Contents

Crin	ninal Jus	stice in Need of a Paradigm Shift	1
1.1	The C	urrent Situation of Victims' Rights in Europe: Common	
	Rights	Without a Common Rationale	1
1.2	A State-Centred Versus a Human-Rights Based Approach		3 9
1.3	Conceptualising the Victim		
	1.3.1	The Witness Paradigm	9
	1.3.2	The Economic Model: The Damaged Victim as Civil	
		Party	13
	1.3.3	The Harm Paradigm: The Harmed and Vulnerable Victim	
		in Need and Deserving of Support, Protection and State	
		Compensation	15
	1.3.4	Private Accusation and the Victim's Right to Enforce	
		Public Prosecution	21
	1.3.5	The Rights Paradigm	22
	1.3.6	Victims' Primary, Secondary and Tertiary Rights	23
1.4	The Emerging Paradigm: States' Duty to Combat Impunity		
	1.4.1	In Need of a Paradigm Shift	24
	1.4.2	The Fundamental Inconsistency Between the Traditional	
		Paradigm and Victims' Rights	24
	1.4.3	The Necessity to Depart from Substantive Criminal	
		Law	26
1.5	First S	eismic Activity	28
	1.5.1	A Notable Root-Cause: Anti-Authoritarian Scepticism	28
	1.5.2	First Indications of a Paradigm Shift at the International	
		Level	30
	1.5.3	The Inter-American Court of Human	
		Rights (IACtHR)	32
	1.5.4	The European Court of Human Rights on States'	
		Obligations to Protect Rights	33

xx Contents

		1.5.5	States' Obligations to Protect by Means of Enacting and	
			Enforcing Criminal Law Provisions	35
		1.5.6	The ECtHR's Two Approaches to Criminal Law	41
		1.5.7	Relations Between the Procedural Aspects and Article	
			13 ECHR	42
		1.5.8	Criminal Justice Serving to Eradicate Impunity of Grave	
			Human Rights Violations	45
		1.5.9	The Rome Statute of the International Criminal Court	47
		1.5.10	Recent Developments at State Level	48
	1.6	Affirma	ative Versus Critical Criminal Law Doctrine	51
		1.6.1	Deterrent Punishment Disregards the Victim	52
		1.6.2	Deterrent Punishment Disregards the Offender	53
		1.6.3	Kant's Principle	54
		1.6.4	Affirmative Criminal Law Doctrine	56
		1.6.5	Human Dignity and Human Rights as Limitations of	
			Criminal Law	58
		1.6.6	The Victim's Rights Alone Cannot Justify the	
			Punishment of the Offender	60
		1.6.7	Conclusion and Outlook	61
	Refer	ences		62
2	Punio	shment s	and Human Sociality	65
_	2.1		unish? Three Questions to Explore	65
	2.2		trasociality Riddle	67
	2.3		Goods, Free Riding and Punishment in Game-Theory	07
	2.3		ments	70
		2.3.1	In a Public Goods Game, Peer Punishment Enables a	, 0
		2.0.1	Group's Cooperation	70
		2.3.2	The Crucial Role of Third Parties: Punishment is	, 0
			Premised on an Emerging Normative Consensus	72
		2.3.3	A Norm is a Public Good	75
	2.4		herent Psychology of Punishment	78
		2.4.1	Hypothesizing: Deterrent Punishing Versus	
			Retribution	78
		2.4.2	Deterrence Does Not Hold the Answer (I)	80
		2.4.3	Betrayal Aversion and Conditional Cooperation	81
		2.4.4	Punishment is a Second-Order Public Good	86
		2.4.5	Non-strategic, Expressive Punishment Driven	
			by Strong Emotions	87
	2.5	Punitiv	e Sentiments	89
		2.5.1	The Central Concern: the Wrong Suffered by	
		•	the Victim	90
		2.5.2	Indignation and Just Desert	92
		2.5.3	The Inclination to Punish Defectors Bonds with	
			Sympathy for Victims	93

Contents xxi

	2.6	The Go	enetic and Neural Basis of Punishing	95	
		2.6.1	Flexible Social Norms and Persistent Punishing	96	
		2.6.2	Multilevel Selection	97	
		2.6.3	Gene-Culture Coevolution (GCC)	98	
		2.6.4	Dual Inheritance Theory and the Normative Animal	100	
		2.6.5	Ostracism	104	
		2.6.6	Empathic Reactions of Newborns and Infants' Sympathy		
			for Victims	106	
		2.6.7	Infants' Aversion Against Obstructive Behaviour and		
			Appreciation of Punishment	108	
		2.6.8	'Inherent' and Conventional Wrong	110	
		2.6.9	The Neural Basis of Retributive Punishment	110	
	2.7	The M	echanism of Punishment	112	
		2.7.1	The Semantics of Punishing: Punishment as Censure	112	
		2.7.2	Punishment as Hardship	114	
		2.7.3	Sharing in the Costs of a Norm: The 'Fairness' of		
			Punishment	116	
		2.7.4	Deterrence Does Not Hold the Answer (II)	118	
		2.7.5	For Comparison: Deterrent 'Punishing' in Animals	121	
		2.7.6	'Mutualism' and 'Nosism'	123	
	2.8	In Con	clusion: Why Punish?	126	
	Refer	ences		131	
3	Hum	an Dign	ity: The Right to be a Person	139	
	3.1 What this Chapter is About: Human Dignity and its				
	Development				
	3.2	Kant and the Concept of Innate Human Dignity		139 144	
		3.2.1	Human Beings Existing in Nature and Culture	147	
		3.2.2	Freedom, Autonomy and Dignity	148	
		3.2.3	Legislation Based on Human Dignity	150	
		3.2.4	God's Voice as Innate Conscience	153	
		3.2.5	Political Implications	157	
	3.3	Body,	Soul and Agency	160	
		3.3.1	Orders of Consciousness	161	
		3.3.2	The 'I'	162	
	3.4 Fichte and Human Dignity as the Right to be a Person and to				
		Partake in Human Culture			
		3.4.1	The Dignity of All Who Carry a Human Face	165	
		3.4.2	Fichte's Theory of Calling (Aufforderung)	168	
		3.4.3	The Concept of a Human Being is the Concept of		
			Humankind	174	
		3.4.4	Fichte on the Cosmopolitan Right "to go about freely on		
			the earth"	176	
		3.4.5	The Socialised Person	179	
		3.4.6	Society's Call Prompts Agency	184	

xxii Contents

	3.4.8	Individuation	195
	3.4.9	The Crucial Importance of Fichte's Concept of Human	
		Dignity	198
3.5	The De	evelopment of Human Rights	201
	3.5.1	The First Generation: Liberal Constitutionalism and	
		Human Rights as a Subject's Private Freedom	202
	3.5.2	The Second Generation: Liberal Nation States and	
		Human Rights as the Political Rights of Equal	
		Citizens	203
	3.5.3	The Third Generation: the Welfare State and Social	
		Rights	205
	3.5.4	The Fourth Generation: Solidarity of Humankind and	
		Universal Rights in a Global Order	207
3.6	Human	Dignity Overcoming Collectivism and Nationalism	211
	3.6.1	Individualism and Universal Rights	213
	3.6.2	The Sovereign Nation	217
	3.6.3	The Sovereign Individual	219
3.7	The Se	cond Enlightenment: from Liberal Democracy to a	
		ist Society	224
	3.7.1	The Mistake of Innate Autonomy and Unrestricted	
		Moral Relativism	225
	3.7.2	In Need of a Second Enlightenment	227
	3.7.3	The Evolution of the Normative Order	229
	3.7.4	Alienating Socialisation	232
	3.7.5	Particularistic Morality and Totalitarianism	241
	3.7.6	Defending the Preconditions of a Humanist Society	244
	3.7.7	The Primacy of Human Dignity and Human Rights:	
		Humanism Overcoming Unconstrained	
		Majoritarianism	250
3.8	Human	Dignity as the Foundation and Guiding Principle of a	
	Global	Humanist Society	255
	3.8.1	Human Dignity and Human Rights are Normative	
		Categories	258
	3.8.2	The Structure of a Global Humanist Society	261
	3.8.3	Horizontal Societal Differentiation Fostering Pluralism	264
3.9	Human	Rights and Obligations	265
	3.9.1	Respect and Care	266
	3.9.2	Formation Rights and Corresponding Obligations	268
	3.9.3	Care Rights	270
	3.9.4	Autonomy Rights	271
	3.9.5	Resource Rights	273
	3.9.6	Rights are to be Practically Effective	274
	3.9.7	The Effectivity of Rights is Premised on a Decent	
		Social Order	275
3.10	In Cond	clusion: Why Human Dignity?	27ϵ

Contents xxiii

		3.10.1	Why Normativity?	277
		3.10.2	The Crucial Challenge: Legitimising Normativity Under	
			Conditions of Modernity	278
		3.10.3	Dignity Norms and Conventional Norms	281
		3.10.4	Making a Virtue of Necessity	282
	Refer	ences		284
4	Crim	inal Just	ice Respecting Human Dignity	293
	4.1	What th 4.1.1	is Chapter is about	293
			Founded on Human Digntiy	295
		4.1.2	Establishing the Truth, Convicting, Sentencing and	
			Punishing Offenders	296
		4.1.3	Criminal Justice in Transition from a Nation State	
			Paradigm to a Humanist Society	298
	4.2		tion State: Criminal Law Unleashed	299
		4.2.1	Franz von Liszt	299
		4.2.2	Ernst Beling	301
		4.2.3	Overcoming the Nation State in Criminal Law	303
	4.3		Start: Human Dignity and the Principle of Guilt	305
		4.3.1	The Paradox of Deterrence	305
		4.3.2	Calling on the Offender	307
		4.3.3	Human Dignity, the Principle of Guilt and Limits of	
			European Integration	309
	4.4		Sender's Right to be Held to Account	312
		4.4.1	Choosing Punishment?	312
		4.4.2	Fichte's "Expiation Contract" and a Citizen's Right to	
			be Punished	315
		4.4.3	Max Scheler: Punishment as Atonement and	
			Reconciliation	317
		4.4.4	A Right to Hardship?	319
		4.4.5	Expiation and the Nation State	321
		4.4.6	The Justification of Punishment	322
	4.5		g the Limits of Criminal Law	323
		4.5.1	Kant Does Not Hold the Answer	323
		4.5.2	Criminal Law and Punishment Limited to Preserving	
			Dignity Rights	324
		4.5.3	Criminalisation: the Message Sent by Criminal Law	328
		4.5.4	The Scope of Criminal Law Based on Human Dignity	329
		4.5.5	Criminal Law Relating to Different Categories	
			of Human Rights	332
	4.6		e Victim's Secondary Rights	333
		4.6.1	Right to Non-recurrence	334
		4.6.2	Right to be Treated with Care and Respect	335
	4.7		d Victim's Right to the Punishment of Her Murderer	336
	48	The Vic	rtim's Right to Justice	341

xxiv Contents

		4.8.1 4.8.2 4.8.3	Right to the Truth	344 345
			Compensation of Damages	346
		4.8.4	Right to Access Justice	347
	4.9 4.10		lation Between the Victim's and the Offender's Rights ng the Offender's Full Status as a Member of Her Legal	347
		Commu	unity	348
		4.10.1	Punishment as Hardship	349
		4.10.2	Criminal Justice Serves the Offender's Formation	351
		4.10.3	Punishment: Exclusion or Inclusion?	352
		4.10.4	The Offender's Right to Her Full Rehabilitation	355
	4.11	Everyo	ne's Right to the Security of Their Rights	356
	Refer			357
5	Diffe	rences B	etween Traditional Criminal Justice and a Human	
			l Approach	363
	5.1		for Victims, Offenders and All Others: the Line of	
		Argume	ent	363
		5.1.1	The Incompatibility Between the Traditional Concept of	
			Criminal Justice and Victims' Participation in	
			Proceedings	363
		5.1.2	A New Paradigm and Start-Up Difficulties	365
		5.1.3	The Animal That Punishes	366
		5.1.4	Human Dignity as the Right to be a Person	366
		5.1.5	Criminal Justice Supporting the Formation of Persons	368
	5.2	The De	ep Roots of the Traditional State-Centred Paradigm	369
		5.2.1	Deontological Versus Consequentialist Ethics	369
		5.2.2	Consequentialism in Ethics and Legal Theory	371
		5.2.3	Empiricism and Objectivity	372
		5.2.4	Is There an Escape from Consequentialism?	373
	5.3	From T	echnical Rationality to Lively Communication	374
		5.3.1	Criminal Justice as a System of Acts of	
			Communication	374
		5.3.2	From Manipulation to Conviviality: Making Criminal	
			Justice a Participatory Institution	376
		5.3.3	The Promise of Objectivity and the Myth of the Vindictive	
			Victim	378
		5.3.4	Criminal Justice as Restoration of the Normative Order	
			and the Persons Concerned	381
	5.4	In Cond	clusion	384
	Refer	ences		386
n.	bla - e	Casa		200
ra	die of	Cases		389
In	dev			305