

Univ. Prof. Dr. Otto Lagodny, Salzburg

Basic Rights and Substantive Criminal Law: the Examples of Incest and of Islamic Banking¹

Today, Basic Rights have gained their decisive role in the field of criminal law and criminal procedure on different layers and levels: As far as the law-making-process is concerned, the questions are focussed on the legislator: Under what conditions is **creating substantive criminal law** in accordance with the requirements of the national constitution (like the German Basic Law) or an international convention (like the European Convention on Human Rights)? With regard to the **application of the law**, one may ask: To what extent may the judge, the magistrate, the defence council etc. take such constitutional guarantees into account when interpreting or applying the law: *May* he or even *must* he apply them?

Both questions (creating and applying) can be identified as well with regard to **procedural criminal law**: Is a law constitutional which allows to search the hard-disk of either a suspect or anyone for criminal proceedings? Is it constitutional – especially under the presumption of innocence - or rather archaic to use hand-cuffs at any rate and for every crime or petty offence?

The problems are multiplied when it comes to problems of transnational application of different laws: Just to give an example: May state A extradite someone to state B when the underlying facts are not even “not punishable” in state A but might *never* be made punishable acts in state A – due to constitutional reasons of that very state.

In my presentation, I will focus on two examples which illustrate the problem of creating substantive criminal law. The first one will be the question of incest (infra B). I will shortly discuss a case which recently was before the German Federal Constitutional Court according to which punishing incest is not contrary to the Basic Law. That case is actually pending in Strasburg before the European Court of Human Rights. The second

¹ Paper prepared for the Conference: „Constitutionalism and the Criminal Law”, Faculty of Law, University of Toronto / Buchmann School of Law, Tel Aviv University December 2008 / September 2009#.

problem is that of usury and the principles of Islamic banking (infra C): The charging of interests for the loan of money without a permission of the state is a crime as such in Turkey (art. 241 of the Criminal Code). It is not necessary to charge excessive interests. In central European countries like Germany or Austria as well as in – e.g. - the United States, the crime of usury requires essentially that the interests are excessive. The difference between both concepts may become decisive when it comes to extradition or other severe forms of international cooperation with regard to double criminality.

Before turning to these examples, I will summarize the way of testing constitutionality (infra A)

A) General: Testing the constitutionality of norms (of criminal law)²

In 1994, the German Federal Constitutional Court (FCC) gave a landmark decision on the punishability of purchasing minor quantities of cannabis for personal consumption. The court held that punishing such special cases would be unproportional unless there were procedural solutions for dropping such cases³. The decision was in due time to foster the ongoing discussion in Germany on the relation between substantive criminal law and constitutional law, especially basic-rights-guarantees. The background of the disputes is the development in so-called „modern“ criminal-law-making to respond to new dangers for society (i. e.: pollution of the environment; drugs, so-called „organized crime“, etc.) by expanding criminal law in two directions: Criminalization starts at an earlier stage of crime, i. e.: not only the act of actually violating or at least endangering an interest or value but already the preparation of such act. This means an extension of criminal law on the time-level. Secondly, the legislator may extend crime on a level of substance. This is, e. g., the case if he criminalizes conduct which manifests only a danger *in abstractu* not only *in concretu*: i. e. not the concrete use of dangerous goods but the purchase or even the mere possession thereof; a more „classical“ example of

² The following part is taken from: Lagodny, Otto, The Case of Substantive Criminal Law before the Bars of Constitutional Law – An Overview from the Perspective of the German Legal Order, European Journal of Crime, Criminal Law and Criminal Justice, 1999 (7), 277 – 288. There have not been decisive changes since that time.

³ BVerfGE 90, 145 (= official collection of decisions of the Federal Constitutional Court: volume, page).

this approach is punishing drunk driving as such without the requirement of a concrete danger. The main feature of this enlargement of criminal law in substance is that it is no longer the individual who has to evaluate his or her conduct and the possible consequences thereof, it rather is the legislator who decides in a general way. This curtails to a certain extent the individual's law-finding-process which is based on individual responsibility⁴. The consequence thereof might be that the threshold for legitimation of such norms must be raised because the *ratio essendi* of criminal law exactly is to be found in the misuse or non-use of such a law-finding-process. In such a situation, it seems understandable that arguments in criminal law grasp for reinforcement by constitutional law.

This article is meant to inform the non-German reader - given limited space: in a condensed form - about consequences which can be drawn on the basis of the practice of the Federal Constitutional Court and supporting doctrine. The analysis follows a pattern well recognised in German constitutional practice and doctrine for checking the constitutionality of a given state's act:

- 1 • Identification of the state's act(ion);
- 2 • Identification of the Basic Right(s) encroached upon by this act(ion);
- 3 • Objective⁵ or purpose of the state's act(ion);
- 4 • Effectiveness or suitability⁶ of the state's act(ion) with regard to this purpose;
- 5 • Necessity (i. e.: is there a milder means which is effective to the same extent as the state's act[ion]);
- 6 • Proportionality of the state's act(ion).

This pattern is meant to answer the question: Is a given legal norm unconstitutional in the very strict sense, i. e. is it valid or not. A different question is to what extent basic rights have a kind of guideline-effect for the legislator. If there is such an effect, it is, of

⁴ See G. Heine, *Die strafrechtliche Verantwortlichkeit von Unternehmen* (Baden-Baden 1995), pp. 27 and subs.

⁵ As to this translation of the notion of "Zweck" see Press Communique of the Federal Constitutional Court (infra B I).

⁶ As to this translation of the notion of "Erforderlichkeit" see Press Communique of the Federal Constitutional Court (infra B I).

course, a valid effect but its disregard does not have the consequence of unconstitutionality. It rather might influence the law-making-process as such. We will see that a lot of questions remain only in the sphere of such constitutional „soft-law“⁷.

I) Step 1 (State's Action) and Step 2 (Basic right's scope)

Step 1 shows that the main distinction as far as substantive criminal law is concerned, has to be drawn between the prohibition as such on the one side and the power to blame and to punish on the other⁸. This has consequences for the basic rights at stake.

1. Prohibition

As soon as it is in force, the prohibition touches upon either special guarantees of freedom or on the general freedom to do or not to do what one wants to (art. 2 para. 1 BL). The prohibition has to be constitutionally justified as such without already looking at a certain type of sanctions for violating the prohibition. This is necessary, because it is the prohibition which already allows for preventive (not for repressive) police actions: Police organs in Germany may act *pro futuro* in order to prevent future dangers or damages. Such actions do not care of questions like the principle of guilt of a possible perpetrator. The imminent or the ongoing violation of a prohibition might be stopped by interference of the police. The task insofar is only prevention.

2. Criminalization (Power to blame and to punish)

A prohibition which is accompanied by a criminal sanction gives the state the power to blame and to punish a person who violates the prohibition. It is important to analyse the two elements, i. e. to blame and to punish, separately⁹. Only this allows us to see that

⁷ See infra 5.

⁸ See more detailed: O. Lagodny, *Strafrecht vor den Schranken der Grundrechte* (Tübingen 1996), pp. 77 - 135; see now also G. Staechelin, *Strafgesetzgebung im Verfassungsstaat* (Berlin 1998), pp. 50 and 111 and sub.; I. Appel, *Verfassung und Strafe* (Berlin 1998), pp. 433 and subs.

⁹ See in detail: O. Lagodny, *op. cit.*, pp. 94 and subs, 129 and subs. See now also BVerfGE 96, 245; W. Schild, 'Strafbegriff und Grundgesetz', in A. Eser/U. Schittenhelm/H. Schumann (eds.), *Festschrift für Theodor Lenckner zum 70. Geburtstag* (Munich 1998), pp. 287, 310 referring also to W. Schild, *Der Strafrichter in der Hauptverhandlung* (Heidelberg/Hamburg 1983), pp. 96 and subs. See now also I. Appel,

criminalization is more than providing for deprivation of liberty. The power to blame a person who has violated the prohibition means in the terms of criminal procedure: The state and its organs may state that person A has committed a certain crime and is guilty thereof. The guilty-verdict as such is the act of blaming. It has a lot of legal consequences¹⁰. The most important one is that this person A - as a rule - may be sentenced. But it is not necessary that in addition to the guilty-verdict also a sanction is imposed. German Criminal Law provides such possibilities in many situations¹¹.

In common law systems, the separation between the guilty-verdict and the sentencing becomes obvious already by procedural structure. From a common law perspective it might sound strange that a guilty-verdict without sentencing is of relevance. However, the basic idea of the truth commissions for crimes committed in the Apartheid era in South Africa is to establish at least the truth by confessions of the perpetrators.

Already the guilty-verdict encroaches upon a basic right which is constituted by human dignity: The right of human personality according to art. 2 para. 1 in connection with art. 1 para. 1 BL („allgemeines Persönlichkeitsrecht“). The guilty verdict severely encroaches upon this right, because the verdict means that the person has acted in contradiction to the highest values of society and because - in addition - this verdict is made publicly. Therefore, human dignity is at stake, because this verdict is meant to stigmatize and to dishonour the violator in social life¹². The inner legitimation of the criminal-law-verdict is the misuse of responsibility, the latter being one of the core aspects of human personality.

op. cit., pp. 490 and subs., who mainly differs in calling the power to blame („Vorwurfsermächtigung“): (the power to) „primary sanction“ („Primärsanktion“).

¹⁰ As far as criminal procedure is concerned, a distinction between the guilty verdict and the sentencing turns out to be of constitutional relevance in German discussion, albeit such a distinction will not be mandatory. See in detail: O. Lagodny, *op. cit.*, pp. 108 and subs. See now also I. Appel, *op. cit.*, pp 499-500.

¹¹ Section 60 Code of Criminal Law (hereinafter: CCL) in general; as one special example see section 314 a CCL.

¹² See in detail: O. Lagodny, *op. cit.*, pp. 98-128; see now also: G. Staechelin, *op. cit.*, p. 114, as well as I. Appel, *op. cit.*, pp. 490 and subs.

Already the protection of human personality involves the need for specific and high thresholds for constitutional justification. The second interference, the power to punish has to meet the thresholds of human liberty according to art. 2 para. 2 sentence 2 BL (allgemeines Freiheitsrecht) as far as deprivation of liberty is concerned or art. 2 para. 1 BL (allgemeine Handlungsfreiheit) as far as fines are concerned. However, liberty must be taken into consideration as well because a guilty-verdict without (other) sanctions is not the rule rather than the exception. When dealing with the constitutionality of norms, the rule has to be focussed. As far as criminal law in the strict sense is concerned, it is the rule that criminalization means in addition to the power to blame: deprivation of liberty. Hence we have a reinforcement of protection: human personality and liberty are the two main thresholds in order to justify criminalization of a certain prohibition.

II) Prohibition

Steps 3 - 6 have to be done separately first for the prohibition (here II), then for the power to blame and to punish (infra III)¹³. The consequence is that a lot of questions which - at first glance - seem to belong to the power to blame and to punish from an understanding of criminal law have to be shifted to the prohibition¹⁴.

1 Step 3 (Purpose)

In general, German constitutional law is very generous in accepting purposes of the legislator. Only in a negative way it excludes some purposes, especially such purposes which run counter to equality. Thus, the threshold offered by this step is not very high.

2 Steps 4 and 5 (Effectiveness and Necessity)

Step 4 (effectiveness), neither, is a tough criterion according to the practice of the Federal Constitutional Court, because it leaves a wide margin of appreciation („Einschätzungsprärogative“) as to the effectiveness of a certain means to the legislator.

¹³ The Federal Constitutional Court in the incest case and in the previous cannabis case combines both steps. In my view, separating them brings about more analytical clarity.

¹⁴ Also I. Appel, *op. cit.*, p. 570 note 137 observes this. Hence, his critics (p. 569 note 133 and p. 312 note 32) and that of Staechelin, *op. cit.*, 51, 164 and subs. that I deal too much with the prohibition *resp.* my proposal leaves to little specifics of criminal law, are not convincing.

This margin depends on the specific requirements of the basic right at stake¹⁵. Scientific evaluations are not necessary in general. But existing results have to be taken into consideration¹⁶. As the necessity-test includes that milder alternatives have to be as effective as the means finally chosen by the legislator, the margin of appreciation is of major relevance also on step 5 (necessity). Example: A prohibition focussing on the creation of an abstract danger restricts the general freedom to a greater extent than a prohibition of concretely dangerous behaviour. The legislator has - more or less - a very broad margin of appreciation as to the effectiveness of both ways of protection. The same is valid for prohibitions which start at an earlier stage. Of course, one should discuss alternatives to prohibition, such as a system of social self-control or a system of financial awards¹⁷. Again: the margin of appreciation will come into play.

3 Step 6 (Proportionality)

In general, proportionality means that the prohibition must be in adequate relation to the special importance and meaning of a basic law at stake¹⁸. In constitutional theory, this approach has been deepened by *Alexy* who demands - on the basis of *Dworkin's* theories - that adequacy-relations have to be formulated which have to be based on the principles underlying the concrete basic right: The more intensive a state's act(ion) encroaches a guarantee of freedom the more conflicting interests have to support the state's action¹⁹.

With regard to the enlargement of criminal law we have especially to face the question: May „bad thoughts“ be prohibited as such without any kind of conduct which can be noticed from an external position (i. e.: the mere intent to kill someone)? Such a prohibition - as a basis for criminalization in the second step - might be justified under

¹⁵ BVerfGE 50, 290, 332; 57, 139, 159; 62, 1, 50; see also 25, 1, 19; 30, 292, 319; 37, 1, 21; 39, 210, 230; 47, 109, 117; 71, 206, 215.

¹⁶ See e. g. BVerfGE 13, 97, 113; 50, 205, 212; 71, 206, 215; 90, 145, 183.

¹⁷ See BVerfGE 77, 84; 81, 70; see now also G. Staechelin, *op. cit.*, pp. 137 and subs.

¹⁸ E. g. BVerfGE 67, 151, 173; 76, 1, 51.

¹⁹ R. Alexy, *Theorie der Grundrechte* (Frankfurt a. M. 1986), pp. 122 and subs., esp. 146 and subs.

steps 1 - 5, because the prohibition encroaches on the freedom to do what you want²⁰, follows a legitimate purpose (protection of life), might - on the basis of the practice of the German Federal Constitutional Court - be effective and necessary. However, it would not be proportional (step 6), because human thoughts as such belong to the nucleus of personality and human dignity. The Federal Constitutional Court in constant practice held that such a nucleus exists, but scarcely has indicated what belongs to it. However, one may conclude that the ability to think is one of the decisive features of human existence²¹. Mere thinking does not create a visible danger to society. There must be a minimum of human activity implementing this thinking and - thereby - create a minimum of danger. Such activity may be to take a first step of, i. e. preparing the act of killing by leaving home in order to buy a knife. This example of buying a knife shows that already on the level of the prohibition, the intention to do something „bad“ becomes decisive, because the intention, i. e., to prepare a steak would not suffice to prohibit purchasing a knife.

Proportionality not only is meant to rebut exceeding state actions, i. e. prohibitions, from the view of the person who might not act. In constitutional doctrine this is called „Abwehrfunktion“ (rebutting-function). Proportionality in this respect establishes a „Übermaßverbot“ (constitutional prohibition of excessive state actions). Proportionality must also be looked upon from the person to be protected by a prohibition („Schutzfunktion“ = protective function). Proportionality from this view means „Untermaßverbot“ (constitutional prohibition of lacking or insufficient state actions)²². Then the questions are: Which prohibitions have to be created by the state in order to protect the person and which exceptions from a prohibition have to be made. The first

²⁰ As to the dispute on the scope of art. 2 para. 1 BL, see BVerfGE 80, 137, 153 and 169; see more detailed: O. Lagodny, *op. cit.*, pp. 90-94; and now also Appel, pp. 319-328. See also G. Jakobs, Bookreview, 110 *Zeitschrift für die gesamte Strafrechtswissenschaft* (hereinafter: ZStW) 717 - 725, 718 and subs. (1998).

²¹ The decision BVerfGE 80, 367 leaves some doubt whether the court regards notes in a diary as belonging to this nucleus. The background was that such notes were the only evidence in a murder case. Although this decision concerned a procedural question, one could draw consequences as to substantive law because it had to deal with the limits of state's intrusion into privacy.

²² BVerfGE 88, 203, 252, 254 and subs.

question is difficult to asset²³; the second includes at least grounds for justification like self-defence or justifying necessity. These considerations show that questions of justification of a given behaviour have to be resolved already on the level of the prohibition, as it is impossible to criminalize an act which is not prohibited²⁴. To sum up: When applying the full test (steps 1 - 6) to different prohibitions, the number of unconstitutional prohibitions is relatively small.

III) Power to blame and to punish

The criminalization of a prohibition requires that this prohibition is constitutional as such. Only then the legislator may choose either criminal law, administrative sanctions (in Germany: Ordnungswidrigkeiten-Sanktionen), only sanctions of civil law (i. e.: damages), or no sanctions at all. If the legislator chooses criminalization, the power to blame the individual has to be justified in the light of art. 2 para. 1 together with art. 1 para. 1 BL, the protection of human personality and in the light of liberty.

1 Step 3 (Purpose)

The purpose of a criminal provision consists of two elements: the necessary purpose is the same purpose which already must have justified the prohibition, i. e. protection of individual interests (life, liberty, estate, honour, secrets, etc.) or protection of goods of the society (independence of judges, etc.). The sufficient, i. e. additional, purpose of providing for criminal responsibility is one of the purposes discussed traditionally since a long time (without result) in criminal law thinking: deterrence, retaliation, normative integration etc. German constitutional law does not provide an answer to this discussion. On the level of step 3 none of these different purposes is excluded as being unconstitutional as such. This means that steps 4 - 6 have to be gone through for each

²³ See in detail: O. Lagodny, *op. cit.*, pp. 262 and. subs.

²⁴ One of the few consequences which may be drawn at this step is that it is not constitutional to punish behaviour which is justified by objective circumstances which the actor is not aware of, see in detail: O. Lagodny, 'Grundrechtliche Vorgaben für einen Straftatbegriff', in: J. Arnold/B. Burkhardt/W. Gropp/Hg. Koch (eds.), *Grenzüberschreitungen - Beiträge zum 60. Geburtstag von Albin Eser* (Freiburg 1995), pp. 27 - 37.

of this purposes. If only one purpose „survives“ in the end, i. e.: goes through steps 4 - 6, this is sufficient in order to justify a certain provision on the constitutional level²⁵.

The purpose of the prohibition is also the „Rechtsgut“ of that norm. The notion(s) of „Rechtsgut“ play an outraging role in German discussions on criminal law²⁶. The contents of „Rechtsgut“ vary in so many respects that it is simply impossible to translate it into English²⁷. From a perspective of constitutional law it may be translated as public values or interests which may either belong to the state, to the community or to the individual(s). They have to be strong enough to justify the specific demands of constitutional law under steps 4 - 6 as far as the prohibition is concerned as well as the second test (criminalization). The notion of „Rechtsgut“ of a criminal law provision serves two main purposes in German criminal law discussion: Undoubtedly it first gives the focus, the *ratio*, for interpretation when applying the norm. Whether the notion is, secondly, able to limit the legislator is a highly questionable problem because this would mean to lift legal discussion on a constitutional level and provide it with the rank of basic rights.

In my view, the importance of arguments on the law-making-level (not on the level of interpretation) based on the notion(s) of „Rechtsgut“ nowadays is over-estimated. It made sense to (try to) limit the legislator in the strict sense of the word by such arguments as long as the legislator was not legally bound by basic rights. As the German legislator since 1949 is directly bound by basic rights (art. 1 para. 3 BL), it is first a question of legal logic that restrictions have to start here. Secondly, it is with no doubt possible to create marvellous systems based on a specific notion of „Rechtsgut“, but if the starting-points, i. e. the specific contents, meanings and consequences of the „Rechtsgut“, are not or only partially shared by constitutional law, such concepts per se may only be helpful in order to influence criminal policy but not the yes/no-question of

²⁵ BVerfGE 86, 28, 35 and subs.

²⁶ Cf. only T. Lenckner, in A. Schönke/H. Schröder, *Strafgesetzbuch*, 25nd edition (Munich 1997), ann. 8 and subs. before section 13.

²⁷ The discussions about the concept of „Rechtsgut“ remind me of the „tû-tû“-analogy which *Alf Ross* (Ross, *Tû-Tû*, 70 *Harvard Law Review* 812-825 [1956/57]) used to analyse the concept of guilt.

constitutionality²⁸. To a large extent, argumentations based on the/a „Rechtsgut“ are arriving at the central substantive constitutional values, i. e. protection of human personality and liberty, only by a detour.

2 Steps 4 and 5 (Effectiveness and Necessity)

The margin-of-appreciation-approach is valid also for the criminalization although one would expect a specification by the protections of human personality and of liberty. The Federal Constitutional Court in constant practice points out that the range of the margin depends on the concrete basic right at stake and on the quality and/or quantity of the encroachment²⁹. However, in the cannabis decision³⁰, the court did not apply this approach very consequently. This may mainly be due to the fact that empirical evaluation of the purposes and effects of criminal law are still not sufficiently explored³¹. One of the view constitutional consequences of step 4 (effectiveness) may be drawn with regard to crimes of possession of dangerous goods. „Possessing“ something is not an positive action. This becomes apparent when regarding art. 3 para a) i) and iii) of the United Nations Convention of 20 December 1988 against Illicit Traffic in Narcotic Drugs and Psychotropic Substances³². Possession has to be something different from purchasing drugs. Purchasing includes the act of acquisition. Therefore, possessing can

²⁸ See O. Lagodny, *op. cit.*, pp. 145-162 and 288-317, 424-445; and now also I. Appel, *op. cit.* pp. 206/7, 336-390. G. Staechelin, *op. cit.*, pp. 120 and *passim*, tries to lift the question of „Rechtsgut“ to a higher level from a different constitutional concept (i. e.: E. Grabitz, 'Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Bundesverfassungsgerichts', 98 *Archiv des öffentlichen Rechts*, 568-616 [1977]), which has not been accepted in constitutional doctrine. Therefore, his approach to promulgate a concretization of the concept of proportionality which is specific for criminal law is not convincing as long as we analyse criminal law on the basis of accepted doctrine in constitutional law.

²⁹ See *supra* 3.2.

³⁰ BVerfGE 90, 145.

³¹ See O. Lagodny, *op. cit.*, 318-321, and I. Appel, *op. cit.*, 175 and subs, 179.

³² Wording: „a) i) The production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention; [...] - iii) The possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in (i) above; [...].

not be equated with acquisition. Hence, possession can be interpreted only as an omission. But what constitutes the act which is omitted by the perpetrator: destruction of the drug? (How do we justify this if the drug belongs to, i. e., a chemist who has been robbed?) simple disposal of the drug in a waste paper basket in the streets? (This would be contrary to the purpose of, i. e. the Vienna Convention or national anti-drug-laws, namely to avoid any access to drugs) or delivering the drug to the police? (How do we combine this with the freedom from self-incrimination?). As there is no sufficient possibility to identify human behaviour, the crime of mere possession is unconstitutional. This is valid for all dangerous goods, because the underlying legal problems are the same. This does, however according to German law, not exclude to prohibit the possession of such goods and to proceed by means of police law and to confiscate such goods.

3 Step 6 (Proportionality)

Constitutional doctrine warns us not to shift too many questions to this step, because of the danger to restrict parliamentary freedom and to enlarge (constitutional) judicial control too much by replacing different subjective concepts of what is and what is not proportional. The foregoing steps (prohibition: steps 1 - 6; criminal law provision: step 1 - 5), however, have shown that their thresholds are not very high if we apply the practise of the Federal Constitutional Court. As a consequence, many questions are left for this last approval, even if one tries to filter as much as possible by the foregoing steps³³. However, the following main results may be concluded:

a) Principle of guilt

We have to recall that one of the two basic rights at stake (protection of human personality) is constituted by human dignity. One would expect that at least here, we would find some nucleus of barriers which cannot be overcome by the legislator. The most important feature of human dignity in substantive criminal law is the principle of guilt („Schuldprinzip“). With regard to our problems here, it can be understood in two different ways:

³³ See in detail: O. Lagodny, *op. cit.*, pages 165 - 366.

- guilt as ability to act in a legal way; this is a more formal understanding because it can be applied to any constitutional prohibition regardless of its contents and impact.
- guilt as a legislative principle which looks in a material way for the gravity and the purpose of the criminalization at stake. The question arises as to alternatives hereto (i. e.: administrative sanctions? civil sanctions? no sanctions?) which have passed the necessity step and therefore must have been appreciated by the legislator as not as effective as the criminalization.

The latter understanding, i. e. the material understanding of the principle of guilt, does not play a dominant role in the practice of the Federal Constitutional Court. It is taken into account only in a more general way³⁴. The formal understanding, on the other side, has been approved of as being part of the constitution³⁵. The ability to act in a legal way lacks, if the person is due to his physical constitution (i. e. mental illness) unable to act according to the law; if he has (had) no possibility to learn that the conduct is illegal (mistake of law); if the following legal duty would cause severe damage to very important goods of that person.

b) Criminalization of prohibitions of mere abstract danger

Prohibitions of mere abstract danger cause only few problems on the level of the control of the prohibition as long as some danger is inherent³⁶. It is nearly out of question that these prohibitions may be sanctioned by administrative fines (in Germany: „Ordnungswidrigkeiten“). The pivotal question in German discussion therefore is to what extent such prohibitions may also be criminalized. According to constant practice of the Federal Constitutional Court, three areas can be distinguished³⁷: Prohibitions which may only be sanctioned by administrative fines and those which - at least as a rule - may only be sanctioned by criminal law. The third area which lies in between is by far the largest.

³⁴ BVerfGE 90, 145, 173 and subs.; cf. also 80, 244, 255; 73, 206, 253.

³⁵ BVerfGE 20, 323, 331.

³⁶ U. Weber, 'Die Vorverlegung des Strafrechtsschutzes durch Gefährdungs- und Unternehmensdelikte', in H.-H. Jescheck, ed., 'Die Vorverlegung des Strafrechtsschutzes durch Gefährdungs- und Unternehmensdelikte', Supplementary to Zeitschrift für die gesamte Strafrechtswissenschaft, Berlin u. a. 1987, pp. 1-36, at 31.

³⁷ See e. g. BVerfGE 80, 182, 185; 22, 49, 81; 23, 113, 126; 27, 18, 29.

Here, the legislator, again³⁸, has a far reaching margin of appreciation. The consequence is that the legislator's choice between administrative fines and criminal law is hardly - and has not been yet - unconstitutional.

It is accepted that the criminalization of prohibitions of mere abstract danger is not unconstitutional per se³⁹. More concrete conclusions are not possible. Before the background of human personality and freedom we can only establish relations of inadequacy which have the character of legal principles rather than legal norms⁴⁰ and therefore will not produce „sharp“ results, such as⁴¹:

It is the more proportional to criminalize prohibitions of mere abstract danger the more

- is left for the individual's risk-evaluation in self-responsibility;
- plausibility and weight an abstract danger and the protected interests⁴² have;
- important the interest of the victim is that certain conduct not takes place regardless of the actor's individual risk-evaluation;
- differentiated the prohibition is with regard to *minima* situations.

These thoughts can be modified for the enlargement of crimes „in time“ (i. e.: preparation, attempt):

It is the more proportional, the more the prohibition

- requires the violation of a sensible object;
- is away from the - unconstitutional - prohibition of mere bad thoughts.

³⁸ Supra 3.2 and 4.2.

³⁹ BVerfGE 28, 175, 188; 51, 60, 74; BVerfG 30 Neue Juristische Wochenschrift 2207 (1977).

⁴⁰ As to the distinction between norms which have a clear-cut yes/no-answer based on a „if ... then...“ pattern and principles which are meant only to optimize conflicting interests in the sense of „more/less“, see Alexy, *op. cit.*, pages 75 and subs.

⁴¹ See in detail: O. Lagodny, *op. cit.* pp. 430-445, 480-488, 519-520. This is the result of bringing together again the control of the prohibition and the power to blame and to punish which Staechelin, *op. cit.*, pp. 51, 164 and subs., misses. His critics might be influenced by the fact that these results are too „weak“, i. e. not in the sense of clear-cut unconstitutionality, from the point of view of his „Rechtsguts“-approach (see supra note 23).

⁴² Special but not exclusive importance have interests which are directly protected by the constitution, i. e. the existence of the state as such etc.

If the legislator has chosen criminal law, a second problem arises: Does the crime comprise every violation or does the legislator exclude for example minor cases by „minima-clauses“. This is necessary if the prohibition is so broad that with regard to minor cases the use of criminal law would be unproportional. The *Cannabis* decision gave an example in this respect.

c) Objective conditions of punishability

German criminal law knows crimes which have so-called „objective conditions of punishability“ („objektive Bedingungen der Strafbarkeit“), i. e. body fight (Schlägerei) which criminalizes mere participation in a body fight if someone is e. g. killed in connection with the fight. The death of that person is the objective condition for which no intent or even recklessness is required: The offender needs not to be aware of those objective requirements. This is the explicit purpose of this legal construction. It is only reconcilable with the principle of guilt if the crime would be constitutional without such a condition. This means: Such conditions must reduce crimes which are constitutional even without the condition; they may not enlarge punishability. This is important, because these conditions are becoming a feature of „modern“ crimes.

IV) Guideline-function

There is a large „grey zone“ where the verdict of unconstitutionality is not yet possible. This is the grey zone of criminal policy. Here, it depends on the quality of public (legal) discussion whether or not to make extensive or restrictive use of this grey zone. However, especially the principle-relations mentioned supra should play a role in the legislation process⁴³.

V) Summary

When looking at these few results, one could be disappointed, especially when recalling that constitutional control in other areas of German law is quite strict. And Jakobs seems to be right when he raises the question whether the present state of constitutional doctrine (*A/lexy*) should be compared to an „inflatable beach toy“ („aufblasbares Strandspielzeug“) which totally depends on how much air is in it⁴⁴. And: Who blows the

⁴³ See in detail Lagodny, *op. cit.*, pages 519 and subs.

⁴⁴ G. Jakobs, *loc. cit.*, 719 and subs.

air into it: The Federal Constitutional Court? Constitutional Doctrine? Criminal law doctrine? Or is substantive criminal law immune against any (or at least: too much) interferences by constitutional law, as the limits are inherent in the subject⁴⁵?

An explanation rather than a justification of this fact may be that decalring a norm of criminal law unconstitutional would mean that all cases in which a conviction was pronounced would have to be re-opened ex officio due to sec. 79 of the Code on Proceedings before the Federal Constitutional Court.

Hence, the „case“ of criminal law creates a real test to the abilities of constitutional doctrine. No doubt: the legislator of criminal law is - as the legislator in general - bound by the basic rights according to art. 1 para. 3 BL. A solution can surely not be to change the general requirements of basic right's control in order to adapt basic right's doctrine to the very needs of criminal law. This would lead - amongst other's - to frictions in other areas of law for which constitutional law must apply as well. One possibility could be to accept that in the special case of criminal law, there are too many loopholes - like the empirical question of the effects of criminal law - for acheieving at more concrete results. Criminal law doctrine either may repeat already existing concepts or develop new ones being aware of the fact that they lack constitutionally binding character. This will be the more a „Sysiphos' game“ the less especially the legislator takes care of what at least was a culture of criminal law discussion in Germany. Or legal discussion between criminal law and constitutional law has to be intensified in order to avoid more bulging oedema of a legislator captured in pure activism. In sum: The „case“ of criminal law might be worthwhile to rethink at least part of legal thinking in constitutional law - or *vice versa*.

⁴⁵ See W. Schild, *loc. cit.*, 290 and subs. who explicitly denies that punishment („Strafe“) may be justified in the sense of constitutional law by the principle of proportionality. See also I. Appel, *op. cit.*, at 48 and subs., 305 and subs., reporting comparable tendencies in criminal law.

B) The incest case

I) The decision of the German Constitutional Court

A decision of the Federal Constitutional Court of 26 february 2008 concerned § 173 section 2 sentence 2 of the German Criminal Code which makes it a crime that sisters and brothers have sexual intercourse. The Court considered it being constitutional. The special point of this decision was that there was one concurring opinion: Judge Hassemer, at that time also the vice-president of the court, vividly disagreed with the majority: Hassemer was the only criminal law professor at that time at the court. And criminal law basis and the question of incest as one pivotal example was one of the questions of his major interest. In the consequence, an application to the European Court of Human Rights in Strasburg was supported by important criminal law professors (Amelung and Renzikowski) and by a Swiss professor of international and European law (Breitenmoser). This background shows that this case is one of the best cases for illustrating the diverging concepts of constitutional law on the one side and criminal law on the other side.

The contents of the decision is reproduced here on the basis of the official press communiqué of the Court⁴⁶, because it summarizes the decision in an English translation which has the most authentic value.

The complainant had been convicted for incest with his sister. He made knowledge of his sister and they fell in love to each other only when he and his sister were adult, because they grew up in separate settings. They have three children.

The main result was:

“The provision in § 173.2 sentence 2 of the German Criminal Code (Strafgesetzbuch, herein after: StGB), which threatens sexual intercourse between natural siblings with imprisonment of not more than two years or a fine, is compatible with the Basic Law. [...] The legislature did not overstep its discretion in decision-making when it deemed protection of the family order from the damaging effects of incest, protection of the "inferior/weaker" partner in an incestuous relationship, as well as the avoidance of serious genetic diseases in children of incestuous

⁴⁶ Federal Constitutional Court - Press office -Press release no. 29/2008 of 13 March 2008 Order of of 26 February 2008 - 2 BvR 392/07.

relationships, sufficient to punish incest, which is taboo in society, through criminal law.

[...]

Judge Hassemer attached a dissenting opinion to the decision. In his view, the provision is incompatible with the principle of proportionality.”

I will juxtapose the reasons of the majority as opposed to those of Judge Hassemer.

“The dissenting opinion of Judge Hassemer is in essence based on the following considerations:

§ 173.2 sentence 2 StGB is incompatible with the principle of proportionality. The provision is not aimed at establishing a rule that would be internally consistent and compatible with the elements of the crime.”

In general, Judge Hassemer shows disappointment that the result of this case does not fit to the other areas of the practice of the court.⁴⁷

In the order of the steps identified supra:

Majority and judge Hassemer as to steps 1 and 2 (state’s action and basic right):

“The decision of the legislature to impose criminal penalties on sibling incest, in accordance with the standard under **Article 2.1 in conjunction with Article 1.1 of the Basic Law (Grundgesetz - GG; right to sexual self-determination)** which are to be addressed in the first instance, are constitutionally unobjectionable.”

[...]

“1. With the criminal provision of § 173.2 sentence 2 StGB, the legislature **restricts the right to sexual self-determination of natural siblings** by making the completion of sexual intercourse between them a punishable offence. In this way the conduct of one's private life is limited, particularly in that certain forms of expressions of sexuality between persons close to one another is penalised. However, this is not an encroachment upon the core area of private life which is impermissible to the legislature from the outset. Sexual intercourse between siblings does not affect them exclusively, but rather, can have effects on the family and society and consequences for children resulting from the relationship. Because the criminal-law prohibition on incest only affects a narrowly defined behaviour and only selectively curtails possibilities for intimate communication, the parties concerned also are not placed in a hopeless position incompatible with respect for human dignity.”

⁴⁷ See also *T. Hörnle*, Das Verbot des Geschwisterinzests – Verfassungsrechtliche Bestätigung und verfassungsrechtliche Kritik, ## Neue Juristische Wochenschrift, 2085 – 2088, 2088.

The Majority considers as to the objectives (Step 3) first the protection of marriage and the family:

“2. The legislature pursues objectives through the challenged provision that are not constitutionally objectionable and, in any event, in their totality legitimise the limitation on the right to sexual self-determination.

a) The essential ground considered by the legislature as the reason for punishment in § 173 StGB is the **protection of marriage and the family**. Empirical studies show that the legislature is not acting outside of its latitude for assessment when it assumes that incestuous relationships between siblings can lead to serious consequences damaging the family and society. Incestuous relationships result in overlapping familial relationships and social roles and, thus, can lead to interference in the system that provides structure in a family. This does not correspond with the image of family that is the basis of Article 6.1 GG. It seems conclusive and is not far-fetched that the children of an incestuous relationship have significant difficulties in finding their place in the family structure and in building a trusting relationship to their closest caregivers. The function of the family, which is of primary importance for the human community and which is at the basis of Article 6.1 GG, would be decisively damaged if the required structures were shaken by incestuous relationships.”

Judge Hassemer opposes.

“[T]he prohibition on sibling incest also is not constitutionally in regard to **protection of marriage and the family**. Only sexual intercourse between natural siblings is a punishable offence, not, however, all other sexual acts. Sexual relationships between same-sex siblings and between non-blood-related siblings are not encompassed. If the criminal provision were actually aimed at protecting the family from sexual acts, it would also extend to these acts that are likewise damaging to the family. The evidence seems to indicate that the provision in its existing version is solely aimed at attitudes to morality and not at a specific legally protected right. Building up or maintaining societal consensus regarding values, however, cannot be the direct objective of a criminal provision.”

The Majority points out another possible objective (Step 3)

“b) To the extent the criminal provision is justified by reference to the **protection of sexual self-determination**, this objective is also relevant between siblings. The objection that the protection of sexual self-determination is comprehensively and sufficiently protected by §§ 174 et seq. StGB (crimes against sexual self-determination) and, therefore, does not justify § 173.2 sentence 2 StGB ignores the fact that § 173 StGB addresses specific dependencies arising from the closeness in the

family or rooted in family relations as well as difficulties of classification of, and defence against, encroachments.”

Judge Hassemer opposes:

“[N]either the wording of the provision nor the statutory system indicate that the protective purpose of the provision or even just one such protective purpose could be protection of the right to sexual self-determination.”

The Majority argues as to a third possible objective (Step 3)

“c) The legislature additionally based its decision on **eugenic grounds** and assumed that the risk of significant damage to children who are the product of an incestuous relationship cannot be excluded due to the increased possibility of an accumulation of recessive hereditary dispositions. In both medical and anthropological literature, which are supported by empirical studies, reference is made to the particular risk of the occurrence of genetic defects.”⁴⁸

Judge Hassemer opposes:

“From the outset consideration of eugenic aspects is not an objective of a criminal-law provision that is supportable under constitutional law.”

The Majority focussing on a summing-up of objectives (Step 3)

“d) The challenged criminal provision is justified by **the sum of the comprehensible penal objectives against the background of a societal conviction effective to date based upon cultural history** regarding the fact that incest should carry criminal penalties, which is also evident in international comparison. As an instrument for protecting sexual self-determination, the public health, and especially the family, the criminal provision fulfils an appellative, law-stabilising function and, thus, a general preventive function, which illustrates the values set by the legislature and, therefore, contributes to their maintenance.”

Judge Hassemer opposes in general (see supra)⁴⁹

⁴⁸ T. Hörnle, Das Verbot des Geschwisterinzests – Verfassungsrechtliche Bestätigung und verfassungsrechtliche Kritik, ## Neue Juristische Wochenschrift, 2085 – 2088, 2087 agrees.

⁴⁹ T. Hörnle, Das Verbot des Geschwisterinzests – Verfassungsrechtliche Bestätigung und verfassungsrechtliche Kritik, ## Neue Juristische Wochenschrift, 2085 – 2088, 2088 vividly objects as well.

The majority as to steps 4 – 6

“3. The challenged provision is also sufficient in regard to the constitutional-law **requirements of suitability, necessity, and proportionality** as to a rule that places limitations on freedom.

a) The criminalisation of sibling incest cannot be denied **suitability** for promoting the desired success. The objection that the challenged criminal provision fails its intended objectives because of fragmentary design and because of the grounds for exemption from penalty in § 173.3 StGB (no punishment for minors) fails to appreciate that through the prohibition on acts of sexual intercourse a central aspect of sexual relations between siblings is penalised which has great significance regarding the incompatibility of sibling incest with the traditional picture of the family, and which finds a further objective justification in the ability, in principle, to cause further damaging consequences by producing descendants. That acts similar to sexual intercourse and sexual intercourse between same-sex siblings are not threatened with criminal penalties, but on the other hand, sexual intercourse between natural siblings also fulfils the elements of the crime even in cases where pregnancy is excluded does not place doubt on the basic achievability of the objectives of protecting sexual self-determination and preventing genetic disease. The same applies to the objection that the criminal provision is unsuitable for protecting the structure of the family because based on the grounds for exemption from punishment as to minors (§ 173.3 StGB) the criminal provision first reaches siblings when they typically are leaving the family circle.”

Judge Hassemer disagrees:

“In addition, the provision **does not offer a suitable path** to the objectives pursued through § 173.2 sentence 2 StGB. The elements of the crime, limiting punishability to acts of sexual intercourse between siblings of different gender, is not in a position to guarantee protection of the family from damaging effects of sexual acts. It does not go far enough because it does not encompass similarly damaging behaviour and, moreover, non-blood-related siblings as possible perpetrators. It goes too far because it encompasses behaviour that - based on the children having reached the age of majority and the attendant process of leaving the family - it cannot (any longer) have damaging effects on the family unit.”⁵⁰

The Majority as to the problem of necessity (Step 5)

⁵⁰ T. Hörnle, Das Verbot des Geschwisterinzests – Verfassungsrechtliche Bestätigung und verfassungsrechtliche Kritik, ## Neue Juristische Wochenschrift, 2085 – 2088, 2086, elaborates on this#. **It is a general problem: how does the judge or anyone else who applies the norm handle cases which fall out of the general scope: restrict the norm or take injustice into account.**

“The challenged provision also is not subject to constitutional-law doubts in regard to **necessity**. It is true that in cases of sibling incest guardianship and youth welfare measures come into consideration. However, in comparison to criminal penalties they are not less serious measures with the same effectiveness. Rather, they are aimed at preventing and redressing violations of provisions and their consequences in specific cases; as a rule they do not have any general preventive or law-stabilising effect.”

Judge Hassemer disagrees:

“In addition, there are constitutional-law doubts about criminal liability for sibling incest based on the principle of proportionality in regard to the availability of **other official measures** that could similarly or even better guarantee the protection of the family, such as youth welfare measures and family court and guardianship measures.”

The Majority as to the problem of proportionality (Step 6)

Majority:

“[T]he threatened punishment is **not disproportionate**. The range of punishment provided for also allows consideration for suspension of proceedings in accordance with discretionary prosecution aspects, for refraining from punishment, or for special sentencing considerations, in certain case constellations in which the accuseds' guilt is slight so that punishment seems unreasonable.”

Judge Hassemer disagrees:

“[T]he criminal provision of § 173.2 sentence 2 StGB conflicts with the constitutional-law prohibition on excessiveness. There is a lack of statutory limitation on criminal liability as to a behaviour that does not endanger any of the possible objects of protection.”

II) The main problem of the decision: What is the legitimate purpose of criminalizing incest

The main problem of the decision as well as the general problem of the control of constitutionality is the discussion of the proper purpose (supra step 3) which determinates the following steps. The decision points out more than one purpose and does not confine itself to purposes which the legislator had in mind at the time he enacted the law.

This is, where the main differences begin: In the view of most of the academic criminal lawyers the purpose of a penal norm can be equated to the “Rechtsgut”. And the idea is that there must be such a “Rechtsgut”⁵¹ which is binding even for the legislator.

This is where the majority of the court disagrees; and this is convincing: Only basic rights, or in general: constitutional law may set limits to the legislator, not a scientific community as such – regardless of the degree to which there is agreement between them.

From a view of constitutional law it is also convincing to look for other purposes than those which the legislator had taken into consideration⁵². This avoids a second complaint and decision, after the law had been declared void on the basis of purpose 1 and the (new) legislator then passed the very same law but based on purpose 2.

III) My personal view on the case

In my view, the case shows how difficult it is to draw a borderline between the creation of a law and its application. The underlying case shows that it is not the norm as such which causes the problem, it is the application of that norm. The case was very exceptional and none of the courts involved was willing to take this into account: adult siblings which had not known each other before they had sexual intercourse. The criminal law norm does not at all focus on such cases. The proper solution, therefore, would have been, to deny punishability in that concrete case by arguing with the constitution when applying the norm.

⁵¹ As to this notion see supra at #.

⁵² See BVerfGE 86, 28, 35 f., 42 ff .#

C) The problem of Islamic banking

In Turkey, the provision of art. 241 of the criminal code of 2005 defines “usury” as: lending money to someone else with the intention to gain money⁵³. This covers even cases of lending money and taking interests for that.

Here as well, it is the prohibition as such which causes already the problems. The background of this article in the Turkish law, obviously are Islamic concepts of the prohibition to take interests and of usury.

The background is the notion of “riba” in the scharia. The notion of “riba” includes – according to the majority of Islamic Lawyers – every interest, not only the excessive interest which would constitute usury in our sense. “Riba” is understood as a benefit which has no counterpart, because giving money temporarily as such to someone else has no value⁵⁴. A legitimate benefit consists only in giving either goods or services to someone else, but not money as such.⁵⁵ Every loan of money is something negative⁵⁶. Only under exceptions this can be legal, especially if the person has a permit of the state. And this is the consequence of that rule: The state of Turkey wants to control the banking sector with regard to “riba”. This could be compared to the control of drugs in a western state: The permit to possess drugs is given only under very restrictive conditions to physicians and hospitals. Other persons do not at all have a right to

⁵³ Art. 241 „Tefecilik“; as to the German translation: „Wer in Gewinnerzielungsabsicht einem anderen ein Darlehen gibt, wird mit zwei bis zu fünf Jahren Gefängnis und bis zu 5000 Tagessätzen Geldstrafe bestraft (Übersetzung von *Tellenbach, Silvia*, Das türkische Strafgesetzbuch – Türk Ceza Kanunu. Deutsche Übersetzung und Einführung. Zweisprachige Ausgabe. Schriftenreihe des Max-Planck-Instituts für ausländisches und internationales Strafrecht Freiburg. Sammlung ausländischer Strafgesetzbücher (Hrsg.: Sieber/Albrecht), Band G 118, Berlin 2008, p. 158.

⁵⁴ Bälz, Kilian, Islamic Finance: Finanziert mit Gottes Hilfe, Zenith Business, 2005, Heft 3, S. 35-38, 36 und 38 (der Autor ist Partner im Frankfurter Büro der Kanzlei Gleiss Lutz); Mahlkecht, Michael, Islamic Finance, S. 19 and subs.

⁵⁵ Ausführlich zum Begriff „riba“ als grundlegendem Verbot im Islam: Mahlkecht, Michael, Islamic Finance – Einführung in Theorie und Praxis, Wiley CH Weinheim, 2009, S. 17-24; Bergmann, Daniel K., Islamic Banking, S. 31-34

⁵⁶ Vgl. weiter zu den hiermit zusammenhängenden Fragen: Mahlkecht, Michael, Islamic Finance 17-47; Bergmann, Daniel K., Islamic Banking – Ein Studienhandbuch, Norderstedt 2008, S. 22-61.

possess drugs. In sum: the crime of “usury” has a totally different prohibition as a basis than western concepts of usury. There is no need of e. g. exploitation or exceeding interest.

The idea behind the prohibition of taking interests for lending money was that in former times it was understood that it only a person suffering from need or an accident needs a loan. And it was “usury” to demand additional money for help from someone in a situation of emergency⁵⁷. Nowadays the role of loans has changed: It is the vivid basis for our economic system. Every one needs loans. In the contrary, the prohibition of „riba“ is one of the central bases of an islamic system of banking⁵⁸. Meanwhile, there is a growing number of states which follow the principles of islamic banking⁵⁹.

It is quite obvious that a norm like art. 241 of the Turkish Penal Code would be unconstitutional in Germany and contrary to the freedoms and guarantees of the European Union and the European Convention on Human Rights. It would be contrary to the guarantee of property (Art. 14 of the German Basic Law; Art. 1 of the First Additional Protocol to the European Human Rights Convention) to restrict the use of the loaner’s money in that way. Hence, we do not need to dicuss the second step, the punishabilty.

⁵⁷ Vgl. auch Mahlkecht, Michael, Islamic Finance, S. 20.

⁵⁸ Mahlkecht, Michael, Islamic Finance, S. 17 – 28; Bergmann, Daniel K., Islamic Banking, S. 29 – 43.

⁵⁹ Vgl. die Nachweise unten C I.