

## The Constitutional Deficiencies of the German *Rechtsgutslehre*

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Stuckenberg, C.F., 2013. The Constitutional Deficiencies of the German *Rechtsgutslehre*. *Oñati Socio-legal Series* [online], 3 (1), 31-41. Available from: <http://ssrn.com/abstract=2200870>



### Abstract

This paper questions the theoretical merits and constitutional validity of the "Rechtsgutslehre" (doctrine of the protection of legal goods), a widely held doctrine about the limits of legitimate criminalization in Germany and some other jurisdictions. The immediate cause for this reassessment is a recent decision of the German constitutional court which upheld the German incest prohibition and simultaneously rejected the traditional "Rechtsgutslehre" as constitutionally irrelevant, thereby stirring up considerable controversy among academic criminal lawyers. The paper tries to show why the court's view is correct by pointing out the main deficiencies of the doctrine and what criteria a better theory must fulfil.

### Key words

Constitutional law; constitutional limits of criminal law; theories about criminalization; democracy and criminal law; democratic criminal law; prohibition of incest; protection of legal goods; protection of legal interests; legitimacy of punishment; Rechtsgutslehre; ultima ratio

### Resumen

Este artículo cuestiona los méritos teóricos y la validez constitucional de la "Rechtsgutslehre" (doctrina de la protección de los bienes jurídicos), una doctrina muy extendida acerca de los límites de la criminalización legítima en Alemania y algunas otras jurisdicciones. La causa inmediata de esta nueva valoración es una decisión reciente del Tribunal Constitucional alemán que ratificó la prohibición del incesto en Alemania y al mismo tiempo rechazó el tradicional "Rechtsgutslehre" por ser constitucionalmente irrelevante, lo que provocó una considerable controversia entre la comunidad académica de abogados criminalistas. El artículo trata de mostrar por qué la decisión de la corte es correcta, señalando las deficiencias principales de la doctrina y los criterios que una teoría más adecuada debe cumplir.

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Article resulting from the paper presented at the workshop *Ultima Ratio: Is the General Principle at Risk in our European Context?*, held in the International Institute for the Sociology of Law, Oñati, Spain, 2-4 February 2012, and coordinated by Joxerramon Bengoetxea (University of the Basque Country), Heike Jung (Saarland University), Kimmo Nuotio (University of Helsinki).

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**Palabras clave**

Derecho constitucional; límites constitucionales del derecho penal; teorías sobre penalización; democracia y derecho penal; derecho penal democrático; prohibición del incesto; protección de bienes jurídicos; protección de los intereses legales; legitimidad del castigo; Rechtsgutslehre; ultima ratio.

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## 1. Introduction

Traditionally, the majority of German academic criminal lawyers approach *ultima ratio* problems within the conceptual framework of the *Rechtsgutslehre* which states, in a nutshell, that the only legitimate aim of criminal law is the protection of "legal goods". The *Rechtsgutslehre* has also been exported abroad and has followers among theorists in various other countries, for example in Spain and Latin America where it is known as "*el principio de la exclusiva protección de bienes jurídicos*".

*Rechtsgut*, *bien juridique*, *bien jurídico* or "legal good" (rather than "legal interest") as a technical term has several distinct meanings or uses and only one of these is of interest here, namely the use of "legal good" as a critical device in political and legislative debates. The claim of the current mainstream version of the *Rechtsgutslehre* is that a criminal law provision is legitimate only if it serves to protect some "personal legal good". The influential definition given by Roxin (2006, § 2 margin no. 7), for instance, identifies "personal legal goods" with the conditions considered necessary for the existence and development of a human being like life, health, personal liberty, property etc. Consequently, a criminal law provision is considered illegitimate if its aim is the protection of something that does not count as a personal "legal good" such as public morality, religious commandments, abstract or collective interests (which is highly controversial) or the paternalistic prevention of self-endangerment.

In the post-World War II-period, the "legal good" served as a critical concept at the foundation of a liberal way of thinking about criminal law which culminated in major criminal law reforms in the late 1960s and early 1970s which deleted many of the traditional "offenses against morals" (*Sittlichkeitsdelikte*) like adultery, procuration, sodomy, and bestiality, but also blasphemy, from the German Criminal Code. — In a historical perspective, this is not without irony because the concept of "legal good" had been introduced in the 19th century by Birnbaum (1834, pp. 177-178) with the opposite intent, namely as a theoretical tool that allowed to justify the protection of moral standards in order to overcome the then prevailing restrictive doctrine formulated by Feuerbach that criminal law may only protect formal legal rights (Amelung 1972, p. 43 *et seq.*). — In recent years, the academic discussion of the *Rechtsgutslehre* concerned mainly the revision and refinement of the concept and asked for instance if collective legal goods like the environment or animal rights may be protected by the criminal law.

## 2. The Incest Case — A Surprise Defeat for the *Rechtsgutslehre*

The happy days filled with the peaceful elaboration of a widely accepted theory were suddenly over when the German Federal Constitutional Court (BVerfGE 120, 224) rendered its judgment in a highly publicized incest case on February 26, 2008. The question put to the court was the constitutionality of section 173 para. 2 of the German Criminal Code which punishes sexual intercourse among brothers and sisters. Most criminal law teachers viewed this provision as a clear example of protection of an archaic taboo but not of a legal good and expected the Constitutional Court to declare unconstitutional and void this last trace of punishable immorality. The Court, however, found the incest prohibition to be valid and, worse, the *Rechtsgutslehre* to be useless.

In its reasoning, the Court first set out an abstract test for the constitutionality of criminal laws. It underlined that criminal law is used as the *ultima ratio* of the protection of legal goods in the event that a certain type of behavior is particularly harmful and intolerable in an ordered society and hence needs to be strongly suppressed. The Court stressed that it is nevertheless the prerogative of the legislature to determine which behavior shall be punished and which shall not. From a constitutional point of view, the more demanding requirements of the *Rechtsgutslehre* are not warranted. The majority of the Second Senate rejected the

concept of “legal good” as controversial and a transpositive version of “legal good” as irreconcilable with the Constitution which entrusts the democratically elected legislature with the task of determining the aims of punishment as well as the interests to be protected by the criminal law. In short, from a constitutional perspective, criminal law is nothing special: only the constitution and nothing else sets boundaries to the law-maker’s discretion. For a constitutional lawyer, these statements seem banal— for many criminal lawyers, they present an outrageous provocation. To my mind, this provocation is both useful and long overdue.

The only criminal lawyer among the eight judges of the deciding senate, former vice-president Hassemer, wrote a trenchant dissenting opinion. He considered section 173 para. 2 of the Criminal Code to be contradictory and devoid of any legitimate objective, an insight which the *Rechtsgutslehre* had reached long ago. The objectives of the provision as identified and accepted by the majority were either illegitimate like the prevention of birth defects by inbreeding, or implausible like the protection of sexual self-determination and of the family. The only remaining objective, in his view, is the protection of morality which could not be the aim of criminal law.

The Court’s decision has been widely criticized and its result and reasoning have been mostly rejected in the literature (Bottke 2009, p. 93 *et seq.*; Cornils 2009, p. 87 *et seq.*; Fischer 2011, § 173 margin no. 2 *et seq.*; Greco 2008; Hörnle 2008; Noltenius 2009; Roxin 2009; Zabel 2008; Ziethen 2008; also Frommel 2010, § 173 margin no. 6-8). The objectives of the provision as identified by the senate’s majority were regarded as inapt or insufficient to justify punishment (Roxin 2009, p. 546 *et seq.*). The wide margin of discretion accorded to the legislator (Noltenius 2009, p. 17) was as fiercely criticized as the rejection of the *Rechtsgutslehre* (Greco 2008, p. 238; Roxin 2009, pp. 545-546). I will not join the protracted discussion for and against the punishment of incest here – briefly, I think the majority’s reasoning is exceptionally poor for the reasons set out in Hassemer’s dissent. Instead, I will use the opportunity to shed some light on the relationship of restrictive doctrines like the *Rechtsgutslehre* with constitutional law. To my mind, the only real and possibly lasting achievement of the decision is the unequivocal dismissal of the *Rechtsgutslehre* as it now stands. Although I will argue against the background of German law, my assumption is that the underlying tension should, in principle, exist in every democracy with a developed system of constitutional liberties.

### 3. The Constitutional Deficiencies of the *Rechtsgutslehre*

#### 3.1. *Disregard of the Constitution and Lack of Integration into the Framework of Constitutional Law*

The fundamental problem of the *Rechtsgutslehre* is not that it were incompatible with constitutional law as such, the problem is rather its theoretical poorness. In German constitutional law, the standard test if a certain statute conforms to the constitution begins with the question if that statute pursues a legitimate, that is constitutionally sound, objective or not. This test is usually framed in negative terms by asking whether the law’s objective is prohibited by the Constitution. According to the jurisprudence of the Constitutional Court (BVerfGE 50, 142, 162; 90, 145, 173; 120, 224, 240; 124, 300, 331), it is entirely up to the legislature which of the multitude of constitutional valid objectives it wants to choose (Appel 1999, p. 303; cf. Vogel 1996, p. 112). Theoretically, one could imagine to narrow down this first requirement in such a way that a criminal law statute needs more than just some non-prohibited objective, but instead a special type of objective like that to protect a particular “legal good”. It has rarely been attempted to integrate or embed the *Rechtsgutslehre* into constitutional doctrine but, structurally, this would be feasible. However, depending on the exact formulation of the *Rechtsgutslehre*, this integration would turn out to be either useless or unconstitutional. Why?

There are several well-known objections to the concept of "legal good" as a theory of criminal policy which I will briefly summarize. One of the main criticisms points to the vagueness of the *Rechtsgutslehre* and its inability to clearly define what a *Rechtsgut* is (Stratenwerth 1998, p. 378; Hirsch 2001, pp. 437-438; Roxin 2006, § 2 margin no. 3 et seq.). This vagueness is the symptom of a fundamental flaw – and the reason is this: The concept of "legal good" is the purely formal expression of the result of a value judgment made by the positive law that *something* is legally protected and hence deemed worthy of this legal protection. Therefore, the quality of "legal good" signifies only that such a value judgment has been made – and nothing else. The concept itself does not offer criteria to determine which objects merit legal protection and which do not and why. It cannot say, for instance, whether only objects perceptible by the senses like life, health or property should qualify as "legal goods", or also Platonic ideas, more abstract notions like public health, public safety or the confidence in the impartiality and incorruptibility of the civil service. Neither does the concept of "legal good" provide us with a yardstick for the necessary value judgment nor does it say *who* is to make the decisive value judgment nor which legal consequences such a judgment will entail. This is a very simple insight: if something is called "good", the attribution of the quality "good" is the result of the application of a set of criteria or standards to that object. Hence, it is not the concept of "legal good" itself which has the power to criticize legislative choices but the criteria behind it which, hopefully, form part of a comprehensive theory (Amelung 1972, p. 304 et seq., 330 et seq.; Amelung 2003, pp. 160-161; Hassemer 1975, p. 156 et seq.) like a grand theory about society and state and the place of the individual therein. This theory should also be able to explain why criminal law should protect only "legal goods" or "legal interests" – an assumption that is – not only to my mind – far from self-evident (cf. Fletcher 2010, pp. 321-322). It would be inadequate to depict modern societies as enterprises entirely devoted to the maximization of "goods" (Jakobs 1991, § 2/22-23; Jakobs 2003, p. 780, sub 4.; Amelung 1972, pp. 48-49, 331 et seq., 350; Amelung 2003, p. 180). Thus, the focus on "goods" produces a distorted picture of the social order unless one increases the complexity of the "legal good"-concept (like Hassemer & Neumann 2010, Vor § 1 margin no. 139) which in turn becomes fuzzier or more "liquid" and loses its power of discernment (Jakobs 2003, p. 780 n. 32; Müssig 1994, pp. 69-70, 156).

But even today, it is not clear what the theory behind the *Rechtsgutslehre* is and even if there any consistent theory at all. As long as the criteria for the determination of "legal goods" remain essentially unclear, the entire doctrine is theoretically unsound and practically useless.

There is no doubt that the *Rechtsgutslehre* means well, that it is based on the laudable motivation to have a rational policy in criminal matters and to help forge a humane and liberal criminal law (e.g. Hassemer & Neumann 2010, Vor § 1 margin no. 115; Hassemer 1973, p. 98 et seq., 192 et seq.). There is no controversy about the desirability of these aims, only about the usefulness of the *Rechtsgutslehre* to help achieve them. For the reasons set out before, I join the critics who think that the *Rechtsgutslehre* is rather counter-productive because it is prone to blur the underlying standards and obscure the real value judgments which often seem to be intuitive instead of reflected upon. My impression is that the proponents of the *Rechtsgutslehre* today agree only on the word "Rechtsgüterschutz" and a few very basic tenets – e.g. that immorality alone is an insufficient basis for criminalization – but neither on the concept nor the essence, i.e. an underlying theory (Amelung 1972, pp. 160-161; Hirsch 2001, p. 436; Müller-Dietz 1992, p. 103).

If a theory behind the notion of the protection of legal goods aims at more – which is not entirely clear to date – than to modestly contribute some aspects to the debate about criminal policy (cf. Hassemer & Neumann 2010, Vor § 1 margin no. 146), it must dress as a constitutional theory (e.g. Amelung 1972, p. 350 et seq.; contra Hassemer 1975, p. 161 et seq.) which puts forward specific requirements for

the constitutionality of criminal law provisions (Neumann 2006, p. 136), for example, by demanding stricter standards for the proportionality test (Hassemer 2006, p. 124 *et seq.*; Neumann 2006, pp. 135-136 with further references; Hörnle 2005, p. 22 *et seq.*; Scheinfeld 2011, pp. 184-185; see also Bunzel 2003, p. 104; but see Weigend 2007, Einl. margin no. 7; Krauss 2010, p. 437), which is often criticized as being toothless when applied to criminal laws.

Incompatible with the German Constitution, however, are those varieties of the *Rechtsgutslehre* which are based on transpositive commitments drawn from natural law or Kantian philosophy which are alleged to bind the legislature; I will expand on this in a minute. Unsuitable are other versions of the doctrine which describe "legal goods" as resulting from processes of normative social discourse and legislative decision (Hassemer 2003, p. 151 *et seq.*, p. 221 *et seq.*; Hassemer & Neumann 2010, Vor § 1 margin no. 139 *et seq.*) because they are unable to criticize such discourse (Appel 1999, pp. 292-293; Frisch 1993, p. 72).

Finally, although proponents of the *Rechtsgutslehre* like to present it as a decidedly liberal doctrine (Amelung 1972, p. 216 *et seq.*; Amelung 1991, p. 274 *et seq.*; Amelung 2003, p. 160: the liberal connotation is probably due to the fact that some jurists who opposed the Nazi regime also were supporters of the *Rechtsgutslehre*), this is less clear as it seems because the liberal quality ultimately depends on the precise formulation of the underlying theory – unless one uses "liberal" in an indiscriminate way for any doctrine that aims at the restriction of criminal law. One should bear in mind that the idea that the protection of legal goods justifies criminalization also has an innate illiberal tendency, because the supposed protection of legal goods by the threat of punishment can always be "enhanced" without ever reaching perfection (Jakobs 1985, pp. 753-754; Jakobs 2003, p. 780 *et seq.*, sub 8.; see also Müller-Dietz 1992, pp. 104-105).

### 3.2. *Disdain for Democracy*

The second and more troubling constitutional deficiency of the *Rechtsgutslehre* is its undemocratic nature (Appel 1999, p. 286 *et seq.*; Amelung 2003, p. 163; see also Sternberg-Lieben 2003, p. 78 *et seq.*; for an in depth-analysis see now Gärditz 2010, p. 342 *et seq.*) which, at the same time, is the hallmark of traditional conceptualizations of the *ultima ratio* principle in German criminal law doctrine.

According to the German Basic Law, the democratically elected legislature is free to choose among political objectives and the corresponding means; the only legal constraints for parliamentary action are those contained in the constitution. As in any free and pluralist society, it is the function of the political process to set goals and select the means necessary to achieve these goals. If a statute conforms to the Constitution, it is always the legitimate expression of the will of the sovereign, i.e. of the people, and it does – legally – not matter whether somebody considers it a good or bad law, intelligent or stupid, theoretically sublime or lousy (Gärditz 2010, p. 365). In other words, the constitutional framework usually admits different shades or varieties of criminal legislation of a more or less liberal character. Academic lawyers, and legal philosophers likewise, may find it deplorable that poor legislative craftsmanship and philosophical illiteracy is not automatically sanctioned by unconstitutionality and voidness but there is no other way in a democratic system: All those alleged flaws of a piece of legislation which do not affect its constitutional validity can only be corrected in the political process. In sum, it is the supreme prerogative of a democratic legislator to enact bad or even stupid laws.

Academic lawyers who elaborate the *ultima ratio* notion and create theories about the use of criminal law in a free society etc. should be frank about the level on which their arguments are meant to be relevant: One possibility is to argue on the policy level where one can try to convince the legislator to take a certain course. Another possibility is to argue on the legal or, more precisely, constitutional level in order to determine whether or not it is constitutionally prohibited to penalize a

certain behavior. Put simply, one must distinguish between what a legislator *should* not do and what it *cannot* (legally) do. The flaw of the *Rechtsgutslehre* which caused its rejection by the German Constitutional Court was that its proponents never cared to clarify the level of argument and even less to make their doctrine work in the context of constitutional analysis. This made it easy for the Senate's majority to dismiss the *Rechtsgutslehre* as an outlandish doctrine which claims to restrict the powers of a democratic legislature without making a constitutional argument at all. It is indeed difficult to see why it should be unconstitutional to penalize mere immoral behavior if a majority in parliament wants this (Appel 1998, pp. 200-201; Appel 1999, p. 302; this was left undecided by BVerfGE 120, 224, 248; contra Hörnle 2005, p. 52 *et seq.*, 470). In fact, the Court resorted to "powerful social convictions of blameworthiness" (BVerfGE 120, 224, 248-249) to justify the punishment for incest. It is well known that a – fortunately not very large – number of provisions in the German Criminal Code cannot be classified otherwise than as crimes against morality (e.g. sections 130, 166, 167, 168, 173, 183, 183a StGB [German criminal Code]; see Hörnle 2005, p. 209 *et seq.*) although they are usually disguised as "crimes against the public peace" (Hörnle 2005, p. 90 *et seq.*; Frisch 2003, pp. 217-218; compare BVerfGE 124, 300, 334 *et seq.* on section 130 para. 4 StGB and art. 5 GG [Basic Law]). This is simply a reversal of cause and effect: Public peace is certainly endangered if a certain type of behavior causes public outrage because it is viewed as shockingly immoral and offensive.

Hence, many familiar assumptions made by criminal theorists are constitutionally unfounded, e.g. that the legislator is legally bound by substantive concepts of crime or doctrinal claims that only personal, individual but not collective or abstract legal goods may be protected by means of the criminal law or that only harm to legal goods justifies punishment but not mere endangerment or abstract risks (Appel 1998, p. 198 *et seq.*, 387 *et seq.*; Appel 1999, p. 301 *et seq.*, 309 *et seq.*; Gärditz 2010, p. 351 *et seq.*; also Amelung 2003, pp. 163-164). In a democracy, it is the prerogative of the elected legislature – and not of non-elected academics – to determine which public interests deserve the protection of the criminal law. Criminal law theories and thinking about the *ultima ratio* principle must take into account that democratic legislators have the license to err within the boundaries of the Constitution (accord Gärditz 2010, p. 353). The traditional version of the *Rechtsgutslehre* chose to ignore this part of constitutional reality and was in turn ignored by an actor who administers this reality. This should not have surprised anyone.

It would be a worth a sociological inquiry how the *Rechtsgutslehre* could stray so far from the path of constitutional relevance. One major reason seems to be that many criminal theorists in Germany share a deeply rooted distrust of the legislator. This distrust can be traced back to pre-constitutional times (Appel 1999, p. 286 *et seq.*; Amelung 2003, pp. 163-164) and was kept alive by the unavoidable blunders committed by the post-war legislator. Nevertheless, it would be a strange view to see in the democratic legislator the prime threat to individual liberties as if democracy – which is often hard won – were not the best form of government invented so far to *preserve* those liberties (cf. Gärditz 2010, p. 342 *et seq.* with further references).

So what should criminal law theorists do? My call is one for a double resurgence of theory: on the one hand, on the level of "pure theory", and, on the other hand, within the positive legal framework of a specific legal order. Academic lawyers should strive for clear and sound theories but must not forget the aspect of their implementation. They should raise their voice in political debates about criminal law and try to convince the law-maker by the force of their reasons. They must be clear and distinguish neatly between "hard" legal arguments like unconstitutionality (accord Sternberg-Lieben 2003, p. 65, 78 *et seq.*) of a criminal law provision or bill, and "soft" policy arguments like undesirability of a certain provision in a liberal state. Thus, criminal lawyers should think more about constitutional doctrine and



try to develop specific standards for criminal laws instead of joining the ritual complaints that constitutional law is too permissive. What they should not do is equally clear: They should not brandish fuzzy concepts like "legal good" and make bold but dubious claims what the legislator can do or is bound (not) to do.

Again, my impression is that the *Rechtsgutslehre* in its current state – which Amelung (2003, p. 160) once called a "jumbled-up mixture of policy arguments without any logical connection" – is not helpful and therefore – as George Fletcher (2010, p. 322) recently advocated – should be abandoned. Theory is badly needed but a better one.

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