

ACADEMIC NEWS

‘One can never harbour too much doubt in matters concerning the State’

John A.E. Vervaele

A laudation delivered by Professor John A.E. Vervaele at the Dom Church in Utrecht on 26 March 2007 when awarding a Doctorate Honoris Causa to Professor Diane Marie Amann on the occasion of the 371st anniversary of Utrecht University.*

‘On ne doute jamais trop, quand il s’agit de l’Etat’, ‘One can never harbour too much doubt in matters concerning the State’.¹ This statement by the French philosopher Bourdieu is the maxim of the work of Professor Diane Marie Amann.

Professor Amann’s academic work examines the law’s response to globalization; in particular, the interaction of national, regional, and international legal regimes which are at play in efforts to combat atrocities and cross-border crime. Changes circulate around the world of criminal justice. There is increased attention to global crime – money laundering, terrorism, crimes against humanity.

Amann’s scholarly work reflects a strong legal and inter- and intradisciplinary approach. She combines inside knowledge from legal and political science. Within legal science she combines legal thinking from Domestic Criminal Procedure, Federal Jurisdiction and Public International Law with legal concepts of International Criminal Law, Transnational Criminal Law, International Human Rights Law and Comparative Constitutional Law. The result is a myriad of surprising analysis and a richness of teaching. Let me pay some attention to three mainstream aspects in her work.

Global justice in criminal matters leads to increasing cooperation between states and to the establishment of supranational criminal tribunals. She analyzes watershed moments in the convergence of law, producing a transnational legal process theory, based on the need for a model constitutional criminal procedure. Professor Amann not only takes inspiration from the US model of constitutionalized criminal procedure in the US, but has great knowledge of the legal evolution in Europe. She is an American Scholar with strong European ties and an interest in European legal pluralism and integration. She has great knowledge of the process of Justice integration in Europe, both by the Human Rights Convention and the case law of the Council of Europe and Justice integration in the EU. Amann is fascinated by the convergence of different

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1 P. Bourdieu, ‘Esprits d’Etat. Genèse et structure du champ bureaucratique’, in P. Bourdieu, *Raisons pratiques : Sur la théorie de l’action*, 1994, p. 102.

legal traditions, in the criminal justice system, in both the accusatorial and inquisitorial systems. She is also very much attracted by legal pluralism and conflicts of laws and processes concerning the regulation of diversity through law. Also the international criminal courts in The Hague are here an experiment in the convergence of criminal procedure. She is very much interested in the transboundary dimensions of new legal spaces, either from a supranational or a comparative perspective. However, she is very conscious that structural obstacles remain, like for instance the lack of independence of the judiciary in some countries and the perceived threats to national sovereignty that can strike a discord in the trend towards convergence in criminal procedure.

This brings me to a second mainstream aspect in her scholarly work. She has written a great deal on international criminal law, dealing with genocide and the rights of children in trials dealing with crimes against humanity. But here her work on this topic does have a very interesting meta-level that I would describe as the interaction between international criminal courts and the sovereign state. To which extent are these courts the creations of state sovereignty and to which extent are they the emanation of justice in a global community?

The law of the land of the Nation States has become an open concept of shared sovereignty, not only between Nation States, but also with the sovereignty of international organizations and the international judiciary. Here, an in-depth analysis of the United States and its positions as regards the International Criminal Court is a starting point for a meta analysis of bringing in an external dimension, that is foreign law. In Europe complexity is taken as given with regard to public as well as private law, and surely with regard to the interaction between national and extranational regimes. This is not the case in the US. Conflict among external and internal sources of law is obscured, as is any need to resort to methods of resolving conflict. Globalization and international criminal justice do mean that national courts have to increasingly deal with foreign aspects. The newness of transnational matters often exposes 'vacant spaces' in domestic jurisprudence. Consultation of external norms that may fill those gaps is most appropriate. Here her work constantly advocates comparative legal work in the judiciary. She applies this in her scholarly writing at all times.

She has developed this reasoning in her recent work that focuses on legal responses to U.S. policies concerning executive detention at Guantánamo Bay, Abu Ghraib and elsewhere, on the use of foreign and international law in U.S. constitutional decision making and on the trials of deposed leaders in Iraq, Serbia, and West Africa. Her article in 2005 on Abu Ghraib, that is part of this third mainstream aspect, was awarded the title of 'Article of the Year in International Criminal Law' by the American section of the International Association of Penal Law. She underlines the fact that in the aftermath of 9/11 a new legal regime has been deliberately constructed, a self-conscious creation of the Executive branch of State power, including the deliberate executive construction of law-free zones of detention, setting aside a complex map of laws concerning detention and interrogation, ranging from the 1949 Geneva Convention on the laws of war to the common habeas corpus guarantees which are deeply-rooted in our legal history. The result is that the executive policy in dealing with the struggle against terrorism has been created, not hampered by judicial supervision, enemy aliens, unlawful combatants and enemy combatants. By using instruments of extraterritoriality and offshore detention these enemies have been reduced to non-persons. In her famous articles on Guantánamo Bay and Abu Ghraib she provides sharp evidence of the failure of the law to keep lawlessness in check. Not only US domestic law, but also Public International Law tolerates mechanisms like reservation and non-self-execution on which the Executive has drawn support for its detention and interrogation policies, by which states cushion themselves against the enforcement of international obligations. She stresses that disclosed confidential legal memoranda of the executive on Abu

Ghraib (also described in the literature as the Road to Torture) have provided rare and troubling evidence of the deliberate construction of a framework that appeared, at first sight, to be ruled by law, but was not so. The framework might better be termed 'legalist' than 'legal'; within it, the only laws recognized were those allowing 'a free rein for presidential prerogative in the guise of legal constraints.'² Both Guantánamo and Abu Ghraib underline the need to integrate common standards in the domestic legal orders, emanating from comparative constitutional law and from international humanitarian and human rights law. The cornerstone of the fundamental rights tradition is that each human being enjoys certain rights simply because he or she has been born as a human, and it is upon respect for the dignity and equality inherent in each human being that freedom, justice and peace depend. No boundary confines this notion. The essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of human dignity.

The analysis by Professor Amann is not only a mirror for the US, but also a mirror for the European continent. European authorities and institutions have cooperated in the deliberate executive construction of law-free zones. Files on extraordinary rendition, secret CIA flights and the scandal concerning the processing of personal data for the US by the Society for Worldwide Interbank Financial Telecommunications (SWIFT) underline the fact that also in Europe the law has failed to keep lawlessness in check.

Professor Amann is a leading scholar on international justice in criminal matters. Thanks to her background – she served as a law clerk for U.S. District Judge Prentice H. Marshall and for U.S. Supreme Court Justice John Paul Stevens, and then practiced federal criminal defense law in San Francisco – she combines scholarly thinking with a great insight into legal practice. Moreover, Professor Amann is active in leading forums such as The American Society of International Law, the American Society of Comparative Law, the International Association of Constitutional Law, etc. She has been a *professeur invitée* at the Faculté de droit, Université de Paris 1 (Panthéon-Sorbonne), and a Visiting Professor at the Irish Centre for Human Rights, National University of Ireland, Galway. Her scholarly work, so erudite and brilliant, and her legal activism for justice in the world is for us a great guidance. We are delighted to honor Diane Amann with a doctorate honoris causa on the occasion of the commemoration of the 371st anniversary of Utrecht University.

2 D. Marie Amann, 'Abu Ghraib', 2005 *University of Pennsylvania Law Review*, no. 6, p. 2126.