Interview of Prof. Dr. Dr. h.c. Kai Ambos, Judge Kosovo Specialist Chambers by Assist. Prof. Vasileios Petropoulos and Dr. Ioannis Morozinis

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Vasileios Petropoulos (V.P.): *Germany along with Greece are perhaps the last "bastions" of a strict personal theory of guilt in the E.U., as they lack a criminal accountability of legal entities. Do you see that changing with view to European and international criminal law, and if so, perhaps on what ground*?

Kai Ambos (K.A.): Well, there are of course doctrinal reasons ("dogmatic" is a bad word in English to use, so we should rather say theoretical or doctrinal reasons!), as you well know, for which legal persons cannot be held criminally responsible for their actions. We are all aware of these reasons, and we have of course eminent authors, who still defend these traditional positions… Luis Greco, for example, who recently published a paper in *Goltdammer's Archiv*, is still repeating these arguments. Well, these are certainly interesting, and I would also say very important arguments. But on the other hand, as you well know, there is an international tendency to hold legal persons criminally responsible for their actions, and I think that there are strong policy reasons to agree with this approach.

Let's just only consider the expressionist theory of punishment, according to which criminal law is, of course, a kind of stigma. So if a legal person, a multinational enterprise for example, is doing something that we consider "horrible", for example if German companies are providing weapons to the parties of the armed conflict in Yemen, we may consider them complicit in war crimes, and, why not, call this conduct "criminal", and hold them responsible for it.

So I think that, if there are policy reasons, and if there is a strong parliamentary and thus legitimate "movement" towards criminalizing the actions of legal entities, then it would be difficult to reject such a position for purely doctrinal reasons. In fact, we should then give pre-eminence to our parliamentary legislators. since there is a kind of priority or legitimacy argument in favour of a democratically elected legislator. So I wouldn't say that a criminal justice system must always maintain traditional positions like *societas non delinquere potest*, if there is this kind of opposite trend and if there are important reasons for a change.

As you certainly know, the previous government drafted a Corporate Sanctions Act [*Verbandssanktionengesetz*] but it was finally not adopted by the Bundestag – interestingly, the more complex act on Supply Chain [*Lieferkettengesetz*][1] had been approved. It is not clear what will happen in this parliamentary period. At any rate, the *Verbandssanktionengesetz* didn't create proper criminal liability for legal persons; it rather created a kind of *sui generis* liability, somewhere between regulatory offences [*Ordnungswidrigkeitenrecht*] and proper criminal liability.

Further to that, I wouldn't say that we are forced under European Union law to establish criminal corporate liability, because the three principles, that have been formed since the "Greek maize" decision[2] do not impose an obligation on member States to necessarily *criminalize* actions of legal entities. I mean, we have to have efficient and dissuasive sanctions under EU Law, but that does not necessarily mean that these have to be of a criminal nature.

V.P.: *Yes, I agree with you… Well, one could say that such a change would be efficient enough. Or perhaps one could say that the idea of introducing criminal liability to legal entities, as opposed to the current administrative fines of a punitive nature, might turn in their favour, since the legal entities would have the status of the defendant and all the defendant rights.*

1. German Law on duty of care in corporate supply chain of 16.07.2021; on that, see https://verfassungsblog.de/neun-thesen-zum-lieferkettensorgfaltspflichtgesetz/.

2. Effectiveness, proportionality, dissuasiveness.

K.A.: Yes, indeed.

V.P.: *A further question, related to that, concerns your concept of international economic criminal law, as described in a rather long article of yours,*[3] *which is based on the protective function of the international criminal law, and it is aiming at holding legal entities accountable for their international criminal wrongdoing. Would you say that in terms of national criminal law, this resembles to organised crime, rather than economic crime? When I saw this concept in that extensive article of yours, I thought that this could be mainly called and perceived as "international organised criminal law", rather than international economic criminal law. And could you elaborate on the difference between economic criminal law in international criminal law and national criminal law?*

K.A.: Well, I think it's not so important how we call this, which name we use. I mean, we can call it international economic criminal law, or we can call it transnational criminal law against organisations, or something else. The important issue here is, first of all, a historical one. In the example of IG Farben, there was this German industry that had benefited from the German aggressive war, and that therefore was indirectly a defendant in the Nuremberg IG Farben and Krupp trial. As a matter of fact, it is very important in such situations to hold collective entities responsible for their actions. This of course also applies in times of peace; think for example of the emissions scandal with Volkswagen, where things moved much more quickly in the United States, one reason being the recognition of corporate liability there. Today, we are in this situation, where multinational companies often have much more power than the States – with the exception of some really powerful States. I would say that even a country like Germany has less power than a multinational company like Volkswagen. The *Bundesland* of Lower Saxony would just die if Volkswagen would close (*laughs*)… So that means that these companies have huge power… And if you define criminal law as something against powerful entities, of course they have much more power than individuals, and especially than the individuals we prosecute in our criminal trials, the little sheep! So why shouldn't criminal law, as perhaps the strongest expression of State power, be applicable to these entities as well?

The problem is that German criminal law scholars would normally not look at the human rights level, which I had tried to take into account in my work on this.[4] But this international debate,

3. Kai Ambos, "International Economic Criminal Law. The Foundations of Companies' Criminal Responsibility under International Law", *Criminal Law Forum* 29, 499-566 (2018); also published as a small book: *Wirtschaftsvölkerstrafrecht, Grundlagen der völkerstrafrechtlichen Verantwortlichkeit von Unternehmen*, Duncker & Humblot 2018.

4. See previous fn.

as reflected in the work of a special working group of the UN Human Rights Council to draft a treaty to establish responsibility for multinational companies for Human Rights violations,[5] must inform our national debates.

V.P.: *Yes, that's very interesting –. Now, continuing in the field of human rights, I do have a question regarding article 6 of the ECHR, which mainly applies to persons accused and not to the victims. Do you think Art. 6 should start referring to the victims as well? Of course, there is also the civil limb of the criminal trial, which applies in some States, for example in France or Greece, at least before the latest change in the Greek criminal procedure code, as it now remains debatable if it still applies, but this is something else. I am talking about the victim as subject of procedural rights with view to the ICC Statute and the EU Directive 29/2012. Do you consider the ECHR as a hermeneutically closed system, or do you think for instance that the Rome Statute could affect the ECHR in that point as well?*

K.A.: I think these are different levels. A human rights system is different from the (international) criminal law system. So if you look at the ICC or at the European Court of Human Rights, these are different courts with their own peculiarities… And then, there is also the national criminal procedure... Well, I would still take the traditional view that human or individual or fair trial rights are first of all defendant's rights… They are rights of protection against the State in the very liberal understanding, and that is maybe different from a modern human rights approach where the victims' rights are very much emphasized. In fact, the whole human rights and international criminal law discourse are, in terms of the legitimacy of the whole undertaking, very much victim based. What we are saying, basically, is, "we only or mainly do this for the victims"… But this may produce excesses when ultimately you have a French style *partie civile* system, more victims' than defence lawyers.

V.P.: *It can happen in Greece as well… Well, in Greece we had a reform in the penal procedure lately, and now there is a civil party only to support the accusation… So the civil party does not have to raise a claim in the criminal trial any more… I don't know if this will affect the civil limb of the criminal trial in terms of Art. 6 ECHR, we will see…*

K.A.: Well, I mean, doctrinally speaking, I wouldn't read Article 6 in the sense of creating an obligation for States to give rights to victims… I mean, of course you can have a Directive, and you take it from secondary EU law and perhaps also from human rights case law for example, but Article 6 in its origin is a classical fair trial provision and represents the classical antagonism

5. https://www.ohchr.org/en/business-and-human-rights/bhr-treaty-process.

between the State as prosecutor and enforcer of criminal law and the individual targeted. I think that the adversarial system is much more consistent in this sense.

V.P.: *Thank you very much – we will continue with Ioannis!*

Ioannis Morozinis (I.M.): *Thank you. Now, lets' get back to the fundamentals! Is the general part of the international criminal law still "a work in progress", as stated in your* Habilitationsschrift[6] *and the first edition of volume I of your International Criminal Law Treatise?*[7] *Now being in the second edition, how much progress did the international community make in the meantime?*

K.A.: Well, as you know, this whole idea of the general part of criminal law is very much a continental concept, very much a German, Spanish or Greek concept. To the mind of Anglo-American lawyers, it always appeared as somewhat strange. They would speak, at best, of general principles, as they start from the actual crimes, from the special part of criminal law, in that sense. And we work in an international criminal law framework, not in our national German or Greek law, and this international level is much more dominated by Anglo-American thinking. Therefore, our English or Americans colleagues wouldn't even ask such a question on the general part!

As to the concrete question, it is difficult to answer. If you look at the codification history, you could say that the Rome Statute has more rules on the general part than the ICTY Statute, or Nuremberg, etc. … But, of course, even the Rome Statute does not have a proper general part, if you compare it to the general part of the Greek German penal codes. There is certainly some progress in terms of detail, but it is still far away from a comprehensive general part as we understand it.

On the other hand, the international case law is not really concerned with this question. It is very much a kind of common law case law, and the whole procedure is in fact quite adversarial. A prosecutor looks for certain crimes, that he/she can prove, if there is enough evidence, and nobody is concerned about what kind of structure is being followed in terms of a general part or a theory of crime (*Verbrechenslehre*)… So in this sense, from a theoretical perspective, it is fair to say that nothing has changed, and we do not really have a general part.

I know of course that my *Habilitationsschrift* (post doc thesis) refers to this general part, but

6. *Der Allgemeine Teil des Völkerstrafrechts*, Duncker & Humblot, 2002 and 2004.
7. *Treatise on International Criminal Law. Vol. I: Foundations and General Part*, OUP 2013, 2nd ed. 2021.

it was written as a *Habilitationsschrift*! This was never written as a kind of work which would have any impact in real life (*laughs*)! In fact, one could say that this book has no impact at all in the common law world, if only for the fact that it has been written in German! It may have had an impact on our (Germanic) civil law world – in contrast, my Oxford Treatise and the ICC Commentary[8] are widely read and quoted in the common law world and even by the case law.

I.M.: *My second question is up to a point related to your book,* NS-Criminal Law *[*nationalsozialistisches Strafrecht*],*[9] *which I very much enjoyed reading. In your unique capacity as a national and international judge and scholar, would you say that politics affect the creation and implementation of international criminal law, and if so, how is that? Up to what point are "politics" involved in the decisions of the International Criminal Courts?*

K.A.: That is also a very big question and it's difficult to give a general answer.

I think the answer is very much case related. One should be looking at specific tribunals and even specific decisions. If we, for example, talk about immunity, of course there is much more politics in immunity than in the question of whether there is *dolus eventualis* or recklessness. Also, if we talk about jurisdiction, for example in the Israel-Palestine situation, there is more politics involved. One can already see this with the number of interested States, representatives of civil society and scholars in these proceedings. … There is also more public interest in these more political questions than in the very "nitty gritty doctrinal" questions!

At any rate, my general impression, based on my experience as defence lawyer and judge, is that proceedings before the international criminal tribunals are highly technical, which has more to do with the highly qualified legal officers than, sadly, with the judges. There is unfortunately still a problem with the selection of judges,[10] while the legal officers are normally highly qualified and strictly selected on their merits.

Thus, I would generally say that there are normally no politics involved in the decision making as it is sometimes said by NGOs or by certain scholars. We try to take decisions based on the law. Of course, none of us is free from certain views and prejudices. For example, I am more

8. Ambos, ed., *Rome Statute of the International Criminal Court. Article-by-Article Commentary*, Beck/Hart/Nomos, 4th edition 2022.

9. The German version was published by Nomos in 2019, the English Version by Nomos/Hart in the same year, as were the Spanish and Portuguese versions (Tirant lo Blanch).

10. This starts with the domestic level, including in Germany; see https://www.faz.net/einspruch/wie-funktioniert-das-verfahren-fuer-die-richterauswahl-an-weltgerichten-18419215.html.

inclined to defence rights, and I have difficulties with the all too easy imposition of pretrial detention, whereas many international judges don't see that as a big problem – although it is in fact a big issue at the international criminal tribunals. On the other hand, judges that have a prosecution background, or come from a system where pretrial detention is widespread, may have less problems with it. They may say "we have more and longer pretrial detention in our system, so we don't see a problem".

I.M.: *Thank You! Let's continue with a question on the national level. You are acquainted with the theory of my* Doktorvater*, Bernd Schünemann, that the* Strafrechtsdogmatik*, the doctrine of criminal law, is the fourth power that checks on all others, without being imposed. Do you think that criminal doctrine can beat politics in law making? Can we make a stand against irrational law making based on the criminal law doctrine?*

K.A.: That is another great question. We had a seminar recently, and we had Tatjana Hörnle presenting a paper on this issue about criminal law theory, and harm principle and *Rechtsgut*, and I asked the question: "*but how does this help against dictatorship*?" Then Anthony Duff made a very laconic statement ... basically saying "*law can never avoid dictatorship, that's not what it's about*"! If you have a mass movement, like the national-socialist movement, and it wants to subordinate the law and use it as an instrument to pursue their objectives, then the law will not stop them. In fact, in line with the so-called policy reservation of such movements, law will be clearly subordinated to politics.

So I think that this whole *fourth power thesis* is highly overstating the possible role of criminal law scholarship. Indeed, think about it, it does not even refer to the law as a whole, but only to its interpretation by scholars. I rather think we should be very humble, and happy if we are at all listened to by our politicians. To convince them, it is certainly better to argue with the Constitution than with doctrinal concepts like the *Rechtsgut*, which is not even explicitly mentioned in the *Grundgesetz*.

And there is also this argument, which I think people like Kuhlen, as an older colleague, but also younger colleagues like Stuckenberg and Kubiciel make, and I think they are right on that, about the question of legitimacy. As scholars, we are just citizens and have no particular legitimacy derived from a popular vote or something else. Already for this reason, we should better be humble and modest.

There are also very few questions where legal doctrine narrows legislative discretion to such a degree that there is no more room for maneuver. Ultimately, it is only the Constitution that

limits the legislator, and for its interpretation we have a constitutional court. We are of course entitled to comment and argue about the law, we can try to convince the legislator with good reasoning, but we should not argue with a kind of intellectual superiority.

I.M.: *And that brings me to the next question, which concerns the book itself, the national-socialist criminal law [*nationalsozialistisches Strafrecht*]. Does it serve to shed light to the past, or as a warning for the future? You point out in the book that many of the ideas of NS criminal law existed before the NS time and continued afterwards. So do you think that the rule of law and in general the main principles of criminal law can effectively protect us from such totalitarian regimes in the future? Can we say that we are mature enough as scholars, to avoid the support lent by many German Scholars to the NS-Regime at the time?*

K.A.: Well… you know, there is this book written by Ernst Fraenkel, *The Double State* [*Der Doppelstaat*]. In this book, Fraenkel makes this distinction between State of Norms and State of Measures (*Normen- and Maßnahmenstaat*). And this book was first written in English… I quote it in the English version of my book on national-socialist criminal law… Well, the *Maßnahmen* are basically executive measures ordered by the executive power, ultimately the *Führer*, and implemented by the Gestapo etc.. The *Maßnahmen* will always undermine the norms that co-exist with them, but operate under the already mentioned "policy reservation" (*Politikvorbehalt*). In other words, if the political power of the day is interested in certain issues, prosecutions, then it may enforce by way of measures its political prerogatives. I note in passing that the same happened in the GDR with its socialist concept of law and legality.

You could see this readily in Hitler's intervention in trials of interest during the regime, as the *Oberste Gerichtsherr* ("supreme judicial leader"). Of course, the NS regime could leave the other norms intact, let's say the criminal law for ordinary theft, as long as no Jews or other discriminated/persecuted persons were involved. But if someone was a dissident, opposing the regime, he/she was targeted by the available measures, and ultimately Hitler or the people close to him intervened to make sure that the "law" was applied as they wished. How can we avoid this kind of perversion from happening? This is in a way what we discussed before. Is it with our writings, with criminal doctrine as a kind of fourth power (*Strafrechtsdogmatik als vierte Gewalt*)? Or does it structurally depend on other factors, for example the independence of the judiciary, the selection and education of judges?

And what is our role as scholars and Professors? Isn't teaching more important than writing academic books printed in 200 or 300 copies, which nobody reads? I think so, and for this reason the German Law on Judges (*Deutsches Richtergesetz*) now demands from us to teach

our students about the two German dictatorships. On the other hand, if you write in a national newspaper or on a blog, then you have more impact. So I think that the only thing we can and should do, as scholars, is to contribute by teaching and publishing also in more popular fora, to explain our ideas so that the public can understand them.

I.M.: *These are some interesting comments, and we will get back to them later! A further question refers to the criminal law of NS time. During the NS time, the whole structure of the criminal law was based on the common feeling about the law, the so-called* gesundes Volksempfinden *as a hermeneutical constant. Do you think that this "common feeling about the law" is still relevant in interpreting and implementing criminal law? We are asking this because this year our supreme court,* Areios Pagos *(*in plenum*) formed a – perhaps* contra legem *– argument about not accepting mitigating factors, based on the common feeling about the law, on the idea of the "common feeling about justice". Perhaps this brings to us scholars "bad memories"; but do you think that this kind of general terms, like the common feeling about the law, could be "de-nazified" and used in our modern criminal doctrine?*

K.A.: That's another important issue, which is highly delicate in Germany and more sensitive than in other countries. We have this idea of "burnt words" [*verbrannte Wörter*], which refers to terms that cannot be used anymore, because they had been used by the Nazis. And *gesundes Volksempfinden* is certainly one of these. That is why we talk about *Verwerflichkeit* in Paragraph 240 of the German Penal Code, replacing the *gesunde Volksempfinden*. Of course, these words cannot be taken out of context. The Nazis did use certain terms but, at the end of the day it was all about securing leadership. They said, "that's democracy", and "we listen to the people", but ultimately it was just about the movement and leadership, and what Hitler and the inner circle of his leadership wanted. So this was a pseudo-democratic argument.

On the other hand, one cannot deny that society is important as a kind of "feedback" in the sense of Jakobs' or Pawlik's "resonance space" [*Resonanzraum*]. I mean, we don't live in a vacuum, you are in Greece, I am in Germany, and our societies change with time. We have to listen to the society, and that is also a kind of *Volksempfinden*. Of course, we don't use this word, but a common or popular feeling about justice is important, and it has to be taken seriously if people consider something as being unjust. Take the example of the proposed tax cuts by the former British prime minister Liz Truss, which could not be implemented since they were met with fierce resistance in the society.

Of course, this does not mean that that and other concepts can only be instrumentalized to keep a given regime in power.

V.P. *Yes, I generally agree with what you said. However, there are cases where what society thinks is not "right" in terms of human rights, so it's of course also important not to restrict personal freedoms only on the ground of this "common sense". I will proceed with my last question on this topic, which is also based on your book. You extensively refer to the eager support that the NS regime received by several criminal scholars, especially by the so-called School of Kiel. This is rightfully criticized, of course, in cases of authoritarian regimes. But what about the western-type liberal democratic States? Is it permitted for academic scholars to "speak" freely and support a political view in such a "liberal" environment, or should they try to suppress their political predispositions in their legal writings?*

K.A.: Well, first of all, I personally think that it is difficult for an academic to formally belong to a political party. I am not talking about the Nazi time, when many law professors, like e.g. Welzel, had been members of the NSDAP. I am talking about today. I'm not a member of any political party, but some law professors are. First of all, I think that once a professor becomes member of a party, or of another organization or movement representing fixed political views, his/her integrity is affected. On the other hand, it is most important for an academic to be transparent in his political affiliations or work-related activities. If for example a law professor works as a defense lawyer, as many professors in Greece, in Italy or in Spain do, and he/she writes a paper about a specific case, then he/she should say in a disclaimer, in a footnote, that he/she had been the defense lawyer in this case. The same principle applies also in an academic review, if for example the reviewer had been an academic supervisor of the reviewee. It is crucial for someone to be clear and transparent about a possible conflict of interests. In general, a scholar should be honest and transparent and explain his/her personal involvement in a certain matter before he/she writes about it. Everybody has personal opinions, of course… I mean, we are human beings! But what an academic should do is to be transparent about his/her interests in general, and in specific cases as well.

V.P.: *Thank you, that's a very clear answer! Further to that, I would like to ask you, since you are both an academic and a judge, national and international, if it is difficult for an academic teacher to remain loyal to his/her writings while being on the bench. That's a question for lawyers as well, defense lawyers or civil party lawyers, but at least lawyers don't have to take the decision, they can just present the arguments and, as you said, be transparent!*

K.A.: Actually, I think it's much easier for a judge than for a defense lawyer to remain loyal to his/her writings because as a defense lawyer you are in a contractual relationship with your client, and you have to defend him/her. I have been a defense lawyer in international cases as

well, and it can be difficult to explain to the client that something that you have written could go against his/her case! I mean, he/she may fire you! That is why in some cases one should not accept the defense in the first place. As a judge, on the other hand, you can have different views. In the end, personally, I can always try and convince my fellow judges, if I have a certain position on a point, that this is the right legal view. On the other hand, in collective decision making, as you know, a compromise might be necessary.

I understand that in our German system, but maybe also in the Greek, Italian and Spanish systems, a professor has a high reputation and is considered to be always right, although he/she might be completely wrong (and ,also guided by certain interests)! This kind of deference to formal authority you don't see it so much in less hierarchical structures like Anglo-American or Scandinavian universities. The situation is getting better in Germany, but a lot of things still need to be improved.

Maximilian Steinbeis, the editor in chief of *Verfassungsblog*, recently wrote a highly critical report about the last assembly of the Association of the German Constitutional Law Professors.[11] Some colleagues here say that he exaggerated, but I think that he rightly pointed to some structural problems that still exist. We certainly should strive to achieve a system where the best argument wins in a democratic and participatory discourse in the "Habermasian" sense… For example, if the three of us have a discussion about a certain issue, the better argument should win and not the person who is higher in the hierarchy. The same should happen in a collegiate judicial function or in an academic seminar… After all, this is not only a problem of being a judge, but also a problem of our academic environment, if arguments of authority win over arguments of reason.

V.P.: *Thank you, that was very interesting! I will continue with a question that might be interesting for our students as well. A more practical question! How can someone become a judge at the international criminal court?*

In fact, these days we had a long discussion about a new German candidate for this job.[12] So one has to distinguish according to the court where one wants to become a judge. Every court has different rules for that. For example, the European Court of Human Rights, as you know, has now ruled that everybody can apply, under European Law, for the position of a judge. And each member State of the Council of Europe and the ECHR has a judge in the European

11. https://verfassungsblog.de/the-guild/.

12. See already *supra*, note 10.

Court of Human Rights. This is not the case in universal courts like the ICJ and the ICC, where judges come rather from geographic or regional groups, not from each State Party. At the domestic level, there are different selection processes, and in most countries these are neither fully competitive (based on merits) nor transparent, including in Germany, as I have criticized, without any effect, for a long time. One could for example advertise such a judicial post and then suitable candidates could apply, as has been done for the Kosovo Specialist Chambers; at the international level, the selection would be decided by an international commission set up by the EU. At the ICC, the final election is done by the Assembly of State Parties, and at the ICJ by the UN General Assembly. In this kind of procedures, there is of course a difference between Greece, Germany and the United States in terms of leverage and influence.

V.P.: *Thank you! I will give the floor to Ioannis for our last round!*

I.M.: *Thank you! The last question is a more personal one, with view to my academic interests. You have explicitly written in your book that the crime that mostly reflects the NS criminal law is the breach of trust [*Untreue*], because this concept of "breach of trust" or "violation of duties" was central in the regime. However, according to my research, it seems that this concept of breach of trust derives from the Roman Law, and specifically Trifoninus, it continued with* Constitutio Criminalis Carolina*, then Feuerbach took over, and so on… In that sense, why shouldn't we perceive this "breach of trust" as a legal concept with ancient routes, which continued to exist throughout the centuries, and was only perverted for a short period? And do you think we can do without the provision about the breach of trust?*

V.P.: *And my last personal favorite question is: can we do without time limitation, like the British doctrine of substantive criminal law does? I had posed this question to Prof. Tatjana Hörnle and I had received an interesting answer…*

K.A.: First of all, I think, of course, that we need the breach of trust as a legal concept. Trust and duty are cornerstones of all legal systems. You can see that in Pawlik's republican theory, and of course Pawlik is not a Nazi writer! So if the issue here is, why do we say that some offences in the German law are a Nazi remnant, the answer lies in their legislative origin. This doesn't mean that breach of trust didn't exist before. You know that better than me, as you have researched this, and I certainly wouldn't question you on that (*laughs*)! My point was much more superficial in the book, and refers to how we can identify what the Nazis did as per specific legislation. It's not only the breach of trust; the same happened with coercion, with murder, with preventive detention… As you know, between 1933 and 1945 the Nazis made several reforms of the German penal code, which, as you know, dated from 1870, but they

were never able to fully replace it with a new Criminal Code (as was done, noted in passing, by the GDR with their 1968 Criminal Code). In the end, the Nazis made specific reforms and changes, which they considered especially important, but ultimately they didn't rely so much on the *Normen*- but one the *Maßnahmenstaat* and did not really need so many normative reforms. All this doesn't mean of course that the concept of breach of trust is a Nazi concept! Not at all! Perhaps this was not made clear enough in the book.

I.M.: *Thank you, I needed this explanation, because I am currently working on the applicability of the breach of trust theory in the Greek law, and I wouldn't like this theory to be coming from the Nazis* (all laugh)!

K.A.: Well, you have to read Schaffstein of course, and his theory of violation of duty (*Pflichtverletzungslehre*). Schaffstein expands the duty and the trust to all areas of law, and that's really the issue. I mean, it's trust in the sense of absolute and unconditional trust to the *Führer*, and that's an abuse of the concept. And if there is a German criminal law, where the concept of trust resembles the one of the German army, where soldiers made an oath to the *Führer* (which makes it difficult for the generals to rebel against him in Stalingrad), then "trust" becomes a radical and very dangerous concept. At the end of the day, Nazi criminal law and Nazi criminology are all a matter of radicalization, I have also published a paper on the latter.[13] So fascism is not necessarily Nazism… I mean, you had a fascist government in Greece that time, and so did Italy, but they didn't kill so many people, i.e. they hadn't been so radical and extreme. The Nazi version of the law and its application is pure perversion and radicalization, and this makes it different from other fascist movements, perhaps more like Stalinism and Maoism.

Now, as to the statutes of limitation, that's another interesting debate, which we recently had in our Anglo-German group.[14] I think that there are good reasons that favour statutes of limitation. First of all, it's the question of legal certainty. Someone, as a citizen, should be certain, that after some time he/she can no longer be prosecuted. Also, a system, in terms of resources, needs to have a kind of full stop at some point. And, of course, there is the question what kind of wrongdoing we are talking about and when does a statute of limitation apply. As you know, in Germany time limitation had been abolished for murder, with view to the Nazi crimes, for policy reasons. So this kind of "sophisticated" system is better that a system without any time limitation at all, which would be a kind of extreme solution.

13. Kai Ambos, "Nazi Criminology: Continuity and Radicalization", *Israel Law Review* 2020, p. 259.
14. See https://www.uni-goettingen.de/de/650288.html.

In fact, there are always factual obstacles to criminal prosecution, so that even when a system does not provide for a time limitation, there are other mechanisms, like for example prosecutorial discretion in the Anglo-American system, that operate as checks and balances. After all, a statute of limitation makes also sense in evidentiary terms. Take for example a 90-95 year-old Nazi suspect who allegedly served in a concentration camp. How can we prove after such a long time what this person really did in the concentration camp (if he/she really worked there, which also needs to be proved in the first place)? The current German case law circumvents these evidentiary problems by changing the rules of imputation (not requiring concrete contributions to atrocities), but that is of course just bypassing the evidentiary problems by way of substantive law.

V.P.: *Yes, I agree with you, and I further think that there are mainly substantive reasons that speak for the time limitation, as you said, so I don't think it's only a matter of evidence. Thank you very much for this interesting conversation.*

I.M.: *Thank you very much, it was a great pleasure.*