Abstract

to the habilitation treatise by

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Gefährdungsschaden und betriebswirtschaftliche Vermögensbewertung

Eine Kritik der "objektiv-wirtschaftlichen" Schadenslehre

The following text offers an overview of the basic conceptual approach and the essential results of my habilitation treatise .

I. It is the recent discussion about the legal construction of the so-called damage of endangerment ("Gefährdungsschaden") in cases of fraud and breach of trust, which is the starting point of my study. This damage has always played a role in criminal jurisdiction. Its relevance stems from the awareness of the fact that an imminent loss in business can possibly lead to an immediate decrease of value of the asset in question. The obvious discrepancy with penal doctrine, which categorically differenciates between the breach, i.e. the damage, and the endangerment has always been noticed, but nevertheless – irrespective of a number of attempts to develop a somewhat narrower understanding of *damage of endangerment* – this discrepancy has practically always been accepted.

Especially in the context of problems, which relate to securities, stocks and bonds and the allocation of credits, the ascertainment of such a damage of endearment can prove rather difficult. This is because according to the up to now prevailing opinion an assessment of the pecuniary claims, which the property holder, as creditor or purchaser of the securities, is entitled to is necessary immediately following the transaction. And that practically is a prognosis about the estimated fulfillment of the (pecuniary) claim. After jurisdiction had accepted damage of endangerment for a long time in rather imprecise terminology, the Supreme Constitutional Court demanded in a much debated decision (2010) that criminal court praxis in future will have to deliver precise figures of the damage in question. In case this, due to the complexity of the circumstances of the case, appears to be especially difficult, the use of methods from economic praxis and the inclusion of non-legal experts is expected.

It is an essential aim of my study to deliver a critical evaluation of the use of non-legal, especially economic expertise in the process of determining and precisely numbering the property damage from the point of view of criminal law. Up to

now it has hardly been examined to which extent methods developed in economics can help to precisely determine future cashflows, thereby producing a significant increase in legal certainty and reliability when damages of endangerment in complex cases are ascertained. The Supreme Constitutional Court has not really dealt with this problem and obviously regarded an intuitive close connection of numbering and strict reliability as sufficient. Insofar legal comments have offered critical assessments, these assessments always referred to conflicts between principles of accounting *laws* and those of criminal law. It was generally not taken into account that applicable assessment procedures are not regulated in the context of accounting laws, but instead have their origin in economics, especially in finance theory. In my study I will have, with the inclusion of considerations from legal theory, a closer look at the question, which relevance such findings from related sciences can have in the context of penal aspects of the determination of damages.

As my study comes to the conclusion, that methods, as used in economics for the quantification of the present value of future cashflows are, from the point of view of criminal law, not eligible, to produce the necessary reliability in determining damages, the determination of damages as a whole must be examined. This will show that this legal construction has a precarious structure not alone from a conceptual perspective. The paradigm of the economic theory of damage will furthermore prove to be not very convincing. In my study a new understanding of the term *damage* will be formulated, based on which a solution for all cases of hazardous transactions is presented dispensing with the construct of the so called damage of endangerment.

II. My study begins with an overview of opinions about the question, which general demands are man in criminal law on the category of actual damage ("Verletzungserfolg"). According to a widespread formulation such a damage consists of an occurrence in the "outer world", to be somewhat more precise – allowing for certain epistemological simplifications – as an, in the broader sense,

empirical occurrence or a factual event, concerning the damage of a legally protected interest. This actual damage as an empirical fact must be distinguishable from a mere endangerment.

On the basis of this assumption, the of late much supported connection to methods used in economics could possibly be understood and legitimated to the effect that these methods supply criminal law with better and more precise information about the "outer world", that is to say about the value of certain property components seen as, in a broader sense, a verifiable empirical phenomenon. Accepting this as true, an important argument would have been introduced to transfer such assessments into criminal law as practiced by the Supreme Constitutional Court.

This, however, leads on to the question, whether the methods developed in finance theory can be understood as description of empirical processes A closer look at the calculation of the so called *present value* and the underlying concepts of probability and future, though, raises grave doubts.

Methods in the field of finance theory make use of very strict assumptions, which considering the nature of the so called "perfect capital market" and the homogeneous expectations of its participants must be judged as obviously unrealistic. Values calculated in this way are highly normative constructs, not the description of empirical occurences.

The empirically ascertainable world is not only composed of such facts whose identification is solely the result of observations (so called *natural* or *brute* facts), but so called institutional or social facts have to be taken into consideration just as well. Therefore it is on principle plausible to assume that findings of other sciences can convey a deeper insight into empirical "factual" occurences to law. This will mainly, but not only apply to the natural sciences.

But – and this is the decisive aspect – law defines its relationship to such findings of related sciences always following normative considerations. What in law is to be understood as a fact is in itself a legal question, it is not determined by a concept

of reality, which other sciences can possibly make authoritative statements about. When law and other sciences overlap, it is the law that has to explain with convincing normative reasoning, which role the findings of these sciences – to be more precise their constructions of reality – can play when it comes to the application of law. Most of all it has to be made clear, what kind of quality these findings have, how they were conceived, what the cognitive interest of the science in question is and in which legal context these findings shall be used.

Judging by these criteria I hold the view that the results of assessments as made by economics cannot be regarded in criminal law as facts referring to property value. Quite contrarily, they do not enable us to provide information about the presuppositions of a present actual damage.

III. As a consequence, the attempt of the Supreme Constitutional Court to solve the problems in connection with actual damage by using non-legal expertise, have failed and therefore the precarious conceptual structure of this legal construction remains as it is. My study aims to show that the problem is due to a basic inconsisteny in the concept of the damage of endangerment ("Gefährdungsschaden "), a concept which owes its acceptance to an inherent recursive structure, where an anticipated future influences the present. This means that in the concept of damage of endangerment the legally constitutive line between damage and danger has been abolished, irrespective of the fact that jurisdiction and legal theory have always denied this.

But as the interdependence between the damage of endangerment ("Gefährdungsschaden") and the basic assumptions of the prevailing theory of damage, with its roots in economic concepts, is too strong, making it impossible to formulate a convincing alternative from within the prevailing concept, my study turns to a closer look at the principles of the concept of damage in German criminal law. I shall now give a short summary of problems and frictions having appeared in the process of my analysis.

The prevailing essentially objective theory of damage maintains that the permanent continuity of monetary value is *the objective-economic aim* of any property stake. The property is to be principally valued according to the fair value. One acts on the assumption that this continuity of monetary value is always on hand when goods are purchased at their market price. But that presupposes that the equivalent achieved is valued in accordance with the cost of its acquisition. If, on the other hand, the fair value, that is the price attainable by resale is taken as starting point, the purchase of goods would practically never lead to such a continuity of monetary value, because goods can hardly ever be resold without losses.

It is the only way to avoid this problem, when one accepts the subjectivity of any kind of assessment, which is widely undisputed especially in economics. According to my conception the subjective determination of aims by the property owner , who by his disposition decides, that he is ready to give up part of his property to achieve a certain aim – as a rule to get an equivalent – will mean that, when the aim is achieved, a property damage always can be excluded. In case of a successful deal – the aim being achieved – the assessment of the equivalent in relation to the purchase costs makes sense, whereas when the aim is not achieved one needs to refer to a realistically achievable resale value (after the transaction).

From such considerations, which differ to some considerable extent from the prevailing opinion, at the same time, though, have some aspects in common with it, does not automatically follow a solution for the cases of damage of endangerment ("Gefährdungsschaden"). In the final part of my study I will address this problem. As a property damage necessarily has to be determined on the basis of a completed development, in order not to give up the difference between the damade and the sheer endangerment, a completed transaction of assets is needed at first. In addition it must be certain, on the basis of present and ascertainable circumstances, that the aim of the property disposition was not achieved. Therefore, in cases of hazardous transactions the damage cannot any

longer be qualified as such because of the risk of future losses. As an alternative, my study will develop a solution, according to which one can speak of a damage in the context of concrete cessations of payment, to be determined from an ex-post point of view. In order to avoid hindsight bias, it has always to be examined, whether the damage, caused by actual losses can be attributed to the offender. The use of economic expertise during this process is possible. A precise estimate of cash flows from an ex-ante perspective becomes irrelevant though. In some cases an expertise on complex market developments from the ex-post perspective can be adequate.