Primo piano:
Massimo Meccarelli, Paolo Palchetti, Carlo Sotis (Eds.)

Die Schattenseite der Menschenrechte. Emanzipationsforderungen und Herrschaftslogik beim Schutz der Einzelperson

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This ambitious volume on «the dark side of human rights» is dedicated to the contrast between the universal claim, and the only relative, sometimes even counteracting effects of human rights guarantees as nationally or internationally codified in our times. The editorial team of Massimo Meccarelli, Paolo Palchetti, Carlo Sotis took up the challenge with the help of Pietro Costa, Domenico Pulitanò, Tullio Scovazzi, Roberto Bartoli, Pietro Sullo, Francescomaria Tedesco, Sergio Labate, Ombretta Di Giovine, Stefano Manacorda, Luca Scuccimarra to analyze the complex interplay between the ontologically idealizing legal discourse and discriminatory human rights violations. It is the great attainment of the volume not to have hided away from the controversies of and about human rights. As their formulated guarantees, constitutional jurisprudence and international codification touch the lawyers' pride 'to be on the right side of the justice sun'[1], there is the risk of a lack of critical awareness of the human rights' pitfalls among legal professionals. Fully convincing the volume starts from Domenico Pulitanò's finding that addresses the different layers of deficiences: «Controversial is the catalogue of human rights; controversies burden the manners according to which they are weighed up and protected.» (cit. in: Introduction, p. 2). Three conceptual dichotomies – universality/ineffectiveness; generality/distinctiveness; multiplication/contradiction – account for the controversies concerning the definition of human rights (and of their beneficiaries), their enforcement and the conflicts between human conflicting rights. There are unsolved questions of 'clashing' human rights (police threat of torture to save the life of an abducted child; targeted shooting down of a hijacked plane that terrorists threaten to bring down over a nuclear reactor) or of 'challenged' rights (dying with

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dignity and biopolitics debates of medically assisted suicide). Moreover, there is neither an adjustment of the visible inequality with the invisible equality of all human beings (as addressees of their legally formulated 'guarantees') nor of the contradiction between the human rights' universalism and their protective status depending on a national-based democratic citizenship. These dark sides of human rights fade away when facing the legal prominence of human rights, both internationally and nationally. It is the great strength of the volume edited by Meccarelli, Palchetti, and Sotis bring the dark sides to light.

The comprehensive historical report by Pietro Costa (pp. 21-76) stands pars pro toto for the excellent contributions of the reviewed volume. The author's familiarity with the transition from medieval theocentrism to the western modern anthropocentrism triggered by the Spanish conquest of the 'New World' keeps up with the editors' renommee in this field. Only few historical arguments do not find the attention they would have deserved (which might easily due to length limits). The *dominium*-aspect of late scholastic reading of rational self-determination (pp. 27-30) is different from the later property-focus of the American 18th century discourse due to Locke's influences. Costa does not mention that six American states had declared their own bills of rights before 1791 (ed. Thorpe 1909, Chafee 1951), and their innovative cataloguing signified the use of universalism to justify cutting feudal ties with the English crown. His contribution does not explain exactly, that de las Casas' plea for the indigenous people's 'gift of reason', their 'freedom of choice' (1550-1/1994 Disputation, 8th response; a.1552/1995. Apologética Historia Sumaria, chap. 48) used not only Italian humanist topoi, but argued with the reciprocity that 'The Indians were … to obey the Spanish crown in the same way that all other free peoples … owe their universal king and lord' (Octavo Remedio 1542, 1st, 2nd Rationale).

The 18th century French discourse with its coinage by the struggle for national sovereignty sits comfortably within the learned argumentation of Costa's contribution. Of utmost importance is the author's reference to the 20th century turning away from etatism in the name of the central importance of the individual (p. 62), in a post-war legal discourse that was inextricably linked to the experiences of totalitarianism and the traumas of war. Facing the indescribable (but also in an Arendtian reading 'bureaucratised') atrocities, like the *Shoah* by the Nazi Regime, human rights as one of the 'finest products' of legal theory were deemed to be the instrument to eradicate the horrors of war and to prevent any ignorance of personal responsibility not to resist. It is no coincidence, that the most prominent defeated nations (Japan, Italy and Germany) had been eager to be at the forefront of human rights constitutionalization after 1945. There is a particular strength in Costa's historical reasoning that the interest in continuities with the famous 1789-text may result in a dark side of the human rights application. The national sovereignty focus of the French revolutionary discourse (esp. Sieyès) and the philosophical (but not legal!) character of the enlightened claim to universalism[2] are no precursors of the post-1945 positivist claims for human rights' universalism. These comprehensive derivations prepared the ground for Bartoli's contribution on «Human Rights and the juridification of the legal system (*Verrichterlichung des Rechts*)», Tedesco's reasoning on the «Break lines: human rights, sovereignty and death penalty», and for Manacorda's theses about the politicisation of the jurisprudence, when dealing with «the obligation to protect by criminal law in times of internationalisation of the law» (Bartoli pp. 139-159; Tedesco pp. 209-242; and Manacorda pp. 319-360).

Together with Pulitanò (pp. 77-114) and Di Giovine

(pp. 271-318) all these contributors on Human Rights and Criminal Law focus on the (risk of) politicisation of jurisprudence dealing with human rights. Their overdue admonitions correspond to Roberto Bartoli's observation that human rights have an effect on the juridification of the legal lystem (*Verrichterlichung des Rechts*). Criminal law and human rights cannot only clash uneasily – as freedom and security prefer different protective measures –; rather there is a «dramatically open … ambivalen[cy]» (p. 113) that human rights are both the preferred object of protection by means of criminal law and of protection against criminal law (p. 89). If the liberal understanding of minimalizing criminal law is taken seriously, the criminal law protection of legal interests should follow the ultima ratio-understanding of criminal responsability, even if the legal interests, protected by criminal law, are human rights of the victim. It is quite rightly attributed to the dark side of human rights that criminal liability gets extended with reference to alleged protective gaps, often in the understandable fears how to deal with fanatic terrorism (pp. 98 ff.). This ambivalence of human rights in the face of unfair asymmetries between rightful positions of victims and offenders also touches the pioneering considerations of Pietro Sullo on the truth seeking reconciliation process in Marroko's way into independence (pp. 161-208) and the «Break lines», addressed by Francesomaria Tedesco, in his innovative analysis of the 1948-constitutionalization of human rights on the internal UDHR-stage (pp. 209-240). The criminalisation of refugees is certainly one of the darkest sides of expanding criminal law codification by piggybacking on human rights, and leads to the pitfalls of human rights on the international codification stages, as addressed by Tullio Scovazzi.

The complex considerations on the international law challenges on human rights by Tullio Scovazzi (pp. 115-138) cover the burden of rhetoric and the particular paradox of international human rights guarantees being negotiated by state representatives, while the very same rights concern the privileges and impunity of state representatives (p. 117). Human rights have always provided a basis or only haze of legitimacy for those who proclaim them, and this legitimising function provokes a delegitimising effect on those unable to adorn themselves with these rights using a comparable rhetoric. Added to this (dark side) is the late codification since 1945, the unenforceability on the international stage due to national sovereignty theories, and the fluctuation of protection standards, even in established democracies, whose discourses are sometimes drawn into discussing the legality of torture (p. 120). In the formulation of human rights, the author observes asymmetrical human rights: for example, the right to emigrate guaranteed by international treaties is not accompanied by any right to immigrate into a country other than one's own. A similar asymmetry exists in the regulation of the status of refugees (p. 121). The misinterpretation of the jurisdiction of the courts in charge or formal legal excuses (as the lack of ratification) are a particularly dark areas of human rights protection (pp. 123 ff.). Finally, Scovazzi addresses most convincingly the perplexities of third-party effects of human rights, including labour and employment relationships under private law (pp. 134 ff.).

The human rights' relevance for due process is particular responsible for effect on juridification of the legal system. Focusing on the conflict of rights Bartoli observes a particular downside of rights in their absolutisation at the expense of others, and in reverse the relativisation of some rights (as the ones of alleged terrorists within ciminal procedures) to be granted on an absolute scale. Bartoli manages to add to the argumentative agenda of Pulitanò (pp. 77-

114), Tedesco (pp. 209-242), and Manacorda (pp. 319-360) the most noteworthy transition from the citizen in 19th century constitutionalism to the human being in post WWII-codifications (cf. the Albertine Statute 1848/61 and the Italian Constitution of 1948, p. 156). It is the convincing consensus of all authors of the edited volumen, that the dark side of constitutionalizing human rights results from the paradoxy that the human being as addressee of modern human rights guarantees is said to be protected on the universal scale due to human existence in general, whereas the reference to the human beings as codified addressees also comprises the connectedness of the single particular human being in his/her/its historical, social, and material context (p. 157).

Sergio Labate's survey on Ernst Bloch's Natural Law and Human Dignity (pp. 243-270) completes the comprehensive sum of contributions carefully differentiating the dark sides of human rights from their brights sides. It was Bloch's attempt to surpass the usual oppositions between the natural law and social utopian traditions, by arguing that revolution and law, rather than being antagonistic, are fundamentally interconnected. In his effort to wed the demands of law to the agenda of a social revolution, Bloch offered a radical restructuring of the understanding of the social world. His approach and its learned analysis within the reviewed volume thereby offer insights in the mere philosophical and moral origins of human rights. This is an irreplaceable stand to free modern discourses on human rights from any ontological parternalism, – an argument all the more needed in the debate about the «responsibility to protect» (Luca Scuccimarra, pp. 361-395).

The book is well worth reading and should be a companion to any lawyer dealing with human rights. The lack of both a complete bibliography and specific lists of references might result in a formal burden on the quick (or superficial?) accessibility for readers unfamiliar with the indicated short titles. The academic community though will not be hindered in the volume's well-deserved interested and wide reception.

[1] The sun of justice is a metaphorical reference to the title of the reviewed volume. Cf. also prophet Malachi (Mal 3:20) and the 16th century currency among the Bohemian brothers; Otto Riethmüller, a leading figure in the Confessing Church from 1933 onwards, transformed this into a song for the protestant youth, as a wake-up call to deal with the rise of the National Socialists.

[2] True for Voltaire and others; true for the philosophical intentional declaration of 1789 which needed legally binding rephrasing 1791, 1946 and 1958. Also true, though in a different context for Kant's reasoning.