

BOOK REVIEW

The Limits of Criminal Law: A Comparative Analysis of Approaches to Legal Theorising

Carl Constantin Lauterwein (2010) Ashgate, Farnham. I.S.B.N. 978 0 7546 7946 2

This book performs the useful service of introducing the German *Rechtsgutstheorie*, a concept in criminal law, to an English-speaking audience. Its comparative aspects are, however, disappointing. The author's mission of making a comparison between German and Australian criminal law fails because of his superficial acquaintance with Australian law. This superficiality is evident in small matters – such as the author's evident belief that 'Sir' Michael Kirby has a Knighthood and the author's failure to recognise that *dogmatisch* must be translated 'doctrinal' and not 'dogmatic' – as in larger and more important matters. To this vice there is added the all-too-common trap – one that ensnares comparativists of all stripes, but seems prevalent among Germans : that of using one's own legal system as the sole measuring-stick against which all others will inevitably be found wanting.

The *Rechtsgutstheorie* is in essence a simple concept. It says that the function of the criminal law is to protect certain interests such as life, liberty, sexual self-determination and so on. In interpreting the criminal law, the interest protected by any particular offence should be borne in mind. This is rather like what we should call purposive interpretation. Secondly, the concept decrees that the state should criminalise only those actions which endanger a recognised interest. Clearly this will lead, as the author recognises, to a great deal of debate about what sorts of interests count as recognised. This normative aspect of the *Rechtsgutstheorie* fulfils an important function in German academic circles and a significant although less important one in practice: as the author notes, attempts to have it adopted as a criterion of constitutional validity have failed.

That being so, Germany cannot be put forward as a jurisdiction in which the legislature is restrained by a normative, legally enforceable principle from the promiscuous creation of criminal offences in a manner that common-law legislatures are not. Nevertheless, the author's description of the *Rechtsgutstheorie* should be read with interest by anyone interested in an explanation of this central concept in German criminal law.

The remainder of the book, however, makes little to no contribution to serious comparative law. The author's search for a similar thing to the *Rechtsgutstheorie* in Australian textbooks was, he says, unavailing; and when he conducted interviews with eleven Australian professors of and practitioners in criminal law, he did not find it there either. From this, he concludes that Australian criminal lawyers, unlike those in the United Kingdom and the United States (p. 2), are either unable to engage in a normative discussion of the limits of criminal law, being confined to criminological perspectives, or use several different possible justifications for the existence of criminal offences (pp. 42f). Each of these aspects of the argument needed much greater work.

To take the last one first : it is said to be characteristic of civil-law systems that they start with all-embracing principles and work downwards, whereas we start from below and work upwards. This insight is hardly new. Many people have noticed this point.

To the lawyer whose mind has been moulded by civilian influences, the theory may come first, and the source of the theory may be the writings of jurists not the decisions of judges. However, that is not the way in which a system based on case law develops; over

time, general principle is derived from judicial decisions upon particular instances, not the other way around.¹

It is not apparent that one or other method of proceeding is necessarily correct or inevitably leads to preferable results. Indeed, the author's own analysis demonstrates that the *Rechtsgutstheorie* covers such a huge multitude of sins that it barely remains one unified theory anyway. The existence of an overarching concept simply shifts the question to: is X a legally recognised interest (and thus legitimately the object of the protection of the criminal law)? My acquaintance with this theory of everything has left me deeply sceptical of the value of such entities: perhaps, given the multifarious purposes served by the criminal law, there is no such thing.

Secondly, there is not the slightest reason why we should develop a completely indigenous criminal law ignoring insights from the rest of the English-speaking world. Essays such as Andrew Ashworth's 'Is the Criminal Law a Lost Cause?'² are read by Australians as well. No-one who is familiar with the literature on the state of the common law's criminal law could claim that everything is perfect in the garden of Australian criminal law. But it is not legitimate to concentrate only on Australian sources when Australia, unlike Germany, is part of a world-wide multi-jurisdictional system of law.

Finally, and most importantly, it would in fact be quite astonishing if the author's initial discovery were correct and there were no debate in this country on the interests that may legitimately be protected by the criminal law. Policy discussions on the limits of the criminal law using normative tools regularly occur even among those unblessed with a legal education in areas such as prostitution and drug use. It has occurred recently or well within living memory in areas as diverse as homosexuality, offences relating to terrorism, 'hate crime'³ and the fate of the partial defence of provocation. Thus, the author grasps (p 67) that our criminal law, being based largely on decided cases and inherited from a centuries-old tradition, is likely to be much more significantly influenced by tradition and history than the criminal law of Germany, both because it is codified and because of the need for a new beginning after 1945. He complains however that this tradition is not subjected to normative criticism, which suggests that he has not looked at, for example, debates about the criminalisation of homosexuality.

Everyone (including the author of the book under review) is familiar with normative concepts on the limits of the criminal law such as the harm principle. The author dismisses the harm principle (p. 103) on the grounds that some employ it to argue for criminalisation of activities such as incest, while others use it to argue against criminalisation; and because there is no 'generally formulated concept of the harm principle'. Neither the lack of one agreed formulation of the principle nor the fact that it leads various people to different conclusions, however, means that no normative debate is going on. It means merely that the principle is not wholly determinate and, indeed, that there is actually a debate going on. Things are no different in a country in which the harm principle is considered but an example of a wider principle such as the *Rechtsgutstheorie*. If only debates could be solved as easily as thinking up a class to which the harm principle would belong!

Nor is the harm principle the only normative tool available to us: the abolition of provocation, 'hate crime' and the decriminalisation of homosexuality raise what might be called a principle of equality. Thanks to the implied freedom of political communication, the legitimacy of criminal offences affecting free speech is nowadays considered from a

¹ *Roxborough v. Rothmans of Pall Mall* (2001) 208 CLR 516, 544.

² (2000) 116 LQR 225.

³ The debate on this is usefully summarised in Mason, 'Hate Crime Laws in Australia: Are they Achieving their Goals?' (2009) 33 *Criminal Law Journal* 326, 328f.

normative perspective both by academics⁴ and judges.⁵ The latter case is admittedly unusual, as it involves not merely an academic debate but constitutional validity; but, as the author of the book under review states, the *Rechtsgutstheorie* has not been accepted as a constitutional doctrine in Germany, and accordingly the difference makes no difference to his argument.

The author mentions at one point the Model Criminal Code Officers' Committee, but does not appear to have troubled to look at their reports. Opening one of them (Ch. 3 pp. 269ff) almost at random, I find a discussion, which could easily be re-cast in terms of the *Rechtsgutstheorie*, of whether the offence of bribery should be extended to include the private sector, or remain confined to the public sector (the interest protected being the integrity of government, in which the public has a special interest).

The *Rechtsgutstheorie* is certainly a valuable tool in German criminal law, but it cannot be maintained that no legal system is complete without an exact copy. The tools we have are a very adequate substitute for it, at least on the evidence presented in this book. Whatever may be wrong with Anglo-Australian criminal law theory at the moment, this book does not reveal it. It would require a much more in-depth and subtler investigation to justify the conclusion that the *Rechtsgutstheorie* really does have something to contribute to the English-speaking world.

There is certainly a significant difference in the style of academic criminal law in common-law countries and in Germany which lies behind the difference highlighted in this book and which might have been examined with more profit by an author capable of avoiding superficial judgments based largely on interviews and the contents of undergraduate textbooks. German professors of criminal law have developed their own philosophical system dealing with such things as the relationship between the mind and the body, and conduct intense debates about the nature of human action. Much of what they do would belong, in our way of looking at things, to disciplines such as legal or even non-legal philosophy. Having noticed this difference as a student in Germany and reflected on it since, I cannot say that we are worse off as a result. My own study of one aspect of this German phenomenon⁶ concluded that professors of criminal law are not necessarily cut out to be philosophers. I should very much have liked to hear the case for the contrary conclusion.

My impression is, further, that German legal scholarship sees the criminal law as almost exclusively something for lawyers. It is seen as a highly technical and sophisticated system which outsiders could not begin to understand. I should be very sorry if that could ever be said of Australia. Many disciplines besides the law have illuminating and interesting things to say about it which lawyers should listen to. The harm principle is, of course, the invention of a philosopher. The law operates in society and its effects on society can be studied from many perspectives. With us, then, legal books are not the only ones in which one may find discussions of the purpose and limits of the criminal law on a normative basis – something which may not have been apparent to a German, and unnecessarily limited his search for such perspectives.

There is one point on which I find myself in agreement with the author. It is indeed a great shame that students in Australia are not regularly introduced, as part of the basic course in criminal law, to theoretical perspectives on the purposes of the criminal law, except perhaps briefly (pp. 115f). My own experience of studying German criminal law in an undergraduate class suggests, however, that things are not much different there, whatever the textbooks may say, largely because the examinations do not require

⁴ See, for example, Meagher, 'The Status of Flag Desecration in Australian Law' (2008) 34 *University of Western Australia Law Review* 73.

⁵ See, for example, *Coleman v. Power* (2004) 220 CLR 1.

⁶ 'Concepts of Intention in German Criminal Law' (2004) 24 *Oxford Journal of Legal Studies* 99; 'The Intention Debate in German Criminal Law' (2004) 17 *Ratio Juris* 346.

students to possess this knowledge and students around the world, being rational actors, do not bother with information that they will not be tested on. It would indeed be a wonderful thing if every student in both Germany and Australia were introduced in a serious way to some part of the debate on what should and should not be criminalised. The competition for time in the curriculum makes this, however, a utopian hope.

And indeed, when I pull down my old textbook from 1998 – one very commonly used in Germany to this day and the most suitable, perhaps, for students, even if not the heaviest or most learned – I see that it devotes barely a page to the *Rechtsgutstheorie* and the justification of the criminal law.⁷ I might conclude from that that normative questions are hardly touched on by German scholars if I were only superficially acquainted with German criminal law scholarship.

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⁷ Wessels, *Strafrecht Allgemeiner Teil : Die Straftat und ihr Aufbau* (27th ed., C.F. Müller, Heidelberg 1997) 2f.

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