Legal Good and Recognition: A Study of Axel Honneth’s Social Theory

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Résumé

Le bien juridique et la reconnaissance : une étude de la théorie honnéthienne de la reconnaissance

Les auteurs exploitent ce que la discussion actuelle sur le « bien juridique » (legal good) et le « principe de préjudice » (harm principle) peut offrir à la théorie honnéthienne de la reconnaissance. À travers Hegel et Durkheim, ils relèvent combien la peine juridique, concept ressenti du droit positif, concrétise puissamment les notions de justice et d’injustice auxquelles font écho les premiers travaux de Honneth sur les expériences négatives de mépris juridique. Regrettant que le modèle honnéthien ait ensuite bifurqué pour envisager d’autres objets d’étude, ils expliquent comment le caractère intégral, c’est-à-dire à la fois axiologique et existentiel, de la notion de bien juridique pourrait en faire l’heureux complément de cette méthode que Honneth appelle la reconstruction normative.


Summary

The authors explore what the contemporary discussion on the legal good and the harm principle can offer Axel Honneth’s theory of recognition. Through Hegel and Durkheim, the reader is reminded how legal sanction – the experienced concept of positive law – powerfully actualizes the key notions of “justice” and “injustice” which are echoed in the earlier works of Honneth dealing with the negative experience of legal contempt. Somewhat regretfully, noting that Honneth’s latter works changed focus, the authors underline how his method of “normative reconstruction” could benefit from the integral character of the “legal good” as a concept possessing both an existential and an axiological dimension.

In the paper *Gerechtigkeitstheorie als Gesellschaftsanalyse. Überlegungen im Anschluss an Hegel* \(^1\) published last year, Axel Honneth presents the foundations of his theory of justice. His main argument is that a theory of justice must be grounded on the structural preconditions (Strukturvoraussetzungen) of contemporary society. He argues that the premises of a theoretical justification of this kind cannot be justified in advance, but, on the contrary, that it needs to be a product of the theoretical process of justification itself. \(^2\) The first premise is that the diversification of society is intrinsically connected with ideals and ethical values. For Honneth these values permeate all the social spheres with ethical norms, which guide individuals within their social spheres of action. \(^3\) All social spheres, including the economic one, are impregnated with ethical values; hence all social orders are bound to the preconditions of legitimation through ethical values or ideals. This premise is connected with a second one, according to which, as theory of justice is concerned, the only values which can be considered are those which a society really embodies. Moreover, one should only count as legitimate those values truly capable of promoting the intrinsic ethical values of each of these social spheres. \(^4\) Thus Honneth, like Hegel, does not believe it would be possible to analyze social values or the principles of justice from a neutral and external moral point of view. We are always intrinsically connected with the ethical values which are embodied in the social spheres of action. Therefore he defends the thesis that a theory of justice can only be developed through an *immanent* method, which describes our principles of justice from within, and must be developed in the form of a social analysis. Honneth calls this “normative reconstruction”. \(^5\)

With this argument Honneth is trying to re-actualise the meaning of Hegel’s concept of “the objective spirit embodiment” (*Verkörperung des objektiven Geistes*), upon which Hegel’s concept of *Sittlichkeit* relies. \(^6\) However, Honneth knows that Hegel’s concept of *Sittlichkeit* involves more than a mere description of given ethical values. For him, it is important that only those ethical life forms which embody the modern ideal and concretized modern institutions count as ethical (*sittlich*). Thus, for a reconstructive method only the ethical life forms which express a concretization of the ideals embedded in modern and democratic institutions can be considered the object of a normative reconstruction. These ideals must be presented as the result of a conflicting evolutionary process, which tends, throughout its development, to increasingly solidify possibilities of individual self-realization. Finally, the method of the normative reconstruction should not only describe the ethical values of contemporary society. It must also make it possible to criticize any

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2. Ibid., p. 15.
3. Ibid., p. 16-17.
4. Ibid., p. 17-19.
5. Ibid., p. 21.
6. Ibid., p. 17.
given institutions from the perspective of the ethical principles embodied in social spheres. 7

I. Honneth’s early Durkheimian argument and its connection to legal good and the harm principle

This brief description of Honneth’s theoretical strategy should help us understand the status and function of the spheres of recognition in his theory of justice. According to Honneth, the three spheres of recognition are the product of the reconstructive strategy described above. The spheres of love, right and social esteem are embedded in ethical values which guide us in our social spheres of action and are invoked as legitimate criteria to solve social conflicts. For Honneth, the social spheres of recognition are a common ground, the “lifeworld” (Lebenswelt) sometimes reflective, sometimes unreflective, which attributes moral sense to our social relations. The meaning, the contours and the ethical principles embodied in each sphere of recognition have evolved following the development of Honneth’s theory; 8 since Honneth himself has acknowledged that his theory is a work in progress, little can be achieved by trying to describe in detail the meaning of each sphere. This is not to say an attempt to clarify his reasoning cannot be made.

It seems clear that with his plural theory of justice, Honneth is trying to introduce into the contemporary discourse elements which have not yet been considered. For instance, he considers it limitative to rule out the emotional dimension of justice, as did Kant and as most of the contemporary debates still do. Honneth tries to overcome this qualification by showing that the experience of love and care and the healthy development of the individual play an important role in concretising justice in social relations, as does the discovery of subjective rights. Both these social spheres of recognition, love and rights, are directly connected with the individual’s self-realization, and these developments can only be correctly understood in interpersonal relationships. However, just like Hegel, Honneth knows that a society

7. Ibid., p. 24. Even if Honneth insists on avoiding making use of Hegel’s concept of spirit (Geist) which, for Hegel, embodies institutions or is embodied in it, it must be said that Honneth’s theoretical strategy is more or less the same one Hegel uses in his Encyclopedia, i.e. the dialectical method developed in his Logik. For a discussion of this argument see Giovani Agostini SAAVEDRA, Der Geist der Anerkennung. Die Reflexionsstufe der Anerkennungstheorie, Inauguraldissertation am Fachbereich Philosophie und Geschichtswissenschaften an der Johann-Wolfgang-Goethe-Universität, Frankfurt/Main, 2008 (manuscript). It suffices to compare Honneth’s argument in his paper with Hegel’s own explanation of his method in the Encyclopedia to see that Honneth, in fact, uses the same strategy: Georg W.F. HEGEL, “Enzyklopädie der philosophischen Wissenschaften III” [1830], in Eva MODENHAUER and Karl Markus MICHEL, Georg Wilhelm Friedrich Hegel, Werke, Bd. 10, Frankfurt/Main: Suhrkamp, 1970, § 387, “Zusatz”, p. 39–40. For a great explanation of this aspect of Hegel’s Logik see Michael THEUNISSEN, Sein und Schein. Die kritische Funktion der Hegelschen Logik, Frankfurt/Main: Suhrkamp, 1980, and Hans Georg FLICKINGER, Neben der Macht. Begriff und Krise des bürgerlichen Rechts, Frankfurt/Main: Syndikat, 1980.

is more than a collection of self-oriented individuals. Sometimes he uses the word “solidarity”, sometimes “social esteem” and recently has started to use the word “achievement” to describe that which lies beyond the dimension of the individual’s social development. In any case, the reasoning is always the same: what matters to Honneth and what he wants to express with his third sphere of recognition is the idea that every human being, having experienced life in society, has developed the feeling of being part of a common project.

Honneth himself acknowledges that his theory of justice and his theory of recognition use more or less the same method as Durkheim. In fact, for Durkheim just like for Honneth, “society and its patterned forms of mutual interaction can only function if there first exists a shared framework of meanings and moralities”. However, Durkheim uses a different phenomenology when he tries to show the set of moral values of modern societies. Whereas Honneth focuses on the surface phenomena of modern societies, like love, subjective rights and social esteem, Durkheim tries to reach the core of their ethical values of society through an analysis of the forms and functions of punishment within them. As Garland correctly observes:

By analyzing the forms and functions of punishment, the sociologist could gain systematic insights into the otherwise ineffable core of moral life around which community and social solidarity were formed. Thus, in the processes and rituals of penal-...
reinterpretation of Hegel’s chapter of *Unrecht* in his Philosophy of Right. As Hegel knows and explicitly shows therein, conflicts of civil law are always conflicts connected to property. Therefore, the structure of subjective rights is always the same: I own X or I have Y, which means in terms of rights: I have the right to do what I want with X, because it is mine. X can stand for almost anything: someone can have or own cars, rights, liberty, etc. Thus, a contract is nothing more and nothing less than an instrument contemporary societies developed to transfer, coordinate and regulate relations through or relations from properties. Accordingly, Hegel argues that in the sphere of civil law we always have collisions of rights (*Rechtskollisionen*), because something could be owned by several persons, each of which can have several legal reasons to claim ownership. In the end, we are simply dealing with *disposable values*, not with the core values of a given society. These conflicts, Hegel calls “Civil society” (*bürgerliche Gesellschaft*) and the institutions which arise in order to manage them are the courts.

To reach the core of the ethical values of a given society, Hegel contends we need to analyze the structures of punishment, crime, and the criminal, because there lays the source of morality: “Die im Verbrechen aufgehobene Unmittelbarkeit führt so durch die Strafe, das heißt, durch die Nichtigkeit dieser Nichtigkeit zur Affirmation – zur Moralität”. Hegel’s analysis, in chapter 2 “Morality”, of right and wrong, formal and theoretical description does not teach us anything about the concretisation of morality. It is only a formal and theoretical description. This concretisation of morality is only address in chapter 3, “Sittlichkeit”, and described therein in the three spheres of family, law and State. The discussion about crime then initiates a reflection about right and wrong, about the kinds of conducts which should be considered criminal, or about how they should accordingly be punished.

Durkheim explains and shows that every law has a double object: it defines the obligations and it defines the sanctions related to their inobservance. However, whereas in the civil law, and more specifically as regards “restitutive sanctions”, the legislator determines both obligations and sanction, in the criminal law, it needs only define sanctions for, Durkheim argues, the obligations related to criminal law.

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13. Ibid., § 82.
14. Ibid.
15. Ibid.
16. “Diese Kollision, in der die Sache aus einem Rechtsgrunde angesprochen wird und welche die Sphäre des bürgerlichen Rechtsstreits ausmacht, enthält die Anerkennung des Rechts als das Allgemeinen und Entscheidenden, so daß die Sache dem gehören soll, der das Recht dazu hat. Der Streit betrifft nur die Subsumtion der Sache unter das Eigentum des einen oder des anderen; – ein schlechtweg negatives Urteil, wo im Prädikate des Meinigen nur das Besondere negiert wird” (ibid.).
17. Ibid., § 219-229, p. 373-381.
20. Ibid., p. 45.
are so deeply connected with our lives and our Lebenswelt as to render an explicit legislative statement unnecessary. 21 That is why, in criminal law, the question is never about obligations, which are always implicit in the discourse, but only about the legitimate, just or adequate punishment. In our opinion, Durkheim is only describing what Hegel already knew and described in his Philosophy of law: the core of our ethical values can only be reached by an analysis which takes into account punishment and criminal law. Honneth’s theory of recognition would strongly benefit from a discussion about the legal good and the harm principle, for both are great phenomenologies which can be normatively reconstructed.

II. Material validity of prohibition as first issue of criminal law

First and foremost, criminal law is concerned with what may be materially considered as criminal conduct or, put more properly, with which material qualities a conduct must gather to be the object of a criminal prohibition. 22 This is not only about criminal punishment; it is perhaps even more about the criminal prohibition, the criminal no, which is the precondition of the criminal-law thinking. One might be tempted, in a subversion of the logical order of things, to prefer investigating when to punish or understanding the dignity of the condition of penal punishment. 23 However, we must first question the material validity of prohibitions and thus strive to grasp the legitimacy that only the criminal no –the opening gesture of criminal-law thinking– is capable of expressing. This is not only the first issue of criminal law, it also serves as a crossing point for several nuances of knowledge, in a complex web of relations and interests, whose consequences go well beyond the scope of this article, as our goal here is more modest.

When Romagnosi, in Genesi del diritto penale, refers to the necessity of a “più forte áPodestá punitrice” –thus, in a way, permitting, through punishment, the sacrifice of humans rights if “ogni pena involge nella sua nozione la sottrazione o totale, o parziale del bem essere di colui che la soffre” 24–, he is in fact, arguing that, when correlating a high cost to individual liberties, criminal law lacks the justification for the material validity that underlies (or should underlie) it. This can only be a starting point. Though the problem has been tackled many times, criminal prohibitions –which are the most sensitive manifestation of the State’s power to restrain rights– continue to lack specific justification. 25 Such justifications cannot simply be pre-

21. Ibid.
23. Working, differently, on the following of the majority comprehension, with criteria such as “Pönalisierungswürdigkeit” and “Pönalisierungsbedürftigkeit”, there are Johann-Moritz SCHENK ZU SCHWEINSBERG, Pönalisierungs der Folter in Deutschland. De lege lata et ferenda, Frankfurt/Main: Goethe Universität, 2009, p. 113 ff. (doctoral dissertation).
25. On whether there is a special justification for the criminal-juridical intervention to be derived from constitutional arguments, see Otto LAGOONY, “Das materielle Strafrecht als Prüfstein der Verfassungsdogmatik”, in Roland HEFENDEHL, Andrew von HIRSCH and Wolfgang WOHLERS (Hrsg.), Die Rechtsgutstheorie.
sumed from the democratic legitimacy of the legislator, stem from the State’s “good will” to pursue its ends—often trapped in its “objective vertigo”—, or be founded on empty formalistic argumentation. Material validity cannot either solely rest on history, at least not as far as democratic and constitutional rule of law States are concerned. In sum, as a matter of principle, the State cannot restrict the constitutional liberties without a sufficient, materially established reason.

Many critics of the theory of legal good have tried to establish the validity of criminal law in the sufficiency of social volition that is democratic representation or in the notion of an intentionally formal existence. Given what we have just expressed as foundational, we must, of course, reject such theories. Criticising the legal good theory when assessing the validity of criminal prohibition is not in itself problematic—quite the contrary, it can contribute to its enhancement. However, negating the value of legal good as a critical *topos* for criminal law is problematic for it is a negation of the very problem of the validity of criminal prohibitions. In other words, one surely might disagree with the remedy prescribed by his physician, but one may no longer negate the illness.

26. Also Claus Roxin, “¿Es la protección de bienes jurídicos una finalidad del Derecho penal?”, *op. cit.*, p. 444.

27. In this exact sense, Winfried Hassemer affirms, and rightly so, that the criminal prohibition of behaviours, when not linked to the protection of legal goods, is nothing but State terror, i.e. the restriction of freedom without any justification: Winfried Hassemer, “Darf es Straftaten geben, die ein strafrechtliches Rechtsgut nicht in Mitleidenschaft ziehen?”, in Roland Hefendehl, Andrew von Hirsch and Wolfgang Wohlers (Hrsg.), *Die Rechtsgutstheorie, op. cit.*, p. 89 ff.

28. For Günter Stratenwerth, “abuse of privileged information” was successfully prohibited in Swiss law, through the argumentation that it is an unwanted conduct, even absent a consensus regarding the legal good protected. According to him, one has to admit that the social position recognized by the legislative is decisive as to whether a norm is maintained or not: Günter Stratenwerth, “2. Sitzung, Rechtsgüterschutz und Zurechnungsprobleme. Berichterstatter: Karsten Gaede und Tilo Mühlfeld”, in Roland Hefendehl, Andrew von Hirsch and Wolfgang Wohlers (Hrsg.), *Die Rechtsgutstheorie, op. cit.*, p. 299. This position finds hard criticism not only in Winfried Hassemer, who sees there some form of “resignation” (Winfried Hassemer, “Darf es Straftaten geben, die ein strafrechtliches Rechtsgut nicht in Mitleidenschaft ziehen?”, *op. cit.*), but also in Bernd Schünemann, to whom the Stratenwerth *Basta-Theorie* and its “naturalist fallacy” (*naturalistischen Fehlschluss*) must be refused: Bernd Schünemann, “Das Rechtsgüterschutzprinzip als Fluchtpunkt der verfassungsrechtlichen Grenzen der Straftatbestände und ihrer Interpretation”, in Roland Hefendehl, Andrew von Hirsch and Wolfgang Wohlers (Hrsg.), *Die Rechtsgutstheorie, op. cit.*, p. 145.

III. Exclusive protection of legal good as a hypothesis

The legal good theory seeks, in the form of a “ratio in which validity is affirmed”, 30 to admit as legitimate the validity of criminal law and, ipso facto, of penal norms. It would be naïve to consider such a task free of recurring and intense difficulties. This, however, does not mean the endeavour is useless. One must bear in mind the intensity of the task, yet one might suggest, as did Schünemann, that abdicating at this stage would take criminal theory back to a “pre-illustrated level”. 31 Overcoming difficulties will be the basis of a powerful legacy, “the strong stone of liberal thought and […] of justice”, to be preserved even before the movements of Europeanization of criminal law. 32

The legal good theory finds its way into many levels of criminal-law thinking, for instance, through arguments on the contractualism 33 or even in the deeper dimensions of the communitarily-inserted Dasein, as proposed by the onto-anthropological orientation of criminal law. 34 Harnessing criminal law with the legal good theory is a dense endeavour, but this density which should not put anyone off: any contribution will help cement the two. We propose a logical-normative resonance contribution to the constitutional normative order through the recognition and justification of the validity of criminal thinking centred on the protection of the legal good. If, following Armin Kaufmann, one starts from the premise that the norm is, for a logical requirement, preceded by a value judgment, 35 one must, for the very same token, admit that the first moment of normative construction consists, invariably, of a positive evaluation, i.e. of some valuation. The first assessment, Kaufmann makes clear, “is always positive, for a negative evaluation always demands that a positive one precedes it, even though both coexist in time”. 36 Valuation is nothing but the original legal moment of recognition –even in criminal law, though its conception of legal good is often deformed and approximate.

The first dimension of the legal good theory is independent both from this sort of evaluation –whatever form it might take– and from the essence of its object. It is always an axiological moment of a positive sign: an historically dated and organised


32. Ibid.

33. Claus ROXIN, “¿Es la protección de bienes jurídicos una finalidad del Derecho penal?”, op. cit., p. 137 ff.


community recognises the existence of certain social realities as good and desirable, and it strives to keep them intact. This keeps nothing of subjectiveness, for even though value, as Hessen puts it, is “always value for someone”, it cannot be doubted that its construction here starts from a profound communitarian-historical reference. Yet, value recognition by communitarian participant is a necessary complex moment. It is necessary because only when such values have been identified can there be incrimination. It is complex both because of the legitimate limits of value judgements and because of the controversial nature of their object. Indeed, many critics of the legal good theory have spoken of its artificiality and vagueness.

While some simply contend that there is no legal good before there is a legislator, others, such as Stratenwerth, speak passionately against the very notion: given the countless definitions of legal good, he says, he who would find a complete material definition would have succeeded in “squaring the circle”. It seems clear to us that any proposition for a theoretical development must necessarily start from a specifically limited concept of legal good, the punctum dolens conditioning the very soundness of the proposition. Amidst so many conceptions, as underlined by Roxin, there can be no debate unless “legal good” is defined. Be that as it may, and despite the diversity of opinions and difficulties faced in obtaining a closed concept, the question currently has a number of satisfactory contributions, that is, guidelines for a concept already sufficiently able to operate in dogmatic and criminal policy. These have been articulated in an improved synthesis in Figueiredo Dias’s Direito Penal, Parte Geral.

IV. The existential dimension of the legal good (Seinaspekt)

For Figueiredo Dias, the legal good is, in its essential core –for he too acknowledges the difficulty, if not the impossibility, of obtaining a closed concept, capable of subsumption—, “the expression of an interest, from the person or community, in the maintenance or integrity of a certain status, object or good in itself and socially relevant and, for that reason, legally perceived as valuable”. It is true this is quite broad; for instance, the notion of “interest” referred to opens up an interesting space for discussion about its relational nature—as Roxin proposes. According to Roxin, it is possible to define goods as “realities or ends that are necessary for a social life that is free and safe, that guarantees the individual’s fundamental and human rights, or for the functioning

38. About this, see, for example, Roxin’s critical reference to Andrew von Hirsch’s position: Claus Roxin, “¿Es la protección de bienes jurídicos una finalidad del Derecho penal?”, *op. cit.*, p. 445.
40. Claus Roxin, “¿Es la protección de bienes jurídicos una finalidad del Derecho Penal?”, *op. cit.*, p. 446.
45. According to Roxin, it is possible to define goods as “realities or ends that are necessary for a social life that is free and safe, that guarantees the individual’s fundamental and human rights, or for the functioning
however is the fact that, so expressed, the concept gains substantial density and delimitation, especially when connected with demands for “corporisation”, “transcendence” and “axiological/constitutional-teleological analogy” –connections very well exposed and defended by Figueiredo Dias. The “legal good” then becomes an eminently operational category.

One can choose to understand legal good in the way proposed by Figueiredo Dias. One can also follow Jescheck and Weigend and ground the concept in a “value of social order”, worthy of being protected by the law. \(^{46}\) In our opinion, this is the correct view, \(^{47}\) though its level of abstraction has attracted some criticism. \(^{48}\) Either concept, Dias’s or that of Jescheck and Wiegend, can serve the demands for corporisation, transcendence and axiological/constitutional-teleological analogy, hence permitting meaningful gains not only in axiological extent, that is, in its “Wertaspekt”, but also in its “existential” extent, i.e. its “Seinaspekt”. \(^{49}\)

Surely the critical potential of the notion of legal good passes through a phenomenological expression, for it is only in the form of a fragment of reality, and not as ideal reality, that the legal good can be reached, in a harmful way, by the \textit{actus reus}. \(^{50}\) That, however, is far from meaning that the good cannot be thought of in the form of a value. Corporisation demands that this value find projection and concreteness in the phenomenological world to really become susceptible of being offended. As presented here, it is nothing but the abstraction of this very world projecting itself and passing through the contrary path, the path of return to the fragments of reality that allowed it to reach recognition as a value of communitarian participation. The process through which the legal good becomes concrete is, for that reason, fundamental to strengthen its critical potential. This feature is not only present in the hypothesis of individual good protection –for instance, Marinucci and Dolcini observed that what is at stake in the protection of life is not

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\(^{47}\) Even though the conceptual difficulties that the notion of “value” implies are not, obviously, unknown: Johannes Hessen, \textit{Filosofia dos valores}, op. cit., p. 43.

\(^{48}\) Johann-Moritz Schenk zu Schweinsberg, \textit{Pönalisierungs der Folter in Deutschland}, op. cit., p. 123 ff. offers a criticism we would consider correct, but for its corporisation requirement, which we address shortly.

\(^{49}\) Whereas the axiological dimension of the legal good is connected to its teleological orientation, its existential one refers to the substantial content that is common to the protection matter, which is to say, the content that will allow the conversion of a value worthy of protection into a \textit{good} worthy of protection. This subject assumes different meanings in the doctrine (v.g., “Zustand”, “Gegenstand”, “Objekt”, “Funktionseinheit” or “Interesse”): \textit{ibid.}, p. 123.

\(^{50}\) \textit{Ibid.}, p. 124 ff.
an abstract *vita in sé*, but the life of the *singolo uomo vivente*\(^{51}\), but also, and mainly, the protection of supra-individual good.

Contrary to the individual legal good, whose proximity or even correspondence with its phenomenological identity frequently make the process of corporisation imperceptible, supra-individual good refers to a level of abstraction significantly more complex, a invariably multiform phenomenological expression. Searching for a unique representation ends up assuming –in a necessary dismissal of the phenomenological world– a generalising feature. Often exceedingly generalising, it sometimes loses its concrete expression, thus inducing a typical reading in exclusively formal terms, in the inadmissible form of sheer disobedience. In cases like this, the maintenance of the critical character of legal goods fundamentally depends on an adequate process of concretisation, which reveals the phenomenological expression covering it; in the concrete circumstances of the case, this means the value protected by the norm. This will delimit the actual scope of incidence of the prohibited act. Kuhlen,\(^{52}\) for instance, when studying the penal protection of the environment, seeks the concretisation of the legal good of the environment in proximate realities, *i.e.* capable of expressing what, *in casu*, should be comprehended as damage, since, obviously, the environment, strictly as an ideal entity or world-wide reality, is incapable of expressing them. These concerns are also contained in the work of Marinucci and Dolcini.\(^ {53}\) Goods such as the public administration and the public faith need a process of *concretizzazione* and *specificazione*: while certain procedures or motions of the legal system are meant to test the evidence, they can also be used in prohibited conducts, *e.g.* abuse of process, false testimony, etc.\(^ {54}\) Yet, the authors suggest the individualization of the legal good (collective or individual) “demands that the good is reconstructed with such an aspect, taintless to render it capable of being offended in the singular concrete case”.\(^ {55}\)

A critical concept of legal good therefore demands the recognition of an existential dimension to be concretized and individualized according to the circumstances and particularities (*Seinsaspekt*) of each case. This existential aspect, although indispensable, does not say anything about its value aspect (*Wertaspekt*) and is thus not yet sufficient to cut short the allegations of excessive vagueness and of semantic plurality the legal good theory has been criticised for. As we will show, as for vagueness, critics are mistaken. Also, its contribution to transcendence and axiological/constitutional-teleological analogy remain priceless.


\(^{55}\) *Ibid.*
V. The axiological dimension of the legal good (Wertaspekt)

The methodological theories and the positive concepts of the legal good go long back. As the question stands, at least when it comes to the critical theories, there has been a fair amount of contributions to the necessity of transcendence of legal goods and value delimitation, starting from constitutional-normative fundaments.

The criminal legal good is not—or, at least, should not be—created by the law. It is easy to produce criminal law, much harder for it to be adequately “recognised” \[56\] —a recognition which transcend the criminal legal order and condition its legitimate scope of protection. The content of recognition is clear in traditional penal law, much less so on questions of greater complexity, such as economic matters. \[57\]

Such a withdrawal of transcendence requirement for those values under protection in determined extension is far from being trivial. On the one hand, assuming artificial legal goods is an important conceptual rupture: we have suppressed a nuclear element without reason or parameters. This element is critical and its absence implies the illegitimacy of the normative period of prescription, not the abandonment of the criteria. On the other hand, we are concerned here with the deepest, most intimate, historically densest and most critical ratio of the concept of legal good, the foundation of so many disputes: we are concerned with what makes the category what it is and how it keeps the criminal law open to its social ratio.

Obviously, in areas of great complexity, one cannot ask for a general and common communitary perception, for the complexity and specificity of agents, relations and premises of existence and continuity are followed by the scope of a regulation. However, accepting that legal objectiveness is built by the law betrays some incomprehension of the complexity of the social and its legitimate emanations. Incomprehension and artificiality of this sort explain why it is impossible today to reach a complete community and horizontal consensus. There is nothing artificial about economy. And there is nothing artificial about community recognition, in its narrowest extension, of fragments of reality with a positive sign valuation. \[58\]

The legal good is—should be, without doubt—the legal representation of a transcendential and corporisational value. That being, one dimension of the analysis goes missing, that of its axiological orientation which today, because the conformation of the democratic States of Law, cannot only be given through a constitutional reading. \[59\] As Feldens has it, asking for an interpretation of the criminal law based


\[57\] As stated above, there are those, like Roxin, who give legitimacy to legal goods created by the legislator, such as in the case of the Tax Law: Claus Roxin, “¿Es la protección de bienes jurídicos una finalidad del Derecho penal?”, op. cit., p. 448.

\[58\] From “the relation of reciprocal coordination between the legal good and the prohibited conduct” in secondary criminal law, it must not be concluded that, in this specific sphere of penal jurisdiction, “the legal good is a posterius and not a primus, a constituto and not a constituentes relative to the structure of the illicit and prohibited matter”: Jorge de Figueiredo Dias, Direito Penal, Parte Geral. Tomo I. Questões fundamentais. A doutrina geral do crime, op. cit., p. 122.

\[59\] See also ibid., p. 120, the passage about “material analogy, founded in an essential correspondence of senses and—from its protection’s point of view—ends.”
on the constitutional-axiological order is not seeking some mere coincidental relation, but one of “coherence, interaction or reciprocal effect”. 60

Conclusion

In the end, the notion of legal good reaches its conceptual completeness in the orientation and axiological delimitation that allows it, today, to be the normative frame of values and constitutional axioms. Along with the harm principle, it could be fruitfully developed within Honneth’s theory of recognition. Both theories have a lot to gain from each other, and should therefore strive to explore their limitations and possibilities. We can only hope, at this point, to have set the foundation of a fertile common ground for discussions that will connect both streams and strengthen them. 61

60. Luciano Feldens, Direitos fundamentais e direito penal, Porto Alegre: Livraria do Advogado, 2008, p. 30 ff. In Brazilian doctrine, he is the author to have taken the furthest the relation between the Constitution and criminal law, going so far as conceiving, under certain aspect, the Constitution as the normative basis of criminal law (p. 16 and 42 ff.). See also, by the same author: A Constituição Penal. A dupla face da proporcionalidade no controle de normas penais, Porto Alegre: Livraria do Advogado, 2005, passim.

61. Translation by Joana Cavedon Ripoll and Melissa S. R. de Lima Lippert; Copy editing by Laurence Bich-Carrière.