"Rechtsgut" as a Finnish Concept – Some Observations

Af Dan Frände[1]

Abstract

The article aims at explaining the discussion in Finland on the concept "oikeushyvä" originating from the German concept of "Rechtsgut". The concept has nowadays a strong foothold in Finnish criminal law. It is always necessary to decide whether a proposal regarding redefinitions of criminal acts or criminalization of new acts can be considered justified by an important public interest. This consideration can easily be referred back to the concept of "Rechtsgut". In addition, the concept is also used in the interpretation theory and the doctrine of concurrence of offences.

1. Introduction

The Finnish translation of *Rechtsgut* as a legal concept has its given place in Finnish criminal law and criminal procedural law. The concept is used in legislative works as well in case law. The concept is also included as a standard formulation in criminal legal doctrine in Finland. One could, perhaps, speak of a concept belonging to the general doctrines of law (Tuori 2002 p. 169-173).

The translation of *Rechtsgut* to "oikeushyvä" has in Finland never been disputed, even though other concepts, primarily the concept of protected interests, have also been used during the last decade in translations of the concept into Swedish.

I understand *Rechtsgut* as a general value or interest protected by a criminal norm, either in force or a norm that is considered as needed.

Professor Brynolf Honkasalo attached primarily an interpretative function to *Rechtsgut* in his widely read and cited book regarding general principles of criminal law, published in its second edition in 1965. In order to interpret a norm of criminal law, one must know the attached object of protection, in other words the *Rechtsgut* (Honkasalo 1965 p. 141). In 1977 the report, which came to be the basis for the full revision of Finnish criminal law, was published by the Criminal Law Committee. In this report it is stated that *Rechtsgüter* can be used when assessing the need for criminalization (KM 1976:72 p. 27). It is feasible to assume that the Committee, mainly consisting of criminal legal researchers, was aware of the German discussion concerning *Rechtsgut*, within the frames of which two notable works were published in the early 1970's (Amelung 1972 and Hassemer 1973).

It was, however, not before the end of the 1980's that the discussion regarding the so called system-critical *Rechtsgutslehre* reached a broader Finnish audience. In 1989 a text by Winfried Hassemer, concerning symbolic criminal law, was published in Finnish. The article stated clearly that the objective of the concept is primarily not to systematize individual norms of criminal law, but to provide criticism of norms of criminalization. The threat of punishment can only be directed towards acts endangering *Rechtsgüter* and, defined like this, the scope of criminalization does not include for instance moral norms or values of the society (Hassemer 1989 p. 396).

The 1990's was a dynamic and exciting decade for the Finnish discussion on the concept of *Rechtsgut* in relation to criminalization. In section two of this presentation, I will attempt to give an account of the results of the developments at that time.

In order to avoid misconceptions, it should here be noted that it is the Constitutional Law Committee of the Parliament that assesses the legitimacy and acceptability of criminalizations. This organ works as a sort of poor man's constitutional court and determines whether legislative proposals stand in conflict with the Constitution. Only if an Act of Parliament is in obvious conflict with the Constitution can a court choose not to apply the act in question. After March 1st 2000 and the entering into force of the new Constitution this option has never been used by a Finnish criminal court. Alleged conflicts with for instance the principle of legality in section 8 of the Constitution have been solved through interpretation, not by invalidation.

Section 3 of this presentation focuses on situations where courts in their interpretation of law use arguments that more or less clearly belong to the doctrine of *Rechtsgut.* Finnish criminal law doctrine has since the 1990's vividly discussed the so called teleological interpretation of law. I will make no further references to this particular discussion, but I will in this presentation concentrate on the lines of reasoning by the Supreme Court in cases where the concept of *Rechtsgut* has been used.

In order to shed light on the usefulness of the concept of *Rechtsgut* two areas where the concept is used without any actual problematization will be presented. These questions concern, firstly, situations of normative concurrence, and secondly, the determination of the position as injured party (e.g. the victim).

After acquainting ourselves with Finnish criminal law and criminal procedural law, section 4 of this presentation purports to summarize the state of criminal law in Finland. I will not, however, make any attempts to assess whether similar ques-

tions in other Nordic countries have been solved with the aid of concepts corresponding to the Finnish *Rechtsgut.*

2. The Boundries for legitime criminalization and "Rechtsgüterschutz"

After the publication of Hassemer's article in 1989 it was not long before Claus Roxin's book from 1992 reached the Finnish forum of criminal legal research. In this book an attempt is made to link the doctrine of *Rechtsgut* to the Constitution (Roxin 2002 p. 11). As Roxin states in an article from 2010 (Roxin 2010 p. 577) the German Constitutional Court has never so far declared a criminal norm invalid on grounds of absence of links to an acceptable *Rechtsgut.* A famous judgment from 2008 with reasoning on *Rechtsgut* concerns the crime of incest between siblings. The judgment includes a dissenting opinion by no one else than Hassemer, who at the time acted as a judge at named court (Asp 2009).

I am personally convinced that the German *Rechtsgut* discussion was of importance when Finland reformed its norms on fundamental rights and freedoms in the early 1990's and in this context explicitly decided on the prerequisites for legitimate criminalization. The preparatory works to this reform, entering into force in 1995 and which later came to be part of the new Constitution, include the important report 25/1994 by the Constitutional Law Committee. This report presents seven general prerequisites for restrictions of constitutional rights through regular legislation. The possibility for restrictions does not, obviously, concern fundamental rights that are absolute in their nature or that have their own prerequisites for restrictions. The 1994 report does not explicitly consider the general role of criminalizations. However, a report from 1997 (23/1997) took direct stands on also this question. This later report states explicitly that each criminalization connected to the exercise of a fundamental right must be in conformity with above mentioned list of seven prerequisites.

This demand for a clear link between fundamental rights and criminalizations can, nevertheless, be seen as automatically satisfied as all criminalizations include threats of warnings, fines or imprisonment. Especially as no criminal norm includes only a warning of punishment, one can easily state that all criminal norms infringe the right to property or freedom of possible perpetrators: these two rights are naturally protected by the Constitution. In addition, one could see threats of punishment as constituting restrictions to the right of freedom and self determination as all criminalizations restrict the amount of actions that can be undertaken or neglected. The Finnish Constitution protects the rights and freedoms of the individual, which is seen as a protection of the right of self-determination for the individual (Perusoikeudet 2011 p. 223). The conclusion is that in principle

all criminalizations must conform with the list of seven prerequisites – a conclusion that is accepted also by the Finnish legal community.

An interesting object for further analysis is whether this list of seven prerequisites says anything about the *Rechtsgüter,* and if so, whether any criteria for acceptable *Rechtsgüter* are provided? Of the seven prerequisites on the list, two are of special interest for our enquiry.

The first prerequisite of interest is referred to by the Constitutional Law Committee as the demand for acceptability. The criminalization must be based on weighty interests of society and the concerned interest must be acceptable also from the point of view of the Constitution. This reasoning provides an opening for an interpretation linking the acceptable interest directly to the catalogue of rights in the Constitution (and the European Convention of Fundamental Rights and Freedoms) (Nuutila 1997 p. 41, Tolvanen 1999 p. 182, Viljanen 2001 p. 333). If this reasoning is accepted, one may easily in line with Viljanen (p. 143), view the link to a fundamental right as a clear indication of that the criminalization is based on a weighty interest of society. The model also has the advantage that the interest of society in this manner can be given material content, as the content is extracted from the Constitution.

In the discussions in the Constitutional Law Committee on new criminalizations one can comparably easily find examples where the interest of society has been linked to fundamental rights. In the report 21/2010 by the Constitutional Law Committee, concerning restrictions to the law on tobacco, the Committee states that the suggested criminalization promotes the health of citizens. This interest is explicitly mentioned in section 19 (3) of the Constitution. In connection to the attempts to criminalize the purchase of sexual services in Finland the Constitutional Law Committee in its report 17/2006 states that the purchase of sexual services violates the human dignity of the seller as protected in section 1 (2) of the Constitution. However, this proposal did not lead to legislative action to criminalize the purchase of sexual services on a general level due to political opposition in the Parliament.

At the same time it is also clear that the Constitutional Law Committee has accepted criminalizations with the interest of securing public order and security. Sometimes this interest can be linked back to the protection of personal safety and security, but this is not always the case. Any mention of such a link did not exist in the report 20/2002 of the Constitutional Law Committee regarding new legislation on public order.

Thus, the conclusion is that each weighty interest of society can function as a ground for criminalization regardless of whether the interest can be linked to fun-

damental rights or not. Looking more broadly at Finnish criminal law, this becomes apparent: cruelty to animals, incitement to racial hatred, perjury, defamation etc. cannot be linked to fundamental rights as they stand today.

So far it thus seems as if the Constitutional Law Committee through the demand for a weighty interest of society explicitly has tried to keep a distance to the concept of *Rechtsgut* as it is developed and used in criminal legal research. Much, however, implies that there has not been such intent by the Committee, particularly as there at that time was no real "domestic" criminal legal theory of criminalization. Such theory of criminalization was only developed with the doctoral dissertation by Sakari Melander in 2008 (Nuotio 2010 p. 257-258).

Rather, the Constitutional Law Committee most probably implies that the weighty interests of society behind criminalizations can be referred to as *Rechtsgut.* This conclusion stems from the second, for our survey interesting prerequisite for criminalization; the demand for proportionality. According to the Constitutional Law Committee this criteria refers to a consideration of whether the criminalization in question is necessary in order to protect the concerned *Rechtsgut* (23/2007). It must also be considered whether there are other possible means for reaching the purpose – the protection of a particular *Rechtsgut.*

Hence, it is quite possible to refer to an interest of society carrying such weight that it can form the basis for a criminalization as a *Rechtsgut.* However, the Constitutional Law Committee does not provide any direct possibilities to connect weighty interests of society with the Constitution or any other normative source. The parallels to the case law of the German Constitutional Court are obvious here. There is, quite obviously, still a need for a *Rechtsgutslehre* where good reasons for criminalization can be built and analyzed. Naturally, this discourse must be critical to its nature: Which interests of society cannot be lifted to the status of a criminal law *Rechtsgut*? As the Constitutional Law Committee hears the opinions of legal experts when deciding on matters of compliance with the Constitution, also criminal legal research plays an important role in the discourse; there is a direct line of communication between law and practice.

3. Case law of the Supreme Court and the Concept of Rechtsgut

The Supreme Court has in its practice post 2002 used teleological interpretation. There is also another, more traditional method of interpretation, but this other method will not be discussed in this context. It is not a simple task to find a suitable name for the teleological method of interpretation. As it reaches back to the reasoning of the European Court of Human Rights (ECtHR) it can, for our purposes, be called the "EC-model".

The EC-model was, according to my understanding, launched by Supreme Court with the judgment 2002:11. Another representative judgment is the PAF-judgment 2005:27. The latter case concerned whether an enterprise from Åland promoting gambling services illegally had arranged gambling in mainland Finland as gambling services had been offered via the Internet. The Supreme Court took the view that illegal gambling had taken place and also stated that norms always must be interpreted. The Court then states that in case law it has been deemed necessary as well as justified to interpret the concepts used in norms of criminalization, as long as the result of the interpretation is in line with the protective intent of the norm and the threat of punishment, and as long as the result reasonably can be foreseen by the perpetrator (see for instance Supreme Court 2002:11 and Supreme Court 2004:46).

This statement by the Supreme Court can be traced back to case-law of the ECtHR. In the judgment S.W v UK from 1995 the ECtHR states: "Article 7 ... cannot be read as outlawing ... interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen."

This seemingly simple phrase gives rise to a number of highly interesting but utterly difficult questions. I will not attempt to answer them here. Rather, I am content with observing that the EC-method is not to be seen as a trump invalidating all other arguments. The Supreme Court uses the method in a controlled and restrictive manner. If the interpretation supported by other more regular arguments does not comply with the purpose of the criminal norm, this interpretation cannot be accepted. The charges must either be discarded, or another interpretation must be chosen. The same line of thought is valid in relation to the demand for reasonable forseeability.

This interpretation naturally requires that the statement on the purpose of a criminal norm means the same as the violation of a protected interest, the *Rechtsgut.* This interpretation does not assess whether a value is a weighty interest of society. Rather, the interpretation strives to find the reasons for the concerned criminalization. To me it seems as the Supreme Court in a consistent manner derives these protected interests from statements in preparatory works to the concerned criminal law legislation. This is, however, not always the case and when such reasoning is impossible, the Court undertakes its own determination of *Rechtsgut.*

A very interesting development has taken place after the determination of the prerequisites for constitutionally defendable criminalizations by the Constitutional Law Committee. It is now more or less legio for the Government to state the weighty interests of society that make the criminalization acceptable in a Gov-

ernment Bill. An enlightening example is the Government Bill 330/2010 concerning the criminalization of begging: A proposition that did not at the time lead to legislative action. In the Bill it is clearly stated that the interest of society is the preservation of public order and safety (p. 23). I here assume that these weighty interests of society are the same form of interests as purported by the Supreme Court in its EC-model. The fact that the Supreme Court does not refer to *Rechtgüterschutz* but rather to interests does not, to me, bring about any difficulties.

The concept of *Rechtsgut* is used without further ado in instances of concurring norms and in situations of determination of the position as injured party. When two or more criminal norms are applicable to the same action the presumption is that the perpetrator shall be found guilty of both crimes. This presumption can, however, be overthrown and the most important consideration in these situations concerns what could be referred to as "the dimension of protected interests". The basic idea is fairly simple: If two criminal norms at least partly protect the same *Rechtsgut* there is no reason to apply both norms. In this assessment the Supreme Court has used the concept of *Rechtsgut* as well as the "interest to protection" (for instance Supreme Court 2006:76, 2008:37 and 2009:73), however without being able to directly link these concepts to the statements in the preparatory works. This lack is mostly due to the fact that the cases have concerned criminal norms from a time before the Constitutional revision.

The concept of *Rechtsgut* has most consistently been used in the context of determining who is to be seen as an injured party in the Finnish criminal procedure. This position provides the party with a number of procedural rights, among others the right to independently demand punishment. A condition for being in the position of injured party is that the person in question is in possession of the *Rechtsgut* protected by the concerned norm that has been violated.

4. Conclusions

Rechtsgut as a concept gained a central position on the criminal legal stage through the constitutional reform and the demands then made regarding legitimate criminalizations. This position has been strengthened by courts and their frequent use of the concept. Despite these developments, no consensus has been reached concerning what can be used as a *Rechtsgut* in criminal law. However, as the legislator in preparatory works has included statements of protected interests and as this has not met any resistance, there is at least one lead to the determination of *Rechtsgut* in relation to particular crimes. At the same time, nevertheless, courts in their interpretations of law have the possibility to pick and choose be-

tween weighty interests of society referred to by preparatory works. Courts can decide to selectively use only one interest out of many possible when determining the position of parties in the procedure or in solving problems of normative conflicts. There is, thus, no direct line between the statements of weighty interests of society in legislative preparatory works and the use of *Rechtsgut* by courts in their reasoning.

Bibliography

Knut Amelung: Rechtsgüterschutz und Schutz der Gesellschaft. Frankfurt: Athenäum 1972

Petter Asp: Anteckningar i anslutning till ett avgörande angående (författningsenlig?) kriminalisering av syskonsamlag. In Festskrift till Suzanne Wennberg. Stockholm: Norstedts juridik, 2009, pp. 188-211

Pekka Hallberg – Heikki Karapuu – Tuomas Ojanen – Martin Scheinun – Kaarlo Tuori – Veli-Pekka Viljanen: Perusoikeudet. Helsinki: WSOYpro 2011 (Perusoikeudet 2011).

Winfried Hassemer: Theorie und Soziologie des Verbrechens. Ansätze zu einer praxisorientierten Rechtsgutslehre. Frankfurt: Athenäeum 1973.

Winfried Hassemer: Symbolinen rikosoikeus ja oikeushyvien suojelu. Oikeus 5/1989 pp. 388-400.

Brynolf Honkasalo: Suomen rikosoikeus. Yleiset opit. Ensimmäinen osa. Toinen painos. Helsinki 1965.

Kimmo Nuotio: Theories of Criminalization and the Limits of Criminal Law: A Legal Cultural Approach. In R A Duff, Lindsay Farmer, S E Marchall, Massimo Renzo and Victor Tadros (eds): The Boundaries of the Criminal Law. Oxford: Oxford University Press 2010. pp. 238-261

KM 1976:72: Rikosoikeuskomitean mietintö – Straffrättskommitténs betänkande: Helsinki 1977.

Sakari Melander: Kriminalisointiteoria – rangaistavaksi säätämisen oikeudelliset rajoitukset. Helsinki: Suomalainen lakimiesyhdistys 2008.

Ari-Matti Nuutila: Rikoslain yleinen osa. Helsinki: Kauppakaari 1997.

Claus Roxin: Strafrecht. Allgemeiner Teil. Band I. Grundlagen. Der Aufbau der Verbrechenslehre. München: Beck 2002.

Claus Roxin: Zur neueren Entwicklung der Rechtsgutsdebatte. In Festschrift für Winfried Hassemer. C.F. Müller: Heidelberg 2010. pp. 573-597

Matti Tolvanen: Tieliikennerikokset ja kriminaalipolitiikka. Helsinki: Kauppakaari OYJ 1999.

Kaarlo Tuori: Critical Legal Positivism. Farnham: Ashgate 2002.

Veli-Pekka Viljanen: Perusoikeuksien rajoitusedellytykset. Helsinki: Werner Söderström Lakitieto Oy 2001.

Note

1. Professor, University of Helsinki.