

Of the moral-genic power of penal law

Once upon a time there was morality in penal law – this is how a beautiful fairy-tale could start to whisper. It would tell you about moral as a creature of times gone by and anyway, about moral as a cloud of fantasy?

You could draw such a conclusion if you, as a diligent student, plunged into a library and picked a big green book out of the shelves there, namely:

Claus Roxin's Strafrecht Allgemeiner Teil (penal law-general part), a classic among academic reference books. In its third edition, published in 1997, Roxin cut it to the edge:

“Mere moral adversities must go unpunished.”¹

As early as in 1910 the German professor of penal law Eduard Kohlrausch brought forward a somehow more refined and polished statement:

“Terms and definitions which 'can not be thought' are to be excluded from penal law”² – according to Kohlrausch metaphysics and morality had to be banned from the law of punishments and this expatriation took place 80 years before Roxin's transcripts.

Thus far, thus well-defined?

Usually, fairy-tales are very old and only little children believe in what the stories tell them.

Thus far, thus cloudy.

Whereas in 1997 Roxin dealt with the whole matter called moral in such briefness which obviously should tell its own tale – that it to say: There is nothing more to say about it, full stop – almost ten years later he seems to feel impelled to tell longer stories:

In the fourth edition of his Strafrecht Allgemeiner Teil of 2006 a short glance

¹ Roxin, Strafrecht AT, 1997, S. 16.

² Kohlrausch, Eduard: Sollen und Können als Grundlage strafrechtlicher Zurechnung in: Güterbock-Festgabe, Berlin 1910, S. 11.

at the table of contents should be sufficient to undermine the self-assurance of good students' brains:

The "mere moral adversities" experienced a cell division and mutated into "immoralities, non-ethics and other damnable aspects of behaviour". Furthermore Roxin has to take a stand about the "protection of feelings" and to open up extra subitems about the question of whether taboos and maybe even, as he puts it, "palladium objects of unseizable abstractness" would exist within the body of penal law.

Hark, can you hear the bells ringing now? - They tell of smouldering fire under every carpet in the house of the so-called moral-free penal law.

How could such a change come about ? In any case, from Kohlrausch in the year of 1910 to professor Roxin's distress in 2006 a long way had been gone.

This way becomes more transparent when you make yourself aware of one thing which commendably Kohlrausch had already stated very clearly: The modern penal law depends on the *Staatsidee* (conception of the state).

Kohlrausch expects that "penal law in its function is a sum of codes which an organized body of humans posts for the behaviour of its members, on pain of disadvantages for the case of code-adversed behaviour."³ Whoever accepts the notion of state - meaning not to indulge in anarchism - therefore also adopts the theory of general prevention, of psychological compulsion or whatever you may call that theory.⁴ With the *Staatsidee* and the theory of general prevention two keywords have been raised which seem to matter over and over again in the discussion about the whole purpose of penal law. And both can by some means or other be annexed to morality.

What precisely is the meaning of general prevention?

This theory targets precautionary crime prevention faced to the commonality. With a little help by the threat of punishments and the enforcement of sentences, the commonality shall be indoctrinated with lawful prohibitions and shall be hold off their violation. The theory contains a negative aspect - the citizens notice what befalls the delinquent and therefore they themselves do not commit crimes - and a positive aspect - the citizens notice what befalls the delinquent and therefore they rely on the assertiveness of the legal order.

³ Kohlrausch, aaO., S. 10.

⁴ Kohlrausch, aaO., S. 12.

If there is any commonality extant at all which can be influenced- i.e. to wonder about the existence of a psychology of the masses - this question shall be left unanswered for the time being. I presume the theory of general prevention as a matter of fact in everyday life and in the history of sciences.

Kohlrausch now states that the theory of general prevention - the link between penal law and commonality, so to speak - is "unavoidable" as long as you find yourself living in a body called state. By that he takes side of a general prevention which is stained by legal positivism. He will not allow law to function beyond a way of stabilisation and maintenance. Kohlrausch is satisfied with a state that is only a purposeful superstructure of organization. Within the context of penal law he obviously does not want to discuss for which kind of purpose one cooperates. For Kohlrausch morality in penal law can only be accepted on condition that "in every single case we see the punishing state as an executor of an empyrean will" - as he ironically states.

About 50 years later just this empyrean tune was now sung by Hans Heinrich Jeschek. He was a conservatively thinking professor of penal law and in 1957 he wrote an essay entitled "The notion of man of our period and the reform of penal law"⁵. There he refers to Kohlrausch in the following way: He changes Kohlrausch's statement that "do's and can's" are necessary fiction within the conception of state (*staatsnotwendige Fiktion*) into his own statement that "guilt and conscience" are necessary fiction within the conception of state.

Just in the sense of those moods of natural justice with which the German jurists, facing the failed attempt of building an everlasting Reich with the Führer's help, were seized right after losing the Second World War - just in this sense Jeschek was preaching:

"With regard to our entire fate of the last centuries we are deeply in need of a powerful penal law which knows and acknowledges ethical values, which calls for the existence and binding force of ethical responsibilities and which holds up, like in a mirror, an image of the better even to the people."⁶

According to that Jeschek thinks of penal law as nothing else but deontology. The theory of general prevention hereby is also stoken up with morality, and consequently the code of penal law (StGB - Strafgesetzbuch) can be nothing

⁵ In: Recht und Staat, Heft 198/199, 1957.

⁶ Jeschek, aaO., S. 8.

else but an appendix to the Bible.

Jeschek also makes his point in such a vehement way because he apparently is desperately trying to keep up something against the “state of industrial society” – that is what he calls his concept of an enemy. He categorically does not grant such a “value-indifferent multi-purpose machine” any authority. And such a machine even less implies any “moral authority which qualifies to lay down a generally accepted scale of values”⁷. Jeschek wants a certain “elite of the people” to determine this scale of values. And – is anybody really surprised by that? – he particularly wants the jurists to be part of that elite. A few more pages further on he tables some quotes from the Bible at least (“For she is the server of God, an avenger to punish those who do evil”⁸).

By that Jeschek does not only preach the state of morality and the penal law of morality, but in well-tried tradition he also considers the jurists elected to show the better ego to the impotent people and to indoctrinate them.

Undemocratic professional ethics, Christian substantiated bigotry – these are two more political reasons to reject the presence of morality in penal law. And obviously these were the reasons why within the scope of the reforms of German penal law (first draft of 1962) there were those jurists who went on the warpath and presented an alternative bill (in 1966) and in other ways voted for the extinction of the moral elements of an offence.

On the whole, those jurists argued with the “*Rechtsgutsbegriff*” (a typical German conception, which may be translated by “object of legal protection”). The *Rechtsgutsbegriff* was to contain the protection by the penal law of only certain predetermined goods⁹. These goods, for example life, integrity of the body and reputation, are guaranteed by the constitution, the Grundgesetz.

Against that background Roxin reaches the following definition: “*Rechtsgüter* (objects of legal protection) are those given facts or determinations of aims that are useful for the individual and their self-fulfilment within the bounds of an overall social system which is based on this very objective, or for the function of this system itself.”¹⁰ The free development of the individual within the bounds of a liberal society is a shared conceptualization which is obviously

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⁸ Jeschek, aaO., S. 25.

⁹ Roxin, aaO., S. 10.

¹⁰ Roxin, aaO., S. 15.

backed up by the idea and conception of the social-liberal constitutional state. And with both at hand in the sixties of the last century it was possible to corner those outstanding offences which comprehended an obdurate sexual morality and, at least, to deprive them of their legal force.

So there were questions like “Which kind of Rechtsgut given by the Constitution exactly is protected by the culpability of homosexuality?” – which even Jeschek was not able to answer satisfactorily. In an aside he only mentioned that “the kind of tragedy which burdens the fate of some human beings just cannot be annihilated by a drawback of the penal law.”¹¹ Well, he erred – at least with regard to the willingness of penal law to concede at some moments in the course of time.

How did the notion of Rechtsgut fare? Did it really do away with morality in penal law, as one would imperatively have to understand after Roxin?

Take a glance at the history of that concept and grave doubts will arise immediately. It is frequently presumed that the concept of the Rechtsgut has been a liberal concept right from its start. But such a view neglects one aspect: In comparison to the original liberal idea of the protection of inalienable rights themselves, the concept of the Rechtsgut represents a maceration respectively an enlargement of penal law.¹² Furthermore it is not possible to restrict the concept of the Rechtsgut only to individual Rechtsgüter – which perhaps could have been the final elimination of morality. Since the penal code (StGB) also protects values of the communality like the course of justice and at least the state itself – even Roxin has to notice that, too.

And thus, in 2006 he has to admit that “so far roughly no agreement has been achieved about what the meaning of the concept of Rechtsgut is.” Besides – Roxin argues – there is dispute about the question of whether or not the concept of the Rechtsgut is only meant to be an argumentative aid or whether it is suited to define the limits of the legislator's privilege of intrusion.¹³

That is to say: The floodgates of defining are wide open, nothing is crystal clear.

Up to this point you can only certify for the Rechtsgutsbegriff that without it

¹¹ Roxin, aaO., S. 9.

¹² Vormbaum, ZStW 107, S. 751.

¹³ Roxin, Strafrecht AT, 2006, S. 14.

the decriminalisation of homosexuality, sodomy and procurement in the sixties would not have been possible.¹⁴

And all of a sudden, the theory of general prevention is knocking on the doors again. Until recently this theory was only accepted with its hardly empirically proven stabilising function. Some even doubted this theory in its entirety because in the end it would be nothing else but revenant of the good old moral-genic power of penal law.¹⁵

But then it took a turn and became reanimated by Günther Jakobs. Jakobs became generally known as the one who developed the conception of "*Feindstrafrecht*" (special penal law for enemies). Looking at the theory of general prevention he succeeded in reanimating it because he assigned the ideas of Niklas Luhmann upon penal law. The effects of general prevention thus would not strike individuals and their behaviours any more and thereby would not avoid endangering and harming Rechtsgüter. The theory of general prevention is rather aimed at social, collective dynamics. The penalty averts the result from an offence as a negative effect on the social system.¹⁶ For the social framework the authority of norms is essential. Crime itself is neither perceived by Jakobs as an infringement of a Rechtsgut but as a frustration of the expectations of the social framework.

By currently advancing his thoughts and theories Jakobs, however, checks out of the abstract, descriptive point of view he once had on examining systems. He now builds on socio-psychological connections again. In this manner one can trace a tendency towards the theories of an absolute retaliation as is known in terms of Kant and Hegel.

Why making this digression into Jakob's theses?

He highlighted that we are not to be warned off by penalty as individuals any more but as parts of a social dimension and as citizens of a certain corporative and legal order¹⁷. By the way, our society still practices retaliation - only its reasons have changed: Now it is no longer based on metaphysics any more but embedded in its social function. Retaliation now stabilizes norms by verifying their standing.

¹⁴ Neubacher, Jura 2000, S. 518.

¹⁵ Hilgendorf, in: Schmidhäuser, Vom Sinn der Strafe, 2004, S. XIII.

¹⁶ Bernardo Feijoo Sánchez, Positive Generalprävention, in: Festschrift für Günther Jakobs, 2007, S. 75.

¹⁷ Sánchez, aaO., S. 86.

And by stepping into this world and forms built by Jakobs, one suddenly can re-imagine a new morality, some kind of new one filled with other material seems not to be excluded from penal law any more.

Morality still remains an idea and a term which cannot be neglected and which one has at least to include somehow, somewhere into one's thoughts. Why not look up into the sky above, stick one's hands into the clouds and grab out of the fog a morality of health, a morality of effort or a morality of data? All of those models own their place in the game of social dimension and legal order nowadays. They refer to us not only as individuals but more as parts of a system.

In my opinion, Roxin used the term of morality in a much too limited sense of meaning when he stated that "the very moral adversities must go unpunished."

No doubt he took a firm stand against Christian sex moral in those days of the sixties. Back then that moral constituted a passed-down morality. One frankly confessed to it or even called out loudly for that public avowal, as Jeschek did. But: Was that morality the morality par excellence? Was there only that one kind of morality and is there now no more morality left at all?

A passed-down morality could be questioned with critical terms. Simply for their function as opponents to morality these terms have to claim that they are everything but not morality.

But the world of the non-moral does not offer any big bunch of flowers from which to pick out the most candy one. If you choose to walk on the non-moral side, you have only one choice: Reason or let's say, the idea of objectivity.

Self-confessing morality was contrasted with an objectively formed term and defeated all along the line. So religious morality in penal law came under fire by the term of Rechtsgut - which obviously lent itself to be used as a social-liberal term of war back then.

What was next?

Passed-down morality fell out of penal law and was relegated to its real home - to the realm of God. The objectively formed term of Rechtsgut had been victorious and seems a bit forlorn now in the big world. Its victory turns into autarchy, autarchy turns into tradition. The term of Rechtsgut alone now

attracts all interests, curiosity and criticism and soon objectivity begins to crumble.

Let us recall what was aptly said during one of our evenings at the seminar: Objectivity is first of all an objective appearance. Related to the Rechtsgut that appearance could survive as long as it still had a subjectively formed morality for opposition. Quasi by the lapse of that morality the seeming objectivity also vanishes. The attempt to preserve that illusion of objectivity is in vain - because on the whole the term of Rechtsgut is not safe from inventing any new Rechtsgüter which are said to be worthy of protection.¹⁸ Control retardant, abstract dangers - like ecological hazards for example - are increasingly criminalized by penal law and conceptualised in more and more abstractly formed Rechtsgüter. The followers of the concept of Rechtsgut are arraigning those abstract Rechtsgüter by arguing that they were only a kind of "pseudo-Rechtsgüter". One denies them membership of the club of true terms. In that dogmatic entanglement, in which the illusion of objectivity fades away, the very nature of the term of Rechtsgut comes to the fore, now one can perceive what the term of Rechtsgut has always been right away from the beginning: Morality, too.

First it was a critical, autonomic morality against tradition and in the end, it seems to be the only morality left over. This thing - which could function as a critical morality as long as it was wearing the hood of objective appearance - this thing itself now becomes a passed-down morality.

If Professor Roxin drank three or four glasses of wine he then at late hour might hum: Well, yet we are a kind of reduced morality, a miniature morality.

Invoking morality but invoking only a kind of reduced morality which may claim its conservation because it is reasonable, anthropological in evidence - if you were sober again, that foundation would seem to be much too weak. Because in the end that foundation is attended by the confession that it might be vulnerable and replaceable. For it is nothing else but making an attack on morality, which one had already done back then in the sixties. If you now remember the already shown *Staatsidee*, that confession of being weak will gain such a power of implosion that some people might be worried to death.

¹⁸ Neubacher, Jura 2000, S. 518.

So what is to be seen when you have a look at the history of the term of Rechtsgut? Sadly, the result is not morality being erased from penal law.

For both Jeschek's morality in terms of Jesus and the make-believe amoral term of Rechtsgut have one thing in common:

Their respective root would be something very true which everyone ought to be aware of and which everyone ought to admit. Jeschek still saw the world through the eyes of Jesus and Roxin tries hard to see the world of constitutional state - though he is forced to blink and to wipe his eyes clean.

And what about Jakobs? Jakobs is already heading for the fairy tales of future times. And morality lived happily ever after.

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