

Developments

Does Age Prevent Punishment? The Struggles of the German Juridical System with Alleged Nazi Criminals: Commentary on the Criminal Proceedings Against John Demjanjuk and Heinrich Boere

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A. Introduction

Modern western societies are aging—according to statistical analyses, in 2060, every seventh German citizen will be over 80 years old.¹ The challenges of an aging society² occupy jurisprudence and the legal practice. Issues specific to aging offenders and aging victims are more relevant than ever³ and must be analyzed.⁴ The question of old age is one of many problematic aspects of two criminal cases recently decided by the German Federal Constitutional Court.⁵ In the following, age's relevance to criminal prosecution and

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¹ *Pressemitteilung des Statistischen Bundesamts* Nr. 435, 18 November 2009, available at: www.destatis.de.

² CHALLENGES OF AN AGING SOCIETY: ETHICAL DILEMMAS, POLITICAL ISSUES (Rachel A. Pruchno & Michael A. Smyer, eds., 2007).

³ Norbert Arnold, *Vorwort*, in: WIE LANGE DÜRFEN WIR ARBEITEN? ZUKUNFTSFORUM POLITIK 7 (Lenz et.al (eds.) 2006); HERWIG BIRG, DIE DEMOGRAPHISCHE ZEITENWENDE (2001); MEINHARD MIEGEL, DIE DEFORMIERTE GESELLSCHAFT (2002); PETER SCHINMANY, DIE ALTERUNG DER GESELLSCHAFT: URSACHEN UND FOLGEN DES DEMOGRAPHISCHEN UMBRUCHS (2003); FRANK SCHIRRMACHER, DAS METHUSALEM-KOMPLOTT (2004).

⁴ The subject of age is discussed in Germany primarily in the context of age discrimination: Karl-Jürgen Bieback, *Altersdiskriminierung – Grundsätzliche Strukturen und sozialrechtliche Probleme*, ZEITSCHRIFT FÜR SOZIALREFORM 75 (2006); Oliver HAHN, AUSWIRKUNGEN DER EUROPÄISCHEN REGELUNGEN ZUR ALTERSDISKRIMINIERUNG IM DEUTSCHEN ARBEITSRECHT (2006); Helen Meenan, *Age Equality after the Employment Directive*, 10 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 9 (2003); POLLOCZEK, ALTERSDISKRIMINIERUNG IM LICHT DES EUROPARECHTS (2008). However, this discussion does not matter for the issue discussed here, because, in the following, age is mainly a proxy-criteria for suspecting certain characteristics of elderly and the need to secure the individual rights of elderly people. This could, in some cases, mean that an unequal treatment of younger people will be considered.

⁵ Bundesverfassungsgericht, 15 October 2009, Case No. 2 BvR 2331/09; BVerfG, 15 October 2009, Case No. 2 BvR 2332/09; BVerfG, 6 October 2009, Case No. 2 BvR 1724/09; Bundesgerichtshof (BGH – Federal Court of Justice), 27 April 2006, Case No. 4 StR 572/05, 59 NJW 2129.

material criminal law will be discussed and related to an analysis of the proceedings of John Demjanjuk and Heinrich Boere, two alleged Nazi criminals, tried in their old age. Demjanjuk's case especially has raised questions well beyond the relevance of his age (89 years). The cases open up many interesting facets of German criminal procedural law and material law connected to the crimes of the Nazi era.

B. Age and Criminal Law

The decisions of the Federal Constitutional Court in the cases mentioned above⁶ are relevant to the question of how age is to be considered in criminal proceedings. The cases assign priority to state obligations to guarantee safety, trust in its institutions, and equal treatment. Special treatment of elderly offenders seems not to be on the Court's agenda. As the Court states, the choice not to open criminal proceedings appears likely only when the proceedings would lead to an imminent, concrete risk to the accused's life or would seriously threaten his health.⁷ The probability of that harm would have to be sufficiently certain to create a disproportionate individual rights violation. According to the Court, such risks always exist and must be accepted to secure the execution of criminal justice. This is a surprisingly high benchmark and does give the impression that age and its side effects will, generally, be no reason for special arrangements in criminal proceedings in future. Considering the specific conditions of old people, who often have health problems, shorter life expectancy, and sometimes difficult social conditions, the German courts seem to have adopted a rather stern position. But one also has to consider that the two accused are facing criminal charges for dreadful crimes during the Second World War.⁸ This is still a difficult chapter of the German past and cannot be considered as a "normal" trial. There remains an enormous amount of guilt on the part of those who participated.

Still, the reasoning of other decisions indicates that not treating elderly people differently seems to be a general direction of German courts.⁹ Whether this is an adequate standpoint with regard to the conditions of elderly and their constitutional rights,¹⁰ remains to be answered. How to deal with elderly offenders depends on the difference age makes in any single legal decision. It is, in some ways, a question of the content and consequences of the command of equal treatment. Basically, this means to treat similar cases similarly, and different cases differently, in accordance to the specificity of the

⁶ *Id.*

⁷ Grundgesetz für die Bundesrepublik Deutschland (GG - German Constitution) Art. 2, ¶ 2, § 1.

⁸ *Mutmaßlicher KZ-Wächter Demjanjuk kommt nach München*, DER SPIEGEL, Apr. 2, 2009, at <http://www.spiegel.de/panorama/justiz/0,1518,616999,00.html>

⁹ BGH, 27 April 2006, 4 StR 572/05; see also the commentaries of: Streng, JURISTISCHE RUNDSCHAU 296 (2007); Nobis, NEUE ZEITSCHRIFT FÜR STRAFRECHT (NSTZ) 489 (2006).

¹⁰ Especially GG Art. 2, ¶ 2, § 1.

difference.¹¹ It is, even more so, a question of protection of their individual constitutional rights. One has to ask if the best way to secure these rights is to treat the elderly the same as all others, or if certain decisions must necessarily consider the offender's age. This question has to be answered in two steps: first the age specific factual differences need to be analyzed, and second, those differences must be considered in relation to normative decisions.

I. The Consequences of Aging

Everyday experience shows that each person ages differently. Thus the decisions of German courts, which claim to consider the special situation of each elderly person on a case-by-case basis, seem to be adequate. But even if not affecting the lives of all elderly people, statistically relevant differences exist between younger people and the elderly that must be respected.¹²

Biologically,¹³ the consequences of aging can be, at least for a statistically relevant group, a decrease of performance and a diminution of mental and physical abilities. For some, cognitive processes change significantly.¹⁴ Furthermore, the statistical probability of certain diseases, for example dementia, is increasing. Dementia, if it occurs, drastically changes all aspects of the patient's personality, especially the ability to observe oneself critically.¹⁵ The elderly, more often than younger people, become sensually affected. An obvious characteristic of old age is the lower statistical life expectancy. Old age also often affects the social circumstances¹⁶—especially the end of professional life, which is often a major event in the life of an elderly person. Retirement can lead to social exclusion and alienation from the social and legal standards of younger generation.¹⁷ Besides contributing to the decrease of mental and social abilities, the sometimes lonely life of an

¹¹ STEFAN HUSTER, RECHTE UND ZIELE. ZUR DOGMATIK DES ALLGEMEINEN GLEICHHEITSSATZES (1993); Stefan Möckel, *Der Gleichheitsgrundsatz. Vorschlag für eine dogmatische Weiterentwicklung*, DEUTSCHES VERWALTUNGSBLATT 2003, 488 ff.

¹² DIE ZWEITE LEBENSHÄLFTE - GESELLSCHAFTLICHE LAGE UND PARTIZIPATION IM SPIEGEL DES ALTERS-SURVEY (Martin Kohli & Harald Künemund, eds. 2000).

¹³ HANDBOOK OF THE BIOLOGY OF AGING (Edward Masoro & Steven Austad, eds., 6. ed., 2006)

¹⁴ Gerhard Mezger, *Geistige Funktionen im Alter*, available at: <http://home.allgaeu.org/gmezger/pers/gf.html>.

¹⁵ Statistically almost 15 % of 80-year-old, and almost half of 90-year-old suffer from dementia, 9 INFOBRIEF DES NATIONALEN ETHIKRATS 2 (2005).

¹⁶ HANDBOOK OF AGING AND THE SOCIAL SCIENCES (Robert H. Binstock et al., eds., 6th ed. 2006).

¹⁷ Marc Coester, *Gewalt gegen alte Menschen. Bestandsaufnahme und Ergebnisse des Workshops*, FORUM KRIMINALPRÄVENTION 25 (2004).

elderly person can lead to reduced social control mechanisms.¹⁸ Elderly people have been raised in a different value system than younger generations and they have lived their lives across varied social contexts and under sometimes quite different circumstances. For all of these challenges, there is at least an increased statistical probability that the elderly will be biologically hindered and socially excluded, beginning at the age of retirement.

II. The Relevance of Age for Criminal Law

The next step is to ask how these differences impact the normative decisions of criminal procedural and material law. This decision has to be oriented toward how to best guarantee the individual rights of elderly people in their unique situation.

One aspect that could be influenced by age is criminal liability. There exist accepted exceptions for children, who are generally neither part of criminal proceedings nor judged as criminal liable. In Germany, juveniles between 14 and 18 are generally treated differently than adults. For adolescents between 18 and 21 the court has to decide in each case whether the offender will be prosecuted as an adult or a juvenile.¹⁹ Mental illness may also exclude criminal liability,²⁰ if the offense can be linked to the mental defect.²¹ Certain other characteristics can lead to diminished liability according to *Strafgesetzbuch* (*StGB* – Penal Code) § 21.

It is obvious that elderly people cannot be generally put in any of these categories. But it also diminishes their individual rights to ignore the statistical differences. It must therefore at least be considered whether age has, especially in cases of very old people, impacted the individual's culpability. It is also possible that a person who committed an act long ago did so under what appears now to be a foreign value system. Especially for offenses committed long ago, the variance in value systems could diminish the offender's responsibility or perhaps could impact a court's sentencing decision.

In criminal proceedings, physically sick people who are unable to attend court are declared unfit to stand trial.²² Also, courts have accepted that certain diseases preclude imprisoning

¹⁸ See HANS-DIETER SCHWIND, *KRIMINOLOGIE*, 19th ed. (2009), § 3 Rn. 37.

¹⁹ See *Jugendgerichtsgesetz* (JGG – Youth Court Law) § 105 *et seq.*; BGH *Neue Zeitschrift für Strafrecht* (NStZ) 555 (2001); INEKE PRUIN, *DIE HERANWACHSENDENREGELUNG IM DEUTSCHEN JUGENDSTRAFRECHT* (2007).

²⁰ Including people with diagnosed dementia of a higher state; KARL LACKNER & KRISTIAN KÜHL, *StGB*, 26. Aufl. (2007), § 20 Rn. 4.

²¹ Karl Lackner & Kristian Kühl, *StGB*, 26. Aufl. (2007), § 20, Rn. 16.

²² BVerfG, *NEUE JURISTISCHE WOCHENSCHRIFT* (NJW) 2349 (1979). BVerfG, NStZ-RR (38) 1996; BGH, NStZ (242) 1996; Oberlandesgericht (OLG – High Regional Court) Stuttgart, NStZ-RR 313 (2006).

some convicted offenders.²³ In light of these exceptions, old age may in some cases be seen as requiring the courts' special treatment. Although the development of elderly is not fully comparable to the phase of growing up one can conclude analogically that the changes should be considered. This is especially to be discussed in the context of procedure, criminal liability and the sentence imposed. Because people age differently it is impractical to define upper age limits for criminal trials. Nonetheless, the analogy to youthful offenders does offer another solution which seems more suitable, looking at the statistics and facts about aging. As with adolescents, one could oblige the court to consider the offender's age according to the specific circumstances of the case and the individual. The court should draw on its knowledge about aging to determine whether age should be considered in each case.

One way to implement these considerations could be to enact rules or a general practice containing the following. From the age of 70, there is a certain probability an individual will be affected by age. But as the chances of not being strongly affected are still statistically higher than not, every case would have to be examined specifically. From the age of 90, the chances of being affected by age are certainly higher. For offenders over 90 years of age, the courts could refutably assume the impact of age. This is only a suggestion, only necessary if it cannot be, in the long term, shown that a higher awareness of the single case by the courts is sufficient to guarantee individual rights.

Paying particular mind to the characteristics of old age only concerns decisions where those traits could be relevant. In criminal law, the most important decisions for which these questions are of relevance are the procedural questions. These are, *e.g.*, pre-trial custody, fitness to stand trial, the possibility of serving time in custody, and sentences in special prisons for elderly people. Judges should consider that the health and mental condition of an elderly person could be in serious danger because of criminal proceedings. It is true that the state obligation to safeguard citizens and to provide justice is of high importance. Still, the individual rights, such as the right to live and not be harmed, have to be reasonably incorporated, especially for the elderly.

Questions concerning the content of the judgment are the high statistical chance of lacking personal liability²⁴ or at least reduction of personal liability²⁵ because of their sometimes diminished physical and mental abilities. Also, their different social status and value systems, which are less connected to the actual rules of society, could become important.²⁶ The length of the sentence should consider the increased value of an elderly

²³ BVerfG NJW 2349 (1979); KG NSTZ 142 (1990); NORBERT GATZWEILER, *Haftungsfähigkeit*, STRAFVERTEIDIGER 283 (1996).

²⁴ See StGB at § 20.

²⁵ See StGB at § 21.

²⁶ See StGB at § 17.

person's remaining years and take into account whether the person is likely to leave prison alive.²⁷ The different value systems under which the person has been raised and any relation between values and the offence committed could also influence the sentencing. Because normal prison conditions can be particularly harsh for the elderly, special prisons may be required.²⁸ In the long term, one has to discuss the need for new laws which could regulate different categories in procedural and material criminal law. It also is thinkable to create different kinds of sentences or treatment for elderly people.

C. The Case against "John Demjanjuk"

By two orders²⁹ from 15 and 16 October, 2009, the Federal Constitutional Court decided not to take on the complaint of John Demjanjuk. He had claimed the unconstitutionality of the criminal procedure against him. The prosecutor accused Demjanjuk of assisting in the murder of at least 27,900 Jews at the Polish Sobibor extermination camp in 1943.³⁰ According to the Constitutional Judges in Karlsruhe, his appeal is to dismiss as improper action, based on the reasoning that procedural interlocutory judgments such as the decision on the commencement of proceedings, cannot be brought before the Constitutional Court. Legal proceedings have to first be fully exploited before the ordinary courts. Previously, on 17 June, 2009, the Federal Constitutional Court dismissed Demjanjuk's complaint against the decision of U.S. courts that his extradition to Germany was unconstitutional.³¹ This decision was based on the argument that the complainant did not specify which rights were violated by the extradition.³² Demjanjuk had claimed that the acts of both the United States and Germany violated his rights under the law on mutual cooperation in criminal matters as well as by the extradition treaties between the countries. According to the Federal Constitutional Court, though, he cannot claim rights as an individual on this basis because they are only binding for the partners of the contracts, *i.e.*, the states.

²⁷ See BGH, April 27, 2006, 4 StR 572/05.

²⁸ Klaus Laubenthal, *Alterskriminalität und Altenstrafvollzug*, in *FESTSCHRIFT FÜR MANFRED SEEBODE ZUM 70 GEBURTSTAG* 499, 508 (Hendrik Schneider et al., eds. 2008).

²⁹ BVerfG, October 15, 2009, 2 BvR 2331/09; 2 BvR 2332/09.

³⁰ Pressemitteilung der Staatsanwaltschaft München I in Sachen John DEMJANJUK vom 13.07.2009 (Press Release, Munich 1 Prosecutor's Office) (13 July, 2009) (available at <http://www.justiz.bayern.de/sta/sta/m1/presse/archiv/2009/02129/>).

³¹ BVerfG June 17, 2009, 2 BvR 1076/09.

³² As far as the complaint does concern actions of the US institutions the German courts do not have any jurisdiction, the Constitutional Court furthermore declared. Finally, Germany's approval of Demjanjuk's entrance did not, according to the court, have any direct legal effects on the complainant, as it were neither a direct nor indirect restraint of his liberty.

Thus, as doctors have declared Demjanjuk restrictedly fit to stand trial, the criminal procedure can be expected to take place as planned. For now the judgment is scheduled for May 2010. It is questionable if this timetable can be met. First of all, the proceedings had to be paused on the third day already because the accused was, according to the doctors, too ill to attend.³³ Also, at the beginning of the proceedings, his counsel raised several objections against the prosecution.³⁴ Some of the objections raised are clearly connected to Demjanuk's age and physical condition: the custody pending trial, fitness to stand trial, the illegality of his transfer, and finally, the question of sentencing.

I. The Question of Custody

Demjanjuk's son already announced that he would take action against the German government because of the harm the proceedings and the detention inflict on his father.³⁵ The custody of the 89-year-old could be regarded as one cause of this harm. One example of the risks posed by his custody is a minor accident on the way to the courtroom in which Demjanjuk fell out of his wheelchair.³⁶ His defense counsels asked for a review of the detention order³⁷ and appealed against the custody³⁸ repeatedly. The reasons for holding someone in pre-trial custody are, according to *Strafprozeßordnung* (StPO – Code of Criminal Procedure) § 112, Par. 2: the accused is a fugitive, the circumstances lead to the probability of him fleeing or it has to be feared the accused will, by, for example, destroying evidence, hinder the elucidation of the truth. None of these reasons can be found in Demjanjuk's case. Obviously, he is neither able to flee nor to influence the evidence in any way. StPO § 112, Par. 3 opens the possibility to hold someone in custody who is accused of, as is the case here, murder. The judge is responsible for the decision on custody³⁹ and, in general, he is free to decide in the cases of StPO § 112, Par. 3 – as long as the decision is proportionate (*„verhältnismäßig“*). Here one could question whether the effects of the detention of an 89-year-old who is unable to walk are proportional to the

³³ *Demjanjuk-Prozess wird ausgesetzt*, SÜDDEUTSCHE ZEITUNG, Feb. 12, 2009, at <http://www.sueddeutsche.de/politik/4/496320/text/>.

³⁴ *Demjanjucks Anwalt beantragt Einstellung des Verfahrens*, DER SPIEGEL, Jan. 12, 2009, at <http://www.spiegel.de/panorama/justiz/0,1518,664445,00.html>; <http://www.sueddeutsche.de/politik/880/496198/text/>.

³⁵ *Im Zweifel für den Vater*, SÜDDEUTSCHE ZEITUNG, Nov. 30, 2009, at <http://www.sueddeutsche.de/politik/692/496012/text/>.

³⁶ *Demjanjuk muss im November vor Gericht*, DER WESTEN, Oct. 2, 2009, at <http://www.derwesten.de/nachrichten/panorama/Demjanjuk-muss-im-November-vor-Gericht-id34611.html>.

³⁷ See StPO at § 117.

³⁸ See StPO at § 304 et seq.

³⁹ See StPO at § 114

possible dangers to his health. Admittedly, doctors have declared him fit for detention, but this is by itself not the answer to the question of whether it is necessary to hold him in custody. Regarding the declared relevance of age and the accompanying biological effects this does not seem an adequate consideration of his specific conditions. Although so far all appeals have been rejected, doubts remain about the proportionality, not just because of Demjanjuk's age,⁴⁰ but also because of the other objections against the proceedings.

II. Illegality of Demjanjuk's Transfer

Demjanjuk's defense counsels have also claimed that because of the illegality—considering his problematic health conditions—of the transfer to Germany the proceedings themselves were illegal. One could argue that this situation violates the principle of “fair trial”. A similar issue has been discussed intensively in the case of Eichmann⁴¹ because it was suspected the accused in this case was kidnapped by the Mossad in Argentina and then brought to Israel for trial. But these situations are not comparable. In the case of kidnapping, in order to have the person tried by the national courts of one's own country, one does not only violate the other nation's sovereignty but also human rights of the person kidnapped. Even this, though, does not necessarily prevent the proceedings from taking place.⁴² But in the case of Demjanjuk the transfer was surely no abduction, but a mutual decision of state institutions in the U.S. and Germany. The problem of Demjanjuk's health condition is not comparable to the accusation of being kidnapped, illegally and without allowance of the state in which Eichmann was living. Neither his sickness nor his age led to the transfer being illegal or to its violating his human rights because the alleged sickness was not caused by the transfer. Because not even kidnapping, as in Eichmann's case, negates the legality of the criminal proceedings, this must even more so be the case for a transfer which has taken place according to the rules of the involved states, accepted by their institutions, approved by the highest courts of both countries.

⁴⁰ OLG Köln NJW 1686 (1996); Matthias Krauß, § 112 (27) in: Beck'scher Online-Kommentar StPO (Jürgen Graf, ed., 2009).

⁴¹ Dominik Lasok, *The Eichmann Trial*, 11 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 355 (1962); Thomas Mertens, *The Eichmann Trial: Hannah Arendt's View on the Jerusalem Court's Competence*, 6 GERMAN LAW JOURNAL 407 (2005); Matthew Lippmann, *Trial of Adolf Eichmann and the Protection of Universal Human Rights under International Law*, 5 HOUSTON JOURNAL OF INTERNATIONAL LAW 1 (1982-1983); each with further references.

⁴² *Id.*

III. Fitness to Stand Trial

Another aspect worth mentioning is Demjanjuk's fitness to stand trial.⁴³ This again is closely connected to his old age.⁴⁴ As discussed already, Demjanjuk is an elderly person who does, to a certain extent, suffer from the exhausting proceedings. On the other side, doctors have repeatedly declared him fit to stand trial. According to the examinations, his conditions are neither life-threatening nor worsening because of the proceedings. As already discussed above, one has to find a balance between justice and the individual rights of the elderly offender. The judges should not blindly rely on the statements of medical experts but have to find their own conclusion. It is dangerous to hand such normative decisions over to medical experts whose responsibility it is to inform on facts. On the other hand, judges by themselves cannot decide to what extent Demjanjuk's age and health problems hinder his participation in the trial. His health will certainly be closely scrutinized for any impact on his fitness to stand trial.⁴⁵ As discussed above, in cases of such old age the judges should consider recognizing certain limitations on the defendant's fitness. It is important that this observation is not influenced by the moral judgment on the alleged offenses. It has to be differentiated between the liability and amount of guilt for certain acts and the actual condition of an offender to bear the effects of criminal proceedings. To this point, the general behavior of the German court has been to differentiate between the defendant's fitness to stand trial and the severity of the charges he faces, and there is no reason to doubt that the court will follow this path during the remaining proceedings.

IV. Sentencing and Enforcement of the Sentence

In the sentencing decision, the judges again will have to consider Demjanjuk's age. The Federal Court of Justice has, in a decision from 2006, refused to give an "age discount" on the sentence for elderly offenders.⁴⁶ Still, this does not mean that being of old age is irrelevant to the sentencing. The Federal Court has also declared that the accused should have the theoretical possibility of regaining freedom. Second, it has to be considered that because of the limited life expectancy every remaining year becomes a lot more valuable to the offender. Finally, the conditions of imprisonment often are unbearable for elderly

⁴³ *Gutachten zu Verhandlungsfähigkeit wird erstellt*, RHEINISCHES POST, May 12, 2009, at http://www.rp-online.de/panorama/deutschland/Gutachten-zu-Verhandlungsfahigkeit-wird-erstellt_aid_707889.html; Von H. Prantl, *Wahrheit verjährt nicht*, SÜDDEUTSCHE ZEITUNG, Apr. 15, 2009, at <http://www.sueddeutsche.de/politik/567/465159/text/>

⁴⁴ The difference to other cases is that Demjanjuk was not elderly at the time the offence is said to have taken place; therefore questions about his liability are irrelevant. Still, questions about fitness to stand trial and be imprisoned as well as the quantity of the sentence are connected to his old age.

⁴⁵ BverfG, September 20, 2001, 2 BVR 1349/01, NJW 51 (2002).

⁴⁶ BGH, April 27, 2006, 4 StR 572/05.

people.⁴⁷ On the other hand, Demjanjuk is accused of assisting in almost 30,000 murders. If the charges can be proven he has been part of the unspeakable horrors of the Nazi regime.⁴⁸ Having committed these offences, Demjanjuk would obviously have shouldered an unimaginable amount of guilt; thus in terms of retribution it seems hard to temper justice with mercy, even just by reducing the sentence. Also in terms of prevention one has to consider the signal that would be sent to the general public. There still is a need to come to terms with this era of the German past, and the enormous public interest and participation of victims or their relatives show that there is still sensitivity about this issue and a strong sense of finding a minimum of justice in convicting Nazi criminals. Surely a reduced sentence would be difficult to communicate to the victims and the observers of the proceedings worldwide. The proceedings are called “the last big Nazi proceedings” and it is questionable whether it is wise to end the German coming-to-terms with the past with an acquittal or a low sentence. But still, one should resist paying the price of injustice for political reasons.⁴⁹

In the case of a conviction, the judges will have to discuss if Demjanjuk should serve his sentence in an ordinary prison or in a special facility for elderly people. This is not part of the sentencing, thus not a lowering of his sentence, but only a question of implementation. Considering his old age it could be argued to be inhumane to expose him to the life in a normal prison. To secure his individual rights (life and health, Art. 2 Par. 2 S. 1 GG) it has to be discussed whether life in prison will endanger his conditions in the future. If this is the case it is necessary to at least protect him by bringing him into a special institution which can provide health services.

All of these questions, which directly are connected to Demjanuk’s old age, have, so far, not been a major issue in the proceedings and should, as discussed above, stay relevant for the judges. The court’s severe position on his detention is especially questionable. It is to be expected that the judges will consider his condition carefully during the further proceedings. This case is a good example of how the statistically relevant differences could affect some elderly people and how the courts should be aware of the need to secure their individual rights. It is true that in many cases it is, so far, sufficient to consider each single

⁴⁷ Andrea Kuhlmann & Gerhard Naegele, *Gewalt gegen ältere Menschen – (k)ein Thema? Empirische Befunde und gegenwärtiger Forschungsstand in der Bundesrepublik Deutschland*, 57 *SOZIALER FORTSCHRITT* 182 (2008); HEIN-JÜRGEN SCHRAMKE, *ALTE MENSCHEN IM STRAFVOLLZUG* (1996) 185; Thomas Wolf, *Rechtliche Gesichtspunkte zur Rückfallprognose und Vollstreckung bei älteren Straftätern*, 3 *FORENSISCHE PSYCHIATRIE, PSYCHOLOGIE, KRIMINOLOGIE* 1862 (2009).

⁴⁸ The sentence for murder always is, generally, lifelong imprisonment. Demjanjuk is only accused to have assisted – this allows to lower the sentence, StGB §§ 27, 49, Abs. 1, Nr. 1.

⁴⁹ Hans Jürgen Papier & Johannes Möller, *Die rechtsstaatliche Bewältigung von Regime-Unrecht nach 1945 und nach 1989*, NJW 3289 (1999).

case by itself. Nevertheless, more knowledge about the conditions of old age, at the minimum, seem necessary to at least base this consideration on all necessary facts.

V. Additional Questions of Demjanjuk's Age

Besides these questions there are some aspects of the case which are, in another way, connected to the old age of Demjanjuk: the offences have been committed decades ago, in another world, under a different value system. This could affect, besides the legal problems connected to these specifics, the liability or at least the quantity of the sentence.

1. The Applicable Law

One has, for example, to consider the question of the applicable law. In general, according to StGB § 2, one has to apply the law of the time in which the action is said to have taken place, thus the law of 1943. The only permissible exception to this is if the punishment according to the law at the time of the proceedings is more lenient than the one of the law in effect at the time of the act. Here one would have to accuse Demjanjuk by the rules of the "*Reichsstrafgesetzbuch*".⁵⁰ But even under this act of the Nazi era, the killing of another human being would have been punishable as murder. The "*Vernichtungsbefehl*" (extermination order) given by Hitler cannot be seen as a justification.⁵¹ Because the possible punishment under the Nazi law would have been death penalty, the contemporary criminal law of murder is without doubt the more lenient law in the sense of StGB § 2, Par. 2.

It could be a question of Demjanjuk's culpability that he committed his offences under a value system different from the present one. This would surely not lead to an excuse, because it is implausible that anyone could have regarded the killing of thousands of Jews as not being illegal and morally wrong. But the difference in value systems could be considered in the sentence to be inflicted. For the modern generation it is almost impossible to understand how it must have felt to be part of the Nazi value system.

2. Recusal of the Judges and Equality in Illegality

Demjanjuk's lawyers also have called for the judges' recusal. They argue for the appearance of bias with former judgments by which Germans have been acquitted even if

⁵⁰ Rudolf Wassermann, *Überblick Verbrechen unter totalitärer Herrschaft - Zur Rolle des Rechts bei der Aufarbeitung der DDR-Vergangenheit*, NJW 895 (1993).

⁵¹ OLG Frankfurt a. M., HEST 1, 67, 71; critically: Gerhard Werle, *Der Holocaust als Gegenstand der bundesdeutschen Strafjustiz*, NJW 2529, 2533 (1992); arguing against him: Klaus Füber, *Geheime Führerbefehle als Rechtsquelle? Minima Juris und das Erfordernis minimaler Rechtskultur*, ZEITSCHRIFT FÜR RECHTSPOLITIK 1993, 180 ff.; see also Hans-Jürgen Papier & Johannes Möller, *Die rechtsstaatliche Bewältigung von Regime-Unrecht nach 1945 und nach 1989*, NJW 3289 (1999).

they held higher positions in the hierarchy of the Nazi regime compared to Demjanjuk. This refers to an unequal treatment of the Nazi value system by German courts. According to the defense counsels, it would be arbitrary to convict someone who has only been “receiving orders” and was facing the threat of being killed if he would not follow them, while the deciding authority was acquitted. One has to differentiate between the question of whether this objection leads to the appearance of bias on the one side, and if the possible inequity has consequences for Demjanjuk’s conviction. The conditions of appearance of bias are regulated in stop § 24.⁵² The lawyers have not argued that any particular judges were personally biased with a view to Demjanjuk, or that the court in its actual composition would give reason to the suspicion of not being objective. For those reasons, the complaint against the composition of the court was considered unsubstantiated.

Another question is if the argument of others that had higher positions in the hierarchy should play a role in the proceedings or the interpretation of the law, or at least in the sentencing. One could argue that it is a violation of the principle of equality⁵³ to acquit offenders who are, from a moral point of view, more directly responsible for the accused offences and convict others who have only taken orders.⁵⁴ First of all, one would have to question if the situations are, actually, comparable. But even if the situations could be compared the argument is implausible. There has been a long debate on this issue and the general and plausible consensus is that there cannot be equality in illegality or injustice.⁵⁵ State institutions are, even according to the principle of equality, not obliged to repeat mistakes. The reference to the acquittals of other alleged Nazi offenders cannot have any influence on the proceedings or the judgment.

3. *Necessity and Duress*

The argument of the different value system also is relevant for another point raised by Demjanjuk’s counsels. They claimed that Demjanjuk would have faced death for failing to follow his given orders. This threat of death was a part of the Nazi system at the time Demjanjuk is alleged to have committed his offenses.⁵⁶ The prosecutors, as well as the private accessory prosecutors (“*Nebenkläger*”), deny this being the case. They argue that

⁵² Thomas Fischer, § 24 (3 et seq.) in: KARLSRUHER KOMMENTAR ZUR STPO (Gerd Pfeiffer, ed., 6th ed. 2008)

⁵³ GG Art. 3.

⁵⁴ *Demjanjucs Verteidiger wirft Richter Willkür vor*, DER SPIEGEL, Nov. 20, 2009, at <http://www.spiegel.de/panorama/justiz/0,1518,664238,00.html>.

⁵⁵ Günter Dürig & Rupert Scholz, Art. 3, § 179 et seq., in: KOMMENTAR ZUM GRUNDGESETZ (Theodor Maunz & Günter Dürig, eds. 2009).

⁵⁶ *Demjanjucs Verteidiger wirft Richter Willkür vor*, DER SPIEGEL, Nov. 20, 2009, at <http://www.spiegel.de/panorama/justiz/0,1518,664238,00.html>.

the death camp guards were free to leave the camp and therefore could have gone home, or at least could have fled.⁵⁷ Thus the possible defenses of either StGB § 34 or StGB § 35 (comparable to “necessity” or “duress” in the Anglo-American legal system) were not fulfilled because there would have been less harmful alternative actions. This will be shown in the evidence of the trial. Still, it is interesting whether Demjanjuk could be convicted if the statement of his lawyers was true. This is not a question of “superior orders”,⁵⁸ which is heavily discussed in international criminal law.⁵⁹ Here it is argued that the actor faced death if he acted against his orders. The wordings of the law indicate that actions which are committed to avoid one’s own death can be justified.⁶⁰ But this is only the case if the good to be secured by the offender is of higher value than the one to be violated. Therefore the general consensus is that it can never be justified under StGB § 34 to kill another (innocent) person, because no good can be of higher value than the life of someone else.⁶¹ Even if the life of the offender is threatened it would not outweigh the life of an innocent person. StGB § 35 may, nonetheless, excuse Demjanjuk’s action. If so, he would not be justified but still could not be blamed for his action. He would have acted without legal guilt. If it is true that he acted because of a comprehensible fear for his life he could be excused.⁶²

At the moments there are no indications of an obligation of Demjanjuk to accept the danger.⁶³ Therefore this question will play an important role in the trial, because if the statements of the defense counsels were true he could have acted without personal liability.⁶⁴ Again, one should at least consider the situation in which Demjanjuk has committed the offenses.

⁵⁷ *Mordprozess gegen John Demjanjuk beginnt*, Stern, Nov. 30, 2009, at <http://www.stern.de/panorama/mutmasslicher-ns-kriegsverbrecher-mordprozess-gegen-john-demjanjuk-beginnt-1525539.html>.

⁵⁸ Völkerstrafgesetzbuch (VStGB – International Law Criminal Code) § 3.

⁵⁹ Thomas Weigend, VStGB § 3 (18 *et seq.*) in: 6/2 MÜNCHNER KOMMENTAR ZUM STGB (Wolfgang Joecks & Klaus Miebach, eds., 2009).

⁶⁰ StGB § 34.

⁶¹ Walter Perron, § 34 (23) in KOMMENTAR ZUM STGB (Adolf Schönke & Horst Schröder, eds., 27th ed. 2006).

⁶² As to the more restricted interpretation of duress in English law see CHRISTOPH SAFFERLING, VORSATZ UND SCHULD (2008) 468 ff.

⁶³ STGB § 35, Par. 1, S. 2.

⁶⁴ BGH 3 StR 353/54; Walter Perron, § 35 (10 *et seq.*) in: KOMMENTAR ZUM STGB (Adolf Schönke & Horst Schröder, eds., 27th ed. 2006). It has to be discussed, though, how actual and concrete the danger was, if Demjanjuk has acted with the intention to avoid the danger, etc. See BGHSt 18, 311 (NJW 1963, 1258; BGH 5 StR 308/69 about the necessity to explore all other possible actions carefully.

As discussed already, it cannot be denied that the acts the prosecutor is alleging are of unimaginable cruelty and inhumanity. This cannot and should not be forgotten at any time during the proceedings. The aim here is not to say that in the end the Court should reduce Demjanjuk's sentence. The only important aspect is to include the mentioned aspects in the decision and weigh them accordingly. It is probable that none of this will influence the decision if the charges against Demjanjuk can be proven. Still, it is an important characteristic of a humane state to include all relevant aspects in the decision so as to avoid acting on bias.

VI. Other Legal Aspects of the Case

To complete the analysis of the case, some other legal aspects of the proceedings should be mentioned. They are not directly connected to Demjanjuk's age, but are consequences of trying a person for acts that took place decades ago in another country.

1. Jurisdiction of German Courts, especially the District Court Munich II

The jurisdiction of German courts is disputable.⁶⁵ Generally German criminal law is applicable only if the accused offenses are said to have been committed on German ground. The Sobibor concentration camp was on Polish ground. Therefore the applicability of German criminal law can only be based on one of the exceptions contained in StGB § 4 *et seq.* As many of the victims have been German nationals, one could argue that German jurisdiction is given because of StGB § 7, Par. 1.⁶⁶ According to this law German criminal law is applicable if the victim had been German and the law is a crime according to the law of the nation in which the crime is said to have taken place, which can be assumed for murder in Poland. Still, there are some problems which will have to be discussed. It is questionable if the application of StGB § 7, Par. 1 leads to the jurisdiction on all killings or only the ones on German victims.⁶⁷ Another question is if StGB § 2 has the consequence that also the regulations on jurisdiction of the time of the offence are applicable or if the question of jurisdiction has to be answered with contemporary law. These open questions have to be discussed by the German court before speaking the judgment.

⁶⁵ See StGB at § 3 *et seq.*

⁶⁶ Albin Eser § 7 (4 *et seq.*) in: KOMMENTAR ZUM STGB (Adolf Schönke & Horst Schröder, eds., 27th ed. 2006).

⁶⁷ Another problem here is that the German government at the time withdrew the citizenship of Jewish Germans, thus, as a first step, one would have to construct the illegality of this official act and see the citizenship as still existing, see Albin Eser § 7 (5) in: KOMMENTAR ZUM STGB (Adolf Schönke & Horst Schröder, eds., 27th ed. 2006). At the time Demjanjuk is supposed to have been in Sobibor there were about 2.000 German victims killed which could reduce the number of accused murders.

The proceedings taking place before the *Landgericht München II* (District Court Munich II) are due to StPO § 13a, which says that if it cannot be derived from the written law which criminal court has to hold trial, the Federal Court of Justice must decide the question.⁶⁸

2. *The Principle “ne bis in idem”*

Another aspect raised by the defendant is the violation of the principle “*ne bis in idem*” which is contained in *Grundgesetz* (GG – Federal Constitution) Art. 103, Par. 3.⁶⁹ The lawyers’ argument refers to the criminal proceedings against Demjanjuk by an Israeli court in the 1980s. There he was accused of having killed and tortured Jewish prisoners in Treblinka as “Ivan the Terrible”.⁷⁰ Also in this trial the evidence which is today referred to by the prosecutor in Munich, a document identifying him as death camp guard, has played an important role. But one has to consider that the principle of “*ne bis in idem*” is violated only if the second accusation is based on the same facts as the first one.⁷¹ The charges before the Israeli court were based on facts pertaining to Treblinka while now the alleged offences are said to have taken place in Sobibor. That the accusations are based on the same evidence does not lead to a violation of GG Art. 103, Par. 3.

3. *The Sufficiency of Evidence*

The questions that will concern the judges when deciding the case will be the sufficiency of evidence and the length of the sentence. It is true that the evidence is, for the accused offences, controvertible. So far the most important evidence is an identity card, the authenticity of which is denied by the defendants.⁷² In general, German judges are free in their consideration of evidence,⁷³ but they cannot act arbitrarily.⁷⁴ And of course, the most important rule in criminal cases, “*in dubio pro reo*” (deduced from the rule-of-law principle⁷⁵), has to be followed.⁷⁶ Because of this, in theory, every single of the accused

⁶⁸ BGH, December 09, 2008, 2 ARs 536/08

⁶⁹ BVerfGE 75, 1; BGH NSTZ 149 *et seq.* (1998).

⁷⁰ After being capitally convicted at first instance he was finally, after seven years in prison, acquitted by the highest Israeli court, because serious doubts have arisen about him being the so-called “Ivan the Terrible”.

⁷¹ Henning Radtke & Andrea Hagemeyer, Art. 103 (48), BECK’SCHER ONLINE-KOMMENTAR GG (Volker Epping, Christian Hillgruber, eds., 2009).

⁷² *Wirbel um Demjanjucks SS-Ausweis*, STERN, July 8, 2009, at <http://www.stern.de/panorama/vernichtungslager-sobibor-wirbel-um-demjanjucks-ss-ausweis-705133.html>.

⁷³ See StPO at § 261.

⁷⁴ Armin Schoreit § 261 (45) in: KARLSRUHER KOMMENTAR ZUR STPO (Gerd Pfeiffer, ed., 6th ed. 2008); Christian Pelz, *Die revisionsgerichtliche Überprüfung der tatrichterlichen Beweiswürdigung*; NSTZ 361 (1993).

⁷⁵ GG Art. 20.

murders would have to be proven to be assisted by Demjanjuk. It is questionable if it has to be shown that Demjanjuk has been at the place of the offence or in other ways assisted the performance.⁷⁷ One could also argue that in the function of death camp guard every action he has undertaken during the time he spent there has to be categorized as “assistance to the killings.” According to this argument, because the number of killings during his time in Sobibor is supposed to have been 29,000, it follows that he assisted in every one of the murders. It will be interesting to see whether the Court finds this evidence sufficient. After so many years and the deaths of most of the survivors, it will be very difficult to assess the evidence. In fact, the prosecutors’ ability to appropriately deal with the evidence will be one of the proceeding’s most interesting questions.

D. The Case against “Heinrich Boere“

The second case⁷⁸ also concerns a former Nazi criminal. The 88-year-old Heinrich Boere is accused of having committed murder in three cases as member of the “*Germanische SS in den Niederlanden*” (Germanic SS in the Netherlands) in 1944.

I. The Decisions of the Federal Constitutional Court

Boere claimed before the German Federal Constitutional Court that the decision of the Higher Regional Court of Cologne (*Oberlandesgericht Köln*) to open trial, thereby quashing the decision of the Regional Court (*Landgericht*) Aachen,⁷⁹ violated his rights under Art. 2, Par. 2, S. 1 of the German Constitution. The Higher Regional Court had illegitimately denied the imminent danger for the life or, at minimum, health of the accused in the case of prosecution. The Federal Constitutional Court by its decision of 6 October, 2009, refused to take on the case because the requirements of BVerfGG § 93a, Abs. 2, had not been fulfilled.⁸⁰ The cases were not, according to the court, of fundamental constitutional importance. Thus it was not necessary for the assertion of the rights of the complainant because of the missing chance of success.

⁷⁶ Bernd Heintschel-Heinegg, § 1 (24 et seq.) in: BECK’SCHER ONLINE KOMMENTAR STGB (Bernd von Heintschel-Heinegg, ed., 2009).

⁷⁷ Albin Eser & Peter Cramer & Günter Heine Vorbem. zu §§25 (17 et seq.), in: KOMMENTAR ZUM STGB (Adolf Schönke & Horst Schröder, eds., 27th ed. 2006).

⁷⁸ BVerfG, October 6, 2009, 2 BvR 1724/09, at the moments the proceedings take place in front of the LG Aachen.

⁷⁹ Which has declared him unfit to stand trial, see Von Volker Schmidt, *Ehemaliger SS-Mann vor Gericht*

Später Prozess, FRANKFURTER RUNDSCHAU, Mar. 9, 2009, at http://www.fr-online.de/in_und_ausland/politik/aktuell/?em_cnt=2055679&

⁸⁰ BVerfG, October 6, 2009, 2 BvR 1724/09.

Furthermore, the court stated that the constitutional complaint was at least without merit. In contrast to the case of Demjanjuk, the court here has discussed explicitly the individual rights of the offender and has adequately weighed his opinion. This difference does make it important to evaluate this decision besides Demjanjuk's case. The decision is based on the fundamental importance the judges gave to the obligation of the state to protect the safety of the citizens, their trust in the functioning of the institutions of the state as well as the equal treatment of all accused in criminal proceedings. Therefore the state is constitutionally obliged to guarantee a functioning system of criminal law to enforce justice and to secure the opening and completion of criminal proceedings. In case of the proceedings leading to serious danger for the life or health of the offender the state obligations and the offender's rights are in conflict.⁸¹ This conflict has to be solved in accordance with the principle of proportionality. Circumstances to be considered are, for example, the category and duration of the criminal proceedings, the types and intensity of the imminent harm, and the possibility of countering them. The decision about the fitness to stand trial has to be based on all relevant circumstances of the case. In general, the decision lies in the competence of criminal courts. The Federal Constitutional Court can only examine if their findings and the consideration of evidence they were based on are grounded on arbitrary arguments or ignorance of the constitutional limitations.⁸²

In Boere's case, the examination has resulted, according to the Constitutional Court, in the Higher Regional Court recognizing the importance and content of the accused's fundamental right in Art. 2, Par. 2, S. 1 of the German Constitution. The appreciation of values by the Higher Regional Court between the state obligation to guarantee a functioning criminal justice system and the fundamental rights of the accused was correct. Especially, it did not oversee that an obvious danger for life or the risk of serious harm for the accused would have the consequence of unfitness to stand trial. The Higher Regional Court argued that the general risk by a life-threatening heart disease of the complainant would not be significantly increased by a trial adapted to his sickness. This is, according to the Federal Constitutional Court, not objectionable. It is especially plausible to have considered the seriousness of the charges and the public interest in the proceedings. All other relevant circumstances have been balanced against each other by the Higher Regional Court. The Federal Constitutional Court also does not have any objections against the Higher Regional Court to recede of the opinion of the medical expert.⁸³ The decision about fitness to stand trial is legal not factual. Therefore the information given by experts

⁸¹ Udo Di Fabio Art. 2 (63) in: KOMMENTAR ZUM GRUNDGESETZ (Theodor Maunz & Günter Dürig, eds. 2009).

⁸² BVerfG, February 24, 1995, 2 BvR 345/95; see NJW 1951, 1952 (1995).

⁸³ BVerfG, October 6, 2009, 2 BvR 1724/09.

is only one relevant factor of the decision made by the court. It is possible that the legal evaluation does come to other conclusions than the factual assessment of experts.⁸⁴

The Federal Constitutional Court therefore decided not to take on the Boere case. He then had to face trial before the Regional Court Aachen.⁸⁵ As decided by the Higher Regional Court, he was transported to the court by an ambulance. An emergency doctor and a paramedic were present during the transport and during the proceedings. Boere confessed to the charges in court.⁸⁶

Regarding the discussed specifics of old age the arguments of the Federal Constitutional Court seem insufficient. The weight of the health conditions and life circumstances of an old person have not been discussed in detail, which would have been necessary in a case of a person of almost 90 years of age. The probability that his health could be seriously damaged by the proceedings is higher than in the case of a younger person. This should, even if safety and preservation of the legal order are important, be considered more alert. Even if he recovered after the first decision which declared him unfit to stand trial, the individual good of health should play a more important role. The constitutional value of this right is generally considered very high. This should be reflected also in the decisions about fitness to stand trial or be held in custody.

II. Aspects of Relevance in the Proceedings

It will be interesting to see whether the *Landgericht* will discuss his age in the reasoning of the sentence. As the judgment of the High Federal Court indicates, an offender should have at least the theoretical possibility of being released from prison during his lifetime.⁸⁷ On the other hand, Boere is charged with heinous acts, killing three people as part of the Nazi machinery. In general, murder convictions do not allow for lenience in sentencing. Because Boere is accused of committing the offense himself, without the Court acknowledging special circumstances, life imprisonment is his only possible sentence. It is questionable, whether the Court will find old age to be sufficient to fulfill the special circumstances requirements.⁸⁸ The judges in Boere's case will have a difficult task in

⁸⁴ BGHSt NSTZ 99 (2003) (see Duttge, NSTZ 2003, 375); Sass, *Der Sachverständige – weiterhin ein prozessuales Problemfeld*, DER SACHVERSTÄNDIGE 256 (2007).

⁸⁵ On 3 March, 2009, the prosecutor in his final pleadings requested a lifelong prison sentence; *Plädoyer gegen Boere*, SÜDDEUTSCHE ZEITUNG, Mar. 3, 2010, at <http://www.sueddeutsche.de/u5338n/3245229/Plaedoyer-gegen-Boere.html>.

⁸⁶ Früherer SS-Mann gesteht Mord an drei Zivilisten, HANNOVERISCHE ALLGEMEINE, Dec. 8, 2009, at <http://www.haz.de/layout/set/gallery/Nachrichten/Politik/Deutschland-Welt/Fruererer-SS-Mann-gesteht-Mord-an-drei-Zivilisten>.

⁸⁷ Bundesgerichtshof (BGH - Federal Court of Justice) BGH vom April 27, 2006, 4 StR 572/05.

⁸⁸ 30 BGHSt 105 (see also 45 BVerfGE 187).

weighing his age and the growing importance of each remaining year against his guilt and the need to deal with Germany's Nazi history publicly. The judges will hopefully consider his old age adequately; until now it has not played a major role in the questions of custody and undertaking of the criminal proceedings. Boere's advanced age does not need to lead to the judges reducing his sentence, but it is necessary that the Court adequately considers these circumstances so as not to violate Boere's individual rights as an elderly person. As with Demjanjuk, the Court should discuss whether Boere should be imprisoned in a special detention facility.

E. Conclusion

Age, of course, cannot prevent punishment. Still, the biological and social differences of aging people are of great relevance, especially for personal liability, the undertaking of criminal proceedings, and sentencing considerations. A certain age should, therefore, at minimum, lead to an obligation for the institutions concerned (*i.e.*, prosecutor, judges, *etc.*) to examine each case carefully. Each aging offender's case has to be decided cautiously. In both cases, Demjanjuk and Boere, the age of the offender does, in fact, play an important role. Both of the offenders have at certain stages of the proceedings had serious health conditions, which have only superficially been discussed. It cannot be denied that, if the accusations are true, both have contract enormous guilt. But still, both are almost 90 years old. It is to be hoped that recognition of their age will inform the remaining proceedings, the sentencing, and the choice of the adequate institution in which they are to be imprisoned.

