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# Is there a Responsibility to Protect By Criminal Law?

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Many modern constitutions contain rules and principles pertaining to criminal procedure and criminal law. The rights of *Habeas Corpus* are the most important and ancient with regard to criminal procedure; the rights which follow from the principle *nulla poena sine lege* with regard to criminal law. One could even say that the very idea of a constitution was generated out of the conflicts about criminal procedure. The experience of arbitrary imprisonment by the Crown was one of the founding moments of the general rule of *Habeas Corpus* which was enshrined in a public and written document.

A closer look to this paradigm case reveals two general features of constitutional norms pertaining to criminal law: (1) The norms have a *negative* meaning; i.e. they prohibit the punishing state to do something (like putting someone under arrest for an indeterminate time or torturing someone to get a confession). Even if they contain duties of the state like bringing a detainee to a judge within a certain time, these duties are only part of a negative right: Nobody shall be arrested without being brought to a judge within 24 hours. (2) The negative meaning and the repulsive function of constitutional norms pertaining to criminal law are directed against the state whose punishing power is somehow presupposed as a fact. But it seems that constitutions do not contain any positive duty of the state to punishment. Some constitutions contain a norm which demands the penalisation of particular kinds of behaviour (like Art. 26 German

Grundgesetz which requires explicitly the punishment of offensive warfare).[1] But these constitutional duties to penalise are not as prominent and central as the negative rights. Nor do they explicitly contain a general duty of the state to criminalise and penalise. With regard to the fact that punishment is one of the most severe violations of human integrity, it is astonishing that constitutions only refer to the modus of punishment but not to its essential justifying reason. Constitutions seem to presuppose the fact of the punishing state as something which is natural and obvious. The historical experience of more than two hundred years of constitutional history seems to demonstrate that citizens have to be protected against a state which exercises a punishing power it already has. The danger came from a state which punishes too much, and not from a state which punishes too little.

If this explanation for the observation that constitutions contain primarily negative rights against the punishing state is correct, one has to realise that it is put into question today. Many people believe that their governments are not tough enough on crime and that the state punishes too little and not too much. Populist movements in Western European countries as well as in the US argue for a "war on crime". Governments and political parties are eager to instrumentalise the fear of crime for their political purposes. As David Garland has observed, the political expression of this fear has become one of the most important features of a culture of control after the end of the welfarist paradigm in criminal justice.[2] The particular situation of "Risk Societies", facing different kinds of risks and dangers originating from new technologies contribute to the general attitude that the state should do more to protect its citizens. Victims of crime have become the "representative character" of middle classes in modern societies who express their emotional solidarity with them and ask the state for being more repressive against the perpetrator.[3] The fear of international terrorism is one of the last steps of this development to make "security" to one of the topic issues of the political agenda.

In the following, I shall deal not so much with the reasons and causes of this paradigm change but primarily with its effects on the constitutional framework of the politics of crime and

[1] For further examples see: Gerhard Robbers, Strafpflichten aus der Verfassung, in: Klaus Lüderssen (Hg.), Aufgeklärte Kriminalpolitik oder Kampf gegen das Böse?, Band 1, Baden-Baden: Nomos-Verlag 1998, pp. 147-155 (148).
[2] David Garland, The Culture of Control. Crime and Social order in Contemporary Society, Chicago 2001.
[3] David Garland.

criminalization. Citizens claim that their rights shall be protected by criminal law and by a stronger criminal law enforcement that the relation between perpetrator and victim is out of balance because the state cares too much about the perpetrator´s constitutional rights in criminal investigation and procedure than the victim´s rights. The protective meaning of the constitution has turned from a shield of the suspect and the convicted perpetrator against the punishing state to a shield of the citizen as a potential or actual victim against the citizen as a criminal. The state comes in as the bearer of a constitutional duty to protect the victim-citizen against the criminal-citizen. This shall be done not only by criminal law and criminal law enforcement but also by preventive police action and other political actions. With the fights against international terrorism and against human rights violations by governments this agenda has recently become a new dynamic. In international public law a "responsibility to protect" (rtp) has been created by which governments are authorised to take preventive actions against severe human rights violations or even to a humanitarian intervention into another state.[4] Of course criminal law and criminal prosecution are only one little part of the rtp which shall be realised by a whole package of measures in a stage-process form prevention to intervention and then to criminal prosecution. But it is guided by the same justificatory logic of protection of citizens by governments, which also guides protective measures taken by national governments against criminal citizens within a nation state. Therefore, when I speak of rtp I always mean this kind of justificatory reasoning which applies to national as well as international criminal law enforcement.

To speak of a paradigm shift could be misleading when it suggests that the rtp was only recently invented and never existed before. That the state has its legitimate ground for its monopoly of violence in the duty to protect citizens against violations of their rights was never doubted seriously (with the exception of anarchism). But in the history of the modern world cases of the abuse of the rtp by governments and the abuse of its powers for the execution of this duty for the repression of people are more present in the collective memory than cases of a violation of this duty itself. There were of course cases where a national government refrained from protecting

[4] http: www.iciss.ca/menu-en.asp.; UN- Resolution of the General Assembly: A/Res/60/1 (chapter 138-139); Eckart Klein (ed.), The Duty to Protect and to Ensure Human Rights, Berlin: Berlin Verlag 2000; Gareth Evans, The Responsibility to Protect. Ending Mass Atrocity Crimes Once and For All, Washington D.C.: Brookings Institution Press, 2008; Christopher Verlage, Responsibility to Protect. Ein neuer Ansatz im Völkerrecht zur Verhinderung von Völkermord, Kriegsverbrechen und Verbrechen gegen die Menschlichkeit, Tübingen: Mohr/Siebeck 2009. See also: Conor Foley, The Thin Blue Line. How Humanitarianism Went to War, London/New York: Verso2008 (pp. 145-170).

groups of people an minorities against violations of their rights For most of the time states and governments were not in need for an authorisation of their measures by an explicit reference to a rtp for at least two reasons. (1) The rtp was at best only an implicit part of a collective value system which was represented by the state, like “national security” or other national interests. (2) In most cases of criminal law legislation the state and the political system were the first to suggest a new legislation which in most of the cases extended criminalisation – and the citizens were at the second place to defend their rights against extended criminalisation. In contrast to this past situation one can observe today that (1) governments explicitly refer to the protection of human rights in order to take criminal law measures against rights violations, and (2) that the citizens themselves raise the claim to protection of their rights at the first place and the governments and legislative bodies are at the second place. On of the first and prominent examples was the claim preserve the punishment of abortion against all attempts to its repeal.

In the following, I shall (1) raise the question about the foundations of the rtp and its possible constitutional foundation. (2) I shall deal with rtp and criminal law. (3) I shall deal with its limits and dangers.

**(1) The foundations of the Rtp**

According to the “Declaration of Human Rights” declared by the Assemblée Nationale at Paris in 1789 the purpose of a political association is the conservation of natural and inviolable human rights (“la conservation des droits naturels et impresciptibles de l`homme”). These rights are liberty, property, security and resistance against oppression (“Ces droits sont la liberté, la proprieté, la sureté, et la résistance à l`oppression.”). The conservation of rights is considered as the general purpose of a political association whereas the right to security is one right among others which shall be protected in particular by the political association.

These brief statements are the result of a long narrative about the justification of political power. As always this narrative of justification consist of a mix of historical experiences and interpretation as well as of raesons and arguments. There is also not one single narrative but different narratives or at least many variations of one single narrative.

(a) “The end of Obedience is Protection”

The historical narrative refers to the conflicts between particular powers which take the law into their own hands and defend themselves against violations of their rights as long as there is no centralised power available as it happened in many parts of Europe during the Middle Ages.[5] The obvious disadvantages of permanent feuds among different groups of society (noble families and their subjects) for agriculture, for commerce and for human flourishing in general led, so it is said, to the mutual waiver of the right to self help or at least to a mutual abandonment of the means of violence. According to this narrative he right to self-help and the means of violence are conveyed to a centralised political power. The risk of being helpless and vulnerable against violent attacks by third parties after relinquishing one´s right to self-help was compensated by the duty of the state to protect its citizens against those attacks. The duty of the citizens to behave peaceful and to obey the law which is given and enforced by the state corresponds to the duty of the community and the state to protect its members and citizens.[6] There is of course a variation of this narrative which tells the story of the neutralisation of the victim of rights violations differently. According to this narrative, there was never a compensation for the relinquishment of the right to self-help and the abandonment of weapons.[7] During the struggles and wars of feuds one powerful group succeeded and subjected its weaker competitors, and it secured its own power and stabilised its authority by taking the law in its own hand. Protecting the subjects against violations of their rights was simply a functional side-effect of the need to stabilise and defend the power. It was not necessary to establish a rtp because the state did punish anyway, and it prosecuted and punished people not because the state wanted to protect its citizens but because the state was eager to protect itself. The primary focus was not on the actual or potential victim of a violation but on the perpetrator who demonstrated a severe lack of loyalty to the state when he committed a crime. His body and, more important, his soul had to be disciplined.[8] The victim also had to be disciplined by learning to keep its emotions quiet. It was individualised and

[5] Peter Blickle, Das alte Europa. Vom Hochmittelalter zur Moderne, München: C.H.Beck 2008, p. 122-128.
[6] This is the narrative of Eberhard Schmidt and Hermann Nohl; see: Wilfried Holz, Justizgewähranspruch des Verbrechensopfers, Berlin: Duncker & Humblot 2007, p. 59-61.
[7] The subject never got a claim-raight against the state to prosecute and punish a perpetrator.
[8] Michel Foucault, Überwachen und Strafen

neutralised because its emotions of humiliation, vengeance and its demand for satisfaction could be dangerous for the state as well, in particular when the victim was able to win solidarity of others. The victim could only look for private satisfaction by litigating against the perpetrator at a civil court for monetary compensation. [9] A constitutionalised criminal law and criminal procedure resulted from a struggle of the citizens with a punishing state that used its monopoly of violence primarily in its own interest.

Both narratives were transformed into a justificatory argument by contractualist doctrines of natural law. According to Hobbes and Locke the right to self-help is part of a natural law which results from two premises: In the state of nature, everybody has a natural right to liberty and a natural duty to preserve his or her won life. As a consequence everybody has a right to do anything what he or she thinks is in his or her own interest and a right to defend him- or herself against any violation of his or her natural right. Of course the people in the state of nature are prudent and reasonable enough that the permanent war which results form natural rights and the duty to preserve oneself can only be overcome by a mutual abandonment of self-help and the mutual recognition of a contract which obliges the perties to keep peace and to recognise the principle of equal freedom. But they are unable to live according to their own rational insight because they have to judge by themselves whether this contract was violated, and they also have to enforce it on their own. In the state of nature everybody is judge and executioner of the law of nature.[10]

It seems to be an obvious consequence to overcome this dilemma by a kind of rational deal. By a mutual abandonment of the right to everything and to confer it to a central power.

Hobbes always insists that the right to preserve one´s own life and body cannot be conferred to anybody. “A covenant not to defend my selfe from force, by force, is always voyd. For no man can transferre, or lay down his Right to save himselfe from Death, Wounds, and Imprisonment.”[11] The reason is that this contradicts the motive and the purpose of the contract to

[9] As an example of this narrative see Klaus Lüderssen, Die Krise des öffentlichen Strafanspruchs, in: Klaus Lüderssen, Abschaffen des Strafens?, Frankfurt am Main: Suhrkamp1995, pp. 22-73 (p. 42).
[10] Thomas Hobbes, Leviathan, (1651), ed. by Crawford B. Macpherson, Harmondsworth: Penguin 1985, ch. 14 (p. 199).
[11] Ibid.

get security, and because it has no advantage for him (as the gain of security is) and therefore cannot be voluntary.[12] As a consequence the subject keeps its liberty "in all those things, the right whereof cannot by Covenant be transferred", and the most prominent example is that a covenant not to defend a man´s own body, is void.[13] The right to self-defence, killing someone who assaults him (fears present death) cannot be given up as long as there is not other kind of effective protection of life. "If he wound him to death, this is no Crime; because no man is supposed at the making of the Common-wealth, to have abandoned the defence of his life, or limbes, where the Law cannot arrive time enough to his assistance."[14] In the chapter on "Punishments and Rewards"[15], Hobbes argues that the Sovereign´s Right to Punish cannot be transferred to him by the subjects. The subject cannot give consent to his own punishment. The subject is obliged by the covenant to assist the sovereign in the punishing of another, but this does not entail the transfer of a right to punish from the subject to the sovereign. Therefore, Hobbes concludes the Right to punish "is not grounded on any concession, or gift of the Subjects."[16] The subjects do not convey their right to self-help to the central political power in exchange for protection by the state. The purpose of the mutual social contract, protection of life and liberty, shall be reached in a different way. The parties to the social contract mutually agree to abandon their fundamental natural right, "the right to every thing, and to do whatsoever he thought necessary to his own preservation." But there is one single party that is left over and is held as being exempt from the mutual agreement. He is the one and only who keeps his natural right and continues to "subdue, to kill, and to hurt", i.e. to preserve himself by any means available as everybody did in the state of nature. The right to punish is a leftover of the mutual abandonment of the right to everything. The sovereign does not *get* a right to punish which he did not have before by a transfer or by an empowerment. The sovereign keeps his natural right to everything and his means of violence become even stronger because everybody else has renounced on his weapons. This is, according to Hobbes the foundation of the right to punish: "For the subjects did not give the Soveraign that right, but oneley in laying down theirs, strengthned him to use his own, as he should think fit."[17]

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[12] „As first a man cannot lay down the right of resisting them, that assault him by force, to take away his life; because he cannot be understood to ayme thereby, at any Good to himselfe." (ibid., ch. 14 (p. 192).
[13] Ibid. ch. 21 (p. 268).
[14] Ibid., Ch. 27 (p. 343)
[15] Ibid., ch. 28 (p.353-363).
[16] Ibid. (p. 354)
[17] Ibid. (p. 354).

There is however an important difference between the natural right to everything and the right to punish. It is mentioned by Hobbes only *en passant*. The sovereign shall exercise his right to everything not (only) for the preservation of himself but (at least concomitant) "for the preservation of them all."[18] The natural right to everything turns into a right to punishment when the sovereign exercises it for the preservation of his subjects, and when he exercises it *equally* to *all*. Then subduing, killing and hurting – the exemplary actions necessary for self-preservation in the state of nature– turn into public punishment, which is according to Hobbes´ definition: "an Evill inflicted by publique Authority, on him that hath done, or omitted that which is Judged by the same Authority to be a Transgression of the Law; to the end that the will of men may thereby the better be disposed to obedience."[19] As a consequence the sovereign is bound to the positive law which has to be enacted before the crime took place, and which has to be a general law that has to be applied and enforced equally.

Although Hobbes´ justificatory narrative of the genesis of the right to punishment is historically more accurate it leaves unclear what exactly the normative reason is. If it is not a transfer of a right or an empowerment it can only be a permission. The driving force behind it is fear. The fear of loosing one´s own life in the state of nature is greater than the fear of being punished by the sovereign.

In his "Second Treatise of Government" John Locke argues explicitly with a right to punish. In the state of nature human beings own two different kinds of natural rights or powers[20]: The first is similar to Hobbes´s right to everything: "to do what soever he thinks fit for the preservation of himself and others within the Law of Nature."[21] The second one "is the *power to punish the Crimes* committed against that Law."[22] This right (and power) is not identical with a right to self-help, because it does not allow (only) self-defence against a violation of his or her own right but (also) a punishment because of a transgression of the law of nature without any reference to the

[18] Ibid., (p. 354).
[19] Ibid., (p.353).
[20] Locke speaks of a "right" to punish in § 8 (p. 272) and of a "power" in §§ 87 (p. 323), 128 (p. 352) and 130 (p. 353).
[21] John Locke, The Second Treatise of Government (1690), in: John Locke, Two Treatises of Government, ed. by Peter Laslett, Cambridge: Cambridge UP 1991, pp. 267-428, § 128 (p.352).
[22] Ibid.

individual who has been violated. In the state of nature everybody has the right and the power to punish anybody who transgressed the law. This kind of punishment may not be a simple manifestation of emotions of humiliation and of being offended, it may not be an act of revenge in search of satisfaction for a loss. Punishment in the state of nature has to realise a general purpose that is independent of an individual intention; the purpose to enforce the law of nature by deterrence: it "may bring such evil on any one who has transgressed that Law, as may make him repent the doing of it, and thereby deter him, and by his Example others from doing the like mischief."[23] This general purpose is the normative reason for a right (and power) to punishment. The only difference between the right to punish in the state of nature and in the political society is that in the state of nature the right to punish can be executed by everybody and not by the political community and a judge. Everybody is the Judge and the Executioner of the Law of Nature.[24] According to Locke this is the reason why the state of nature is insecure and dangerous. Everybody´s right to judge and execute any violation of the law of nature turns into the tragedy of civil war where "the enjoyment of the property he has in this state is very unsafe, very unsecure" so that he is willing to quit this condition which "however free, is full of fears and continual dangers."[25] The good intention to protect the law of nature fails because of human nature. Biased by their interests and ignorant to the content of the law, thy are unable to determine its meaning in order to apply it to particular cases, being partial to themselves and driven by passion and revenge with regard to their won case or being unconcerned and negligent with regard to cases of others they are unable to judge impartially, lacking of power to support and to execute the sentence they are unable to resist to injustices of the stronger and they fear the danger of losing their life. "The inconveniences, that they are therein exposed to, by the irregular and uncertain exercise of the Power every Man has of punishing the transgressions of others, make them take Sanctuary under the establish`d Laws of Government, and therein seek *the preservation of their Property*."[26] Their property is insecure and unsafe not only because of everybody's right to everything (the primary cause according to Hobbes), but also (and primarily) because of everybody's right and power to be judge and executioner of the law of nature. As a consequence the state of nature can only be overcome when the people abandon both kinds of rights, the right

[23] Ibid., § 8 (p. 272).
[24] Ibid., §§ 87 (p. 324) and 125 (p. 351).
[25] Ibid., § 123 (p. 350).
[26] Ibid., § 127 (p. 352).

to everything as well as the right to punish: "(…) the *Power* of *punishing* he wholly gives up (…)."[27]

Again the question arises how the public authority of the political society gets its right to punish, how the mutual abandonment of everybody's right allows for a public right to punish. Locke argues similar to Hobbes when he says that the first step consists in a mutual abandonment of a natural right or power. But the next step is different. The parties to the social contract give their power to punish up to the benefit of the community or the political body: "there, and there only is Political Society, where every one of the Members hath quitted this natural Power (to punish – K.G.), resign`d it up into the hands of the Community in all cases that exclude him not from appealing for Protection to the Law established by it."[28] The natural power to punish is given up with an intention or with a purpose in the mind of everybody: "to be exercised by such alone as shall be appointed to it amongst them; and by such Rules as the Community, or those authorised by them to that purpose, shall agree on."[29] This could be interpreted as a (negative) abandonment of the right to punish an *uno acto* as a kind of transfer (resign it up into the hands) to the appointed judges. Again the general end which is pursued by everybody is protection of property (life, body and liberty), and this aim can only be reached negatively by mutual abandonment of the power to punish and positively by establishing a legislation and by appointing judges who exercise the right to punish according to a predetermined positive law. Locke`s focus on the power to punish reveals a paradox: The overall end of protection of property is endangered by the natural power to punish; the first step to reach the end of protection is the abandonment (and not the strengthening) of the power to punish. Protection is protection from everybody's power to punish according to his or her interpretation of the law of nature. Protection granted by the Political Society is only possible if the power to punish is concentrated into one body and disciplined by an independent political legislation.

Hobbes and Locke do only speak of a right to punish but not of a *duty* or *responsibility* to protect the subjects and citizens by punishing perpetrators according to the pre-established and pre-determined criminal aw. Again it seems that the negative and disciplinary aspect of the power to punish was more important to them than the positive aspect. But one can find at least some

[27] Ibid., § 130 (p. 353).
[28] Ibid., § 87 (p. 324).
[29] Ibid., § 127 (p. 352).

implicit arguments which look like a duty to protect. There is, of course, the overall end of Protection which is the most important reason for everybody to join the social contract. Protection is the *raison d`etre* of Hobbes` Leviathan and of Locke´s Political Society. If the state is unable to protect its subjects they exercise their right to protect themselves against any violation. But this argument does not state a duty of the state to protect its citizens. It only describes its *raison d`etre*, a constitutive rule of the state and not a regulative rule. It does also not contain a duty to protect the subjects by punishment according to criminal law. The end of Protection could be realised by different kinds of measures, not primarily by punishment which only reacts to violations of rights which already happened (and only with a vague expectation that it would deter others in the future to commit a similar crime). An implicit argument for a duty to protect could be found in Hobbes´ remark that the Sovereign shall use the natural right to everything that he alone kept from the previous state of nature *for the preservation of all*. i.e. for each of its subjects equally. And Locke´s statement that everybody resigns his power to punish up into the hands of the appointed judges could mean that the transfer of the power as well as the appointment of the judges entails also a duty (of the state) to punish any violation of the positive law which contains punishment as a sanction. One could even say that Locke´s concessive statement that the abandonment of the power to punish and the appointment of judges were valid only "in all cases that exclude him not from appealing for Protection to the Law established by it"[30] could allow for a claim-right of the citizen to protection of the law by punishment of the perpetrator which has a duty of the state to punish as its correlate.[31] But there is no extensive argument about this possible correlation. The reason could be that a correlation of a claim-right and a duty would be too strong because it would bring the citizen into a position where he could mobilize the punishing state in his own interest. And this is exactly what Locke considers as the perfect state of nature. Therefore Locke is cautions enough to speak of a *right to appeal* only. The right to appeal is not directed to the state, but to the pre-established and pre-determined Law, it is a right to litigate and to ask for the protection of the law. Punishment would be a consequence of the application of the law to a particular case by a judge. So there is only a weaker correlation between a right to appeal for protection according to the law and a duty to protect through application and enforcement of the law. It seems that this correlation is overlapped by the more general correlation between the abandonment of rights in the state of nature, be it the right to

[30] Ibid., § 87 (p. 324)
[31] For the correlation of a claim-right and a duty see: Hohfeld,

everything or the right to punish, and the general end that consists in protection: “The end of obedience is Protection.”[32]

If one compares Hobbes` and Locke’s account of the genesis of the right to punish it becomes obvious why it is not explicitly stated in a constitution. A constitution only begins when a public power to punish has already been recognised by the citizens. The mutual recognition of such a power is a pre-constitutional moment and a necessary prerequisite of any constitution, not a part of it. According to Locke, the normative as well as factual generative moment of any constitution happens when everybody is willing to give up his right to punish and to appoint judges who punish according to established laws to which the citizens agree: “And in this we have the original *right and rise* of both *the Legislative and Executive Power*, as well as of Governments and Societies themselves.”[33] A Political Society is constituted by the willingness of the people to live peaceful, to abandon the right to self-help, and to live according to those laws to which they agree, i.e. to laws which originate from the exercise of political autonomy. A constitution is resulting from these fundamental commitments.

(b) Protection against violation of the law

The conflicts which result from everybody's right to preserve him- and herself in the state of nature and of everybody's right to punish serve as a negative backround of the kind of protection which shall be exercised by the political society that is born of the social contract. The state of nature is characterised by insecurity because of the unvertainty and indeterminacy of the Law of Nautre, because of ignorance and unconcernedness, because of passios of revenge, and because of the unequal distribution of power among the individuals. The Political Society and the sovereign shall have the opposite proterties: Protection shall be granted according to pre-established and determinate laws which are general and equal, which shall not be applied retroactively, which shall be administered and applied by impartial and neutral judges, and which shall be enforced equally and independent from individual power-elations by the state who has a monopoly of violence. The state is not allowed to exercise its right to punish arbitrarily but in a

[32] Ch. 21 (p. 272)
[33] Locke, ibid., § 127 (p. 352) (italics by L).

disciplined manner so that the citizens get what they aimed for when they entered into the social contract: Equal protection.

This scenario still pertains to the risks and dangers which could come from a state abusing its right and power to punish which he got or kept by the social contract. From the subject´s and citizen´s point of view the focus shifts from the overall end of protection to the kind of protection which he or she could get in a political society. When it has to become a protection by and according to the law (because this marks the difference to uncertain, indeterminate and unequal protection self-help and everybody's right to punish in the state of nature) the question which kind of protection a citizen gets depends on the law. It does of course also depend on the willingness and power of the state to apply and to enforce the law, but the primary ground of protection is the law itself. It is the law which protects in the first place, and it shall protect equally, calculable and effectively in a twofold manner. It shall protect all those citizens who demand protection of the law against others who attempt to violate the law (and their rights as far as they are protected by the law). But it shall also protect those citizens who are uncertain whether their intentions and actions turn out to be a violation of the rights of others or whether they are legally permissible by offering them a determinate rule according to which they could calculate the risk of being punished. Whether or not a right, a good, an interest is protected depends on a law and its content. But who determines the content, who decides about the scope, extent and range of the protection which is exercised by the law? What happens when the law does not protect enough, when the scope of protection is too small, when there is a demand for protection to the legislator to extend the scope of protection, when the citizen is excluded from appealing for protection of the law because there is no law?

It seems that these questions are left unanswered by the social contract theorists because they could not imagine that basic rights and needs were not protected by the Sovereign and by the Political society. The protection of life, liberty, and estate, the protection of “property” in the Locekean sense was obviously the one and only reason to enter into the social contract at all. If the sovereign turns out to be unable to preserve them against violations of others it looses its reason of existence and everybody re-enters into the state of nature where he preserves his rights by himself and where he punishes rights violations of others. But this is true only in a general sense and for clear and obvious violations of these basic rights. Whether or not a particular case

of damage to body or estate is a case of protection, whether or not a certain action is a kind of damage that calls for protection by the law at all could be controversial. And even if a judge decided that a certain action does not fall under a kind of damage calling for protection by the law it could remain controversial whether it should be protected by a law. Here a responsibility or duty to protect comes in.

One can only draw indirect conclusions out of the formal characteristics of the law which are given by the social contract theorists. Life liberty and property shall be protected by a law which is determined and calculable, i.e. which is precise enough to circumscribe the concrete ways of an unlawful attack of determinate kinds. This excludes any kind of an all-inclusive protection against any kind of damage (with the exception of life) to liberty and property. More important are the consequences of the feature of equality. The requirement of equal protection does not only mean that the law shall be administered and applied equally. It does also mean that the law has to determine the scope, extent and range of protection of life, liberty and property equally. There shall be no privileges for some and no discriminations for others. If I demand protection of a certain kind of property against a certain kind of attack I have to accept an equal protection for all my fellow citizens, I have to obey to a law which grants the same protection which I am asking for everybody else. As a consequence I have to refrain from any violation of the law which I demand for my protection. Any protection I demand for my life, liberty and property has to be a general and reciprocal one. Locke is more explicit on this point when he says that the power to punish shall be exercised only "by such Rules as the Community, or those authorised by them to that purpose, *shall agree on*."[34] Even if this requirement does not entail any criterion about the question whether or not a kind of protection by the law in a certain type of cases shall be established by legislation it offers a procedural criterion for the evaluation oaf any demand for protection by a law which is raised by a citizen. It has to be a protection by a law that is general and reciprocal and not a protection that privileges some and discriminates others.

This requirement becomes more important in the following debates about the appropriateness of the social contract theory. It shifts the focus from the protection of the individual and his and her rights against a violation by others to the protection of the law itself and to the protection of the legislation and of the general will which is expressed by the law against a violation. The

[34] Locke, ibid., § 127 (p. 352) (italics K.G.).

protection of the individual and his or her rights is internalized by the general will of equal and reciprocal protection of all citizens by a general law. If a citizen demands a law for his or her protection he or she has to conceive him- or herself as a co-legislator of a mutual agreement or consent, as a participant in the realisation of the general will. My rights can only be violated insofar as they are part of the general will; a violation of my right is always *uno acto* a violation of the general will which recognizes my right as an equal right of each citizen. An unlawful violation of the rights of a person is a kind of unjustified domination, a violation of the right to self-determination as it is the case when a person is dominated by an unjustified political power which imposes its arbitrary will on him or her. Consequently, the citizens justified belief in the validity of the law as a manifestation of the general will is damaged by the crime, because the perpetrator imposes his particular law on others by violating the general law.[35]

The general will is often identified as the reasonable. A law is reasonable when its justifying reasons are mutually acceptable and cannot be rejected by anybody. Consequently, a perpetrator who violates a reasonably justified law contradicts himself. If I steal the property of my fellow-citizen with the purpose to keep it for myself I cannot reasonably claim at the same time that the law shall be respected by everybody and that it shall protect me and my property. By destroying the life, liberty and property of others the perpetrator destroys his life, liberty and property. By interpreting the violation of the law which manifests the general will as a self-contradiction, the perpetrator is treated as a reasonable person too. His intention and his purpose are considered as a reasonable claim to validity, although it is self-contradictory and therefore false. He excludes himself from co-legislation and from the general will – and *vice versa* he does not only attack me and my private rights but also me as a co-legislator and a reasonable person.[36] Treating the perpetrator as a reasonable person also includes a protection against arbitrariness in investigation, prosecution, litigation and punishment. The suspect and the convicted person shall not be treated as a mere object of the power to punish. Equal protection of the citizens, who are considered as reasonable persons, and equal protection of suspects and perpetrators, who are considered as reasonable persons too, go hand in hand.

[35] For this kind of „intellectual damage“ see: Karl Theodor Welcker, Letzte Gründe von Recht, Staat und Strafe (1813), Aalen: Scientia Verlag, 1964, p. 249-253.
[36] Rousseau, Kant, Hegel.

Thus, the social contract becomes a device of representation, because the reason for establishing a general law of equal protection already comes from the reasonable itself. Equal protection by a general law becomes a part of the project of the realisation of reason, the enhancement of equal liberty, i.e. of autonomy.

(c) Protection of fundamental rights against third parties

According to this narrative, a duty to protect the rights of citizens against violations committed by others through criminal law and punishment is implicitly included in the normative argument that requires the state (or the Sovereign, or the Political Society) to exercise its original right to everything and its right to punish by protecting the equal rights of the citizens equally according to a general law. The general law manifests the agreement and the reasonable will of the citizens. It seems that within this narrative nobody could imagine that a gap could open itself between equal protection by the general law and individual rights which suffer damages against which no protection or only insufficient protection was available.

Why and how did the right to punish become a duty? There are several reasons and causes which could explain and justify this shift.

(a) It is a common historical experience that it makes an important difference whether one has an equal right to life, liberty and property and whether one also lives under social, economic and cultural conditions in society which determine the scope and extent of the exercise of these rights. These factual conditions determine the value which a right has for its owner. The dialectic between equal rights ownership and equal factual conditions of exercising rights changed the general constitutional framework. The protection of Rights against state interventions goes alongside with a protection of rights through state intervention. Rights are still directed to the state, but not only with the function of repulse, but also with the function of rendering a service by the state to the owner of a right. This is the paradigm of the interventionist and the welfare state.
(b) As a consequence of new technological developments new kinds of risks and dangers for life, liberty and property emerge. Most important are dangers for life and health. These

risks and dangers are often not as clear and imminent as an attack of one person against another. Evaluations of risks may differ among those who benefit from taking a risk and those who might suffer from it realisation. Some risks are more abstract and some are more concrete. Whether and how a risk turns into damage depends on the degree of probability. It is therefore difficult to get sufficient protection against these risks. A simple preservation of life and health by a comprehensive legal prohibition of risky behaviour would prevent society from the benefits of risky technologies. It would also prohibit citizens from exercising their right to liberty or property when a risky use of freedom and property was totally prohibited. As a consequence, all those risks which are beneficial for society are tamed by procedural norms and by standards of conduct, by rules of caution and in some cases by a duty to take insurance. In some cases a legal prohibition of behaviour still in the approach of a manifest damage is enacted by legislation. Some of these rules and norms can be supported by criminal law (e.g. German environment law). By this development the activist state which intervenes into society in order to protect becomes more and more customary.

(c) It s a global historical experience of the 20th century that equal protection of rights by a general law can be explicitly rejected and denied to certain groups and minorities. They are explicitly or implicitly excluded from co-legislation, the general law becomes discriminatory or it turns out to have discriminatory effects by application and enforcement. Discrimination and exclusion of German Jews is one of the most terrible cases. The rights of discriminated minorities are not only violated by the state alone but also by others, by former fellow-citizens. Sometimes the state tolerates, condones, encourages or instigates rights violations of minorities committed by other citizens.

(d) In particular the last experience made it obvious that there can be a gap between the general law protecting citizens against violations of their rights and dangers to or violations of these rights against which the law does not protect them. This changes the whole structure of the constitutional framework: Rights can be violated by the state as well as by a private person, the state (with its three powers of legislation, justice and government) can violate rights by intervention as well as by non-intervention. The mutual abandonment of the right to punish in favour of the Political Society to protect the rights of the citizens was considered as a pre-constitutional moment which is a condition of any constitution. Now it becomes a part of the constitution itself. It does not any longer go

without saying that state power is exercised for the protection of all citizens, and that the primary function of a constitution (and basic rights enshrined in a constitution) is to protect citizens against possible and probable abuses of this power. Rights require a responsibility or a duty to protect against violations by others which is directed to the state. Where there is no constitutional duty to protect, where the legislation or the judiciary or the government of a state on a certain territory discriminate, suppress or start to destroy a minority's equal rights of life, health and liberty, human rights can entail a responsibility to protect which is demanded of foreign states that they shall intervene in order to stop human rights violations.[37] The rtp is shifted from the sovereign state to the international community. Part of this rtp is criminal law, as the long history from the Nuremberg Trial against the Nazi-German government to the *ad hoc-tribunals* of former Yugoslavia and Ruanda and, finally, the Statute of Rome and the erection of the International Criminal Court demonstrates.

### 2./3. The scope and the limits of the rtp

The history that I have reconstructed above demonstrates the not only the factual stages of the development of a rtp, but also the justificatory narrative which contains and exemplifies the normative reasons for adopting a rtp. Nevertheless one has to keep in mind its possible risks and dangers which are also part of the constitutional paradigm change mentioned above. If the rtp is no longer a constitutive and founding rule of the constitutional state but becomes a regulative rule available to the state to justify its actions and measurements, it is obvious that the rtp can be abused quite easily. In particular with regard to criminal law, a rtp could turn out as a tool for the protection of one group of citizens at the expense of another group whose behaviour becomes criminalized and punished.

[37] For an interpretation of human rights as norms of empowerment for humanitarian interventions see Joseph Raz, Human Rights Without Foundations (homepage Joseph Raz).

The German Constitutional Court developed a rtp in 1975 in a decision about criminal law-legislation on abortion.[38] It provoked a huge discussion whether a rtp can be derived from the constitution, about its nature, scope and limit, and about its relation to criminal law.[39]

The following requirements are important[40]:

(a) There has to be a serious actual or potential violation of a constitutional individual right by a third (private) party. As a consequence, the victim has to be in a situation where it is arbitrarily dominated by someone else and left at his mercy and in need for help. The use of violence by self-help is only permitted in cases of self-defence.

(b) It has to be a violation of a constitutional individual right which serves the interests of the actual or potential victim. Most prominent are the rights to life and health (Art 2 sc. 1 German GG). The important question here is, whether the objective content of the right ("objektivrechtlicher Gehalt der Grundrechtsnorm") only is at stake or whether it allows also for an individual right ("subjective right") of the right-owner. In the latter case, the legislation was not only required to protect the goods which fall under the objective Content of an individual right, but also individual interests of the rights-owner. Then the rights-owner could have a claim-right to the legislation to enact a law which protects him.[41]

(c) If an rtp can be derived from a constitutional individual right the next question is by which means it can be fulfilled, by which means the protection against violations of others can be ensured. Criminal law shall not be the one and only tool available. Here it becomes important to take into account those constitutional rights which could be violated by the enforcement of the rtp for a certain right. The legislator has a position of pre-eminence to evaluate the facts and to choose among several means to reach the end of ensuring and

[38] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 39, 1, 46seq.
[39] See as most prominent examples: Georg Hermes, Das Grundrecht auf Schutz von Leben und Gesundheit. Schutzpflicht und Schutzanspruch aus Art. 2 Abs. 2 Satz 1 GG, Heidelberg: C.F.Müller, 1987; Otto Lagodny, Strafrecht vor den Schranken der Grundrechte, Die Ermächtigung zum strafrechtlichen Vorwurf im Lichte der Grundrechtsdogmatik dargestellt am Beispiel der Vorfeldkriminalisierung, Tübingen: Mohr/Siebeck 1996, pp. 254-274; Ivo Appel, Verfassung und Strafe. Zu den verfassungsrechtlichen Grenzen staatlichen Strafens, Berlin: Duncker & Humblot, 1998, pp. 62-72; Karin Graßhof, The Duty to Protect and to Ensure Human Rights Under the Basic Law of the Federal Republic of Germany, in: Eckart Klein (ed.), The Duty to Protect and to Ensure Human Rights, Berlin: Arno Spitz, 2000, pp. 33-52; Wilfried Holz, Justizgewähranspruch des Verbrechensopfers, Berlin: Duncker & Humblot, 2007, pp. 52-121.
[40] Here I refer to: BVerfGE 39, 1 46seq., Goerg Hermes (see above Fn. 38) and Otto Lagodny (see above Fn. 38).
[41] Wilfried Holz, (above, fn. 38), p.94-96.

preserving a right. At first the legislator has to decide if a prohibitive norm is necessary or if alternative kinds of norms are able to reach the same end of protection (e.g. a norm which allows the risky behaviour under certain procedural or restrictive conditions). If a prohibitive norm is the only alternative, then the question is by which kinds of sanctions the prohibition can be enforced. Criminal law would be the sharpest weapon which would intervene most intensively into the rights of others. Weaker alternative means which are equally effective have to be considered, e.g. by civil law (tort law) or administrative law. Preventive measurements have priority over repressive; criminal law shall be *ultima ratio* only. Criminal law is only allowed if the particular purpose and justifying reason for a *criminal* sanction is necessary and the only alternative. It is of course unclear what kind of function and purpose criminal law serves. It could be the expressive function of public censure as well as general or individual prevention or retribution. To sum up: Only severe attacts to basic and highly important individual rights could make it necessary to protect these rights by criminal law: "The elementary value of human life requires criminal law punishment for its destruction."[42]

(d) Of course a realisation of the rtp by criminal law then has to respect all the protective rules and rights of the suspect, the defendant and the convicted person.

This sketchy outline of a rtp by criminal law makes obvious that it always hat to take into account the rights of others on all stages from the foundation of a rtp pertaining to a certain individual right up to the choice of criminal law as the only alternative.

Furthermore, a doctrine of rtp by criminal law has to consider two further requirements:

(a) An rtp has to be protected against its occupation by some rights owners to mobilise that state for a protection of their interests against others.
(b) There may be no zero-sum game between the rights of the one and the rights of the other. A rtp for one right may not destroy other rights. (Dangerous developments in the German Aviation Security Act, and in the ticking bomb-scenarios of torture-cases).

[42] BVerfGE 39, p. 1 seq.(engl. translation), p. 83.

(c) The state has to be prohibited from instrumentalising the rtp for his own interests. The rtp can only be realised by a general law which takes the rights of all citizens who shall be affected by the law into account.

(d) The last requirement is most important on the international level. It may not serve as an immediate empowerment-norm for an intervention of one stat into another. A general law is required as a pre-condition.