§1: What is *Strafrecht*?
Part Two

IV. Legislative Powers in the Criminal Law

1. Authority (Jurisdiction) of the Federal Republic/German States

De facto, the criminal law is the responsibility of the federation. According to Art. 74 I No. 1 Basic Law, the Federation and the German states (Länder) are generally responsible for legislation in the field of criminal law. According to Art. 72 I GG the Länder have the power to legislate only as long as, and to the extent that, the federal government has not yet exercised its legislative power. In the *Grundgesetz Kommentar,* Prof. Dr. **Michael Sachs** wrote that the criminal law is codified by the StGB and criminal secondary laws. Therefore, the German states are largely excluded from legislation. The barrier effect is to be determined by the interests (*Rechtsgüter*) protected by law, not by specific offenses. This is the reason why there is hardly any room for criminal law in the Länder.

„Das **Kriminalstrafrecht** ist durch StGB und strafrechtliche Nebengesetze **kodifiziert**; die Länder sind damit weitestgehend von der Gesetzgebung ausgeschlossen […]. Die Sperrwirkung des Bundesgesetzes ist rechtsgutsbezogen zu bestimmen, nicht nach dem jeweiligen Einzeltatbestand; auch deshalb verbleibt kaum noch Raum für ein Kriminalstrafrecht der Länder“ (*Sachs* Grundgesetz Kommentar Art. 74 Rn. 17).

A rare example of the federal state law utilization of non-conclusive criminal legislation of the Federation is **§ 182 (1) of the Hessian School Act** (*Hessischen Schulgesetzes,* HSchG). According to this criminal provision, parents can be punished with fines or imprisonment for up to six months if they consistently or persistently deprive their children from compulsory schooling. The Federal Constitutional Court declared the provision in November 2014 to be formally constitutional. The competence of the State of Hesse to adopt this provision was, in particular, not superseded by §171 StGB (Violation of duties of care or education), since it serves the protection of another legal interest and therefore does not develop a barrier effect. The reason for the decision was the criminal conviction of a parental parent who taught all of his nine children, due to severe reasons of conscience, at home (BVerfG NJW 2015, 44).

2. Jurisdiction of the European Union legislator

With the entry into force of the Treaty of Lisbon on 1 December 2009, the previously highly controversial issue of whether the European Community as a legislator may also act in the field of criminal law has been decided in certain areas in favor of EU lawmaking. Thus, at least Art. 325 of the Treaty on the Functioning of the European Union (TFEU), which provides for the fight against fraud, Article 33 TFEU for the protection of customs, and probably also Article 79 II lit. C and lit. (D) TFEU for measures to combat illegal immigration and trafficking in human beings, are a sufficient basis for the adoption of directly applicable penal norms (this is disputed).

Furthermore, Art. 83 I UAb. (1) TFEU of the EU, in the area of particularly serious crimes of cross-border dimension, empowers the EU to pass minimum rules for the definition of offenses and penalties by means of a directive. The specific crimes are described in Art. 83 I UAb. 2 TFEU and include, inter alia, terrorism, illicit drug trafficking or organized crime.

However, in its Lisbon judgment of 30 June 2009, the BVerfG emphasized that formal and substantive criminal law is particularly subject to the democratic decision-making process and should therefore be deprived of state regulatory authority only in exceptional cases and narrow limits; the abovementioned

competence norms must therefore be interpreted strictly and linked to a particular justification (BVerfGE 123, 267, 408 ff., See also Krüger HRRS 2012, 311).

Fortunately, the European Union legislature takes on its responsibilities, but with caution. The Directive 2011/36/EU on the prevention and combating of trafficking in human beings and the protection of its victims was based primarily on Article 83 I TFEU. The current proposal for a directive on combating fraud affecting the financial interests of the EU now provides that this is to be based on Article 83 II TFEU, and thus on the overall "annex competence". The first draft of the Commission still saw the legal basis in Article 325 IV TFEU.

3. Additional European influence

An additional influence by European jurisprudence, in particular on the criminal procedural law, results from the European Convention on Human Rights (ECHR). This has been ratified by the Federal Republic and therefore has the same status of other laws passed by the German parliament. Since the ECHR is international law, German law must always be viewed in the light of the ECHR, in accordance with the prin-

ciple of international law, which is why the legal position of the European Court of Human Rights is of decisive importance.

This can also lead to a change in the rules of substantive criminal law, as exemplified by the critical judgments of the European Court of Human Rights regarding the German rules on preventive detention (NJW 2010, 2495 and NJW 2011, 3423). When the BVerfGE joined in a landmark judgment in 2011 (BVerfGE 128, 326 = NJW 2011, 1931), this led to the abolition of the relevant provisions and a fundamental legislative reconception of preventive detention (see esp. § 66c and §§ 67a ff., StGB n.F.; *Zimmermann* HRRS 2013, 164).

4. Criticism of internationalization

There is a risk that inconsistencies in national law will be generated by the action of the EU legislature or European or international courts, respectively, that criminal law will be harmonized and that sufficient participation of national parliaments will be omitted. (*Eisele* JZ 2008, 251 ff.; *Hefendehl* ZIS 2006, 161 ff.; BVerfGE 123, 267).

IV. Definition of criminal law in the formal and material sense

1. Criminal law in the formal sense

Sum of all provisions which regulate the conditions or consequences of a behavior threatened with punishment or a measure of improvement and security (Roxin AT I § 1 marg. 1). Punishment and measures are therefore the point of reference for criminal law. It is not the standardization of commands or prohibitions that characterize the penal norm (such commands and prohibitions exist in other legal forms), but the sanctioning of a prohibition by means of punishment or measure (Roxin AT I § 1 marg. 2). Every sentence imposes guilt of the perpetrator in the past act and every measure precedes a perpetual danger of the perpetrator in the future. Punishment and measures are not in any alternative relationship; they can also be arranged cumulatively. Punishment and measure characterize the system of two-way modern penal codes.

Overview: The two-fold nature of the criminal justice system

Criminal Penalties	**Measures of Rehabilitation and Incapacitation**
Based on the perpetrator's guilt (see § 46 I 1 StGB)	Based on the social dangerousness of the perpetrator (see §§ 63 ff. StGB)
Prerequisites: I. The Facts (Tatbestand) II. Illegality (Rechtswidrigkeit) III. Fault (Schuld)	Prerequisites: I. The Facts (Tatbestand) II. Illegality (Rechtswidrigkeit)

2. Criminal law in the material sense - substantive concept of crime

The substantive concept of crime does not follow the law in force and its formal criteria - the norm which imposes punishment or measure as a sanction - but deals with the question "how a behavior must be so that the state is entitled to punish it" (Roxin AT I § 2 marg. 1). This concept of crime is based on the task of criminal law to ensure subsidiary protection of legal interests. "The substantive legitimacy is that the criminal laws are necessary to preserve the state and society. There is no genuine content of the criminal norms, but the possible contents are determined by the given regulation" (Jakobs Strafrecht AT, II / 2).

V. Protection of the *Rechtsgut* as the task of criminal law

Starting point: The criminal law is intended to ensure the protection of a ***Rechtsgut*** (legal good or interest). Any criminal sanction – penalty or measure – constitutes the infringement (even partial risk) of a *Rechtsgut*.

Forms of *Rechtsgut*:

- Individual *Rechtsgut* (eg life, cf. § 212 StGB, health, cf. § 223 StGB, assets, cf. §263 StGB)

- Collective *Rechtsgut* (eg trust in the security and reliability of monetary transactions, cf. § 146 StGB)

- mixed forms (eg § 164 StGB, which according to prevailing opinion [jurisprudence and predominant voices of the literature] seeks equally to protect judicature as a collective good and individually protect the accused from false suspicions).

A deeper look: It can be seen from the above definition that protection of *Rechtsgüter* is not guaranteed exclusively through criminal law. Public and civil law also codify legal protection.

From the viewpoint of criminal law, the following questions therefore arise:

A) What is a *Rechtsgut*?

(B) What *Rechtsgüter* need the protection of the criminal sanction?

"The death of old age, the ruin of a thing in time, and other things destroy destinies in the designated sense, but do not fulfill a criminal offense. The criminal law therefore has no duty to guarantee the existence of the designated goods in any case, but only in the case of certain attacks." (Jacob's Criminal Law AT / 4)

1. Definitions of legal goods (translated)

Alternative draft to the Penal Code (AE-StGB) 1966 § 2:
"Penalties and measures serving as the protection of the *Rechtsgüter*."

Roxin AT I § 2 Rn. 1 and 7:
"The task of criminal law is understood here as "subsidiary protection of *Rechtsgüter*". ... legal goods are circumstances or purposes which are useful to the individual in his free development within the framework of an overall social system based on this objective or the functioning of the system itself."

SK / Rudolphi Before § 1 Rn. 8th:
"After all, on the basis of what has been said, legal goods can generally be described as indispensable and therefore valuable units of functions for our constitutional society and thus also for the constitutional position and liberty of the individual citizen."

Jacob's AT, II / 15:
"... *Rechtsgüter*, for example, are defined as objects in their relation to people, valuable functional units, potentials or 'Partizipalien', in social interaction. The term "functional unit" is used below."

Otto AT § 1 Rn. 32:
"A *Rechtsgut* is a specific, real relationship of the person to concrete values which is described in the individual offenses and recognized by the legal community –" social functional units "– in which the individuum personally develops with the approval of the legal order."

When trying to define a *Rechtsgut* positively, one quickly comes to the sobering result: Either the definition is so narrow that many of the *Rechtsgüter* of our criminal codes would not fall under the definition. Or the definition is vague and can cover almost anything.

2. Importance of the *Rechtsgut* concept

The attempt to positively define the concept of the *Rechtsgut* is sometimes described as hopeless. However, this does not lead to the conclusion that the concept should be dropped entirely. Against this speaks the critically self-limiting function of the legal concept for the criminal law. It is intended to identify criminal law as a protective right and to delimit it from a counter-model of the penalization of pure duty violations. The *Rechtsgut* has a critical and negative function. It places substantive legal requirements on criminal offenses:

"According to our constitution, criminal law is responsible for protecting the coexistence of people in our present society, which is characterized by the basic law, from attacks, meaning socially harmful behavior. [...] From this constitutional purpose of state criminal law, the limits as well as the obligations of state criminal law legislation result. The legislature is entitled to adopt a penal norm only if it is necessary to safeguard the living conditions of our society based on the freedom and responsibility of the person. However, the State does not have the right to force individuals with the aid of punitive threats to choose certain religious, moral or other values as a guideline for their conduct, provided that their observance is not a function for the creation or maintenance of a right to freedom and responsibility of the individual social life. [...] It also follows that the protection of universal interests is only legitimate to the extent that

it is necessary to secure the necessary conditions for the free development of the citizen [...] the protection of state institutions and other universal interests must therefore not be undertaken for their own sake. " (SK / Rudolphi Vor § 1 marg. 1)

It is thus clear that the legislature is not free in determining which Rechtsgüter deserve criminal protection. It has to be guided by the above-mentioned constitutional purpose of criminal law. He has to orient himself to the above-described constitutional purpose of criminal law. However, it cannot be concluded from this that a positive constitutional concept of criminal *Rechtsgut* could be constructed. Rather, only every criminal *Rechtsgut* can be examined for its constitutionality by reference to the constitutional purpose of criminal law.

3. Content requirements for criminal *Rechtsgut*

From the texts quoted above, the content requirements for a criminal *Rechtsgut* are:

- No purely ideological purpose ← →Criminal record of keeping the German blood clean in national socialism

- No mere moral offenses ← → Penalty of adultery

- No purely ideal purpose ← →The criminal offense protects a *Rechtsgut*, even if this does (or does not) exist.

- **Socially harmful behavior** as a starting point

- The necessity of the ultimate reference to society or to the members the society constituting it (personal configuration) of the criminal property: Although the *Rechtsgut* theory is based on the dualistic concept of the individual and collective *Rechtsgüter*, the criminal law can not be protected by a constitutional objective of the criminal law - securing of the free development of **citizens** - **exclusively** a collective *Rechtsgut*. For the state citizen, functionless institutions deserve no criminal protection. The importance of collective property is not affected by this observation, since in a complex society individual goals can often only be realized with the help of social and state institutions, which are therefore also worthy of protection.

4. The incest decision of the BVerfG

The "incest decision" of the BVerfG of 26 February 2008 (BVerfGE 120, 224 = NJW 2008, 1137) offers the possibility of dealing with the *Rechtsgut* concept by means of a controversial issue. The BVerfG had the question to clarify whether a criminal conviction for intercourse between siblings according § 173 II 2 StGB is constitutional.

As early as 1902, it was considered in the context of a criminal law reform to abolish the incest offence, since the latter did not protect any *Rechtsgut*, but merely served the current morality. Today, as then, incestation is legitimized on the grounds that "the incest [the] most serious attack on the moral nature of the family [constitute and justify] dangers for the offspring." (BVerfGE 120, 224, 226)

For the BVerfG there was a possibility to support the tendency of various criminal law reforms to decriminalize sexual offenses with its decision. The aim of the decriminalization of sexual offenses is to exclude mere moral unruliness from criminal prosecution and to restrict the latter to strict *Rechtsgut* protection. For example, "the abolition of the punishability of adultery, of homosexuality among adults, of bestiality (here, however, it must be noted that the use of an animal for sexual acts has been pursued at least since

2013 as an administrative offense, § 3 no. 13 TierSchG) and extramarital sexual intercourse ". (BVerfGE 120, 224, 233)

Contrary to a correction of the punishability of the incest, which is desirable from the point of view of the *Rechtsgut* aspects of criminal law, the BVerfG has confirmed the constitutionality of this criminal provision.

The BVerfG states that no further requirements beyond the constitution can be deduced from the legal doctrine of the criminal *Rechtsgut*. The only basis for assessment is the Constitution (BVerfGE 120, 224, 241).

Criticism: The BVerfG, of course, examines the Constitution. Nevertheless, this case shows that the critical and criminal law-limiting function of the *Rechtsgut* doctrine cannot be underestimated. The *Rechtsgut* doctrine does not want to supplant the constitution, but to accompany it.

Furthermore, the BVerfG dealt with the penal grounds of § 173 StGB. The BVerfG mentions the following aspects:

Protection of Marriage and Family, Art. 6 Basic Law: "The family, subject to the special protection of Art. 6 Basic Law, is determined by structural principles which result from the connection of the constitutional standard with traditional forms of life and other value decisions of the constitution ... "(Incr. 120, 224, 244)" Incest connections, including those between siblings, lead to an overlapping of relationships between relatives and social roles, and thus, an impairment of the family structure. Such role overlaps do not correspond to the image of the family, which is based on Article 6 (1) of the Basic Law. It seems conclusive and is not far from the fact that children from incestuous relationships have great difficulties in finding their place in the family structure and establishing a trusting relationship with their closest caregiver" (BVerfGE 120, 224, 245)

Criticism: These statements are not convincing, since only sexual intercourse is punishable, other sexual acts, which are equally suited to the family life, remain unpunished. In addition, although the family is subject to fundamental protection (Article 6 of the Basic Law), impairments of the family from within may also only be prosecuted in absolute exceptional cases, because the nature of the constitution of a family is largely left to the family members as *Rechtsgut* bearers.

Protection of sexual self-determination: "The fact that § 173 of the StGB has specific dependencies and difficulties arising from the closeness of the family or roots in kinship and difficulties in the classification and defense overlaps" (BVerfGE 120, 224, 246)

Criticism: Systematic position of § 173 StGB outside the sexual offense. Furthermore, the decisive factor for the impairment of sexual self-determination, namely the use of necessities or the utilization of a qualified dependency ratio, is not included in the elements.

Prevention of inheritance damage: "The legislator has also based on eugenic aspects and has assumed that the risk of considerable damage cannot be ruled out in the case of children born out of an incestuous relationship because of the increased possibility of the accumulation of recessive hereditary conditions. "(BVerfGE 120, 224, 247)

Criticism: "It is forbidden to make the protection of the health of potential offspring the basis of any criminal law interference. A *Rechtsguter* beneficiary whose suspected interests could be used to justify the incest prohibition does not exist at the time of the action, apart from the affected sibling couple. [...] Therefore, for good reasons, we do not know the criminality of cohabitation even where the likelihood

of disabled offspring is higher and the expected disabilities are more massive than incest. "(Dissenting opinion Hassemer BVerfGE 120, 224, 258)

Historic cultural aspect: "In the legislative process, the retention of the controversial incest facts was discussed at length and repeatedly stressed several times that one did not want to break with the tradition of the incest prohibition. The societal taboo of the incest was also referred to with regard to the incest children who, because of their descent, were exposed to the risk of discrimination [...]. The above-mentioned penal sanctions thus find support in the conviction of the legislators that they should take up a sense of injustice anchored in society and continue to support it by the means of criminal law. [...] On the contrary, the attacked criminal norm is justified in the summary of comprehensible criminal aims against the backdrop of a convincing social conviction of the criminality of incest, which is still founded on the basis of a culture of history, as is also to be found in an international comparison. "(BVerfGE 120, 224, 248)

Criticism: Criminal law is to ensure the protection of *Rechtsgüter*. In this context, it does not matter whether the incest prohibition is a persistent constant, or whether society is convinced of the punishment of incest. Even an international comparison, one thinks of the death penalty, is irrelevant.

In 2012, the ECtHR also denied a breach of Article 8 ECHR (right to respect for family and private life), confirming the arguments of the BVerfG (ECtHR NJW 2013, 215).

On the occasion of the decision of the European Court of Human Rights, the German Ethics Council also dealt with the prohibition of incest and called for its abolition at least for such adult siblings who had long ceased to be part of the family alliance and agreed to intercourse. In particular, the court's reasoning strongly based on the genetic dangers for descendants is a "severe relapse" into past eugenic ways of thinking (the Ethics Council's opinion is available at:

http://www.ethikrat.org/dateien/pdf/stellungnahme-inzestverbot).Pdf [6.11.2016]).

Literature reference:

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Blog Contribution Hefendehl: http://strafrecht-online.org/stuff/Hefendehl_Inzestentscheidung.pdf

Rengier AT § 2

Roxin AT I § 2

Deepening:

Kubiciel ZIS 2012, 282 (Das deutsche Inzestverbot vor den Schranken des EGMR)

Marchlewitz Forum Recht 2012, 16 (Zur Verfassungsmäßigkeit des Inzest-Straftatbestandes)