PRIVATE LAW

Reforms of the German Criminal Code -Stock-taking and Perspectives - also from a Constitutional Point of View

By Christoph Krehl

[Editor's Note: *This article was originally presented as a report at the "International Conference on Problems of Criminal Laws Coming Into Force" at Vilnius, 29 November 2002*]

Once a major reform has been concluded, one might easily be tempted to be just glad about what has been achieved and to think that nothing more needs to be done. However, experience in Germany as regards the amendment of criminal law and law of criminal procedure has shown that "after the reform" has, at the same time, always meant "before the reform." The history of German criminal law is the history of a never-ending reform. The reform has not only consisted in making individual corrections to the existing positive law; time and again, developments in society have posed new challenges to criminal law, which, in the course of time, have resulted in profound changes in its structure. This means that even after a reform has been concluded, there must be willingness to further shape criminal law or, as the case may be, to protect it from changes that might be brought about by new influences. German criminal law, with its more than 130 years of history, and with its almost 180 more or less profound amendments of the law, bears eloquent witness to the profound changes that criminal law can experience, in spite of individual extensive reforms, admittedly in a time of historical upheavals. The present contribution provides an outline of the history of German criminal law through the present time and tries, on the basis of this outline, to develop a forecast of the influence to which criminal law will be exposed in the future.

A. The Development Through 1945

The beginnings of German criminal law were marked by the entry into force of the 1871 *Strafgesetzbuch für das Deutsche Reich* (RStGB – Criminal Code for the German Reich), which until well into the second half of the last century determined criminal law in Germany. It created a uniform law for Germany; it was characterized by the 19th-century world of thought of the liberal state governed by the rule of law. What was decisive for punishment was the idea of retaliation for criminal offences that was geared to a general prevention of crime. The Reich Criminal Code hardly

https://doi.org/10.1017/S2071832200016114 Published online by Cambridge University Press

contains any provisions that are based on the concept that the purpose of punishment is to deter the offender from further wrongdoing, *i.e*. that were geared to the offender.[1] Since the Reich Criminal Code, rather than initiating a future-oriented development, brought a previous development to a close, it was soon reproached as having already been obsolete at its inception.[2]

It is true that the need for reforming the Reich Criminal Code became evident very soon; instrumental in this was, above all, Franz von Liszt with his 1882 Marburg Programme[3] and his demand for a criminal law that focused on the deterrent effect on the particular offender. And after all, it was not before the 1920s that reform efforts in this direction were taken with the creation of a Juvenile Court Act (1923) and with the legislation on fines that was aimed at reducing short-term prison sentences (1924).[4] The introduction, which had been demanded for quite some time, of a dual approach between punishment and measures other than punishment for dealing with serious criminal offences followed in 1933. Soon afterwards, the mitigation of a sentence in the case of diminished criminal responsibility was introduced, and in the 1943 Reich Juvenile Court Act, the criminal law relating to young offenders was further developed. Contrary to this, numerous other amendments of criminal law that took place through the end of the Second World War implemented the principle of general prevention with the utmost severity, like, for instance, through the unscrupulous expansion of capital punishment.[5] These amendments came about "by way of spontaneous, momentary legislation" and were deleted after the collapse of the National Socialist regime.

B. The Period Through the "Grand Criminal Law Reform"

After 1945, the focus was on repealing statutes that were an expression of National Socialist injustice, and apart from this, individual legislative concerns were pursued.[6] In 1949, for instance, capital punishment was abolished by the adoption

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[1] See, Eser, in *Festschrift für Werner Maihofer*, 1988, *Hundert Jahre deutscher Strafgesetzgebung*, p. 110.

[2] Cf. *Entwurf eines Strafgesetzbuchs* (E 1962), Records of the *Bundestag (Bundestagsdrucksache)* IV/650, p. 93.

[3] In this context: Naucke, *Strafrecht, Eine Einführung*, 9th edition 2000, p. 35.

[4] Eser, in: *Festschrift für Werner Maihofer*, 1988, *Hundert Jahre deutscher Strafgesetzgebung*, pp. 112-113; moreover Jescheck, in: *Leipziger Kommentar, Strafgesetzbuch*, 11th edition 1992, Introduction, marginal number 49.

[5] Eser, in: *Festschrift für Werner Maihofer*, 1988, *Hundert Jahre deutscher Strafgesetzgebung*, p. 113.

[6] Cf. Eser, in: Schönke/Schröder, *Strafgesetzbuch, Kommentar*, 26th edition 2001, Introduction, marginal number 1.

https://doi.org/10.1017/S2071832200016114 Published online by Cambridge University Press

of the Basic Law (the *Grundgesetz*).[7] At any rate, the creation of a constitution that was endowed with guarantees in accordance with the rule of law was a decisive circumstance, which was to prove its suitability to contribute to the evolution of criminal law in the following years. Of particular importance in this context were the fundamental rights of the individual, *i.e*. the rights of the citizen against the state, from which the Federal Constitutional Court was to derive, later on, specific requirements placed on the configuration of criminal law, but also the obligation, on the side of the state, to adopt precise laws so that the citizens of the state can be aware of what is punishable and what is not.

Other important amendments of criminal law were the introduction, in 1952, of the corrective measure, imposed by criminal courts, of revoking a driver's license, and one year later, of the suspension of a sentence in favor of probation, which had before only been possible by an act of clemency. When finally, in 1953, an overall reform[8] of German criminal law was embarked upon with German thoroughness, no one would have foreseen that it would be completed only in 1975. After prolonged preparatory work in the "Grand Commission on Criminal Law," which had been established especially to this effect, it was possible only in 1962 to have a government draft on a reform of criminal law discussed by Parliament. However, the government draft "E 1962" had no chance to become a law however much it excelled in completeness and exactness when formulating general prerequisites of criminal liability. It was based on an understanding of punishment that, above all, focused on retaliation, wrongdoing and guilt; it lacked, however, a modern concept of criminological policy.[9]

It was due to the alternative draft that had been worked out in 1966 by German and Swiss criminal-law scholars that the reform did not reach a deadlock.[10] The consistent orientation of this draft towards the concept of rehabilitation of offenders, combined with an express withdrawal of criminal law and the limitation of its application to clearly punishable behavior, were in sharp contrast to the 1962 draft. Just to mention some key issues, it advanced the uniform introduction of prison sentences instead of differentiating between penal servitude and

[7] See Eser, in: *Festschrift für Werner Maihofer*, 1988, *Hundert Jahre deutscher Strafgesetzgebung*, p. 114.

[8] See in this context Maurach/Zipf, *Strafrecht, Allgemeiner Teil*, partial volume 1, 8th edition 1992, pp. 53 et seq.; also Jescheck, in: *Leipziger Kommentar, Strafgesetzbuch*, 11th edition 1992, Introduction, marginal numbers 58 *et seq*.

[9] This was admitted even by members of the Grand Commission on Criminal Law, like, in particular, Jescheck (*Strafrecht, Allgemeiner Teil*, 1st edition 1969, p. 75).

[10] As regards the alternative draft, see Maurach/Zipf, *Strafrecht, Allgemeiner Teil*, partial volume 1, 8th edition 1992, pp. 53-54; Eser, in: *Festschrift für Werner Maihofer*, 1988, *Hundert Jahre deutscher Strafgesetzgebung*, p. 116.

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imprisonment, and the complete renunciation of short-term prison sentences. However, one of the most important reasons why the reform could progress was its departure from the German tradition of codifying law as comprehensively and systematically as possible; instead, the English model of a step-by-step legislation was followed. It became apparent that there was not enough political capital for comprehensive codification but that the existing political climate was sufficient for smaller partial reforms that could be adapted more easily to the course of social change.[11]

The first essential step was, in 1968, the decriminalization of minor offences, by converting them into regulatory offences; subsequently, this measure was followed, in 1975, by five criminal-law reform acts. The first two reform acts essentially contained the new regulation of the General Provisions of the Criminal Code; the new regulation, which constituted a compromise between the 1962 draft and the 1966 draft,[12] was more oriented towards the first draft, but nevertheless, brought considerable progress: A uniform prison sentence, expanded possibilities of suspending a sentence in favor of probation, the modification of the system of fines in favor of the Scandinavian system of daily rated fines, the introduction of the warning notice with the reservation of punishment, the legalization of the mistake as to the wrongful nature of an act, and the legalization of necessity as justification. As regards the Special Provisions of the Criminal Code, the reform abolished the offences of adultery and simple homosexuality, whereas the further reform of the Special Provisions was left to be dealt with in the other criminal-law reform acts.[13]

The Third Criminal-Law Reform Act contained the new regulation of the offences connected with public peace and demonstrations (1970), the Fourth Criminal-Law Reform Act was concerned with the so-called "offences against morality," and the Fifth Criminal-Law Reform Act contained the new regulation of the law concerning the termination of pregnancy (1974). The last overall repeal of obsolete statutes was brought about, in 1974, by the Introductory Act of the Criminal Code, which followed the tendency towards further decriminalization by repealing the part of the Act that dealt with *Übertretungen* (transgressions) and deleting most of them without substitution.[14]

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[11] Eser, in: *Festschrift für Werner Maihofer*, 1988, *Hundert Jahre deutscher Strafgesetzgebung*, p. 117.

[12] As concerns the assessment of the reform legislation as a compromise between both drafts: Maurach/Zipf, *Strafrecht, Allgemeiner Teil*, partial volume 1,8th edition 1992, p. 78.

[13] Cf. Eser, in: Schönke/Schröder, *Strafgesetzbuch, Kommentar*, 26th edition 2001, Introduction, marginal number 6, which further specifies the legislation.

[14] Cf. in this context Jung's overview in: Roxin/Stree/Zipf/Jung, *Einführung in das neue Strafrecht*, 2nd edition 1975, pp. 117 *et seq.*

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C. The Latest Developments

The end of the reform, which was marked by the new publication of the Criminal Code in 1975, more than one hundred years after its entry into force, was not the end of the reform of the Special Provisions of the Criminal Code. Up to now, more than 70 more or less far-reaching amendments have followed, which give the Criminal Code of today a completely different character. The criminal law of 1975 is no longer comparable to that of 2002.

Only a few examples are quoted here which also show that criminal law has, from then on, developed differently, *i.e*. contrary to the reforms, which had been characterized, above all, by humanization and rehabilitation.[15] The Fifteenth Criminal-Law Amendment Act, which was adopted in 1976, introduced an extended catalogue of legal justifications for an abortion in the new regulation of the termination of pregnancy *("erweitertes Indikationsmodell")*,[16] after the Federal Constitutional Court had, in 1975, declared the time-phase solution for the termination of pregnancy incompatible with the protection of life that is prescribed by the Constitution.[17] As early as in 1976, the first act on the fight against white-collar crime followed, which was complemented ten years later by a second such act. The classical offences against property had proven insufficient; specific legal elements of economic subsidy fraud and credit fraud were introduced; they are mere endangerment offences, *i.e.* that no damage need be specified. The Second Act on the fight against white-collar crime resulted in a further wave of determining new criminal offences, especially in the sectors of check transactions, computer-related crime and investment fraud.[18]

The reform of environmental criminal law is to be assessed in the same way; the reform owes its existence to social change alone, and in particular, to the fact that the attitude concerning the need for protection of the natural foundations of life has

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[15] A conclusive account is given in: Ebert, *Tendenzwende in der Straf- und Strafprozessgesetzgebung*, *Juristische Rundschau* 1978, pp. 136, 138.

[16] See in this context Eser, in: *Festschrift für Werner Maihofer*, 1988, *Hundert Jahre deutscher Strafgesetzgebung*, pp. 127-128.

[17] Judgment of the First Senate of the Federal Constitutional Court of 25 February 1975 - 1 BvR 1, 2, 3, 4, 5, 6/74 -, in: BVerfGE (official collection of decisions of the Federal Constitutional Court), volume 39, pp. 1 *et seq.*

[18] Eser, in: *Festschrift für Werner Maihofer*, 1988, *Hundert Jahre deutscher Strafgesetzgebung*, p. 131;in greater detail: Tiedemann, *Die Bekämpfung der Wirtschaftskriminalität durch den Gesetzgeber, JZ (Juristenzeitung)* 1986, pp. 865 *et seq.*; see also Jescheck, in: *Leipziger Kommentar, Strafgesetzbuch*, 11th edition 1992, Introduction, marginal number 90.

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changed considerably. Although threats of punishment and regulatory fines had existed before, the legislature, in 1980, regarded it as appropriate to consolidate the most important relevant provisions in the Criminal Code.[19]

The introduction, in 1981, of the possibility of suspending the remainder of a life imprisonment sentence, which has far-reaching consequences in practice, does not fit into this notion of a criminal policy that to an increasing extent served as a instrument to control major social or state malfunctions. It must be kept in mind, however, that the introduction of this possibility was the consequence of a Federal Constitutional Court decision pursuant to which, under constitutional law, also a person sentenced to life imprisonment must have the chance to gain freedom again someday.[20]

Apart from the 1986 Crime Victims' Protection Act, which strengthened the victims' interests and the idea of compensation in criminal proceedings,[21] the legislative projects that followed each other in the subsequent years mainly aggravated existing threats of punishment or created new elements of criminal offences.[22] Examples for this are the 1986 Terrorism Act, the Fight Against Organized Crime Acts from 1992 and 1998[23] (which introduced the offence of money laundering and expanded the legal possibilities of the skimming-off of profits, in particular by means of a fine levied on property; this fine has, in the meantime, been declared unconstitutional by the Federal Constitutional Court on account of an infringement of the prohibition of *ex post facto* laws[24]); other examples are the so-called Fight Against Crime Act from 1994 (which, in particular, aggravated punishment in the context of the fight against xenophobic and other right-wing and left-wing extremist threats but also introduced the settlement between offender and victim into general criminal law[25]), a criminal-law amendment act from 1997 that made

[19] A comprehensive source in this context: Tiedemann, *Die Neuordnung des Umweltstrafrechts*, 1980.

[20] Cf. Judgment of the First Senate of the Federal Constitutional Court of 21 June 1977 - 1 BvL 14/78 -, in: BVerfGE (official collection of decisions of the Federal Constitutional Court), volume 45, pp. 187 *et seq.*

[21] See in this context Eser, in: Schönke/Schröder, *Strafgesetzbuch, Kommentar*, 26th edition 2001, Introduction, marginal number 11.

[22] This assessment is shared by Eser, in: Schönke/Schröder, *Strafgesetzbuch, Kommentar*, 26th edition 2001, Introduction, marginal numbers 11-12.

[23] See in this context Tröndle/Fischer, *Strafgesetzbuch, Kommentar*, 51st edition 2003, Introduction, marginal number 13.

[24] Judgment of the Second Senate of the Federal Constitutional Court of 20 March 2002 - 2 BvR 794/95 -, *Neue Juristische Wochenschrift* 2002, pp. 1779 *et seq.*

[25] In this context: Neumann, *Zum Entwurf eines Verbrechensbekämpfungsgesetzes, Strafverteidiger* 1994, pp. 273 *et seq.*

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marital rape a punishable offence, the Fight Against Corruption Act from the same year and also the Sixth Criminal-Law Reform Act of 1998. After an extraordinarily hasty legislative procedure, and without the participation of criminal-law scholars, this Act subjected the Criminal Code's threats of punishment to a comprehensive examination; as regards the aspired harmonization, in particular of legal interests that cannot be transferred and of substantive legal interests, the Sixth Criminal-Law Reform Act opted, in principle, in favor of increasing the statutory ranges of punishment.[26]

What is particularly worth mentioning is also the Law on the Fight Against Sexual Offences and other Dangerous Crimes from 1998, which was adopted very quickly, solely under the impression of the public's indignation over two sexual offences to minors.[27] This tendency towards fast amendments to criminal law[28] continued until the recent past: legislative measures in the wake of 11 September 2001 of course also concerned criminal law.

However, the overview of the reform of German criminal law would not be complete if, for instance, amendments from 1998 went unmentioned that originate from international agreements and, for example as regards corruption and bribery, are aimed at extending German punitive power to foreign office-holders.[29]

D. German Criminal Law and the 21st Century

At the end of the historical overview, the question arises: which factors will influence the further development of German criminal law? The only reliable forecast that can probably be made is that the time of amendments of the Criminal Code is not over; on the contrary, criminal law will continue to be in the focus of reflections that deal with finding a suitable answer to the change of social circumstances or to "new challenges."

The newly appointed Federal Minister of Justice, Ms. Brigitte Zypries, made it clear in her first speech before the *Bundestag* (German Federal Parliament) on 29 October

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[26] Cf. Bussmann, *Konservative Anmerkungen zur Ausweitung des Strafrechts nach dem Sechsten Strafrechtsreformgesetz*, *Strafverteidiger* 1999, pp. 613 *et seq.*

[27] A critical view is also advanced by: Schäfer, brief presentation, *Neue Juristische Wochenschrift* 1997, p. 1288; see moreover Schöch, *Das Gesetz zur Bekämpfung von Sexualdelikten und anderen gefährlichen Straftaten vom 26. Januar 1998, Neue Juristische Wochenschrift* 1998, pp. 1257 *et seq.*

[28] See also Albrecht, *Das Strafrecht im Zugriff populistischer Politik*, *Strafverteidiger* 1994, p. 267.

[29] Cf. in this context Eser, in: Schönke/Schröder, *Strafgesetzbuch*, 26th edition 2001, Introduction marginal number 14.

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2002, that, for example, as regards the fight against violence, she definitely places an emphasis on criminal law.[30] It seems that what first and foremost matters to her in this context is not merely to bring more offenders before the criminal courts and to sentence them by way of an extended coverage of behavior that is regarded as punishable. What is in the foreground for Ms. Zypries is obviously the power of the criminal law in the stabilization of values: "Because criminal law, as a clear indicator of the limits of freedom, is also important, and particularly so, wherever in society commitments to fundamental values lose their binding force."

This point of view of the Federal Minister of Justice is in line with a criminological policy that, after the conclusion of the major reform efforts in 1975, has essentially been characterized by creating new elements of criminal offences and by more severe sentences, and no longer, as before, by decriminalization and a mitigation of sentences. Such criminological policy is almost always connected with current social problems for which the state is looking for answers at a given point in time.[31] From this perspective, criminal law is, in principle, an acceptable and effective instrument of control, and the idea to make use of criminal law as an *ultima ratio*, which had been essential for criminal law, is evidently no longer of great importance. Criminal law is always mentioned as a panacea when the state is looking for adequate answers. Whether this approach can indeed serve to solve the problem is a question that is not raised in the first place or that remains unanswered.

The subjects of this type of criminological policy are less the classical legal interests of the individual (life, health, freedom) but rather the legal interests of the public, which are circumscribed in such an imprecise and elusive manner that they can serve to justify any threat of punishment: the protection of human wellbeing, public health, the functionality of the capital markets or the protection of electronic data processing.[32]

Protection under criminal law is implemented, in most cases, in endangerment offences and to a lesser extent in offences causing an injury.[33] This makes the criminal judge's work easier, who only has to establish that the punishable act has

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[30] In the discussion on the Federal Chancellor's policy statement in the German *Bundestag* on 29 October 2002.

[31] In this context an early view was given by Hassemer, *Kennzeichen und Krisen des Modernen Strafrechts*, *Zeitschrift für Rechtspolitik* 1992, p. 380.

[32] Other examples in Albrecht, *Strafverteidiger* 1994, p. 265; see also Hassemer, *Das Schicksal der Bürgerrechte im "effizienten Strafrecht"*, *Strafverteidiger* 1990, p. 330.

[33] Explicitly: Albrecht, *Strafverteidiger* 1994, p. 269.

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been committed but does not have to determine a damage or a specific danger that is attributable to acts committed by the person affected. Nevertheless, deplorable deficiencies in execution remain. Criminal law, which has been expanded on a large scale, cannot accomplish the tasks of solving general conflicts in society that have been assigned to it, or cannot accomplish them as expected. This frequently results in the intention to limit these deficiencies by further aggravations. If this approach is not successful, the only function of criminal law that remains is a symbolical one.[34]

The hope that processes in society can be controlled by a new criminal law is not fulfilled; criminal law degenerates into a make-believe weapon in the political arena, which is only of benefit for the legislature because the legislature can claim to have reacted, immediately and with the sharp sword of criminal law, to the fears of individuals, to threats on a world-wide scale or merely to the impairment of interests that are regarded as socially important.

This trend, the end of which is nowhere to be seen, is in accord with developments that result from a Europe that grows ever closer together. Not alone the "internationalization of crime" is an urgent motive for criminal law to develop beyond national borders. The "Europeanization of criminal law" - which can be noticed even today in connection with the expansion of the scope of protection of national provisions in criminal law as a reaction to a changed Europe - is the logical consequence of a general Europeanization of all spheres of life, which, undoubtedly, requires a (certain degree of) uniformity and harmonization of judicial areas.[35] The European states will therefore have to get used to framework decisions of the European Union, which will force them to amend their national law and will thus also result in the establishment of new offences, in an increase in the threatened measures of punishment, and in the expansion of the authorization to investigate. Whether this, as is feared by some, will go along with a strengthening of European, or certain national, interests, or even with the traditions of a state governed by the rule of law being abandoned or undermined, will depend on how decision-making processes in the European framework will proceed in the future, particularly in an ever larger Europe. The Europeanization of criminal law will not become easier with the increasing number of national systems of criminal law that are to be considered in a new "criminal law with a European character," because criminal law often, and this becomes particularly evident in the

[34] In this context : Hassemer, *Symbolisches Strafrecht und Rechtsgüterschutz*, *Neue Zeitschrift für Strafrecht* 1989, pp. 553 *et seq.*

[35] Cf. in this context in greater detail: Hassemer, *Ein Strafrecht für Europa*, talk at the University of Würzburg on 28 June 2002 (unpublished as yet); see also Jescheck, in: *Leipziger Kommentar, Strafgesetzbuch*, 11th edition 1992, Introduction, marginal numbers 98 *et seq.*

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relationship between freedom and security, has strong national traits that can originate in traditional persuasions and concepts of morality, but also in historical experience.

The national and international tendency towards an increase in criminal law is contrasted, although only to a limited extent, by guarantees in our Constitution[36] to which the Federal Constitutional Court has given substance in 50 years of jurisprudence. Criminal law must be just and humane, it must safeguard human dignity, and it must not be disproportionate. An act of criminal law must not provide cruel, inhuman or degrading punishment, it must also not be more severe than the occasion requires for which it has been adopted. Minor offences must not be persecuted with cruel punishment. Life imprisonment for an act of theft would be unconstitutional. Criminal law must only hit the guilty person; even in complex situations of threat, the proof of a relation, or attribution, of a particular offence to a specific individual cannot be renounced, remaining doubts or insecurities preclude, *in dubio pro reo*, the use of criminal law. The Basic Law would not permit a criminal law that prescribed punishments that are no longer in an adequate proportion to the seriousness of the criminal offence and to the perpetrator's guilt. Criminal law, however, must also not exclude from its efforts of protection important legal interests that would otherwise be insufficiently protected. A criminal code that did not contain offences that are punishable in the interest of the protection of human life would be in conflict with the Constitution. Finally, a criminal law that is in accord with our Constitution must be clearly defined and may not retroactively make a specific behavior punishable. The limits of criminal liability are to be specified as precisely as possible, the consequences of a violation are to be specified so that citizens can be aware of them.

This constitutional program could be complemented by fundamental cornerstones but also by specific conclusions that the Federal Constitutional Court has drawn from the principles that I have just mentioned. This program might not be rich enough in content to answer some criminal-law questions from the perspective of constitutional law, but it is at least suitable for drawing limits that are to be respected in the configuration of criminal law.

The power of constitutional law to shape the configuration of criminal law must not be underestimated, even though, with a view to the history of reforms of criminal law, and the increasing penalization in which they have resulted, skepticism seems to be more advisable. Not all criminal-law issues have a constitutional dimension.

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[36] Cf.in this context in greater detail *Naucke, Strafrecht, Eine Einführung*, 9th edition 2000, which, on pp. 83-85, comments on the jurisprudence of the Federal Constitutional Court; see also Hassemer, *Symbolisches Strafrecht und Rechtsgüterschutz*, *Neue Zeitschrift für Strafrecht* 1989, p. 558.

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However, if a constitutional court exists that takes the criminal-law program that is contained in the Constitution seriously, this alone guarantees that the legislature, as we in Germany experience with every legislative project in criminal law, respects the constitutional bounds when further refining criminal law, and refrains from plans that carry too much of a constitutional risk.

With this, the driving forces of the further development of German Criminal law have been mentioned. However, the ultimate direction will no longer be decided in Germany alone, but will be determined in Europe as well.

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