Interview of Prof. Dr. Tatjana Hörnle Director at the Max Planck Institute for the Study of Crime, Security and Law in Freiburg

by Dr. habil. Vasileios Petropoulos

Vasileios Petropoulos (V.P.): *It is a great pleasure and honor to welcome you, Prof. Dr. Hörnle, on behalf of the Redaction of The Art of Crime journal to this interview, and let me also congratulate you on your new position as head of the Max Planck Institute for the Study of Crime, Security and Law.*

Tatjana Hörnle (T.H.): Thank you for the invitation, it's a pleasure.

V.P.: *At first, may I ask for a short presentation of the Institute? We know that there has been a change in the name of the Institute. It is no longer the "Institute for Foreign and International Criminal Law". Does this mean that research in the Institute is now less extrovert than before, or is it the opposite?*

T.H.: As you know, there has been a retirement of both professors, and the Max Planck Society appointed three new professors, so it was evident that we had to change the name. Reason No 1: The name has never been accurate because it was also an Institute for Criminology, and criminology never appeared in the name. For this reason, it is entirely understandable that our new head of the criminology department, Jean-Louis van Gelder, had good reasons to argue that we need to find a better, more comprehensive name…

V.P.: *Yes, this makes absolute sense…*

T.H.: …The second reason is that we have now a third department, with the research fields of public law, police law and security law, led by Professor Ralf Poscher, and there was the challenge to include these topics, too. So, "criminal law" was no longer a name, which fits an Institute with three different departments. And as far as criminal law is concerned, the name "foreign criminal law" was no longer fitting. As you might know, the idea is coming from 1938. This was a time, when foreign countries were very "far away", because travel was much more difficult and exchange very limited. At that time, it was very important to have a place in Germany to collect information for everyone studying foreign criminal law. This is no longer a good description. Today, every German criminal law professor has international contacts, and we are all in constant exchange with the help of the Internet. Therefore, criminal law in other national systems is no longer "foreign", like something being out there, somewhere, and nobody knows about it … (laughs)… I mean the old idea was a little bit like ethnology… where

you go and study some very "foreign" things. Today, it is an exchange but that's something different than studying foreign subjects.

V.P.: *In fact, one could argue that it was exactly the opposite. This institute was a huge export "success story" for German criminal law. It has been rather exporting German criminal law than being a centre for studying "foreign" criminal law in Germany. Well, this new interdisciplinary character of the Institute is quite fascinating. Especially including public law as a research topic of the institute makes perfect sense, as many issues that arise in criminal science derive from public law; for instance, the interaction between criminal procedure, and police law…*

T.H.: Yes.

V.P.: *And this will be interdisciplinary for the German police law as well, because there are more than one police laws in Germany, as you know better than me... This is something quite interesting nowadays.*

T.H.: Yes.

V.P.: *You are a renowned scholar in the field of criminal law and philosophy of law, and you are well known for combining the German and the English philosophy of criminal law as a representative of the so called expressive criminal theories. Let's talk about them, as they tend to be misunderstood sometimes… It would be very interesting to elaborate some key points on the expressive theories, for example what is the new element that they offer in this discussion, and what is the core of these theories…*

T.H.: Well, expressive theory is a heading for different kind of theories. Let me start with how they stand to the more common field of theory discussion. As You know, it is quite common to distinguish between two groups of theories… in German: absolute und relative, but you have the same phenomenon in the English-speaking world where scholars distinguish between preventive and retributive theories, so that the main way of thinking about these questions are these two opposites: preventive – retributive, or absolute and relative theories of punishment … The more you think about it, the more it becomes obvious that this is not a good way to organize the phenomenon of criminal punishment. It does not really capture all aspects. My point is not that we should leave out all preventive considerations and have only expressive theories, but expressive elements are an important feature in criminal law theory… . The terms "retributive" and "preventive" do not describe all the important functions of criminal law punishment comprehensively, one needs to include the phenomena, which you can only describe as expressive… Because in contrast to classical retribution or "Vergeltung" they are in fact functional. We should not punish for the purpose of punishment (which I think does not make sense). The classic absolute theory is no theory at all, it's just an emotion or perhaps a religious sentiment.

Expressive theories allow for the victims of crimes a much larger role in punishment theory, but there are also other versions of talking about expressive theories… if you think of Guenter Jacobs' or Wolfgang Frisch's approach. The idea here is to support norms, which is a more abstract functional approach… it's functional but in a more subtle way.

V.P.: *Well, this approach is not only theoretical, but it can have practical consequences as well. I am thinking of the Greek institution of "civil party", which exists in the French criminal procedure as well and allows victims to actively participate in the criminal procedure. I do not know if protecting the rights of the victims can be set as a sentencing purpose, but it seems that the victim's participation in the criminal trial does not cause any "harm"... meaning that it can be compatible with the criminal theories. It would be interesting to have these expressive theories elaborated in a nutshell, with view to the victim. When the victim is there, things are clear, but when there is no obvious victim, like in environmental crimes, then can you just say that the victim is the "whole society"?*

T.H.: Yes, you can say that, of course. We are all harmed by the environmental harm… it's a collective legal interest.

V.P.: *So do you think that the participation of the victim in the criminal procedure can also be explained also from the point of view of expressive criminal theories?*

T.H.: Well, you can explain it by pointing to expressive theories… and if you take the point of legal sociology, it certainly has a very strong explanatory power, if you think about modern criminal trials regarding spectacular crimes which cause a lot of public attention. Consider terrorism cases in the last years, specifically our large right-wing terrorism cases. The victims' support played a large role in these trials, which is to be explained with expressive function and expressive desires of victims and relatives of victims to be present, to be heard, to have a say…

V.P.: *Have a say in the trial, yes… Although someone could say that this is opposed to the rights of the defendant, I think that the rights of the victims and the rights of the defendant are not somehow struggling with each other. The purpose of the criminal trial is defendant oriented, and the victim just participates in the trial without altering the purpose of it. It remains defendant oriented… So, what you said about the expressive theories makes sense…*

T.H.: Of course, there can be a tension, because obviously the victims' interest can conflict with the interest of discovering the truth.

V.P.: *Yes…*

T.H.: So if you have a lot of interference and a lot of energy on the victims' interest, it might mean for criminal trials that it becomes difficult for courts to actually conduct proceedings efficiently and in a focused way. If you have 30 or 40 lawyers in the court room, as victims'

counsels and ancillary prosecutors (*Nebenklagevertreter*), they all have to do something and justify their role in the trial. This can make criminal trials from a practical point of view really cumbersome and frustrating… And it can also conflict with our shared interest in concentrating trials on the discovery of truth.

V.P.: *Yes, in the procedure of finding the truth, there can be a conflict, but this conflict does not have a theoretical background…*

T.H.: It's a practical conflict…

V.P.: *Yes, it's not against the principles of criminal and criminal procedure law, so to say…*

T.H.: Yes.

V.P.: *The other major area in which you are a renowned academic is sentencing law and especially the principles of sentencing. This reminds me of the latest change in the Greek Criminal Code, where for the first time it is stated that the judicial decisions on sentencing must be reasoned. Many judges reacted to that, as henceforth they would have to conduct a further reasoning in their decisions, whereas they were somehow used to imposing the "right" penalty intuitively and without any reasoning or any specific method… And this reminds me of what you once said, about the difference between German and American judges regarding the necessity for "guidelines on sentencing": The Greek system resembles the German or the French one… there is a school of judges, and the judges are not elected. So, do you think that in a, let's say, "continental" system the "guidelines on sentencing" are necessary – especially regarding reasoning?*

T.H.: Well… Clearly the system of sentencing in German courts is not perfect, for several reasons… First of all, sentencing is not taught in universities, there are no courses on sentencing… which also means there is no systematic training. Basics of sentencing theory exist in Germany, there are some books, and there are some principles, and there are some guidelines, in an abstract way, how to think, and how to reason and the kind of steps you should go through. With regard to sentencing in practice, more needs to be done.

V.P.: *How exactly could that be improved? This would be very interesting for Greek judges as well. Although in the end Greek courts do achieve a sentencing that is proportional to the crime committed, it seems that Greek judges tend to impose their sentences rather intuitively. Some judges say that "in order to impose the penalty, I judge based on what the defendant looks like"!*

T.H.: At some point in legal education, we need courses on sentencing. One problem is that our students have already to learn a lot at universities. Specifically in the general part, we teach details that are very far off from what later on becomes important … our students hear every tiny detail about let's say the difference between «imaginary offence» (*Wahndelikt*) and «unsuitable attempt» (*untauglicher Versuch*)… and other tiny little dogmatic and doctrinal differences. It

might make sense to do a little bit less of that and a bit more of sentencing. This would include sentencing theory. You have to think about notions like the "wrong of the result" (*Erfolgsunrecht*) or the "wrong of the act" (*Handlungsunrecht*)… what does "diminished guilt" (*gemilderte Schuld*) mean … At university, our law students will not attend courses, here at university. At least regarding the practical training, the "referendariat", should involve a more systematic approach, theoretical foundations beyond intuitions.

V.P.: *This is very interesting. Although, at least in Greece, every time that someone tries to make more systematic this intuitive thinking in the reasoning of the sentence, it seems that one reaches a dead end. And there is also the question of time and effort required for that reasoning… For example, after a while this mandatory reasoning of sentencing was abolished in Greece, because the judges were burdened with a heavy task…*

T.H.: Yes, I see.

V.P.: *So let me change the subject to another area of your interest, sexual crimes. There have been several "me too" cases in Greece as well, some of which were time bared. So, I would like your opinion on the institution of time limitation, and perhaps not only regarding sexual crimes, but more generally as well. As an expert in the field of English criminal law, you also know that time limitation does not exist in the British law. There is something like a form of procedural limitation, a procedural obstacle that resembles time limitation in some cases, but not a "substantial" one. This is also the case in Cyprus, for example, where English criminal law more or less applies; they do not have the institution of time limitation… So we would like to hear your opinion on time limitation.*

T.H.: I don't think there is a principle, a theoretical reason, why we must have limitation. It would be conceivable not to have it at all. Now, there are some practical reasons … if it's a minor offense, perhaps also for economic crimes, it is easier for purely pragmatic reasons to say we cannot invest time into that kind of offense. This is particularly important if you have, as is the case in Germany, the general idea that every crime must be prosecuted. The notion, the principle of legality, that every crime needs to be prosecuted, is far from reality, but it is the idea behind our criminal procedure…

V.P.: *You gave this idea to us as well! In fact, it was only after the latest reform of our criminal procedure code that the principle of opportunity was extensively introduced in the Greek criminal procedure…*

T.H.: That is a more realistic approach. In Germany and elsewhere, the kind of idealism or theoretical thinking that stands behind the legality principle is not helpful. What happens is, it's getting circumvented everywhere, people find routes around it, so it's more honest and more

straight-forward if we admit from the beginning that it's not feasible. Criminal justice systems have limited resources… They are in fact very limited; in Germany, it is a manifest problem nowadays that there are not enough prosecutors and judges, and this problem will increase in the next few years, as many judges and prosecutors retire. If one talks to professionals (I have a couple of friends who are prosecutors), they will tell you, it's ridiculous, it's like living with a big lie in the end… or, let's put it more friendly, it's like living with a big illusion…

V.P.: *Yes, yes, many prosecutors say the same in Greece… So you don't think that time limitation as an institution has anything to do with the restoration of social peace?*

T.H.: No I don't think so… This reference to peace sounds very nice, but it is a euphemism that covers up the real difficulties.

V.P.: *Well, you may be right about sexual crimes. In Greece, we did not experience any restoration of peace due to time limitation…*

T.H.: No, it' not helpful for peace in society. The way victims of sexual abuse reacted to limitations showed this very clearly. There was a large degree of frustration when it became evident that many cases of abuse in institutions and elsewhere could not be prosecuted. Also, it became evident that the public does not understand the system very well, and again, it does not promote peace in society.

V.P.: *This is a very interesting approach, although I don't think that all scholars would agree with that…*

T.H.: No, no, I know; in fact, in some respects, I am more pragmatic than many German colleagues.

V.P.: *Yes, that makes the interview more interesting! Now, let us change the topic to one of the last key points of the interview, the so-called criminal law in times of pandemic. What we knew, or thought we knew, in criminal law did not apply 100%. For example, the notion that human life is an absolute value… It seems that this notion was relativized, especially in cases where decisions had to be made and a doctor had to choose which life to save without acting unlawfully. Or perhaps, from another point of view, imposing restrictions on movement, and trying to strike a balance between health protection and freedom of movement... What do you think about that?*

T.H.: Are you referring to triage or restrictions?

V.P.: *On both, perhaps. Do you think that this extreme situation could become a back door through which absolute rights and even the absolute protection of human life could become relative?*

T.H.: Hmmm… No. The current pandemic is a very, very extreme situation. If you talk about the situation of triage, this is something that is fortunately rare in a modern society with a decent health care system, and it's not something which has been chosen or affirmed by anybody, it's an emergency. As you certainly know, we have organized a little book on the topic of triage. In this book, there is one article, written by Stefan Huster, and he very convincingly takes the point which I completely share. We should not make general conclusions from the state of emergency.

V.P.: *Yes… One could point that as the "highlight" of the whole argumentation, I totally agree...*

T.H.: Yes… We have to deal with an emergency the best we can, responding to very difficult situations, but it's no reason to generalize or draw any normative conclusion. In fact, this should be avoided, and reasoning should be limited to the question how to deal with the requirements of a state of emergency.

V.P.: *And don't you see any "tug of war" between public safety and personal freedom, or personal data protection?*

T.H.: Well, my first remark about emergency referred to triage…

V.P.: *But what about these restrictions? Does this "emergency argumentation" apply on them as well?*

T.H.: Well… if you leave the very particular situation in an emergency room aside… because that was what I was talking about: two patients who cannot be treated at the same time... Once we shift the focus away from this situation and talk about how should society respond to dangers for public health: how should we respond and restrict our liberties… in order to prevent dangers for life and health? W ell, the way how to balance these issues is a very … that's banal to say that, but it's a very difficult balancing act. I'm not sure if all the relevant interests have always been considered properly in the current situation. Politicians who have to respond to a specific situation tend to be biased in one way. A strong impulse will be to avoid what is visible, to avoid people dying and emergency rooms running too full. There will always be a focus on the concrete and the visible… but there is this large side on the other side which is less visible: people are suffering from depression; children suffer because they missed two years of school; the selective mechanism in our school systems become even stronger. These are long term effects, and they have cumulative effects. It is hard to quantify, measure and weigh such interests, thus the in-built bias in our political decision towards the concrete, with the tendency to neglect the long-term effects…

V.P.: *I see… This was a very interesting answer as well. If I may ask a last question, there was an interview you had given to a newspaper concerning the alleged tortures on Julian Assange. His long restriction in the embassy building was described as torture, and you were opposed to that.*

Now, I do agree with you; some terms must not lose their meaning, otherwise we will not be able to communicate with each other, and in the end real tortures might not be described as such any more. This reminded me of the difference between facts and opinions on facts, especially regarding hate crimes. Torture is a fact, but if someone says that someone is tortured, then this is an opinion. Do you think that there is ultimately a difference between these two?

T.H.: Well, the crucial point is that the term *Folter* or "torture" is a legally defined term in international law, it requires the intention to inflict harm on someone. The fact that someone suffers due to certain circumstances is not sufficient for the legal use of the term. The problem is that words are often used in our daily language in a more loose and broad way. The point in the Assange case was that the UN rapporteur said Assange had been tortured by Ecuador, for example, and by Sweden, but it seems hardly possible to assume that there was the required intention of intentional, that is, orchestrated, collective torture. It makes a huge difference to say that Sweden maybe has not done a good job when dealing with the accusation of sexual offenses, and the claim that there was intentional torture.

V.P.: *So, in this case could you say that there is a difference between facts and opinions on facts, although the facts are, well, somehow normative?*

T.H.: The difference between fact and opinion is very clear if you say "Is it raining today?"… then we can have a fact or we can have an opinion… if you say "I believe it's raining", well, that's your opinion… but if you look out of the window, it might change… but once we talk about normative assessment, about *normative Bewertung*, it's less clear, and there will be always some leeway whether you actually agree this is the case or it's not… but normative facts are more complicated than natural facts…

V.P.: *And this remark also applies to hate crimes and freedom of speech, you could say?*

T.H.: Of course, freedom of speech is a good example. When somebody is giving a normative judgment, *Werturteile* in German language… then that's an entirely different thing than a factual statement like, for instance, "who won the second WW"… but even that in the end is a normative fact…

V.P.: *Yes, exactly…*

T.H.: More facts are actually normative facts than we think they are. Even historical facts are often a matter of normative evaluation, it's not always that easy…

V.P.: *Well, after that, I can only thank you very much for this very nice interview.*

T.H.: It was a very nice interview, I would like to thank you.