REBELS, BANDITS AND INTRIGUERS – WHY GERMANS ARE HAVING A DEBATE ON “ENEMY CRIMINAL LAW” IN THE 21st CENTURY: AND THUS ARE FALLING BEHIND THE DRAMATURGY OF ENLIGHTENED THEATRE OF THE LATE 18th CENTURY – TO THINK SCHILLER’S BANDITS

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Abstract: In this article, the author does not criticize the Jakobs construction from today’s point of view, but from the perspective of the enlightened idealists around 1800. The author illustrates the long-term effects traditions, which are waved goodbye by Jakobs, even though he seems to want to keep up some kind of normal constitutional state prosecution. With this, the author demonstrates that Jakobs continued a tradition of thinking which intentionally declares certain people’s exclusion as a legitimate purpose of governmental action.

Keywords: Criminal law for the enemy; Enlightened idealists; Jakobs construction.

“Enemy Criminal Law” is an aggressive way of controlling so called “dangerous subcultures”, such as fighting organized crime, especially terrorists. By the majority, this judgmental term is used in order to express critique towards it. Some authors consider the overall control of organized crime part of these provocative terms and thus, in my opinion, become hypercritical

One author only, Günther Jakobs, keeps considering this attribution (ascription) a description and his absurd thesis is drawing a lot of media attention. The debate seems to ask for an avowal: does one grieve this development or accept it as inevitable, if possible because the binning of certain controlling styles in this muddy area – Jakobs would even try to avoid this value judgment – is perceived as the lesser of two evils compared to the “contamination” of all action criminal law by combat strategies against “dangerous” people.

In the following, I will not take a shortcut to critique this construction from today’s point of view but I will take the long way. How – I am wondering – would enlightened idealists have reacted on such a construction around 1800? Would it have been conceived as a commitment to the older “Polizeyrecht” and thus as an attack to the ideas of the constitutional state, which were considered important at that time? To give an answer to this, I will illustrate the long-term effects traditions, which led to the


1 Hefendehl StV 2005, 156 ff and help – though wanting to express critique – Jakobs breaks a taboo which became a dictum.
classic action criminal law after 1945 and which are waved good-bye by Jakobs, even though he seems to want to keep up some kind of normal constitutional state prosecution. The one saying “friend” and “foe” should also recognize that power over the state of emergency, i.e. the power to define the “foe” in our world view is crucial to the character of criminal politics.

Continuously, “ascriptions of the enemy” have been made in Europe over the last two centuries in spite of the tendency to commit to a liberal action criminal law. In any of those phases relevant to our criminal law culture there was a specific “enemy” that was “fought” against. The perceiving of threats and combat scenarios seems to be typical for modern criminal law.

1. Normative functionalism: strategies to politically control people who turn down the particular criminal law norm structure

To demonstrate that the differences which were introduced by Jakobs are created by his understanding of criminal law, I will make a short remark on the significance of these theses within his complete works. Retrospectively, the affirmative application of the construction of the “citizen- and enemy”- criminal law fits the constant keeping up of a general preventative model of criminal law. The ones considering norm stabilization the “reason of criminal law” – in archaic terms - need to have a factual right to protect which focuses on certain people. Normative functionalism then allocates – examining neither the empirical question of necessity nor the normative question of commensurability nor the sociological question on finding alternatives to his way of controlling – functions to every single legal area and leaves the regulation necessary to fixate norm stabilization and risk minimizing to the legislator. The missing of a general normative limitation of the state’s right to ignore individual rights with respect to security and risk minimizing is characteristic. In functionalism’s gutsy words: If necessary (politics), it is prior to fulfil the purpose of norm stabilization and succeed in averting danger.

Jakobs worked out a consequently functionalist concept concerning the purpose of penalty from 1976 to 1983 and focused on the AT (general part) of the StGB (German Criminal Code) which itself is constructed in a functional and criminal law dogmatic way. Later, he merely modified it. The provocative summing up of dazzling theses on enemy criminal law since 1985 was not expected to be as fierce from the beginning, but neither do these theses on modern extra criminal law contradict the complete works. They seem to have evolved due to a culture where outbidding and exaggerating are permanent, which also includes the aiming towards attention from

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2 The interesting layout of his criminal theory and thus his criminal law theory is the indirect setting of the general preventative thought. It is neither the retribution of guilt nor deterrence are the purpose of criminal law ascription, but seemingly it is neutral “norm stabilization”. These words do bring up the memory of Luhmann although they were not uttered by him. But the apprehension of norm stabilization being the purpose of criminal law ascription by criminal law norm affirmation had been critiqued early by empiric criminal sociologists as an empty notion. Jakobs is decribing a function but means to make a description. He is conducting a normative functionalism and means to say: norm stabilization is the highest good of criminal law. Like this, he is making a contribution to normative principles, not empiric courses. Due to that, Karl Schumann noted that Jakobs was using a classic juridical neutralizing technique because the ascription initially excludes any empiric falsification of the manifest and latent consequences. It is supposed to become clear that the beginning of the debate lies in its special understanding of the empirically intangible “ascription” of normative functions.
the audience by speaking publicly and stage-managing oneself. That’s when different styles of hypercriticism worded with relish and the anti-presentation of a radical anti-reformation come up. I do not want to take part in it but bring closer to the parties of the dispute the historical texts which are the basis for the stereotypical “citizen” and “foe” and the particular criminal law. In the 20th century, they are the image of a “normal-” and a state of “emergency”. I will skip the parallel to Carl Schmitt imposing itself and go back further into history because of the sad fact that in the 1930ies, hardly anybody represented the “liberal action criminal law”. The only thing to be shown is how it was easy and convenient to set up illiberal concepts of delinquent-enemy criminal law and leave power to the lawless and folkish national socialists and the opportunistic decisionists. Biological criminologists and all the ones who merely wanted to identify normative types of delinquents in order to set up a list of all “foes” which had to be eliminated did not encounter nameable resistance. That is why I will keep those memories (which seduce to make use of killer phrases) in the dark and will look for texts which may unemotionally illustrate the problem which came up once more.

2. Classes of treaties and the “criminal’s lawlessness”

Jakobs’ theses are based on Fichte. This is exceptional and may be related to the fact that Fichte is the only follower of German Idealism who, in the former model treaty dialect, thought about belonging to civil society or not and connected those thoughts to the purpose of penalty. Penalty (as a reaction to heavy norm violation) is one way of exclusion from civil society, according to Fichte. It is obvious for an author who was skilled in Luhmann’s theses on in- and exclusion to become alert when receiving this model. Superficially, Fichte is a rather harmless philosopher whose name is associated with pathos of freedom and German Idealism. But the time has come to interpret Fichte’s modified treaty construction, which was Hobbes-oriented, in the historical context and ask: Of what significance were Fichte’s conceptual stipulations at his time?

To give a hint on the conclusion: Treaty constructions and categories such as belonging or exclusion are terrifically suited to serve as a basis for enemy criminal law and not for constitutional criminal law. At Fichte’s time, limitation of governmental power was predominant. Also, Fichte was an outstanding personality. He did not invoke on Hobbes and the then dominating doctrine of treaties coincidentally. Creation myths of treaties may be suitable to be put in a speech on the German nation. Those constructions could become more usable if one was interested in the democratic self-conception of a certain society, considering that the rule of majority favours the exclusion of minorities. But the question desperately needing an answer at that time, the limitation of governmental power, did not catch Fichte’s interest at all. What does that mean? At first, it clarifies that there is a long-term effect of traditions constructing “friends” / formerly “citizens”, later on “comrades” on the one and “foes” / “rebels” and, since 1933, “inferiors” on the other side. Let us go back to the turn of the century from 18th to 19th because the argumentations from 1933 on serve as killer phrases which I would like to keep in the background.

Dealing with Fichte and his theses of the “criminal’s lawlessness” is more than uncommon for someone who wants to historically reconstruct modern criminal law science. Fichte was a philosopher and theologian who examined law along the way
because natural justice was modern at that time, the amount of natural justice systems was overwhelming and every philosopher quickly wrote down something about it.

In 1796, Fichte’s “fundaments of natural justice according to the principles of science teaching” were published. They dealt with “strict legislation” in a tiny paragraph only (§ 20 of “natural justice” – easy to be found in the particular edition), which kind of exclusively focused on the criminal’s “lawlessness”. Fichte postulates a state which does not know the separation of powers and which is controlled by a board of experts and notabilities elected by the people. An insurrection against this highest power may be justified, but when it fails, insurgents must be severely punished without regard to their morals, because they should have known better about their Nation.

We are dealing with a construction that was not taken seriously by any jurist at that time. Calling Fichte’s subjectivism a theory is an overestimation. On stage merely, such thoughts could lead to emotional expressions by catharsis. Franz Mohr, an adapted, ugly intriguer who was not well endowed by life, is responsible for Karl Mohr’s desperation. Karl is a likeable yet tragic hero who was supposed to receive a heritage. Then, he affiliates with the wrong crowd and becomes a rebel – a theatrical forecast of the philosophical problem of dialectics of good intention and bad means. His anger is comprehensible and it is not turned against governmental power but the unsoundness of society, still, he becomes “lawless”. At the same time, he is a victim of the intrigues of the seemingly honourable Franz Mohr. Although this constitutes a heart-throbbing tragedy, he would have had to be submitted under “enemy criminal law” as a “bandit”, if Fichte had successfully convinced the jurists. But the way of thinking, not politics at that time were in different trouble. Elder and younger Kantian jurists highly estimated the limitation of governmental power. In the end, Schiller links the upcoming execution to a good deed: the poor devil, who hands over Karl on his demand, is receiving a reward and the audience gets a comedic punchline: “This man can be helped”.

3. The Kantian’s role in developing constitutional criminal law – with all contemporary contradictions

A huge contrast between theory and practice is characteristic to law’s development from the end of the 18th century up to the 1970ies. In theory, criminal law science favoured Kant’s model of legal penalty, which was called “civil penalty” (§ 15 of the general German strict Law of P. J. A. from Feuerbach which was published first in 1801 up to a 14th edition in 1847). Practice was affected by strategies nowadays called “enemy criminal law”.

Fichte’s rigidness was not talked about seriously by philosophically educated jurists. It was rather made for theatre. Yet, people did not care about the huge difference existing between theory and practice.

In our days, everyday pictures of torture, civil war and suicide bombing have become trivial and the consequences for the victims are too dominant to reasonably and adequately debate on those scenarios. In the following, I will show that, even from a pessimistic point of view on the future threats, recourse to Fichte will not provide an
answer. Let’s start with the debate on the legitimate fundament of penalty between 1796 and 1804.

4. What was the meaning of the elder Kantians’ thesis about securing outer rights by the State mentioned at the beginning of consolidating modern criminal law science?

Kant’s legal doctrine was published in 1797, shortly after Fichte’s science doctrine. It is important to become free of all Kant-legends and pay attention to the context. As a representative of the theory of absolute penalty (in secondary literature), Kant is not easily accessible. But when trying to figure out why Kant formulated this theory and considering that he was not received by the then philosophically educated jurists, the point of view may shift and it becomes possible to think about the younger Kantians fascination on Kant in an unprejudiced way. It was the limitation of governmental power, the postulate of a constitution and, from a contemporary point of view: the utopia of world peace.

Kant wrote against Fichte’s theory of rigid deterrence. Fichte then started polemising against Kant’s theory of absolute penalty, but his polemics did not convince jurists. Also, Fichte’s polemics did not have anything in common with Franz von Liszt’s critique on theories of absolute penalty 100 years later. In 1882, the then reformers wanted to defend and enforce a special preventative criminal law against Kant’s theory of absolute penalty. I will factor out this aspect – the theories on absolute and relative penalty – and add to the record: When Franz von Liszt formulated his theory of the modern purpose of penalty in 1882, he was influenced in a different way than Fichte was when working on his rigid deterrence criminal law in 1796. Fichte reproved Kant’s normativism. That is why he calls the categorical imperative “inaccessible to research” and considers the thesis of penalty as a purpose in itself to be anchorless. In short: this part of Kant’s opus is an age-related blooper by a “great, yet not infallible man”, according to Fichte. He would rather stick with the common argument of penalty to be a means to deter potential criminals and discipline the good willed by the latent effects of strict penalties.

Concerning the rejection of the theory of absolute penalty, Fichte is one of many. Reading the then reviews³, one will learn quickly that not even the younger or elder Kant-related criminal law scientist of the time followed his absolute theory. But in contrast to Fichte, they did not long for the most possible deterrence. In fact, the then philosophically educated criminal law jurists were cautious because they wanted to reach consensus on a certain request. It was their goal to oppose to 18th century arbitrariness with a coherent and strict legal system based on a liberal concept of law. In contrast to Fichte, Kant’s concept of law was a role model to criminal law jurists who rejected to see as a role-model the then dominating instrumental-rational

³ I evaluated all contemporary hand books and popular literature magazines, which dealt with Kant in an intensive way; and all new Kantian publications also. The “Library of strict law, strict legislation and law teachings 1797-1804, edited by Almendingen, Feuerbach, Groiman” is exemplary of the critical yet professionally-informed thinking of the time. Elder Kantians and later on pragmatic reformers were published in the Criminal Law Archive 1799-1807, edited by Klein / Kleinschrod. The New Archive 1834-1875 is edited by Abegg / Birnbaum / Heffter / Mittermaier / Wächter. From our distant point of view, all jurists named can be labelled as liberal and enlightened - irrespective to the former controversy. Fichte’s law of enforcement was not part of them. Forcing the law was typical for older deontology and thus despotism.
penalty to deter and protect (the theories of association also contained such aspects). The state’s purpose may be to secure civil liberty rights, but the entailment of legal relations is supposed to overrule the enlargement of governmental powers.

Conciseness is the difference between the elder teachings relating to Kant, as Ernst Ferdinand Klein, to whom “it was all the same” if the goal was “reached by an improving, deterring or exemplary penalty” and the younger teachings. Between 1797 and 1804, when critical criminal law science developed, Klein was not criticised exactly enough. The then upcoming protagonist Paul Johann Anselm von Feuerbach was achieved acceptance of. Up to today, his ideas influence the guaranty of process-related fundamental rights, the principle that administrative decisions should be precise, clear and unambiguous and grandfathering (see §§ 19-20 of the “highest principles of strict law” written down in his schoolbook).

In 1796, one year prior to the publication of the Kantian legal doctrine, he had already written the “critique on natural justice” and uttered a warning about speculative natural justice systems which meant to postulate “native” civil rights represented and sanctioned as natural by the state. Maxims of decent life were not to be drawn from “nature”. Younger Kantians focused on a restricted field of philosophical analysis of the legal doctrine and constructed in a formal way in order to build up a coherent dogmatic system highlighted with the proper legal rule.

5. Younger Kantians’ critique on the elder ones: Criminal law is not an optional means to secure. It must be legitimated and made positive, i.e. detracted from political arbitrariness

Between the 18th and 19th century, philosophical and natural justice criminal law essays were written hourly. All authors unanimously agreed on the fact that penalty is not an arbitrary means, but a justified reaction to heavy unjustness. But strict law was overcome and not constructed in accordance to philosophical – we may call them constitutional – standards or made positive by a legitimated legislator. Younger Kantians were not irritated by that and reconstructed it according to philosophical principles. Its impossibility to be systematized (and thus its illegality) must have been obvious to judges, professors and any educated reader. But the Younger Kantians approach was obviously modern, too. In the end, it was not only successful, but carefully elaborated.

As a successful example, Paul Johann Anselm Ritter von Feuerbach (1775-1833) can be named. Systematically, his struggle is stipulated in an earlier AT (general part) and BT (special part), Feuerbach’s schoolbook of strict law, which is still worth reading. In 1804, he announced the programme of positive legal science when talking about the difficult relation between empiricism and philosophy in his famous Landshut inaugural speech. The Kantians gathering around Feuerbach turned Kant’s critique into a systematic one and thus had an effect on criminal law science for several decades. The 14th edition of Feuerbach’s schoolbook has served as an important position of points. During Vormärz, editor C.J.A. Mittermaier had already prolonged his contributions to an extent that two books could be found under the cover: A precise Kantian layout of criminal law science and a contemporary and moderately liberal, very pragmatic conversion more than willing to compromise. Fichte’s dominant statement linking the “criminal's lawlessness” to “natural justice"
(according to Fichte’s words, it could be translated with “nature”) from 1796 would have neither been accepted in 1847. The rejection of Fichte’s legal doctrine was based on a just cause.

Retrospectively, Fichte may have expressed the Jena zeitgeist and later on, amongst others, the Berlin spirit of a liberal German nationalism for a certain period (up to 1799) and, as a consequence, represent a romantic and idealist early on civil climate. In the then culture, enormous tension between the pathos of liberty and inflexible social integration can be seen as a paradigm. But the criminal law development, which was characterized by a vast difference between theory and practice, was capable of using Kantian legal doctrine elements in practice. Criminal law thinking was mostly liberal due to the exclusion of empirical analysis and the representatives’ political austereness. Also, it was not infected with a strong reference to society, least of all to Fichte’s subjective definition of liberty. Considering the term “morality”, Fichte’s thoughts may have been typical for his time. The individual could only expand itself if paying respect to the conditional abidance of the laws which were full of common welfare phrases and morality avowals. References to laws and morality were typical for the social climate, not the aspiring critical 19th century jurisprudence.

6. Fichte’s polemics and the Kantians systematization significant in the aftermath

Up to the middle of the 19th century, Feuerbach’s infringement doctrine had an effect on criminal law discussions. Afterwards, Feuerbach’s doctrine was replaced by the still usual term of the legal protected interest and his theory of psychological compulsion was substituted by the justice or the today called penalty combination theory. Our modern thinking is influenced by this tradition and there is no reason to abandon this approach. Fichte’s thesis of the criminal being excluded of civil society by becoming an outlaw was, till the most recent reactivation by Jakobs, a dead end of criminal law philosophy. The innovations introduced by Jakobs will fade also. Norm stabilization as the last purpose of criminal law is too narrow and too wide, too unspecific to determine the purpose of penalty. Any precise culture of control and prosecution must face empiric examination and normative criticism. If the injured is satisfied with norm affirmation out of the criminal law range, a criminal law intervention in the state’s interest will need careful reasoning. And if there are alternatives to punishment, norm stabilization by punishing will need that reasoning as well. Norm stabilization is not a matter typical for criminal law as a subsystem. It is linked with any notion of norms in a logic way (concerning its factual validity). As a consequence, norm stabilization is not typical for “punishment”. But let us return to the historic debate between Kant and Fichte.

Looking back, he is a classic constitutionally thinking philosopher. Trying to characterise the Kantian legal doctrine and to describe the constitutional understanding (not the practice) of the criminal law which he was responsible for, one can agree with Feuerbach and say: penalty is “the legal consequence of a law based on the necessity to conserve outer rights and threat to punish infringement with sensual evil” (§16 of the schoolbook). It needs to be the legal consequence of attributable injustice (more than only functional), necessary (comparative) and legitimated by a term of criminal law injustice, which ultimately serves to preserve the outer rights of the community members. Feuerbach did indeed know of the then
legislator’s preference to punish almost everything which would not have been open for legitimization after his criminal law theory; he bewared of an open articulation.

It is interesting to know how a former positivist dealt with the then strict law. Criminal offences, which were made positive, but could not be legitimated because they did not violate any right, were collected by Feuerbach and named “vague police felonies”. Obscure delicts were called “vague general felonies”, as abortion (Feuerbach could not picture “rights” of the unborn) and riot. He even included the later on called deception and betrayal. To Feuerbach, white-collar crime would have been part of an alternative controlling system. “Police felonies” are worth taking a closer look at. There are all crimes against vice squad, prohibited gambling and so on. He handed those phenomena of buggery as “felonies”, as jurists are bound to positive law. Still, it is highly visible that he did not want to legitimate this kind of regulatory policy using the means of criminal law as called for by rationality. Drug control and other regulatory policy activities can not be dealt with by means of a classic element of crime. That word had already spread with earlier liberal criminal law scientists. Their philosophical yet natural justice-sceptical comments thus are a specific version of the Kantian legal doctrine. It became the foundation of continental European criminal law, as far as it claimed to picture law as a legitimate order.

7. How to confront insistent denial of basic criminal law norms?

Someone who consequently breaks the law is, according to Feuerbach, a both reasonable and sensual being. A division into citizen and inner enemy is not to be thought of in terms of an enlightened point of view (which does not completely exclude its practice). An earlier liberal notion of criminal law anticipates the criminal’s unreasonableness. Older treaty models like the one established by Hobbes, which Fichte used as a reference, were replaced by more complex constitutional theories and Fichte’s dangerous play of words of the criminal’s exclusion was no longer part of professional discussions at the beginning of the 19th century. They would rather turn to positive law, as upcoming criminal law science was aware of the fact that philosophic navel-gazing would not lead to any conclusion. Instead, law comparison and science of experience had to be taken a closer look at.

How come, an approach which seemed to have already been outdated in 1800, suddenly became relevant again? First, let’s examine:

- How Fichte thought of turning the alleged natural justice conception of law into a police state one, which guaranteed rights “under the condition of fitting a society of reasonable beings”?

- Finally, we need to question why certain people’s exclusion of society and a conduct close to martial law criteria became attractive. All of this happened after radical realism had been normatively absorbed by more than persons opposing the legal order (according to empiric studies) for several decades without nameable irritation. Up to today, victim protection has been intensified, but the development of special criminal law for “dangerous ones” still is not a realistic option.
8. How severe are provocative theses of the “enemy” and the outlaw criminal by habit?

To prevent misunderstanding: The golden bridge, which should have been built up for Jakobs after the 29th criminal defence lawyer’s day in order to spare his theory of an overwhelming emotional critique, is not stable. He does not want a police law for “dangerous ones”, because this would have been submitted under procedural restrictions and restrictions of commensurability. It could have only loosened principles such as the presumption of innocence, the determination of criminal laws and the prohibition of an analogy at the expense of the accused and the formal strength of the criminal procedure. The demand for enemy criminal law is a demand for special law. Certain people are supposed to be labelled as “unpersons” – not only in Fichte’s notion – and then will be excluded from society of reasonable (Fichte would call them “fitting”) beings. The excluded will be disposed of after the rules of the law of exclusion, which provides exceptional measures. Looking at it this way, a parallel to Winfried Brugger’s 1996 thesis of “rescue torture” becomes clear. Such provocation will only make sense if thinking that exceptional dangers can only be confronted by exceptional law. The mere radicalisation of the 20th century double-track of criminal and measure law is already being pushed forward.

Securing measures, which are consequently (after the latest bills even more consequent) enhanced and part of police law, are not being critiqued either. The provocative thesis, after which the awarding of being a citizen depends on the condition of the return of law abidance after a certain time of serving penalty is crucial and not only a rhetorical gaffe. Jakobs was serious when saying: The “permanent criminal”, who declares himself an enemy through his deeds and attitude, will be excluded and declared an outlaw in the notion of Fichte. Harmonization does not make sense. They will take away the thesis’ acuteness and thus the construction’s importance.

9. What is the past and current status of the provocation on exclusion of inner “enemies” from civil society?

An answer to the status of particular contributions on “enemy criminal law” can be given easily. The phrases are neither descriptive, nor critical nor affirmative. It does not make sense either, to demand an avowal in favour of or against their consequences. Jakobs did intentionally formulate his thesis in an ivory tower, which means a criminal law construction neither normative nor descriptive but dogmatic. Its object are the newer laws on “dangerous” delinquents (§§ 66, 66a, 66b of the German Code of Criminal Procedure), members of terrorist associations (§§ 129a and b of the German Criminal Code), suicide bombers and / or other rebels tactically using violence.

The construction is not supposed to describe in a way that reproduces legislation, its conditions and implementations. It is more like an introduction to a superior schoolbook on the general part of the German Criminal Code, trying to set up a coherent concept of the actual law of abatement. The dogmatization is superior in the way that it is based on an indirect general preventative interpretation of the overcome understanding of guilt. This dogmatic determination acts on the assumption that the subject of criminal procedures can only be the one willing and able to accept the
command given by the norm. Punishment will only bring legal piece after this condition, a term known as usual, but by Jakob, it was translated into words alluding to Luhmann. In the following, I will refuse to use an art language and formulate in the conventional way. Jakobs formulated a general preventative reconstruction of criminal law. But this only addresses a part of criminals, the ones able to understand their guilt and the ones who were not lawless in general. Whoever was not part of this group, will be, under the condition of being an extraordinary danger or a safety hazard, be subject of a special treatment. From the author’s point of view, it is a lapidary statement to draw a clear line between the normal and exceptional state, between general preventative guilt oriented criminal law and a consequent exclusion of the ones not accessible to norms. Proceeding like this would be better than contaminating all general preventative guilt oriented criminal law, in criminal politics terms. In historic terms, it is a modern reception and further development of Fichte’s strong words that “the state is responsible for the execution of the exclusion of those which do not fulfil the conditions of the treaty”.

10. Are there parallels between Fichte’s compulsive law and modern variations of the dogmatic restriction of criminal law to securing and general prevention?

Has the idea of constitutional criminal law, which was generated in 19th century, been linked to the image of an addressee impressed by his own conviction? How can an author receive the model of lawlessness of the convinced criminal, or the criminal by habit, which can not be impressed, today?

“Bad will is supposed to be oppressed by the threatening of a penalty, the lacking good will is supposed to come out by it”. In order to reach that goal, the penalty will have to be executed “without exception”. Fichte is turning Kant’s categorical imperative into the rigid execution of threatened penalties. How does the today version of general prevention and securing of so called dangerous ones look like?

Jakobs’ reasoning of general prevention is not oriented to the overcome model of deterrence, securing or recovery by fear of strict punishment or exclusion, but it changes to the civil level and accepts the symbolic recreation of the disappointed expectation of law abiding behaviour. His model is flexible and able to integrate the scope of modern criminal law sanctions.

The cognitive conditions of this normative criminal theory do cause problems, just because of the fact that this approach itself can not justify the difference between criminal law and non-criminal law sanctions. Jakobs thinks he possesses profound knowledge on certain people who will not be scared by penalty. Thus, the presentation of norm stabilization will run dry. That’s right in theory, but in practice, it is impossible to make the right future decision. That’s why any legislation and law application will set up normative limitations, concerning the risks which will have to be carried by society and which will not. In this context, the potentially dangerous criminal’s procedural basic rights do make sense, may it be a blamed, an accused, a convicted or prison inmate.

An indirect general preventative justification of criminal law will become boundless and hardly sets up limitations to control governmental power. This model does not differentiate after the principle of ultima ratio and it does not request the formulation
of clear and verifiable objects of legal protection. The closing down of possible left over gaps by means of a security or special criminal law, which does not provide clear boundaries, will lead to an even more dramatic situation. When fighting the “lawless or “enemies”, the particular governmental power, which does not find its purpose in itself, may strive for the so called security purpose at any cost. In addition, it has a boundless scope for judgment evaluation when it comes to ultimate measures. The executive will determine if the maximization of power will be proper and necessary to secure order in a "state of emergency".

Such proceedings are part of the logic of pure functional thinking, which declares norm stabilization (without the recourse to legitimacy of formal, material and procedural elements of positively set norms in a state of emergency) as the end in itself of governmental action.

This way of thinking does not provide any way of formal, material or procedural correction. Those constructions are neither overall normative nor accessible to empiric examination, because they blank out the consequences of such extensive relativization of all overcome forms, views of justice and procedural values for all areas of communal life. They can not even discuss the consequences of the value reduction and the reduction of the human being down to his faithfulness to norms because such a dogmatically reduced model does not provide space for such examination.

It seems, today’s debating culture recognized this flaw and provocation is being led into a dead end. That was the reaction when Fichte published his theory of punishment, although the overestimation of morals to them was as common as today’s diffuse fear of terrorists.

Still, it is to be feared that today’s way of permanent outbidding will complicate the diplomatic disposal of enemy criminal law. Unfortunately, we tend to talk about provocation as long as, literally, the grass on the speaker’s field will stop growing. Hypercritical exaggerations and dramatizing hyperrealism are rocking each other to a short, breathless verbal sparring. Fortunately, exhaustion is the result of agitation, the advantages of a double-tracked reaction system come to light and the consequent constitutional thinking process is set in. The current interaction with the so called dangerous ones made very clear that there was but arbitrary, helpless and exaggerating guessing. Help could be provided by more frequent analysing, more precise descriptions and calm pragmatics. But this kind of endeavour is as interesting as rhetoric outbidding discoursing. We do possess evidence of it. Modern tragedies are played day-to-day. Former theatre scripts now are displayed in the movies. Pieces of civil fighters in Palestine camps, a tacks piece on the unloved scion of the dispensable oil tycoon’s secondary wife who becomes a modern terrorist working online; all of that is great movie material. The subtle introduction of the new challenges is far more interesting than the mass of pictures displayed by the privatized narrow-minded home television. In a movie, enemy criminal law is acceptable. In television, the pictures are too close to politics. At all times, intellectuals have tried to instruct the particular politics with a way to have the author become famous and add a higher sense to politics. The Carl Schmitt construction of the alleged fundamental category of the friend-foe-relation serves as a paradigm and its fascination after 1945 is a phenomenon with a dark premonition.
The historic review was fertile and awful at the same time. Jakobs continued a tradition of thinking which intentionally declares certain people’s exclusion as a legitimate purpose of governmental action. With Jakobs, criminal law is endowed with a gentle function of plain neutralization of norm violation and would be replaceable by symbolic alternatives to criminal law, as any legal consequence stabilizes its norm validity. The other side of this symbolism is an extraordinarily rigid way of controlling the ones who do not just occasionally, but systematically and notoriously refuse or ignore the norms. To me, it is incomprehensible how this way of controlling deserves to be called “law”. Fichte also did not want to establish criminal law but tried to force the constitutional right. Considering the fact that liberal societies’ need for security keeps growing and that felonies restrict individual security, I think that, after a careful appreciation of values, the German double-tracked system of punishment and securing measures seems to be right and reasonable. Preventative detention, to name an example, is a police measure, but its promulgation after the strict forms of criminal and criminal proceedings law is to be favoured in comparison to an uncontrollable way of police control. Thus, allusions to authors such as Hobbes or Carl Schmitt, who helped authorize police states, are not to be made. We are not supposed to reactivate such things, not even in times of global threat.