Schriften des Zentrums für Europäische
und Internationale Strafrechtsstudien

Band 5

Herausgegeben von Arndt Sinn

Arndt Sinn (Hg.)

# Menschenrechte und Strafrecht

Beiträge zur 4. Sitzung des International Forum on Crime and Criminal Law in the Global Era (IFCCLGE)

V&R unipress

Universitätsverlag Osnabrück

UNIVERSITÄT OSNABRÜCK


Bibliografische Information der Deutschen Nationalbibliothek

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über http://dnb.d-nb.de abrufbar.

ISBN 978-3-8471-0184-0
ISBN 978-3-8470-0184-3 (E-Book)

**Veröffentlichungen des Universitätsverlags Osnabrück**
**erscheinen im Verlag V&R unipress GmbH.**


Printed in Germany.
Druck und Bindung: CPI Buch Bücher.de GmbH, Birkach

Gedruckt auf alterungsbeständigem Papier.

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## Vorwort

Als im Jahr 2009 von zunächst 11 Gründungsmitgliedern das International Forum on Crime and Criminal Law in the Global Era in Peking gegründet wurde, war noch nicht absehbar, dass es zu einer festen Institution internationaler wissenschaftlicher Kooperation werden würde. Prof. Dr. Bingsong He, der Gründer des Forums, verfolgte ein ehrgeiziges Ziel: Bis 2018 sollte in jedem Jahr eine internationale Tagung zu globalen und aktuellen Themen des Strafrechts in Peking stattfinden. Inzwischen wurden vier Tagungen veranstaltet und das Forum ist gewachsen, es kamen weitere Delegationen hinzu und Netzwerke konnten über das Forum hinaus etabliert werden. Inzwischen zweifelt niemand daran, dass das Forum auch in den kommenden sechs Jahren weiterhin bestehen wird. Das letzte Oktoberwochenende ist ein fester Termin in den Kalendern international tätiger Wissenschaftlerinnen und Wissenschaftler geworden.

Im Zentrum der 2012 veranstalteten Tagung standen Fragen zur Straftheorie, zu den Menschenrechten und zur Todesstrafe. Die Beschäftigung mit diesen Themen ist ein wesentlicher Forschungsgegenstand in der chinesischen Strafrechtswissenschaft. Er bildet die Grundlage für essentielle Ableitungen. Das 4. Forum hat sich vor dem Hintergrund der von Prof. Bingsong He vorgestellten Theorie zur Verteidigung der Menschenrechte geschlossen für die weltweite Abschaffung der Todesstrafe ausgesprochen. Dem offenen Geist des Forums entsprechend und zur Erinnerung an diese wegweisende Tagung wurden die Beiträge der deutschen Delegation in diesem Tagungsband zusammengefasst. Sie spiegeln die große Bandbreite der diskutierten Probleme wider.

Nicht unerwähnt soll bleiben, dass die deutsche Delegation von vielen Seiten unterstützt wurde. Mein Dank geht zunächst an meinen Kollegen Prof. Dr. Gesk, der in vielen Situationen und aufgrund seiner engen sprachlichen und kulturellen Verbundenheit mit China sowie seiner Expertise ein wichtiger Partner war und ist. Auch Margret Uebber hat viele Wege geebnet. Sie hat aus der deutschen Botschaft in Peking stets den Kontakt zu mir aufrechterhalten und nicht nur anlässlich des 4. Forums Grußworte an die Tagung gerichtet. Danken möchte ich auch dem heute nicht mehr amtierenden Botschafter Dr. Schaefer und dem

gesandten Herrn Prof. Dr. Riedel, die mit dem Empfang in der deutschen Botschaft die enge Verbundenheit mit der Arbeit der deutschen Strafrechtswissenschaft und dem Forum zum Ausdruck gebracht haben.

Zuletzt danke ich Herrn Patrick Skeries, der die redaktionelle Betreuung der Beiträge übernommen hatte und umsichtig zum Gelingen des Bandes beigetragen hat. Er wurde dabei tatkräftig unterstützt von Esma Dogruel, Alina Dubhorn, Melanie Humbert und Eileen Müller.

Osnabrück im September 2013 Prof. Dr. Arndt Sinn

# 前言

當11位啟發會員於2009年在北京創設了全球化時代犯罪與刑法國際論壇時，沒有人真正能夠預期，該論壇將變成國際學術合作的固定平台。主要的發啟人何秉松教授追求了一個十分有企圖心的計畫：要連續到2018年每年都於北京舉辦一個有關犯罪學以及刑法學的國際論壇，每一屆的論壇應以全球性重要、現實上重要的題材為主軸。 到目前為止，我們已經舉辦了四屆的論壇，且可以看到組織成長：除當年共創本論壇的成員外，論壇上增加了好幾個代表團，也形成了論壇周邊的密切聯絡網。現在已經沒有人懷疑，論壇在未來6年是否真正能夠存活。十月最後一個週末已變成國際性行動的學者們在各自行事歷中的固定檔期。

2012年所舉辦的論壇以刑罰理論、人權防衛論及死刑等議題為主。相關論點都成為中國刑法科學的重要課題，也成為重要著作之背景與出發點。基於何秉松教授所發表的人權防衛論，第四屆論壇 全體通過全球性廢除死刑的訴求。既然第四屆論壇具有指導方針的意議，我們就要將德國代表團的論文集結成冊，藉此表現論壇的開放態度，具體呈現論壇在題材上的廣闊，同時給予後人參考的機會。

在此非提不可，德國代表團獲得了各方的協助。我首要感謝葛祥林教授；由於他在語言和文化上與中國特別地熟悉，又具背豐厚的專業知識，所以在很多的情況協助很多；他現在以及未來必定是位重要的夥伴。Margret Uebber女士同樣疏通了很多管道。她由德國史館不斷與本人聯繫，且不僅以第四屆論壇上的賀詞幫助該會議得以順利舉行。 在此也應該提起之前擔任德國駐華大史Dr. Schaefer以及目前代管史館業務的 Dr. Riedel；他們經由史館之歡迎晚會表現出德國刑法學界與全球化時代犯罪與刑法國際論壇的密切關係。

我最後謝謝Patrick Skeries先生，他負責本論文集之編輯作業，且藉此周全地幫助本論文集得以問世。

奧斯納布呂客，2013年9月　　幸恩

Susanne Beck

# The defence of human rights theory and the concept of responsibility

Different kinds of social regulations have developed over time out of the need for functional and effective regulation of human co-existence on the one hand and the consensus about the wrongfulness of treating humans as simply natural causes of events on the other. One of them, focussing on the "blaming" of the offender or his offence, is criminal law. In the following article, this area of law will be discussed as an historically probably unavoidable[1] social construction to regulate human behaviour.

One of the most important aspects of the social construct of "punishment" is the following: "What is the purpose of criminal law(s)?"[2] In answering this question, the "defence of human rights" theory is based on the correct premise of worldwide acceptance of the basic human rights and focuses on restricting the legitimate content of criminal laws and the modes and methods of punishment,[3] thus fundamentally strengthening the rights of the individual. Both the (potential) victims and the (potential) offenders can rely on this protection.

Especially when focussing on the offender, it is important to include the following considerations: Criminal legal systems are generally based on a specific concept of guilt, liability, or responsibility[4], expressing an idea of mankind (including concepts of action, will, and decision making) as well as an idea of the state and legal system. In the following, I choose the notion "responsibility". The reason for this choice will be explained later, as it is in itself a decision on the

1 This does not mean that there are no (as such plausible) changes of penal theories – for more details on the historical development of these theories and the relations of these changes to the national objectives see the contribution of *Wörner* in this volume.

2 For an overview see *Banks*, Criminal Justice Ethics, 2004, pp. 103 et seqq.

3 *He*, On the Defense of Human Rights, 2010, pp. 455 et seqq.

4 This concept is the basis of the system "criminal law", of the abstract possibility of punishment. "Culpability" is connected to the singular offence which has to have been committed "culpably". Obviously, there is no culpability without an abstract concept of "responsibility". And such a concept must be adaptable to culpability for singular offences. The correlation between these two will be discussed in detail later. For an in-depth analysis of the concept of responsibility see *Tadros*, Criminal Responsibility, 2007.

content of the concept. It has to be reasoned after some general thoughts on how to describe or (re-)construct the concept in the light of the defence-of-human-rights theory.

In the following I discuss if the defence-of-human-rights theory has to be based on a concept of "responsibility" as well. Therefore, I am going to transfer the arguments of traditional concept(s) developed in the light of traditional criminal law theories onto the defence-of-human-rights theory – if possible. Based on these considerations and on the premises of the defence-of-human-rights theory I then will discuss the potential content of a concept of "responsibility" (at that point I will have reasoned my decision for "responsibility") compatible with the defence-of-human-rights theory.

## 1. The necessity of a concept of responsibility in traditional theories

To clarify the connection between traditional criminal law theories and the concept of responsibility one should analyse the notion of punishment, a description of modern criminal legal systems, and the common premises of these theories and concepts.

a) Punishment – this notion loses its meaning if not based on a concept of responsibility – at least in contemporary societies[5]. Without the premise that the offender is responsible, the reaction of the state would be called differently[6] (e. g. prevention of danger, cure for the psychologically handicapped aggressor). But whenever we punish, it is because someone has done something blameworthy[7] – or at least, the state pretends he has done so.[8] Thus, every theory about punishment, be it moral or legal, has to include a concept of blame, otherwise it would not be a theory about punishment.[9]

5 This interpretation is not meant in a conceptual meaning – I do not want to say that it is, generally, unthinkable to create another meaning for this concept. But the contemporary everyday usage of the notion "punishment" is connected to a concept of "responsibility". See also *Bedau*, Stanford Encyclopaedia of Philosophy, "Punishment": "*the authorized imposition of deprivations — of freedom or privacy or other goods to which the person otherwise has a right, or the imposition of special burdens — because the person has been found* ***guilty*** *of some criminal violation" (emphasis added).*

6 This is why, e. g., the German sanctions which do not depend on such a concept are called "care orders".

7 Therefore, we do **not** punish the storm for destroying houses, the dog for hunting other animals, the toddler for destroying valuables.

8 At least, a modern western state would not imprison its citizens with the argument that they are a thread for its power because of their opinions or actions without their having committed a crime.

9 *Kühl*, Zum Missbilligungscharakter der Strafe, in: Arnold et al. (eds.), Menschengerechtes

b) On a descriptive level, it has to be said, that in all modern states, the use of force in the form of punishment is based on the idea that their citizens are accountable for their actions. The (imagined) contract between citizens in modern democratic societies – legitimising the limitations of their freedom by the state – is based on the idea of reasonable, autonomous, socially responsible human beings.[10] Thus, even potentially dangerous citizens normally cannot be "tamed" or "locked away" by the state, but have to be treated as autonomous even if they have committed a crime (or are suspected to have done so).[11] Political freedom comes with a concept of responsibility: Being free entails being responsible. Liberal states are based on the idea that holding citizens accountable for their own actions is justified as one side of the autonomy coin – the other side being the guarantee of human rights as limit of state power.[12]

c) The plausibility of all traditional criminal law theories depends on one variant of responsibility or another. This is obvious for retributive theories as they explicitly refer to the moral guilt of the offender.[13] It is also the case for communication theories: A judgement stating that the offender committed a criminal offence and therefore will have to serve a sentence only has communicative content directed towards the offender and the public[14] if it refers to the moral wrongfulness of his action. Thus it has to be based on the idea of the offender being held responsible for his actions. Finally, even consequentialist theories of criminal law are not completely giving up on these concepts:[15] It is generally agreed upon that criminal law is not effective (no matter how the prevention is to be reached) if innocent citizens are punished or the punishment is disproportionate. Having said that, in modern states, consequentialist theories are limited by some deontological borders: Even if criminal laws were effective without any concept of responsibility, modern states can only punish a person who is responsible, because treating them as dangerous animals would violate fundamental human rights and their

Strafrecht. Festschrift für Albin Eser zum 70. Geburtstag, 2005, p. 149; *Kühl*, Die ethisch-moralischen Grundlagen des Strafrechts, ZStW 116 (2004), pp. 870 et seqq.; *Roxin*, Strafrecht, AT, 2006, p. 89.

10 For an overview on freedom of will in constitutional law (with a focus on Kant's philosophy) see *Möllers*, in: Lampe/Pauen/Roth (eds.), Willensfreiheit und rechtliche Ordnung, 2008, pp. 250 et seqq.

11 Already at this point the connection to the "Defence of Human Rights"-Theory which I will discuss in more detail later comes to light.

12 *Greene/Cohen*, For the law, neuroscience changes nothing and everything, Philosophical Transactions of the Royal Society of London 2004, pp. 1775 et seqq.

13 *Roxin*, Strafrecht, AT, 2006, p. 70; *Lacey*, State Punishment, 1988, p. 59.

14 *Duff*, Punishment, Communication and Community, 2001.

15 *Lacey*, State Punishment, 1988, p. 59 et seq. (although they do not, on a conceptual level, depend on the concept of "free will" – this I will discuss later in more detail).