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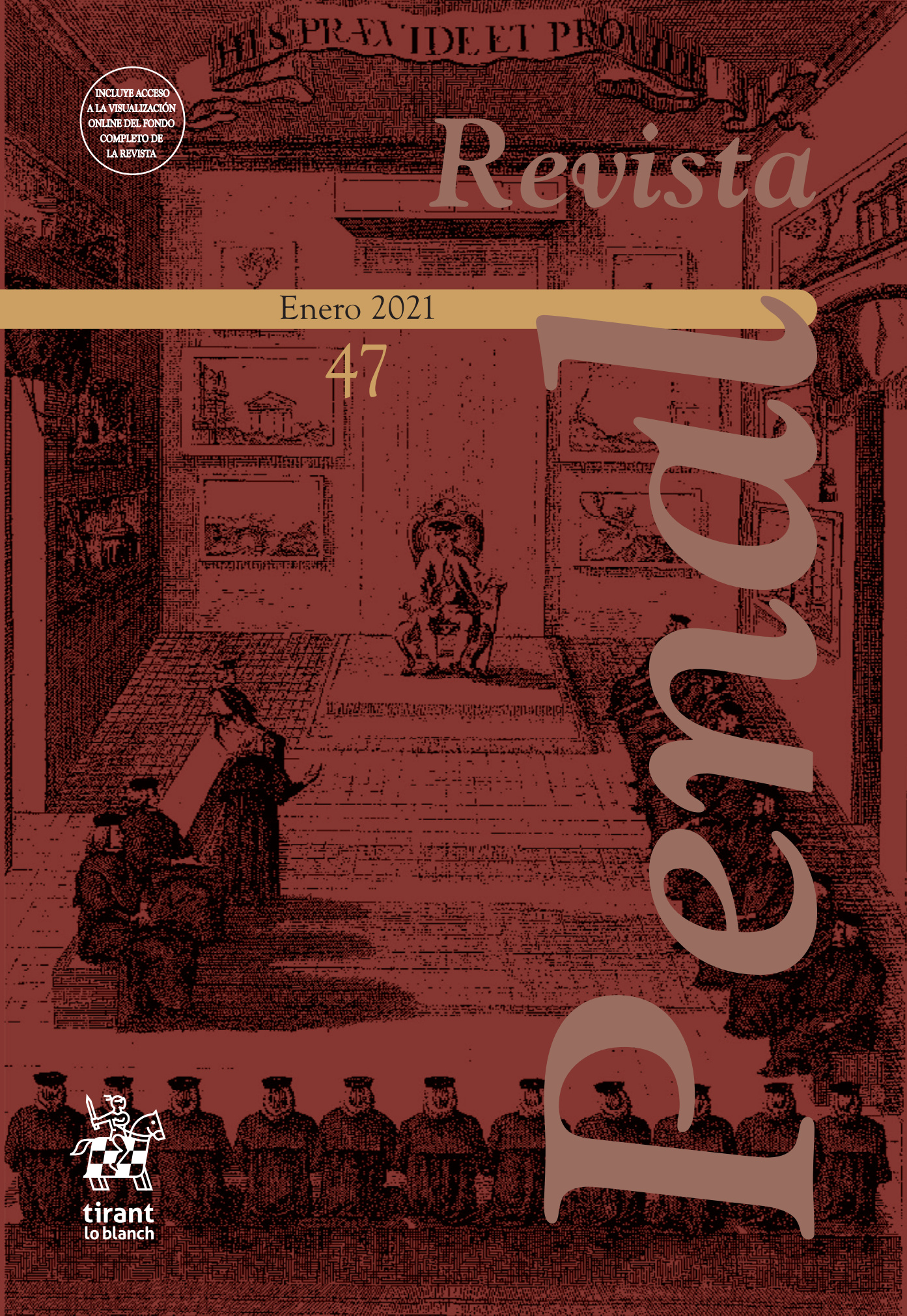

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Criminalizing Lifestyles of "Asociality" in Germany. The Historical Experience and a Potential Grounding in the Doctrine of "Functionalism"

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Title: Criminalizing Lifestyles of "Asociality" in Germany. The Historical Experience and a Potential Grounding in the Doctrine of "Functionalism"

Resumen: Este artículo investiga la evolución histórica de la teoría del "funcionalismo" en Alemania en relación con la criminalización de las formas de "asocialidad". Después del análisis de los autores más representativos de esta teoría, este artículo concluye que los enfoques de Roxin, Frisch y Freund no parecen ofrecer una base para la re-penalización de los estilos de vida "asociales". Sin embargo, los enfoques de Jakobs y Pawlik podrían apoyar esa re-penalización.
Palabras clave: Asocialidad, criminalización, funcionalismo, Alemania, castigo

Abstract: This paper investigates the historical evolution of the theory of "functionalism" in Germany in relation to the criminalisation of forms of "asociality". After the analysis of the most representative authors of this theory, this paper concludes that the approaches of Roxin, Frisch and Freund do not seem to offer a basis for the re-penalisation of "asocial" lifestyles. However, the approaches of Jakobs and Pawlik could support such re-penalisation.
Key words: Asociality, criminalisation, functionalism, Germany, punishment

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I. LEGISLATIVE APPROACHES TOWARDS THE CHALLENGE OF "ASOCIAL" LIFESTYLES

In light of *Droysen*'s maxim that we understand the present by grasping its genesis[1], it seems useful to begin with a brief overview over the various stances towards the criminalization of "asocial" behaviour that Germany's vibrant criminal law history has spawned during the past 150 years.

1. The Wilhelmine Empire

One year after the founding of the German Empire in 1871, a national criminal code (RStGB) entered into force, putting an end to the previous legal fragmentation. Like its predecessors the code embraced the idea that certain manifestations of "asociality" should be countered with the mean of criminal law. Specifically, Art. 361 RStGB defined as punishable offences: vagrancy ("roaming as a vagrant"), mendicity ("begging or instructing children to beg"), self-induced indigence ("neediness due to giving oneself of to gambling or alcohol abuse") and indolence, i.e. the refusal to take up suitable work whilst living on public welfare. While the scope of sentences was rather mild, ranging from one to sixty days of light imprisonment (*Haft*), Art. 362 additionally allowed the court to commit the convict to the respective state police authorities, who would then be authorized, at their discretion, to put the person to work in a workhouse (*Arbeitshaus*) or to community service for up to two years. Although largely congruent with previous state provisions, such a blatant infringement upon a person's freedom for comparably trivial reasons would still seem to be at odds with the overall liberal spirit of the RStGB[2]. Pursuing the prevailing legal conception during the classical liberal period of the late 19th century, the RStGB's drafters merely sought to provide a formal legal framework for the otherwise autonomous unfolding of civil society. In that light, Art. 362 constituted quite an alien element within an otherwise quite coherent body of law, and this finding accurately betrays the underlying rationale: It sought to address an alien element within an economically quite like-minded society. The RStGB was designed as a criminal code for and by a bourgeois society, whose Juste Milieu readily followed the motto "Enrichissez-vous." In addition and unbeknown to many, a romantic idolization of work and workmanship widely spread[3], and against the backdrop of Germany's newly gained national sovereignty, this sentiment evolved into a source of national pride and national unity[4]. These factors, amongst others, added to a perception that persons abstaining from the work process were to be taken as 'foreign' and hence requiring a different treatment than culprits from society's midst. Already at the incipient stages of German national criminal law, an - albeit faint - rift can hence be observed between the legal treatment of the civilian majority on the one hand and "asocial" lifestyles on the other.

2. The "Third Reich" and the German Democratic Republic

This rift grew larger with a vengeance in the criminal law of the two German dictatorial regimes of the 20th century. As is typical of totalitarian forms of government, both the national-socialist (NS) "Third Reich" (1933-1945) and the socialist German Democratic Republic (GDR, 1949-1990) swiftly transformed criminal law into an unbridled coercive tool for achieving their respective ideological goals. Notwithstanding their vast differences, national-socialism and socialism displayed one common feature: They both expended a great deal of effort on 'socializing the people', in other words organizing them collectively from the cradle to the grave, pressing them into a collective way of life and fitting them firmly into a collective discipline[5]. The Nazis strove for creating a "racially"[6] homogenous ethnic community (*Volksgemeinschaft*), the socialists for a socialist community of the working class (*Gemeinschaft der Werktätigen*). People who did not meet the requirements of the proposed ideal or refused to be integrated were perceived of as foreign objects or parasitical elements, deserving to be excluded and disposed of with all necessary means, including those of criminal law.

The centrepiece of the Nazis' policy was to purge the "racial corpus" (*Volkskörper*) from a variety of "internal enemies"[7]. Those enemies were roughly divided into those who are "alien to the race" (*artfremd*) and those

1 *Droysen*, Historische Zeitschrift 9 (1863), p. 13: „[W]as da ist, verstehen wir, indem wir es als ein Gewordenes fassen".
2 *Hähnchen*, Rechtsgeschichte (2016), para. 11 mn. 613-614.
3 This is captured, for instance, in *Wilhelm Riehl*'s hymn-like study *Die deutsche Arbeit* (1862).
4 *Wilde*, Armut und Strafe (2015), pp. 13-14.
5 *Haffner*, Anmerkungen zu Hitler (1978), pp. 50-51, 77.
6 For being a key-stone of the NS-ideology, its notion of „race" was surprisingly unclear. See, e.g.: *Haffner*, Anmerkungen zu Hitler, pp. 102-103.
7 *Schmuhl*, in: Bracher/Funke/Jacobsen (eds.), Deutschland 1933-1945 (1992), pp. 182-197, 191.

who are "alien to the community" (*gemeinschaftsfremd*)[8]. The latter category was further split up into a group of "anti-social" (*antisozial*) individuals, composed of regular criminal offenders, and a group of "asocial" (*asozial*) elements. The term "asocial" was never precisely defined[9] and largely served as an umbrella expression for all sorts of people on the fringe of society whose maladaptive lifestyles were considered to have a demoralizing or disintegrating impact on the *Volksgemeinschaft*[10]. Homeless people, chronic alcoholics and —especially— individuals considered as inherently workshy were categorized as such[11]. For combating "asocial" behaviour, the Nazis did not primarily resort to criminal law proper, but to the executive instrument of "preventive detention" (*Vorbeugehaft*), that was introduced by ministerial decree in 1937[12]. However, with regard to NS-law, the distinction between criminal law and police law should not be overrated and may even seem incongruous, as both legal fields more and more merged into one totalitarian toolbox of terror. The special measure of *Vorbeugehaft*, which was misleadingly declared as a mere "educational measure", broadly resembled the infamous "protective detention" (*Schutzhaft*) that was specifically employed against political enemies. In essence, *Vorbeugehaft* meant indefinite detention in a concentration camp with uncertain chances of survival[13].

The GDR introduced its socialist criminal code in 1968 (StGB-GDR). Its preamble reveals the code's distinct socialist alignment, stating: "The systematic development of the socialist law (…) serves the purpose to methodically unfold and guide the productive forces and the socialist relations of production, in order to develop the socialist community (…) and to defend our order against the plots of our enemies and against criminal deeds of all kinds. (…) Likewise, it helps lead the fight against criminal acts that arise from the remnants of the capitalistic age and being fuelled by the hostile influence and moral decadence of the imperialist states." In alignment with this policy focus, habitually indolent individuals who did not contribute to the socialist end were counted among internal enemies. Very insightful are the explanations of two of the GDR's leading legal scholars —*John Lekschas* (1925-1999) and *Joachim Renneberg* (1926-1977)— before the criminal code draft commission in 1961. Both in tone and structure, these remarks bear a striking resemblance to the NS-approach, adopting the differentiation between criminal and "asocial" elements and calling for the "liquidation" of the latter phenomenon within the socialist community: "The more the socialist society evolves and solidifies, the clearer it gets that —apart from criminality— a second kind of socially detrimental behaviour exists that needs to be banished from society before the building of communism, and that can only be liquidated by means of state compulsion (…): the asocial parasitical lifestyle of a number of individuals. (…) There still is a number of declassified social elements we inherited (…) from the capitalistic era, who entirely or mostly pursue a parasitical way of life (e.g. prostitutes and their milieu, work dodgers (…), alcoholics and drifters)."[14] These policy considerations found expression in Art. 249 StGB-GDR. According to this provision, any person who impairs social coexistence or public order and security by abstaining from a regular occupation despite being fit for work, by engaging in prostitution or by generally entertaining an asocial lifestyle (*asoziale Lebensweise*) should be liable to, *inter alia*, a term of imprisonment up to two years[15]. On top of that, Art. 42 StGB-GDR enjoined the subjection of convicts of a variety of crimes whose lifestyle were deemed "asocial" to a regime of "education by labour" (*Arbeitserziehung*) for at least one year until educational success could be reached[16]. GDR courts made extensive use of both provisions. Convictions under Art. 249 StGB-GDR numbered 14.000 in 1973. In 1975, 27% of GDR inmates were subjected to measures of *Arbeitserziehung*[17] that regularly consisted in hard physical work.

3. The Federal Republic of Germany

The Federal Republic of Germany (FRG) who had —like the GDR— inherited the RStGB in 1949, showed no reluctance in applying Art. 361 RStGB during the 1950s and 1960s[18]. This observation is fully

8 *Psonka*, Strafverfahren gegen Minderjährige im Dritten Reich, pp. 22-23. See also *Diener*, Deutsches Recht 5 (1935), p. 457.

9 *Broszat*, Vierteljahrshefte für Zeitgeschichte 6 (1958), p. 395.

10 *Psonka*, Strafverfahren gegen Minderjährige im Dritten Reich (2019), pp. 22-23.

11 *Haeckel*, Deutsche Justiz 98 (1936), p. 1724.

12 "Grunderlass Vorbeugende Verbrechensbekämpfung" (14.12.1937), BArch R36/1846, n. fol., in: *Ayass*, „Gemeinschaftsfremde" - Quellen zur Verfolgung von „Asozialen" 1933-1945, Nr. 50.

13 *Broszat*, Vierteljahrshefte für Zeitgeschichte 6 (1958), pp. 395-396.

14 *Lindenberger*, Geschichte und Gesellschaft 31 (2005) pp. 233-235.

15 This reflects the slightly amended 1979 version of Art. 249 StGB-GDR.

16 Art. 42 StGB-GDR was abolished in 1977.

17 *Korzilius*, „Asoziale" und „Parasiten" im Recht der SBZ/DDR (2005), p. 619.

18 For a striking example, see the judgement of the Oberlandesgericht Hamburg, NJW 1968, p. 1150.

consonant with the prevailing attitude at the time, according to which criminal law should also serve to buttress the laws of morality[19]. The same conviction made marked appearance in the criminal law reform draft of 1962 that emphatically recommended to uphold the criminalization of "asocial" forms of conduct[20]. In the course of 1960s, however, a competing position gained ground, insisting that only the protection of recognizable *legal values* (*Rechtsgüter*) should constitute a legitimate reason for punishment. In the case of "asocial" lifestyles, however, such values could not be named. The FRGs legislature adopted this standpoint[21], so that eventually, through the 2nd criminal law reform bill taking effect in 1974, punishability of "asocial" lifestyles was abolished.

4. A Blind Spot between Individual-and Society-Oriented Approaches

The foregoing retrospective spanning over one and a half centuries leaves us with a somewhat incomplete impression of possible criminal law responses to forms of "asocial" lifestyles: Whenever a criminal law system was singly centered around societal interests —as was taken to extremes by the Third Reich and the GDR— those who stood apart were likely to be winnowed out and subjected to forced labour and harsh punishment. On the other hand, such lifestyles tend to go unpunished when a legal system places the main emphasis on the legal interests and values (*Rechtsgüter*) pertaining to the individual - as was implemented by the FRG's 2nd criminal law reform in 1974. Between these two approaches a potential gap can be made out: One wonders how an "intermediate" approach would respond to the social phenomenon of persons leading an "asocial" way of life. By "intermediate" we mean criminal law theories that are fully grounded in the principles of modern-time *liberal* democracy and yet also factor in the legitimate *societal* interests in a functioning penal law. Approaches of this kind are particularly reflected in the movement of "functionalism" that shall be addressed in the following.

II. THE CRIMINAL LAW APPROACH OF "FUNCTIONALISM"

1. Introduction

Methodically speaking, the functionalistic approaches flow from the Southwest German school of neo-Kantianism, that brought about a major paradigm shift in the theory of science and allowed legal scholarship to perceive of itself as a "science" in its own right. By the turn of the 20th century, *Wilhelm Windelband* and *Heinrich Rickert* identified natural sciences and "cultural sciences" (humanities, *Kulturwissenschaften*) as two distinct yet equivalent forms of academic contemplation. Both fields are set apart, first, by their respective objects of observation: Natural sciences cover realities of the material world that are directly or indirectly accessible to the senses and exist independently of human values or purposes, whereas the humanities study realities whose existence flows from cultural values, as in each and every cultural state of affairs some humanly recognized value can be made out in whose pursuit the state is effectuated or upheld. Second, they also differ in terms of method: While natural sciences seek to determine *communalities* of the examined objects so as to categorize them as examples of natural principles, humanities are in search of the *specifics* by which a cultural object attains importance under a guiding cultural value[22].

The jurisprudential adoption of the neo-Kantian perspective led to ground-breaking changes. Most importantly in the present context, law would no longer have to be construed naturalistically, i.e. in accordance with the empirical sciences, but in due consideration of the legal values it seeks to serve and protect. This, however, begged the question: Which values precisely? Up to 1933, German academic writing and jurisprudence predominantly took a somewhat conservative stance and largely confined the new methodical approach to the teleological interpretation of statute elements in light of the protective purpose of the respective statutory offence[23]. More spirited and comprehensive reflections on how the functions of criminal law *as such* might call for rethinking the conventional concepts of criminal law on a more fundamental level were either broken off by the Nazis' rise to power or (at least partially)

19 *Schneider*, Kann die Einübung in Normanerkennung die Strafrechtsdogmatik leiten? (2004), p. 233.

20 Bundestags-Drucksache IV/650, pp. 540-544.

21 Bundestags-Drucksache V/4095, p. 48.

22 *Rickert*, Die Probleme der Geschichtsphilosophie (1924), p. 84; *idem*, Kulturwissenschaft und Naturwissenschaft (1915), pp. 18-28, 40, 110; *Windelband*, Geschichte und Naturwissenschaft (1904), pp. 11-27.

23 See *Schwinge*, Die teleologische Begriffsbildung im Strafrecht (1930), p. 33; *Schneider*, Kann die Einübung in Normanerkennung die Strafrechtsdogmatik leiten? (2004), p. 23.

infested by NS-thinking[24]. It would not be until the 1970s that this abandoned thread was taken up again by a new generation of scholars. Amongst the first was *Claus Roxin*. In his seminal essay *Kriminalpolitik und Strafrechtssystem* (1973) he noted that criminal law theory had missed a splendid chance in the 1920s, as the value-oriented methodology of neo-Kantianism could have given rise to an entirely new "picture of the criminal law system", if the leading decisions of criminal law policy had been chosen as a reference point[25]. Other authors also picked up on *Roxin*'s call which led to the development of several "instrumentally rational" (*zweckrational*) or "functional" theories.

2. *Roxin*, *Frisch* and *Freund*

Although opening up to the social functions of criminal law, some of these new approaches maintain the view that the legitimization of criminal law can never be based on societal interests alone but must at all times additionally be rooted in the protection of individual legal values. This idea features prominently in *Roxin*'s writing[26], but is also embedded in other theories, *inter alia* those by *Freund*[27] and *Frisch*[28]. Subject to this limitation, however, criminalizing forms of "asocial" lifestyle is ruled out from the start, as mentioned above under I.3. Consequently, these theories need not be taken into further consideration here.

3. *Jakobs*

Jakobs' functionalism differs in one important respect from the other approaches, whose leading purposes of punishment depict or comprise veritable legal values or "cultural values", respectively, and are thus fully in line with the value-oriented spirit of neo-Kantianism. In principle, *Jakobs* too acknowledges that the endeavour of building a criminal law theory requires one overarching and "illuminating reason of legitimation"[29], and one would hence expect one prominent purpose/value as the keystone of his concept. That is, however, not the case. At the very top of his theory, *Jakobs* does not place a legal *value* through the lens of which criminal law could be "understood", but an *empirical* rule by which criminal law can be "explained"[30]. *Jakobs* builds on the sociological insight that social systems seek to maintain their current identity, and as (criminal) law systems consist of legal norms, stabilizing these identity-establishing norms is what constitutes the purpose of the criminal law system. When a crime is committed, the socio-psychological appreciation of the behavioural norm suffers in a twofold manner (*Normgeltungsgefährdung*): First, the breaking of the rule implies the perpetrator's proposition that the disobeyed norm shall be null and void and be replaced by the perpetrator's criminal maxim; and second, on the part of the other members of the legal community, the act gives cause for concern that further breaches of law are to be expected which erodes the general expectation of lawful conduct and hence undermines the trustworthiness of the system as a whole. Punishment of the malefactor then counters both threats to the stability of norms: By rendering a conviction, the court contradicts the perpetrator's previous challenge of the norms validity and underscores its retention, and by imposing an appropriate sentence the crime is clearly tagged as a failed and unattractive enterprise[31].

The fact that *Jakobs* builds his theory of punishment much more from a detached sociological-empirical perspective than from within a specific legal order may have a strong initial appeal as it focuses on the social dynamics where criminal law actually means to make an impact. But it also carries rather questionable consequences in its wake. An obvious and frequently voiced point of criticism is that the approach could be applied indiscriminately to virtually any legal system —liberal, dictatorial or otherwise— as long as the norms in question defined a society's internal communication and hence shaped its identity. On these terms, the argument runs, *Jakobs'* approach could even legitimize punishment for failing to salute Gessler's hat[32]. However, this criticism would appear to be rooted in a misunderstanding of *Jakobs'* objective. According to the present view, he seeks to provide a mere explanation of the *functioning* of punishment. The normative question of legitimacy of the criminal sanction and the underlying

24 E.g. *Mittasch,* Die Auswirkungen des wertbeziehenden Denkens in der Strafrechtssystematik(1939), pp. 31, 86.

25 *Roxin,* Kriminalpolitik und Strafrechtssystem (1973), p. 12.

26 *Roxin,* JA 1980, pp. 221-222; *Roxin*, JA 1980 p. 546; *idem*, Strafrecht Allgemeiner Teil I (2005), para. 2, mn. 1-5.

27 *Freund*, Erfolgsdelikt und Unterlassen (1992), pp. 52 et seq., 80-81; *idem*, Strafrecht Allgemeiner Teil (2009), para. 1, mn. 5 et seq.

28 *Frisch*, Vorsatz und Risiko (1983), pp. 46 et seq., 74-75., 204-205; *idem,* Tatbestandsmäßiges Verhalten (1988), pp. 140 et seq.

29 *Jakobs*, Strafrecht als wissenschaftliche Disziplin. In: Engel/Schön (eds.), Das Proprium der Rechtswissenschaft (2007), p. 106.

30 For an overview of *Diltheys* famous concept of explaining (*Erklären*) and understanding (*Verstehen*) and its modern adaptions, see: *Schurz*, in: Jäger/Straub (eds.), Handbuch der Kulturwissenschaften, pp. 156-174.

31 *Jakobs*, Staatliche Strafe: Bedeutung und Zweck (2004), pp. 28 et seq.

32 *Weigend*, in: Laufhütte/Rissing-van Saan/Tiedemann (eds.), Leipziger Kommentar, 12th ed., Einleitung, mn. 6; see also *Kreß*, in: Kindhäuser/Kreß/Pawlik/Stuckenberg (eds.), Strafrecht und Gesellschaft (2019), p. 25. "Gessler's hat" refers to *Schiller's* play "Wilhelm Tell": Gessler, a tyrannical governor of the Swiss cantons, sets his cap upon a pole, commanding that all who pass must bow to it be killed.

rule of conduct remains open and needs to be addressed separately[33]. Nevertheless, doubts may be raised as to the compatibility of this theory of punishment with the current German law. For instance, the code of criminal procedure (StPO) does not provide any indication that reversing the crime-induced "weakening" of legal norms constitute a matter of public interest. Quite to the contrary: If, for instance, a person witnesses a crime without being personally affected, he or she will only be informed about the procedural outcome upon a written request (§ 171 StPO). Moreover, *Jakobs* assumes sources of law that are hardly consonant with the prevailing constitutional framework. For determining the relevant behavioural norms, *Jakobs* proposes, primary focus should not be given to statutory stipulations, but instead be listened to the society's "semantics": Such rules as emerge "in the bosom of society" constitute not only customary law but ultimately even bind the legislature as "no law-making body can override a society's stable spirit"[34] which would —arguably— also extend to constitutional provisions. Now it is certainly true that we have long departed from the static positivistic notion that all relevant value judgements are made by the legislature, and have come to acknowledge the evolutionary dynamics and cultural sensitivity of legal systems, but holding that, in essence, law flows directly from a "society's stable spirit" would seem oblivious of the representative democratic system of government and revert to *Puchta*'s and *v. Savigny*'s "Volksgeist"-theory from the early decades of the 19th century[35].

This being said and coming back to the above question whether *Jakobs'* functionalistic concept provides for the punishment of "asocial" lifestyles, no definite answer can be given. *Jakobs'* —so to speak— "direct democratic" approach would not provide a foothold for criminalizing such lifestyles as long as the norms that actually shape and reflect a society's spirit, identity and communication remain tolerant towards lifestyles that fail to conform with the work ethics of the majority population. The chequered historical experience, however, gives no indication that the currently high level of tolerance may last.

4. Pawlik

Michael Pawlik's functionalistic theory of punishment is related to *Jakobs*' considerations, but unlike the latter, *Pawlik* closely ties his approach to the liberal foundations of the (German) legal system. Proceeding form there, *Pawlik* observes that any *effectual* enjoyment of the granted liberties presupposes a reasonable extent of trust in the overall compliance with the common behavioural standards. If everyone had to expect being robbed at every street-corner, the rights of movement, property and bodily integrity would obviously not be worth a straw. The state alone, however, cannot fully grant the needed security unless turning itself into an omniscient and omnipotent police state, which would —paradoxically— ultimately amount to a total loss of liberty. Instead, each citizen bears an original *duty to contribute* to the trustworthiness of the norms by adhering to them. The granting of freedom by the state is hence inextricably and synallagmatically linked to the fulfilment of this fundamental civic duty. By committing a crime, the perpetrator impairs trust in the normative order and thus breaches his primary duty to contribute. This gives rise to a secondary duty, namely, to tolerate that the mutuality of enjoying freedom and contributing thereto be reaffirmed at the perpetrator's expense, that is, by means of punishment[36].

Arguably, this idea of mutuality at the heart of *Pawlik's* theory could indeed provide a toehold for legitimizing the penalization of "asocial" lifestyles within a generally liberal legal system.

Apart from a lack of trust in the law-abidance of fellow citizens, a second obstacle to the effectual enjoyment of liberty can be named that can only be overcome with the assistance of citizens. As *Pawlik* rightfully notes in a different context, self-determination is a "highly presuppositional project" and requires not only relatively stable external conditions that allow for longer-term planning, but also the existence of fundamental infrastructural institutions (e.g. basic health care) as well as basic economic security (i.e. the subsistence level)[37]. The means to provide for these material prerequisites of freedom cannot be furnished by the state alone (unless it transforms into a "robber state" —as an analogon to the aforementioned police state); instead, the state's spending must be funded by its citizens, commonly by means of taxes. Just like treating

33 Similarly *Kreß*, Strafrecht und Gesellschaft (2019), p. 25.

34 *Jakobs*, System der strafrechtlichen Zurechnung (2012), p. 30. See: *Kreß*, Strafrecht und Gesellschaft (2019), pp. 32-34.

35 *Puchta*, Vorlesungen über das heutige Römische Recht I (1846), p. 25. For similar critique see *Gärdiz*, Strafrecht und Gesellschaft (2019), p. 735.

36 *Pawlik* Das Unrecht des Bürgers (2012), pp. 82 et seq.; *idem*, Person, Subjekt, Bürger (2004), pp. 72 et seq.; *idem*, Staatlicher Strafanspruch und Strafzwecke, pp. 82 et seq.

37 *Pawlik*, Das Unrecht des Bürgers (2012), p. 186.

other persons in accordance with the law, giving a share of one's work value to the state is a price payed for the freedom of all[38]. In this light, therefore, *Pawlik's* approach might imply a theoretical basis for the punishment of those who persistently object to contribute to the funding of state welfare.

III. CONCLUSIVE REMARK

In light of the foregoing, an unequivocal conclusion as to if the doctrines of "functionalism" pave a way toward the (re-)penalization of "asocial" lifestyles cannot be reached. While the approaches of *Roxin*, *Frisch* and *Freund* would quite clearly not provide a stepping-stone to this end, the same cannot be said in regard of *Jakobs* and *Pawlik*. As a preliminary conclusion, however, it can be stated that any attempts to reconcile the criminalization of "asocial" behaviour with the legal fundaments of liberal democracies —albeit not inconceivable— would indiscriminately be treading on thin ice. Yet, not least against the background of the dark experiences during the 20th century, treading on firmer ground would be desirable.

38 See, for instance, *Kirchhof*, 11. Weltethos-Rede am 31. Oktober 2014: "Steuer ist (…) der Preis der Freiheit".