Ethics and Human Rights in a Globalized World

Edited by
KLAUS HOFFMANN-HOLLAND

Mohr Siebeck

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An Interdisciplinary and International Approach

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Klaus Hoffmann-Holland

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Klaus Hoffmann-Holland is Professor of Criminology and Criminal Law at Freie Universität Berlin.

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Preface

In November 2008, the Freie Universität Berlin together with the Hebrew University of Jerusalem, the resident Minerva Center for Human Rights and the Israel Democracy Institute held the symposium "Ethics and Human Rights in a Globalized World". It was kindly funded by the German Federal Ministry of Education and Research. The event was embedded in the German-Israeli Year of Science and Technology, and aimed at developing sustainable cooperation in human rights research between Berlin and Jerusalem, with a focus on the promotion of young researchers.

Both Germany and Israel have a long tradition of ethics and human rights research. The scientific cooperation between the two countries has, however, usually demonstrated a strong disciplinary focus and has yet to take sufficient advantage of the potential of multidisciplinary approaches. In addition, the German-Israeli cooperation could benefit in the long term through increased networking of already existing thematically similar projects and from resulting synergies. Against this background, the initiative of the Freie Universität Berlin and the Hebrew University of Jerusalem provides the field of German-Israeli human rights research with a common and structured platform for promoting continuing cooperation between the two countries in this area.

The purpose of the cooperation between the two institutions is to develop research structures that pay due attention to the international and interdisciplinary aspects of ethical issues concerning the protection of human rights. To this end, the main focus will be on taking measures that encourage academic exchange between young German and Israeli researchers. Postgraduate students are given the opportunity to benefit from the international cooperation and interdisciplinary-oriented research.

In the name of all the participants in the symposium, I thank the Federal Minister of Education and Research and the Israeli Minister of Science, Culture and Sports for their generous support within the framework of the German-Israeli Year of Science and Technology in 2008.

I also thank my colleagues from the Hebrew University of Jerusalem, Yuval Shany, Mordechai Kremnitzer and Danny Evron, for all their enthusiasm in organizing this symposium. The symposium would also not have been possible without the work of the staff of the Minerva Center for Human Rights, the Israel Democracy Institute and the Freie Universität Berlin, especially Anat

Mishali and Merav Kaddar from the Minerva Center and Hagit Agmon from the Israel Democracy Institute, as well as Matthias Kuder and Kristina Kühl from the Freie Universität Berlin. My thanks go as well to Sr. Katherine Wolff, Sophie Birkner, Matthias Simonis and Jan Storm.

Berlin/London, February 2009 Klaus Hoffmann-Holland

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Ethics and Human Rights in a Globalized World

An Interdisciplinary Approach[1]

Klaus Hoffmann-Holland

I. Rights, Wrongs and Ethical Contributions

In his "secular theory of the origins of rights", *Alan Dershowitz* argues that rights neither come from religion, nor nature, nor logic, nor law, but from wrongs (such as the human experience with injustice).[2] An example can be found in the development of international humanitarian law (that is closely linked to human rights law[3]). The milestone of the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, the first general multilateral convention and the root of the Geneva law, is a reaction to the aftermath of the battle of Solferino in 1859, where 38.000 men were lying on the battlefield without sufficient care.[4]

But we can see that human beings faced wrongdoings of all kinds throughout history, and often the result was not a right or its enforcement (and isn't the denial of a right also a wrong?). What was the right or the enforcement of rights after September 11, 2001? The attempt to curtail terrorism very often led to

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[1] This article is deeply influenced by the discussions, letters and emails before, during and after the symposium "Ethics and Human Rights in a Globalized World" in Jerusalem, an event during the German-Israeli Year of Science and Technology 2008. To name but a few, I have to thank Daniel Bogner, Michael Bongardt, Matthias Kuder, Kristina Kühl and Kristina Roepstorff for many thoughts, perspectives and ideas expressed in this article.

[2] *A. Dershowitz*, Rights from Wrongs – A Secular Theory of the Origins of Rights, New York 2004, pp. 8 f.

[3] *R. Kolb*, The Relationship between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions, International Review of the Red Cross 324 (1998), p. 409; *R. Provost*, International human rights and humanitarian law, 3rd ed. Cambridge 2004; *W. Sandholtz*, Humanitarian Intervention – Global Enforcement of Human Rights?, in: A. Brysk (ed.), Globalization and Human Rights, Berkeley 2002, p. 201.

[4] *J.K. Klefner*, Protection of the Wounded, Sick and Shipwrecked, in: D. Fleck (ed.), The Handbook of International Humanitarian Law, 2nd ed. Oxford 2008, pp. 325 f.

curtailing human rights.[5] We should look again more closely at the example of the battle of Solferino: The initiative of *Henry Dunant*, who was an eye witness of the sufferings of the wounded in the field, was necessary.[6] So it takes more than wrongs to produce rights. The question is: What is the mechanism or context that may transform a wrong to a right? This is a question that cannot be answered within the narrow confines of laws or any other single discipline. The answer can only be found in an interdisciplinary perspective. Different perspectives may help to understand the dimensions of a phenomenon. The importance of perspectives may be demonstrated by an analogy with art. We can compare two paintings, both showing aspects of the battle of Solferino: In his 1863 painting "Napoleon III at the Battle of Solferino", *Jean-Louis-Ernest Meissonier* concentrates on living mounted soldiers in file, showing only little of the disorder. This is one way of looking at the events of Solferino. *Katharina Ziemke*, however, lets us take part in a view that may be closer to what *Dunant* witnessed. In her painting "Solferino", she doesn't show any living soldier, but only blood and dead bodies, most of them torn apart.

Going even further back in the history of international humanitarian law, we can see that ethics and religion influence the basis of rights. The influential treaty "The Art of War" by *Sun Tzu*, written presumably in the 6th century BCE, is inspired by Taoism as a philosophical and religious concept.[7] And even if "there are no universal ethics", as *Micheline Ishay* points out, she starts her history of human rights with "early ethical contributions".[8] Human Rights are (a part of) formalized ethics.

Concentrating on current debates and problems of human rights as liberal, social and moral rights (II.), the example of globalization (III.) shows that the need for an international and systematic interdisciplinary dialogue (IV.) is not sufficient. The awareness of an international and interdisciplinary interaction can affect the debate within jurisprudence and its methodology (V.).

II. Freedom, Social and Moral Rights

Human Rights may be understood as an immediate result of human dignity. They must not be denied on a basis of ethnicity, religion, age or gender, as article

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[5] *D. Cole*, Enemy Aliens – Double Standards and Constitutional Freedoms in the War on Terrorism, 2nd ed. New York 2005, p. 57; *R. Foot*, Human rights and counter terrorism in America's Asia policy, Oxford 2004; *J. Strawson*, Law After Ground Zero, Florence 2002.

[6] *J. K. Klefner*, Protection of the Wounded, Sick and Shipwrecked, in: D. Fleck (ed.), The Handbook of International Humanitarian Law, 2nd ed. Oxford 2008, p. 325.

[7] *F. Bouchet-Saulnier*, The Practical Guide to Humanitarian Law, 2d ed. Lanham 2007, p. 212; *T. Hanzhang/R. Wilkinson*, The Art of War – Sunzi Bing Fa, Ware 1998, pp. 16 ff.

[8] *M. R. Ishay*, The History of Human Rights – From Ancient Times to the Globalization Era, Berkeley 2008, p. 16.

1 of the Universal Declaration of Human Rights, adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948, stipulates:

"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

The emphasis on equality as a basis for freedom refers to the dangers to human rights. Human rights neither depend on the acceptance by a state nor on the actions of human beings. They are inalienable, as is stated in the 1776 constitution of Virginia (Bill of Rights), section 1:

"That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."

And again, the emphasis on freedom by nature refers to the fact that states and regulations on the one hand endanger human rights and on the other hand should protect them.

We can distinguish between three generations of human rights:[9] First generation liberal rights (e.g. freedom of speech, religion, freedom from torture), second generation social or collective rights (e.g. right to work, equal payment, a standard of living, right to education, social security, food),[10] and third generation solidarity and developmental human rights (e.g. right to development, right to peace, right to a healthy environment).[11] These generations all refer to particular philosophical, political and sociological backgrounds.[12]

Human Rights may apply to all human beings, but they are endangered differently in differing contexts and for different groups. In *Price v. the United Kingdom*, the European Court of Human Rights considered that to detain a severely disabled person in conditions in which her special needs could not be met (and where "she is dangerously cold, risks developing sores because her bed is too hard or unreachable, and is unable to go to the toilet or keep clean without the greatest of difficulty") constitutes a treatment contrary to Article 3 of the European Convention on Human Rights, which prohibits inhuman or degrading treatment.[13] So the principle of equality as a basis for freedom can, espe-

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[9] *K. Vasak*, Pour les droits de l'homme de la troisième génération: les droits de la solidarité, Revue de Droits de l'Homme (1979), p. 3.

[10] See articles 23–29 of the Universal Declaration of Human Rights and the 1966 United Nations International Covenant on Economic, Social and Cultural Rights.

[11] *O. C. Ruppel*, Third-generation human rights and the protection of the environment in Namibia, in: N. Horn/A. Bösl (eds.), Human Rights and the Rule of Law in Namibia, Windhoek 2008, pp. 101, 102.

[12] *M. R. Ishay*, The History of Human Rights – From Ancient Times to the Globalization Era, Berkeley 2008, p. 11.

[13] *Price v. the United Kingdom*, 34 EHRR 1285 (2002).

cially in the perspective of social rights, require that someone is treated differently. As pointed out in the separate opinion of Judge *Greve*, "the applicant is different from other people to the extent that treating her like others is not only discrimination but brings about a violation of Article 3".[14] The decision whether a certain condition or circumstance requires different treatment (or under which circumstances treating persons differently in analogous situations is a prohibited discrimination) is a legal one, but it needs awareness of political, social and especially ethical dimensions. In the words of Judge *Greve*:

"In a civilised country like the United Kingdom, society considers it not only appropriate but a basic humane concern to try to improve and compensate for the disabilities faced by a person in the applicant's situation." [15]

A very special link between ethics and human rights can be seen in the discussion on moral rights. Examples for moral rights are the right to participation, the right to autonomy and self-development, the right to equal respect, the right to security and livelihood, the right to freedom.[16] These moral rights refer directly to ethical foundations.[17]

III. The Example of Globalization

Globalization is an example for the need of an interdisciplinary and international approach in human rights research. When we talk about globalization, we have to distinguish between phenomena that are already global in their origin and phenomena that are local in their origin but spread around the globe, which is characteristic of globalization. So globalization is different from internationalization. It is closer to transnational developments. From this point of view, a "globalized world" is a paradox, as the world is global in its origin, at least from a geographical perspective. But the world we share can be influenced, and sometimes even dominated, by transnational phenomena. Globalization can be defined as

"the growing interpenetration of states, markets, communications, and ideas across borders".[18]

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[14] *Price v. the United Kingdom*, 34 EHRR 1285 (2002), sub para. 37.

[15] *Price v. the United Kingdom*, 34 EHRR 1285 (2002), sub para. 37.

[16] *P. H. Werhane*, Persons, rights, and corporations, Englewood Cliffs, 1985, p. 16 ff.

[17] See *J. Hinkmann*, Ethik der Menschenrechte – eine Studie zur philosophischen Begründung von Menschenrechten als universalen Normen, Marburg, 2002; *T. Talaulicar*, Unternehmenskodizes: Typen und Normierungsstrategien zur Implementierung einer Unternehmensethik, Wiesbaden 2006, p. 404.

[18] *A. Brysk*, Introduction – Transnational Threats and Opportunities, in: A. Brysk (ed.), Globalization and Human Rights, Berkeley 2002, p. 1.

The impact of globalization is not restricted to a single system or discipline. It can be seen in (information-) technology as well as in the social, cultural, economic, and political system, and it affects the way we talk (and think).[19] *Gopinath* shows that there are varying perspectives on globalization in the different disciplines, when a geographer watches the interaction of places and people, a sociologist defines globalization as the "intensification of worldwide social relations that link distant localities …", an economist understands it as "the removal of barriers to free trade", and a political theorist highlights the intensification of worldwide social interdependencies and a growing awareness of deepening connections.[20] So the question whether globalization enforces human rights in the world or whether it endangers human rights[21] has to be debated in the different disciplines as well as on an interdisciplinary level. But is an interdisciplinary dialogue about the globalization of human rights[22] possible?

IV. Systematic Interdisciplinary Dialogue

Although human rights are discussed extensively in scientific literature, a systematic interdisciplinary debate covering questions of implementation and enforcement of human rights in conflict and an exchange between different (legal) traditions are lacking. Human rights are a global issue. The realisation of these human rights is sought on a regional, national and international level. The interplay of these various levels can cause difficulties resulting from varying institutional arrangements and the significance of respective specific regional contexts, cultural traditions or thematic experience.

For the success of interdisciplinary exchange, it is useful to start with the practice, method and self-understanding of *one* academic discipline – namely jurisprudence. Introducing the perspectives of additional disciplines can lead to a critical debate on the functional requirements and the paradigmatic understanding of jurisprudence.[23] Therefore, attention has to be paid to the effective

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[19] *C. Gopinath*, Globalization – A Multidimensional System, Los Angeles 2008, p. 36; *R. Clark*, Global Awareness – Thinking Systematically about the World, Lanham 2002.

[20] *C. Gopinath*, Globalization – A Multidimensional System, Los Angeles 2008, pp. 7 f.

[21] See the contributions in M. Mehra (ed.), Human Rights and Economic Globalisation: Directions for the WTO, Uppsala 1999; *A. Brysk*, Introduction – Transnational Threats and Opportunities, in: A. Brysk (ed.), Globalization and Human Rights, Berkeley 2002, pp. 1, 7, 9.

[22] See *J.-M. Coicaud*, Human Rights in Discourse and Practice – The Quandary of International Justice, in: J.-M. Coicaud, M. W. Doyle, A.-M. Gardner (eds.), The Globalization of Human Rights, Tokyo 2003, pp. 178 ff.

[23] Understanding the parallels to other disciplines like theology (hermeneutics, text interpretation, use of sources) can lead to more intellectual richness in jurisprudence, see *G. Samuel*, Is Law Really a Social Science? A View from Comparative Law, Cambridge Law Journal 67 (2008), p. 288.

but often not explicitly addressed presuppositions in the self-understanding of jurisprudence. Such presuppositions can be best demonstrated in terms of specific concepts: What exactly is meant when speaking of "norm-justification", "entitlement to liberty", "consensus" or (legal) "dogma"? From where does the law borrow its categories and from what are they derived?

In this respect, the systematic interdisciplinary dialogue, the starting point of which is the formulation of legal questions, plays a key role in understanding the complex human rights issues that derive from a particularly tense relationship between the different disciplines. Terms of relevance for this topic differ in the various disciplines and various languages. Intercultural and interdisciplinary dialogue will help the participating disciplines to understand each other better and to be mutually supportive in advancing joint research.

In this way, the interdisciplinary approach leads to a deliberate and fundamental debate about scientific paradigmatic functions which could be enlightening not only for jurisprudence but also for the other disciplines involved, which implicitly and repeatedly refer to the law. Differences and parallels in disciplinary approaches should be discussed. An example might be the question whether in jurisprudence "hard cases make bad law" and in philosophy "artificial cases make bad ethics".[24] Internationalism and interdisciplinarity enable an innovative discussion of (classic) areas such as the universality of human rights or the manifestations of individual human rights. Enforcement strategies that support the recognition and realisation of human rights also need to be examined.

The envisaged research focus is, for example, on migration and rights of participation, the relationship between freedom and terror prevention, as well as the responsibility of transnational companies. Due attention has to be paid thereby to the fact that the concepts of "justification", "enforcement" and "tradition" differ in the various disciplines (ethics, law, politics). Even terms such as "violence" or "security" are used and determined differently in the various disciplines. The importance of the use of legal terms with an ethical background cannot be underestimated, as the example of the term "torture" in the current debate about "harsh interrogation tactics" in the so called "war on terror" shows.[25] Each discipline involved adds a specific and indispensable contribution to the common debate. For example, political theory can provide a perspective on the role and function of law in the political-social process, whilst comparative ethics and philosophy can show those aspects that transcend a mere positivist understanding of human rights.

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[24] *H. Shue*, Torture, Philosophy & Public Affairs 7 (1978), p. 141.

[25] *D.J. Luban*, The War on Terrorism and the End of Human Rights, in: T. Shipka (ed.), Philosophy – Paradox and Discovery, 5th ed. Boston 2004, p. 393; *D. Luban*, Torture and the Professions, Criminal Justice Ethics 26 (2007), p. 59.

The specific cultural contexts not only shape the specific human rights discourse, but pose particular difficulties for the realisation of human rights, for example in terms of religious law or legal pluralism in general. In addition, particular experiences cause a context-specific perspective of universal human rights. The specific narration of suffering is reflected in the thematic prioritisation of individual rights as well as in the thematic focus in a particular cultural context (gender, fragile statehood, terrorism, AIDS, etc.). Therefore, fundamental aspects for the realisation of human rights are reflected in the interplay of the different institutional levels (constitutional level, International Criminal Law, actors beyond the State / Non-State Actors such as NGOs, businesses or the role of the media).

V. The Interdisciplinary Approach and the Methodology of Jurisprudence

The interdisciplinary approach enriches jurisprudential work. Results of interdisciplinary dialogue can influence jurisprudential analysis. An interdisciplinary perspective allows jurisprudence to take into account not only the axioms of its terminology but also the consequences of its actions. In its methods, jurisprudence can and must consider these consequences. A focus on consequences is permissible when applying teleological interpretation. This focus also connects jurisprudence to other disciplines in the interdisciplinary approach.

1. Consequence-Oriented Interpretation

Interpretation focused on consequences can be understood as a means of opening jurisprudence to sociological methods and factors.[26] According to the concept of consequence-oriented interpretation, the social consequences of jurisdiction are to be considered and if necessary have to guide the process of interpretation.[27] However, not the consequences provided by the law itself are the subject matter of the consequence-focused interpretation, but the empirically

[26] See *M. Deckert*, Zur Einführung: Die folgenorientierte Auslegung, Juristische Schulung (1995), p. 480.

[27] *M. Deckert*, Zur Einführung: Die folgenorientierte Auslegung, Juristische Schulung (1995), p. 480; *A. Eser, in*: A. Schönke/H. Schröder, Strafgesetzbuch, 26. Aufl., München 2001, § 1 Rn. 54; *W. Hassemer*, Über die Berücksichtigung von Folgen bei der Auslegung der Strafgesetze, in: N. Horn (ed.), Europäisches Rechtsdenken in Geschichte und Gegenwart, Festschrift für Helmut Coing, Band I, München 1982, pp. 493, 498; *G. Lübbe-Wolff*, Rechtsfolgen und Realfolgen – welche Rolle können Folgenerwägungen in der juristischen Regel- und Begriffsbildung spielen?, Freiburg/München 1981, p. 25; *T. Sambuc*, Folgenerwägungen im Richterrecht, Berlin 1977; *S. Wälde*, Juristische Folgenorientierung, Königstein/Ts. 1979, p. 5.

identifiable social consequences of its application.[28] The loss of employment due to a prison sentence to be served, for instance, would be considered such a consequence.[29] The effect on the design of future demonstrations caused by changes in jurisdiction on coercion (§ 240, I, 2 German Criminal Code [StGB]) – relevant to the freedom of speech – would constitute another example of such consequences, in this case a consequence of adaptation.[30]

2. *Constitutionally Limited Legitimacy of Consequence-Orientation*

The core issue of consequence-oriented interpretation in criminal law is the legitimacy of consequence-orientation, since it is subject to constitutional limitations. According to *Luhmann*, jurisprudence is defined by conditional routines and is to be free of expectations and considerations of consequence. He claims that consequence-orientation is not part of the jurisprudence programme.[31]

Contrary to that assumption, law itself incorporates rules that require jurisprudence to consider consequences. For example, Article 17, para. 1 of the Rome Statute of the International Criminal Court states as an issue of admissibility that the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, a State is unable to get access to the accused or to gather the necessary evidence and testimony or otherwise unable

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[28] *M. Deckert*, Zur Einführung: Die folgenorientierte Auslegung, Juristische Schulung (1995), p. 480; *W. Hassemer*, Über die Berücksichtigung von Folgen bei der Auslegung der Strafgesetze, in: N. Horn (ed.), Europäisches Rechtsdenken in Geschichte und Gegenwart, Festschrift für Helmut Coing, Band I, München 1982, pp. 493, 513; *G. Lübbe-Wolff*, Rechtsfolgen und Realfolgen – welche Rolle können Folgenerwägungen in der juristischen Regel- und Begriffsbildung spielen?, Freiburg/München 1981, p. 25; *H. Rottleuthner*, Zur Methode einer folgenorientierten Rechtsanwendung, in: Wissenschaften und Philosophie als Basis der Jurisprudenz, Beiheft N. F. Nr. 13 des ARSP, Wiesbaden 1980, pp. 97, 107; *T. Sambuc*, Folgenerwägungen im Richterrecht, Berlin 1977, p. 107; *S. Wälde*, Juristische Folgenorientierung, Königstein/Ts. 1979, p. 6; in this respect, *R. Schmitz*, in: Münchner Kommentar zum StGB, 1.Auflage, München 2003, § 1 Rn. 84, is incorrect. He states that consequence-orientation is only applicable when choosing legal consequences, claiming that otherwise issues of a particular case would function as criteria for the interpretation of the elements of a crime. However, the consideration of factual consequences does not just affect singular cases but factors in general issues that are relevant for the interpretation of the elements of a crime, see BVerfGE 45 (Decisions of the Federal Constitutional Court), p. 187 (concerning the interpretation of the elements of murder) and *W. Hassemer*, Über die Berücksichtigung von Folgen bei der Auslegung der Strafgesetze, in: N. Horn (ed.), Europäisches Rechtsdenken in Geschichte und Gegenwart, Festschrift für Helmut Coing, Band I, München 1982, p. 493 (497).

[29] *W. Hassemer*, Über die Berücksichtigung von Folgen bei der Auslegung der Strafgesetze, in: N. Horn (ed.), Europäisches Rechtsdenken in Geschichte und Gegenwart, Festschrift für Helmut Coing, Band I, München 1982, p. 493 (513).

[30] See *M. Deckert*, Zur Einführung: Die folgenorientierte Auslegung, Juristische Schulung (1995), p. 480 (481).

[31] *N. Luhmann*, Funktionale Methode und juristische Entscheidung, Archiv des öffentlichen Rechts (1969), p. 1 (3f.); *N. Luhmann*, Rechtssystem und Rechtsdogmatik, Stuttgart/Berlin/u. a. 1974, p. 5.

to carry out its proceedings. The consideration of consequences is also implicitly entrusted to jurisprudence by the legislature, for instance in the Rome Statute preamble. Para. 5 of the preamble arranges for a system of "prevention by enforcement",[32] while para. 8 even establishes "non-intervention in internal affairs".[33]

This procedure of considering consequences is particularly frequent in new fields of law[34] and ultimately provides for legal sustainability.[35] Considerations of consequences can also influence the interpretation of elements of a crime in the jurisdiction of the German Federal Constitutional Court (BVerfG). This was the case, for example, in the decision concerning the constitutionality of the life sentence for murder (§ 211 StGB), where the factual consequences for the person concerned were taken into consideration and therefore a restrictive interpretation of the elements of crime was postulated.[36]

Altogether, the consideration of consequences can – contrary to *Luhmann* – be a part of jurisprudence. In modern statute law, which entails the differentiation of a society and its law, jurisprudence must allow for the variety of areas of life. Thus, welfare state concerns must be considered in the application of criminal law, which does not *per se* take precedence.[37] However, this also means that the strict adherence of criminal law to the rule of law has to be maintained. As Article 22 paragraph 2 Rome Statute of the International Criminal Court states,

> "the definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted".

Considerations of consequences need to be capable of integration into the complex and diverse system of legal norms. In doing so, both the rule of speciality and the hierarchy of norms have to be taken into account. First and foremost, the statute to be interpreted has to leave a margin for interpretation, especially

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[32] *O. Triffterer*, in: O. Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court – observers' notes, article by article, 2. ed. München 2008, preamble Rn. 15.

[33] *M. Bergsmo*, in: Triffterer, Otto (ed.), Commentary on the Rome Statute of the International Criminal Court – observers' notes, article by article , 2. ed. München 2008, preamble Rn. 19.

[34] *M. Deckert*, Zur Einführung: Die folgenorientierte Auslegung, Juristische Schulung (1995), p. 480 (481); *S. Wälde*, Juristische Folgenorientierung, Königstein/Ts. 1979, p. 11.

[35] See *K. F. Gärditz*, Nachhaltigkeit und Völkerrecht, in: W. Kahl (ed.), Nachhaltigkeit als Verbundbegriff, Tübingen 2008, pp. 137 ff.

[36] BVerfGE 45, p. 187 (267); see *W. Hassemer*, Über die Berücksichtigung von Folgen bei der Auslegung der Strafgesetze, in: N. Horn (ed.), Europäisches Rechtsdenken in Geschichte und Gegenwart, Festschrift für Helmut Coing, Band I, München 1982, p. 493 (497).

[37] BVerfG, Neue Juristische Wochenschrift (1977), p. 1489 (1490 f.); *A. Kreuzer*, Beschluß des Bundesverfassungsgerichts über die Beschlagnahme von Klientenakten einer Suchtberatungsstelle mit Anmerkungen und einer Stellungnahme, Suchtgefahren (1978), p. 84 .

considering the wording and the legal context.[38] In addition, the consequence-oriented interpretation has to be in keeping with the particular aim of the statute in order to observe the rule of law and the separation of powers.[39] Therefore, considerations of consequence-orientation have to allow for adjustments to laws of higher and equal rank.

As long as these requirements are met, consequence-oriented interpretation does not constitute a violation of the separation of powers and is thus constitutionally legitimised.

3. Relationship to Teleological Interpretation

However, the relationship between consequence-oriented and teleological interpretation needs to be determined. *Winfried Hassemer*, former vice-president of the Federal Constitutional Court, seeks to delimit teleological from consequence-oriented interpretation by distinguishing between "internal" and "external" consequences, which are both perceived as effects of an interpretation.[40] He claims that internal consequences are effects of one interpretation of a statute on other interpretations of that statute, for example a certain definition of the term "intent" that would have to be considered in future decisions. According to *Hassemer*, these internal consequences are a subject of teleological interpretation.[41] External consequences, on the other hand, are a subject of consequence-oriented interpretation and affect

> "future situations that are expected consequences of a certain interpretation of a statute and are empirically describable."[42]

This distinction unduly narrows the scope of teleological interpretation and does not sufficiently reflect the extent to which consequence-orientation is subject to the rule of law. A methodologically sound, objective teleology must imply that a certain statute is always supposed to formatively fit into an overall legal system. Only in this respect can a statute be seen as a forward-looking and

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[38] *M. Deckert*, Zur Einführung: Die folgenorientierte Auslegung, Juristische Schulung (1995), p. 480 (483); *H. Rottleuthner*, Zur Methode einer folgenorientierten Rechtsanwendung, in: Wissenschaften und Philosophie als Basis der Jurisprudenz, Beiheft N. F. Nr. 13 des ARSP, Wiesbaden 1980, p. 97 (114 f.); *S. Wälde*, Juristische Folgenorientierung, Königstein/Ts. 1979, p. 96.

[39] See *T. Sambuc*, Folgenerwägungen im Richterrecht, Berlin 1977, p. 111.

[40] *W. Hassemer*, Über die Berücksichtigung von Folgen bei der Auslegung der Strafgesetze, in: N. Horn (ed.), Europäisches Rechtsdenken in Geschichte und Gegenwart, Festschrift für Helmut Coing, Band I, München 1982, p. 493 (513).

[41] *W. Hassemer*, Über die Berücksichtigung von Folgen bei der Auslegung der Strafgesetze, in: N. Horn (ed.), Europäisches Rechtsdenken in Geschichte und Gegenwart, Festschrift für Helmut Coing, Band I, München 1982, p. 493 (512 f.).

[42] *W. Hassemer*, Über die Berücksichtigung von Folgen bei der Auslegung der Strafgesetze, in: N. Horn (ed.), Europäisches Rechtsdenken in Geschichte und Gegenwart, Festschrift für Helmut Coing, Band I, München 1982, p. 493 (513).