[3].

Apart of the general protection measures in criminal investigation and proceedings, provided by the Directive 2012/29/EU the Directive 2011/36/EU manifests the additional guarantees for victims of THB. Most of these guarantees have a gen-

[1] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA OJ L 315, 14.11.2012, p. 57—73.

[2] Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims Official Journal L 261, 6.8.2004, p. 15—18.

[3] Miettinen S. Criminal Law and Policy in the European Union. Routledge, 2013. P. 123.

eral application, such as access to witness protection programmes or other similar measures, legal counselling and legal representation, including for the purpose of claiming compensation, which could be free of charge in case when the victim does not have sufficient financial resources.

Moreover, according to the Article 12 (4) Directive 2011/36/EU Member States shall ensure that victims of THB receive specific treatment aimed at preventing secondary victimisation by avoiding unnecessary repetition of interviews during investigation, prosecution or trial, visual contact between victims and defendants, unnecessary questioning concerning the victim's private life and giving of evidence in open court.

One of the most contradictory measures for victim's protection is issuance the resident permits. This measure applies only to the third country nationals, although as was mentioned above according the statistics the majority of the victims of THB are citizens of EU.

The legal basis of issuance of residence permits for victims of trafficking or smuggling is a Directive 2004/81/EC[1]. In this case, the Directive applies to persons who are subject to both trafficking (human trafficking) and smuggling (human smuggling).

The main purpose of the Directive 2004/81/EC was to attract as many victims of smuggling or trade as possible to cooperate with law enforcement agencies.

From the one side, the adoption of this Directive was considered as an important measure to protect victims of crimes related to trafficking in persons. In accordance with this Directive, victims of crime who are willing to cooperate with the law enforcement agencies of the Member States may be issued residence permits with a validity period of up to 6 months. From the other side, the granting of residence permits in exchange for cooperation with law enforcement authorities contradicts to the principle of unconditional support and assistance.

According the Article 11 (3) of the Directive 2011/36/EU Member States shall provide the unconditional support for trafficked persons. It means that such support are not made conditional on the victim's willingness to cooperate in the criminal investigation. Though assistance and support for trafficked persons is unconditional, the residency status of third-country nationals is not. It means, that victim of THB is in danger of deportation if the criminal procedure has not started or if he (she) is not willing or able to cooperate with law enforcement authorities[2].

The direct connection between issuance the resident permit and ability to testify and cooperate with trial is one of the problems within the implementation of this protection measure.

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[1] Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, OJ L 261, 06/08/2004 P. 0019—0023.

[2] Probst E. Victims' protection within the context of trafficking in human beings and European Union standards. ERA Forum. 2019—19. P. 362. https://doi.org/10.1007/s12027-018-0526-3.

The issuance of a residence permit did not mean granting a third country national the right to permanent residence in the EU, the maximum period of stay on the basis of a residence permit is six months, the specified period can be extended. However, based on the meaning of the Directive, the total period of stay of an victim of THB on the basis of a residence permit should be limited to the period necessary for an investigation and, if necessary, a trial. As soon as the need for a third country national to stay on the territory of Member States disappears, he (she) is subject to the general requirements for the stay of foreign citizens.

Such provisions would jeopardise the real protection of victims, their human security and as a result reduce the effectiveness of this instrument, because it doesn't stimulate the victims of THB to cooperate with law enforcement agencies of the Member States, because of the temporary nature of the residence permit.

The granting the temporary residence status could be considered as a modest payment for the cooperation within criminal procedure, which is firstly in interest of State and trial, but not victim of THB. In other words it doesn't correspond to the interests of the victim of THB, who after the termination of the criminal procedure would be in danger of deportation, re-trafficking and retribution from the side of criminals.

One of the possible solution is the granting the temporary residence status, which is not limited by the period of criminal proceedings. In this situation the victim of THB would have more guarantees against re-trafficking and other violations.

Another obstacle for effective implementation of the Directive 2004/81/EC is the fact that the Directive does not apply to family members of the victim of THB. It is obvious that such situation doesn't correspond to the principle of family unity and could put family member at risk. According to the Preamble (15) Member States should consider authorising the stay for the members of his/her family or for persons treated as members of his/her family on other grounds, according to their national legislation. But this Directive doesn't contain any certain provisions in this respect.

In October 2010, the Commission prepared a communication on the application of Directive 2004/81/EC, which concluded that there was insufficient use of the opportunities contained in it. In this regard, the Commission considered it necessary, firstly, to more actively disseminate information on the possibilities of obtaining residence permits for victims of smuggling, and, secondly, it came to the conclusion that it was necessary to amend the directive to increase the level of protection of victims crimes[1].

[1] Report from the Commission to the European Parliament and the Council on the application of Directive 2004/81 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, Brussels, 15.10.2010, COM(2010) 493 final. URL: http://ec.europa.eu/transparency/regdoc/rep/eims/HOME/136970/COM(2010)493.pdf (accessed 20.10.2019).

In order to meet the both challenges of the granting the residence permits to victims of THB (conditional character and restriction of the validity) the European Commission agreed to consider the possibility for amendments to the Directive, including the issuing a temporary residence permit based on the vulnerable situation of the victim and not necessarily in exchange for cooperation with competent authorities, as well as granting the specified length of reflection periods for victims. But up to now the Directive 2004/81/EC was not amended.

The Directive 2011/36/EU pays a special attention to the protection measures for child victims of THB. The main principle of the child protection means that child's best interests shall be a primary consideration. According to this principle the specific actions to assist and support child victims of THB will aimed to finding a durable solution for the child and should be based on individual assessment of the special circumstances of each particular child victim, taking due account of the child's views, needs. Moreover according to the article 14 (2) Directive 2011/36/EU Members States shall appoint a guardian or a representative for a child victim of THB from the moment the child is identified by the authorities where.

The Member States shall ensure that the age of person subject to THB should be identified, in case of doubt the person concerned is presumed to be a child in order to receive special protection.

3.5. Combating sexual exploitation of children

Child trafficking is a significant social problem across the EU[1]. That is why the problem of combating against the trafficking of children has a special significance, which needs a special legal regulation.

The EU legal act aimed at combating the sale of children and their sexual exploitation is the Directive 2011/93/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography[2].

The Directive 2011/93/EU concerns the crimes, which does not constitute the THB, it means that in contrast to Directive 2011/36/EU this Directive provides for criminal sanctions only against exploiters, but there are no similar provisions against traffickers. But in spite of this fact the Directive 2011/93/EU is considered as a part of the EU anti-trafficking legal framework, because according to the Preamble (paragraph 7) the Directive 2011/93/EU should be fully complementary with Directive 2011/36/EU on preventing and combating trafficking in human beings, as some victims of human trafficking have also been child victims of sexual abuse or sexual exploitation. The scope of this Directive covers all crimes, connecting with

[1] Palmer E. Trafficked children and child protection systems in the European Union, European Journal of Social Work, 2019. 22:4, pp. 551—562, doi: 10.1080/13691457.2018.1441134.

[2] Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA. OJ L 335, 17.12.2011, p. 1—14.

sexual exploitation of children, which may not be the result of smuggling or trafficking. However, in most cases, sexual exploitation and smuggling or trafficking are elements of one criminal activity. Thus, the Directive 2011/93/EU has general application and does not apply solely to issues of trafficking in children. It aims to harmonize the norms of criminal and criminal procedure law aimed at protecting children from sexual abuse.

The structure of the Directive 2011/93/EU is similar to the Directive 2011/36/EU, apart from provisions on criminal law harmonization it contains the rules on jurisdiction, coordination of prosecution, crime prevention, protection of child victims etc. In other words, the Directive 2011/93/EU, as well as Directive 2011/36/EU has an interdisciplinary character. The legal basis of both Directives are provisions of Article 83 (1) TFEU (harmonization of criminal law) and the provisions of Article 82 (2) TFEU (cooperation in the field of criminal procedure). This is the fundamental difference between these legal instruments and other acts in the field of harmonization of criminal law.

4. External dimension of the eu policy in combating thb

Taking into account the transnational character of the THB the EU has to pay special attention to the external dimension of the fighting against human trafficking. This issue is dedicated to the Action Oriented Paper on strengthening the EU external dimension on action against THB[1], approved by the EU Council on November 30, 2009[2]. The Action Oriented Paper is a non-binding document, which contains different proposals for the implementation of the external dimension with concrete steps to help realize them. In general the external dimension of the combating THB is realized by means of soft law within different programs (EU Development Policy, European Neighbourhood Policy)[3]. More recent in the EU Agenda on Migration[4] the European Commission emphasizes the importance of the cooperation with third countries in the fight against smugglers and traffickers.

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[1] Action-Oriented Paper on strengthening the EU external dimension on action against trafficking in human beings; Towards Global EU Action against Trafficking in Human Beings, 19.11.2009. URL: http://register.consilium.europa.eu/pdf/en/09/st11/st11450-re05.en09.pdf (accessed 20.10.2019).

[2] Press Release, 2979th Council meeting, Justice and Home Affairs, Brussels, 30 November and 1 December 2009. URL: http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/09/355& format=HTML&aged=0&lg=da&guiLanguage=en (accessed 20.10.2019).

[3] See: Rijken C.& de Volder E. (2010). The European Union's Struggle to Realize a Human Rights-based Approach to Trafficking in Human Beings: A Call on the EU to Take THB-Sensitive Action in Relevant Areas of Law. Connecticut Journal of Int'l law. 25 (49). P. 49—80.

[4] Communication from the Commission to the European parliament, the Council, the European economic and social committee and the committee of the regions. A European agenda on migration Brussels, 13.5.2015 COM(2015) 240 final. URL: https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/communication_on_the_european_agenda_on_migration_en.pdf (accessed 10.11.2019).

The issue of combating THB was mentioned in the Road Map on the Common Space of Freedom, Security and Justice between EU and Russia, adopted in May 2005[1].

According to the part II, paragraph 2.6. within the Security component of the Common Space the Parties agreed to develop cooperation in the field of combating THB, as a priority area. According to the Road Map the EU-Russia cooperation covers different aspects of combating THB, including law enforcement cooperation, victim's protection, implementation of international agreements etc., but such cooperation looks quite declarative. Even before the suspension of the EU-Russia cooperation in 2014 the Parties didn't reach any significant results in common action against THB.

But political disagreements between EU and Russia could not be an obstacle for the cooperation in the field of combating organised crime, including THB, which is in interests of both Parties.

Moreover the EU's experience in this area could be interesting for Russian legislator and Law enforcement agencies and even for further development of the Eurasian Economic Union (EAEU). The current version of the EAEU agreement does not provide for cooperation in areas related to fight against crime. However, the development of any integration organisation involves political rapprochement. In other words, deepening economic integration inevitably leads to the development of cooperation in other areas, including in area of fighting against criminal activities. The development of the cooperation in the field fighting against crime will be a logical continuation of the formation of the EAEU internal market. In this situation the EAEU could use the EU legislation in combating THB for the reception of certain provisions within the development of its own legal framework.

5. Conclusion

The EU policy on combating THB is a large-scale activity, which is realized within different policy framework. The special emphasis is put on the immigration policy and judicial cooperation in criminal matters. The current EU legislation on combating THB consists from provisions on harmonisation of Substantive and Procedural Criminal law, i. e. the part of judicial cooperation in criminal matters. The issuance of the resident permits to the victims of THB is a special measure, which is implemented within the EU immigration policy.

At the moment EU legal framework on combating THB is based on victims-oriented approach and establishes a number of measures, which provide a necessary level of fighting and prevention this phenomenon. But despite this fact the EU anti-trafficking legislation still continues to have certain legislative gaps and difficulties of implementation. Thus, there is a room for improvement and further development of the legal framework.

[1] Road Map on the Common Space of Freedom, Security and Justice, May 10, 2005, Moscow. URL: https://russiaeu.ru/userfiles/file/road_map_on_the_common_space_of_freedom,_security_and_ justice_2005_english.pdf (accessed 11.11.2020).

EU has a shared competence in the field of combating the THB, as a part of the AFSJ policy. The current EU legislation on combating THB has no direct effect in Member States. The main legal instrument in this area is Directive, which should be implemented on national level. Thus, the EU legislation on combating THB has an intermediate place between international law and the national norms of the Member States

The experience of the EU demonstrates that integration organization could play a significant role on combating THB and would strengthen the capacity of national law enforcement agency in this area. Moreover the EU legal framework on combating THB could be a good example for further development of other integration organizations, including the Eurasian Economic Union.

Nationale Verfolgung internationaler Verbrechen am Beispiel des deutschen Völkerstrafgesetzbuchs

1. Einleitung: Deutschland und das Völkerstrafrecht

Die Entstehung des modernen Völkerstrafrechts ist untrennbar mit der jüngeren Geschichte Deutschlands verbunden. Die Idee, hochrangige Politiker und Militärs für die Verletzung internationalen Rechts individuell zur Verantwortung zu ziehen, wurde erstmals prominent im Anschluss an den Ersten Weltkrieg im Friedensvertrag von Versailles rechtlich verankert. Dessen Art. 227 sah vor, dass sich der ehemalige deutsche Kaiser, Wilhelm II. von Hohenzollern, wegen schwerer Verletzung des internationalen Sittengesetzes und der Heiligkeit der Verträge vor einem internationalen Strafgericht der Alliierten verantworten müsse. Ihm wurden insbesondere die Verletzung des internationalen Friedens und die Initiierung eines Angriffskrieges zur Last gelegt.[1] Im Übrigen sollten Verstöße gegen die Gesetze und Gebräuche des Krieges vor den Militärgerichten der Alliierten strafrechtlich geahndet werden (Art. 228, 229 Versailler Vertrag). Umgesetzt wurden diese Vorschriften allerdings nicht bzw. nur in Ansätzen: Wilhelm II. fand Asyl in den Niederlanden, wo er schließlich 1941 starb.[2] Zudem weigerte sich Deutschland, potentielle Kriegsverbrecher an die Alliierten auszuliefern[3] und bot stattdessen an, die Beschuldigten selbst zu verfolgen. Die daraufhin vor dem Reichsgericht in Leipzig geführten Strafverfahren (die sog. „Leipziger Prozesse") wird man allerdings eher als Scheinprozesse ansehen müssen, denn als ernstzunehmenden Versuch, die hauptverantwortlichen deutschen Kriegsverbrecher zur Verantwortung zu ziehen: Obwohl allein von den Alliterierten knapp 900 Personen als mutmaßliche Täter identifiziert worden waren, wurden lediglich 17 Personen in zwölf Verfahren an-

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[1] Vertiefend *K. Sellars,* The First World War, Wilhelm II and Article 227: The Origin of the Idea of 'Aggression' in International Criminal Law, in: *C. Kreß / S. Barriga* (Hrsg.), The Crime of Aggression: A Commentary — Volume I, Cambridge University Press, Cambridge 2017, S. 21.

[2] Vertiefend *G. Hankel*, Die Leipziger Prozesse. Deutsche Kriegsverbrechen und ihre strafrechtliche Verfolgung nach dem Ersten Weltkrieg, Hamburger Edition, Hamburg 2003, S. 74 ff.; *W. A. Schabas*, The Trial of the Kaiser, Oxford University Press, Oxford 2018, *passim*.

[3] Abgesehen von der politischen Erwägung, dass die Auslieferung der Beschuldigten an die Alliierten als ein (weiteres) Symbol der schmählichen Niederlage Deutschlands angesehen werden könne, verbot § 9 des damals geltenden Reichsstrafgesetzbuchs, deutsche Staatsangehörige an eine ausländische Regierung zur Verfolgung oder Bestrafung auszuliefern, *K. Ambos*, Treatise on International Criminal Law. Volume 1: Foundations and General Part, Oxford University Press, Oxford 2013, S. 3 mit Fußnote 15.

geklagt; davon wurden neun freigesprochen, die restlichen acht zu vergleichsweise milden Freiheitsstrafen zwischen sechs Monaten und fünf Jahren verurteilt. Mehr als 1.700 Verfahren wurden eingestellt.[1]

Ungeachtet dieses ernüchternden Ergebnisses wird man die symbolische Bedeutung der Leipziger Prozesse kaum überschätzen können: Mit ihnen wurde — wie unzureichend auch immer — die Vorstellung, dass Krieg kein rechtsfreier Raum ist, umgesetzt und zum Ausdruck gebracht, dass die Verletzung internationaler Regeln nicht nur politische Folgen hat, sondern individuelle strafrechtliche Verantwortung begründen kann. Damit bilden Versailler Vertrag und Leipziger Prozesse das geistige Fundament für die internationalen Militärgerichtshöfe von Nürnberg und Tokio, mit denen die Alliierten nach dem Zweiten Weltkrieg „die Hauptkriegsverbrecher der europäischen Achse“ und „des Fernen Ostens“ wegen Verbrechen gegen den Frieden, Kriegsverbrechen und Verbrechen gegen die Menschlichkeit zur Verantwortung gezogen haben.

Deutschland stand der sich neu entwickelnden Internationalen Strafjustiz zunächst skeptisch gegenüber. Der Großteil der Bevölkerung empfand die Nürnberger Prozesse als Siegerjustiz — vor allem, weil mutmaßliche Kriegsverbrechen der Alliierten wie die Bombardierung Dresdens und Königsbergs (heute: Kaliningrad, Russland) nicht verfolgt wurden.[2] Mit den Jahren hat sich diese Einstellung allerdings geändert; mittlerweile fühlt sich Deutschland — auch und gerade angesichts seiner historischen Verantwortung — in besonderem Maße dem Kampf gegen die Straflosigkeit internationaler Verbrechen verpflichtet.[3] Dies zeigte sich deutlich, als das Völkerstrafrecht nach Ende des Kalten Krieges Anfang der 90er Jahre seine Wiedergeburt[4] erlebte. Deutschland unterstützte von Anfang an die Gründung Internationaler Strafgerichte und arbeitete eng mit den UN-Tribunalen für das ehemalige Jugoslawien und Ruanda zusammen.[5] Insbesondere wurde der

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[1] *G. Hankel*, Die Leipziger Prozesse. Deutsche Kriegsverbrechen und ihre strafrechtliche Verfolgung nach dem Ersten Weltkrieg, Hamburger Edition, Hamburg 2003, S. 97—103.

[2] Vertiefend *C. Safferling*, German Participation in the Nuremberg Trials and Its Implications for Today, in: *B. A. Griech-Polelle* (Hrsg.), The Nuremberg War Crimes Trial and its Policy Consequences Today, Nomos, Baden-Baden 2009, S. 33. Zur beschränkten Zuständigkeit der Militärtribunale *K. Ambos / S. Bock*, Procedural Regimes, in: *L. Reydams / J. Wouters / C. Ryngaert* (Hrsg.), International Prosecutors, Oxford University Press, Oxford 2012, S. 488, 491.

[3] Vertiefend *G. Werle*, Deutschland und das Völkerstrafrecht: Zeitgeschichtliche Perspektiven, in: *F. Jeßberger / J. Geneuss* (Hrsg.), Zehn Jahre Völkerstrafgesetzbuch, Nomos, Baden-Baden 2013, S. 23; *M. Eikel*, „Die Herrschaft des Rechts und nicht das Recht des Stärkeren“ — Die Bundesrepublik Deutschland und die Entstehungsgeschichte des Internationalen Strafgerichtshofs, Vierteljahreshefte für Zeitgeschichte 66 (2018), 9.

[4] Während des Kalten Krieges kam die (internationale) Entwicklung des Völkerstrafrechts zum Erliegen, hierzu *H. Satzger*, Internationales und Europäisches Strafrecht, Nomos, Baden-Baden 9. Aufl. 2020, § 13 Rn. 15—17.

[5] Siehe hierzu die Überblicksdarstellung bei *P. Wilkitzki*, The Contribution of the Federal Republic of Germany and the German Laender to the Work of the ICTY, in: *L. C. Vohrah u. a.* (Hrsg.), Man’s Inhumanity to Man — Essays on International Law in Honour of Judge A. Cassese, Kluwer Law International, Den Haag 2003, S. 923.

erste Beschuldigte, der sich vor dem ICTY verantworten musste, Duško Tadić, in Deutschland festgenommen und später nach Den Haag überstellt.[1] Als Mitglied der Gruppe der sogenannten „like-minded states"[2] setzte sich Deutschland bei den Verhandlungen von Rom[3] Ende der 90er Jahre für einen starken, unabhängigen Internationalen Strafgerichtshof (IStGH) ein.[4] So sprach sich Deutschland beispielsweise dafür aus, dem Ankläger des IStGH die Befugnis einzuräumen, Ermittlungen von Amts wegen einzuleiten[5] (siehe nun Art. 13 lit. c), 15 Abs. 3, 4 IStGH-Statut)

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[1] *C. Safferling*, German Participation in the Nuremberg Trials and Its Implications for Today, in: *B.A. Griech-Polelle* (Hrsg.), The Nuremberg War Crimes Trial and its Policy Consequences Today, Nomos, Baden-Baden 2009, S. 33, 40, der zugleich aufzeigt, dass die Überstellung von *Tadić* unter verfassungsrechtlichen Gesichtspunkten nicht unproblematisch war, da Art. 101 des deutschen Grundgesetzes die Errichtung von (und damit wohl auch die Kooperation mit) Ausnahmegerichten verbietet; siehe auch *T. Römer*, Scope of National Duties to Cooperate with International Tribunals and the International Criminal Court, in: *H.-D. Horn / S. Bock* (Hrsg.), On the Correlation between National and International Law. Results of a Joint German-Russian Research Seminar, EPUB, Marburg 2020, S. 100.

[2] *K. Kinkel*, Für einen funktionsfähigen Weltstrafgerichtshof, Neue Juristische Wochenschrift 50 (1997), 2860, 2861.

[3] Die Diplomatische Bevollmächtigtenkonferenz, die vom 15.6. bis zum 17.7.1998 unter der Schirmherrschaft der Vereinten Nationen in Rom stattfand, führte schlussendlich zur Annahme des Römischen Statuts des Internationalen Strafgerichtshofs (IStGH-Statut). Beteiligt an der Konferenz waren 159 Staaten, 17 zwischenstaatlichen Organisationen sowie 250 Nichtregierungsorganisationen, hierzu *K. Ambos*, Treatise on International Criminal Law. Volume 1: Foundations and General Part, Oxford University Press, Oxford 2013, S. 24 f.

[4] Vertiefend *H.-P. Kaul*, Der Beitrag Deutschlands zum Völkerstrafrecht, in: *C. Safferling / S. Kirsch* (Hrsg.), Völkerstrafrechtspolitik, Springer, Heidelberg 2014, S. 51; *M. Eikel*, „Die Herrschaft des Rechts und nicht das Recht des Stärkeren" — Die Bundesrepublik Deutschland und die Entstehungsgeschichte des Internationalen Strafgerichtshofs, Vierteljahreshefte für Zeitgeschichte 66 (2018), 17 ff.

[5] Proposal submitted by Argentina and Germany, Article 46, Information submitted to the Prosecutor, 25 March 1998, UN Doc A/AC.249/1998/WG.4/DP.35; siehe auch *K. Kinkel*, Für einen funktionsfähigen Weltstrafgerichtshof, Neue Juristische Wochenschrift 50 (1997), 2860, 2861. Die Frage, wie Verfahren vor dem IStGH eingeleitet werden können sollen (sog. „trigger mechanisms"), war bei den Verhandlungen von Rom stark umstritten. Einige Staaten — unter ihnen die USA und China — befürchteten, dass *ex-officio*-Befugnisse von einem überehrgeizigen Ankläger missbraucht werden könnten, um politisch motivierte, inhaltlich unberechtigte Verfahren einzuleiten. Die *like-minded* Staaten hielten *ex-officio*-Befugnisse des Anklägers hingegen für unabdingbar für die politische Unabhängigkeit des Gerichtshofs. Anders könne nicht gewährleistet werden, dass internationale Verbrechen auch dann geahndet werden, wenn die Mitgliedstaaten oder der Sicherheitsrat den Gerichtshof aus politischen Erwägungen heraus nicht um die Aufnahme von Ermittlungen ersuchen, siehe *W. A. Schabas / G. Pecorella*, Article 13 — Exercise of Jurisdiction, in: *O. Triffterer / K. Ambos* (Hrsg.), Rome Statute of the International Criminal Court — A Commentary, C.H. Beck, München 3. Aufl. 2016, Rn. 2 ff. Der finale in Rom erzielte Kompromiss sieht vor, dass der Ankläger zwar die Befugnis hat, selbstständig Ermittlungen einzuleiten, hierfür aber die Genehmigung der Vorverfahrenskammer braucht (Art. 13, 15 IStGH-Statut).

und setzte sich dafür ein, den Gerichtshof mit universeller Zuständigkeit auszustatten, damit er internationale Verbrechen weltweit, unabhängig vom Tatort und der Nationalität von Täter und Opfer verfolgen kann[1] — ein sehr weitreichender Vorschlag, der keine Mehrheit unter den Staaten finden konnte (zum schlussendlich in Rom erzielten Kompromiss unter 3.). Zugleich — und dies soll im Zentrum der weiteren Überlegungen stehen — kündigte die deutsche Regierung bereits während der Verhandlungen von Rom an, auch auf nationaler Ebene eine effektive Verfolgung internationaler Verbrechen sicherstellen zu wollen. Unterstützt von Experten aus verschiedenen Ministerien, der Justizpraxis und der Wissenschaft erarbeitete die Regierung einen Vorschlag für ein nationales Völkerstrafgesetzbuch (VStGB), der vom Gesetzgeber mit nur wenigen Änderungen angenommen wurde. Das VStGB trat am 30.6.2002, einen Tag vor dem Statut des IStGH, in Kraft.[2]

2. Das VStGB – nationale Implementation internationaler Strafvorschriften

2.1. Gesetzgeberische Motive

Mit Erlass des VStGB hat der deutsche Gesetzgeber die dem IStGH-Statut zugrunde liegende Idee aufgenommen, dass die Verfolgung völkerrechtlicher Verbrecher gemeinsame Aufgabe der internationalen Gemeinschaft und der Nationalstaaten ist. In diesem Sinne wird bereits in der Präambel des Statuts daran erinnert, dass „es die Pflicht eines jeden Staates ist, seine Strafgerichtsbarkeit über die für internationale Verbrechen Verantwortlichen auszuüben“. Anders als die UN-Tribunale[3] beansprucht der IStGH keine Vorrangzuständigkeit vor nationalen Gerichten. Er versteht sich vielmehr als ein „last resort“, das in Ergänzung der nationalen Gerichtsbarkeit nur dann eingreift, wenn dies notwendig ist, um eine Straflosigkeit völkerrechtlicher Verbrechen zu verhindern. Nach dem in Art. 17 IStGH-Statut verankerten Komplementaritätsprinzip ist ein Verfahren vor dem IStGH grundsätzlich nicht zulässig, wenn sich die nationale Justiz den in Frage stehenden Verbrechen annimmt. Etwas anderes gilt nur dann, wenn der jeweilige Staat nicht willens oder in der Lage ist, die Ermittlungen oder die Strafverfolgung ernsthaft durchzuführen.[4] Das IStGH-Statut verpflichtet die Mitgliedstaaten daher nicht unmittelbar, die internationalen Kernverbrechen auch im nationalen Recht

[1] Report of the Preparatory Committee on the Establishment of an International Criminal Court, 14 April 1998, UN Doc A/Conf.183/2/Add.1, S. 30 ff.

[2] Zur Entstehungsgeschichte *G. Werle / F. Jeßberger*, International Criminal Justice is Coming Home: The New German Code of Crimes against International Law, Criminal Law Forum 12 (2000), 191, 199.

[3] Hierzu *K. Ambos / S. Bock*, Procedural Regimes, in: *L. Reydams / J. Wouters / C. Ryngaert* (Hrsg.), International Prosecutors, Oxford University Press, Oxford 2012, S. 488, 503.

[4] Vertiefend *K. Ambos*, Treatise on International Criminal Law. Volume III: International Criminal Procedure, Oxford University Press, Oxford 2016, S. 271 ff.

unter Strafe zu stellen, setzt aber entsprechende Anreize, da die nationale Justiz anderenfalls Gefahr läuft, ihre grundsätzlich bestehende Vorrangzuständigkeit zu verlieren.[1]

Dies galt auch für Deutschland. Mit Ausnahme des Völkermordes (§ 220a StGB a. F.) und bestimmten Aggressionsakten (§ 80 StGB a. F.) stellte das deutsche Recht bis zum 30.6.2002 völkerrechtliche Verbrechen nicht als solche unter Strafe. Die einschlägigen Handlungen konnten zwar regelmäßig als „gewöhnliche" nationale Straftat — beispielsweise als Totschlag, Körperverletzung oder Sachbeschädigung — geahndet werden. Dies wurde aber dem spezifischen Unrecht internationaler Verbrechen, das in ihrer kollektiven Dimension liegt, nicht gerecht.[2] So wird beispielsweise die Tötung eines anderen Menschen von einem einfachen Totschlag zu einem Verbrechen gegen die Menschlichkeit, wenn sie in einen übergeordneten Kontext organisierter Gewaltanwendung eingebettet, also Teil eines ausgedehnten oder systematischen Angriffs gegen die Zivilbevölkerung ist. Diesem funktionalen Zusammenhang zwischen Einzeltat und Gesamtakt kann nur durch die Pönalisierung von internationalen Verbrechen als solche Rechnung getragen werden.[3] Teilweise existierten aber auch echte Strafbarkeitslücken, d. h., dass bestimmte Handlungen, wie die Erklärung, dass es kein Pardon gäbe (Art. 8 Abs. 2 lit. b] [xii] IStGH-Statut) oder die völkerrechtswidrige Überführung eines Teils der eigenen Bevölkerung in ein besetztes Gebiet (Art. 8 Abs. 2 lit. b] [viii] IStGH-Statut) vom IStGH-Statut als internationales Verbrechen eingestuft wurden, nach deutschem Recht jedoch nicht strafbar waren.[4]

Die mit Erlass des VStGB erfolgte Anpassung des deutschen Strafrechts an das IStGH-Statut ist zum einen Ausdruck der Bereitschaft Deutschlands, eine aktive Rolle im System der Internationalen Strafjustiz zu spielen. Zugleich wahrt Deutschland damit aber auch seine nationalen Interessen. Deutschland ist traditionell sehr zurückhaltend mit der Auslieferung eigener Staatsangehöriger; Art. 16 Abs. 2 Grundgesetz (GG) gewährleistete lange Zeit ein unbeschränktes Grundrecht auf Auslieferungsfreiheit. Erst 2002 wurde das kategorische Auslieferungsverbot insoweit gelockert, als deutsche Staatsangehörige nunmehr unter bestimmten Voraussetzungen an andere EU-Mitgliedstaaten oder internationale Gerichtshöfe aus-

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[1] *A. Zimmermann*, Auf dem Weg zu einem deutschen Völkerstrafgesetzbuch — Entstehung, völkerrechtlicher Rahmen und wesentliche Inhalte, Zeitschrift für Rechtspolitik 35 (2002), 97, 98 spricht daher von einer Pönalisierungsobliegenheit.

[2] Vgl. hierzu *S. Bock*, Das Opfer vor dem Internationalen Strafgerichtshof, Duncker & Humblot, Berlin 2010, S. 80—118 mwN.

[3] Bundesregierung, Entwurf eines Gesetzes zur Einführung des Völkerstrafgesetzbuches, 13.03.2002, BT-Drs.14/8524, S. 12; *H. Satzger*, Das neue Völkerstrafgesetzbuch — eine kritische Würdigung, Neue Zeitschrift für Strafrecht 22 (2002), 125, 126; *H. Gropengießer / H. Kreicker,* Deutschland, in *A. Eser / H. Kreicker* (Hrsg.), Nationale Strafverfolgung völkerrechtlicher Verbrechen — National Prosecution of International Crimes, Band 1, edition iuscrim, Freiburg i. Br. 2003, S. 62.

[4] Bundesregierung, Entwurf eines Gesetzes zur Einführung des Völkerstrafgesetzbuches, 13.03.2002, BT-Drs. 14/8524, S. 12.

geliefert werden dürfen. Ungeachtet der damit verbundenen Öffnung der deutschen (Straf-)Rechtsordnung gegenüber der Europäischen und internationalen Gemeinschaft hat das Bundesverfassungsgericht in einer Grundsatzentscheidung klargestellt, dass Eingriffe in die Auslieferungsfreiheit so schonend wie möglich und unter besonderer Berücksichtigung der Grundsätze der Rechtssicherheit und des Vertrauensschutzes erfolgen müssen.[1] Deutlich wird damit, dass die Auslieferung Deutscher weiterhin die (begründungsbedürftige) Ausnahme ist. Mit Erlass des VStGB hat Deutschland in diesem Sinne sichergestellt, dass die deutsche Justiz rechtlich in der Lage ist, deutsche Staatsangehörige, die der Begehung völkerrechtlicher Verbrechen verdächtig sind, selbst zu verfolgen und die Beschuldigten nicht an den IStGH überstellen muss.[2] Es ist damit auch eine Schutzmaßnahme, mit der verhindert wird, dass deutsche Bürger „gegen ihren Willen aus der ihnen vertrauten Rechtsordnung entfernt werden" müssen und „vor den Unsicherheiten einer Aburteilung unter einem… fremden Rechtssystem"[3] bewahrt werden können.

2.2. Aufbau und wesentlicher Inhalt des VStGB

Worauf nun auch immer der Schwerpunkt der gesetzgeberischen Intention lag — Beteiligung am internationalen Kampf gegen die Straflosigkeit völkerrechtlicher Verbrechen oder Wahrung der nationalen Vorrangzuständigkeit vor dem IStGH —, erreicht werden können diese Ziele nur, wenn das VStGB die Vorschriften des IStGH-Statuts so vollständig und umfassend wie möglich ins nationale Recht überführt. Dies ist auch weitgehend gelungen: Das VStGB gliedert sich in einen Allgemeinen (§§ 1—5) und einen Besonderen Teil (§§ 6—14). Dabei fungiert § 2 VStGB als Scharnier zum allgemeinen Strafgesetzbuch[4]: Soweit das VStGB keine Sonderregelungen aufstellt, findet das allgemeine Strafrecht auch auf internationale Verbrechen Anwendung. Abweichend ist zunächst das Strafanwendungsrecht geregelt. So unterstellt § 1 VStGB die völkerrechtlichen Verbrechen dem Universalitätsprinzip und ermöglicht damit eine Strafverfolgung unabhängig vom Tatort oder von der Nationalität von Täter und Opfer (dazu näher unter 3.). § 3 VStGB enthält einen besonderen Straffreistellungsgrund für Täter, die aufgrund eines irr-

[1] Bundesverfassungsgericht, Urteil v. 18.7.2004, Az. 2 BvR 2236/04, BVerfGE (Entscheidungen des Bundesverfassungsgerichts) 113, 273, 301.

[2] Siehe *H. Satzger*, Das neue Völkerstrafgesetzbuch — eine kritische Würdigung, Neue Zeitschrift für Strafrecht 22 (2002), 125, 126; *A. Zimmermann*, Auf dem Weg zu einem deutschen Völkerstrafgesetzbuch — Entstehung, völkerrechtlicher Rahmen und wesentliche Inhalte, Zeitschrift für Rechtspolitik 35 (2002), 97, 98.

[3] Vgl. zur Ratio des Grundrechts auf Auslieferungsfreiheit Bundesverfassungsgericht, Urteil v. 18.7.2004, Az. 2 BvR 2236/04, BVerfGE (Entscheidungen des Bundesverfassungsgerichts) 113, 273, 301.

[4] Siehe auch *H. Satzger*, Das neue Völkerstrafgesetzbuch — eine kritische Würdigung, Neue Zeitschrift für Strafrecht 22 (2002), 125, 127; *G. Werle*, Einleitung Völkerstrafgesetzbuch, in: *C. Safferling* (Hrsg.), Münchener Kommentar zum Strafgesetzbuch, Band 8: Nebenstrafrecht III, C. H. Beck: München 3. Aufl. 2018, Rn. 47.

tümlich für verbindlich und rechtmäßig erachteten Befehls ein Kriegsverbrechen oder das Verbrechen der Aggression begangen haben (entspricht Art. 33 IStGH-Statut). Die § 4 VStGB i. V. m. §§ 14, 15 VStGB überführen die völkerstrafrechtliche Zurechnungsfigur der Vorgesetztenverantwortlichkeit (entspricht im Wesentlichen Art. 28 IStGH-Statut) in das deutsche Strafrecht; § 5 VStGB ordnet die Unverjährbarkeit völkerrechtlicher Verbrechen an (entspricht Art. 29 IStGH-Statut). Der Besondere Teil umfasst die völkerrechtlichen Kernverbrechen: Völkermord (§ 6 VStGB / Art. 6 IStGH-Statut), Verbrechen gegen die Menschlichkeit (§ 7 VStGB / Art. 7 IStGH-Statut), Kriegsverbrechen (§§ 8—12 VStGB / Art. 8 IStGH-Statut) und das Verbrechen der Aggression (§ 13 VStGB / Art. 8bis IStGH-Statut).

2.3. Divergenzen

Auch wenn sich das VStGB grundsätzlich eng an seinem internationalen Pendant orientiert, gibt es doch ein paar bemerkenswerte Unterschiede. Dies betrifft zunächst und in besonders augenfälliger Weise die Kodifizierung der Kriegsverbrechen. Das IStGH-Statut basiert auf dem klassischen two-box-approach des Humanitären Völkerrechts, unterscheidet also formell strikt zwischen Kriegsverbrechen im internationalen bewaffneten Konflikt (Art. 8 Abs. 2 lit. a] und b] IStGH-Statut) und Kriegsverbrechen im nicht-internationalen bewaffneten Konflikt (Art. 8 Abs. 2 lit. c] und e] IStGH-Statut).[1] Das deutsche VStGB differenziert hingegen zwischen Kriegsverbrechen gegen Personen (§ 8 VStGB), Kriegsverbrechen gegen das Eigentum und sonstige Rechte (§ 9 VStGB), Kriegsverbrechen gegen humanitäre Operationen und Embleme (§ 10 VStGB) sowie dem Einsatz verbotener Methoden (§ 11 VStGB) und Mittel (§ 12 VStGB) der Kampfführung. Internationaler und nicht-internationaler Konflikt werden dabei — soweit es der Stand des Völkergewohnheitsrechts erlaubt[2] — weitgehend gleichgesetzt. Indem das deutsche Recht den Fokus nicht mehr auf die Natur des Konflikts, sondern auf das durch die Kampfhandlung beeinträchtigte Interesse legt, leistet es einen Beitrag zur (weiteren) rechtsgutorientierten Fortentwicklung des Humanitären Völkerrechts, die mit der Rechtsprechung des Jugoslawien-Tribunals ihren Anfang genommen hat.[3]

An anderer Stelle bleibt das VStGB hingegen hinter den internationalen Strafvorschriften zurück. Insbesondere hat der deutsche Gesetzgeber einige der im

[1] Hierzu *K. Ambos*, Treatise on International Criminal Law. Volume 2: The Crimes and Sentencing, Oxford University Press, Oxford 2014, S. 161 ff.

[2] Bundesregierung, Entwurf eines Gesetzes zur Einführung des Völkerstrafgesetzbuches, 13.3.2002, BT-Drs. 14/8524, S. 24. Für Ausnahmen siehe §§ 8 Abs. 3 (rechtswidrige Gefangenhaltung, Überführung der Zivilbevölkerung der Besatzungsmacht, Nötigung zum Dienst in den Streitkräften des Gegners, Nötigung zu Kriegshandlungen), 9 Abs. 2 (Aufhebung und Aussetzung von Rechten und Forderungen) und 11 Abs. 3 (Angriffe, die zu unverhältnismäßigen Umweltschäden führen) VStGB.

[3] Hierzu *K. Ambos*, Treatise on International Criminal Law. Volume 2: The Crimes and Sentencing, Oxford University Press, Oxford 2014, S. 118 ff. (insbesondere auch Fn. 28).

IStGH-Statut enthaltenen Auffangtatbestände nicht übernommen bzw. präzisiert. Beispielsweise pönalisiert Art. 7 Abs. 1 lit. k) IStGH-Statut Verbrechen gegen die Menschlichkeit in Form anderer unmenschlicher Handlungen, mit denen vorsätzlich große Leiden oder eine schwere Beeinträchtigung der körperlichen Unversehrtheit oder geistigen oder körperlichen Gesundheit verursacht werden. Im deutschen Recht ist die Einzeltat hingegen wie folgt gefasst: Strafbar ist, wer „einem anderen Menschen schwere körperliche oder seelische Schäden, insbesondere der in § 226 des Strafgesetzbuches bezeichneten Art, zufügt." Damit hat der Gesetzgeber bewusst auf das konturlose Tatbestandsmerkmal[1] der „anderen unmenschlichen Handlung ähnlicher Art" verzichtet. Zudem wurde mit dem Verweis auf den Straftatbestand der schweren Körperverletzung (§ 226 StGB), der beispielsweise dann erfüllt ist, wenn das Opfer das Sehvermögen, das Gehör oder ein wichtiges Glied verliert oder nach der Tat in Siechtum oder Lähmung verfällt, ein Indikator für die erforderliche Intensität der Tatfolgen geliefert, der dem internationalen Strafrecht so fremd ist.[2] Ähnlich wurde beim Völkermordtatbestand verfahren.[3] Auch übernimmt das VStGB bei den Sexualdelikten nicht die völkerstrafrechtliche catch all Klausel „jede andere Form sexueller Gewalt von vergleichbarer Schwere" (Art. 7 Abs. 1 lit. g] IStGH-Statut, ähnlich auch Art. 8 Abs. 2 lit. b] [xxii], 8 Abs. 2 lit. e] [vi] IStGH-Statut), sondern verwendet vielmehr in Anlehnung an den deutschen § 177 StGB den Begriff der sexuellen Nötigung (§§ 7 Abs. 1 Nr. 6, 8 Abs. 1 Nr. 4 VStGB).[4] Durch diese und ähnliche Konkretisierungen, die zudem an nationale Strafvorschriften und Rechtskonzepte anknüpfen, sind die deutschen Strafvorschriften enger als ihre internationalen Gegenstücke, können also nicht gewährleisten, dass alle Verhaltensweisen, die nach dem IStGH-Statut strafbar sind, auch nach deutschem Recht als internationale Verbrechen eingestuft werden. Hintergrund dieser Änderungen ist Art. 103 Abs. 2 GG, dem zufolge eine Tat nur bestraft werden kann, wenn die Strafbarkeit gesetzlich bestimmt war, bevor die Tat begangen wurde. Der hierin enthaltene Bestimmtheitsgrundsatz verlangt, dass jedermann vorhersehen können muss, welches Verhalten verboten und mit Strafe bedroht ist.[5] Das deutsche Verfassungsrecht stellt damit tendenziell striktere An-

[1] Kritisch zur mangelnden Bestimmtheit einer solchen Generalklausel auch ICTY, *Prosecutor v. Kupreškić et al.,* Trial Chamber Judgement v. 14.01.2000, Case No. IT-95-16, Rn. 562—566.

[2] Bundesregierung, Entwurf eines Gesetzes zur Einführung des Völkerstrafgesetzbuches, 13.3.2002, BT-Drs. 14/8524, S. 20.

[3] Art. 6 lit. b) IStGH-Statut: „Verursachung von schwerem körperlichem oder seelischem Schaden an Mitgliedern der Gruppe" v. § 6 Abs. 1 Nr. 2 VStGB: „einem Mitglied der Gruppe schwere körperliche oder seelische Schäden, insbesondere der in § 226 des Strafgesetzbuches bezeichneten Art, zufügt".

[4] Vertiefend *S. Bock,* Das Völkerstrafgesetzbuch im Lichte des Grundgesetzes, in: 36. Strafverteidigertag, Hannover 2012, Alternativen zur Freiheitsstrafe, Strafverteidigervereinigungen, Berlin 2013, S. 117, 125 f. mwN.

[5] Ständige Rechtsprechung des Bundesverfassungsgerichts, siehe nur Bundesverfassungsgericht, Beschluss v. 23.06.2010, Az. 2 BvR 2559/08, 105, 491/09, BVerfGE 126, 195.

forderungen an Bestimmtheit, Erkennbarkeit und Verstehbarkeit von Strafnormen als das internationale (Straf-) Recht. Auch wenn Art. 103 Abs. 2 GG der Verwendung von auslegungsbedürftigen Tatbestandsmerkmalen und Generalklauseln nicht per se entgegensteht,[1] sah sich der deutsche Gesetzgeber doch aus verfassungsrechtlichen Gründen gehindert, die Auffangtatbestände des IStGH-Statuts unmodifiziert ins deutsche Recht zu übernehmen.[2]

Ebenfalls verfassungsrechtlichen Erwägungen geschuldet sind Abweichungen beim Aggressionsverbrechen. Art. 8bis IStGH-Statut stellt die Planung, Vorbereitung, Einleitung oder Ausführung einer Angriffshandlung unter Strafe, die ihrer Art, ihrer Schwere und ihrem Umfang nach eine offenkundige Verletzung der Charta der Vereinten Nationen darstellt, sofern der Täter tatsächlich in der Lage ist, das politische oder militärische Handeln eines Staates zu kontrollieren oder zu lenken. Die mit der Pönalisierung reiner Vorbereitungsakte (Planung / Vorbereitung) grundsätzlich verbundene Ausdehnung der Strafbarkeit ins Tatvorfeld wird allerdings insoweit wieder beschränkt, als individuelle Verantwortlichkeit nur dann entsteht, wenn die staatliche Aggressionshandlung[3] tatsächlich ausgeführt wurde.[4] Dies entspricht auch grundsätzlich dem Ansatz des deutschen Rechts (§ 13 Abs. 2 Nr. 1 VStGB). Sofern aber durch die Tat die Gefahr eines Angriffskrieges oder einer sonstigen Angriffshandlung für die Bundesrepublik Deutschland herbeigeführt wird, ist auch die Vorbereitung von Aggressionshandlungen an sich und unabhängig davon strafbar, ob es tatsächlich zu einer staatlichen Angriffshandlung kommt (§ 13 Abs. 2 Nr. 2 VStGB). Damit will der deutsche Gesetzgeber dem Verfassungsauftrag des Art. 26 Abs. 1 GG nachkommen, dem zufolge Handlungen, die geeignet sind und in der Absicht vorgenommen werden, das friedliche Zusammenleben der Völker zu stören, insbesondere die Führung eines Angriffskrieges vorzubereiten, verfassungswidrig sind und unter Strafe gestellt werden müssen.

Insgesamt zeigt sich, dass der deutsche Gesetzgeber bei der nationalen Implementierung des IStGH-Statuts vor der Herausforderung stand, das deutsche Recht an internationale Standards anzupassen, dabei aber zugleich den Fundamentalprin-

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[1] Grundlegend Bundesverfassungsgericht, Beschluss v. 30.11.1955, Az. 1 BvL 120/53, BVerfGE 4, 358: „Auch das Strafrecht kann nicht darauf verzichten, allgemeine Begriffe zu verwenden, die in besonderem Maße einer Deutung durch den Richter bedürfen. Ohne derartige Begriffe könnte der Gesetzgeber der Vielgestaltigkeit des Lebens nicht Rechnung tragen. Sie sind deshalb unentbehrlich."

[2] Vgl. Bundesregierung, Entwurf eines Gesetzes zur Einführung des Völkerstrafgesetzbuches, 13.3.2002, BT-Drs. 14/8524, S. 22.

[3] Zur Zweiaktigkeit des Verbrechens der Aggression (staatliche Angriffshandlung + individueller Tatbeitrag), *S. Bock,* Individuelle Verantwortlichkeit für staatliche Angriffshandlungen — Überlegungen zum Verbrechen der Aggression, in: *J. C. Bublitz u. a.* (Hrsg.), Festschrift für Reinhard Merkel zum 70. Geburtstag, Berlin, Duncker & Humblot 2020, S. 1433, 1436.

[4] Element 3 Resolution RC/Res. 6, Advance Version, 16.6.2010, Annex II. Vgl. auch *K. Ambos*, Das Verbrechen der Aggression nach Kampala, Zeitschrift für Internationale Strafrechtsdogmatik 5 (2010), 649, 660 ff.

zipien der nationalen (Straf-)Rechtsordnung hinreichend Rechnung zu tragen. Das VStGB ist damit auch ein Beispiel für das Spannungsverhältnis zwischen dem Prinzip der Völkerrechtsfreundlichkeit nationaler Rechtsordnungen, das ggf. auch nach einer Anpassung des nationalen Strafrechts an internationale Entwicklung verlangt, und der Wahrung nationaler Identitäten und rechtskultureller Besonderheiten im (fortschreitenden) Prozess der Internationalisierung des Rechts.

3. Verfolgungsreichweite: Universalitätsprinzip trifft Opportunitätsprinzip

Welchen Stellenwert Deutschland der Verfolgung völkerrechtlicher Verbrechen beimisst, kommt besonderes deutlich in den Regelungen zum Anwendungsbereich des VStGB zum Ausdruck. Wie bereits erwähnt, hatte sich Deutschland bei den Verhandlungen von Rom dafür eingesetzt, den IStGH mit universeller Gerichtsbarkeit auszustatten. Zur Begründung verwies die deutsche Delegation darauf, dass alle Nationalstaaten völkergewohnheitsrechtlich berechtigt seien, die internationalen Kernverbrechen auch dann strafrechtlich zu ahnden, wenn die Taten keinen Bezug zum verfolgenden Staat aufweisen. Dies ist nach der vorzugswürdigen normativen Begründung des Universalitätsprinzips keine völkerrechtlich unzulässige Einmischung in die inneren Angelegenheiten des Tatortstaates, weil die völkerrechtlichen Kernverbrechen universell anerkannte Rechtsgüter in systematischer Weise verletzen und damit die gemeinsame Wertgrundlage der gesamten Staatengemeinschaft erschüttern. Der Staat, der eine Tat auf Basis des Universalitätsprinzips verfolgt, wird damit nicht (nur) im eigenen Interesse tätig, sondern gleichsam als Stellvertreter der internationalen Staatengemeinschaft.[1] Wenn jedoch die Nationalstaaten das unbegrenzte, aber abgeleitete Recht zur weltweiten Verfolgung internationaler Verbrechen haben, so erscheint es theoretisch konsequent, das gleiche Recht auch und erst recht dem IStGH zuzusprechen — einem Organ der internationalen Staatengemeinschaft, das von dieser zur direkten Durchsetzung des Völkerstrafrechts gegründet worden ist.[2] Diese rechtsdogmatische Argumentation konnte sich allerdings aus politischen Gründen bei den Verhandlungen von Rom nicht durchsetzen: Den IStGH mit universeller Gerichtsbarkeit auszustatten, war den gerichtshofkritischen Staaten zu weitgehend — zumal es ihnen auch darum ging, zu verhindern, dass sich ihre Staatsangehörigen vor einem internationalen Gericht verantworten müssen, dem sie ggf. nicht beitreten.[3] Dementsprechend kann der IStGH nunmehr nur dann weltweite Zuständigkeit beanspruchen, wenn ihm eine Situation vom UN-Sicherheitsrat überwiesen wurde. Im Übrigen basiert seine

[1] *K. Ambos*, Treatise on International Criminal Law. Volume 3: International Criminal Procedure, Oxford University Press, Oxford 2016, S. 224 ff.
[2] *S. Bock*, Das Opfer vor dem Internationalen Strafgerichtshof, Duncker & Humblot, Berlin 2010, S. 266.
[3] Zur Diskussion *W. A. Schabas / G. Pecorella*, Article 13 — Exercise of Jurisdiction, in: *O. Triffterer / K. Ambos* (Hrsg.), Rome Statute of the International Criminal Court — A Commentary, C. H. Beck, München 3. Aufl. 2016, Rn. 5 ff.

Gerichtsbarkeit auf dem Territorialitätsprinzip (Verfolgung von internationalen Verbrechen, die auf dem Gebiet eines Mitgliedstaates begangen werden) und dem aktiven Personalitätsprinzip (Verfolgung von internationalen Verbrechen, die von den Staatsangehörigen eines Mitgliedstaates begangen werden, siehe Art. 12 IStGH-Statut).

Auf nationaler Ebene ist Deutschland seiner in Rom vertretenen Linie jedoch treu geblieben. § 1 VStGB ermächtigt die deutschen Justizbehörden, Völkermord, Verbrechen gegen die Menschlichkeit und Kriegsverbrechen, die im Ausland begangen werden, auch dann zu verfolgen, wenn die Taten keinen Bezug zum Inland aufweisen. Auf die Staatsangehörigkeit von Täter und Opfer oder das am Tatort geltende Recht kommt es damit nicht an. Etwas anderes gilt hingegen für das Verbrechen der Aggression. Hier greift das deutsche Strafrecht bei Auslandstaten nur dann ein, wenn der Täter Deutscher ist oder sich die Tat gegen die Bundesrepublik Deutschland richtet. Damit trägt der deutsche Gesetzgeber der Tatsache Rechnung, dass das Verbrechen der Aggression, das nur von (i. d. R. politischen oder militärischen) Führungspersonen[1] begangen werden kann, politisch besonders sensibel ist. Eine strafrechtliche Verfolgung soll daher — so die deutsche Gesetzesbegründung — entweder durch einen unmittelbar betroffenen Staat oder den IStGH erfolgen.[2]

Das für die anderen Kernverbrechen geltende Universalitätsprinzip stellt die Praxis freilich vor große Herausforderungen: Die deutsche Justiz mit ihren notwendig begrenzten Ressourcen ist schlicht nicht in der Lage, alle weltweit begangenen völkerrechtlichen Verbrechen zu verfolgen. Da im deutschen Strafrecht grundsätzlich das Legalitätsprinzip gilt, die Strafverfolgungsbehörden also prinzipiell bei entsprechenden Verdachtsmomenten zur Ermittlung und Anklage aller (mutmaßlichen) Straftaten verpflichtet sind, droht mit § 1 VStGB die Überlastung der deutschen Strafrechtspflege. Um dies zu verhindern, wurden zeitgleich mit Erlass des VStGB durch eine Änderung der Strafprozessordnung (StPO) erweiterte Einstellungsmöglichkeiten geschaffen.[3] Gemäß § 153f StPO besteht eine Verfolgungspflicht bei völkerrechtlichen Verbrechen nur, wenn die Tat im Inland begangen wird oder sich der Beschuldigte im Inland aufhält, bzw. ein solcher Aufenthalt zu erwarten ist. Sichergestellt wird damit, dass Deutschland nicht zu einem „sicheren Hafen" für Völkerrechtsverbrecher wird, diese also nicht durch eine Flucht nach Deutschland einer Straftatahndung entgehen können. Auch wenn der Täter Deutscher ist, müssen die deutschen Strafverfolgungsbehörden grundsätzlich tätig werden. Etwas anderes gilt nur dann, wenn die Tat durch einen Internatio-

[1] Zum Führungscharakter des Aggressionsverbrechens und der Bestimmung des Führungszirkels: *S. Bock*, Individuelle Verantwortlichkeit für staatliche Angriffshandlungen — Überlegungen zum Verbrechen der Aggression, in: *J. C. Bublitz u. a.* (Hrsg.), Festschrift für Reinhard Merkel zum 70. Geburtstag, Berlin, Duncker & Humblot 2020, S. 1433, 1442 ff.

[2] Bundesregierung, Entwurf eines Gesetzes zur Änderung des Völkerstrafgesetzbuches, 1.6.2016, BT-Drs. 18/8621, S. 13.

[3] *K. Ambos*, § 1 VStGB, in: *C. Safferling* (Hrsg.), Münchener Kommentar zum Strafgesetzbuch, Band 8: Nebenstrafrecht III, C. H. Beck: München 3. Aufl. 2018, Rn. 25.

nalen Strafgerichtshof, den Tatort- oder den Opferstaat geahndet wird. Weist die Tat keinen Inlandsbezug auf, hat die Staatsanwaltschaft hingegen ein weites Verfolgungsermessen. Bei ihrer Entscheidung muss sie aber dem Ziel des VStGB, nämlich eine Straflosigkeit völkerrechtlicher Verbrechen zu beenden, Rechnung tragen. Eine Verfahrenseinstellung kommt nach § 153f StPO namentlich dann in Betracht, wenn die Tat von einem Internationalen Gericht oder einem anderen (tatnäheren) Staat verfolgt wird. Zusammengefasst liegt dem deutschen Recht die Vorstellung eines dreistufigen Zuständigkeitssystems zugrunde: Völkerrechtliche Verbrechen sollen primär durch tatnahe Staaten, also den Tatort-, Täter- oder Opferstaat, verfolgt werden. Bleiben diese untätig, ist einer Strafverfolgung vor dem IStGH Vorzug zu geben. Erfolgt diese nicht (sei es, dass der IStGH nicht zuständig ist, sei es, dass die Ankläger andere Taten priorisiert), sind Drittstaaten zur universellen Strafverfolgung berufen.[1] In diesem Sinne gewährleisten die §§ 1 VStGB, 153f StPO, dass Deutschland stets dann zur weltweiten Strafverfolgung berechtigt, aber ggf. auch verpflichtet ist, wenn dies notwendig ist, um eine Straffreiheit völkerrechtlicher Verbrechen zu verhindern.[2]

4. Anwendungspraxis

Zu Beginn machte der Generalbundesanwalt nur zögerlich von den neuen VStGB-Kompetenzen Gebrauch, was möglicherweise auch an der für die deutsche Justiz in dieser Form ungewöhnlichen politischen Dimension völkerrechtlicher Verfahren lag.[3] Gleichsam als Paradebeispiel für die „Startschwierigkeiten" bei der praktischen Anwendung des VStGB gilt das Verfahren gegen den damaligen US-Verteidigungsminister Donald Rumsfeld. Im November 2014 wurde Rumsfeld unter Beteiligung des European Center for Constitutional and Human Rights bei den deutschen Behörden u. a. wegen der Misshandlung und Folter von irakischen Gefangenen im Gefängniskomplex Abu Ghraib angezeigt.[4] Im Februar 2015 gab der Generalbundesanwalt bekannt, in dieser Sache keine Ermittlungen aufzunehmen;[5] das hiergegen von den Anzeigeerstattern vor dem Oberlandesgericht Stuttgart eingeleitete Klageerzwingungsverfahren blieb erfolglos.[6] Der Generalbundesanwalt stützte seine Entscheidung auf § 153f StPO und verwies in seiner Begründung

[1] Bundesverfassungsgericht, Beschluss v. 1.3.2011, Neue Zeitschrift für Strafrecht 31 (2011), 253.

[2] *K. Ambos*, § 1 VStGB, in: *C. Safferling* (Hrsg.), Münchener Kommentar zum Strafgesetzbuch, Band 8: Nebenstrafrecht III, C. H. Beck: München 3. Aufl. 2018, Rn. 26 ff. mwN.

[3] Hierzu auch *S. Bock*, Western Sahara and Universal Jurisdiction in Germany, Revue belge de droit international 43 (2010), 43, 56.

[4] Siehe https://www.ecchr.eu/fall/die-rumsfeld-folter-faelle/, zuletzt besucht am 9.12.2020.

[5] Generalbundesanwalt, Keine deutschen Ermittlungen wegen der angezeigten Vorfälle von Abu Ghraib/Irak, Juristenzeitung 60 (2005), 311.

[6] Oberlandesgericht Stuttgart, Beschluss vom 13.9.2005, NStZ 2006, 117.

insbesondere darauf, dass die Strafverfolgung anderweitig — nämlich durch die USA als Täterstaat — erfolgen würde, sodass (zusätzliche) Ermittlungen in Deutschland nicht notwendig seien. Dabei sollte es nach Ansicht des Generalbundesanwalts nicht darauf ankommen, dass sich die ausländischen Strafverfolgungsbemühungen gegen einen einzelnen Tatverdächtigen und einen speziellen Tatbeitrag richten. Ausreichend sei vielmehr, dass „der vorrangig zuständige Staat im Rahmen eines Gesamtkomplexes gegen Einzelpersonen ermittelt". Da die USA wegen der Vorgänge von Abu Ghraib bereits mehrere Verfahren, auch gegen Angehörige des Militärs, eingeleitet hätten, müsste aufgrund der Subsidiarität des Universalitätsprinzips die weitere Behandlung des „Tatgeschehens in seiner Gesamtheit" den amerikanischen Justizbehörden überlassen bleiben. Dies gelte auch für die Frage, mit welchen Mitteln und zu welchem Zeitpunkt gegen weitere mögliche Tatverdächtige vorgegangen werde.[1] Diese Entscheidung ist in der Wissenschaft auf starke Kritik gestoßen. Insbesondere erscheint es wenig überzeugend, dass Ermittlungen gegen den an der Spitze der Befehlshierarchie stehenden Verteidigungsminister gesperrt sein sollen, wenn und solange der Heimatstaat der Tatverdächtigen — hier die USA — nicht gegen Führungsverantwortliche, sondern allein gegen diejenigen vorgeht, die als untergeordnete Befehlsempfänger die Taten unmittelbar ausgeführt haben. Der gesetzlichen Ratio der §§ 1 VStGB, 153f StPO, nämlich eine effektive Verfolgung internationaler Verbrechen sicherzustellen (was voraussetzt, dass auch und vor allem gegen die hauptverantwortlichen Täter vorgegangen wird), entspricht es vielmehr, Ermittlungen auf Basis des Universalitätsprinzips nur dann und insoweit für subsidiär zu erklären, wenn sich die anderweite Strafverfolgung auf denselben Verdächtigen und denselben Tatvorwurf bezieht.[2]

Mittlerweile ist das VStGB aber vollständig in der Praxis angekommen.[3] Fast schon zur Ermittlungsroutine gehört die Verfolgung von sog. Syrien-Heimkehrern, also von Personen, die sich in Syrien dem Islamischen Staat oder anderen bewaffneten Gruppen angeschlossen, dort mutmaßlich Kriegsverbrechen begangen haben und nach der Tat nach Deutschland zurückkehren. Weitere prominente Beispiele für deutsche Völkerstrafverfahren sind die Ermittlungen gegen Oberst Klein, der während des Afghanistaneinsatzes der Bundeswehr die Bombardierung von Rebellen entführter Tanklastwagen befohlen hat, wobei mehrere Zivilisten zu

[1] Generalbundesanwalt, Keine deutschen Ermittlungen wegen der angezeigten Vorfälle von Abu Ghraib/Irak, Juristenzeitung 60 (2005), 311, 312.

[2] Ausführlich und mit weiteren Nachweisen *S. Bock*, Western Sahara and Universal Jurisdiction in Germany, Revue belge de droit international 43 (2010), 43, 54 ff.; *K. Ambos*, § 1 VStGB, in: *C. Safferling* (Hrsg.), Münchener Kommentar zum Strafgesetzbuch, Band 8: Nebenstrafrecht III, C. H. Beck: München 3. Aufl. 2018, Rn. 29 ff.

[3] Vgl. hierzu die Berichte von *L. Büngener*, Aus der Praxis des Generalbundesanwaltes im Völkerstrafrecht — Aktuelle Entwicklungen, Zeitschrift für Internationale Strafrechtsdogmatik 12 (2017), 755 und *C. Ritscher*, Aktuelle Entwicklung in der Strafverfolgung des Generalbundesanwaltes auf dem Gebiet des Völkerstrafrechts, Zeitschrift für Internationale Strafrechtsdogmatik 14 (2019), 599.

Tode kamen[1] sowie das vor dem Oberlandesgericht Stuttgart geführte Verfahren gegen Führungsfunktionäre der insbesondere in der Demokratischen Republik Kongo agierenden, paramilitärischen „Forces Démocratiques de Libération du Rwanda“ (FDLR — dazu sogleich noch näher). Großes internationales Aufsehen erregt der derzeit vor dem Oberlandesgericht Koblenz geführte Prozess gegen zwei ehemalige Funktionäre des syrischen Allgemeinen Geheimdienstdirektorats, bei dem es um Freiheitszentziehung sowie Folter, Tötung und Vergewaltigung von Gefangenen in einer syrischen Haftanstalt geht. Es ist weltweit das erste Mal, dass sich ehemalige Angehörige des Assad-Regimes wegen ihrer mutmaßlichen Beteiligung an staatlich unterstützten bzw. organisierten Völkerrechtsverbrechen vor einem ordentlichen Gericht verantworten müssen.[2] Zudem sind vor den Oberlandesgerichten München[3] und Frankfurt[4] Verfahren anhängig, die im Zusammenhang mit dem Völkermord an den Jesiden in der irakischen Region Sindschar stehen.

Mit diesen und anderen Verfahren trägt Deutschland auch zur Verfestigung und Weiterentwicklung des Völkerstrafrechts bei. So ging es beispielsweise im sogenannten Leichenschändungsverfahren um den persönlichen Schutzbereich der Kriegsverbrechen. Der Angeklagte hatte sich nach den Feststellungen des zuständigen Gerichts in Syrien einer bewaffneten Oppositionsgruppe angeschlossen. Im Rahmen eines Angriffs auf einen Checkpoint der syrischen Armee, an dem der Angeklagte nicht unmittelbar beteiligt war, wurden mindestens zwei gegnerische Soldaten gefangen genommen, getötet und enthauptet. Die Kämpfer spießten die abgetrennten Köpfe auf Metallstangen und stellten sie vor einer Schule auf. Um die toten Soldaten zu verhöhnen und in ihrer Ehre herabzusetzen, posierte der Angeklagte in militärischer Kleidung mit ihren Überresten und ließ sich dabei fotografieren. Eines der Bilder wurde später im Internet veröffentlicht.[5] Der Angeklagte wurde wegen des Kriegsverbrechens der schwerwiegenden entwürdigenden oder

[1] Das Verfahren gegen Klein wurde gem. § 170 Abs. 2 StPO mangels hinreichendem Tatverdacht eingestellt. Der Generalbundesanwalt kam zu dem Schluss, „dass die Beschuldigten schon nicht davon ausgegangen [sind], dass sich zum Zeitpunkt des Luftangriffs Zivilisten auf der Sandbank des Kunduz-Flusses aufhielten.“; hierzu *K. Ambos,* Afghanistan-Einsatz der Bundeswehr und Völker(straf)recht, Neue Juristische Wochenschrift 63 (2010), 1725; *C. Richter,* Tödliche militärische Gewalt und strafrechtliche Verantwortlichkeit, Onlinezeitschrift für Höchstrichterliche Rechtsprechung zum Strafrecht 13 (2012), 28.

[2] Siehe hierzu die Prozessdokumentationen des European Center for Constitutional and Human Rights (https://www.ecchr.eu/fall/prozessberichte-weltweit-erster-prozess-zu-folter-in-syrien/) und des Syria Justice and Accountability Centre (in Kooperation mit dem Marburger Internationalen Forschungs- und Dokumentationszentrums Kriegsverbrecherprozesse — https://syriaaccountability.org/topic/trial-monitoring/updates/). Zudem informiert Branch 251 in einem eigenen Podcast wöchentlich über den Fortgang des Verfahrens (https://branch-251.captivate.fm/); alle zuletzt besucht am 9.12.2020.

[3] https://www.generalbundesanwalt.de/SharedDocs/Pressemitteilungen/DE/2018/Pressemitteilung-vom-28-12-2018.html?nn=478298 (accessed 09.12.2020).

[4] https://www.generalbundesanwalt.de/SharedDocs/Pressemitteilungen/DE/aktuelle/Pressemitteilung-vom-21-02-2020.html (accessed 09.12.2020).

[5] Bundesgerichtshof, Urteil v. 27.2.2017—3 StR 57/17, BGHSt (Entscheidungen des Bundesgerichtshofs in Strafsachen) 62, 272.

erniedrigenden Behandlung verurteilt. Unter Verweis auf die einschlägigen Rechtsquellen des IStGH[1] und den Stand des Völkergewohnheitsrechts legten die deutschen Gerichte dar, dass der Schutzbereich dieses Tatbestandes, der mit den Worten eine „nach dem humanitären Völkerrecht zu schützenden Person" umschrieben ist, auch verstorbene Soldaten umfasst[2] — eine Auslegung, die zwar völkerrechtsfreundlich ist, aber in einem gewissen Spannungsverhältnis zu der allgemeinen Systematik des deutschen Strafrechts und dem verfassungsrechtlichen Analogieverbot steht.[3] Potential, die weitere (nationale und internationale) Rechtsprechung mitzuprägen, hat auch die Entscheidung des Bundesgerichtshofs, die in der syrisch-irakischen Konfliktsituation verbreiteten Praxis, Häuser und Wohnungen in Besitz zu nehmen, aus denen zuvor die rechtmäßigen Eigentümer von Kämpfern des Islamischen Staates vertrieben worden sind, als Kriegsverbrechen gegen Eigentum in Form der Aneignung einzuordnen.[4]

Dessen ungeachtet darf aber nicht übersehen werden, dass völkerstrafrechtliche Großverfahren die nationale Strafjustiz vor erhebliche Herausforderungen stellen. Dies zeigte sich besonders deutlich im bereits angesprochenen FDLR-Verfahren vor dem Oberlandesgericht Stuttgart. Im Dezember 2010 wurden Ignace Murwanashyaka, Präsident der FDLR, und Straton Musoni, sein Vizepräsident, angeklagt, als Vorgesetzte für zahlreiche Kriegsverbrechen und Verbrechen gegen die Menschlichkeit verantwortlich zu sein, die Mitglieder des bewaffneten Flügels der FDLR zwischen Januar 2008 und November 2009 in der Demokratischen Republik Kongo begangen haben sollen — darunter Massentötungen, Menschenhandel, Vergewaltigung, Geiselnahme und unmenschliche Behandlung. Wegen der Distanz zum Tatortstaat, der zudem immer noch von bewaffneten Auseinandersetzungen erschüttert wurde, erwiesen sich die Ermittlungen als sehr schwierig. Während des Verfahrens mussten einige Anklagepunkte aus Mangel an Beweisen zurückgezogen werden. Am 28. September 2015 verurteilte das Oberlandesgericht Stuttgart dann Murwanashyaka wegen Beihilfe zu Kriegsverbrechen und Rädelsführerschaft in einer ausländischen terroristischen Vereinigung zu 13 Jahren Haft. Musoni wurde nur der Rädelsführerschaft in einer ausländischen terroristischen Vereinigung für schuldig befunden. Das Gericht erkannte auf acht Jahre Haft. Da Musoni bereits sechs Jahre in Untersuchungshaft gesessen hatte, wurde er zeitgleich mit der Urteilungsverkündung aus der Haft entlassen.[5] Die Verurteilung Murwana-

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[1] Siehe insbesondere die Fußnote zu den Verbrechenselementen von Art. 8 Abs. 2 b (xxi) IStGH-Statut.

[2] Bundesgerichtshof, Urteil v. 27.2.2017-3 StR 57/17, BGHSt (Entscheidungen des Bundesgerichtshofs in Strafsachen) 62, 272.

[3] Hierzu *S. Bock / N. Bülte*, Die Strafbarkeit von Leichenschändungen nach dem VStGB und die Herausforderungen einer völkerrechtskonformen Auslegung. Anmerkung zu BGH, Urteil v. 27.2.2017-3 StR 57/17 = HRRS 2017 Nr. 997, Onlinezeitschrift für Höchstrichterliche Rechtsprechung zum Strafrecht 18 (2018), 100.

[4] BGH, Beschluss v. 4.4.2019-AK 12/19, Neue Zeitschrift für Strafrecht — RechtsprechungsReport 24 (2019), 229.

[5] OLG Stuttgart, Urteil v. 28.8.2015-5-3 StE 6/10, https://oberlandesgericht-stuttgart.justiz-bw.de/pb/,Lde/Startseite/PRESSE/OLG+Stuttgart+verurteilt+Funktionaere+ der+_FDLR_/?LISTPAGE=1178276 (accessed 09.12.2020).

shyakas wurde im Dezember 2018 vom Bundesgerichtshof teilweise aufgehoben — einerseits habe das Oberlandesgericht eine Verurteilung wegen einer Beteiligung an Verbrechen gegen die Menschlichkeit vorschnell ausgeschlossen; andererseits sei der Gehilfenvorsatz Murwanashyakas nicht hinreichend belegt worden.[1] Murwanashyaka verstarb im April 2019 — zu der geplanten Neuverhandlung seines Falles kam es nicht mehr.

Insgesamt wird das FDLR-Verfahren — auch mit Blick auf die im Vergleich zur ambitionierten Anklage vergleichsweise niedrig wirkenden erstinstanzlichen Strafaussprüche — von einigen Beobachtern kritisch gesehen; teilweise wird es sogar als Beleg dafür angeführt, dass die Idee einer national-dezentralen Durchsetzung des Völkerstrafrechts gescheitert ist.[2] Diese Ansicht wird tendenziell sogar vom Vorsitzenden des Stuttgarter Verfahrens, Richter Jürgen Hettich, geteilt, der die Urteilsverkündung mit den mittlerweile berühmt-berüchtigten Worten eingeleitet hat: „So geht es nicht".[3] Haupteinwand gegen eine nationale Verfolgung völkerrechtlicher Verbrechen ist, dass diese Großverfahren mit dem klassischen Instrumentarium des deutschen Strafverfahrensrechts nicht zu bewältigen seien: Sie würden zu lange dauern; die Rekonstruktion von Geschehnissen, die sich tausende von Kilometern entfernt vom Gericht abgespielt haben, sei kaum möglich. Zudem würden die Erhebung und Würdigung von Beweisen erheblich durch sprachliche und kulturelle Barrieren erschwert. Diese Kritik hat zu einer Diskussion um eine mögliche Änderung des Strafprozessrechts geführt: Zentrale Punkte sind der Schutz von Opfern und Zeugen, ihre Einbindung in das Verfahren, die Stärkung der Verfahrensrechte des Angeklagten sowie die Effektivierung der internationalen Rechtshilfe in Strafsachen.[4] Darüber hinaus zeigt sich in den aktuellen völkerstrafrechtlichen Verfahren, dass im völkerstrafrechtlichen Kontext auch Fragen des outreaches, also die Kommunikation zwischen Gericht und (internationaler) Öffentlichkeit, neu bedacht werden müssen.[5] Es bleibt also abzuwarten, ob Deutschland langfristig den hohen Erwartungen gerecht werden kann, die es mit Erlass des VStGB geweckt hat. Dabei gilt es nicht nur, einen effektiven Beitrag zur Beendigung der Straflosigkeit völkerrechtlicher Verbrechen zu leisten, sondern auch, die Verfahrensrechte des Beschuldigten sowie fundamentale Rechtsprinzipien der deutschen (zumindest teilweise verfassungsrechtlich determinierten) Strafrechtsordnung zu wahren.

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[1] Bundesgerichtshof, Urteil v. 20.12.2018-3 StR 236/17, BGHSt 64, 10.

[2] Siehe z. B. *B. Lakotta*, Zu weit weg für die Wahrheit, spiegel online v. 28.9.2015. URL: http://www.spiegel.de/politik/deutschland/ruanda-prozess-zu-weit-weg-fuer-die-wahrheit-a-10551 42.html (accessed 09.12.2020).

[3] Vgl. *D. Bentele*, Völkerstrafprozess in Deutschland voranbringen, Zeitschrift für Internationale Strafrechtsdogmatik 11 (2016), 803.

[4] Vertiefend *D. Bentele*, Völkerstrafprozess in Deutschland voranbringen, Zeitschrift für Internationale Strafrechtsdogmatik 11 (2016), 803.

[5] Siehe hierzu Bundesverfassungsgericht, Beschluss v. 18.8.2020-1 BVR 1918/20, Neue Juristische Wochenschrift 73 (2020), 3166; *S. Bock / M. Wagner*, Nationale Strafverfolgung von Völkerrechtsverbrechen — in kleinen Schritten weitergedacht, Neue Juristische Wochenschrift 73 (2020), 3146.

Comparative legal analysis of basic forms and directions in management of prevention and counteraction to extremism among young people in Russia and Germany

Extremism, as a commitment to extreme views and ideologies, poses a serious threat to modern society. Intransigence, intransigence, denial of any form of dialogue or compromise gives rise to aggression and can lead to the commission of various illegal actions. The range of such actions is wide enough. Minor administrative offenses (insult, vandalism, discrimination, etc.) and criminal offenses with increased public danger (riots, murders, terrorist acts, etc.) can be committed on the basis of solidarity with radical views and ideologies.

Each country has a certain specificity in the field of preventing and countering extremism, because youth extremism is a global problem and poses a security threat to almost every sovereign state. Best foreign practice study in this area will contribute to the creation of the most effective system of countering extremist manifestations in the Russian Federation, which capable of ensuring the safety and well-being of society as a whole and of an individual in particular.

The experience of the Federal Republic of Germany in the field of countering and preventing extremism is of particular interest for research, because the fight against this problem has been going on for almost 70 years. Meanwhile in Russia extremist manifestations among the youth have acquired a systemic character only after the collapse of the USSR. However, it is necessary to clarify and synchronize framework of categories and concepts of youth extremism and its determinants as applied to this study, before proceeding to a direct analysis and comparison of methods and forms of countering extremism in Russia and Germany.

A universal and standard definition of extremism in domestic jurisprudence has not yet been developed. However, there are two main approaches to understanding this category.

According to the first point of view, extremism is perceived primarily as an activity.

A. G. Khlebushkin considers extremism as illegal activity, which causes or may cause significant harm to the foundations of the constitutional order or interpersonal relations[1].

Keeping similar views on the concept of "extremism as an activity," however, in a different way, with some empathy and justification, Yu. P. Zinchenko defines: "Extremism is aggression directed against changes in the existing social order.... *Extremism, in essence, is a struggle of social groups put in a critical situation by*

[1] Khlebushkin, A. G. Extremism: criminal-legal and criminal-political analysis / A. G. Khlebushkin. Saratov, 2007.

extraordinary means and methods to preserve their physical existence and cultural identity. But it is important to emphasize that this is a destructive and illusory struggle, which does not resolve, but only aggravates the critical situation of this social group.[1]"

A legal definition of extremism was formulated within the framework of the same approach. It is found in Article 1 of the Federal Law of the Russian Federation of 25.07.2002. No. 114-FZ "On Counteracting Extremist Activities".

Thus, paragraph 1 of Article 1 of this law constitutes to extremism as a violent change in the foundations of the constitutional order and violation of the entirety of the Russian Federation; public justification of terrorism and other terrorist activities; incitement of social, racial, national or religious hatred; propaganda of the exclusivity, superiority or inferiority of a person on the basis of his social, racial, national, religious or linguistic affiliation or attitude to religion, etc. Thus, the legislator identified the concepts of "extremism" and "extremist activity", which seems to be methodologically incorrect and needs to be differentiated, as pointed out by many authors[2].

However, there exists another approach, within which extremism appears as a phenomenon.

A rather laconic and general definition was proposed by M. A. Krasnov: "*Extremism is always a spirit of hatred and anger, a spirit of aggression and contempt for a person*"[3]. At the same time, the spirit acts as an abstract metaphysical category, which may not be reflected in concrete actions and deeds.

A more informative definition was formulated by T. S. Arkhireeva: *"Extremism is an antisocial socio-political phenomenon, which is a socially and psychologically conditioned ideologically motivated use of extreme forms and methods in socio-political relations."*[4]

Appeal to the German understanding of extremism, it should be noted that foreign jurists, political scientists and historians always consider this category through the prism of activity. Another specific feature of the foreign interpretation of extremism is the "vagueness" of the proposed definitions, which the scientists themselves admit.[5]

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[1] Zinchenko Yu. P. Extremism from the perspective of a system approach // Psychology in Russia: State of the Art. 2014. Vol. 7 (1). P. 31.

[2] Zhamborov A. A. The concept of extremism and extremist activity in the current Russian legislation and legal doctrine. // Eurasian Law Journal. 2018. No. 1 (116). P. 94; Osipov V. A. Extremism, extremist activity and crimes of an extremist orientation: concepts, content and correlation // Bulletin of the Krasnodar University of Russian MIA. 2018. No. 4 (42). P. 35.

[3] Krasnov M. A. Ontology: Diversity (to the Comprehension of Article 13 of the Constitution of the Russian Federation) // Social Sciences and Modernity. 2006. №2, 3. P. 41.

[4] Arkhireeva, T. S. Extremism: concept, essence, types / T. S. Arkhireeva, M. V. Titov // Modern problems of youth extremism in the Russian Federation: state and trends: materials of the round table. M., 2008.

[5] Jaschke H.-G. Rechtsextremismus und Fremdefeindschaft. Begriffe, Positionen, Praxisfelder. Opladen, 1994. S. 25; Butterwegre Chr. Rechtsextremismus, Rassismus und Gewalt. Erklarungsmodellein der Diskussion. Darmstadt, 1996. S. 31.

A striking case in point is the definition of Professor Minkenberg, who considers extremism as extremely anti-democratic sentiments and actions of individual subjects, which consists in denying the *Rechtsstaat* (*note — the German doctrine of the rule of law*), as well as its fundamental values and principles, in favor of a "natural approach" to I understand states where there is a certain, standard racial (ethnic) composition of the population and (or) a certain, radical form of political structure (as a rule, anti-liberal or anti-communist).[1]

In turn, the German political scientist and researcher of extremism Uwe Bakes defines extremism as *"a political discourse, program and ideology that are directed explicitly or implicitly against the fundamental values and rules of democratic constitutional states.*[2]*"*

It should also be noted that in Germany there is no legal definition of extremism as such. Only the Criminal Code of the Federal Republic of Germany in article 130 discloses extremism as a crime, as follows: "*Anyone who, in any way that violates public order, incites hatred towards a part of the population, or calls for the commission of violence or arbitrariness against it, or encroaches on human the dignity of another in such a way that he humiliates the dignity of a part of the population, maliciously denigrates or slanders him, — should be punished by imprisonment for up to 5 years.*" Therefore, a certain political motivation must be contained in the intention of the infringer in order for a violent act to acquire an extremist subtext. It is also worth noting that the Criminal Code of the Federal Republic of Germany provides for liability: for the production and distribution of extremist materials (Art. 130 (2)); for publicly challenging, approving or minimizing the commission of the act specified in Art. 220a — genocide (Article 130 (3)), for organizing and membership in a terrorist organization (Article 129a).[3]

The concept of establishing the extremist nature of certain political actions and views by checking them for compliance with the constitution has become widespread in German legal and political science in the last three decades[4]. If the actions (including judgments and opinions) of an individual or public entity do not comply with the constitution and pose a threat to the current state structure, then they can be recognized as extremist.

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[1] Minkenberg M. The new right in comparative perspective: the USA and Germany — Ithaca, NY: Cornell Univ., 1993. P. 7.

[2] Backes U. Politische Extreme. Eine Wort — und Begriffsgeschichte von der Antike bis zur Gegenwart. — Gottingen: Vandenhoeck& Ruprecht, 2006.

[3] German Criminal Code in the version promulgated on 13 November 1998, Federal Law Gazette [Bundesgesetzblatt] I p. 3322, last amended by Article 1 of the Law of 24 September 2013, Federal Law Gazette I p. 3671 and with the text of Article 6 (18) of the Law of 10 October 2013, Federal Law Gazette I p 3799 / Translation of the German Criminal Code provided by Prof. Dr. Michael Bohlander. Available at: http://www.gesetze-im-internet.de/englisch_stgb/index.html (accessed: 20.11.2020).

[4] Backes U., Jesse E. Politischer Extremismus in der Bundesrepublik Deutschland. Berlin, Frankfurt a. M., 1993.; Stöss, R. Rechtsextremismus im Wandel / R. Stöss // 3., aktualisierte Aufl. — Berlin: Friedrich-Ebert-Stiftung, Forum Berlin, Projekt gegen Rechtstextremismus, 2010.

Whereas Russian jurists and legislators turned out to be more precise in their wording than their foreign counterparts, in relation to this study it seems possible to formulate the author's definition of extremism, based on the achievements of domestic legal thought, but at the same time, taking into account foreign experience. Thus, extremism can be defined as the adherence of specific individuals or organizations to extreme views and measures of social practice that carry a high degree of danger to the individual, society and the state.

Concerning the determinants of extremism, the most reasonable is the consolidated Russian-German position of O. S. Solodukhina and Professor K. Drebenstedt. Researchers believe that extremism movements and trends are caused by a combination of problems such as the growth of social tension, loss of moral values, lack of spirituality, lack of clear ideas about the history and prospects of the country's development, loss of a sense of belonging and responsibility for the fate of the homeland, non-observance of laws, corruption, making unfair decisions by administrative bodies.[1]

It turns out that the roots of extremism lie in the social nature of society, arise from its contradictions. Traditionally, it is believed (both in Russia and abroad) that the basis for the spread of radical and extremist ideas are declassed elements, marginalized people and the gathering of individuals who are extremely dissatisfied with their social status in society.

Undoubtedly, people who have sunk to the “bottom” of the social ladder, where the position of the more successful in the material, social and power plan causes envy and irritation, are more prone to radicalism, the perception of ultra-left and (or) ultra-right ideas. However, It seems to be an reprehensible and not entirely constructive action to think that social dissatisfaction is the only (main) cause of extremism.

For example, in the course of researching the "wave" of ultra-right extremism that swept Germany in the 90s of the 20th century, scientists revealed the following pattern: the most zealous and active members of the right-wing radical movements came from the families of the party nomenclature of the German Democratic Republic or representatives of the middle class of the Federal Republic of Germany.[2] This clearly shows that extremist ideology can find a breeding ground at the top level of the social structure.

In any case, youth extremism has a certain specificity, which manifests itself, among other things, in its determinants.

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[1] Solodukhina O. S., Drebenstedt K. Socio-psychological ideas about extremism among young people in Russia and Germany // In the collection: risk and safety: socio-psychological aspects VI International symposium. 2015. P. 177—185.

[2] Leggewie C., Meier H. Republikschutz. Maßstabe für die Verteidigung der Demokratie. Mit zwei Exkursen von A. Molter und W. Stenke. Hamburg, 1995.; Right-Wing Radicalism Today: Perspectives from Europe and the US/ Sabine von Mering. [Online-Ausg.]. Hoboken: Taylor and Francis, 2013.

The Russian researcher A. A. Jhuk concluded that the roots of this problem are: conflict relationships in the family (alcoholization of parents), states of frustration, an acute sense of incomprehensibility, loneliness, informative and communication hunger.[1]

German researchers look at the causes of youth extremism in a similar way. They distinguish the growth of social disintegration, alienation and feelings of insecurity, which is observed everywhere — on the street, in the family and at work.[2]

Proceeding to a direct analysis of the types of extremism most widespread among young people in Russia and Germany, take a detailed look at the foreign experience.

Right-wing extremism is the traditional problem for the Federal Republic of Germany. The essence of right-wing extremism lies in the point of view that belonging to a certain ethnic group, nation or race determines the value of a person.[3] The main features of right-wing extremism are xenophobia, racism, nationalism, chauvinism and anti-Semitism.

The Federal Office for the Protection of the Constitution of the Federal Republic of Germany (an analogue of the Russian FSB) interprets right-wing extremism as *"... aspirations that are directly directed against the fundamental equality of people enshrined in the fundamental law, as well as against the universal significance of human rights. Right-wing extremists are enemies of a democratic constitutional state, since in their understanding the state should be built on authoritarian principles, on the principle of leaderism. The outlook of right-wing extremists is characterized by an overestimation of the importance of a particular ethnic group to which a person belongs. At the same time, such a point of view prevails among them that a person's belonging to a certain ethnic group, nation, "race" determines his value. Hence, xenophobia arises as a result. Anti-Semitism is also an integral part of right-wing extremism in open or hidden form. Personal rights and public interests are subordinated to the collective 'people's community' — hence antipluralism.[4]"*

Right-wing extremists include various subcultural associations, neo-Nazi groups and even political parties (some of them are valid and are not prohibited by law, for example, the National Democratic Party of Germany (NPD)).

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[1] Dzhuk A. A. Youth extremism as an element of youth maladjustment // Bulletin of ChitGU. No. 8 (75). 2011. P. 63.

[2] Heitmeyer, W., Buhse, H., Liebe-Freund, J., Möller, K., Müller, J., Ritz, H., Siller, G. & Vossen, J. (1992). Die Bielefelder Rechtsextremismus-Studie. Erste Langzeituntersuchung zur politischen Sozialisation männlicher Jugendlicher. Weinheim: Juventa.

[3] Antonov A. E. The history of right-wing extremism in the Federal Republic of Germany on the example of the National Democratic Party (NPD) //APRIORI. Series: Humanities. 2015. No 3. P. 2.

[4] Bundesamt für Verfassungsschutz. URL: http://www.verfassungsschutz.de/de/service/glossar/_lR#rechtsextremismus (accessed 21.11.2020).

Based on the study of special literature, there are two main periods can be distinguished when the right-wing radical sentiments were especially strong in post-war Germany.

The first "outbreak" of right-wing extremism can be considered the period from 1950 to 1970. This period characterized by the creation of the Socialist Imperial Party (banned in 1952), the National Democratic Party (still active), as well as a number of anti-Semitic demonstrations (for example, waves of "dirty trick" — the appearance of a large number of anti-Semitic graffiti in western Germany in the second half of the 1950s).[1]

The latest and most serious was the wave of right-wing extremism that swept a united Germany in the early 1990s. During this period, representatives of informal extremist associations switched from words to actions — direct violence. *For example, Jorge Joao Gomondani, a 28-year-old citizen of Mozambique, was thrown from a car at full speed by a group of local right-wing teenagers in Dresden in April 1991. The injuries sustained as a result of the fall and the previous beating proved to be incompatible with life. At the same time, the funeral was overshadowed by the arrival of more than 80 young people who publicly chanted "Seig Heil" and "Auslander Raus" (foreigners get out).*[2]

Moreover, the number of crimes similar to the above case grew steadily from year to year. More than 1,500 episodes of criminal activity were recorded in 1991, and in 1992 the number of attacks by extremists reached 2,639 (17 people were killed). [3]

If political parties of extreme right orientation set themselves the main goal of dominance in the Bundestag and complete control over all political processes in Germany, then youth extremist groups were more modest in their desires and fought for the creation of "liberated zones" ("liberated" from migrants and diversity political views) within one territory (city or district).

The crime situation in the country had improved, due to repressive measures by the state, the number of extremist crimes sharply declined by the end of 1996. However, the problem has not exhausted its relevance to the present day. Right-wing extremism among the youth has not been defeated. It has transformed and continues to exist.

In past the driving force of right-wing extremism was "skinheads" who represented a certain youth culture subculture, where great importance was attached to external attributes (certain preferences in clothing, hairstyles and accessories) and

[1] Transforming the transformation?: the East European radical right in the political process / Michael Minkenberg. [Online-Ausg.]. L. : Routledge, 2015.

[2] Lewis, Rand C. The Neo-Nazis and German unification / Rand C. Lewis. Westport, Conn. [u. a.]: Praeger, 1996. P. 58.

[3] Allenov S. G. The threat of right-wing extremism and the experience of its suppression in the Federal Republic of Germany (1990s) // Vestnik Voronezh State University. Series: History. Political science. Sociology. 2008. No 1. P. 6.

behavior (spending time together, thematic discos and meetings) in addition to the ideological component. Secrecy is at the forefront nowadays. Currently, it is impossible to compose a forensic portrait of a young neo-Nazi or supporter of another form of right-wing extremism. This can be either an uneducated marginal dissatisfied with his financial situation, or a representative of the middle class with a well-paid job and a good university education, who sincerely convinced that the policy of multiculturalism will lead to the death of “white Germany”. At the same time, both the first and the second will not have visual attributes that allow judging a person's adherence to extremist movements. Nowadays, neo-Nazis are united in the so-called "partnerships" — deeply conspiratorial groups that do not have a charter, role division of members, or orderly funding. The associations organize demonstrations, rallies, distribute brochures and leaflets promoting their views, are active on the Internet, and fight their opponents on the streets using violence. According to the official data of the Federal Office for the Protection of the Constitution of the Federal Republic of Germany, about 160 such associations are currently operating in the country, with a total number of about 6,000 people.[1]

There is no concept of recruiting new members as such in modern ultra-right extremist organizations. Accession into a right-wing extremist organization usually is carried out on the basis of a personal expression of will. However, right-wing extremists contend for the loyalty of the common population through the production and distribution of campaign materials. For these purposes, various leaflets, booklets, brochures and stickers are produced in large quantities and then distributed.

Also, adherents of ultra-right ideas quickly discovered the value of cyberspace as an effective way to promote their extremist views. Since 1993, systematic work has begun (and continues to this day) on creation thematic portals in the Internet. These portals are dedicated to the subject of right-wing extremism, cyber attacks to state web resources, spamming (sending campaign materials by e-mail to an unlimited number of persons). In conclusion, it should be noted that right-wing extremists often use non-trivial methods to indirectly promote and popularize right-wing radical ideas. It does this through the tacit funding of documentaries and quasi-scientific research that complementarily describe the period of the Third Reich.

Despite the fact that the "right-wing threat" in Germany is not as strong now as in the 1990s, law enforcement agencies have registered at least 10,000 extremist offenses every year since 2000 (in quantitative terms, this is higher than in the 1990s, however, more violent crimes were committed then). At the same time, some scientists are suspicious of official statistics. They believe that in reality the number of extremist crimes may be much higher due to the high latency of this category of crimes or artificial underestimation of indicators by law enforcement officers. For example, according to official data from law enforcement agencies,

[1] Recherche-nord. Information internet portal dedicated to the activities of "free partnerships". [Electronic resource]. URL: http://www.recherche-nord.com/index.html (accessed 21.11.2020).

26 people committed suicide (were brought to suicide) on the basis of right-wing extremism from 1993 to 2000. At the same time journalists of two independent print media counted and presented representative data on more than 90 suicide episodes[1].

Another urgent problem for Germany is religious extremism, usually based on a radical interpretation of Islam. The most dangerous form of such an extremist religious movement is Salafism, whose adherents oppose the introduction of what they consider elements of other religions and philosophical movements into Islam, for a direct understanding of all the attributes of Allah (without allegories), and also consider disbelievers all those (including and other Muslims) who do not share their point of view.

It would make sense to refer to the data of official statistics of the competent authorities in Germany to clearly show the level of danger of "Islamic extremism", according to which:

— Currently there are more than 7,900 Salafi jihadists in the country, each of whom can involve two or three new members in the movement;

— 760 German citizens left for territory controlled by ISIS to carry out hostilities on the side of the radicals;

— 29 Bundeswehr soldiers fought on the side of ISIS.[2]

The specificity of religious extremism in Germany is its external orientation. As a rule, Islamic extremists identify themselves as members of international terrorist and extremist organizations (Al-Qaeda, ISIS, the Muslim Brotherhood). At the same time, there are Islamic extremist organizations inside of the Germany as well. The official authorities are concerned about the Milli Görüs association established by the Turkish expat community, which as of 2014 has more than 31,000 members. Officially, this organization is not banned, but it is in constant criminal intelligence analysis of the special services of the Federal Republic of Germany, which is understandable: there are appear articles about "defenders of Islam who are ready to give their lives in the name of jihad" and about the supremacism of radical Islam in the periodical printed edition of the organization (Milli Gazette)[3]; *28-year-old German citizen of Turkish origin Cuneyt Ciftci (who actively visited the Milli Goryus mosque in Germany) detonated an explosive device on it In March 2008, in Afghanistan, a terrorist attack killed four people*[4].

First of all, it is necessary to consider the main types of religious extremists and draw up a forensic portrait of the subject most suitable for recruitment in order to fully understand the methodology for involving new members in religious extremist organizations.

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[1] Jansen, Frank (2000): Seit der Einheit 93 Tote. In: Der Tagesspiegel, 14.09.2000.

[2] Germany: Extremism & Counter-Extremism. URL: http://www.counterextremism.com/countries/germany (accessed 20.11.2020).

[3] David Vielhaber. The Milli Gorus of Germany. Current trends in Islamist ideology/vol.13/ A journal of Hudson Institute, 2012., pp. 47—68. URL: http://www.hudson.org/content/researchattachments/attachment/1268/vielhaber.pdf (accessed 19.11.2020).

[4] Ismayilov F. Islamic Jihad Union. Master Thesis. Masaryk University, Brno. 2010. P. 38.

Thus, some German researchers in any religious radical (terrorist) organization identify the following types of extremists:

1. The entrepreneur — leaders of a specific organization, determining the methods and forms of carrying out extremist actions, recruiting new members, distributing roles within the organization, and also sending active members to militant training camps in the Middle East. These subjects usually have a good education received at a secular university, but also have deep theological knowledge. They do not take direct participation in extremist actions.

2. Proteges — members of the extremist association closest to the entrepreneur. Their hallmark is the presence of a good education and the implementation of narrowly specialized tasks in the organization (manufacture of explosive devices, IT support, financial management, etc.).

3. Misfits — people with an extremely negative background, experiencing problems with finances, law and (or) socialization in society. They join the ranks of extremists not only because of the ideological component, in order to "get on the right path" and "get support, brothers", but also in order to resolve personal problems. They carry out operational tasks set by the entrepreneurs or proteges (purchase / transportation of weapons and ammunition; laying of explosive devices; distribution of propaganda products). They are recruited as perpetrators of extremist acts.

4. Drifters — nominal members of extremist organizations who were not recruited purposefully, but got there on their own (as a rule, they are friends or relatives of one of the active members of the extremist association). The leaders of the organization consider them as a personnel reserve in case of dropout (death or arrest) of members of the third category.[1]

Based on the analysis of this and other classifications of religious extremists available in foreign legal literature, a typical forensic portrait of a person suitable for recruitment into an extremist organization can be presented as follows: a young person aged 15 to 30; male; having German citizenship, but not being an ethnic German (there are Arab or Turkic roots); experiencing problems with socialization in society (the expat community is the reference environment); unemployed (academic performance in an educational institution is low); previously he could be involved in the commission of minor offenses (both administrative and criminal). As mentioned earlier, right-wing extremists are trying to achieve solidarity and support of the ordinary population of Germany by holding appropriate demonstrations, rallies, as well as developing and distributing campaign materials. Religious extremists do not try to win the sympathy of the population, because they do not feel community with the majority of German citizens and do not even consider them as potential supporters. In this regard, the scale of agitation and propaganda

[1] Islamist terrorism in Europe: a history / Petter Nesser. London: Hurst & Company, 2015. P. 13—18.

carried out by religious extremists is somewhat different. ISIS produced information materials in German from 2009 to 2016, but this content is still designed either to agitate among the Muslim (or rather, to have Muslim roots) part of the population, or to intimidate and intimidate the indigenous people of Germany.

It is also worth noting that the presence in the country of persons who share extremist views on the basis of Islam can lead (and has already led) to the activation of right-radicals.

Thus, the PEGIDA movement (PEGIDA-Patriotische Europäer gegen die Islamisierung des Abendlandes — European patriots against the Islamization of Western European countries) gained popularity among right-wing extremism. The name of the movement is the slogan with which the right-wing populists on the social network Facebook in October 2014 called to go out into the streets to protest against the alleged “Islamization” of Germany, the existing migration policy and etc. The first protest meeting took place on October 20, 2014 in Dresden. In 2015, similar right-wing events took place in many other cities in Germany and gathered up to 30,000 supporters.[1]

In modern Russia, the problem of youth extremism has acquired a systemic character relatively recently, along with the transformative processes of the early 90s of the XX century. These processes were aimed at a radical change in the ideological paradigm of the socialist state-administrative formation. There is all the variety of extremist movements at the present time in Russia: right-wing extremism (deriving its ideological basis from the doctrine of building a mono-national state "Russia for the Russians"); left-wing extremism (based on the postulates of Marxist-Leninist philosophy); religious extremism (based on the ideas of building a caliphate).

The most famous right-wing youth groups are: "Mad Crowd" (a youth group of skinheads that promoted ideas of anti-Semitism, racism and national socialism; carried out group attacks on foreign citizens); "The militant organization of right-wing nationalists" (members of this organization, propagating the ideas of Pan-Slavism[2], published the thematic magazine "Russian image" and committed seven political murders; currently all members of the group are sentenced to long terms of imprisonment); "Combat terrorist organization" (a neo-Nazi terrorist group that has been responsible for five murders and a series of armed attacks; currently all members of the group have been brought to justice or have been liquidated); “White Society 88” (a neo-Nazi youth group whose members committed four murders and nine attempted murders of persons of non-Slavic appearance); "SPAS" (a neo-Nazi extremist organization best known for the terrorist attack on the Cherkizovsky market, as a result of which 14 people died and more than 50 were injured). It should also be noted that ultras of most football teams sympathize with the right-wing ideas.

[1] Netz gegen Nazis. Pegida [Electronic resource]. URL: http://www.netz-gegennazis.de/artikel/factsheet-und-zeitleiste-pegida-2918 (accessed: 22.11.2020).

[2] Pan-Slavism is an ideology based on the theses about the need for a Slavic national political unification on the basis of an ethnic, cultural and linguistic community.

As an example of a left-wing extremist organization in Russia, can be cited the Left Front, whose founder, Sergei Udaltsov, served a 5-year prison term for organizing mass riots.

Among the religious extremist organizations in Russia, one can single out the "Caucasian Emirate[1]", but at present the greatest danger is posed by the international terrorist organization ISIS, which is actively recruiting new members among Russian youth.

At the same time, the specificity of youth extremist groups in Russia is that many members of such associations have no idea about the ideological basis of extremist movements. Participation in extremist groups is perceived by them as time spent in the circle of their peers, where external attributes, loud slogans and other accessories have a huge influence on them.[2]

Taking into account this position, and on the basis of generalization of criminal cases materials of extremist orientation, it seems possible to single out three main types of extremists that are most often encountered among young people.

The first type of young extremist can be conditionally defined as “opportunistic”. For a large number of young people, social, economic, and political reasons are secondary, and often they simply do not have a semantic meaning. The struggle "for justice" is carried out on a hunch or even is an imaginary pretext to satisfy one's own ego in an attempt to "stand out of the pack." Like a subcultural, informal association, adherence to radicalism allows young people to declare themselves, their position, their defiance and rebellion. Radicals of the “opportunistic” type make up the majority of all categories of extremists present in the youth environment. As a rule, such young people do not pose a significant threat to society and the state, since their radicalism does not go beyond the virtual space (demonstrating their own antisocial position and disseminating extremist materials in social networks). It can manifest itself in vandalism or domestic hooliganism in the worst case.

At the same time, people who are fanatical and implacably convinced of their radical views pose a significant threat to society. This type of extremists can be characterized as “ideologically stable”. The formation of a stable, antisocial ideological base among young people, as a rule, occurs from the outside, through communication with older mentors[3]. Communication with a pseudo-specialist who is well versed in a particular topic helps a young man: first, to find out that the truth was hidden from him; second, to enlist the support of a mentor. Topics for conversation can be: Wahhabism as the only "true" interpretation of Islam; philosophy of National Socialism of the Third Reich; pre-Christian history of Russia; the content

[1] Makhnenko S. I., Sypchenko A. N. Religious aspects of terrorism in the North Caucasus // Economics, Sociology and Law. 2018. No. 3. P. 10—13.

[2] Belokobylskiy M. E., Belokobylskaya O. I. Youth extremism in Russia: features of its manifestation // Bulletin of the Kazan Law Institute of MIA Russia. 2015. No. 3 (21). P. 55.

[3] Yarmolenko L. V. Discourse of extremism in the religious aspect of public safety // Caspian region: politics, economics, culture. 2013. No. 3 (36). P. 205—208.

of any quasi-religion and etc. Various methods of psychological influence, which can have a destructive effect even on a well-educated person, are often used in recruitment. A *vivid example is the "case of Karaulova" — an ethnically Russian student of the 2nd year of the Faculty of Philosophy of Lomonosov Moscow State University. Karaulova is a girl from the complete, prosperous family. She was misled by representatives of ISIS through social networks. She changed her religion, broke off relations with her family and tried to leave for Syria, to the territory controlled by ISIS. It is also indicative that after the girl was returned home, and the story received a wide public response, Karaulova tried to re-establish contact with the extremists who had recruited her.*

For the third category of extremists, ideological support is secondary and has practically no meaning. In such cases, the goals pursued by citizens are "blurred" and lack logical justification, therefore the third type of extremists can be characterized as "aimless". *As an example is the case of 18-year-old Maria Pogorelova, who in November 2014, 18-year-old moved from St. Petersburg to the territory of ISIS, where she had been recruiting new adherents through social networks and participated in military clashes. It is noteworthy that before becoming interested in radical Islam, Pogorelova was an active supporter of the ultra-right movement and even had a swastika-shaped tattoo on her neck*[1]. Such polar changes in radical beliefs indicate that a girl didn't have a stable ideological base. Extremism in any of its manifestations and forms was a pretext for unlawful actions against the established public order and individual citizens.[2]

Extremists of the second and third types are in a greater degree the objects of operational development by the competent law enforcement agencies, preventive or educational work with them is futile. In this regard, it is advisable to carry out preventive work in relation to "opportunistic" extremists, as well as in relation to neutral-minded young people who have not yet been noticed in sympathy for radical views, but may turn out to be objects of recruiting in extremist organizations.

In view of the multifaceted nature of the problems under consideration and the impossibility of solving problems only by the forces of law enforcement agencies, an Interdepartmental Commission was formed to counter extremism in the Russian Federation by the Decree of the President of the Russian Federation in July 2011.[3]

The Interdepartmental Commission includes the heads of 21 ministries and departments, starting from the Ministry of Internal Affairs of the Russian Federation and the FSB of Russia, ending with the Ministry of Culture of the Russian Federa-

[1] Evolution of protest: from skinhead-girl to "white" suicide bomber // St. Petersburg Internet newspaper "Fontanka." URL: http://www.fontanka.ru/2015/04/15/119/ (accessed: 24.10.2020).

[2] Avakyan M. V. Topical issues of organizing the prevention of extremism among the youth // Economics, Sociology and Law. 2016. No. 10. P. 59—60.

[3] On the Interdepartmental Commission on Countering Extremism in the Russian Federation: Decree of the President of the Russian Federation of July 26, 2011. No. 988. URL: http://kremlin.ru/events/president/news/12135 (accessed: 10.12.2020).

tion and the Ministry of Education and Science of the Russian Federation. The Chairman of the Interdepartmental Commission is the Minister of Internal Affairs of the Russian Federation.

The main task of the Interdepartmental Commission is to formulate state policy and improve legislation in the field of countering extremism, ensure coordination of the activities of federal executive bodies in this area, and develop measures aimed at improving activities.

In order to determine the vector for the development of state policy in the anti-extremist direction, in 2014 the Interdepartmental Commission developed a Strategy for Countering Extremism in the Russian Federation until 2025.[1]

Despite the fact that relatively recently, work has been completed to update the provisions of the Strategy for Countering Extremism in the Russian Federation until 2025, which clarified the objectives of state policy in the field of countering extremism, defined the role of civil society institutions and educational organizations, to note on the record the creation of a single effective system for preventing extremism is impossible.

Moreover, among Russian researchers and legislators there is no clear understanding in what form and how such activities should be carried out. Quite often in the specialized literature one can come across opinions about the need to create public organizations, patriotic orientation, conduct mass "ideologically correct" events[2], as well as the formation of specialized organizations involved in cyber-prevention of extremism (censoring information on the Internet, creating and promoting thematic web communities of a patriotic orientation)[3]. However, the work has not yet progressed further than the relatively short-term experiences of individual subjects of the Russian Federation in implementing projects aimed at preventing extremism among young people[4].

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[1] On the approval of the Strategy for Countering Extremism in the Russian Federation until 2025: Decree of the President of the Russian Federation of 07.26.2011. No. 988. URL: http://publication.pravo.gov.ru/Document/View/0001202005290036 (accessed 29.09.2020).

[2] Markova N. G. Youth extremism and its prevention // Actual problems of the humanities and socio-economic sciences. 2015. No. 9-2. P. 51—54.

[3] Zagutin D. S., Ivchenko M. V. Prevention of youth extremism and aggression in social networks on the example of youth policy in the Rostov region // Bulletin of continuing education. 2015. No. 2. P. 88—89.

[4] Ishchenko O. V. Participation of local government bodies of the Khanty-Mansiysk Autonomous Okrug. // Northern region: science, education, culture. 2015. T. 1. No. 2 (32). P. 62—66; Ugarova N. M. Regional experience of educational organizations in the prevention of extremism ideology // Kazan Pedagogical Journal. 2016. No. 3 (116). P. 72—79; Volchetskaya T. S., Zagoskin A. V. Modern problems of prevention of terrorism and extremism and ways of their solution from the standpoint of a situational approach // In the collection: Situational approach in solving modern problems of countering terrorism and extremism. Materials of the All-Russian scientific-practical conference "Countering terrorism and extremism: a situational approach". 2017. P. 6—14.

The Federal Republic of Germany also has fundamental normative legal acts that predetermine the main directions of countering and preventing extremism. Thus, the German Federal Government (Bundesregierung) has drawn up a separate strategy for preventing extremism and promoting democracy (Strategie der Bundesregierung zur Extremismusprävention und Demokratieförderung). By "promoting democracy" the German authorities mean proposals, structures and procedures that strengthen democratic thinking and action, foster a democratic political culture based on constitutional values, and stimulate appropriate educational processes and forms of participation[1]. A comprehensive plan for the prevention of extremism consists of the following points:

— political literacy, intercultural learning and democratic work (Politische Bildung, interkulturelles Lernen und Demokratiearbeit);

— citizen engagement (Zivilgesellschaftliches Engagement);

— consulting, oversight and intervention (Beratung, Monitoring und Intervention);

— Media and Internet (Medien und Internet);

— scientific research (Forschung);

— international cooperation (Internationale Zusammenarbeit).

At the same time, the use of such a category as "democracy" in the official document circulation does not imply its unambiguous interpretation, but allows an expansive approach to its interpretation. As rightly noted E. O. Ovchinnikova the main goal of such a discourse: "to create in recipients a sense of belonging to an indistinct, but" correct "and" fair "whole, which the state, together with its citizens, must support in order to gain social harmony or as close as possible to it.[2]

Meanwhile, Germany has accumulated significant experience in applied programs for the prevention of extremism in addition to conceptual ideas about the forms and methods of countering extremism.

During the period from 1990 to 2000, many German socially oriented projects for the prevention of extremism among youth were tested in practice everywhere. At different times, at different rates and in parallel thematic camps were created, sports tournaments in various sports (football, rugby, basketball) were held under the slogan: "no xenophobia and racism", youth mass-cultural events of anti-extremist orientation were organized (festivals, concerts, contests).[3]

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[1] Strategie der Bundesregierung zur Extremismusprävention und Demokratieforderung. Herausgeber: Bundesministerium fur Familie, Senioren, Frauen und Jugend und Bundesministerium des Innern, fur Bau und Heimat. Juli 2016, 1. Aufl age. 62 p.

[2] Ovchinnikova E. O. Linguistic regulation of society: German experience in the prevention of extremism // Union of Criminalists and Criminologists. 2020. No. 4. P. 106.

[3] Breymann, Klaus (2001): Soziale Prävention statt Kriminalprävention. In: Danner, Stefan; Dulabaum, Nina; Rieker, Peter; von Wolffersdorff, Christian (ed.): Rechtsextreme Jugend: eine Erschütterung der Gesellschaft Ursachen, Ausdruckformen, Prävention und Intervention. Leipzig: 73—87; Klose, Christiana; Rademacher, Helmholt; Hafeneger, Benno; Jansen, Mechthild (2000): Gewalt und Fremdenfeindlichkeit — jugendpädagogische Auswege. Opladen: Leske + Budrich; Fromm, Hannes (1992): Möglichkeiten sozialer Arbeit mit Fußballfans. In: Scherr, Albert: Jugendarbeit mit rechten Jugendlichen. Bielefeld: KT-Verlag: 96—111.

From 1992 to 1996, projects dedicated to the prevention of extremism among young people were developed with the support of the special federal program "Aktionsprogramm gegen Aggression und Gewalt".[1]

At the same time, the systemic prevention of youth extremism showed the greatest efficiency. It was carried out with the help of educational technologies (social and pedagogical activity)[2]. Socio-pedagogical activity is based on the principles of humanism and non-violence, and pursues two main goals: "the first is to prevent the intensifying of social maladjustment of young people and the second is to expand the range of pedagogical activities that help reduce the level of violence and other deviations[3]".

Social pedagogical prevention consists of three levels: 1) primär Prävention (primary or early prevention); sekundär Prävention (secondary prevention); tetiär Prävention (tertiary prevention, special prevention). Each German citizen at an early age is faced with primary prevention, which consists of social and educational activities of an educational nature on a wide range of issues (the problems of drug addiction and AIDS, extremism and terrorism are discussed). Some elements of primär Prävention can be introduced even in kindergartens or primary grades of general education schools. Two other levels of socio-pedagogical work are initiated in case of necessity (growth of anti-Semitic and racist sentiments among students of a particular educational institution; committing an administrative offense of extremist orientation), and provide for the involvement of additional persons with special knowledge and competencies in this issue in preventive work, which served as the basis for conducting preventive measures (as a rule, representatives of law enforcement agencies or specialists in the field of conflict management, psychology).[4]

Moreover, the Government of the Federal Republic of Germany launched the program "Youth for tolerance and democracy — against right-wing extremism, xenophobia and anti-Semitism" in 2001. This program aims to consolidate financial flows from various sources (government grants, public funds, private donations), and then distribute them to carry out preventive work in three main areas of "Civitas", "Entimon" and "Xenos". The first ("Civitas") aims to develop democratic principles and civic justice in eastern Germany by supporting mobile consulting groups and psychological hotlines for victims of xenophobic, anti-Semitic and racist violence. The second direction of the program ("Entimon") is aimed at supporting fundamental and applied research projects devoted to political education, inter-

[1] Aktionsprogramm gegen Aggression und Gewalt. URL: https://de.indymedia.org/node/6764 (accessed 22.11.2020).

[2] Pingel, Andrea & Rieker, Peter (2002): Pädagogik mit rechtsextrem orientierten Jugendlichen. Ansätze und Erfahrungen in der Jugendarbeit. Leipzig: Deutsches Jugendinstitut, Projekt Rechtsextremismus und Fremdenfeindlichkeit.

[3] Heitmeyer W., Collmann B., Conrads J. et al. Gewalt: Schattenseiten der Individualisierung bei Jugendlichen aus unterschiedlichen Milieus. München: Juventa, 2. Aufl. 1996. S. 27.

[4] Mansel J., Hurrelmann K. Aggressives und delinquentes Verhalten Jugendlicher im Zeitvergleich // Kölner Zeitschrift für Soziologie und Sozialpsychologie. 1998. №50. S. 78—109.

cultural communication and cyber counteraction to any manifestation of right-wing extremism in the Federal Republic of Germany. Finally, the third ("Xenos") is focused on supporting similar projects that are dedicated to combating ethnic and religious discrimination in the field of professional activity and training.[1]

It should also be noted the role of public organizations in Germany in countering extremism. Thus, social activists regularly conduct and then publish on the Internet: retrospective analyzes of the reasons and conditions that contributed to the popularization of extremist ideas in the post-war period; comprehensive research on trends in the development of extremism among young people; monitoring the current crime situation in the country for an increase in the proportion of extremist crimes; analysis of the activities of political parties suspected of adherence to the right ideology. At the same time, these initiatives have serious technical and financial support, which allows placing research texts at the top of the list of contextual search results on the Internet. That is mean, that with trying to enter the word "extremismus" into the contextual search line on the home page of a google website, the user will receive a list of results, where the first positions will be occupied by links to anti-extremist portals.

Also, the public initiative “EXIT-Germany” was founded in 2000 by criminologist, former police officer Bernd Wagner and former neo-Nazi leader Ingo Hasselbach. It provides assistance to every willing extremist who decided to embark on the path of reform and start a new life. More than 500 extremists have been deradicalized with the help of this program for more than 15 years (the share of the return of the “de-radicalized” to extremist organizations is no more than 3 %).

Concluding the analysis of the main forms of prevention of youth extremism in the Federal Republic of Germany, it cannot be fail to note the fact that among Russian researchers dealing with youth extremism there have been more frequent calls for the need to prepare methodological recommendations on the prevention of extremism and realization on their basis of systematic social pedagogical work among young people.[2]

However, is it possible to adopt the German experience (in this case, It means not reckless incorporation, but borrowing precisely the conceptual foundations) and organize something similar in Russia?

The obvious answer to this question is no in the current economic and political realities. It should be understood that the problem of preventing extremism among young people in Germany is given serious attention on a national scale, including at the government level. This is confirmed by the developed and successfully im-

[1] Rieker, Peter (2002): Aktionsprogramme gegen Rechtsextremismus und Fremdenfeindlichkeit — Überblick und Einschätzungen. In: Recht der Jugend und des Bildungswesens 50/1: 30—40.

[2] Baturin, V. Yu. On the problems of combating youth extremism // Bulletin of the Volgograd Academy of MIA Russia. 2015. No. 1. P. 52; Anisimov R. Yu. On the use of foreign experience in the prevention of manifestations of extremism in the youth environment. Actual problems of combating crimes and other offenses. 2016. No. 14—1. P. 211—213.

plemented government federal programs. These programs are aimed at supporting anti-extremist activities, and the legislative framework that determines the format and procedure for conducting social and educational activities in the field of extremism prevention. In addition, projects for the prevention of extremism among young people are financed from both budgetary and private funds, which allows for long-term planning and development. For example, the EXIT-Germany project has a long-term cooperation agreement with the Ministry of Finance of the Government of the Federal Republic of Germany. Another important reason is that any preventive activity does not fit into the generally accepted statistical framework. It is impossible to use the so-called in Russia "stick system", where quantitative indicators are at the forefront.

In conclusion, certain socio-political changes are required in order to organize systematic work on the prevention of extremism among young people in the Russian Federation. These changes should be aimed at revising the conceptual ideas of society and the authorities about the meaning and role of prevention in countering extremism.

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