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THEORIES OF CRIMINALIZATION AND PREVENTION

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I. Theories of Peno-Legal Criminal Controls as Creators of Legitimacy for Criminal Law

What must be differentiated from the task of socio-scientific studying of the social phenomenon criminality using *«theories of criminality»* is the question of the theories of peno-legal social controls, usually simply called *«penal theories»* (or more technical: *criminalization theories*). A need for criminological analyses of the causes of criminality and the effects of sanctions is only created when criminal law is given over to the service of social considerations of utility. This occurred for the first time in the penal theories of the Enlightenment. But first, a basic requirement for peno-theoretical models must be presented. While theories of criminality regularly ask about the conditions for the appearance of social deviance, penal theories, which usually assume an etiological-individual model of criminality, are always occupied with the general *justification of punishment*. The term «penal *theory*» is therefore somewhat misleading, as they are primarily concerned with theoretically legitimizing punishment and (state-instituted) punishment, but the punishment itself is not critically reflected. Penal theories are not theories about punishment but rather *rationalizations of punishment*.

Those who ask about the raison d'être of the punishments designated by criminal law find themselves confronted with numerous lines of argumentation, ideas of humankind, understandings of the state, or security philosophies [1, p. 32]. On the one hand, we are dealing with

absolute penal theories which go back to the legal-philosophical works of *Kant* and *Hegel*. Here, the idea of a generally binding justice based on «natural law» is the focus [2, p. 484] according to which the justification of punishment lies primarily in the *restitution of guilt*.

The absolute penal theories are linked with the tradition of German idealism *(Kant, Hegel)*. They present a theory which decouples the state punishment from a purposeful enforcement (absolute) and restricts it to the restitution of committed injustices (repressive). Its purpose lies in the restoration of the legal order, in the realization of justice. There is no inhuman rigorism underlying these texts but a concern for the dignity of the convicted [3, p. 89].

In contrast to this, the *relative criminal theories* favor the purpose of prevention. They assume that crimes are socially harmful. The goal of punishment is then *criminal prevention*, which is to be achieved by resocializing or securing the perpetrator. A theory of the purpose of punishment was first written by the so-called Modern Criminal Law School around the turn of the 20th century. Its most prominent proponent is *Franz v. Liszt* [4, p. 525].

The effective penal law and jurisprudence of the courts, as explained by the Federal Constitutional Court (*Bundesverfassungsgericht*) [5] mainly follow the so-called *unification theory* which, with varying foci, attempts to unite *all purposes of punishment* in a *balanced relationship* to one another. In detail, they refer to the following constructs.

II. Restitution and Retribution

The right to and necessity of punishment is justified in *absolute criminal theories* more or less *retrospectively from the criminal act* due to the violation of the law. The punishment is therefore based on a *restoration of the legal order*, which was knocked out of balance by the crime. The punishment ensures that justice is realized by counterbalancing the injustice committed.

In this context, *Hegel* speaks of the punishment as the «negation of the negation» of the law. He turns against a purely functionally-justified punishment: *«To justify punishment in this way is like raising one's stick at a dog; it means treating a human being like a dog instead of respecting his honor and freedom»* [6, p. 190].

As much as the absolute penal theories are free from the pursuit of a particular purpose in their *rationale* of the punishment (at the level of

the justification of the punishment), this theory does have an implicit purpose behind it in regards to the goals of punishment. The restoration of the legal order does not occur in an empty space but takes place in a society which uses law as an instrument to create order. The necessity of punishment is seen in the desire to secure social order through law – and thereby to make it possible for people to live together in societies. This consideration can be extended to the metaphysically-grounded reason for punishment.

The principle of guilt is currently anchored in penal law in § 46, Para. 1, Sentence 1 of the Criminal Code (*Strafgesetzbuch*, StGB). According to this, the guilt of the perpetrator forms the basis of the degree of punishment, and it thereby also limits punishment. At the same time, the regulation demands that the preventive effects of the punishment on the future life of the perpetrator in society which can be expected by the law are to be «taken into consideration» (§ 46, Para. 1, Sentence 2 StGB).

Weaknesses in the concept of guilt

There are two key arguments against the concept of guilt as represented by the absolute penal theories.

- *Cannot be empirically proven*

Guilt which is based on the individual being able to act otherwise at the time of the crime cannot be proven. The *empirical proof* which is required for assuming guilt *cannot be brought forth*. In the area of forensic psychiatry, there is a consensus that the ability of the perpetrator to act in a way other than he did at the time of the crime cannot be proven with empirical methods [7, p. 643].

- *Metaphysics of retribution*

A state's right to restitutive retribution can no longer be derived from a purpose-free constructed principle of restitution for guilt which is only beholden to the idea of justice. The judge's verdict is no longer able to be metaphysically derived but is subject to the principles of the *civil-democratic constitution*. The claim to absolute power has been lost. The judge is now legitimized by a state power which, at least according to the constitution, comes from the people. *A right to retribution can therefore not exist* [8, p. 643].

Guilt as a normative construct for limiting penal law

Despite all justified criticism of the premises of the principle of guilt, the *limiting functions of guilt* on a state which would otherwise preven-

tively punish is a necessary means of *securing freedom* [9]. In its decision on the repeal of the pecuniary punishment, the Federal Constitutional Court demanded that the rule-of-law principle of guilt must always be taken into consideration when reaching a decision about the threat of punishment, whereby the judge has the possibility of «giving a just and proportionate punishment in individual cases. The principle of guilt and the certainty of legal consequences stand in tension and must be balanced in a manner in line with the constitution» [9].

Especially because the category of guilt is a *normative construct* which cannot be sufficiently proven by empirical reasons for acting, it limits the preventive state's access to the citizens. The normative term «guilt» is thus understood as a bastion against possible screening and controls of the citizens.

The theses of modern brain research are therefore also futile when they attempt to use neurological determinants of human behavior to reject penal law based on guilt by pointing to a lack of free will and call for a law of preventive measures [10] The advantage of the peno-legal, normative construct «guilt» lies precisely in the fact that the citizens are perceived as having free will which may not be able to be neurologically proven, but must determine the social relations of people. Only authoritarian systems are exclusively oriented on preventive measures.

III. Specific Deterrence

Utility as a «modern» social principle

Social and economic developments in the last third of the 19th century increased the need for state guidance in the area of domestic infrastructure, the opening of new markets, and the organization of school education and flanking control institutions. Through the further development of production technology, the demands on laborers grew, and these could no longer be fulfilled with casual, familial socialization. Parallel to this, the need for legal guidance of negative consequences which resulted from the uninhibited market powers, for example monopolies, low wages, or child labor, increased. In place of the liberal distance between the citizens and the state, there now arose a glorification of the expansive, planning, regulating, and crisis-preventing state. The growing demands of the citizens for a confident, intervening state resulted in peno-theoretical considerations which clearly put the forceful instru-

ments of penal law under the control of the state's considerations of utility.

Target: The individual

Specific prevention is viewed as a key purpose of state punishment which does not direct its effects against all those subjected to the law but only against the minority of convicted criminals. It therefore does not ask «What should be the punishment for robbery, murder, or perjury?» but «What should be the punishment for *this* robber, *this* murderer, or *this* perjurer?» [11, p. 175].

Positive specific prevention is concentrated on resocializing the perpetrator. This is based on a treatment model which assumes personal deficits and attempts to compensate for far-reaching socialization shortcomings and affect them positively (cf. § 46 Para. 1 Sent. 2 StGB). Specific prevention is the *goal* of treatment and even the sole goal of enforcement (§ 2 Sent. 1 Penal Law (*Strafvollzugsgesetz,* StVollzG)).

Negative specific prevention, on the other hand, is focused only on the assumed dangerousness of the criminal. It therefore points to aspects of security in order to keep the perpetrator out of society, and therefore sees the *purpose* as being the protection of the general public from further crimes (§ 2 Sent. 2 StVollzG).

IV. General Prevention

Deterrence

The theory of general prevention believes that it can secure the general public's adherence to norms and deter others who are in danger of committing similar crimes through the existence and application of criminal law.

Negative general prevention attempts to stop others from commiting similar crimes by sanctioning the perpetrator. *Positive general prevention* is tied to the stabilization of society's adherence to norms. In this context, particularly the theory of positive general prevention makes up an important basis of legitimacy for the penal control system: In paragraph 1, § 47 StGB speaks of the necessity of an imprisonment of less than 6 months if this is, amongst other conditions, «essential for the defense of the legal order». Positive general prevention is seen as perfectly suited for justifying penal law because of its necessity and utility [12, p. 5].

General prevention for the purpose of stabilizing norms

- *Entitlement to global societal protection*

In this context, the term of general prevention which is aimed at the general public gains the most momentum. It profits from society's desire for protection and security, but also from an offer for a way to channel feelings of vengeance. It is also seen as useful for overcoming the weaknesses of the absolute criminal theories more or less by turning it into a strength which is constructive for society.

Concepts such as these no longer only refer to the principle of *individual* deterrence or moral stabilization of those subject to the law, but also insist on a *global societal protection* in the sense of a system of protection which is supposed to realize individual and societal criminal prevention on complementary tracks [12, p. 3].

- *Amendments from depth psychology*

If the concept of general prevention is additionally enriched by aspects from depth psychology, [13] another advantage is uncovered, that is, the almost complete protection against possible falsifications. According to this, it is the task of criminal law to *stabilize* the *citizens' trust in the law* and the corresponding social norms on a psycho-analytical basis (scapegoat theory) in the long-term. In this setting, the theory of general prevention has a good chance of becoming the long-term predominant goal of penal law, especially because it can be neither proven nor disproven empirically. Still, there is a strong rule-of-law unease tied to legitimizing criminal law psycho-analytically.

V. Unification «Theory» and Integration Prevention

The Federal Constitutional Court's Position

The cornerstones of general prevention and restitution, together with elements of specific prevention, make up an all-encompassing basis of legitimation for state punishment, the so-called *unification theory* of the Federal Constitutional Court [14]. This is done within the framework given to the law-maker as the *«freedom of scope pursuant with the Constitution to recognize individual reasons for punishment, weigh them against one another, and harmonize them. In its opinions, the Federal Constitutional Court has therefore emphasized not only the principle of guilt, but also other purposes of punishment. It has described the basic purpose of penal law to be the protection of the elementary values of*

communal life. Retribution, restitution, prevention, resocialization of the perpetrator, atonement, and retaliation for committed injustices are deemed to be aspects of an appropriate sanction» [5].

This kind of «theory» has the advantage of apparently eliminating any contradictions of the individual approaches and turning the trilogy of specific prevention, general prevention, and restitution into the *perfect argumentative weapon* [15, p. 832].

General prevention as a protection for reliance on existing law

To emphasize the positive aspects of general prevention, the term *«integration prevention»* has become a buzzword in the more recent debates in penal theory [16, p. 817]. The terms «positive general prevention» and «integration prevention» are usually used synonymously in the literature [17, p. 481]. This development was supported by the argumentation of the Federal Constitutional Court, which described positive general prevention as the «maintenance and strengthening of the trust in the legal order's resilience and ability to assert itself» [18]. The Federal Court of Justice (*Bundesgerichtshof*) argues in a similar fashion: It states that the enforcement of a (brief) custodial sentence to defend the legal order is only necessary if a waiver of the punishment would offend the general sense of justice and *the public's trust* in the infallibility of law and if the protection of the legal order from crime would be shaken [19].

From the perspective of integration prevention, punishment has a socially integrating and rehabilitating function which reverses direction if a punishment is not enforced and results in a process of social disorganization. In integration prevention, there is therefore an aspect which can be described by the term «intellectual criminal damage» [16]: The punishment is supposed to create something in the consciousness of those subject to the law which cannot be otherwise achieved, that is, general conformity and adaptation to the predominant normative structure of the society. As far as the principles which determine the content of the punishment, the judges are considered the standard whose efforts must be aimed at *«coming as close as possible to the fictitious optimum value of the punishment appropriate to the crime»* [16, p. 826].

Integration prevention and judicial formalities

A specific rule-of-law variation is given to this approach by *Hassemer*, who does not believe that the punishment is justified when reso-

cialization and deterrence are achieved, but only if it does not err from the *paths of formalized control* (strict rule-of-law judicial formalities) in doing so [20, p. 316].

From protection of individual interests to protection of functional complexes

It is clear to see that the concept of integration prevention strays from the basis of the real social relationship and is in the process of usurping the *idea* of security for abstract objects of legal protection. According to *Baratta*, this results in the purpose of penal law shifting from the protection of individual interests to the protection of functional social complexes. This means that penal law no longer protects *objects of legal protection*, but *functions* [21, p. 137].

References

1. Cf. Naucke, Strafrecht: Eine Einführung, 10th edition, 2002, p. 32 ff.
2. Cf. Müller-Dietz, Vom intellektuellen Verbrechensschaden, GA 1983, p. 484.
3. Hassemer, NK-StGB, 1995, before § 1 margin no. 411 ff.; Herzog, Prävention des Unrechts oder Manifestation des Rechts, 1987, p. 89 ff.
4. Cf. here also Naucke, Die Kriminalpolitik des Marburger Programms 1882, ZStW 94 (1982), p. 525 ff.
5. BVerfGE 45, 187, 253 ff.
6. Hegel, Werke, Tome 7 (Grundlinien der Philosophie des Rechts), Amendment to § 99, p. 190.
7. Cf. Roxin (note 26), p. 643 f.;
8. Cf. Roxin (note 26), p. 643 f.; Stratenwerth, Die Zukunft des strafrechtlichen Schuldprinzips, 1977.
9. On this, cf. BVerfGE 105, 135 ff.
10. Representative of many, cf. Geyer, Hirnforschung und Willensfreiheit – Zur Deutung der neuesten Experimente, 2004.
11. Von Liszt, Strafrechtliche Aufsätze und Vorträge, Tome 1 (1875–1891), 1905, p. 175.
12. Jakobs, Strafrecht, Allgemeiner Teil, 2nd edition, 1993, p. 5 ff.
13. Cf. Haffke, Tiefenpsychologie und Generalprävention, 1976.
14. Opinion of the Federal Constitutional Court (BVerfGE) 45, 187, 253 ff.
15. Cf. Albrecht, P.-A., Spezialprävention angesichts neuer Tätergruppen, ZStW 97 (1985), p. 832.

16. Müller-Dietz, Integrationsprävention und Strafrecht, in: Jescheck-Festschrift 1985, Tome 2, p. 817 ff.

17. Müller-Tuckfeld, Integrationsprävention, 1998, p. 6; Zipf, Die Integrationsprävention (positive Generalprävention), in: Pallin-Festschrift 1989, p. 481.

18. BVerfGE 45, 187, 256.

19. BGHSt 24, 40, 46; cf. also § 56 Para. 3 StGB.

20. Hassemer, Einführung in die Grundlagen des Strafrechts, 2nd edition, 1990, p. 316 ff.

21. Baratta, KrimJ 1984, p.137.

Professor Dr. Albrecht P.-A. Theories of criminalization and prevention

In the article the problem of determining the theories of peno-legal social controls. They usually are called «penal theories» or criminalization theories. Penal theories are not theories about punishment but rather rationalizations of punishment. On the one hand, we are dealing with absolute penal theories which go back to the legal-philosophical works of Kant and Hegel. Here, the idea of a generally binding justice based on «natural law» is the focus according to which the justification of punishment lies primarily in the restitution of guilt. Its purpose lies in the restoration of the legal order, in the realization of justice. In contrast to this, the relative criminal theories favor the purpose of prevention. They assume that crimes are socially harmful. The goal of punishment is then criminal prevention, which is to be achieved by resocializing or securing the perpetrator. The effective penal law and jurisprudence of the courts, as explained by the Federal Constitutional Court mainly follow the so-called unification theory which, with varying foci, attempts to unite all purposes of punishment in a balanced relationship to one another.

Key words: *criminalization, penal theories, absolute penal theories, relative criminal theories.*

Альбрехт П.-А. Теорії криміналізації та запобігання

У статті розглядається проблема визначення теорій кримінально-правового соціального контролю, які ще називають «штрафні теорії», або теорії криміналізації. Автор зазначає, що «штрафні теорії» не є теоріями про покарання, а скоріше, раціоналізації покарання. З одного боку, ми маємо справу з абсолютними кримінальними теоріями, основу яких становлять філософсько-правові праці Канта та Гегеля, що ґрунтуються на ідеї загальнообов’язкової справедливості на основі «природного права». Їх мета полягає у відновленні правового порядку та здійсненні правосуддя. На відміну від абсолютних, основою метою відносних кримінальних теорій є профілактика. Вони припускають, що злочини є суспільно шкідливими, проте метою покарання є кримінальне попередження, яке повинно бути досягнуто шляхом ресоціалізації злочинця. Ефективне кримінальне законодавство і судова практика в судах, за роз’ясненням Федерального консти-

туційного суду, в основному підтримують так звану теорію об’єднання, яка намагається з’єднати всі цілі покарання в збалансовані відносини одного з одним.

Ключові слова: *криміналізація, штрафні теорії, абсолютні штрафні теорії, відносні кримінальні теорії.*

Альбрехт П.-А. Теории криминализации и предотвращения

В статье рассматривается проблема определения теорий уголовно-правового социального контроля, которые еще называют «штрафные теории», или теории криминализации. Автор отмечает, что «штрафные теории» не являются теориями о наказании, а скорее, рационализации наказания. С одной стороны, мы имеем дело с абсолютными уголовными теориями, основу которых составляют философско-правовые труды Канта и Гегеля, основанные на идее общеобязательной справедливости на основе «естественного права». Их цель заключается в восстановлении правового порядка и правосудия. В отличие от абсолютных, основой целью относительных уголовных теорий является профилактика. Они предполагают, что преступления являются общественно вредными, при этом целью наказания является уголовное предупреждение, которое должно быть достигнуто путем ресоциализации преступника. По мнению автора, эффективное уголовное законодательство и судебная практика в судах, за разъяснением Федерального конституционного суда, в основном поддерживают так называемую теорию объединения, которая пытается соединить все цели наказания в сбалансированные отношения друг с другом.

Ключевые слова: *криминализация, штрафные теории, абсолютные штрафные теории, относительные уголовные теории.*