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GERMAN INFLUENCES ON ROMANIAN LAW
A COMPARATIVE APPROACH

Supported by UEFISCDI, project PNII-RU-TE-2012-3-0412

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Foreword

An international workshop took place on 30th-31st of October 2015 in Bucharest, under the UEFISCDI project PNII-RU_TE-2012-3-0412.

The guiding line of this project is to overcome the existing gap between the traditional paradigm of Romanian legal thought and the German theory of crime inspiring the new legislation, in the context of the new Penal Code adopted in 2009. The project aims to contribute thereto by developing a comprehensive comparative analysis of the doctrines which decisively shaped the criminal law scholarship in Germany and Romania.

In this context, the main purpose of the workshop was to assess the influences of mainly German law, but also European law and common law over other national legal systems, with a specific focus on Romanian legislation, from the constitutional law, passing through private law, public law and to the criminal law.

Editor
Dr. Tudor AVRIGEANU, M. iur. comp. (Bonn)

1. Between Political Science and apolitical Technique Romanian Criminal Law Doctrine Before and After 1989

Tudor AVRIGEANU*

„For the sake of brevity we call, technically speaking, the connection of law with the general existence of the people – the political element; and the distinct scientific existence of law – the technical element".[1] Friedrich Carl von Savigny (1779-1971), the founding father of the Historical School of Law and of the modern German science of private law[2], did not understand the distinction between the *political* and the *technical* elements of the law in such a way that the latter could be understood as independent from the life of the people, or, as we may call it in our days, the society.[3] The legal science is for Savigny at the same time science of the legal norms (*Normenwissenschaft*) as well as science of society (*Sozialwissenschaft*)[4] and as such it has to express technically with the help of legal concepts (*Begriffe*) and institutions (*Rechtsinstitute*) the law which the people / society itself brings into life throughout the history, more precisely: the legal relations (*Rechtsverhältnisse*) which form by themselves the law of the *polis*. Notwithstanding the fact that the actual configuration of these legal

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[1] F. C. v. Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, transl. A. Hayward, Littlewood, London, 1931, p. 29.

[2] The bibliography on Savigny is vast, see e.g. Joachim Rückert, *Savignys Konzeption von Jurisprudenz und Recht, ihre Folgen und ihre Bedeutung bis heute*, Tijdschrift voor Rechtsgeschiedenis 61 (1993), pp. 65-95; Reinhard Zimmermann, *Savigny's legacy: legal history, comparative law, and the emergence of a European legal science*, Law Quarterly Review (1996), pp. 576-605; Andreas Rahmatian, *Friedrich Carl von Savigny's Beruf and Volksgeistlehre*, The Journal of Legal History 28 (2007), pp. 1-29; Luc J. Wintgens, *From Law without a Science to Legal Science without the Legislator: The German Historical School and the Foundation of Law*, Statute Law Review 31 (2010), pp. 85-106.

[3] See at large O. Behrends, *Idealismus, Politik und Jurisprudenz in F. C. v. Savignys System des heutigen römischen Rechts*, in O. Behrends et al. (Hg.), Römisches Recht in der europäischen Tradition, Rolf Gremer, Ebelsbach, 1985, pp. 257-321.

[4] Gerhard Dilcher, *Der rechtswissenschaftliche Positivismus: Wissenschaftliche Methode, Sozialphilosophie, Gesellschaftspolitik*, ARSP 61 (1975), pp. 497-528, 508.

relations as well as of the legal concepts and institutions cannot be properly understood if not taking into account their historical evolution, historical legal science (*geschichtliche Rechtswissenschaft*) is by no means confounded with mere history of law (*Rechtsgeschichte*). Conceived as „the umbilical cord that connects the system to history and yet is itself a reduction of lived experiences to an underlying unity"[5], the legal institutes can be „created" by these scholars as well as „modified or even eliminated ... if they had become alien to the sense and the needs of the time".[6]

The same perspective seems to be embraced by the so-called functionalist approach within the German science of criminal law. Expressed through the words of the German criminal law scholar Günther Jakobs, the task of the science of (criminal) law consists not only in ordering the existing legal norms, but mainly in setting these norms in relation to the „normative configuration" of the society itself "in its own time".[7] As Jakobs' own theory of criminal law shows, the very construction of technical concepts and legal institutions within the technical element of the criminal law can be consistently understood and developed into a systematic form only if their construction reflects the political element, *i.e.* the concrete configuration of the social order as well as the needs of this order in view of its own preservation. Yet the Historical School of Law and its capital distinction between the political and the technical element of the law plays no role within Jakobs' theoretical construction, as well as within the whole German science of criminal law. Since the famous quarrel on the codification (1814) of the German law, the criminalists went in the footsteps of Savigny's main rivals: the Kantian criminalist Paul Johann Anselm von Feuerbach as well as the philosopher Georg Wilhelm Friedrich Hegel. This is the way the German legal science became, from the very beginning, a philosophical science.

The philosophical starting points reflect themselves until today in the technical concepts and institutions of the criminal law, especially within the General Part. On the contrary the Romanian criminalists have been from the beginning rather repulsive to any kind of philosophy within the boundaries of

[5] P. Grossi, *Das Recht in der europäischen Geschichte*, transl. L. Hooper, Wiley-Blackwell, 2010, p. 162.

[6] Savigny, *System des heutigen römischen Rechts*, Band I, Veit, Berlin, p. 17.

[7] G. Jakobs, *Strafrecht als wissenschaftliche Disziplin*, in C. Engel / W. Schön (ed.), Das Proprium der Rechtswissenschaften, Mohr Siebeck, Tübingen, 2007, pp. 103-135, 106.

their own field. Therefore, there is nothing surprising in the fact that the reception of German concept and institution in the Romanian criminal law doctrine has succeeded since the 19th century at most sporadically. The situation seems to have changed itself since the 1990, when some Romanian scholars began to pay increased attention to the German general theory of crime (*allgemeine Verbrechenslehre*), yet without taking into consideration the philosophical foundations of this theory. The consequence of this omission consists in the general disorientation at scholarly level, which was shown last but not least by the controversy on the new formulation of art. 15 of the New Romanian Penal Code. Legal transplant of foreign concepts und institutions without having previously built the foundations cannot work at all and since the attitude not only of the Romanian criminalists but also generally speaking of the Romanian jurists towards philosophy will foreseeably not change very soon, the difficulties which the Romanian science of criminal law is facing at the present time could be overcome by recovering the Savignian difference between the two elements of law in the form in which it is present in Romanian «traditionalist» as well as in German «functionalist» approach.

I.

"The study that we publish here...is a part of The Legal Research Institute's continual work in giving response, regarding the Marxist philosophy standpoint, to some general theoretical problems of law science. Among them there is a complex issue of the «law constants», shown in the Academician I. G. Maurer's «Preface»." In the important study of 1965 concerning *The connection between the socio-political content and the content of regulatory criminal law*, Vintilă Dongoroz introduced in the first footnote, an enumeration of texts published "in the recent years... on some of the lines of investigation" indicated by "that Maurer's programmatic study" all from the 1964-1965 period, all but one published in 1960, and has as its theme *the main transformations of the criminal law of the RPR in the light of Marxist-Leninist conception*, and as the author was Dongoroz himself. [8]

As the title shows, this latter text examines the *transformation* of the criminal law, from "the *primordial* transformation" due to the change of the

[8] V. Dongoroz, Dreptul penal socialist al țării noastre. *Raportul dintre conținutul social-politic şi conținutul normativ al dreptului penal* din R.S.R., SCJ 3/1965, pp. 465-495, 465-466.

dominant social class over the two "*general* transformation" (concerning on the one hand "the effectiveness of general and special preventive actions of the criminal law by modifying their functional proficiency' and on the other hand, "the meaning of the criminal law evolution") to the four "*special* transformations" concerning "the institution of the crime, the institution of criminal liability, the public punishment and the incriminations". Unlike the transformations, "law constants" are hard to identify, and as such *the problem* is raised and resolved with maximum celerity: "that normative material that was previously rescript under previous regime and which had to be kept in force after the overthrow of that regime ... received, substantially and formally, such radical transformations that were inserted as something entirely new, qualitatively, in the contents of the current criminal law of R.P.R." Consistently, quoting from Karl Marx's letter to a certain Annenkov, Dongoroz was advancing the thesis that "categories are at least as well eternal as the relations whose expressions are", for in the end "the need to liquidate the last residues of the past, which are still more secular in the normative material of criminal law", namely from R.P.R. "the outdated categories and legal forms" (related to "certain idealistic conceptions") that give "a wrong image over the content and the structure of the present system of criminal law". [9]

From structural point of view, such a speech was not primarily new, and not even was able to be counted as specific to Marxism-Leninism dogmatic. As things stood the same in Germany under the tyranny of national socialism, onwards 1933, it had been triggered a process of renewal of the German law

[9] V. Dongoroz, *Principalele transformări ale dreptului penal*, Studii Juridice, Bucureşti, 1960, pp. 393-432, 394, 395, 426, 432. – As it is shown in the index of the fourth Volume of *Works* by Marx and Engels where Dongoroz is sending us, in the letter addressed on 28th December 1847 to the Russian man of letters P. V. Annenkov, Marx formulates the main ideas which he shall develope in the *Mizeria filozofiei. Răspuns la «Filozofia mizeriei» a d-lui Proudhon*, „one of the most important theoretic works of Marxism, the main work of K. Marx against P. J. Proudhon, an ideologist of little bourgeoisie". In this text, Marx writes, among the others: „...Mr Proudhon does not assert that bourgeois life is for him an eternal truth. He tells it indirectly, deifying the categories that express the bourgeois relations as ideas... basically Proudhon does nothing but what every good bourgeois does", and this is because he is a "philosopher, the economist of the small bourgeoisie (Marx, *Scrisoare către P. V. Annenkov* = Marx-Engels, *Opere* IV, Editura Politică, Bucureşti, 1958, pp. 559-570, 567, 569). If Dongoroz's text had been linked to Maurer's *Preface* and if the latter text had been interpreted from the perspective of the "law constants", it would hardly have imagined, under the conditions of the era, a more destructive attack against Maurer himself!

against "juridical spirit" specific to the "western enlightenment philosophy"[10], particularly against the French Revolution, which according to Karl Marx and Otto von Gierke, "suppressed the political character of "the civil society"[11] and almost "achieved the dissolution of the social body into an omnipotent and centralized state and into an automatized and fragmentary mass of free and equal individuals.[12] The science of law had to return to be "political", and the beginning of a text about *the science of criminal law* published in 1934, Friedrich Schaffstein (1905-2001) proclaimed "the adversity of new science and the old liberal: a scientist who, consciously or unconsciously, started from the premise that the freedom of the individual affirmation constitutes the last reason of the state and the supreme value of law, and non-political nature of which stemmed from the fact that to the *polis* only a value derived from that of the individual was recognized".[13] A year later, Hans Welzel (1904-1977) showed in the *Naturalism and axiology in the science of criminal law* that because "the community of the human existence is characterized by order and originating relations" at the base of the new science of the criminal law and must stand thinking in order of life, "with references to *the three kinds of scientific thinking in law"* and to "criticism of Carl Schmitt's legal positivism which starts from the premise of a concrete disorder which must be ordered through regulatory decisions." Framing it in the context set by Schaffstein comes naturally: for Welzel "the most noble task of law science lies in understanding the values of a specific historical eras which are at the origin of the rules and to whom they owed their meaning and content", and the last reference to the judgments of law science is "popular state community", hence the "political assignment in regard to the comprehensive meaning of law science." [14]

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[10] Exemplar K. Larenz, *Deutsche Rechtserneuerung und Rechtsphilosophie*, Mohr Siebeck, Tübingen, 1934, p. 3-4.

[11] Marx, *Contribuţii la problema evreiască* = Marx-Engels, *Opere* I, Ed. politică, Bucureşti, 1957, p. 404.

[12] O. Gierke, *Naturrecht und Deutsches Recht*, Rütten & Loening, Frankfurt, 1883, p. 28-29.

[13] F. Schaffstein, *Politische Strafrechtswissenschaft*, Hanseatische Verlagsanstalt, Hamburg, 1934, p. 6; comp. C. Schmitt, *Der Begriff des Politischen*, Duncker & Humblot, Berlin, ^{5}1963, p. 25: „The specifically political differentiation where the political motifs and actions start is the differentiation between friend and enemy".

[14] H. Welzel, *Naturalismus und Wertphilosophie = Abhandlungen zum Strafrecht und zur Rechtsphilosophie,* W. de Gruyter, Berlin / New York, 1975, pp. 29-119, 103, 105.

The self-proclaimed political science of the criminal law is gaining followers in Bucharest. In a separate series of articles published between 1938 and 1942 and compiled in 1945 (!), the lawyer and writer Petre Marcu (1904-1968), also known under the pseudonym Petre Pandrea, started an attack on the positions of Shaffstein over Vintilă Dongoroz, accused of being created in Romania "a retrograde school, compared to the historical moment whereby we go through... a liberal enlightenment and atomized-rationalistic school"[15] irreconcilable with the State's new "mystique" in which "the individual is subordinate to the community".[16] Beyond such diatribes, Pandrea insisted on the line of the attack led by Schaffstein against the followers of the «dogma» that the offence is a good legal injury (*Rechtsgutsverletzung*) established by Karl Binding (1841-1920), and Franz von Liszt (1851-1919) and combated by "the new criminal law" national-socialist by defining the offence as a «duty harm (*Pflichtverletzung*) to the community» [17].

In Binding's conception, the legal goods are "the conditions of a healthy legal life in which...subjects of law can exercise their rights without being troubled or prevented"[18], being consecrated by rules of conduct (*Normen*) to which criminal law grants only their own penalty and which are distinct from the criminal laws (*Strafgesetze*) regulating the conditions under which the violation constitutes an infringement. Other than John Tanoviceanu (), for whom "modern criminal laws, as too well observed Binding, do not contain like those old ones formal prescriptions: do not steal, thou shalt not kill; but they assume some non-negotiable rules of the legislature, which he thought unnecessary to formulate them and whose violation would constitute the offence"[19], Vintilă Dongoroz resolutely refuses this construction by this theoretical support and necessary to develop a theory of criminal law on the basis of social order that criminal law is required to protect and assuming that Binding "claimed that law, in general, do not create rules, it is not normative, but it only protects, sanctions the pre-existing law rules which are positive, being created by the group's social

[15] P. Pandrea, *Criminologia dialectică*, Fundația Regele Mihai I, Bucureşti, 1945, p. 35.

[16] P. Pandrea, *Doctrina modernă a pedepsei*, f. ed., Bucureşti, 1941p. 65.

[17] F. Schaffstein, *Das Verbrechen als Rechtsgutsverletzung?*, Deutsches Strafrecht 2 (1935), pp. 97-116.

[18] K. Binding, apud G. Jakobs, *Rechtsgüterschutz? Zur Legitimation des Strafrechts*, Schöningh, Paderborn, 2012, p.14.

[19] I. Tanoviceanu, *Tratat de drept penal şi procedură penală* I, Curierul judiciar, Bucureşti, [2]1924, § 241, p. 252.

conscience", what would be wrong, "because if it is exactly that the law stems from the need of life and social conscience, if the rules of conduct are modelled after those imperatives, it is no less true that law, and so the rules of law do not exist as such until they are created by the public power, which dress them in juridical covering.[20]

From the way he presented Binding's doctrine, Dongoroz seems to have had in mind the doctrine of Max Ernst Mayer (1875-1923) concerning cultural norms (*Kulturnormen*) as "the totality of religious, moral, conventional orders or prohibitions addressed to the individual as requirements of social and professional relations[21], that concept which even Binding criticized, though he himself was "a positivist of law (*Rechtspositivist*) and not of the legal (*Gesetzespositivist*)" [22]. For Binding, "the concept of order ...implies that of rationality" and the science of law (criminal) must identify this rationality "in the goals that [order] pursues them", therefore "is pushed beyond the law will of the by its exterior ideas of a "why" and "what purpose". Furthermore, given the fact that, right from the beginning of *The Handbook on Criminal Law*, Binding said about the legal concepts that they must be understood "in the perspective of history, law language and the legal life of a given era"[23], it is clear that such an approach involves taking cultural norms.[24] Defining cultural norms as "prohibition or orders by which a society claims its corresponding behaviour interests", Mayer specifies that "the demarcation between *legitimate* behaviour and the *illegitimate one* is achieved through *legislation*, since "culture norm always constitutes the only material (*Stoff*) in which the legislator sets up the legal norm".[25]

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[20] V. Dongoroz, *Drept penal* (1939), Ed. Societății Tempus / Asociația Română de Ştiințe Penale, Bucureşti, [2]2000, § 13, p. 27.

[21] M. E. Mayer, *Rechtsnormen und Kulturnormen*, Schletter, Breslau, 1903, p. 17.

[22] G. Jakobs, *Bindings Normen und die Gesellschaft*, pp. 392-397, 395, 396: «the norms» „can be not only *leges scriptae*, but also „latent norms", and when Binding starts from the assumption that the breaking of the chain usually constituted by the *nulla-poena* would be broken, a universally accepted unimportant right could develop, it is not far from accepting a social normalization achieved through self-regulation."

[23] K. Binding, *Handbuch des Strafrechts*, Bd. I, Duncker & Humblot, Leipzig, 1885, p. 3, 13.

[24] G. Jakobs, *Bindings Normen und die Gesellschaft*, in M. da Costa Andrade et.al. (ed.), Estudos em homenagem ao Prof. Doutor Jorge de Figueiredo Dias, vol. I, Universidade de Coimbra, 2009, pp. 387-400, 397.

[25] M. E. Mayer, *Der Allgemeine Teil des Deutschen Strafrechts*,Winter, Heidelberg, 1915, p. 49.

The inclusive terminological similarity with the passage from *The Roman Law System* in which Savigny approaches the legal relations (existing on the *political* element of the law) as a *subject* (*Stoff*) in which the savant jurist builds *forms* consisting of *technical* institutions of law[26] it is not accidentally striking: in both cases the main idea lies in the admission or rejection of a social *primary* normativity that, for Mayer is not yet (other than in the case of Savigny) *legally* native. When Binding reaches the stating about the content of the law that he is determined by the way in which "the spirit of the people (*Volksgeist*) interprets it rationally in the sense that the law thinks and wants what the spirit of the people come off of it"[27], to extend the Binding-Mayer line back to Savigny and forward to Carl Schmitt is also handy. Hence all the abyss which separates this genuine *political* science of criminal law for the perversion of politics by national socialism, and for the abolition of "Dongoroz methodology", which "does not differ from the methodology of Franz von Liszt, because it is that time and rationalist philosophy methodology.[28]

Liszt's methodology consists of a clearer study regarding *The Legal Action and the Common Concept in Binding's Manual*, where the first part is dedicated to "the legal method", namely: the legal science understood as "systematic science" (*systematische Wissenschaft*) both as a practice science (*praktische Wissenschaft*). Such a science has as its task to "facilitate the way in which the rules apply to the realities of life", namely through a "systematic knowledge" of rules of positive law, obtained by analysis (deduction of "notions and definitions") and synthesis (the construction of the system itself).[29] Other than Binding, Liszt meant by legal good the *real* interest of human (as an individual) that criminal law protects directly and not through the sanction of rules of behaviour, and by the logic of the previous reference to "the opposition of Binding option to an objective law, institutionally defined (for him the legal asset is a property of law) and that of Liszt to a subjective law, correlated with the interests of individuals".[30] Dongoroz lies on the latter's position, and the concept set out in the Treaty of *Criminal Law* published in 1939 starts from the specific modern opposition between an amorphous society in terms of normative and the

[26] Savigny, *System des heutigen römischen Rechts* I, p. 333.

[27] Binding, *Handbuch des Strafrechts* I, p. 451, 456-457.

[28] P. Pandrea, *Criminologia dialectică*, p. 90.

[29] F. v. Liszt, *Rechtsgut und Handlungsbegriff im Bindinschen Handbuche*, ZStW 6 (1886), pp. 663-698, 665, 666, 667.

[30] G. Jakobs, *Rechtsgüterschutz?*, p. 15.

law understood as a whole of provisions by which the State itself sets up rules over the society. The law is therefore, nothing but a whole (a system) of rules of conduct imposed by public power and designed to assure order in the society" and "there is no crime that may have been incriminated as such, without this incrimination should not regard the indictment *of an interest*".[31] In view of all this facts, criminal law does not protect the regulatory identity of an actual society and, but the free and equal individuals' interests who interact as natural human beings potentially dangerous for one another.

Regarding the technical background of the theory of infraction, this political positioning corresponds to the system whose nucleus consists of "conditions that regard the substance of the activity incriminated as physical manifestation (the objective side) and as a psychical manifestation (the subjective side)"[32], totally similar to that promoted by von Liszt. In Germany, the same system had been enriched thanks to Ernst Beling (1866-1932) by the addition of "typicality", but the resulting tripartite constituted a "very arbitrary compromise from a historical perspective"[33] between von Liszt and Beling as a disciple of Binding. Represented by the "Kiel School" headed by Schaffstein, the political science of the specific national-socialist criminal law consistently pursues with the elimination of the legal good from the sphere of the political element of the new national-social criminal law and the replacement of the tripartite category system with the so-called integrative perspective (*ganzheitliche Betrachtungsweise*)[34], dissolving internal differences into an all-encompassing type of criminality[35], which must be understood not only rationally, existentially inferred[36], and intercepting in this form, "the legal thinking of concrete orders" of Carl Schmitt[37], even though the influence of the

[31] V. Dongoroz, *Drept penal*, § 82, p. 164.

[32] V. Dongoroz, *Drept penal*, § 87, p. 172.

[33] H. Welzel, *Vom Bleibenden und vom Vergänglichen in der Strafrechtswissenschaft = Abhandlungen*, pp. 345-365, 364.

[34] Comp. H.-H. Jescheck / T. Weigend, *Strafrecht*, Allgemeiner Teil, Duncker & Humblot, Berlin, [5]1996, p. 208-209.

[35] J. Schröder, *Rechtswissenschaft in Diktaturen. Die juristische Methodenlehre im NS-Staat und in der DDR*, C.H. Beck, München, 2016, p. 54.

[36] Exemplary are Georg Dahm and Friedrich Schaffstein's contributions in the collective study, reprezentative for the entire «Kiel school» *Grundfragen der neuen Rechtswissenschaft* (Junker & Dünnhaupt, Berlin, 1935), pp. 62-107 şi 108-142.

[37] Ralf Walkenhaus, *Gab es eine «Kieler Schule»? Die Kieler Grenzlanduniversität und das Konzept der «politischen Wissenschaft» im Dritten Reich*, în W. Bleek / H. J. Lietzmann

latter should not be exaggerated.[38] On the other hand, those scholars which were obviously indebted to the national-socialist ideology, in their turn, argued both the necessity of the categorical structure of the offense[39], and the possibility of applying the doctrine of the juridical good to national-socialism. Given the fact that the liberal doctrine, which is already in the position of legalistic positivism, does not consider an interest as a legal good to the extent that it was protected by law, this last position was rational: the legal good had become "a null concept…where the socialists could introduce their own judgments of value"[40], and this was all the more so, since the principle of legality had been abandoned in 1935 in favour of the analogy based on "the healthy intuition of the people" (*das gesunde Volksempfinden*) with regard to the intrinsic criminal nature of behaviours: *nullum crimen sine poena*[41] and *Volksgeist* instead of legislation.[42]

Adopting a reserved attitude towards all these variants of science, so-called political science of criminal law under a tyranny that invaded politics in its own benefit, Hans Welzel published in 1939 a 70-pages text entitled *Studies on the System of Criminal Law*. Welzel deplored the splitting of the (infr-)action between an objective and a subjective side, division that makes it disappear from the concerns of the criminal law scholar "what is the action before it can be divided into these causal components and psychological and legal appreciation thereof... as *the primary unit* and *real meaningful totality* in the context of real social life."[43] Other than a causal process, human action is the carrier of a meaning (*Sinn*), due to *the goal* pursued by the agent who must face the choice of the latter. As the primary unit between causation and intent, the final action

(eds.), Schulen der deutschen Politikwissenschaft, Leske & Budrich, Opladen, 1999, pp. 159-182, 172.

[38] Carmelo Jiménez Segado, *Carl Schmitt y las ideas penales de la Escuela de Kiel,* ADPCP 62 (2009), pp. 451-482, 482.

[39] Erich Schwinge / Leopold Zimmerl, *Wesenschau und konkretes Ordnungsdenken im Strafrecht*, Röhrscheid, Bonn 1937, pp. 17-32.

[40] K. Klee, *Das Verbrechen als Rechtsguts- und als Pflichtverletzung*, Deutsches Strafrecht 3 (1936), pp. 1-16.

[41] C. Schmitt, *Nationalsozialismus und Rechtsstaat*, Juristische Wochenschrift 1934, pp. 713-716, 713-714.

[42] Joachim Rückert, *Das «gesunde Volksempfinden» – eine Erbschaft Savignys?*, ZRG GA 103 (1986), pp. 199-247.

[43] H. Welzel, *Studien zum System des Strafrechts*, ZStW 58 (1939), pp. 491-566, 491. – Regarding this text, considered „the most important contribution in criminal law" of Welzel, see G. Jakobs, *Welzels Bedeutung für die heutige Strafrechtswissenschaft*, in W. Frisch, (ed.), Lebendiges und Totes in der Verbrechenslehre Hans Welzels, pp. 257-275, 261-272, 261.

thus becomes the foundation of the new «criminal law system», entailing changes within all institutions located on the *technical* theory of the crime, as well as the separation of the subjective side of guilt and relocating them alongside the objective side within typicality to the intentional crimes.[44]

These elements characterize Welzel's thinking already before 1933 and will constitute the defining notes of his doctrine after 1945. Specific to the *Studies* from 1939 are however: the legal action settlement "in actual social relations" and the exclusion of the typicality's framework the actions that are «socially adequate» (*sozialadäquat*), "including a special case where risk is allowed (*erlaubtes Risiko*)" configured under "historical order" whose reason lies in the implementation of the agreement of the challenges brought about by the evolution of technical knowledge with society's needs for conservation and development.[45] Without the *specific* national-socialist connotations, Welzel is the echo of Carl Schmitt's institutionalism and can be rightly considered that "allusions to thinking in concrete agendas cannot be overlooked, but they are inevitable if we do not want that a concrete society to be impelled by the criminal law"[46], the more so as the reliable scholars of the regime who bent the German society to a barbaric experiment had already consistently elaborated a «criminal law concept of the offender» who was supposed to replace altogether the orientation on the scene and its social objective significance.[47]

Could such a science be considered a political science of criminal law within the authenticity of the term? To the extent that «political» designates the opposition to liberal individualism, the answer can only be an affirmative one, which explains more deeply and had almost never shown openly as such the profound evil that national-socialist ideology had produced (and) on the long-

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[44] Exemplar Fritz Loos, *Hans Welzel (1904-1977): Die Suche nach dem Überpositiven im Recht*, in: Id. (ed.), Rechtswissenschaft in Göttingen, Vanderhoeck & Ruprecht, Göttingen, 1987, pp. 486-509; Hans-Joachim Hirsch, *Grundlagen, Entwicklungen und Missdeutungen des „Finalismus"*, in Festschrift für N. Androulakis, Sakkoulas, Athen, 2003, pp. 225-248, and also here Claus Roxin, *Vorzüge und Defizite des Finalismus. Eine Bilanz*, pp. 575-590; Enrique Bacigalupo, *Die Diskussion um die finale Handlungslehre im Strafrecht*, in J. Arnold et. al. (ed.), Festschrift für A. Eser, C. H. Beck, München, 2005, pp. 61-75; G. Jakobs, *Handlungssteuerung und Antriebssteuerung*. *Zu Hans Welzels Verbrechensbegriff*, in K. Amelung et al. (ed.), Festschrift für H.-L. Schreiber C.F. Müller, Heidelberg, 2003, pp. 949-958.

[45] H. Welzel, *Studien zum System des Strafrechts*, ZStW 58 (1939), pp. 491-566, 516, 518.

[46] G. Jakobs, *Welzels Bedeutung für die heutige Strafrechtswissenschaft*, p. 264.

[47] H-H. Lesch, *Der Verbrechensbegriff*. Grunlinien einer funktionalen Revision, Heymanns, Köln, 1999, pp. 158-165.

term to the legal thinking: the lasting compromise of this opposition started from the authentic *political* positions of classic-Aristotelian traditionalism (juridical), thus a mentality for which law should to be developed starting not from the abstract individual, but from a society understood as the practical normative *real* order (and not: ideological constructed) of free persons. As this was a foreign perspective for Vintilă Dongoroz, too, in 1939, as it shows his adherence to the technical „juridical" of Vincenzo Manzini (1872-1957) and Arturo Rocco (1876-1942) in their turn, „students of the German neo-Kant teachers"[48] and representatives of what can be called "the most complete and strict expression of formalist legal positivism"[49] in the science of criminal law. With direct reference to Arturo Rocco, Dongoroz drafted the scientific study of criminal law as an exegesis, dogmatic and critic of laws: "the science of criminal law with only the knowledge of the rules of criminal law in force (from the existing laws) and the rules of law being some abstract rules, *i.e.* prescriptions formulated by people, thus it is designated "the *normative and formal science* character of this subject"[50], thus illustrating *volens nolens*, the "juridical absurdity" of crime in a normative manner: "Nobody violates the general rule as a rule; from the legal point of view it does not violate anything."[51] The link with such science with the actual order of the Romanian society in 1939 was missing entirely, and this was nothing but the corollary of the method based on "a formal tools inventory, relatively constant compared to the changing content of the criminal codification"[52], an instrumentation that Vintilă Dongoroz started to use exactly the same way and under the conditions of the period of time after 1947.

II.

"Knowing to which order a criminal law system serves, we find implicitly whose will and conscience expresses the rules of that system, which social relations protects, who takes advantage by this protection", and this socio-

[48] P. Pandrea, *Criminologia dialectică*, p. 35.

[49] Ferrando Mantovani, *Diritto penale PG*, Cedam, Padova, 1992, p. 64. – See broadly Sergio Seminara, *Die rechtstechnische Methode und die Entwicklung der italienischen Strafrechtswissenschaft in der ersten Hälfte des 20. Jahrhunderts*, in T. Vormbaum (ed.), *Arturo Rocco und der Rechtstechnizismus im italienischen Strafrecht*, Lit, Berlin et. al., 2013, pp. 1-42.

[50] V. Dongoroz, *Drept penal*, § 42, p. 79.

[51] C. Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens*, Duncker & Humblot, Berlin, 2006, p. 18.

[52] P. Pandrea, *Criminologia dialectică*, p. 220-221.

political content "forms the true essence of each rule, each principle, each individual institution within the system of criminal law".[53] In the study of 1960 Vintilă Dongoroz expressed the clearer correlation required between the political and technical element of criminal law. At this correlation Dongoroz will give up, but in 1965, joining such direction indicated by Traian Ionaşcu and Eugen Barasch. Without resorting to explicit distinction between the *science* of law and the legal *technique*, Dongoroz differentiated within the criminal law "seen as a set of rules" a form and content, but this content, although "forms a unity,… for its scientific research must be viewed in its two aspects, that is, in relation to its own side (organic), which facilitates exposures that we call «normative content», and in relation to the socio-political side, which we call «socio-political content», thus explaining how "principles, institutions and incriminations" in the criminal law can be maintained from a social order to another while retaining the shape (the literal expression) and the normative content, given that "what has been removed and replaced is the socio-political content".[54] The normative content of the criminal law acquires the same autonomy towards social order that criminal law itself is required to protect, just as in the case of Traian Ionaşcu and Eugen Barasch, the logic form became autonomous versus the law content.

The price paid in the 1965 study for the autonomy of the normative content of the criminal law towards the socio-political content, however, is considerably, Dongoroz being forced to carry out with its normative content matter (although "consisting of rules of conduct") not only outside the *law*, but also as - belonging to *nature* – outside the *society* itself: "Acts, actions and deeds, that shall be substituted for the rule of conduct, constitutes by their nature, realities with an extra juridical character, but which are subject to legal regulation and... retains this character when they do any certain legal rules, and those rules should take account of all their natural particularities." Further, however, from the fact that "all these extra juridical realities… acquire, through their transposition in the normative contents of law, the character of legal categories and regulations more or less similar and invariable in time and space" showing that the *distinctions* such as those "between the will and the committed deed done by reason of coercion (force majeure, state of necessity, self-defence) or between the deed committed consciously (intentionally or not intentionally) and the deed of those deprived of the possibility to realize its character (mad people, kids, fortuitous

[53] V. Dongoroz, *Principalele transformări ale dreptului penal*, p. 397.

[54] V. Dongoroz, *Conținutul social-politic şi conținutul normativ al dreptului penal*, p. 470-471, 472.

case, actual error) "and *institutions* designated by the whole "terminology concerning the general part of the criminal law" which characterizes criminal law "since immemorial times" and should be considered "constant legal categories, resembling in this respect with those abstract notions which constitute the basic categories of law science as: legal law, legal norm, legal report, subject of law, objective law, subjective law, legal sanction, legal liability, rights in rem, rights of claim, representation etc., categories that are common to all systems of law regardless of the kind of social system".[55]

Accordingly, Dongoroz restores in the first volume of *The Theoretical Explanations of the Romanian Criminal Code* in 1969 a general theory of crime as *cum grano salis* than that promoted by Franz von Liszt himself and developed during the interwar period. This was structured starting from "the ultra-simplified Cartesian understanding for the problem of the relation between body and intellect" which is at the origin of "every effort to differentiate between the subjective and objective elements of crime (between *actus reus* and *mens rea*)"[56], such a theory could make abstraction of "the class character of the infraction", with the price of receding the correlation between political and technical element of criminal law, thus receding the reflection of social order in terms of the categories of criminal dogmatic. Through the same process of "neutralization and depoliticizing[57] of the theory for criminal law was found, however, the finalist doctrine developed by Hans Welzel after 1945, and the answer offered by Welzel whether "there's something constant in the science of law"[58] was of a structural perspective like the one offered by Dongoroz: there is a «logic of things» (*Sachlogik*), whose "ontological structures" are eternal truths (*ewige Wahrheiten*) for any legislator should take into account in the elaboration of positive law under the sanction of lack of effectiveness of their regulations.[59]

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[55] V. Dongoroz, *Conţinutul social-politic şi conţinutul normativ al dreptului penal*, p. 489-492, 474, 476, 478, 479, 480.

[56] G. P. Fletcher, *The Grammar of Criminal Law* I: Foundations, Oxford University Press 2007, p. 55.

[57] C. Schmitt, The Age of Neutralizations and Depoliticizations (1929) = The Concept of the Political, trad. G. Schwab, The University of Chicago Press, 2007, pp. 80-96.

[58] H. Welzel, *Vom Bleibenden und vom Vergänglichen in der Strafrechtswissenschaft* = *Abhandlungen*, p. 345.

[59] H. Welzel, *Naturrecht und materiale Gerechtigkeit*, Vandenhoeck & Ruprecht, Göttingen, ^{4}1962, p. 244. – See broadly O. Sticht, *Sachlogik als Naturrecht*, Zur Rechtsphilosophie Hans Welzels (1904-1977), Schöningh, Paderborn, 2000, pp. 37-48, for the dogmatic consequences pp. 297-330, regarding philosophical origins Zong Uk Tjong, *Der*

Such intrinsic logic structures of the «logic of things» (*sachlogische Strukturen*), as well as the conscious orientation to human action toward achieving a goal and guilt, but also the duration of pregnancy in women or the non-contradiction principle are considered by Welzel to be basically extra-juridical realities. However when the legislature decides on the basis of value-judgements given on human recognition as *person*[60], recognition which for Welzel stands for "what remains valid" in the entire history of the doctrines of natural law[61] - to transform them into legal categories (as in the case of guilt), they become the true object of study of law science, as they are not subject to any arbitrary human disposition, nor any attached to objective conditioning with reference to the identity of societies. A genuine "formal and apolitical natural law", «the logic of things» have the advantage of eliminating from the legal German post-war debates, the sensitive theme of the connection between criminal law and policy[62], once with this, however, also the «political element» of the criminal law regarding the concrete order of the post-war German society. In this circumstances, for the finalists "there is no purely national science of criminal law... but a science that must be assessed according to the universal scientific criteria as being wholly or partly right or wrong".[63]

Imagined by Dongoroz under the conditions of the year 1965 to allow the perpetuation of a criminal law *de facto* «bourgeois» in the conditions of a society whose political order had been proclaimed to have become already «socialist», the distinction between the content of socio-political and normative content of criminal law should have been dropped after 1989, opening the possibility of explaining the normative material of criminal law owing to differences in form *ad quem* and *a quo*. In reality, nothing highlights more clear than the

Ursprung und die philosophische Grundlage der Lehre von den sachlogischen Strukturen im Strafrecht, ARSP 54 (1968), pp. 411-427; in defence of the «logic of things» against functionalism G. Stratenwerth, *Sachlogische Strukturen?*, in M. Pawlik and others (ed.), Festschrift für G. Jakobs (Heymanns, Köln, 2007), pp. 663-674; recently K. Seelmann, *Hans Welzels «sachlogische Strukturen» und die Naturrechtslehre*, in W. Frisch, (Hg.), Lebendiges und Totes in der Verbrechenslehre Hans Welzels, pp. 7-19.

[60] G. Stratenwerth, *Das rechtstheoretische Problem der Natur der Sache*, Mohr Siebeck, Tübingen, 1957, p. 17.

[61] H. Welzel, *Naturrecht und materiale Gerechtigkeit*, p. 240.

[62] G. Jakobs, *Strafrecht als wissenschaftliche Disziplin*, p. 126.

[63] H.-J. Hirsch, *Gibt es eine national unabhängige Strafrechtswissenschaft*?, in M. Seebode (ed.), Festschrift für G. Spendel, W. de Gruyter, Berlin/New York, 1988, pp. 43-58, 58.

perpetuation of this constant concern to the majority of the criminal law scholars to abandon the «social-material aspect» from the «old» definition of the offence, as would hardly be able to find a more appropriate example for the failure of the absolute formalism than the confusion around the new definitions of the infraction and the status of «culpability» as an «essential feature» of the latter.[64] „The fact that the social danger of the offence does not appear mentioned in the content of the definition of infraction does not mean it is not an intrinsic feature of it"[65]. That is what Hegel understood by "the standpoint of danger which is presented as an action for society" could be considered after 1989 as being itself a feature of infraction "specific to Soviet-inspired laws"[66] is symptomatic for already breaking in this point the link between the *political* and the *technical* element of the criminal law.

Things are not otherwise as for so-called «the normative theory of guilt», whose reception in the Romanian criminal doctrine has led finally to the well-known complications around the current regulations of the essential features of the offence provided for in article 15 of the New Criminal Code. Considered – quite rightly – the one who went ahead to «the normative theory of [guilt] based on the finalist concept of the action»[67], Welzel defines guilt (*Schuld*) by *Vorwerfbarkeit des Willensbildung*, so the „judgment of the personal reproach" is bearing (*not* on the *assertion*, but:) on the „*formation* of the will... in order not to refrain from the anti-juridical action, although he could refrain".[68] Even if it can be assumed that the persistent non-clarities in the acceptance of guilt as „reproach [brought to the offender] that he has not adopted the behaviour that could lead him to avoid the antisocial result and observe the criminal law"[69] or as "imputation made to the offender because he acted differently than the legal

[64] Comp. C. Mitrache / C. Mitrache, *Drept penal român, partea generală,* Universul Juridic, Bucureşti, 2014, No. 146, pp. 133-135; F. Streteanu / D. Nițu, *Drept penal, partea generală* I, Universul Juridic Bucureşti, 2014, No. 267, p. 254-256.

[65] Comp. V. Paşca, *Drept penal, partea generală*, Universul Juridic, Bucureşti, [3]2014, No. 100, p. 148.

[66] F. Streteanu, *Proiectul noului Cod penal şi reconfigurarea teoriei infracțiunii în dreptul român*, CDP 2/2009, pp. 50-57, 53.

[67] G. Antoniu, *Vinovăția penală*, EAR, Bucureşti, [2]2002, p. 27.

[68] H. Welzel, *Das Deutsche Strafrecht*, W. de Gruyter, Berlin / New York, [11]1969, p. 137.

[69] G. Antoniu, *Art. 16*, in G. Antoniu / T. Toader (coord.), *Explicațiile noului cod penal* I, Universul Juridic, Bucureşti, 2015, p. 168.

order required"[70] can be explained in large part by the developments of German post-welzelian criminal dogmatic[71]. No less can be considered the fact that Dongoroz' formalist positions closed to the Romanian authors the proper way to the clarifying of all these concepts on the basis of the substantial aspect of criminal culpability. Revealed by the functionalist theory – presented in Romania only sporadically and in particular from the perspective of its critics[72] – *the criterion* of reproach judgment also indicates a fundamental deficiency of the finalists conception about infraction, *i.e.* the fact that for Welzel the "action is related to the individual, and the guilt to the person".[73]

The most visible consequence of misunderstanding the guilt in a genuine manner is the lack of the regulatory framework of non-imputability causes of the state of necessity relating to exceptional situations in which this reproach is excluded, demonstrating more of itself: "the refusal of the systematic approach" to criminal law[74], the absence of *exculpate* state of necessity from the Romanian criminal law is compounded by considering it as an alternative to the *justificatory* state of necessity as "the saved value is more important... equal or lower importance compared with the sacrificed value", with the consequence for the introduction of a state of necessity in the context of *justificatory* causes starting from "the idea of a significant injury absence brought to the social

[70] F. Streteanu, *Proiectul noului Cod penal şi reconfigurarea teoriei infracţiunii în dreptul român*, CDP 2/2009, p, 55; more recently F. Streteanu / D. Nițu, *Drept penal PG,* N. 421 p. 410 („social blame").

[71] See H.-H. Jescheck, *Wandlungen des strafrechtlichen Schuldbegriffs in Deutschland und Österreich*, Juristische Blätter 120 (1998), pp. 609-619; B. Schünemann, *Die Entwicklung der Schuldlehre in der Bundesrepublik Deutschland*, in H. J. Hirsch / Th. Weigend (ed.), Strafrecht und Kriminalpolitik in Japan und Deutschland Duncker & Humblot, Berlin. 1989, pp. 147-176; H.-J. Hirsch, *Über Irrungen und Wirrungen in der gegenwärtigen Schuldlehre*, in G. Dannecker et.al. (ed.), Festschrift für Harro Otto, Heymanns, Köln, 2007, pp. 307-330.

[72] F. Streteanu, *Tratat de drept penal PG* I, N. 269 p. 269-270; G. Antoniu, *Art. 16*, in G. Antoniu / T. Toader (coord.), *Explicațiile noului cod penal* I, p. 168-169: „ it is questionable the position of those normative extremist who propose to develop a theory of infraction without guilt (not even as a reproach), criminal liability being based only on the retributive needs of society". – Comp. B. Schünemann, *Die Funktion des Schuldprinzips im modernen Präventionsstrafrecht*, in B. Schünemann (ed.), Grundfragen des modernen Strafrechtssystems, W. de Gruyter, Berlin, 1984, pp. 153-196, 184: Günther Jakobs' „normativism" considered as „extreme contrary pole towards the position as unsustainable as criminal naturalism".

[73] G. Jakobs, *Handlungssteuerung und Antriebssteuerung*, in K. Amelung et. al. (ed.), Festschrift für H.-L. Schreiber, C.F. Müller, Heidelberg, 2003, pp. 949-959, 955.

[74] G. Radbruch, *Der Geist des englischen Rechts*, Rausch, Heidelberg, 1947, p. 76, regarding the case «*Regina* versus *Dudley and Stevens*» of 1884.

order".[75] In reality, whether the *exculpate* necessity involves an *exceptional* benefit granted to the individuality of the offender in an existential conflict between the individual survival and an offender obligation that he – as a person entitled, so that the holder of the obligation to respect legal order – can meet only with the price of his own sacrifice, the *justificatory* state of necessity, thus *as* "the law of necessity"[76] presupposes that the offender as "son of the civil society, who claims he [observing the law], just as he has the rights to it", thus a social order whose *legitimacy* presupposes that "private good should be treated as a right and must be realised."[77] From the perspective of the political element of the law, the difference between the two approaches is that the order of a totalitarian political regime cannot conceive of such a right, waiting for the *individual* the unconditional sacrifice towards *the collective totality*[78], the society formed of free *people* may accept either the justification by the «law of necessity», or the exculpating from the "survival of individuality" only under conditions that do not threaten *the order* as a whole. [79]

Similarly, the methodological concepts promoted at the end by Welzel and Dongoroz are different as regards the construction of the criminal dogmatic, understandable given their common affinity with modern natural law, where "any determination is likely to be received in the form of concept and should be marketed as a quality; and there is absolutely nothing that could be transformed in this way in the law".[80] The only thing that seems to link them was the idea of *the system* that Dongoroz saw expressed in the *Romanian Criminal Code*[81]

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[75] F. Streteanu / D. Nițu, *Drept penal PG*, Nr. 387, p. 375.

[76] Hegel, *Grundlinien der Philosophie des Rechts* = Hegel-Werke, Bd. 7, ed. M. Moldenhauer / M. Michel, Suhrkamp, Frankfurt, 1970, § 127; see G. Jakobs, *System der strafrechtlichen Zurechnung*, Klostermann, Frankfurt, 2012, p. 48-49.

[77] Hegel, *Grundlinien der Philosophie des Rechts*, §§ 230, 238.

[78] F. Schaffstein, *Politische Strafrechtswissenschaft*, p. 21; Vasile Papadopol, *Drept penal, partea generală*, in Ministerul Justiției (ed.), Manual Juridic (Editura Științifică, Bucureşti, 1957, pp. 327-387, 350: „The Soviet Criminal Law does not regulate moral constraint and does not consider it a cause that excludes guilt ...because it reflects the principles of socialist morality which, by cultivating heroism and the spirit of sacrifice, requires resistance to the defence of social values against any threats".

[79] Broadly, G. Jakobs, *Norm, Person, Gesellschaft*, Duncker / Humblot, [3]2008, pp. 99-108.

[80] Hegel, *Über die wissenschaftlichen Behandlungsarten des Naturrechts, seine Stelle in der praktischen Philosophie und sein Verhältnis zu den positiven Rechtswissenschaften = Werke*, Bd. II, pp. 434-530, 461.

[81] V. Dongoroz, *Sinteze asupra noului cod penal al RSR*, SCJ 1/1969, pp. 7-35, 7.

achieved under the direct coordination of himself and entered into force in 1969, and Welzel in his famous *Treaty* of *German Criminal Law* reached also in 1969 the eleventh and final Edition. Asserting from Aristotle and Hegel, the theory of the final action[82], Welzel does not consider, however, that "the concepts of will and conscious intent or knowledge, which typically have an understandable psychological meaning, are considered as objects of law only in a *social sense*; it is not about internal psychic phenomena, but also about social phenomena."[83] The preference given to subjectivism in the prejudice of inherent institutionalism of «social adequacy»[84] was, however, inevitable, while about promoters «to the logic of things» could and can still affirm together with Anita Naschitz that "breaking laws, structures and features typical to various categories of relations, situations, positions referring to the fundamental structures of society, they actually give up the opportunity to reveal the real essence of the running mechanisms of general social life in a stage of its development therefore, also the formation mechanisms of legal regulations."[85] In the formulation of Professor Günther Jakobs, the (criminal) law specific logic "is not a logic of *things*, but a *social* logic, and therefore a *political logic* in the primary sense of the term", namely: "considering the order to be protected" by the criminal law."[86]

III.

"This Napoleon Code, which I have in my hand, never created the modern bourgeois society. On the contrary, the bourgeois society, which emerged in the 18th century and continued to grow in the 19th century, finds in this code only its legal expression. As soon as it ceases to correspond to social relations, it is no more than a heap of papers".[87] Invoked with predilection in the Marxist-Leninist

[82] H. Welzel, *Die deutsche strafrechtliche Dogmatik der letzten 100 Jahre und de finale Handlungslehre,* JuS 1966, pp. 421-425, 424.

[83] M. Djuvara, *Precis de filosofie juridică = Eseuri de filosofie a dreptului*, ed. N. Culic, Trei, Bucureşti. 1998, p. 222.

[84] Manuel Cancio Melia, *Finale Handlungslehre und objektive Zurechnung*, GA 1995, pp. 179-194.

[85] A. M. Naschitz, *Teorie şi tehnică în procesul de creare a dreptului*, EAR, Bucureşti, 1969, p. 35-36, regarding Welzel's „immanent structures for the logic of things" p. 30.

[86] G. Jakobs, *System der strafrechtlichen Zurechnung*, p. 16 note 13.

[87] Marx, *Procesul împotriva Comitetului districtual al democraților din Renania* = Marx-Engels, *Opere* VI, pp. 265-284, 270.

legal literature, these words of Karl Marx could have been written as well by Hegel, for whom "a criminal code has its own time and regards the civil society at that time."[88] Starting from the thesis according to which "in any social order, criminal law aims, testified or not, to the defence system, and thus of social relations specific to that system."[89] Vintilă Dongoroz put the basis, by the text in the 1960 enshrined *in pectore* to the ideas from *The Preface* of Ion Gheorghe Maurer, to a veritable functionalist-program "criminal functionalism means the doctrine according to which the criminal law is oriented to the guarantee of the normative identity, for the security of the Constitution and society"[90] – for the Romanian criminal law science, the higher the topicality, the more understanding of the criminal law from the perspective *of its function* of defencing the society as «order», so that the normative order of the social *institutions* – institutions on which, having an objective background, the subjectivity itself can be contoured[91] – is a prerequisite for the understanding of some institutions already received in Romanian criminal law, such as the objective imputation of the outcome as an achievement of a risk that is not allowed[92] or the guilt as normative reproach: solving the "problem of knowing *when* a risk is legitimate and when it is illegitimate" depends on "the extent and the basis of the risk for any human actions... depending on the social order"[93] as

[88] Hegel, *Grundlinien der Philosophie des Rechts*, § 218.

[89] V. Dongoroz, *Principalele transformări ale dreptului penal*, p. 399.

[90] G. Jakobs, *Das Strafrecht zwischen Funktionalismus und «alteuropäischem" Prinzipiendenken*, ZStW 107 (1995), pp. 843-876, 843. – Regarding criminal functionalism, see Manuel Cancio Meliá, *Dogmática y política criminal en una teoría funcional del delito*, in G. Jakobs / M. Cancio Meliá, *El sistema funcionalista en el derecho penal*, pp. 17-42; Gustavo Montealegre Lynett, *Estudio introductorio a la obra de Günther Jakobs*, in E. Montealegre Lynett (ed.), El Funcionalismo En Derecho Penal: Libro Homenaje Al Profesor Gunther Jakobs, Tomo I, Universidad Externado de Columbia, Bogotá, 2003, pp. 21-36; Miguel Polaino Navarrete, *Dimensiones básicas del funcionalismo jurídico-penal: algunas consideraciones críticas*, Derecho Penal y Criminología 47 (2005), pp. 47-75.

[91] U. Di Fabio, *Die Kultur der Freiheit*, C. H. Beck, München, 2005, p. 83: „modern individualism can only be conceived as an individual benefit from social institutions"; regarding the critique of the monistic-individualist approach to the legal good, G. Jakobs, *Sozialschaden? – Bemerkungen zu einem strafrechtstheoretischen Fundamentalproblem*, M. Böse / D. Sternberg-Lieben (ed.) Festschrift für Knut Amelung (Duncker & Humblot, Berlin, 2009, pp. 37-49; 41-44.

[92] F. Streteanu, *Tratat de drept penal PG* I, No. 228, pp. 419-428; D. Nițu, *Teoria riscului în dreptul penal*, RDP 1/2005, pp. 107-117.

[93] Aurel Dincu, *Considerații cu privire la culpa penală*, AUB 1966, pp. 85-90, 86-87.

the normative conception of guilt in the criminal law of a certain society is inseparable from "the identity and agenda of *this* society".[94]

Other than in the later study devoted to the socio-political and regulatory contents, Dongoroz asserted in 1960 not the *separation*, but *the correlation* of these contents (elements), between a system of criminal law in which "the criminal phenomenon is viewed only in terms of its legal aspect, out of touch with the social reality in which it produces", the system in which the same phenomenon "is viewed in its social material aspect, *i.e.* in the light of realities in which it occurs."[95] Even if *the manner* in which Dongoroz portrays the difference between «society» and «bourgeois socialist» could not be taken seriously as a *scientific* perspective (as placing «political science to criminal law» by Schaffstein in the horizon of the concrete social order, it had been discredited by the national-socialist context), no less than the idea itself of such differences as a starting point for a theory of criminal law is worth highlighting. On the other hand, as Dongoroz's thesis is not *itself* altered by placing it in an ideological Communist context, neither the criticism as ideologically compromised of Schaffstein addressing «the legal good» does not justify the post-war option for this concept[96], used since the 1960 as a particularly effective weapon in the "struggle against the fundamentals of traditional society" – the same society that the Communism and National-Socialism wanted to be replaced with their own ideological constructions – by reconsidering to care for the *social institutions* and de-legitimating of incriminations that did not accentuate a more or less direct harm to the *individual interests*.[97]

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[94] Willy Oelmüller, *Schwierigkeiten mit dem Schuldbegriff*, in H. M. Baumgartner / A. Eser (ed.), Schuld und Verantwortung, Mohr Siebeck, Tübingen, 1983, pp. 9-17, 13.

[95] V. Dongoroz, *Principalele transformări ale dreptului penal*, p. 410.

[96] Roland Hefendehl, *Mit langem Atem: Der Begriff des Rechtsguts*, GA 2007, pp. 1-14; Sabine Swoboda, *Die Lehre vom Rechtsgut und ihre Alternativen*, ZStW 122 (2010), pp. 24-50; Hans Kudlich, *Die Relevanz der Rechtsgutstheorie im modernen Verfassungsstaa*t, ZStW 127 (2015), pp. 635–653; Otto Lagodny, *Fallstricke der Strafrechtsvergleichung am Beispiel der deutschen Rechtsgutslehre*, ZIS 10/2016, pp. 672-680.

[97] J. Braun, *Wahn und Wirklichkeit*, Honhenrein, Tübingen, 2008, p. 216; comp. G. Jakobs, *Rechtsgüterschutz*, p. 23-24. – As in Romania after 1989, the matter in which this dynamic was mainly asserted was that of the former "infractions against good morals" (pioneer: Herbert Jäger, Strafgesetzgebung und Rechtsgüterschutz bei Sittlichkeitsdelikten, F. Enke, Stuttgart, 1957) became "infractions against sexual self-determination", just as in Romania the former "infractions concerning sexual life" provided for in the 1968 - Criminal Code became the current infractions against sexual freedom", pioneer Valerian Cioclei, *Viață sexuală şi politică penală*, Holding Reporter, Bucureşti, 1994.

Other than the relations within the feudal or socialist societies[98] the modern, liberal society is characterized by anonymous contacts among *people*, whose progress in complying with the strict observance by the latter of certain social roles specified: "*persona* is the mask, thus not the expression of its wearer subjectivity, but the appearance of a socially relevant skill"[99], just like in Roman law "*persona* designates the role played by a citizen in society".[100] Unlike the proclamation of legitimacy implicit in Vintilă Dongoroz's thesis (1968) that "the requirements of normative law (criminal) find their full approval in the consciousness of each citizen" because "in the popular-democratic organisation each man shall be provided with opportunities to meet the cultural and material needs, to develop skills, to put in value the merits"[101], modern society avoids taking an *obligatio in conscientia* as "a religious connection and at the same time the base of social action"[102] specific to the natural law. Defining the person through an institutionalised freedom[103], the order of modern society has as "universal institution" the *sinalagmatic* correlation between the *freedom* of the person and *the responsibility* for the observance of the limits of one's own social role. [104]

Retracting in 1960 "the formal concept of the infraction notion" which he had advocated previously as «bourgeois» scholar and stressing once again that "when we speak of society, this reference does not concern society as an abstraction, but a particular social formation", so that each offence protects "the

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[98] Regarding the transition from socialism to capitalism as a resumption of the process for overcoming feudalism, see Gerd Roellecke, *Sozialismus und deutsche Wiedervereinigung*, Der Staat, Vol. 29, No. 4 (1990), pp. 481-496.

[99] G. Jakobs, *Das Strafrecht zwischen Funktionalismus und «alteuropäischem" Prinzipiendenken*, p. 859.

[100] V. Hanga / M. D. Bob, *Curs de drept privat roman*, Universul Juridic, Bucureşti, [4]2011, p. 24.

[101] V. Dongoroz, *Principalele transformări ale dreptului penal*, p. 402, 403:

[102] Götz Schulze, *Die Naturalobligation*, Mohr Siebeck, Tübingen, 2008, p. 91.

[103] Regarding the liberty of *persona* in Roman Law, see O. Behrends, *The Natural Freedom of the Human Person and the Rule of Law in the Perspective of the Classical Roman Legal Theory*, The Tulane European and Civil Law Forum 26 (2011), pp. 1-31, 16, 22: *Where man once moved freely in the wilderness, he now moves in a legally systematized world, and by no means less freely*.

[104] G. Jakobs, *Strafrecht als wissenschaftliche Disziplin*, p. 133 note 152. – Comp. O. Behrends, *Savignys Geistigkeit und der Geist der justinianischen Kodifikation*, în S. Meder/ C.-E. Menke (ed.), Savigny global 1814-2014, Vandenhoeck & Ruprecht, Göttingen, 2016, pp. 25-73, 57.

social relations specific to social system where they operate [criminal law]" [105], Dongoroz opens up the path to reconfiguration of the *objective side* of the infraction (content), playing the exact role of «social adequacy» designed by Hans Welzel already in 1939, mentioned as early as in the 1969 edition of *The Treaty* of *German Criminal Law* as a cause of exclusion of the (objective) «typicality»[106] and later developed as the core of the doctrine of objective imputation in terms of determining the aspect of objective nature (not) allowed to a behaviour as a "social phenomenon".[107] Traditionally conditioned by setting of a report of *causality* between the conduct of a person and the existence of an injury, the *objective* imputation of this presupposes *the liability* (*Zuständigkeit*, *competencia*), of a person, determined according to the objectives limits of the violated role or not; the imputation does not operate when the conduct has remained within the bounds of «allowed risk» (*erlaubtes Risiko*), assumed the «trust» (*Vertrauensgrundsatz*) in proper performance by others of their roles or was inserted in the causal chain of the injured himself (*Handeln auf eigene Gefahr*) or other persons, so that one can speak of «regress interdiction» (*Regressverbot*) by the one whose conduct is in itself harmless. [108]

From the perspective of the *objective* side, the infraction appears as a violation by a person of their own freedoms, and the delimitation of the limits of this freedom (and thus the domain of liability) is a normative reality *given* on *the political* plan of the legal relations of social order[109] and *built* by the science of

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[105] V. Dongoroz, *Principalele transformări ale dreptului penal*, p. 409, 411, 425-426. – Beyond the polemic character of expression, the relation between the *systematic* nature of criminal law and its quantitative expansion is still present: "due to the widening of its domain, criminal law during the capitalist regime appeared as a set of rules lacking that unity and that cohesion that characterizes a true system of criminal law, unity and cohesion on which good understanding depends and also correct application of legal norms" (p. 406), comp. Jesús María Silva Sánchez, *La expansión del Derecho penal,* Civitas, Madrid, 2001, p. 82; R. Zaczyk, *Die Notwendigkeit systematischen Strafrechts – Zugleich zum Begriff «fragmentarisches Strafrecht»*, ZStW 123 (2011), pp. 691-708.

[106] H. Welzel, *Das Deutsche Strafrecht*, p. 66.

[107] G. Jakobs*, Strafrecht als wissenschaftliche Disziplin*, p. 126, see further p. 128-129 – on the current stage of discussion Florian Knauer, *Zur Wiederkehr der Sozialadäquanz im Strafrecht – Renaissance einer überholten Rechtsfigur oder dogmatische Kategorie der Zukunft?*, ZStW 126 (2014), pp. 844-865.

[108] G. Jakobs, *System der strafrechtlichen Zurechnung*, pp. 28-34. – See our doctrine for a clear presentation of these institutions, Ioana Curt, *Raportul de cauzalitate în lumina actualelor sale proiecții intradogmatice*, CDP 2/2012, pp. 30-62, 52-58, especially pp. 53-54.

[109] W. Schild, *Soziale und rechtliche Verantwortungen*, JZ 1980, pp. 597-603; Bernd Müssig, *Rechts- und gesellschaftstheoretische Aspekte der objektiven Zurechnung im Strafrecht*,

(criminal) law on the *technical* plan of (criminal) legal categories. Not quite as clear are things, however, on the subjective side. Otherwise, later in *The Theoretical Explanations* from 1969, infraction is defined since 1960 by Dongoroz, as well as in the treaty of *Criminal Law* from 1939, only through the "legal aspect" (formal) and "material-social aspect", while the "moral-human aspect" which constitutes the premises of matter for the guilt problems are related to *the institution* of criminal liability and are treated distinctly. While the level of objective side highlights the overall function of the law, in order to guarantee the social order as an order of the personal responsible freedom[110], together with a consideration of the subjective side emphasises the function of criminal law in guaranteeing the integrity, not to some particular social roles (doctor, driver, etc.), but also the universal role in fidelity to the person against the law (*Rechtstreue*).[111]

In the context of *Theoretical Explanations*, the guilt will be framed by Dongoroz in the content of the infraction, and the subjective conception was to be carried out according to the same program outlined in 1960. As in the case of objective side, Dongoroz also insisted in matters of criminal liability (associated to guilt) over the connection between *political* element and *technical* element of (criminal) law: "legal liability in any field, before being a problem of law is a human and social problem; *human*, because this issue questions primarily the human aptitude to steer the will, *social*, because the human capacity for self-determination is always influenced by specific conditions to each of the objectives of social life system".[112] Even if, regarding this, Dongoroz's enunciations are affected by phraseology propaganda of the era, their theoretical substance can be drawn from this corset: criminal guilt involves directing the free wills of their own, but the freedom in question is not addressed in terms of the opposition between determinism and indeterminism, but also in the social order itself[113], which leads to the separation of the essence for the normative

in K. Rogall et al. (ed.), Festschrift für H.-J. Rudolphi, Luchterhand, Neuwied 2004, pp. 165-185.

[110] O. Behrends, *Idealismus, Politik und Jurisprudenz in F. C. v. Savignys System des heutigen römischen Rechts*, in O. Behrends et al. (Hg.), Römisches Recht in der europäischen Tradition, Rolf Gremer, Ebelsbach, 1985, pp. 257-321, 269-271.

[111] G. Jakobs*, Strafrecht als wissenschaftliche Disziplin*, p. 129.

[112] V. Dongoroz, *Principalele transformări ale dreptului penal*, p. 415.

[113] G. Jakobs, *Strafrechtliche Schuld als gesellschaftliche Konstruktion*, in S. Schleim et al. (ed.), Von der Neuroethik zum Neurorecht, Vandenhoeck & Ruprecht, Göttingen, 2009, pp. 243-263. – Even in the interwar period, Dongoroz had argued with typical functionalist

concept of guilt as liability of an individual for a lack of loyalty towards the legal order (*Rechtstreue*) to the extent that it would have been objectively necessary in order to prevent a breach of this order. "To be free in the process for the determination [of will] means having unrestrained manner of electing the way we behave; to be free means to know everything that is needed to make a fair ruling in a given situation; to be free means to find in your own consciousness enough ways to boost and cause a certain behaviour".[114] Therefore, *the person* is itself responsible for finding a sufficiently strong motivations in the direction of a conduct whereby the legal order must not be violated, and *the absence of such reasons* is attributable to themselves as *guilt*.

In the Romanian criminal doctrine Traian Pop (1885-1960) is the one who most clearly formulated the normative essence of criminal culpability, starting from the objective definition of *the person* through "social cooperation", so by own responsibility for conduct which satisfies social norms: "the person is *reproached*, is held liable... only the individual... about which one can say that chooses not to cooperate in maintaining social formations", namely because this «individual» learned in "imputable state... worked against the will, knowing or being able to know this, though he had the opportunity to work under his will".[115] Other than in the context of psychological or philosophical theories about guilt, specific to functionalism is the determination of this «possibility» regarding not the mental information about the «individual» and the *individual* effort that a *person* needs to give up to the violation of the rule, but the ability of society to solve the conflict differently than by criminal liability. The central reason of difficulties in the case of the majority of Romanian scholars with the concept of guilt and the key-distinction from the functionalism perspective of criminal law between the intellective factor deficiency (*Wissensfehler*) and the volitional factor (*Willensfehler*)[116] is just neglecting the difference between the individual

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arguments that "the issue of freedom of will no longer has a place in the science of criminal law", (V. Dongoroz, in I. Tanoviceanu, *Tratat* I, § 108[1], p. 105), comp. for an equally clear expression G. Jakobs, *Strafrechtliche Schuld ohne Willensfreiheit?*, in: D. Henrich (Hrsg.), Aspekte der Freiheit, Mittelbayerische Druckerei- u. Verlagsgesellschaft, Regensburg, 1982, pp. 69-83, 80: "Criminal law does not know the category of freedom of will."

[114] V. Dongoroz, *Principalele transformări ale dreptului penal*, p. 415.

[115] T. Pop, *Drept penal comparat* III, p. 25; T. Pop, *Drept penal comparat* II, p. 346; H. Welzel, *Das Deutsche Strafrecht*, p. 16.

[116] This difference is the key to the functional concept of guilt: G. Jakobs, *Strafrecht als Wissenschaft*, p. 130; regards the configuration of the guilt, more recently about G. Jakobs, *Drei*

and the person, by virtue of which "the current theory of the will, particularly among the legal profession through a tradition coming from the Romans, must therefore be taken in an understanding, that do not lead to confusion between social and psychological"[117], which is possible only in conditions in which "the very idea of the individual as we think in law, does not include a purely biological or purely psychological individual, but an individual *in social relations*" so that "only thanks to this report for the formation of the idea of society we can come to think as the idea of a person".[118] As psycho-physical being, the individual is naturally inclined to ensure knowledge of the world, since the errors of orientation may frustrate the attainment of individual goals to their own purposes - which can be perhaps even better achieved in conditions of non-compliance with social norms. It is for this reason that "the law leaves for the individual the burden of securing this motivations" and easier treatment of facts through negligence in relation with the intentional: the necessity of conserving society as hidden theme, mostly under constructions as «justice».[119] As political science, the science of criminal law only expresses a political element of the criminal law on the technical element plan, in order to crystallize into a system the legal institutions which social order produces from itself for its own preservation.

Bemerkungen zum gesellschaftsfunktionalen Schuldbegriff, in M. Heger ş.a. (Hg.), Festschrift für Kristian Kühl, C.H. Beck, München, 2014, pp. 281-293, 287-289.

[117] M. Djuvara, *Precis de filosofie juridică = Eseuri de filosofie a dreptului*, pp. 178-262, 222.

[118] M. Djuvara, *Despre ideea de drept subiectiv şi obligaţie = Eseuri de filosofie a dreptului*, pp. 99-118, 111; comp. also M. Djuvara, *Teoria generală a dreptului*, All, Bucureşti, 1995, p. 215: „Through the idea of society and only through it, our minds get to build the idea of members of society."

[119] G. Jakobs, *Strafrecht als wissenschaftliche Disziplin*, 130-131.

2. Germany and Romania – Legal Encounters on Constitutional Realm

Marius BĂLAN*

Despite the common ideological background of modern states – featured by liberal trends – the constitution is *par excellence* the straightest expression of national identity and specificity of a concrete political community. Perhaps here lies the explanation for the impossibility of an effective constitutional transplant.[1] However, certain influences on both academic and judicial level can be revealed in the context of dialogue among legal cultures. From this perspective, a comparison between German and Romanian constitutional law can be reasonably interesting. Both systems appeared and evolved under the influence of external political and legal models. In the Romanian case, it was the whole European or Western model, which decisively formed the modernization process of Romanian state and society. For Germany the envisaged model was focused on parliamentary democracy and constitutionalism of Western – *i.e.* English, French and later, to some degree, American – type. This model prevailed only in interaction with traditional and established conceptions and institutions contributing to a significant extent to the configuration of an aggregate Western political and legal concept, which was embraced often as a whole by Central and Eastern European nations.

Both Germany and Romania are national states, emerged in the process of accomplishment of a political project focused on the idea of nation, whereupon the state as such was built. The "civic" nation – preponderant in Western Europe – is considered to be created and maintained by rational bounds, contractual in nature (the social compact of modern natural lawyers). The "ethnic" nation is the outcome of a collectivistic and supra-individual approach, as a result of cultural, historical, linguistic and emotional affinities. Its cohesion is supposed to originate in irrational causes. The difference between these two "nations" lies rather in the perspective of the approach and in the concrete tactics of promoting

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[1] On the difficulties of constitutional transplant, illustrated by Romanian constitutional history, see Manuel Guțan, *Transplant constituțional şi constituționalism în România modernă*: *1802-1866*, Ed. Hamangiu, Bucureşti, 2013.

the political endeavor to a nation-state than in the object of the cognitive approach. One cannot say the French nation is a civic one, and the Romanian or Hungarian is purely ethic. The evolution of national states was quite different in the case of the latter nations. The Romanian state – as the Italian, Hungarian, Polish or German – is the achievement of the respective nation, or more accurately, of the political elite that designed and accomplished it. Contrary, in France, the French nation is considered to be the creation of its state.[2] The political unity and continuity of state's being imprinted decisively the physiognomy of the French nation, by imposing or at least by promoting the emergence and perpetuation of common linguistic, cultural, economic, social or even religious features. For other peoples (German, Italian, Polish, Romanian, Hungarian), the common features in respect to ethnicity, language, culture or religion induced the formation of a political project with the high point consisting in the creation the own national state.

Both countries, Germany and Romania, are marked by similar historical experiences. In the 19th and at the beginning of the 20th century their political organization gravitated around constitutional monarchy. In Germany, monarchy was an institution deeply rooted in the political traditions of the great majority of the Empire's constituent states with an uninterrupted continuity for many centuries. In Romania, constitutional monarchy is a product of exogenous circumstances and of modernization – it consolidates alongside the evolution of representative democracy. For various historical reasons, in both countries, prior to the emergence of a totalitarian regime,[3] an unaccomplished constitutional monarchy represented both the major element in defining the political identity of the nation, and the capstone of the political architecture of its state. The totalitarian dictatorship affected both countries: an authoritarian military dictatorship in Romania, in alliance with national-socialist Germany (1940-1944), followed by more than four decades (1947-1989) of real socialism under communist party rule under Soviet supervision, and a totalitarian nationl-socialist regime in Germany (1933-1945), followed in the Eastern part of the

[2] See Rogers Brubaker, *Citizenship and Nationhood in France and Germany*, Harvard University Press, Cambridge, Massachussetts, 1992, at p. 184: „The French understand their nation as the creation of their state, the Germans their nation as the basis of their state".

[3] In Germany supervened the brief interlude of the Weimar Republic. It is however significant that a considerable part of the interwar Germans remained deeply committed to the monarchical symbols, traditions and institutions and the affective bounds towards the new republic were yet too frail.

country – occupied by the USSR – by another regime of lawlessness of communist nature (1945-1989).

The resurgence of representative democracy and constitutionalism – after 1945 in Western Germany, and after 1989 in Eastern Germany and Romania – confronted both legal systems with similar challenges: the foundation of a political system grounded on rule of law principles, the indemnification of the victims of political crime and repression under totalitarian rule, the restitution of unlawfully confiscated property, and especially the punishment of persons responsible for crimes and abuses committed on behalf of prior rulers during the reign of a political and legal system in which either such actions were not regarded as crimes, or their perpetrators availed themselves of practical impunity for actions committed in the service of the rulers. The tension between the necessity of maintaining continuity in state functioning and stability in public offices and the imperative of a radical change of personnel of state services and of their practices and mentalities – in the first instance in the judicial and executive branches – characterized both legal systems. Although the solutions were sometimes quite different in Germany and Romania, the very existence of such issues has nevertheless practical consequences.

These circumstances determined a certain similitude in some constitutional rules and institutions. In this respect,[4] the Romanian Constitution is closer to the German Basic Law than to the constitutions of states with long established cultural and political connections to Romanian (France), or with constitutional and political systems traditionally considered relevant by Romanian scholars (USA or Great Britain).

The first resemblance is discernible in constitutional provisions on fundamental rights. The human rights catalogue of the Romanian Constitution is more comprehensive, including social and economical rights, but it is closer in respect to conception and wording to the text of the German Basic Law than to the constitutional provisions of France, USA or Great Britain. For the latter states, the central role is played by solemn declarations or bills of right with profound indisputable and historical value. The texts are lapidary and the list of protected rights is quite limited; the effectiveness of guaranteeing the protected

[4] The contrasting features are more obvious: state structure (federal in Germany and centralized in Romania), bicameralism (effective and rigorous in Romania and alleviated by a "one and a half chamber" system in Germany), the role of the head of state (active and accentuated in Romania and merely symbolic and far less incisive in Germany), local autonomy (effective and based on a long tradition in Germany and only nominal in Romania).

rights is mainly the task of the judiciary, and is sometimes enhanced by the incorporation in the Constitution of international provisions protecting human rights.[5] The totalitarian past of Germany and Romania necessarily determined the drafting of detailed and comprehensive constitutional regulations of fundamental rights and the emphatic statement of their status as binding norms on the highest legal level.

Another similarity consists in the concept of citizenship. Citizenship is acquired by birth, when both parents of the child (or even a single one) are citizens of the state, according to the *ius sanguinis* principle. This principle is common to a great number of continental European states. Anyhow, a peculiarity for both Romanian and German legal systems lies in the circumstance that in a relatively high number of cases citizenship is acquired or retrieved by persons born abroad, on the basis of descent from citizens of the respective state. This circumstance is partially a result of frequent border changes in the last century and highlights at the same time the constitutive character of ethnicity for the political community of the state.

The establishment of constitutional courts, the specialized judicial review of legislation and the scope of the court's powers also situates Romania closer to Germany than to states whose constitutions and constitutional scholarship were expressly taken into account by Romanian political deciders and academics (France, Great Britain and USA). Although the powers of the German Federal Constitutional Court (Bundesverfassungsgericht) are more comprehensive than those of its Romanian counterpart,[6] the power of the latter to exert an effective judicial review of legislation and to solve legal disputes of constitutional nature among highest authorities in the state stands for a far more extended role of the Romanian court than in the classical Western aforementioned systems. The standing, reputation and symbolic authority of the German Federal Court were built and consolidated in decades. The younger Romanian Constitutional Court has not acquired yet a similar prestige – moreover some of its decisions are

[5] Such is the case of the "Human Rights Act" of 1998 in Great Britain or, in France, of the doctrine of "le bloc de constitutionalité", conferring constitutional value on several acts, including the French Declaration of 1789 („Déclaration des droits de l'homme et du citoyen") and the European Convention of Human Rights.

[6] I mention *e.g.* the power of the German constitutional court to rule on a "constitutional complaint" (Verfassungsbeschwerde) which can be filed by everyone alleging the infringement of his or her fundamental rights, by any public authority, including the legislator and the judiciary (art. 93, pct. 4a of the Basic Law), or the possibility for municipalities to challenge directly the laws encroaching upon their right to self-government (art. 93, pct. 4b of the Basic Law).

vigorously challenged,[7] reproaching the constitutional justices for allegedly substituting their own political will and preferences to those of the vast majority of the people and of its representatives.

In the following, I will present some significant cases of reception of German constitutional law in the works of some Romanian authors of the first half of the 20th century (I), and, conversely, I'll dwell upon further on one of the most noticeable foreign writings on the Romanian Constitution of 1923, published in Germany (II). Another illustrative facet for the benefits, dangers and difficulties of the dialogue among legal cultures is the Carl Schmitt reception in Romania in the 30's and 40's (III). Finally, I will highlight some influences of the German Federal Constitutional Court on the recent case law of the Romanian Constitutional Court.

I.

High consideration, academic interest and receptivity towards German constitutional law scholarship and political and constitutional evolutions in this country are noticeable at two important Romanian professors: Constantin Stere and Constantin C. Angelescu.

I.1. Constantin Stere

Constantin Stere (1865-1936)[8] was an outstanding Romanian politician, writer, journalist and legal scholar. He taught constitutional law at the University of Jassy and was for a brief period of time (1914-1915) rector of the same university. Born under Russian rule in Bessarabia, he was involved into revolutionary activities on behalf of the Narodnik movement and was subsequently arrested before he reached 20 years of age by the Tsar's police and sent into exile in Siberia. Here, by contact with Russian intellectuals of diverse ideological orientations he becomes acquainted to Western literature on various topics of interest to him, published especially in German, but also in French or English. His university studies in Jassy, Romania, (1892-1895, after escaping from Siberia) will only complete his already defined and accomplished

[7] It is noteworthy in this respect the visceral reaction of a great part of the Romanian political establishment and mass-media to the Court's decisions that accompanied and concluded the Romanian political and constitutional crisis in Summer 2012.

[8] For a comprehensive and well documented biography, see the until now unmatched work of Zigu Ornea: *Viaţa lui Constantin Stere*, Cartea Românească, Bucureşti, vol. I: 1989, vol. II: 1991.

intellectual profile. His prodigious journalistic activity[9] focused in social and political topics of the day reveals an obvious superiority, both in level of erudition and information and in coherence and articulated thinking over most of his adversaries. His academic career is intertwined with his political one and seems to remain rather in the shadow of the latter.[10] His textbook on constitutional law[11] is drafted following the pattern of similar propaedaeutic works in German and English academic literature. He does not endeavour to exhaust any given theme, but only to facilitate access to understanding some of the essential issues, and to orienting the reader towards the relevant literature on each topic. The text displays a sound knowledge of both German and English legal academic literature.[12] The textbook outperforms similar Romanian works by an organic and thorough integration of concepts and ideas of thinkers like Kant, Hegel, Marx and Engels into a coherent jurisprudential discourse at highest academic level. Important authors of that time, such as Robert von Mohl, Rudolf von Gneist, Lorenz von Stein, Rudolf von Jhering, Otto von Gierke, Ludwig Gumplowicz, Georg Jellinek, Max von Seydel or Adolf Lasson, and other legal scholars, today rather unbeknown, like Hermann Schultze or Albert Bolze configure the horizon of legal scholarship of the best articulated Romanian

[9] The papers Stere published in various literary and political journals in Jassy and Bucharest between 1893 and 1916 were collected in three massive volumes, edited by Victor Durnea: Constantin Stere, *Publicistică*, Editura Universității "Alexandru Ioan Cuza" din Iaşi, Vol. I (1893-1905), 2010, Vol. II (1905-1909), 2012, Vol. III (1910-1916). Starting from leftist („narodnik" and socialist) positions, and evolving towards the liberal centre for grounds of political realism or opportunity, Constantin Stere is anyhow one of the very few Romanian legal academics of his time acquainted with the philosophy of Marx and Engles.

[10] Stere is appointed in 1902, with political support from his friends in the liberal party, professor of Constitutional law at the University of Jassy. In 1918 he is suspended from teaching as a consequence of his filo-German attitude displayed in his articles published in Bucharest under German military occupation (1816-1918). The most aggravated circumstance was his political activity during German occupation, challenging the necessity of maintaining the king Ferdinand (who declared war on Germany) on the throne, and culminating with an uninspired trip to Berlin.

[11] *Introducere în studiul dreptului constituțional* [=Introduction to the Study of Constitutional Law], Tipografia Editoare „Dacia", Iaşi, 1903 (henceforth: C. Stere, *Introducere*…).

[12] The presentation of German legal doctrines was not uncommon in Romanian academic scholarship (quite numerous but rather superficial references can be found in Constantin Dissescu's textbook: *Drept constituțional*, Socec, Bucureşti, 3rd edition, 1915). The acquaintance with English legal literature was however a rarity for public lawyers in Romania at the beginning of the 20th century.

textbook on constitutional law of that era. The constitutional model envisaged by Constantin Stere is obviously that of the "Anglo-Saxon race". A whole chapter is dedicated to the "Origins and evolution of the constitutional form of government in England."[13] Nevertheless, the concept of the book is made in Germany. The basic approach lies on the theory of state (Staatslehre), where the bulk of the references occur on Johann Caspar Bluntschli's work. The whole book is focused on the idea of the state, depicted in its historical evolution aiming towards parliamentary democracy – whose preeminent and most prestigious illustration were to be found at that time in the British constitutional system. But even the topics of British constitutional history are examined by taking into consideration the famous work of Rudolf von Gneist.[14] Although Stere's propaedeutic work was intended only as a starting point of a never accomplished academic endeavour, it remains a paramount academic performance for that era and surpasses the didactical rigid schematism of the other Romanian textbooks. At the same time, the textbook marks the moment of a mature and elaborated reception of Central- and West-European constitutional legal scholarship in Romania, connecting Romania to Europe on this academic field.

Faithfull to his strong political commitment to the left, after the Great War Constantin Stere joins the newly created Peasant Party (Partidul Țărănesc) and becomes in next to no time one of its key figures. On behalf of this party, he pens the draft for a new Romanian Constitution, which is endorsed by the whole party with some amendments.[15] "Stigmatized" by his recent history of collaboration with the German occupier, Stere avoids for very easy understandable reasons any explicit reference to German or German speaking authors.[16] Furthermore, it

[13] C. Stere, *Introducere*…, Chapter VIII, „*Originea şi dezvoltarea formei de stat constituțional în Anglia*", p. 181-212.

[14] Rudolf von Gneist, *Englische Verfassungsgeschichte*, Berlin: Springer, 1882. This is all the more significant, since Constantin Stere was familiar with the classical works of William Stubbs and Albert Venn Dicey, also frequently quoted in his textbook.

[15] *Ante-proect de constituție întocmit de secția de studii a partidului țărănesc cu o expunere de motive de* Constantin Stere [=Preliminary Draft of a Constitution, penned by the Peasant's Party Research Department, including an Explanatory Memorandum by Constantin Stere], Viața Românească, București, 1922 (henceforth: *Ante-proect*…). The amendments reflect the position of Virgil Madgearu, another important leader of the party, who expresses some reserve regarding the provisions on economical topics, mainly on freedom of trade-unions (art. 31 of the draft) and on the establishment of an Economic Council (art. 77-86).

[16] With a single exception: Joseph Redlich, *Englische Lokalverwaltung*. *Darstellung der inneren Verwaltung Englands in ihrer geschichtlichen Entwicklung und in ihrer gegenwärtigen Gestalt*, Leipzig, Duncker & Humblot, 1901, quoted diplomatically after the French version: *Le*

is self-evident that the mentioning of the concept of the Weimar Constitution of 11 August 1919 would have been highly inopportune. Abstaining from direct references, Stere's draft adopts some solutions of the fundamental law of interwar Germany.[17] First of all the institutions of referendum and of popular legislative initiative are to be mentioned.[18] The text of the Romanian draft is more detailed and comprehensive, in accordance to Stere's concern to avoid eventual circumventions by subsequent enforcing legislation or by administrative measures. The „High Economic Council" („Sfatul Economic Superior" – art. 77-86) constitutes an extended and amplified acquisition of the Federal Economic Council (Reichwirtschaftsrat) instituted by art. 166 of the Weimar Constitution.

I.2. Constantin C. Angelescu

Penned as a doctoral thesis under the supervision of the French law professor Joseph Barthélemy, the Constantin C. Angelescu's monograph on people's direct consultation outside elections under the Weimar Constitution[19] stands out as one of the most significant contributions on this topic in Europe. The author benefited from his status as a foreigner, remaining politically equidistant and uninvolved. He was kindly and courteously received and guided to a certain extent into the intricate or arcane matters of German state practice by competent persons, such as the ministerial counsellor (Ministerialrat) at the Federal Home Office[20] Georg Kaisenberg[21] or the preeminent public law

gouvernement local en Angleterre, par Joseph Redlich. Avec des additions par Francis W. Hirst. Traduction française par W. Oualid, Paris: V. Giard & E. Brière, 1911 (*Ante-proect*…, at pp. 34-35).

[17] This was relatively soon indicated by Friedrich A. Weinreich, in *Die Verfassung von Rumänien von 1923*, Universitätsverlag von Robert Noske in Leipzig, 1933, at pp. 60-61. Without substantiation by concrete references, the German author asserts that „numerous provisions are more or less literally extracted (entnommen), from the Weimar Constitution, and other from the English constitutional law."

[18] The provisions of art. 71-76 in Stere's draft (constituting the second section of the first chapter, on legislative power, of the third title: State Powers) bear obvious resemblance to the regulations in art. 73-75 of the Weimar Constitution.

[19] Constantin C. Angelesco, *La Consultation directe du peuple, en dehors de l'élection d'après la Constitution de Weimar*, Paris, Librairie des Facultés Emile Muller, 1933.

[20] « Ministerialrat im Reichsinnenministerium ».

[21] This can be observed not only in Angelescu's acknowledgements in the foreword of his monograph, but also in the abundant references to Kaisenberg in the bibliography: 24 works amounting to roughly a tenth of all the works listed in it. The most significant: Georg Kaisenberg,

professor Walter Jellinek. The documentation is exhaustive and well oriented[22] and the date of the drafting of his thesis – the end of the Weimar Republic – afforded him the opportunity to grasp the whole picture of the legal architecture and political functioning of referendum and people's legislative initiative during the entire existence of the dying Republic.

In its first part, the monograph describes the legislative history regarding the drafting of the provisions on the referendum and the popular initiative in the Weimar Constitution. The much larger second part examines the veto right of the Reich President, of the Federal Council (Reichsrat), the people's veto, and the popular legislative initiative (Chapter IV, p. 294-295 – the most extensive chapter in the book, thoroughly depicting all the nine situations where this procedure was carried on), the popular initiative and referendum on territorial rearrangements, the deposition of the President of the Reich, the popular initiative and referendum on international treaties, the alteration or abrogation of laws enacted by means of a referendum, and finally, the costs of popular initiative and referendum.

The author reaches to the conclusion that the fears expressed primarily, at the designing of the Weimar Constitution in regard to popular legislative[23] initiative proved in fact to be ill-founded. Political instability and extremist disturbances – which eventually amounted to the dissolution of democracy in the first German republic – were not a consequence of these provisions. The popular legislative initiative and the referendum allowed the German nation to express its will on specific issues, and the decisions adopted as a result of a referendum were characterized rather by prudence and conservatism. On the other hand, Angelescu approves the reluctant trend in German legal scholarship[24] rejecting

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Volksentscheid un Volksbegehren. Reichsgesetz über den Volksentscheid nebst Ausführungsbestimmungen, 2nd edition, Carl Heymanns, Berlin, 1926; idem, *Die Wahl zum Reichstag. Fuehrer für die Reichstagswahlen auf Grund der neuen Reichswahlgesetzes und der neuen Reichsstimmordnung*, 4th edition, Verlag für Politik und Wirtschaft, Berlin, 1930. In addition to these monographs, numerous papers and articles – including some newspaper articles – are listed in the bibliography.

[22] In the introduction to his monograph, Angelescu criticises another comprehensive work in this field (Yves Le Dantec, *L'initiative populaire, le referendum et le plébiscite dans le Reich et les pays allemandes*, thèse, Paris, Association des hautes études, 1932) on grounds of lacking selectivity in elaborating the biography, which besides omits some major contributions to the topic.

[23] It is noticeable above all the dismissive opinion of Hugo Preuss, the „father" of the Weimar Constitution.

[24] Endorsed by Hans Nawiasky and Georg Kaisenberg.

the idea of establishing of a mandatory referendum for popular legislative initiatives, aiming at a constitutional amendment[25] in this respect. Finally, the author emphasizes that popular legislative initiative and referendum faced, for the time being, an uncertain future. Anyhow, the effective functioning of these institutions is possible only under democratic rule and is excluded in a dictatorship.[26]

Indirectly, Angelscu's monograph displays a soberly balanced and unpartisan conclusion on the performances and the functioning of the Weimar Republic's political system.

II. A German on Romania's Interwar Constitution – The Monograph of Friedrich Weinreich

Published within the book series of the Leipzig University Institute for Politics, Compared Public Law, and International Public Law (Institut für Politik, ausländisches öfentliches Recht und Völkerrecht), Friedrich Weinreich's monograph[27] stands out as one of the most significant contributions on the Romanian Constitution of 1923.[28] As usual for such a topic, Weinreich has thoroughly researched the relevant Romanian scholarship, without omitting any important author (Constantin Dissescu, Paul Negulescu, Constantin Stere, I. C. Filitti, Constantin C. Angelescu, Romul Boilă, Gheorghe Alexianu, A. Lascarov-Moldoveanu, Sergiu D. Ionescu, Victor Onişor, George Tătărăscu, Ion N. Stambulecu, Victor Orescu, Anibal Teodorescu, Constantin G. Vasiliu şi M. Văraru). The general tone of the text is objective and cautious; historical and political events are briefly and accurately depicted, on the basis of

[25] Advocated by Carl Tannert in *Die Fehlgestalt des Volksentscheids. Gesetzesvorschlag zur Änderung der Art. 75 und 76 Abs. 1 Satz 4 der Reichsverfassung*, Marcus Verlag, Breslau, 1929.

[26] C. Angelescu, *op. cit*., p. 620.

[27] Friedrich A. Weinreich, *Die Verfassung von Rumänien von 1923*, Universitätsverlag von Robert Noske in Leipzig, 1933. The publishing year must not lead to the conclusion of a political perspective closing to National-Socialist viewpoints. This is obvious also from the abundant quotation of "non-Aryan" scholars, such as Paul Laband, Georg Jellinek, Joseph L. Kunz, Karl Strupp, Hans Nawiasky or Siegfried Brie.

[28] For the German legal scholarship, it is also noticeable the work of Ernst Schmidt: *Die verfassungsrechtliche und politische Struktur des rumänischen Staates in ihrer historischen Entwicklung*, München, 1932, 157 p. In regart both to documentation and method, the book is far below Weinreich's monograph. See the dismissive review of Constantin C. Angelescu in "Revista de Drept Public" [=Public Law Review], vol. X (1934), pp. 266-268.

comprehensive and time consuming documentation, often outreaching the boundaries of a purely legal disquisition. The political and constitutional evolution of the Romanian Principalities and of the subsequent Romanian nation-state is outlined against the background of South-Eastern Europe, taking also into consideration some of the legal scholarship of the respective era. The drafting and the adoption of the Constitution of the 28th March 1923 is dealt with certain complaisance for the peculiar political circumstances of the time. Contrary to criticism articulated by most of the opposition parties,[29] the author asserts that the adoption of the fundamental law in disregard of the provisions on constitutional amendment in the 1866 Constitution – in force at that time[30] – does not infringe the principle of national sovereignty. The convocation of the Constituent Assembly was performed "in accordance – to the greatest possible extent – with the Constitution of 1866."[31] This conclusion, indicating rather an attitude of political realism than concern for rigorous observance of the constitutional text, was endorsed by the majority of the legal scholars and by the subsequent practice of all political parties.

Another sensitive issue examined briefly but pertinently by Weinreich is the dynastical crisis of 1926-1930. The crown prince Carol, the eldest son of King Ferdinand I declared in December 1925 his renunciation of the throne[32] succession, and shortly afterwards the King passes away (on the 20th July 1927). The exercise of the prerogatives of the underage King Mihai is assigned to a Regency Council. This Council did not provide for political stability in the country and was not treated with the same degree of deference deemed adequate

[29] The Peasant's Party (Partidul Țărănesc) and the National Party (representing the Transylvanian Romanians) declined to take part at the parliamentary debate on the Constitution and at the final vote on its adoption.

[30] Art. 129 of this Constitution provided for an amendment process in two steps: first of all, a declaration had to be adopted, stating the necessity of amendment and determining the articles of the Constitution subjected to it. By adopting the declaration, in three successive readings, both chambers were *de iure* dissolved. The new elected Parliament passes subsequently the law amending the Constitution, but only within the limits of the articles prior determined in the declaration. The Liberal's Party Cabinet (1922-1926) circumvented these provisions by announcing that chambers formed as a result of the proximal parliamentary elections, scheduled for the 27th March 1922, will adopt a new Constitution.

[31] Fr. A. Weinreich, *op. cit.*, pp. 58-59

[32] The renunciation is expressed in a letter addressed to his father (28th December 1925), and followed by a law enacted by the Parliament on the 4th January 1926, taking notice of the act of renunciation and establishing the succession to the throne in favor of Carol's underage son, Mihai.

towards a constitutional monarch, as a "neutral power". As a result, the idea of the return of the former crown prince Carol becomes increasingly popular. The return takes place in the 6th of June 1930, with tacit agreement from the Government controlled by the National-Peasant Party. Two days later (8th June 1930) the Parliament passes a new law revoking Carlo's renunciation to the throne and fully reinstating him into his royal rights. The huge political relevance of the issue of constitutionality or even legal validity of this legislative act is very obvious. In subsequent academic debates, some arguments such as the irregularity of the act of renunciation or the alleged illegality of the legislative chambers[33] elected in 1922 (which ruled in 1926 on the act of renunciation) amounting to the annulment of the 1926 law, were actually illegal were invoked.[34] Briefly resuming the opinions of Romanian constitutional scholarship on this topic, Weinreich trenchantly endorses the validity of the act of renunciation to the throne, highlighting at the same time the weaknesses of the law passed on 8th of June 1930: The annulment of the act of renunciation does not entail only the change in the order of succession to the throne, but also implies the dethronement of the existing King (Mihai I). Legally speaking, the 1930 law was invalid (ungültig), but from the political perspective, Carol II was anyhow King of Romania and accepted as such by all relevant political and social actors: the people, the Parliament, the Government and the Regency.[35] His equidistant and neutral position as a foreigner allowed Weinreich to asses the situation with more detachment and objectivity. He highlights realistically the politically irrevocable character of the 1930 decisions, without ignoring the controversial legal and constitutional issues.

The intricate topic of judicial review of legislation was also examined by the German author.[36] The well-known decision of the Romanian Supreme Court (Curtea de Casație) of 16th March 1912 in the "Tramway-Case"[37] is regarded

[33] Due to the fact that the election was officially announced for the adoption of a new Constitution, contrary to the provisions on the amendment procedure of the Constitution of 1866, in force at that time.

[34] Romul Boilă, *Die Verfassung und Verwaltung Rumäniens seit dem Weltkriege*, in „Jahrbuch des öffentlichen Rechts", XVIII. Bd. (1930), pp. 324 et seq., at p. 351.

[35] Fr. A. Weinreich, *op.cit.,* p. 98-99.

[36] *Ibid*., pp. 201-209.

[37] Created by a special law passed in 1909 by a Parliament with liberal majority, the Tramway Company of Bucharest ("Societatea Tramvaielor Bucureşti", hereinafter: STB) was based on the association of private banks and businessmen (mainly liberals) with the Bucharest municipality (than under liberal control). The conservative majority formed in 1911 considering

with caution by Weinreich, who endorses the dissenting opinion of judge I. Manu from the Ilfov Court (Tribunalul Ilfov). Manu considers the provisions of article 108 of the 1864 Romanian Criminal Code[38] – concerning judicial power abuse – as an express prohibition of ruling on the validity (even in regard to constitutionality) of any applicable law adopted by the Parliament.

On the other hand, Weinriech approved the system of concentrated judicial review of legislation established by the Constitution of 28th of March 1923. According to its article 103, paragraph 1, only the Court of Cassation (Curtea de Casație) in plenary session had the power to review the constitutionality of laws and to declare inapplicable the legislation contravening the Constitution. The effects of the Court's decision were limited to that specific trial. The author asserts that for Romania, judicial review of legislation constitutes a significant step forward to a state based on the principles of rule of law (Rechtsstaat).[39] As in other countries, this institution is to be highly appreciated, since the much feared politicizing of justice predicted by its critics did not occur.

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that the STB Statute were far too unfavourable for the municipality presses for a substantial amendment thereof. The government issues a cabinet order (Jurnal al Consiliului de Miniştri) adopting new STB-statues, more favourable to the municipality and dissatisfactory for the private associates. The latter file a complaint on behalf of the STB against the municipality and the state, at the local county court (Tribunalul Ilfov), requesting the annulment of the order issued by the conservative cabinet. At 18th of December 1911, while the trial was still pending, the conservative controlled Parliament issues a retroactive law named "interpretative of the 1909 law" imposing to the shareholders the option between accepting the new statutes and dispossession of their shares for a compensation amounting to the value of the invested capital plus 6% *per anum* interest. The lawyers representing the defendants (Bucharest Municipality and the Ministry of Interior, on behalf of the State) request, at the proximate hearing after the adoption of the "interpretative" law, the postponement of the procedure and the fixing of date for the hearing subsequent to the reorganizing of the STB in accordance with the new statutes imposed by the new law. The petitioners object, claiming the unconstitutionality of the 1911 law. The court admits the objection (excepția de neconstituționalitate) and rules that the contested law is unconstitutional, as it represents an expropriation prohibited by art. 17 of the fundamental law (inviolability of private property), as it furthermore constitutes an encroachment upon judicial power, in violation of article 36 of the Constitution ("the judicial power is carried on by courts and tribunals") and it represents also a breach of article 14 (no one can be deprived against his will by his judge established by law). The decision of the Ilfov Court (Tribunalul Ilfov), rendered on the 2nd February 1912 was subsequently confirmed by the Supreme Court (Curtea de Casație) at the 14th March 1912.

[38] This article followed the wording of article 127 of the French Criminal Code. In France, the most legal authors construed this text as a prohibition of judicial review of laws.

[39] Fr. A. Weinreich, *op. cit.*, p. 208.

Altogether, it is noteworthy that Weinreich discussed all relevant issues and institutions of the Romanian constitutional system using consequently a consistent methodology and taking into consideration of significant European public law authors, mainly Germans, but also French, British, Belgian or Italian (Georg Anschütz, Günther Holstein, Georg Jellinek, Paul Laband, Georg Meyer, Hans Nawiasky, Carl Schmitt, Rudolf Smend, Karl Strupp, Léon Duguit, Adhémar Esmein, Félix Moreau, Paul Errera, Maurice Vauthier, Jean-Joseph Thonissen, James Bryce, A. V. Dicey, or Vittorio Emanuele Orlando). Often some controversial issues are examined from the viewpoint of legislative or doctrinal solutions from other European legal systems, or at least, taking them into account.[40] Alike other central and eastern European legal and constitutional systems,[41] the Romanian system is comprehended as integrant part of an European constitutional culture, in which the political institutions manifest essential similarities and the political and constitutional experience is highly convertible. Unfortunately, subsequent political developments, both in Germany and in Romania, hampered an adequate reception of this book.[42] After the economic crisis of 1929-1933 (which partially overlapped the dynastical crisis of 1926-1930), the political life in Romania becomes increasingly tensed and antagonistic. As a result, the confidence in democratic political parties, in Parliament and even in the entire system of the Constitution of 28th March 1923 fades away.[43]

[40] See *e.g.* Fr. A. Weinreich, *op. cit.*, pp. 41-48, 64-65, 66-68, 73-77, 82-84, 86-87, 92, 98, 109-111, 113-117, 134-135, 141-143, 176-177, 201-205.

[41] The book series of the Leipzig University Institute for Politics, Co0mpared Public Law and Public International Law included, at the time Weinreich published his monograph, contributions on legal and constitutional developments in Czechoslovakia, Lithuania, Latvia, Bulgaria, Poland, France, Switzerland, and furthermore, some papers on public law developments in extra-European countries.

[42] Anyhow, the monograph was favourably reviewed – with some punctual objections – by Constantin C. Angelescu in "Revista de Drept Public", vol. X (1934), pp. 268-272. The reviewer criticizes the lack of a final general conclusion, the excessive weight ascribed to purely theoretical issues (separation of powers, general characteristics of parliamentary monarchy, royal prerogatives, parliamentary system, bicameralism etc.), and some small errors of detail.

[43] For a general assessment of the era, see Hans-Christian Maner, *Parlamentarismul în România*: *1930-1940* [*Parliamentarism in Romania, 1930-1940*], Editura Enciclopedică, Bucureşti, 2004 (original edition: *Parlamentarismus in Rumänien* (*1930-1940*) – *Demokratie im autoritären Umfeld*, München (Südosteuropäische Arbeiten, 101), 1997).

III. Carl Schmitt Reception in Romania

Unlike other German public law scholars – whose reception in Romania was generally mediated by French authors – Carl Schmitt was perceived directly and relatively soon in Romanian legal literature. This is largely a consequence of his entanglement with National-Socialism. After 1939, when Romania's geopolitical situation dramatically changed, the interest for German public law scholars focused on authors perceived as emblematic for National-Socialist rule. Schhmitt's booklet *Staat-Bewegung-Volk*[44] was translated into Romanian,[45] since the author of the translation wrongly assumed it constitutes an official depiction of the political organization of Hitler's state. Obviously, the translator was not aware of Schmitt's political position; at this time, although he was still a professor at the Berlin University, he held no politically relevant office and even the translated paper had been reluctantly and adversely reviewed by genuine national-socialist authors.[46]

One of the future leaders of youth organization of the national-liberals (the most important main-stream party of Romania), Mihai Fărcăşanu,[47] penned his doctoral thesis in 1938 under Carl Schmitt's supervision.[48] At the first sight, it

[44] Carl Schmitt, *Staat – Bewegung – Volk. Über die Dreigliederung der politischen Einheit*, Hanseatische Verlagsanstalt, Hamburg, 1933.

[45] Carl Schmitt, *Stat - Mişcare – Popor. Despre întreita articulare a unității politice*, Tipografia Modernă, Constanța, 1939, 51 p. The author of the translation, Mircea I. Goruneanu, drafted later a doctoral thesis on the "Führerprinzip": *Principiul conducerii hierarhice în Germania național-socialistă*, Teză pentru doctoratul economico-politic, Bucureşti, Tiparul Românesc, 1941, 143 p.

[46] Authors like Reinhard Höhn or Otto Koellrueter blamed the paper for highlighting excessively the role of the state to the disadvantage of the "movement" ("Bewegung").

[47] Fărcăşanu lead the youth organization from 1944 to1947. He was one of the most hated public figures for the communist rulers. In exile, he continued his political activities and published numerous press articles against the communist regimes. His politically relevant publications are collected in Mihail Fărcăşanu, *Viitorul libertății. Publicistică din țară şi din exil* (*1944-1963*) [*The Fuure of Freedom*. *Journal articles from home and from exile* (*1944-1963*)], Editura Polirom, Iaşi, 2013. He is also the author of a successful novel, *Frunzele nu mai sunt aceleaşi* (Bucureşti: Cultura Națională, 1946, published under the pen name Mihail Villara) relying heavily on his personal experience as doctoral student in Germany. Here he depicts Carl Schmitt, under the pseudonym „Michael Göring", which remained unnoticed by coevals. For a correct assessment of the identity of this fictional character, see Ion Papuc, *Un elev român al lui Carl Schmitt* [*A Romanian disciple of Carl Schmitt*], in „Convorbiri literare", June 2006, nr. 6 (126), p. 113-117 and July 2006, nr. 7 (127), pp. 97-102.

[48] Mihail Fărcăşanu, *Über die geistesgeschichtliche Entwickung des Begriffs der Monarchie*, K. Triltsch, Würzburg, Inaugural-Dissertation Berlin, 1938. The Romanian

may be surprising that a young liberal works on a doctoral thesis under the mentoring of a staunch and renowned anti-liberal like Carl Schmitt. The incompatibility is not so drastic as it seems to be. Romanian liberalism is coined by a strong national agenda, leaning to statism and to a non-ideological, reason-of-state approach in the allegiance to Western Powers. The modernization of Romanian society and of the state promoted by the liberals was conceived rather than a prerequisite of the creation of a strong national state fulfilling the historical task of national unity.

Fărcăşanu's thesis is a radical apology of monarchy and at the same time a critique of abstract democracy. It finds it's place rather in the fields of political sciences or history of ideas than in the austere domain of public law. The bibliographical apparatus is extensive and the frequent incursions in theology or history document the vast erudition of the author. However the style is predominantly polemical. In this respect, it differs from Schmitt's sober, clinical and reticent style. Apparently Fărcăşanu stated in vehement and spirited manner what Schmitt affords only to suggest within a seemingly equidistant depiction. Intense passions and virulent hostility – saved by Schmitt for his personal papers[49] – emerge here manifestly. In a climate ideologically and intellectually still dominated by paradigms of liberal thinking,[50] Fărcăşanu makes unabashed statements, as if it was self-evident, on the irrelevance of separation of powers, on the oligarchic character of modern democracy or on the antinomy between people and republicanism.

The first sic chapters of the thesis depict synthetically the evolution of political ideas and institutions from a monarchical viewpoint. The seventh chapter – constituting the focal point of the whole book – is dedicated to the actual subject matter of the research, the social monarchy, and relies heavily on

expanded version is published in 1940: *Monarhia social* [=*The Social Monarchy*], Editura Fundației pentru Literatură şi Artă „Regele Carol II", Bucureşti, 1940. It was re-edited after more than half of a century: Mihai Fărcăşanu, *Monarhia socială*, under supervision of Marin Diaconu and Ion Papuc, Romania Press, Bucureşti, 2008. The following references are related to this new edition (henceforth: M. Fărcăşanu, *Monarhia*...).

[49] See e.g. *Glossarium – Aufzeichnungen der Jahre 1947-1952*, Duncker & Humblot. Berlin, 1991; idem, *Tagebücher. 1930-1934*, edited by Wolfgang Schuller, Akademie-Verlag, Berlin, 2010.

[50] It is to be mentioned that although the political climate changed in Romania to a considerable extent, public law scholars still adhered to the concepts, themes and terminology classical liberal legal thinking.

the work of Lorenz von Stein,[51] with some incursions in the works of Rudolf von Gneist. The French Revolution is depicted predominantly in dark colors, with frequent polemical assertions, as a practical fulfillment of 18th century's rationalism by a "brutal assault of abstract ideas against concrete realities."[52] Lorenz von Stein's concept lies in Fărcăşanu's opinion at the antipode of violent enforcement of abstract ideas over social reality. The social organism is conceived from the perspective of a dualism between state and society, where the state stands for the principle of freedom and the society for bondage (Unfreiheit), as a consequence of inequality which constitutes the basis of any social organization. The state is the regulator of social life, preventing the hierarchical order from ossification, and monarchy asserts itself as a reaction against aristocratic despotism. This line of reasoning is not entirely new: the civil religion of abstract constitutionalism promoted by the French Revolution was rejected from a skeptical perspective and by the sociological or proto-sociological approach of authors like Luis de Bonald, Joseph de Maistre, Edmund Burke, Alexis de Tocqueville, or later, Hippolyte Taine. The political struggle for imposing abstract ideals leads easily to assertion and consolidation of the social, economical and eventually political positions of pre-existing or emerging elite (oligarchy). The novelty in Lorenz von Stein's approach lies in the conceptualization of "class struggle", perceived sharply in its explosive potential, disruptive both for social order and for individual freedom. The antagonism of interests between labor and capital has to be perceived and conciliated by the state, in pursuance of the common interest of the whole society. Unlike Marxism, the solution was not the sharpening of class struggle and suppression of private property, but the defense of a social order grounded on the solidarity of the ruling class with the "lower people"; the latter had to be encouraged towards social assent and self-assertion and accumulation of wealth and capital. Property played a central role in Lorenz von Stein's view. It is the manifestation of materialized liberty and an incentive for accomplishment.[53]

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[51] Especially his fundamental opus *Geschichte der sozialen Bewegung in Frankreich von 1789 bis auf unsere Tage* (1850), hrsg. von Gottfried Salomon, Bd. 1, *Der Begriff der Gesellschaft und die soziale Geschichte der französischen Revolution bis zum Jahre 1830*, Bd. 2, *Die industrielle Gesellschaft, der Sozialismus und Kommunismus Frankreichs von 1830 bis 1848*, Bd. 3, *Das Königtum, die Republik und die Souveränität der französischen Gesellschaft seit der Februarrevolution 1921*, München, Drei Masken Verlag, 1921.

[52] M. Fărcăşanu, *Monarhia*..., p. 133.

[53] See, for a brief but laudatory assessment of the relevance of Lorenz von Stein for legal theory,: Bernd Rüthers, Christian Fischer şi Axel Birk, *Rechtstheorie mit juristischer*

The theory of the institution, coined by scholars like Maurice Hauriou, Santi Romano and Georges Renard and positively received by Carl Schmitt[54] plays an important role in Fărcăşanu's understanding of Lorenz von Stein's work. Monarchy is the institution *par excellence*. It safeguards the neutral character of the state, above private interests – especially of possessing classes –, and strives for realization of the common good. The implementation of social reforms in the interest of the majority is consequently the major political task of a viable and sustainable monarchy. The Romanian expanded version of the thesis appeared in 1940, during King Carol the II's "Royal Dictatorship". Apart from a certain degree of opportunism on the part of the author, the publication had to an incontestable political aim: to awake the ruling class and even the king and to channel in some measure political decisions in a direction deemed appropriate by Schmitt's disciple. The abrupt end of Kong Carol's reign (on the 6th of September 1940) rendered this endeavor inopportune and overshadowed undeservedly this original and non-conformist book.

A swift academic echo in Romania was prompted by Schmitt's well known book *Völkerrechtliche Grossraumordnung mit Interventionsverbot für*

Methodenmlehre, 6. Auflage, München: C.H. Beck, 2011, pp. 319-324, especially pp. 321-322. The authors furthermore that the importance of von Stein (appart from scholarship on administrative science, sociology and public law) is generally neglected in general works of legal theory. (p. 324). For an ssessment of the relevance of von Stein in the context of hi stime and for today, see: Ernst Wolfgang Böckenförde, *Lorenz von Stein als Theoretiker der Bewegung von Staat und Gesellschaft zum Sozialstaat*, în *Staat, Gesellschaft, Freiheit – Studien zur Staatstheorie und zum Verfassungsrecht*, Suhrkamp, Frankfurt, 1976, pp. 146-184; Dirk Blasius, *Lorenz von Steins Sozialstaat im Kontext der „Zeitgeschichte" des 19. Jahrhunderts*, şi Utz Schliesky, *Verfassung und Verwaltung bei Lorenz von Stein*, ambele în: Stefan Koslowski (ed.), *Lorenz von Stein und der Sozialstaat*, Nomos Verlagsgesellschaft, Baden-Baden (Reihe Staatsverständnisse: vol. 63), 2014, pp. 30-41, and respectively pp. 83-96. In regard to his contribution on administrativ law in the context of the history of public law and of jurisprudence in Germany, see Michael Stolleis, *Public Law in Germany 1800-1914*, Berghahn Books, New York, Oxford, 2001, pp. 381-384. Carl Schmitt has quite many references to von Stein in his *Verfassungslehre* (Duncker & Humblot, München and Leipzig, 1928, at pp. 6-7, 54, 132, 141, 212, 241, 253, and especially 308-311).

[54] Carl Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens*, Hamburg, Hanseatische Verlagsanstalt, 1934. For a critical view on the versatility of legal institutional thinking, concerning mainly its possible commissioning for totalitarian rule, see: Bernd Rüthers, *Institutionelles Rechtsdenken im Wandel der Verfassungsepochen*, Bad Homburg v.d.H. / Berlin / Zürich, Gehlen Verlag, 1970; and an expanded version : *Wir denken die Rechtsbegriffe um... Die Weltanschauung als Auslegungsprinzip*, Zürich, Edition Interfrom, 1987.

raumfremde Mächte,[55] where the German scholar pleads for a reinterpretation of the Monroe doctrine, applied *mutatis mutandis* on the political conditions of Europe at that time. The paper is a slightly changed version of his oral presentation held at the 1st April 1939 at the Institute for International Law (Institut für Internationales Recht) in Kiel. All in all, the paper is rather an interpretation and expounding of the existent international situation (and implicitly a plea for *status quo*) than an anticipated apology of future aggressions.[56]

Mircea Djuvara (1886-1945), an important legal philosopher in Bucharest who took part at the Kiel conference, where he presented a paper on the new Romanian Constitution of 1938,[57] reviewed politely but rather dismissive Schmitt's work.[58] This booklet was also mentioned in Djuvara's extensive paper *Le nouvel essai de philosophie politique et juridique en Allemagne.*[59] Like other Romanian academics of that time, he wrongly assumed that he was close to the regime's ruler circles and his opinions expressed an official standpoint. Close to Schmitt from a generational viewpoint, Djuvara was nevertheless situated far away from the ideological and cultural horizon of the Berlin professor. A real dialogue among this two scholars could not take place, although they subsequently met again.[60]

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[55] Published in 1939 at Deutscher Rechtsverlag, Berlin and Vienna

[56] The work was repeatedly criticized for justifying National-Socialist aggressive policy. This criticism ignores however that a such Monroe doctrine in German clothes had had to start inevitable from the prerequisite of pacific relations with other great powers. Only in the absence of any significant threat from Germany, the other powers could reasonably be deemed to concede to this country the freedom of movement requested by an actual implementation of the concept of " Großraum" (great space, *i.e.* sphere of influence), as Schmitt understood it. See also Marius Balan, *Metamorfoze ale dreptului public si atitudini ale juriştilor in anii naţional-socialismului. Un studiu de caz: Carl Schmitt* [Law's Metamorphoses and Lawyers Responses under National-Socialism. A Case Study: Carl Schmitt], in "Analele ştiinţifice ale Universităţii «Alexandru Ioan Cuza» din Iaşi", Vol. XLVI-XLVII, 2001-2002, pp. 49-78, la pp. 55 et seq. For a overview on the echoes of Schmit's booklet and on the ensuing controversies, see Günther Maschke, *Zur unmittelbaren Diskussion und Rezeption der "Großraumordnung"*, in Carl Schmitt, *Staat, Großraum, Nomos. Arbeiten aus den Jahren 1916-1969*, herausgegeben von Günter Maschke, Duncker&Humblot, Berlin, 1995, pp. 341-370.

[57] The paper was later published in the volume of the conference: *Die neue rumänische Verfassung*, in Paul Ritterbusch, *Politische Wissenschaft*, Deutscher Rechtsverlag, Berlin, 1940.

[58] "Analele Facultăţii de Drept din Bucureşti" (1939), at pp. 389 and seq.

[59] "Revista de Drept Public", Anul XIV (1939), nr. 1-2, pp. 97-156 (at pp. 137-142).

[60] Mircea Djuvara held later two conferences at the Romanian Institute in Berlin (17th January 1942) and at the Berlin University (18th January 1942). The academic substance of his

During the conference tour Schmitt held in several European capitals (within the framework of German propaganda struggle on cultural ground, which mobilized some of the outstanding academic personalities), he visited Bucharest in February 1943.[61] He held two conferences: one about the current situation of European jurisprudence, and the second on "land and see" (Land und Meer). He was welcomed by the dean of the Law faculty of the Bucharest University, and received afterwards by the Romanian deputy prime minister and minister of foreign affairs, Mihai Antonescu, who was also a professor of international law.[62] The contacts with leading public law professors from the Bucharest Faculty were affable, correct and polite, but not quite sparking. Schmitt was much more interested in the conversation with the young legal historian and Roman lawyer Valentin Al. Georgescu and with the history professor George Brătianu.

IV. The Practice of the Romanian Constitutional Court

For Romania, in recent years the influence of German legal and constitutional thinking was more pregnant in the realm of the judiciary than in that of the doctrine. Within the context of the dialogue among constitutional

dated, correct and droughty conferences determined Schmitt to maliciously name him a "museum piece" (Museumsstück), according to the account of the Romanian diplomat Cristian Amzăr (*Jurnal berlinez*, Editura România Press, Bucureşti, 2005, p. 283). At the same place, notes: "what appalled me at both conferences was the mimetic 'Heil Hitler!' at the end of the lecture. I can understand someone to be and remain a liberal, but please, not to become a wretch! " the conflict of generations and mentalities resounds clearly from this trenchant lines, of an intimate diary not intended for publishing. The remarkable professor, Mircea Djuvara, a scholar of encyclopaedic learning who has the merit of „acclimatizing" in Romanian the thinking of Kant and the ideas and works of German authors like Rudolf Stammler, Karl Binding or Gustav Radbruch, was unable to grasp the fundamental shift of paradigm in political and legal thinking after 1933. He presents ideas and concepts of an era considered to be outworn by the new rulers and contents himself with some mimetic and strident adaptations to the external forms of the discourse of the day. This inadequacy has not gone unnoticed by Dumitru Amzăr, who despite his right-leaning orientation, shows himself (in the privacy of his diary) critical towards the regime and the rulers of the state where he was accredited as a diplomat.

[61] Christian Tilitzki, *Die Vortragsreisen Carl Schmitts während des Zweiten Weltkrieges*, in „Schmittiana – Beiträge zu Leben und Werk Carl Schmitts", Band V 1998, Duncker & Humblot, Berlin, pp. 191-271, at pp. 212-225.

[62] After this visit, Schmitt receives three leather-bound volumes of Mihai Antonescu's "boring" works, lavishly edited (on state expenses). Supposedly, Schmitt was not very impressed. See Chr. Tilitzki, *loc. cit.,* p. 221, at note 95.

justices,[63] certain institutions and argumentative models primarily formulated and crystallized in German scholarship and judicial practice were received in Romanian judicial practice. It is noteworthy that this reception was mediated; German concepts and legal institutions were taken into consideration only a long time after their relevance and validity have been received on European level. The proportionality principle[64] is the most relevant example in this respect. Its gestation and subsequent evolution in German public law[65] did not arouse any special interest on the part of Romanian legal scholarship.[66] The proportionality

[63] Tudorel Toader, Marieta Safta, *Dialogul judecătorilor constituționali* [=*Dialogue among Constitutional Justices*], Ed. Universul Juridic, Bucureşti, 2015. Robert Badinter, Stephen Breyer (eds.), *Judges in contemporary Democracy*: *An International Conversation*, New York University Press, New York and London, 2004.

[64] The proportionality principle (or "prohibition of disproportionate measures" – „Übermaßverbot") was developed within the practice of the Bundesverfassungsgericht expounding the rule of law principle (Rechtsstaatsgrundsatz). It is considered as a general rule in any „Rechtsstaat", governing the relations between state and individuals, and at the same time as one of the leading principles of justice under the fundamental law. Its origins lie in the basic idea that state acts and measures limiting individual freedom have to be justified by a determinable and nameable purpose (Zweck), and have also to be measurable – in respect of their scope and extent – in relation to this purpose. The proportionality principle observation will ensure that no citizen be subjected to limitless or arbitrary state power. See in this respect: Thomas Reuter, *Die Verhältnismäßigkeit im engeren Sinne – das unbekannte Wesen*, in „Jura", Heft 7/2009, p. 511-518; Florian Becker, § 21, *Verhältnismäßigkeit* , in Hanno Kube, Rudolf Mellinghoff, Gerd Morgenthaler, Ulrich Palm, Thomas Puhl, Christian Seiler (Hrsg.), *Leitgedanken des Rechts zu Staat und Verfassung - Studienasugabe*, C.F. Müller, Heidelberg, 2015, pp. 225-236; see further Christian Hillgruber, § 200: *Grundrechtlicher Schutzbereich, Grundrechtsausgestaltung und Grundrechtseingriff* and § 201, *Grundrechtsschranken*, in *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Dritte Auflage, Band IX, *Allgemeine Grundrechtslehren*, Dritte Auflage, C.F. Müller, Heidelberg, 2011, at pp. 981-1032 and respectively pp. 1033-1076, and also Niels Petersen, *Verhältnismäßigkeit als Rationalitätskontrolle*: *Eine rechtsempirische Studie verfassungsrechtlicher Rechtsprechung zu den Freiheitsrechten*, Mohr (Siebeck), Tübingen, 2015 (Jus publicum, 258).

[65] See Aharon Barak, *Proportionality*: *Constitutional Rights and their Limitations*, Cambridge University Press, Cambridge, New York, 2012, pp. 179-185.

[66] *E.g*., even in the monograph dedicated to this very theme (Marius Andreescu, *Principiul proporționalității în dreptul constituțional român* [=*The Principle of Proportionality in Romanian Constitutional Law*], C.H. Beck, Bucureşti, 2007, at pp. 112-113), the priority of the German judicial practice is mentioned only lapidary in the chapter regarding the constitutional texts referring to proportionality (which as well known are absent in the German Basic Law); the chapter in this book on the role of judicial practice in defining and clarifying proportionality examines only the European Court of Human Rights and the European Court of Justice.

principle was received only via legal practice of the European Court of Human Rights.[67]

Although patterns of reasoning pretty close to those of the proportionality principle were used earlier by the Romanian Constitutional Court,[68] its explicit acquisition under quotation of the German model occurs for the first time in the Decision no. 266 rendered on 21st May 2013.[69] In this case, the Romanian Constitutional Court ruled on the proportionality of an interference in Cable TV operators' private property. They were bound by a special statutory provision to include in their cable-TV service offer programs of Romanian State Broadcasting Corporation (Televiziunea Română) and of other TV programs produced by private broadcasters under Romanian jurisdiction, within the limit of to 25% of the total number of TV-Program services delivered by the respective network. The Court examined the admissibility of such a limitation of the protected scope of article 44 of the Constitution (right of private property) from the perspective of proportionality principle. Analyzing the legitimacy of the interference, the majority stated that "by imposing a *must*-carry obligation, the legislator aimed to achieve the public interest goals defined in article 3 of the Law No 504/2002, according to which in distributing and retransmitting of TV-program services, political and social pluralism, and cultural, linguistic and

[67] It is noticeable that the 2003 amended version art. 53 of the Romanian Constitution (Restrictions on the exercise of certain rights and freedoms) replicates the wording of the 1950 European Convention on Human Rights: measures prescribed by law, with legitimate aim, and necessary in a democratic society. In addition "[t]he measure shall be proportional to the situation having caused it, applied without discrimination, and without infringing the existence of such right or freedom" (art. 53, par. 2, last sentence).

[68] See *e.g.* the Decision nr. 1258/2009 (Monitorul Oficial al României (Romania's Official Gazette, hereinafter: M. Of.), no. 798 from 23rd November 2009), where the Court states, in consonance with the wording of the Constitution (art. 53) and the terminology of the European Court of Human Rights, that "legislative measures affecting the exercise of fundamental rights and freedoms have to aim to a legitimate purpose, consisting of protecting national security, public safety, defence of public order, prevention of criminal offences and protection of other persons' rights and interests; [furthermore] they have to be necessary in a democratic society and proportional to the situation having caused them, to be applied in a non-discriminatory manner and to let unaffected the existence of the restricted right or freedom."

[69] M. Of. no. 443 from 19th July 2013. See Maria Mona Pivniceru, Károly Benke, *Receptarea principiului proporționalității în jurisprudența Curții Constituționale a României. Influențe constituționale germane* / *The Principle of Proportionality Reflected in the Case Law of the Constitutional Court of Romania. German Constitutional Influences*, in "Revista de Drept Constituțional / Constitutional Law Review", Nr. 1/2015, pp. 51-71/72-92, at p. 67 and respectively, p. 87.

religious diversity, as well as information, education and entertainment of the public are to be realized and guaranteed, in observance of fundamental rights and freedoms of man. Furthermore, all audiovisual-media service providers are under the obligation to ensure objective information of the public." (par. 1.3.2 of the aforementioned decision).[70] After finding the interference legitimate, the Court applied the three steps of the proportionality test, by ruling that such a limitation of property rights is firstly suitable, secondly necessary, and finally in accordance to a fair balance between the property rights limited by the interference and the right to information and the access to culture (provided for in articles 31 and 33 of the Constitution). At the third and essential step of this test, the Court was quite lapidary: "regarding the existence of a fair balance between the measure determining the limitation of the property right and the purpose followed, the Court finds that there is a reasonable relationship between the general interest requirements of the collectivity and the protection of individual's fundamental rights."

Subsequent Constitutional Court decisions reiterate rationales based on the proportionality principle. In Decision no. 270 from 7th May 2014,[71] the Court examines on the bases of the three-pronged proportionality test the constitutionality of a provision of the Revenue Procedure Code (Codul de procedură fiscală).[72] The challenged disposition set the sanction of preclusion (decădere) in case of non-submission within one year from the day of payment, of restitution applications for taxes paid on a wrong account. The Court examined whether such a provision constitutes a justified interference in the private property right of the tax payer, protected by article 44 of the Constitution, and found that the measure under discussion is disproportionate to the purpose followed, which equates to encroachment upon tax payer's property rights, as the latter has to accept a disproportionate diminishing of its property. The Constitutional Court decided later, also on the basis of the proportionality test, that the dispositions of the Civil procedure code regarding the mandatory character of composing and supporting applications only by a lawyer (avocat)

[70] It is noticeable that the Romanian Constitutional Court cites here expressly the "Apotrheken-Urteil" of the Bundesverfassungsgericht (delivered on 11th June 1958, published in BVerfGE, Vol. 7, p. 377 et. seq.), in respect to determining the three steps of the proportionality test (suitability, necessity and proportionality *stricto sensu*).

[71] M. Of. no. 554 from 28th July 2014.

[72] The challenged provisions lied in article 114, par. 6 of the Revenue Procedure Code, adopted by Emergency Ordinance no. 92/2003.

are unconstitutional as representing a disproportionate encroachment upon the protected domain of articles 21 and 24 of the Constitutions (regarding free access to justice and the right to defence).[73] On the other hand, the Court ruled that the temporary interdiction of sale of litigious land is constitutional and fulfils the requirement of the proportionality test. In the opinion of the majority, such a prohibition imposed by public order purposes (interdicție de ordine publică), which entails the severe sanction of annulment for purchase acts disregarding it, is nevertheless constitutional despite its heaviness, on account of its temporary character.[74]

In the decision no. 440 from 8th July 2014,[75] the Constitutional Court departed from the classical scheme of the proportionality test. The issue under discussion was the constitutionality of the law regarding the retention of data generated or processed by electronic communication network or service providers.[76] It is noticeable that this decision is consequent with the outcome of prior decision on the same topic[77] and follows a decision of the European Court of Justice ruling the contrariety to articles 7, 8 and 52 (1) of the European Charter of Fundamental Rights of the provisions of the Data Retention Directive 2006/24/CE (in transposing whereof the Romanian law was adopted). Furthermore, this decision quotes expressly (alongside with a Bulgarian and a Czech decision) the decision rendered by the German Federal Constitutional Court on the 2nd March 2010 regarding "data retention."[78] This time, the Court

[73] Decision no. 462 rendered on 17th September 2014 (M. Of. no. 775 from 24th October 2014); see also Decision no. 485 rendered on 23rd June 2015 (M. Of. no. 539 from 20th July 2015).

[74] Decision no. 785 rendered on 15th October 2014 (M. Of. no. 956 from 29th December 2014).

[75] M. Of. no. 653 from 4th September 2014.

[76] The Law no. 82 from 7th June 2012, modified and republished in M. Of. no. 211 from 25th March 2014.

[77] The Decision no. 1258/2009 (M. Of. no. 798 from 23rd November 2009).

[78] BVerfGE 125, 260 ("Vorratsdatenspeicherung"), mentioned in par. 70-74 of the Romanian decision (in regd to ruling the unconstitutionality of the provisions of articles 113a and 113b of the German 2007 law on telecommunication surveillance, which "violate the proportionality principle, by not-fulfilling neither the requirements of the constitutional requirements concerning data security and transparency of data use, and nor the exigencies of legal protection", and on the article 100g of the German Criminal Procedure Code, found unconstitutional because it allows "data accessing also in other situations than in single cases, without judicial validation and without knowledge of the concerned person"). See also Antonie Moser-Knierim, *Vorratsdatenspeicherung – Zwischen Überwachungsstaat und Terrorabwehr*, Wiesbaden: Springer Vieweg, 2014, *passim*, especially at pp. 255 et seq.

forbore in some degree from the three steps pattern of the proportionality test.[79] It asserted first that the interference in fundamental rights concerning intimacy, familial and private life, the secrecy of correspondence and freedom of expression is of great magnitude and is to be considered as very serious, and furthermore, the circumstance that the retention and subsequent use of data occur without informing the user or the subscriber is susceptible to induce to the concerned persons the sensation of a constant surveillance of their private lives. Secondly, such a limitation in the exercise of the right to privacy, to family and personal life, to secrecy of correspondence, and to freedom of expression has to take place in a clear, predictable and unequivocal manner, in order to eliminate as much as possible the occurrence of state authorities' arbitrariness and abuse in this domain. Finally, the Court ruled that the challenged law does not contain clear and accurate norms in regard to content and implementation of the measures of data retention and use, in order to provide that persons concerned have sufficient guarantees, ensuring adequate protection against abuses and any unlawful access to and use of personal data.[80]

A certain rapprochement to the practice of the Bundesverfassungsgericht is also discernible in regard to the exigency of clarity, precision and predictability of the legislation. This principle bears obvious resemblance to the requirement of "clarity and definiteness" in German legal scholarship and practice.[81] The Romanian Constitutional Court stated this requirement in a lapidary way,[82] for the first time in respect to statutory crimes (infracțiuni) for which the measure of preventive custody (arest preventiv) of the perpetrator is admissible (article 223, par. 2 of the Romanian Code of Criminal Procedure). The Court found that the insertion of "drug trafficking" („trafic de stupefiante") in the list of offenses

[79] See also Maria Mona Pivniceru, Károly Benke, *loc. cit.*, at p. 70 and respectively, p. 91

[80] Decision No 440/2014, par. 55-57.

[81] „Gebot der Klarheit und Bestimmtheit des Gesetzes". See BverfGE (27th November 1990, Josefine Mützenbacher Case); BVerfGE 92, 1, at p. 16 et seq. (10th January 1995 , „Sitzblockaden" – „Sitting-Blocade" 10 ianuarie 1995); BVerfGE 102, 347, at p. 361 (10th December 2000, „Schokwerbung I" –„Shoking Advertising I"); BVerfGE 110, 370, at pp. 396 et seq.(, 18th May 2004 „Klärschlamm" – „Residual mud"); BVerfGE 120, 378, at pp. 407et seq. (11th March 2008, „KfZ Kennzeichenerfassung" – „Automatic reading of number plates"); BVerfGE 114, 1, (27th October 1990, „Übertragung von Lebensversicherungsverträgen" – „Transfer of life inssurance contracts", 27 octombrie 2004); See also Christian Bumke, Anreas Voßkuhle, *Casebook Verfassungsrecht*, 7. Auflage, Mohr-Siebeck, Tübingen, 2013, pp. 390 et seq.

[82] Decision no. 553 rendered on 16th July 2015 (M. Of. no. 707 from 21st September 2015).

amenable to preventive custody contravenes the abovementioned requirements. The majority of the justices noticed that the term "drug trafficking" („trafic de stupefiante") at issue in this case is absent in the content of both the Criminal code and any special criminal law. It can be "only inferred from the corroborate construction of the provisions" of some special laws, and therefore it fails to offer the required degree of clarity, precision and predictability. In a subsequent decision[83] the Court admitted partially the unconstitutionality objection (excepția de neconstituționalitate) concerning the provisions of article 142 par. 2 of the Romanian Code of surveillance. The challenged stipulations imposed for the providers of public networks of electronic communication or of electronic communication services open to the public or of any other type of communication or financial services, the obligation to cooperate with the "criminal prosecution authorities" (organele de urmărire penală) and with the authorities mentioned in the first paragraph of the same article (where the prosecutor, the "criminal investigation authority" („organul de cercetare penală"), "the specialized employees of the police force" („lucrători specializați din cadrul poliției") and "other specialized authorities of the state" were referred to). The Court found that the obligations stipulated by the law are unconstitutional insofar they refer to the cooperation with "other specialized authorities of the state", as such a term lacks the necessary clearness, precision and predictability, and therefore the law does not allow its subjects to understand which are actually the authorities empowered to enforce such measures

[83] Decision no. 51 rendered on 16th February 2016 (M. Of. no. 190 from 14th March 2016). See also Decision no. 363 rendered on 7th May 2015 (M. Of. no. 495 from 6th July 2015), par. 24 and 25: The Court held that the provisions of article 6 of the Law no. 242/2005 relating to prevention and suppression of tax evasion are unconstitutional as the term of „tax with retention at the source" („impozit cu reținere la sursă") cannot be defined, and as a result, the norm addressee cannot orient his conduct according to the normative hypothesis of the law. Consequently, the challenged stipulations do not fulfil the constitutional exigencies in regard to the quality of a law, in other words they lack the characteristics of clarity, precision and predictability, and are therefore contrary to the provisions of article 1 par. 5 of the Constitution (stating the supremacy of the Constitution and the mandatory observance of the laws); interestingly, the Court did not bring forward the argument of encroaching upon the rule of law principle (provided for in article 1 par. 3 of the Constitution). Furthermore, by Decision no. 603 of 6th October 2015 (M. Of. no. 845 from 13th November 2015), the Court found that the term "business relations" ("raporturi comerciale") used in article 301 par. 1 of the Criminal Code inflicts the characteristic of lack of clearness, precision and predictability on the legal definition of the statutory crime of conflict of interests.

involving high degree of intrusion into privacy and personal life of the individuals.[84]

Finally, the Constitutional Court referred to German constitutional scholarship and practice in a decision[85] concerning article 125 par. 3 the Romanian Criminal Code.[86] The challenged provision (inserted by the Law no. 27/2012) extended the statute of illimitability in time ("imprescriptibilitate") for enforcement of sentences to several crimes which were until then under status of limitation (murder and other deliberate crimes leading to victim's death), insofar the period of statutory limitation had not already expired at the time of the coming into force of the new law. The Court quotes quite extensively the decision of the Second Chamber ("Senat") of the Bundesferfassungsgericht, rendered on 26th February 1969 in the "Statutory limitation of prosecution case" (Verfolgungsverjährung).[87] The German Court hold that "the postulate of legal security (Rechtssicherheit), intrinsic for the rule of law principle (Rechtsstaatsprinzip) requires that any citizen can foresee possible state encroachments upon him and he can adapt himself accordingly. As a result, he should basically be able to rely on the fact that the legislator will not inflict for accomplished situations (abgeschlossene Tatbestände) consequences less favorable than foreseeable at the moment of the accomplishment of that situations (genuine retroaction). Possibly, the faith of the citizen can require protection, so that his legal position be not retroactive devaluated by provisions having an effect only on current, yet unaccomplished situations (non-genuine retroaction). Legal security means for the citizen first of all protection of trust (Vertrauensschutz). However, to the rule of law principle (Rechtsstaatlichkeit)[88] pertain not only the legal security, but also the material justice (materielle Gerechtigkeit). These two sides of the rule of law principle cannot always be equally taken into account by the legislator. If legal security is in conflict with equity, it is the task of the legislator to decide in favor of one or the other. If this

[84] The aforementioned Decision no. 51/2016, at par. 38.

[85] Decision no. 511 rendered on 12th December 2013 (M. Of. no. 75 from 30th January 2014).

[86] This stipulation pertains to the former Criminal Code of 1968, abrogated on the 1st February 2014 (whose provisions were nevertheless still relevant for a great number of cases, due to the *mitior lex* principle). The challenged provision (article 125 par. 3) was inserted in the Code by the Law no 27/2012 (M. Of. no. 180 from 20th March 2012).

[87] BVerfGE 25, 269 (Verfolgungsverjährung); The relevant findings at p. 290 *et seq*.

[88] The Romanian version quoted in the decision of the Constitutional Court erroneously states "constitutional legality" (legalitate constituțională) instead of "Rechtsstaatlichkeit".

occurs without arbitrariness, the decision of the legislator cannot be rejected for constitutional grounds. Accordingly, the German Federal Constitutional Court found in the same case, that the Law of 13th April 1965 relating to the calculation of the limitation period in criminal cases (Gesetz über die Berechnung strafrechtlicher Verjährungsfristen) provides only for the extension in the future of unexpired periods of limitation and does not apply retroactively to legal situations (Tatbestände) already accomplished in the past. It does not apply to actions whose prosecution has been already statute-bared [because of expiration of the limitation period]. As a result, the extension of the periods of limitation for crimes punished with life-sentence had no constitutionally relevant consequence in regard to breach of faith (Vertrauensschaden)."[89]

It can be inferred that the influence of the Bundesverfassungsgericht on its Romanian counterpart is sometimes important (and certainly more significant than that of similar courts of other European countries), but not decisive. The case law of the European Court of Human Rights and of the European Court of Justice is more frequently quoted. The cases evoking the German practice regard generally current issues, which are common to European legal systems (data retention) or topics where similar historical experience imposes related solutions (such as prosecution of crimes perpetrated in the recent past, under totalitarian rule).

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Although mutual interest for cultural insights was manifest in Germany and Romania, the dialogue of legal cultures developed only hesitatingly and with discontinuities on the constitutional realm, despite some remarkable efforts. Constitutional law is political law par excellence. Consequently, academic interchange is much more perishable and its achievements much harder to utilize. This situation can change radically within a stable and viable European order. There is certainly a yet not fully exploited potential for amplifying the dialogue among justices, as integral part of the dialogue among legal systems and cultures.

[89] Paragraph I.5 of the aforementioned Decision no. 511/2013. I have inserted in brackets the original German terms.

3. German and Italian Criminal Law Theory: *Liaisons dangereuses*

Luigi CORNACCHIA*

An old friendship based on a common attraction: the general theory as term of comparison

The relationships between Italian and German criminal law theory go back to the nineteenth century: especially concerning the general theory of crime and the improvement of big conceptual structures and grounds in order to frame the formal and the material dimension of basic rules and doctrines (causality, imputation, action, omission, intention, negligence, endangerment, justification or better "Rechtswidrigkeit").

In reality it goes back further: because the relationship between German and Italian jurists goes back to the middle-ages, in facts the age of "nationes" and "universitates" (the "Natio germanica Bononiae", in Bologna, in general to the immigration of northern students to Italian universities). In reality the University of the "Glossatores", glosses and commentaries, of the "Questiones", questions and answers on the principles of law was a real melting pot, a meeting point of different cultures: for example, the age of the first codification of the types of participants in crime: «*áuctor criminis*» and «*coauctores*», «*societas delinquendi*», «*auxilium*», «*consilium*», «*mandatum*», «*iussus*», «*ratihabitio*», «*receptatio*», «*conscius*»[1]: later archetypes of the modern forms of participation, *i.e.* in the German criminal code, but not in the Italian, because in Italian there is the unitive or "monist model" – «*Einheitstäterprinzip*»[2].

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[1] S. above E. Pessina, *Elementi di diritto penale*, Napoli, 1871, 258; W. Engelmann, Der geistige Urheber des Verbrechens nach dem italienischen Recht des Mittelalters, in Festschrift Binding, II, Leipzig, 1911, 394, 422; F. Schaffstein, *Die allgemeinen Lehren vom Verbrechen*, Berlin, 1930, 174; G. Dahm, *Das Strafrecht Italiens im ausgehenden Mittelalter: Untersuchungen über die Beziehungen zwischen Theorie und Praxis im Strafrecht des Spätmittelalters, namentlich im 14. Jahrhundert*, Berlin-Leipzig, 1931. Recently R. Sorice (Ed.), *Concorso di persone nel reato e pratiche discorsive dei giuristi. Un contributo interdisciplinare*, Bologna, 2013.

[2] S. R. Dell'Andro, *La fattispecie plurisoggettiva in diritto penale*, Milano, 1957, 79 ss.; M. Gallo, *Lineamenti di una teoria sul concorso di persone nel reato*, Milano, 1957, 23 ss., 27

We are speaking about the framework of criminal law from the last centuries.

From the beginning not the comparison of legislations or leading cases was pivotal, but of general conceptual archetypes, such as "absolute" doctrines, meaning, doctrines that are not conceived as local, parochial theories of a peculiar territorial context, but as "universal" solutions, applicable to different legal systems.

Positive School

The contacts among the exponents of the Positive School were already well known from the nineteenth century. The doctrine of Franz von Liszt on crime as a social phenomenon and punishment as social prevention[3] had big resonance in the Italian debate, but some topics were even extended: such as determinist interpretation of human behaviour and the issue of social dangerousness, emphasis placed on the offender rather than on the offence, social defence[4] and the fight against social dangerousness[5], the preventive approach and scientific evaluation of the social danger of the offender[6].

Other issues were taken to extremes: for example the theory of Lombroso – the doctor and psychiatrist who first formulated an explanation of criminal behaviour using scientific, empirical methods: criminality is inherited, and someone "born criminal" could be identified by physical (congenital) defects, which confirm a criminal as savage or atavistic.

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ss., 53 ss.; A.R. Latagliata, *I principi del concorso di persone nel reato*, 2nd ed., Napoli, 1964, 94, 107; P. Nuvolone*, Il sistema del diritto penale*, 2nd ed., Padova, 1982, 398; T. Padovani, *Le ipotesi speciali di concorso nel reato*, Milano, 1973, L. Cornacchia, *Concorso di colpe e principio di responsabilità penale per fatto proprio*, Torino, 2004; Fahrlässige Mitverantwortung, in M. Pawlik – R. Zaczyk r. (Ed.), in Festschrift für Günther Jakobs, Berlin, 2007, 9; 55, 70. Recently M. Helfer, *Il concorso di più persone nel reato. Problemi aperti del sistema unitario italiano*, Torino, 2013.

[3] S. the so-called "Marburger Program": F. von Liszt, *Der Zweckgedanke im Strafrecht*, in Zeitschrift f. die gesamte Strafrechtswissenchaft, 3, 1883, 1.

[4] In the frame of the so-called "*nouvelle défense sociale*" s. F. Grammatica, *Principi di difesa sociale*, Padova, 1961

[5] R. Garofalo, *Criminologia: studio sul delitto, sulle sue cause e sui mezzi di repressione*, Torino, 1885; 2.nd edition: *Criminologia: studio sul delitto e sulla teoria della repressione*, Torino, 1891.

[6] S. the most important works of E. Ferri, *Socialismo e criminalità*, Torino, 1883; *Sociologia criminale*, Torino, 1884; and of C. Lombroso, *L'uomo delinquente*, Milano, 1876.

Also known is the origin of the principle "*Nullum crimen nulla poena sine lege*" in Feuerbach, but already in Beccaria: but the thought of Feuerbach, much more than the French Enlightment, had a big influence, for example, on the work of Francesco Carrara and the Classic School in general, just think at the idea of crime as an infringement of individual's rights[7]. Also Francesco Carrara had a really in-depth knowledge about German doctrines[8].

The discovery of the core-concept of the elements of crime by the theory of Beling and Delitala

These relationships go further in the twentieth century.

At the beginning of 1900, for example, the connection is clear (although in the different developments) between the Doctrine of Crime (*Verbrechenslehre*) of Ernst Beling (drawing up the concept of *Tatbestand*) and the Theory of "fact" (*fatto*) in the system of Giacomo Delitala[9]: both are centred on the idea of an impersonal "type", described by the legislator, as the main object of the scrutiny of judge.

It is remarkable that at the age of fascism in Italy there was no dictatorial criminal law theory: the totalitarian theories of the Kiel's School (Dahm, Schaffstein) had no followers (with only one exception, Giuseppe Maggiore, who theorized a totalitarian system of criminal law founded on the will of the "Duce"), the majority of the criminal law scholars were followers of the method of legal technicality ("tecnicismo giuridico", founded by Arturo Rocco), that limits the work of jurists only to study the positive law, not to take an interest in the social or anthropological aspect, and even less to politics: as a consequence, the most important target was to avoid critics to the jackboot, or to the dictatorship at all, and to guarantee loyalty to the power[10].

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[7] F. Carrara, *Programma del corso di diritto criminale. Del delitto, della pena*, Lucca, 1860, 31.

[8] S. M. Maiwald, *Idealismus und Empirismus. Ein Vergleich der Strafrechtswissenschaft in Deutschland und Italien in der ersten Hälfte des 19.Jahrhunderts*, in F. Loos/J.M. Jehle, *Bedeutung der Strafrechtsdogmatik in Geschichte und Gegenwart: Manfred Maiwald zu ehren*, Heidelberg, 2008, 3.

[9] G. Delitala, *Il "fatto" nella teoria generale del reato*, Cedam, Padova, 1930, 32.

[10] F. Bricola, *Teoria generale del reato*, Torino, 1974, 11; L. Ferrajoli, *La cultura giuridica nell'Italia del Novecento*, Roma-Bari, 1999, 31 ss.; C.F. Grosso, *Le grandi correnti del pensiero penalistico italiano tra Ottocento e Novecento*, in *Storia d'Italia. Annali 12, La criminalità*, Torino, 1997, 18; G. Neppi Modona, *Storia e ideologia del diritto penale dall'illuminismo ai*

A controversial impact of German criminal law general theory on the Italian doctrine: the method of legal technicality

After the second world war the *trait d'union* among Italian and German scholars was the Max-Planck-Institute of Freiburg i.B. (especially under the management, explicitly pro-italian, of Hans Heinrich Jescheck).

The cultural impact of German criminal dogmatics was always controversial: the interests in Italy for the German criminal doctrine has been always dialectical, in the sense of refusing to a make a "calque" of the German criminal law theory, for many reasons[11].

First: the already mentioned dominance of the so-called "Tecnicismo giuridico" (method of legal technicality): by such method the scholar of criminal law has to study and to analyse only the positive law with technical instruments, not the social, philosophical, psychological context; it means a complete refusal to mix law and sociology, or anthropology, or philosophy, or other social sciences[12].

Second: as a consequence of the first, the refusal of a philosophical[13] or anyway theoretical foundation of criminal law[14].

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nostri giorni, in C.F. Grosso – G. Neppi Modona – L. Violante, *Giustizia penale e poteri dello Stato*, Milano, 2002, 175. A different point of view on the method of legal technicality in the fascist era in M. Sbriccoli, *La penalistica civile. Teorie e ideologie del diritto penale nell'Italia unita*, in *Stato e cultura giuridica in Italia dall'Unità alla Repubblica*, a cura di A. Schiavone, Laterza, Roma-Bari, 1990, 217.

[11] S. above for example V. Manzini, *Trattato di diritto penale italiano*, I, Torino, 1950, 2 s.; F. Antolisei, *Per un indirizzo realistico nella scienza del diritto penale*, in *Riv. it. dir. pen.*, 1937, 16.

[12] S. Art. Rocco, *Il problema e il metodo della scienza del diritto penale*, in Rivista di diritto e procedura penale, 1910, 497. Recently about the issue v. M. Donini, *Tecnicismo giuridico e scienza penale cent'anni dopo. La prolusione di Arturo Rocco (1910) nell'età dell'europeismo giudiziario*, in *Criminalia*, 2010, 127 ss.; S. Seminara, *Sul metodo tecnico-giuridico e sull'evoluzione della penalistica italiana nella prima metà del XX secolo*, in *Studi M. Romano*, vol. I, 2011, 575 ss.; T. Vormbaum (Ed.), *Arturo Rocco und der Rechtstechnizismus im italienischen Strafrecht,* Lit, Berlin, 2013.

[13] S. above V. Manzini, *Trattato di diritto penale italiano*, I, Torino, 1950, 7 (especially § 2, *La filosofia e il diritto penale*, and the sinfull headings of two paragraph: "Inutilità giuridica delle indagini filosofiche" and "Danno della filosofia al diritto penale").

[14] But the application of the method of legal technicality was never so "pure", not even by Arturo Rocco, as remarkable in his most important work: Art. Rocco, *L'oggetto del reato e della tutela giuridica penale*, Bocca, Milano, Torino, Roma, 1913. About the debate s. above

In the first half of the twentieth century the most dominant thought in the Italian Universities was clearly neo-idealism or neo-hegelism (Benedetto Croce and Giovanni Gentile): but curiously in the framework of criminal law sciences, the influence of hegelian philosophy (and in general of German philosophy, also Kantian) occupies a really marginal position, limited to the works of Ugo Spirito (considered a Philosopher, not a Criminalist)[15].

Consequently, in the name of the pure theory of law as a legal technicality, the normative perspective has had big success: such as a kelsenian interpretation of law, for example in the developments of Marcello Gallo[16].

Third: some problems of mentality and environmental context, which also influenced sentencing and the real enforcement of law. We need to bear in mind for example how to appreciate some rules, such as the trust principle (*Vertrauensgrundsatz*): we, the "Latins", don't believe in rules, or better, we have a disenchanted, undeceived world view; the consequence is a different evaluation of the institutional frame of reliance. Normal trust as the ground of personal or more intimate relationships is not questioned, we can say, the *cognitive reliance*, however the normative reliance, granted by institutional structures such as law, is questioned.

Dare I say that the influence of the German legal dogmatics has not been in the sense of a direct acceptance, but of a controversial, sometimes strongly dialectical dialogue or better debate.

But of course debate means at first interest and admiration.

I will mention only few examples.

First: the influence of German systems, which encountered such a big success in different countries of the world, such as finalism of Welzel, or the doctrine of the objective imputation, or normative functionalism of Jakobs.

Second: the doctrine of legal goods.

M. Donini, *Tecnicismo giuridico e scienza penale cent'anni dopo. La prolusione di Arturo Rocco (1910) nell'età dell'europeismo giudiziario*, 131.

[15] S. U. Spirito, *La storia del diritto penale italiano da Cesare Beccaria ai giorni nostri*, 1924, 2. Ed., Firenze, 1974; *Il nuovo diritto penale*, Venezia, 1929; above G. Vassalli, 'Il modello penale di Ugo Spirito', in: A. Russo, P. Gregoretti (Ed.), Ugo Spirito. Filosofo, giurista, economista e la recezione dell'attualismo a Trieste. Atti Convegno (Trieste, 27-29 novembre 1995), Trieste, 2000, 392.

[16] S. for example M. Gallo, *La teoria dell'azione «finalistica» nella più recente dottrina tedesca*, Milano, 1950, 19; *Dolo* (dir. pen.), in *Enciclopedia del Diritto*, XIII, 1964, 750; *Il concetto unitario di colpevolezza*, Milano, 1951

Concerning big general theories

The theory of Welzel was studied by most scholars in Italy, but had only some followers in the Neapel School (Santamaria, Fiore)[17].

Otherwise it was strongly criticized, especially the ontological cornerstone of Welzels thought, although it was very often misinterpreted: The topic of "logical structure of things" ("sachlogische Strukturen")[18] was probably the result of the fenomenological approach as a methodological reaction against the value philosophy ("Wertphilosophie") of Neo-Kantianism, but not exactly an ontological issue in the classical sense. Moreover, the idea of intention as the ground of the action, together with the concept of "Gesinnung", were interpreted in the light of the doctrines of some followers – such as Armin Kaufmann, or Zielinski – as a perspective of extreme subjectivism: such topics were criticised because of their (supposed) contrast with the principle "cogitationis poena nemo patitur" (in Italy, "principle of materiality").

Mistakes, misunderstandings, misinterpretations.

Later there is a remarkable reinassance of some concepts in the works of contemporary scholars, such as Massimo Donini: *e.g*. the idea of intention as an element of the fact[19], the straightforward separation between fact and culpability consistent with the "Schuldlehre" and the distinction '*Tatbestandsirrtum*' versus '*Verbotsirrtum'*[20]; and the non-finalist issues of Welzel's big path, such as social adequacy – "Sozialadäquanz"[21].

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[17] D. Santamaria, *Prospettive del concetto finalistico di azione*, Napoli, 1955; C. Fiore, "Azione finalistica", in *Enciclopedia Giuridica Treccani*, IV, Roma, 1988, 1; S. S. Moccia (Ed.), *Significato e prospettive del finalismo nell'esperienza giuspenalistica*, Napoli, 2007; above G. Dannert, *Die finale Handlungslehre Welzels im Spiegel der italienischen Strafrechtsdgmatik*, Göttingen, 1963; recently F. Schiaffo, *Il diritto penale tra scienza e scientismo. Derive autoritarie e falsificabilità nella scienza del diritto penale*, Napoli, 2012; M. Pawlik, L. Cornacchia (Ed.), a cura di, *Hans Welzel nella prospettiva attuale. Fondamenti filosofici, sviluppi dogmatici ed esiti storici del finalismo penale*, Napoli, 2015

[18] H. Welzel, *Über Wertungen im Strafrecht*, in *Der Gerichtssaal*, 103, 1933, in *Abhandlungen zum Strafrecht und zur Rechtsphilosophie*, Berlin – New York, 1975, 27; *Vom Bleibenden und Vergänglichen in der Strafrechtswissenschaft*, Marburg, 1964, in *Abhandlungen*, 346, 365; *Naturrecht und Rechtspositivismus*, in Festschrift f. Hans Niedermeyer, Göttingen, 1954, in *Abhandlungen*, 284

[19] M. Donini, *Teoria del reato. Una introduzione*, Padova, 1996, 76; *Idem*, "Teoria del reato", in DDP, XIV, 1999, 37.

[20] M. Donini, *Illecito e colpevolezza nell'imputazione del reato*, Milano, 1991; *Il delitto contravvenzionale. 'Culpa iuris' e oggetto del dolo nei reati a condotta neutra*, Milano, 1993.

[21] C. Fiore, *L'azione socialmente adeguata nel diritto penale*, Napoli, 1966.

However, the interesting aspect of the – sometimes false – critics of the Italian scholars is that they were, or better, they still are always directed to an assessment of consistency with the principle of the Constitution: the orientation to the fundamental principle is maybe the most peculiar feature of the Italian doctrine, also in comparison to German doctrine[22].

It explains the sympathy for the theories of the School of Frankfurt (especially Hassemer[23]) and the project – typical of Italian scholars – to ground and develop the whole theory of crime according to constitutional principles, better, *on the basis of* constitutional principles.

It explains the big debate on legal goods too: more on this aspect later.

The same has occurred concerning, for example, the doctrine of objective imputation (Roxin[24]), and later the doctrine of imputation (for example Jakobs[25]): Francesco Antolisei[26] devised the basics of it before Roxin (or Honig[27]), at the same time of Engisch[28], but only later it was rediscovered and

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[22] F. Bricola*,* voce *Teoria generale del reato,* in *Noviss. Dig. It*., vol. XIV, 1973, 14, 82; F. Bricola, *Rapporti tra dommatica e politica criminale*, in *Rivista italiana di diritto e procedura penale*, 1988, 3; M. Donini, *Il volto attuale dell'illecito penale. La democrazia penale tra differenziazione e sussidiarietà*, Giuffrè, Milano, 2004; Id., *Il principio di offensività. Dalla penalistica italiana ai programmi europei*, in Diritto Penale Contemporaneo, Rivista trimestrale, 4/2013, 3; ID., *L'eredità di Bricola e il costituzionalismo penale come metodo. Radici nazionali e sviluppi sovranazionali*, in Diritto Penale Contemporaneo, Rivista trimestrale, 2012, 51; ID., *Principi costituzionali e sistema penale. Modello e programma*, in IUS17@unibo.it, n. 2/2009, 421; L. Ferrajoli, *Diritto e ragione. Teoria del garantismo penale*, Roma-Bari, 1989; L. Ferrajoli, *Il paradigma garantista. Filosofia e critica del diritto penale*, Napoli, 2014.

[23] For example concerning the requirement of a selection of lawfully protected goods by the criminal law which have to be oriented at the individual's interests. Peculiar importance had in Italy the work W. HASSEMER, *Theorie und Soziologie des Verbrechens*, Frankfurt a.M., 1973.

[24] C. Roxin, *Gedanken zur Problematik der Zurechnung im Strafrecht*, in *Festschrift für Honig*, Göttingen, 1970,133.

[25] G. Jakobs, *Strafrecht. Allgemeiner Teil*, 2nd. Ed., Berlin /New York, 1993, 123; *System der strafrechtlichen Zurechnung*, Frankfurt am Main, 2012. His theory of imputation has had influence on S. Canestrari/L. Cornacchia/G. DE Simone, *Manuale di diritto penale. Parte generale*, Bologna, 2007, 193, 704.

[26] F. Antolisei, *Il rapporto di causalità nel diritto penale*, Padova, 1934, 199.

[27] R. Honig, *Kausalität und objektive Zurechnung*, in *Festgabe für Frank*, vol. I, Tübingen, 1930, 174 (but before in civil law K. Larenz, *Hegels Zurechnungslehre und der Begriff der objektiven Zurechnung*, Leipzig, 1927, expecially 60).

[28] K. Engisch, *Die Kausalität als Merkmale strafrechtlicher Tatbestände*, Tübingen, 1931, 53, 61, 65 (s. especially the notion of "Verwirklichung der Gefahr"); and later *Die Kausalität im Recht*, in «Vom Weltbild des Juristen», II ed., Heidelberg, 1965, 110

studied in his German version at the end of the 1980's[29] as a tool to implement the principle of culpability (in a system where there are some cases of strict liability – "responsabilità oggettiva")[30] or the principle of individual responsibility[31], but it was criticised as substitute to causality (*condicio sine qua non – formula*) or as general criterion[32].

Most of the critics on the modern normative version of imputation – the concept of Jakobs – have to deal with some misinterpretations: about the notions of normative expectations, roles, duties, prevention as confirmation of the validity of norms, etc. But maybe it's much too soon to draw up a picture of the debate.

Concerning the doctrine of legal goods

Some remarks about the debate on Harm Principle.

In the last 10 to 15 years there has been an effort to achieve a common approach about the Harm Principle and the Theory of Legal Goods (but maybe based on some misconception)[33].

The original influence came from Birnbaum's topic of crime as violation of goods protected by the state[34].

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[29] M. Donini, *Lettura sistematica delle teorie dell'imputazione oggettiva dell'evento*, *RIDPP*, 1989, 588 ss., 1114; Illecito e colpevolezza, 311; *Teoria del reato*, in *Dig. disc. pen.*, vol. XIV, Torino, 1999, 61 ss; *Imputazione oggettiva dell'evento. «Nesso di rischio» e responsabilità per fatto proprio*; A. Castaldo, *L'imputazione oggettiva nel delitto colposo d'evento*, Napoli, 1989; A. PAGLIARO, *Imputazione obiettiva dell'evento*, in *Rivista Italiana di Diritto e Procedura Penale*, 1991, 779

[30] For example S. Canestrari, *L'illecito penale preterintenzionale*, Padova, 1989, 157; "Preterintenzione", in Digesto Discipline Penalistiche, IX, Torino, 1995, 694, 707.

[31] M. Donini, *Lettura sistematica delle teorie dell'imputazione oggettiva dell'evento*, in *Rivista italiana di diritto e procedura penale*, 1989, 588, 1114; *Imputazione oggettiva dell'evento* (dir. pen.), in *Annali Enciclopedia del Diritto*, III, Milano, 2010, 638; *Imputazione oggettiva dell'evento. 'Nesso di rischio' e responsabilità per fatto proprio*, Torino, 2006; L. Cornacchia, *Concorso di colpe e principio di responsabilità penale per fatto proprio*, 17, 88.

[32] S. Canestrari, *Dolo eventuale e colpa cosciente, Ai confini tra dolo e colpa nella struttura delle tipologie delittuose*, Milano, 1999, 90.

[33] S. for example A. Cadoppi, *Liberalismo, paternalismo e diritto penale*, in G. Fiandaca - G. Francolini, (Ed.), *Sulla legittimazione del diritto penale. Culture europeo-continentale e anglo-americana a confronto*, Torino, 2008, 121.

[34] J.M.F. Birnbaum, *Über das Erforderniß einer Rechtsverletzung zum Begriffe des Verbrechen*, in *Archiv des Criminalrechts*, 15, 1834, 149.

The idea that the legitimate content of legal goods is determined by the constitution and the emphasis on the restrictive character of the legal good concept in Italian literature (for example Bricola) are instead clearly close to the theory of Claus Roxin[35]: at least to the fundamental ideas of restrictive character of the legal good concept and legitimate content of legal goods determined by the constitution. In this case it's more a coincidence than an influence, because the debate about the constitutional foundation of legal goods in Italy dates from the 1960's.

Towards a universal doctrine of criminal law?

Hans Joachim Hirsch wrote that "there is no Italian, or Spanish, or German, or Rumanian legal dogmatics, but only a right or false legal dogmatics"[36].

In light of such a basic point, could one affirm that the path of law and sentencing is towards a universal "general theory"[37]?

If we intend that we have to go back to Welzel's logical structure of reality, or to look for common features of the legal systems, I disagree: the first is false, the second is needless.

Nevertheless, there would seem to be a need for general clarification.

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[35] C. Roxin, *Kriminalpolitik und Strafrechtssystem*, Berlin, 1970, 2nd. Ed. 1973.

[36] H.J. Hirsch, Die Stellung von Rechtfertigung und Entschuldigung im Verbrechenssystem, in A. Eser – W. Perron (Ed.), Rechtfertigung und Entschuldigung, III, Freiburg i.B., 1991, 54.

[37] S. H. J. Hirsch, *Gibt es eine national unabhängige Strafrechtswissenschaft?*, in *Fest. Spendel*, Berlin-New York, 1992, 43, 58; *Necessità, approcci e limiti di una scienza penale universale*, in *Studi Marinucci*, I, Milano, 2006, 387; W. Frisch, *Zur Bedeutung der Rechtsdogmatik für die Entwicklung des Strafrechts*, in R. Stürner (Ed.), *Die Bedeutung der Rechtsdogmatik für die Rechtsentwicklung*, Mohr, Tübingen, 2010, 169; M. Pawlik, *Strafrechtswissenschaftstheorie*, in *Fest. Jakobs*, C. Heymanns, Köln, Berlin, Bonn, München, 2007, 469; B. Schünemann, *Die deutsche Strafrechtswissenschaft nach der Jahrtausendwende*, in *Goldtdammer's Archiv f. Str*., 2001, 205 ss., 216 ss.; ID., *Strafrechtsdogmatik als Wissenschaft*, in *Fest. Roxin*, de Gruyter, Berlin-New York, 2001, 1 ss.; con maggiori sfumature, ID., *Aufgaben und Grenzen der Strafrechtswissenschaft im 21. Jahrhundert*, in *Fest. Herzberg*, Mohr Siebeck, Tübingen, 2008, 39 ; U. Sieber, *Grenzen des Strafrechts*, in *ZStW*, 119, 2007, 1; H. Welzel, *Die deutsche strafrechtliche Dogmatik der letzten 100 Jahre und die finale Handlungslehre*, in *Jur. Schulung*, 1966, 421 ss.; ID., *Vom Bleibenden und vom Vergänglichen in der Strafrechtswissenschaft*, in *Erinnerungsgabe f. Max Grünhut*, Elwert Verlag, Marburg, 1965, 173, 188; ID., *Die Dogmatik im Strafrecht*, in *Fest. Maurach*, Müller, Karlsruhe, 1972, 3; in the doctrine of the XIX century F. Von Liszt, *Das Strafrecht der Staaten Europas*, Liebmann, Berlin, 1894, XXIV

I don't think that in legal studies much attention is given to the exposition of different experiences of ruling and sentencing: it leads only to some exoticism, maybe interesting in an anthropological point of view, but not in a legal, or as a ground for treating general problems.

Sometimes there is talk of "culture tourism", of "art tourism", even of "sex tourism", well, such methodology is a type of "law tourism", nothing more than this.

What we need are not practical solutions, but general issues and topics[38].

The role of the academic culture is the discovery, based on meticulous methodology, of systematic and logical solutions oriented to allow critics to the legislation and the sentencing.

Thus we can distinguish, from the more general to the more specific:

Levels of analysis: such as Tatbestand, Rechtswidrigkeit, Schuld (and it is difficult to translate those concepts in English, or to compare with different concepts such as offence and defence, facts and wrongdoing, *mens rea*, that one may understand the success of the doctrinal foundation in Latin countries also).

Categories: action and omission, intention and negligence, causality.

Principles: legacy (*nullum crimine sine lege*), individual and culpable responsibility (*nullum crimen sine culpa, and bevor nullum crimen sine sua re*), harm to others and harm to legal goods.

Rules: as implementation of Principles (according to Alexy, for example).

Modal meta-rules: rules that suggests standards of behaviour, for example the duty of caution in negligence.

"Tatbestand": the type which describes the fact that is to punish, and the "core" of the doctrine of crime in the German and Italian criminal law tradition.

This complex background shows, that some paradigms or constructive frameworks have surely been cultural products of good general theory and good comparison.

And it is correct to affirm that the German science of criminal law has had a big influence on that of Italian, or probably it has been the most influential, much more, for example, than the common law tradition: we can speak of an

[38] The dogmatics guarentees scientific rationale: recently M. Ronco, *La dommatica come garanzia di razionalità del diritto penale*, in *Indice penale*, 2014, 333; N. Jareborg, *Legal Dogmatics and the Concept of Science*, in *Festschrift Frisch*, Duncker & Humblot, Berlin, 2013, 49 underpins the idea of dogmatics as a a demonstration through reasoning.

always fruitful relationship, whereby the Italians have often adopted polemical positions[39].

But of course such influence was clearly mostly on the basis of dogmatics, and not of the comparison between cultural, geographically limited products[40].

The founder of the Bologna school, Franco Bricola, used to say to his disciples that the import of German doctrines requires procedures of "customs clearance": customs means of course critical passages.

I think that the most important goal of the comparison is to improve knowledge, to discover and discuss well-grounded scientific methods, rules and postulations of a discipline[41].

Jurisprudence – *juris prudentia* – means wise learned knowledge of law, of its sense and function in society. And it allows the understanding of the framework of ideas and beliefs thus forming a global description through which a different legal cultures watches and interprets the same problems.

The very fundamental achievement of the relationship between German and Italian criminal science is the acknowledgement of a common route: sometimes the journey is more important than the goal, or maybe it is precisely the goal.

I hope this journey will continue.

[39] S. H.-H. Jescheck, *Neue Strafrechtsdogmatik und Kriminalpolitik in rechtsvergleichender Sicht*, in ZStW 98, 1986,1.

[40] S. above C. Pedrazzi, *Apporto della comparazione alle discipline penalistiche*, in AA.VV., *L'apporto della comparazione alla scienza giuridica. Studi di diritto comparato*, Milano, 1980, 169

[41] Concerning the debate on comparison in Italiy and the model of "*applicatio*" s. M. Donini, *Il volto attuale dell'illecito penale*, *La democrazia penale tra differenziazione e sussidiarietà*, Milano, 2004, 188; *Scienza penale e potere politico*, in Rivista italiana di diritto e procedura penale, 2015, 99.

4. German Legal Doctrine and the Romanian Civil Code: The Concept of Patrimony

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Introduction

In the course of time, legal doctrine has formulated several scientific hypotheses regarding the concept of patrimony, with the intention to express a theory, on one hand, as complete and unitary as possible, and on the other hand, as close to practical needs as possible. Despite the fact that, as we have shown in the first chapter, in Roman law the concept of patrimony was well known and used, as we noticed, the doctrine at that time has never elaborated an actual theory of patrimony. Only in modern era, more precisely the 19th century, the development of such theory has begun and, along with the more and more manifest needs of the society, were built what we can call now the scientific bases of the patrimony theory.

We believe, and deservedly, that "the birth certificate" of the modern civil law is the 1804 French Civil Code of Napoleon Bonaparte. However, as regards the concept of patrimony, similar to most of the regulatory deeds that preceded it, but also to those that followed it, this one limits itself to provisions according to the Roman law, and refers mainly to assets. The term "patrimony" is used exceptionally, and only to refer to the assets belonging to a *père de famille* (*pater familias* in Roman law), transmitted by way of a succession, under the form of a *patrimoine* (*pater-moine*). But we may appreciate, in a legislative context, that the etymologic meaning of such term has once again dethroned the legal meaning; the (apparently) indissoluble connection between the *pater-* root and the idea of succession on the father's side seems to have last and imposed all along the millenniums. This notion of patrimony is nevertheless very restrictive and purely objective, and for this reason we believe that it is arguable because, first of all, it does not contain also the debts, and, secondly, it does not practically concern any legal universality, ascribed to a person.

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It should be mentioned at the same time that, in this renowned monument of legal reasoning, which has recently celebrated its bicentenary, the word "patrimony" is very rarely used: it is found at articles 878, 881 and 2111, related to the payment of estate debts, setting forth that the creditors of the deceased have the possibility "to claim, in any situation and against any other creditor, the separation of the deceased's patrimony from the patrimony of the successor" (art. 878). It is possible that this has a certain meaning, given the fact that the term is found when talking about separation of a *hereditas* into two separate parts.

In reality, there are other texts also in the French Civil Code where the term "patrimony" does not appear explicitly, but where we find the idea of a connection between assets and debts, based on which the first theory of patrimony was then formulated. We mention to this effect art. 2092: "Whoever has personally made himself liable is bound to fulfil his undertaking out of all his movable or immovable assets, existing and to come"; and art. 2093: "The assets of a debtor are the common pledge of his creditors...". Please notice also the fact that the authors of these texts used the plural ("the assets") and not the singular form ("the patrimony"). We believe it is important to mention that this Civil Code, as the laws immediately preceding it (after 1789), rejects completely the traditional division in the former French law of its *de cujus* assets depending on their origin: "Law disregards the nature and the origin of the assets when determining the succession", which is an ideal situation, subject to the above-mentioned possibility of separating the patrimonies, as it is the case of a *universitas*. However, a radical change of such principle took place, shortly after that, by the establishment, between 1806 and 1808, of "les majorats", meaning the assets allotted to the first-born male inheritor, having for sole purpose to serve as support for granting and transferring the new hereditary titles of the new imperial aristocracy. Being inalienable and intangible, and not being able to be subject to a mortgage, the "majorats", by their simple existence, on one hand, adversely influenced the principle of the patrimony's unity, and on the other hand, included again the right of the first born in the aristocratic families of the French Empire. In conclusion, if we exclusively refer to the Civil Code, the elements allowing the characterisation of the patrimony are, after all, quite limited.

We should remind that neither the revolutionary jurists, nor the authors of the French Civil Code, defined the patrimony. Jean-Baptiste-Victor Proudhon, a legislation teacher at the Central School in Besançon and author of some famous

treaties in the 19th century, makes a distinction, for his students, between three categories of domains: the sovereign domain, namely the political power, the public domain, which is the entire State property, and the patrimonial or private domain, "the one taking into account the citizens' properties along with the person who owns them", in other words, everything that's subject to private property[1]. As regards Portalis[2], he uses, in various speeches and presentations on the Civil Code or during private discussions on this subject, the plural form, that is "the patrimonies", which, depending on the context, may designate the assets purely and simply. And thus, starting from certain articles of the Civil Code, the classical theory of patrimony will be edified.

Finally, we cannot end this presentation of the way the concept of patrimony is treated in the French Civil Code without a brief review of its presence in the Romanian Civil Code of 1864, which entered into force in 1865. We believe that, in this case, we are dealing with a "successful legislative transplant"[3]. Being an almost identical copy of the French Civil Code, this regulatory deed of crucial importance laid the foundation of the modern Romanian civil law, with its principles and institutions, and in this manner, the modern legal terms were included in the Romanian language[4].

As it was expected, given the French origin of the Civil Code, the concept of patrimony is used expressly also in certain of its provisions regarding especially the separation of patrimonies that the creditors of a succession and the legatees holding a particular deed may request, if the legate has for object an amount of money, in order to stop the confusion or the link between the successional patrimony and the patrimony owned by the inheritor holding the universal right to succession[5]. By acting like this, they will be entitled to recover their receivables from the value of the successional assets, without being forced to bear the participation of the inheritor's creditors, which would happen if the two patrimonies are confused.

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[1] Jean-Baptiste, Victor Proudhon, *Cours de Législation et jurisprudence,* Besançon, 7e année républicaine (1799), t. I, p. 60 et s., reed. în col. „Fontes et Paginae", Presses Universitaires de Caen, 2010.

[2] Jean-Étienne-Marie Portalis, *Discours et rapports sur le Code Civil*, reed. în col. „Fontes et Paginae", Presses Universitaires de Caen, 2010, p. 115 şi urm.

[3] Marilena Uliescu (coord.), *Noul Cod Civil. Comentarii,* Ed. Universul Juridic, Bucureşti, 2011.

[4] *Idem,* p. 9.

[5] Liviu Pop, Liviu-Marius Harosa, *Drept civil. Drepturile reale principale*, Ed. Universul Juridic, Bucureşti, 2006, p. 7 şi urm.

Being predominant, as in the case of the Romanian Civil Code, the implied references to the notion of patrimony, we mention that the most general and, probably, the most important of these is mentioned at art. 1718 of the Civil Code, according to which "whoever is personally liable is bound to fulfil his undertaking out of all his movable or immovable assets, existing and to come". The reference that the text makes to all the assets of the debtor, *existing and to come*, with which this one secures the accomplishment of the undertakings towards its creditor, takes into account all its assets, so their universality, regarded as such. At the same time, the express references to patrimony are made, as we have mentioned above, only in relation to the separations of patrimonies (art. 781). Pursuant to such article, its *de cujus* creditors may request "the separation of the patrimony of the deceased from the one of the heir". The notion of "separations of patrimonies" is also mentioned at art. 784 and 1743 of the Civil Code, on the matter of liens.

We notice that, similar to the French (Napoleonian) Civil Code of 1804, the notion of patrimony **is not defined under this regulatory deed**, and it is the theoreticians and legal advisers' difficult mission to offer a clear and precise definition of such term, which is essential for our study field.

I. Theory of the patrimony-personality

For the beginning, we'll present the stages and the guidelines of the construction of the patrimony theory in the 19th century.

The first reviewers of the French Civil Code, when explaining every article separately, have not succeeded, as regards the patrimony, to outline an original notion. From the end of the first half and during the second half of the 19th century, a new theory was suggested, which thus have sparked several controversies. Its initiators were two professors in Strasbourg, who have become famous in this way: Charles Aubry and Frédéric-Charles Rau, the authors of an equally famous *Course of French Civil Law*, which was drafted based on the course of the German professor Karl Salomo Zacharie from the University in Heidelberg[6]. Their work, imbued with the idealistic and individualistic philosophy of that time, sustaining subjective rights, was so a spectacular innovation. One of their most original theses is undoubtedly the one that gave

[6] Jean-Louis Halpérin, *Histoire du droit privé français depuis 1804*, Paris, PUF, 1996, p. 65-66.

rise to the concept of "patrimony-personality"; we believe that they could be deemed the creators of the theory as well, although they did not do practically anything but take-over and systematise the notion of *universitas juris* of the ancient scholars: "The patrimony is all the assets of a person, regarded as forming a legal universality (*universitas juris*)... of an purely intellectual nature"[7]. Practically from this idea resulted all the other ones that followed. Each patrimony belongs to a person, either individual or legal entity, and each person can have only one patrimony. "The idea of patrimony originates from the idea of personality. Whichever the objects are over which a person can exercise their rights, whichever their nature or diversity would be, all are subject to the same free arbiter, the same will, the action of a single legal power"[8]. Moreover, it was also deducted the fact that any person mandatorily owns a patrimony, even if they do not possess actually anything, because this one includes not only the existing assets, but also the past and the future ones; in conclusion, the patrimony may be potential or virtual, manifesting itself under the form of a "potentiality", of a "possibility" to acquire assets and to undertake obligations. As regards the future assets, namely those that the person could acquire, the Civil Code mention them several times; Aubry and Rau qualify the same as assets *in potentia*, "which expresses very well the German word *Vermogen* meaning at the same time power and patrimony"[9]. Thus, the authors conclude that "the patrimony of a person represents its legal power, taken into account in an absolute manner, and separated from all the limits of time and space", which is an assertion in perfect accordance with the concept of the property-sovereignty.

As regards the assets "that the person's existence itself is being confounded with", in other words the extra-patrimonial rights, both authors seem even regretting that French law does not believe them to be part of the patrimony, given that, as it is natural, these cannot be assessed as money. In exchange, the motions for the payment of damages resulted from the prejudices caused to such rights belong, however, to the patrimony. In front of the idealism and abstraction of such theory, other jurists, who this time were from "beyond the Rhine" area, such as Brinz, but also French jurists, such as Saleilles, have conceived a theory that was deemed to be more realistic, the one of the *patrimony of affectation*, starting from the idea that the patrimony is a mass of assets whose cohesion does

[7] Aubry et Rau, *Cours de droit civil français d'après la méthode de Zachariae*, Paris, Cosse, 4e éd., 1873, t. IX, par. 573.

[8] *Idem.*

[9] *Idem,* note 15

not result from the fact that it is held by a person, but because these are destined (allotted) to a given purpose.

The classical theory of patrimony is therefore due to French jurists Aubry and Rau. It should be mentioned though that such theory is based on a survey about the French Civil Code conducted by the German professor K. S. Zachariae with the University in Heidelberg. This one has initially started from an analysis of the development of the French succession law, by reference to the "revolution" in the legal field caused by the implementation of the Civil Code in 1804. Thus, unlike the legislations of the "old regime", whereby the assets of the deceased, as mentioned above, were transferred depending on their nature (making thus a distinction between its own assets, the acquired assets and the movable assets) and, at the same time, only the movable assets were allotted to the payment of the debts, according to the Napoleonian Code all the assets of a succession are subject to the same legal regime, and all such assets, in their entirety, represent the overall security of the creditors.

Starting from this idea, professor Zachariae extended the applicability of the concept's universality, believing that the unique ensemble, which included the assets but also the liabilities, is destined to be transferred to the inheritors, ensuring thus the continuity of the deceased. In other words, the patrimony becomes a mainly subjective notion, providing the expression of the legal personality of the person.

It results from all that is presented herein above that the theory conceived by Aubry and Rau may be regarded synthetically through the following ideas, which in our opinion represent the theoretical foundation of the concept of patrimony as this is known and analysed at present time: (1) "the patrimony, under its highest expression, is the human personality itself, in the relation with his exterior things." and (2) "the idea of patrimony results directly from the idea of personality". To this effect, in the paper *Tratat de drept civil roman* (Treaty of Romanian Civil Law) under the supervision of Professor Constantin Hamangiu, a similar perspective, according to which "the patrimony absorbs the entire human personality, and the only thing that remains is the patrimony"[10].

And this is how, for the first time in the history of the civil law theory, and assertion was made about the patrimony not representing only **a simple group of assets**, but expresses even **the dimension of the legal personality in relation**

[10] C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Tratat de drept civil român*, vol. I, Editura Națională, Bucureşti, 1928, p. 25.

to the rights, in other words, the patrimony allows personality to express itself and, consequently, to exist, to the extent the patrimony provides the environment for possessing and involving the assets. Thus, we see how, step by step, the modern notion of patrimony is shaped, and may defined, from this perspective, as a unique legal universality, including all the assets and the debts, intimately related to the legal personality of their holder.

Due to this close relation between the patrimony and the individual, certain distinctive features may be noticed. First of all, as it results quite obviously, only persons can have a patrimony. By developing this idea, one may undoubtedly reach the conclusion that, on one hand, any person has a patrimony, and, on the other hand, a person may have only one patrimony. Therefore, the patrimony cannot be separated from the person as long as they are alive. As it results from such considerations, Aubry and Rau regarded the patrimony as a "manifestation" of the legal personality, a "projection" of this one over the assets. As any subject of law possesses assets or at least the objective ability to acquire the same, the absolutely natural consequence is unequivocally that any person has a patrimony.

As for the indivisibility of the patrimony, the problem may be approached from two separate standpoints: from the perspective of the patrimony as legal universality (*de jure* universality) and from the perspective of its component elements, this latter idea having been previously mentioned through the concept of general pledge of the unsecured creditors. We remind that such right over the entire patrimony of the debtor originates in fact from the Roman law, more precisely during the (ancient) period when the creditor, in case they could not recover their receivable by the debtor's consent, they have a right over this one's person, and not over this one's assets. In such situation, the creditor could hold the debtor's captive until the receivable was recovered from the latter's family, otherwise they have the possibility and even the right to kill the debtor. In time, due to the inconveniences caused by such primitive practice of the civil and economic circuit, this right was replaced by the lien over the entire patrimony of the debtor, over their assets. Such solution, besides the obvious practical advantages, is in accordance also with the modern idea, as outlined above, of a relation between the patrimony and the person, a theory according to which the patrimony of a person is only a manifestation of their legal personality. It is interesting to have in mind also the fact that a reminiscence of the ancient right

over the debtor's person is found in modern legislations regarding the "debtors' prison"[11].

Thus, in the light of this theory, the distinction between patrimony and person is possible only when the person dies, and the patrimony is to be transferred to the universal inheritors or based on an universal title, right from the moment of death. It results so that, during the holder's life, only the elements forming the patrimony may be transferred, and that exclusively under a specific title. We mention that this rule currently applies only as regards the individuals; legal entities may, by way of merger or division, alienate their entire patrimony or a part thereof, without affecting however the existence of the legal entity.

However, as we have seen, the ancient Romans believed that the patrimony extended its *de cujus* personality until the succession was accepted and all the debts were paid. This reason, despite its age, only supports the modern idea of the existence of a close relation between personality and patrimony, which, in the light of the ideas of the Antiquity jurists, could even "survive" the physical existence of the person, up to being called to their account.

The theory of patrimony conceived by Aubry and Rau corresponded perfectly to the economic realities and interests existing within the European socio-cultural area at the middle of 19th century, when the only enterprises were individual and the trading companies were in fact partnerships. The fact that businessmen at that time engaged their responsibility in an unlimited manner, with their entire wealth, towards the enterprise's creditors, had its theoretical basis and explanation in the indivisible nature of the patrimony. At the same time, it should be mentioned that these were the only conditions under which the owners of financial capital were willing to grant loans to various entrepreneurs.

Starting from this practical inconvenient, a series of criticisms were formulated, since the 19th century, on this theory that has already become, in a very short time, "classical". The first discussion to this effect has started from the indivisible nature of the patrimony. Thus, towards the end of the 19th century, given the social and economic changes imposed by the industrial revolution, the need of an objective process for capital concentration became more and more present. To this effect, capital enterprises became more numerous, especially under the form of joint-stock companies. In brief, the particularities of those companies consist in the fact that, since their incorporation and during their entire functioning, the identity and qualities of the members had no importance

[11] C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *op. cit.*, p. 27;

(in reality, most of the times, they even did not know each other). Thus, under such conditions, the company's share capital was made of shares freely assignable or transferable, and the shareholders' liability was strictly limited to the value of the shares they held at the company's share capital.

Therefore, it results that, in situations like the ones described above, the indivisible nature of the patrimony and its unity were no longer in full accord with the social and economic realities and needs. So, the shareholders' liability could not be limited without previously admitting the divisibility of their patrimony, an idea that has afterwards finished by being accepted and supported also by the legal doctrine of that time.

However, we believe that for a thorough analysis we should not disregard the aspects less legally convenient that are caused or purely and simply created by such situation. Thus, accepting the possibility to divide the patrimony led to the premise, for all persons, of a capacity to participate, as shareholders, with parts or values of their patrimony, in two or several companies, exclusively based on the idea according to which, whereby, the liability towards the creditors of each company is limited only to the extent of their contribution to the share capital. Practically, the prejudice was on the receivables of the creditors of the companies as they were obviously disadvantaged by such practices.

Another criticism on the classical theory started from the idea of the unique nature of the patrimony. Thus, it is deemed that, in reality, there could be several situations when fractions of the patrimony or masses with special allocation may exist independently, so without any connection with the idea of person, representing genuine legal universalities of an independent nature. We believe for good reason that such theory is evidently against the idea of unity and indivisibility of the patrimony; such contradiction between the theoretical concept of patrimony, more precisely of its unique nature, and the actual situations when the economic and social needs were practically requiring that the legal and doctrinaire vision becomes more "flexible", resulted in the creation and acceptance, however by another current of legal thinking, of the concept of "purpose patrimony" or "patrimony of affectation".

Also in relation to the "fractions" of patrimony/masses of assets for special affectation and their conflict with the "rigidity" of the theory of the unique nature of the patrimony, we must remind in this context also the opinion of Professor Rosetti-Bălănescu, which was presented in a benchmark book in Romanian

doctrine of civil law[12]. Thus, he affirmed that: "we have to stop here and not follow certain authors who exaggerate with the abstraction, as the classical authors, but only in reverse, by admitting there could exist patrimonies that do not belong to anyone.". So, we think that Prof. Rosetti-Bălănescu suggests the avoidance of accepting "extremist" positions, in the sense of supporting to an absurd extent either the strict form of the patrimony-personality, excluding certain reasonable solutions in order to settle certain practical issues, or a theory of absolute patrimonies of affectation, in which the idea of person is entirely eliminated, and the precedence is taken by the importance of the purpose for which those universalities are allotted. In other words, we are dealing with a genuine encouragement to moderation in legal thinking, so the trend is towards a more operative harmonisation of the legal concepts, and not towards a rigid secession, without concrete results and application methods that are useful in the legal relations.

A third (and last) criticism on the concept of patrimony-personality, that we would like to remind here, refers to the fact that according to the above-mentioned theory the idea of patrimony (in fact, the patrimony itself!) results directly from the idea of (legal) personality. Such criticism supports the idea according to which, although any person holds a patrimony, this is not due to the fact that the patrimony is a product of the personality, but because any person has a minimum of assets, which does not exclude the concomitant existence of some fractions of patrimonies, independent from the holder's person.

In reply, we believe to be useful showing that it cannot be a question, no matter how the concept of patrimony is defined and explained, of assets that a person "holds" (a term that, in our opinion, must be avoided in a rigorously legal speech, given its quite wide and vague semantic area), because the patrimony, as we all know, does not regard the assets possessed in their materiality and individuality, but, on the contrary, starts from their conceptualisation in an abstract manner, under the form of rights. But, it is deemed, for good reason, that a person who, although does not actually possess any asset, holds, however, a patrimony, as an expression of their potentiality and capacity to acquire rights and assume obligations. Thus, we may say that the patrimony is not an expression of the legal **personality**, but its **manifestation** and rather an expression of the legal **capacity** of a person.

[12] I. Rosetti-Bălănescu, O. Sachelarie, N. G. Nedelcu, *Principiile dreptului civil român*, Bucureşti, Editura de stat, 1947, p. 155.

II. Theory of patrimony of affectation

Once several States enacted (among which the young Romanian State, in 1864) a civil code following the French (Napoleonian) civil code of 1804, within the German-speaking area though the theory of patrimony-personality was, more or less explicitly, abandoned, and was replaced by the theory of "purpose patrimony" or patrimony of affectation.

II.1. This new theory was inspired by the German legal doctrine, and was supported especially in the works that, in this way, brought serious criticisms of the theoretical approach already known as "the classical theory of the patrimony". The dedicated patrimony (or assets) theory appeared in German law as an answer to the so-called "Classical Theory", as it was conceptualized by the French professors Charles Aubry and Charles Rau, in the works of professor Bekker, in *Zweckvermögen, insbesondere Peculium, Handels vermögen und actiengesellshaften. Zeitschrift für das Gesammte Handelsrecht* (1861), professor Brinz, by his *Lehrbuch der Pandekten* (Erlagen, 1860) and, ultimately, professor Uger, by the treatise known as *Zur Lehre von den juristichen Personen (Kritiche Überschau der deutschen Gezetsgebung und Rechtwissenschaft)* (1860).

It brief, as the Classical Theory assumed that all patrimony is intimately linked to a person's juridical personality, the one that followed stated that it is not required for a universality of goods to be necessarily linked to a person, being able to exist on its own as long as it followed a purpose. As a counter-attack to the French influence over the European countries that adopted a Civil code, either the Napoleon version, of 1804, either an adapted form (as Romania did, in 1864), the Germans lawyers stated that it is not the person that defines the unity of the patrimony, but the sole purpose it was created for. Therefore, the (general) patrimony of a certain individual may be divided in a number of distinct universalities, known as affectation or dedicated patrimonies, as justified by the business activities the person was directing. In this view, the patrimony can be defined as a universality of rights and obligations relative to a group of goods, dedicated to a common purpose.

Hence, the German doctrine has introduced in the theory of Civil Law actually two new and revolutionary concepts: the purpose-patrimony (*Zweckvermögen*) and the independent patrimony (*Sandervermögen*). It was then accepted that one person could have as many patrimonies as needed, each having its own destination, according to activities they developed, a general

patrimony and several dedicated ones. Furthermore, and as a natural consequence to these ideas, but also to contradict one of the pillars of the classical (French) theory, it was considered that there is no hindrance in the possibility of an *inter vivos* assignment of the distinctive patrimonial masses, each having its own assets and liabilities. This statement has proven itself extremely useful considering the goodwill which can be alienated between merchants without losing its statute of universality of law and without forbidding its holder to have other patrimonies. More so, the contemporary commercial law doctrine appreciates the goodwill as an asset, part of the merchant's patrimony. And yet, it must be taken into account that even so they resemble very much each other, patrimony and goodwill have very different juridical natures.

It is interesting to notice that the ones who support this theory of affectation patrimony consider that the patrimony is a reality and not an abstract entity, because it is susceptible to increase or diminish, has both an active and a passive side, in other words, rights and obligations, and, more so, it can be given a mathematical value, as a figure obtained by subtracting the passive from the active. In this order of business, we may reach the conclusion that this very theory expressly opposes the consideration according to which the patrimony contains present and future goods person owns. On the contrary, it follows that it must contains exclusively concrete goods, acquired and in existence in the present, in their materiality, and that the debts that belong to the patrimony are immediately and directly related to those goods, and so to the economic and social affectation of that patrimony. Being in a perpetual state of movement, patrimony does not have to influence in any way the existence of the juridical personality of its holder, so that, in the limits of this theory, it is to be understood why there is no more indissoluble link between patrimony and individual; patrimony is in a perpetual change, while the juridical personality is, with some exceptions, constant.

In other words, any universality of patrimonial rights and obligations, united by an intellectual link and being dedicated to a common purpose, can be an independent patrimony, having a separate existence from the general and other special patrimonies of the individual, each having its own active and passive sides. The doctrine has stated that the dedicated patrimony may become a juridical universality belonging to its own destination [1]. As a conclusion, in the light of this theory, we can state that patrimony has no (longer a) holder, its part being played by the goods composing it, or by the purpose they are dedicated to.

It is interesting to notice that, from such a perspective, the assigned patrimony resembles the institution of trust as existing in common law systems, as introduced in the civil law systems, including the new Romanian Civil Code, as the "Fiducie".

II.2. The theory of the patrimony of affectation is objectionable because, on the one hand, in absolutely ignores the existence of the individual as subject of law. Even though we adhere to the point of view stating that patrimony cannot ever be confused with the legal capacity to use of the individual, in spite of the very tight liaisons between the two, however, we agree upon the idea that a patrimony has to belong to a person, and thus because only persons (individuals or entities) can acquire rights or assume obligations. One cannot conceive, not on a juridical level, and not on a common one, that an ensemble of goods can take action in a sense of its increase, or to assume obligations, by exploiting its goods. On the contrary, the theory of the "purpose-patrimony" sustains the idea that entities are nothing but impersonal patrimonies, which belong to nobody, but only to their purpose, the destination for which they are created. The idea of the person as subject of law is virtually eliminated from the equation; by eliminating the person, we automatically exclude the idea of legal will and, by consequence, the idea according to which a legal act is a manifestation of such a will. Thus we arrive, *in extremis*, at least in theory, to the collapse of an entire juridical system.

The criticisms of the theory of the purpose patrimony (patrimony of affectation) refer mainly to the fact that it ignores the existence (or at least the importance) of the person as subject of law. From such perspective, it is deemed that the asset may also be subject of law, such as, for example, a trust that acquires or owes an easement, because what matters is the purpose that was initially allotted. Starting from this concept, from the perspective of this theory, it is deemed that the legal patrimonies are simple impersonal theoretical constructs, which do not belong to anyone but to the purpose, affectation or destination for which these ones were created.

At the same time, it is deemed that the idea of the purpose-patrimony would compromise the security of the legal relations linked to the contents of the person's patrimony. As a person would have, under such circumstances, several patrimonies, allotted to separate purposes or activities, its creditors, whose obligations result from a legal relation linked to one of the above-mentioned affectations, would be prejudiced in case those assets are finished, given that the

person is liable exclusively with the patrimony allotted to that particular activity. In other words, the (general) pledge of the unsecured creditors is limited to one patrimony allotted (given that the person holds several such "patrimonies"), to the detriment of their interests.

In other words, the researchers who criticised this theory thought that it would not be justified to give up the idea that the patrimony is a legal universality and the principle according to which the right to have a patrimony is one of the attributes of the personality. By accepting the theory of the purpose patrimony under its purest form, it was therefore accepted that the legal personality was no longer related, mandatorily, to the patrimony. According to this reasoning, the conclusion that may be practically reached – absurd as a matter of fact! – is that if we accept the existence of a patrimony without a holder, *per a contrario*, we may have also legal personality without a patrimony!

II.3. In relation to the theory of patrimony of affectation and to the idea that the patrimony is a universality by right, we should remind the issue, from such perspective, of the goodwill. Thus, goodwill is deemed to be a patrimony allotted for a certain purpose that is the exercise of trade; being a legal universality, this one represents an independent patrimony, with rights and obligations separate from the civil rights and obligations. Another point of view affirms however that the goodwill is an autonomous subject of law, having headquarters, company and patrimony and, so, its own rights and obligations. According to this concept, it is interesting to keep in mind that the employer, as holder of the goodwill, is seen only as its representative and not as its holder[13]. The current Romanian doctrine sustains that the goodwill is an intangible ownership right and has the following features: a) it is an unitary asset, separate from the elements forming it; b) it is a movable asset, subject to the legal regime of movable assets; c) it is an intangible movable asset, and therefore it is not subject to the instantaneous prescription regulated under art. 1909 of the Civil Code.

From the perspective of the universality theory, it is obvious that the goodwill is a *de facto* universality, that is a group of elements united by a *de facto* relation for a common goal, namely to exercise a certain trade.

[13] Stanciu D. Cărpenaru, *Drept comercial român*, Ed. Universul Juridic, București, 2007, p. 115 and urm.

Taking into account all these remarks, we may make a comparative analysis of the goodwill notion by reference to the concept of patrimony. Thus, the goodwill is a group of movable and immovable assets, either tangible or intangible, allotted by a trader for carrying-on a commercial activity. In exchange, the patrimony represents all the rights and obligations of the trader, with a patrimonial value. In conclusion, it is noticed from the very beginning that the goodwill does not include the receivables and debts of the trader, although these are part of this one's patrimony. On the contrary, the goodwill is regarded as **a movable asset, included in the trader's patrimony** and which may be transferred, entirely or partially, in compliance with certain legal conditions[14].

II.4. Finally, we remind here, in the same context, another interesting face of the patrimony of affectation, namely the French institution of *la fiducie* (the trust), which is also present in the new Romanian Civil Code of 2009 (Romanian: *fiducie*), which entered into force on 1 October 2011. First of all we show that in this regulatory deed the first reference to the trust is made at the third paragraph of article 31, namely: *Patrimonies of affectation are* ***fiduciary*** (author's underlining A.D.-B.) *patrimony masses*, *created according to the provisions of title IV of book III, those allotted for the exercise of an authorised profession, as well as other patrimonies decided according to law*. As it may be noticed, such provision of the new regulation defines explicitly the patrimony of affectation (!), establishing even a potential identity between this concept and the notion of patrimony mass (that we are going to analyse hereinafter), but, the provisions that follow (including those regarding the trust), this is completely overlooked, the legislator preferring to use, apparently exclusively, the concept of *patrimony mass*.

Similar to the other codifications that occurred after 1990 in our country, the new Civil Code had to make compatible the legal traditions with the elements of uniformity, mainly with an economic content, and resulted especially from the common law system. To this effect, we will review hereinafter the issues of the trust, which is, after all, only an imitation, according to the continental civil law, of the Anglo-Saxon concept of trust.

The institution of trust has an ancient history. Being extended from the Great Britain and the USA in numerous countries with a common law tradition,

[14] Stanciu Cărpenaru, *op. cit.*, p. 120.

in the 20th century, and after its implementation in several countries of Latin America, in 1985 the trust was subject to a convention of international private law signed in The Hague, which provided the recognition of the trusts created under the legal regime that authorised the same. In a unilateral manner (which was forbidden practically in the international conventions), a common law institution was able, in this way, to get into the civil law States. The convention was also mentioning in the articles that were subject to divergent interpretations, the legal relations similar to trusts and the possibility, for the citizens of a country with a French-German civil tradition, to form "domestic" or "internal" trusts, regulated by a foreign legislation.

It should be noticed however that a few States with a French-Roman legal tradition ratified that convention (Italy in 1990, the Netherlands in 1995, Luxemburg – 2004, Switzerland – 2007). And nevertheless this one encouraged taking-over the legal form in the new laws, and the result was even the presence of a movement imitating such institution from the '90s. The first step in this direction, explainable also by its actual application – French legal tradition in an Anglo-Saxon context – was in the legal system of the Canadian province of Quebec. From the 19th century, this one knew the testamentary trust, by donation or as security. When the new Civil Code was written, and enacted in 1991 (and entered into force in 1994), a title was inserted in the 4th Book of this regulatory deed (entitled "Property"), regarding some patrimonies of affectation, which included the foundation and *la fiducie*, in the French version of the Code, and *trust*, in English. Thus, art. 1260 and the following of the Civil Code of Quebec authorise the creation of a patrimony separately from that of the settlor by means of a transfer (for valuable consideration or for free) to the *fiduciaires* which administer the said patrimony to the profit of the beneficiaries. It was deemed that neither the settlor, not the *fiduciaire* or the beneficiary had any real right over that patrimony of affectation, and this aspect is thus differentiating *la fiducie* (practically a patrimony without subject, that may be transferred among the living) from the trust, which involves a division between the property rights of the trustees (*fiduciaires*) and the equitable rights of the beneficiaries. On the other hand, we notice that the functions of *fiducie* are however very similar to those of trusts: creating a security, by means of liberalities of familial nature or by a philanthropic act for educational, cultural or religious purpose.

In 1993, the new Civil Code of Russian Federation has transplanted the notion de trust (under the expression *dovertotelnie upravlenie*); for requirements imposed by the privatisation process, two laws of 1990 and 1992 had used the

same institution, in order to manage the shares of the State-owned companies under denationalisation process. Further to the protests of the Russian jurists, who invoked national tradition against this Anglo-Saxon concept, the writers of the Civil Code were more prudent when authorising the management by the directors of the social assets, immovable assets or personal funds (for at most five years). The related rules, forming new groups in the book on obligations, exclude an ownership transfer to the benefit of the directors or the beneficiaries, which drive away the new institution from the form of the Anglo-American trusts.

After the failure of several Parliament propositions for the implementation of a contract of *la fiducie* in the '90s in France (which did not know the trust-security, as Germany was, provided at art. 930 of Bürgerlichen Gesetzbuches), a law of 19 February 2007 inserted in the Civil Code (art. 2011-2043, in the vacant place left by the reform of the surety, which placed the new institution among the securities rather than the assets). Being regulated in this way, the French *fiducie* is far from the Anglo-American trust; it is reserved exclusively to the non-profit legal entities subject to corporate tax, cannot result in certain freedoms and aims at the creation of a separate patrimony for management or security purposes. The status of *fiducies* is closely conditional upon tax rules, to such extent that the concept under the Civil Code seems difficult, and the law refrains from defining the fiduciary patrimony.

II.5. In conclusion, we believe that it is of course a question of **patrimony of affectation, without subject**, but which is not entirely separated from the patrimony of the settlor (against whom the creditors of the fiduciary patrimony may go), neither by the patrimony of the fiduciary (within which this one creates a subdivision, with rights limited by the beneficiary receivable). Being established under a solemn contract, subject to registration *ad validitatem*, at this moment *la fiducie* seems to be a very far imitation of certain mechanisms of the trust, and not an importation of this institution in the continental law. From such perspective, the similarity between the civil law countries and the common law countries seems quite limited.

The new Romanian civil code includes an entire title for this issue (Title IV – **Trust (*Fiducie*)**, art. 773-791 of Book III – **Property**), taking-over practically the definition and, to many regards, the rules related to the legal regime of the trust and the trust property of the French Civil Code. According to the definition at art. 773, this is a transfer of rights, performed for a strictly

determined purpose and having for result the creation of a patrimony of affectation[15]. From the point of view of its purpose, it is regulated thus the trust for management purpose (art. 777), the security trust and the trust for free transfer purpose (art. 775). Of course, it is still to see how and to what extent the new legal institution will make its own way in the Romanian legal practice.

III. The compromise solution: "mixed" theory of patrimony

Taking into account these brief reviews of both opinions on the legal concept of patrimony, we deem necessary and useful, given the goals of this approach, to make some remarks. We cannot say, with a sincere and impartial scientific strictness, that both theories are completely antagonist and, thus, exclude one another; being the result of two schools of thought and, at the same time, of some separate social realities, both of them present an independent point of view on what the patrimony represents (or may represent), and such perspectives must not be taken into account strictly severally, separately, maybe even as being contradictory, but as two approaches that, in the last resort, complete each other.

Thus, by accepting that the legal personality is the basic element of any patrimony, we cannot eliminate the possibility for the holder to divide such patrimony into several patrimony masses of affectation (each of them being allotted to separate purposes), but without prejudicing in this way the unity of the patrimony, which is expressed, maybe in the best way, by the existence of its holder's person. Thus, we may think that the legal personality is the bond between the patrimony masses/patrimonies allotted to various purposes, in support of the thesis about the patrimony's unity, concomitantly with the diversity of its destinations.

Under such circumstances, we cannot exclude either the idea of a direct relation between the patrimony the legal personality of its holder, or the idea of a mass of separate assets allotted to a certain purpose, with its own assets and liabilities, but being part of the same person's patrimony. At the same time, we should remind also the fact that the legal doctrine in this field has reached the same conclusion as to the nature of legal (*de jure*) universality of the patrimony, which practically means that this is different from all the elements forming it,

[15] Ioan Popa, *Contractul de fiducie reglementat de noul Cod civil*, in „Revista română de jurisprudență" no. 2/2011, p. 213-252.

that is the rights and obligations included in the patrimony's content. These ones may disappear, may increase or decrease, but the patrimony, as an abstract entity, independent from its elements, remains the same. Thus, nothing forbids that a "group" of such assets is destined to certain practices, as its content is clearly defined by the holder, so that the rights and obligations correlative to this one are strictly limited from the other elements of the patrimony, as a whole.

This "mixed" theory, as it was called in the speciality doctrine, was deemed as the most useful and, moreover, as being beneficial to the civil circuit and the legal practice. Given the high degree of flexibility, it was possible to adapt the mixed theory of patrimony according to the requirements of the civil and commercial relations in the 20th century, satisfying the needs of an era when the dynamism and practical and theoretical adaptability are essential for any economic and social activity.

The theoretical, but especially practical interest for establishing a unitary concept and, why not, universally valid, within the continental legal system, has faced again and not few times, the (almost) total lack of interest of the legislator in defining and underlining the features of the concept of patrimony, in a civil code. Since the Napoleonian approach for systematising as exactly as possible the rules of private law, which was done under the French Civil Code of 1804, it was the legal adviser who had to find references and referrals to the idea of patrimony, wealth, inheritance, as these concepts are reminded under various internal regulatory deeds in this field, in order to outline a clear, unequivocal notion.

It is not up to us to reproach however the civil legislators of the last 200 years these reluctances in defining in a concrete and exact manner the concept of patrimony; the requirements of the legislative technique at that time, or only of the actual legislative approach, have supressed the need to present a particular definition of this concept, as it was deemed necessary, useful and sufficient only to reveal it based on its functions.

IV. Regulating patrimony in the new Romanian Civil Code

In the new Romanian Civil Code, (NRCC, Law no. 287/2009), which entered into force on October 1st, 2011, patrimony is expressly provided at article 31 (entitled accordingly, "The Patrimony. Patrimonial masses and dedicated patrimonies"), article 32 (Intra-patrimonial transfer) and article 33 (Individual professional patrimony). From a certain point of view, the legal provisions are

limited to describing the patrimony and its attributes, without even trying to offer a proper definition. And yet, as we are about to show in the following lines, now we can speak of a first legal definition of the concept of patrimony in Romanian law. We also find the concept of patrimony to be present also in its "consecrated" matters, such as the provisions regarding inheritance (article 1114 par. 2 or article 1156 of the NRCC).

As a fist, probably superficial, observation, we note a very important issue concerning the point of view of the Romanian contemporary law maker in regard to the concept of patrimony. Thus, article 31, aforementioned, is to be found in Book I – On Individuals, Title I – General provisions. This issue, of textual structure of the Code, shows that the authors would adhere to the "personalist theory" of the patrimony, and more precisely, to the indissoluble liaison between the juridical personality of the individual and their patrimony; the same idea is show in the contents of the aforementioned article and of those that follow it, that "Any physical or juridical person is titular to a patrimony that includes all their rights and debts that can be monetarily evaluated and belong to them" (par. 1).

Besides adhering to the theory first stated by French jurisconsults Ch. Aubry and Ch. Rau, the paragraph we mentioned above seems to contain, even though it is not stated as such, a definition of patrimony, respectively as all the rights and debts that can be monetarily evaluated belonging to a person. And this because one can easily notice that the law maker has taken account of all that definitions that the doctrine has offered over time to the concerning concept, but they have proved to be, perhaps, overcautious in regards to using a more obvious formulation, as it could have been, for instance, "Patrimony is/represents/ constitutes…" etc.

Under such conditions, we cannot but ask ourselves how did the law maker considers to combine the two great different views on the concept of patrimony, the personalist theory and the purpose theory respectively. First, regarding terminology, the situation seems to be more complicated; for a start, one must notice that the essential elements of the personalist theory are mentioned, coming to support the singularity of patrimony; within the same article, though, the law maker introduces expressly the concept of dedicated patrimony, implying the existence of more patrimonies belonging to the same holder. It should be noted that, in the classical legal doctrine, these two notions had different, and sometimes opposable, meanings, not exclusively because of their contents, but mainly because of the context they were used. If the dedicated patrimony is a

patrimony *per se*, standing on its own, dedicated to some or other destination, and a holder can own many such patrimonies, the notion of patrimonial mass has been introduced by the doctrine in the sole purpose of usefully combining this idea, of harmonizing the theory of the unity of a patrimony to the practical necessity of having more categories of masses of goods, according to their destinations. Thus, the idea of one patrimony is kept, but also that within it, one can have many other patrimonial masses, each dedicated to a certain purpose, but not separated from the rest of the goods; regarding the holder's liability, it is not limited to the goods assigned to a certain patrimonial mass.

But the provisions of the new Civil Code dispose that there is identity between these two concepts. In such an interpretation, one could understand that, by means of legal regulation, the conclusions of a century-old doctrine are annulled. No doubt, the studies on the new Code that will follow are going to offer a sufficiently pertinent explication for this change and will analyze the new implications of the concept of patrimonial mass.

We also notice, in the same context, that the new civil ruling imposes an ambiguous legal regime to these patrimonial masses dedicated to different purposes. Thus, as we have shown above, there has been imposed an apparent identity between the concepts of "patrimonial mass" and "patrimony of affectation". Such a conclusion proves to be more bizarre given that it has become contradictory in itself, as the two notions have been since their creation in contradiction, the former being adopted as a response and replacement to the latter. Thus, both researcher and practitioner must prove to be most diligent in studying and applying these regulations, to avoid any confusion between the meanings of these phrases. As we have already stated, the Civil Code now in force imposes this synonymy; and yet, it is possible that regulations that will follow shall not take it into account, which imposes an increased diligence in their utilization.

V. Practical uses of the dedicated patrimony in the Romanian Civil Code

It is interesting to notice that the new Civil Code regulates the legal status of the so-called "liberal professions", regarding the legal regime of their patrimony – lawyers, medical practicioners, notary publics, bailiffs etc. – professions that impose to the practitioner the existence of a "professional personal patrimony". Certain opinions stated in the doctrine, tributary mainly to the former regulations, considered that, in fact, it is intended to acknowledge the

existence of a patrimonial mass destined to the exercise of the profession, and thus, there is no dedicated patrimony. And yet, in an obvious contradiction to this idea comes that fact that article 31 paragraph 3 of the RCC states, as shown above, that there is an identity between the dedicated patrimony and the patrimonial masses, at least considering the new regulation. Therefore, also regarding the provisions of article 33 paragraph 1, stating that "the constitution of the patrimonial mass dedicated to the individual exercise of an authorized profession is determined by the document signed by the titular, in observance of the form and publicity conditions imposed by the law", we rightly appreciate that the law maker has actually considered a dedicated patrimony. Nevertheless, given this terminological aspect which, in our opinion, is of major importance, we appreciate that, within the limits of scientific research, we are entitled to keep a reserved attitude in regards to this semantic identity between these two terms that formerly, as shown above, had different meanings in the specialized doctrine. We may add, as a personal note, that a strict and express determination, of recognizing or not the concept of dedicated patrimony, it would have been a significant step forward for the Romanian private legal system.

Although the aforementioned paragraph, offering a definition of the dedicated patrimony, could be interpreted as establishing a conceptual identity strictly between this type of patrimony and certain patrimonial masses, respectively the "fiduciaries, constituted according to the provisions of title IV, book III, the ones dedicated to the exercise of an authorized profession, and also other patrimonies determined according to law", meaning that there is actually a very strict differentiation of the patrimonial masses that are to be assimilated to the dedicated patrimony, thus having certain patrimonial masses that escape this assimilation. And yet, we cannot fail to notice that the legal text enumerates all the situations that the doctrine and interpretations of the ancient Civil Code considered as a proper patrimonial mass, including the situation of practicing trade activities or liberal professions. Therefore, we appreciate our interpretation, in this context, to be extremely pertinent.

VI. Conclusions

Despite being completely unintentional or, at least, not taken seriously into consideration, the influence of the German legal doctrine of the XIXth century on the Romanian Civil Code of 2011 is significantly present. Even though not

taken as such from the aforementioned theoretical works, but mainly by the indirect filter of French and old Romanian doctrine, the idea of a patrimony of affectation and its practical uses, as regulated by the new civil regulation, reflect with high fidelity the vision of certain German theorists of law, standing out as one of the great schools of thought of private law of the second half of the 1800s.

We cannot close this brief analysis of the concept of patrimony, mostly a historical approach rather that a strictly legal one, without mentioning, according to a proposition or, better say, a *de lege ferenda* desiderata of a general nature, namely that the explanation at legislative level of the concept of patrimony, along with establishing, as rigorously as possible, its basic features and functions, represent a compulsory need of any Roman-German inspired legal systems.

5. The Migration of Constitutional Ideas-Word Translations or Norm Transfers?

Bogdan IANCU*

I. Introduction

German post-WWII constitutional law has served as an extremely influential model to many post-totalitarian constitutional transitions. Numerous norms, procedures, and institutional arrangements derived from the Grundgesetz (proportionality, constructive vote of no confidence, militant democracy, model of constitutional review, etc.) have inspired and influenced constitution-making processes around the world. Examples range from post-Salazar Portugal to post-communist constitutionalism or post-Apartheid South Africa.

The Romanian constitution-maker was also (marginally) inspired by the German model, borrowing a few elements from the German constitutional toolkit. Human dignity (Art. 1 GG) and the free development of personality (Art. 2 GG) have found their way into Art. 1 (3) of the Romanian Constitution, which guarantees these rights as "supreme values".

My paper will address a recurrent theme of comparative law, *i.e.*, if norm borrowing is an exercise in mere word translation or presupposes also extensive conceptual transplants from the jurisdiction of origin. I will seek to provide a tentative answer, starting from the example of the way in which a characteristic German constitutional right (human dignity) has been interpreted (received) by Romanian constitutional law.

II. The Migration of Constitutional Ideas

Post-millennial comparative constitutional studies have used a bevy of adjectival qualifications ('global constitutionalism', 'transnational constitutionalism', 'migration of constitutional ideas', and the like) in to express the

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general idea that national constitutional interactions with one another and with international and supranational jurisdictions progressively approximate a wider, ever more cosmopolitan dialogue of cultures. The premise underlying such doctrinal positions is that judicial dialogues and borrowing, together with the international consolidation of good practices through the intermediary of informal and formal professional networks are converging towards an denser and more cohesive constitutional synergy.

That the degree of rapprochement between constitutional systems in the last decades is quantitatively higher than that of the former two centuries is an easily observable phenomenon. To be sure, there has always been a degree of imitation and transplant of foreign norms, even at the constitutional level and particularly at the moment of constitution-making. For instance, the Romanian Constitution of 1866 took as a model the Belgian Constitution of 1931, in form if not necessarily at the level of actual practices.[1] The short-lived French Constitution of 1848 followed, in adapted form, the template of American presidentialism. More rarely, the imitation of a prestigious model went further, surpassing mere transposition of foreign institutional blueprints. Following foreign doctrine and practice is common in civil law; the specific difference of fundamental law has been a contingent factor of the rarity of judicial review before WWII but essentially resides in the sovereignty- and legitimacy-related implications of constitution-making and constitutional interpretation. Even when a 19th or early 20th – century court took its inspiration from abroad, it usually proceeded to emulate foreign practice *sub rosa*. For example, the reasoning of the Ilfov Tribunal, in the 'Streetcar Society of Bucharest' case of 1912, which asserted the power of ordinary courts to interpret the Constitution and, should a conflict be observed between constitutional provisions and those of inferior norms, to disapply legislative norms in conflict with the Constitution, is strikingly similar with that of John Marshall in *Marbury v. Madison* but no actual reference to *Marbury* was provided.[2] The Argentinian example is singled out in the literature on legal transplants, as an exceptionally far-reaching case of early borrowing, insofar as not only norms were adopted from the US Constitution in

[1] *See generally*, "Reflecții privind începuturile regimului parlamentar în România modernă – între transplant constituțional şi autoritarism regal (1866-1914)" – în *Dreptul* nr. 8/2011, pp. 131-162.

[2] *Cf.* Mircea Criste, "Începuturile controlului de constituționalitate în România-Procesul societății tramvaielor", în *Curentul juridic*, nr. 1-2 (2005), available at http://revcurentjur.ro/old/arhiva/attachments_200434/recjurid043_42F.pdf.

the Argentine Constitution of 1853-1860, but the interpretations given to the borrowed rules in the jurisdiction of origin served as formal sources of constitutional law in the importing legal system. The Argentinian Supreme Court incorporated by reference the US Supreme Court judgments interpreting analogous provisions (*e.g.,* property rights and free speech) in its case-law, until the 1930s, and started to diverge from its practice of following strictly US judgments as *binding precedents* in domestic practice only in the last decade of the nineteenth century.[3] In effect, US Constitutional *law* as such, not just the American Constitution, enjoyed a 'talismanic authority'[4] in Argentinian judicial practice for the better part of a century. In short, transplant and transfer have always been features of constitutionalism, from the rise of the modern normative constitution and the appearance of influential models to be emulated in the post-revolutionary fundamental laws of France (1791) and the United States (1787).

Nonetheless, contemporary developments appear to surpass prior experiences in both reach and depth of constitutional interactions. First, democratization, which has presupposed as a first step the adoption of post-totalitarian constitutions, for instance in Latin America (Brazil (1988)) or Southern Europe ((Greece, after military dictatorship (1975), post-Salazar Portugal (1976), Spain after Franco (1978)), in Eastern Europe after 1989, or – more recently – in post – Apartheid South Africa (Constitution of 1996) or Irak (2005), has taken place in a constitution-drafting climate propitious to a large-scale immitation of Western models, perceived as authomatically enjoying more prestige than autochtonous ones. Furthermore, immitation, in the last part of the twentieth century, consisted primarily not in the transfer of a coherent model as such, but in the taking of prefabricated fragments, bits and pieces of the Ikea constitutional toolkit[5] (French semi-presidentialism, the German model of Constitutional review, Scandinavian Ombudsmen, American independent agencies, the Italian-French model of a High Judicial Council, and the like) by local elites and adapting them slightly to the domestic constitutional environment. Second, and related, influential and industrious 'norm entrepreneurs' have

[3] Jonathan Miller, "Judicial Review and Constitutional Stability: A Sociology of the U.S. Model and its Collapse in Argentina", 21 *Hastings Int'l & Comp. L. Rev.* 77 (1997-1998).

[4] Jonathan M. Miller, "The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite's Leap of Faith," 46 *Am. U. L. Rev.* 1483 (1997).

[5] Günter Frankenberger, "The Ikea Theory Revisited", 8 (3) *Int. J. Const. L.* 563-579 (2010), available at http://icon.oxfordjournals.org/content/8/3/563.full.

been more readily available, especially after the collapse of Communism, to facilitate the translation of various models and norms across systems. The European Commission for Democracy through Law of the Council of Europe, usually known under its moniker as the 'Venice Commission' of the Council of Europe, is a particularly suitable example. Created in 1990, as a project of a former Italian Minister for European Affairs, Antonio La Pergola, who advocated its adoption as a consultative body, designed to provide constitutional expertise to the former Eastern bloc, the Commission has outgrown its initial mandate and membership beyond all initial expectations.[6] Now, the membership, straddling 5 continents, is much wider than that of the Council of Europe itself; the 61 current full members of the include for example the United States, Peru, Chile, Brazil, Morocco, Tunisia, and South Korea.[7] The current institution wears, aside from its staple advisory hat, the hat of a sui-generis constitutional broker, relaying information, admonition, and counsel, and building networks at the constitutional interface between the European Union and its Member States, and the hat of a transnational constitutional codifier of 'good practices'. Third, and related, international organizations (IMF, the World Bank) include nowadays in structural adjustment programs some convergence criteria which comprise constitutional elements, or at least 'good governance' standards with constitutional impact (*e.g.*, judicial reforms with a strong predilection for professionally elected councils).[8] At the level of the European Union, what began as a kind of marginal convergence requirement, in the form of the political *acquis*, monitored under the 1993 Copenhagen Criteria, has in the meanwhile grown into what recent commentators proclaim as a genuine "European Constitutional Area". The triumphalist undertones of this metaphor may be perhaps premature but the intensity of the interactions between the

[6] Maartje de Visser, "A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform", 63 *Am. J. Comp. L.* 963 (2015).

[7] Belarus is the only associate member. There are also five observers (Argentina, Canada, the Holy See, Japan, and Uruguay) and four 'special status' entities (this latter, hybrid category includes a country (South Africa), a professional association (Association of Constitutional Courts using the French Language), an interim de facto government (Palestinian National Authority), and an international organization (the European Union) (http://www.venice.coe.int/WebForms/members/countries.aspx?lang=EN.

[8] I discuss this phenomenon at length in Bogdan Iancu, "Standards of "Good Governance" and Peripheral Constitutionalism: The Case of Post-Accession Romania", forthcoming in A. Febbrajo and G. Corsi (eds.), *Sociology of Constitutions: A Paradoxical Perspective* (London: Routledge, 2016), pp. 180-197.

Commission and its newer Member States, both pre- and post-accession (witness the reactions to the 2011 Hungarian Constitution and subsequent Cardinal Acts, to the 2012 government crisis in Romania, and to the recent events in Poland) is an undeniable fact.[9] Such interactions involve nowadays a denser network and a measure of international cross-hybridization, insofar as the older master of the conditionality, the European Commission, increasingly makes informal (references in country reports) and formal (cooption in the fledgling Rule of Law Mechanism) use of the Venice Commission. These three phenomena, namely the process of accelerated adoption of new liberal constitutions (associated with the desire and sometimes need to emulate paradigmatic success models of Western constitutionalism), the rise of influential 'constitutional norm entrepreneurs', and the juridification, with constitutional overtones, of former international organizations converge in creating an unprecedented process of cross-hybridization and migration of constitutional norms, institutions, procedures, methodologies.

These unprecedented developments, and in particular the current intensity of constitutional exchanges, restate the old question of legal transplant doctrine with immediacy, namely, to what extent the translation of rules from one system to another is accompanied by a transfer of values from one system to another. Is the migration of structures from one system to another normative in nature? Does the reception of a rule or institution or concept from a foreign system accomplish in its new environment analogous or similar functions or does the new system reject the transplant or perhaps, perceiving it as a superficial 'irritation', reinterpret it in domestic logic, for idiosyncratic local purposes?

This chapter attempts not a general answer to this question (perhaps unanswerable in general terms) but a limited, marginal gloss on the debate, starting from the post-communist reception in Romanian constitutional jurisprudence of a quintessentially German constitutional notion, human dignity.

III. Human Dignity as a Constitutional Value and Subjective Right

References to human dignity in fundamental law and human rights documents predate the Basic Law of 1949. The Constitution of Ireland, adopted in 1937, includes in its preamble the recognition of the principle of the "dignity and freedom of the individual" as one of the overarching goals of the

[9] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014DC0158.

constitutional order.[10] From this clause the Supreme Court of Ireland has derived a rich constitutional jurisprudence, treating dignity both (alternatively) as a standalone right and as a background principle against which other rights (asylum, the prohibition of torture and degrading treatments, due process) are construed.[11]

At the international level, the Universal Declaration of Human Rights of 1948 mentions dignity both in the preamble (in the first ("the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" and fifth ("the peoples of the United Nations have … reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person") recitals and in the 1st[12] and 22nd articles.[13] The concept is mentioned in many other constitutions, for example those of India and South Africa. But even if human dignity is not found in the text as such, references to this principle, used as an background norm, sometimes found their way into constitutional jurisprudence. The Supreme Court of the United States, albeit notoriously impervious to both innovation and importation, has more recently used dignity as an interpretive aid in its adjudication on the freedoms protected by the Eight (prohibition of 'cruel and unusual punishment') and Fourth (protection from 'unreasonable searches and seizures') Amendments and as a component of the 'liberty' protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.[14]

Human dignity is therefore not a German constitutional *novum*. But German constitutional law has had the merit of constraining this in and of itself

[10] "And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations, Do hereby adopt, enact, and give to ourselves this Constitution."

[11] Conor O'Mahony, "The Dignity of the Individual in Irish Constitutional Law", Law (January 8, 2016), forthcoming in Dieter Grimm, Alexandra Kemmerer & Christoph Möllers (eds), *Human Dignity in Context* (Oxford: Hart Publishing, 2017). Available at SSRN: https://ssrn.com/abstract=2712736

[12] All human beings are born free and equal in dignity and rights.

[13] Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

[14] Neomi Rao, "On the Use and Abuse of Dignity in Constitutional Law", 14 *Colum. J. Eur. L.* 201 (2007-2008).

widely open-ended concept by dint of a disciplined framework of interpretation. As such, dignity is a "heavyweight notion" charged with unstated presuppositions and natural law connotations, so that. If used as a self-standing concept, it lends itself very easily to confusing interpretations or judicial abuse by way of *post hoc*, discretionary interpretations.[15] Even in a relatively settled constitutional order such as that of Ireland, the case-law relying on dignity as a self-standing right or interpretive adjuvant (heuristic tool) appears at times confusing and haphazard. In a recent study, Conor O'Mahoney juxtaposes some right to life judgments in whose reasoning dignity played a center stage role, with the perplexing result that a dignified life may require in some cases a dignified death, whereas in other hypotheses the dignity of life means that terminally ill individuals must be refused access to early termination through assisted suicide.[16]

The Basic Law opens with the guarantee of human dignity: "Human dignity shall be inviolable (*unantastbar*). To respect and protect it shall be the duty of all state authority."[17] This general guarantee contains a subjective right to dignity. The jurisprudence of the Federal Constitutional Tribunal has constrained the lofty provision of Art. 1, par. 1, by interpreting it within a disciplined (consistent and coherent) methodological paradigm. First, unlike other rights and liberties protected by the constitution, the guarantee of dignity is absolute (*Absolutheisthese*). This means that once it is determined that state or private action impinge on dignity, no recourse to the usual proportionality control and balancing, the routine framework of analysis through which the restriction of a

[15] Steven Pinker, "The Stupidity of Dignity", in *The New Republic* (May 28, 2008), available at: https://newrepublic.com/article/64674/the-stupidity-dignity. Rao, supra, at p. 208: "As a baseline for recognizing our shared humanity, equal human dignity has ringing appeal. But in concrete cases, human dignity will often fail to provide any specific guidance precisely because there are many different and conflicting conceptions of what dignity may require. For example, dignity may be considered part of autonomy, liberty, equality or respect-values that will often be irreconcilable."

[16] *In Re a Ward of Court* concerned withdrawal of life support from a woman in persistent, long term (twenty years) vegetative state (*dignity was taken to mean that one has a right to a dignified death*). In *Fleming v. Ireland*, a challenge by a multiple sclerosis sufferer to legislation prohibiting assisted suicide was deflected with a 'dignitarian' argument by the Supreme Court of Ireland (*dignity was understood as underlying the sacrosanct value of any life, at any point, that of a youngster in his prime as well as that of an old, terminally ill, disabled person*). O'Mahoney, *supra* note.

[17] Official translation https://www.bundestag.de/blob/284870/ce0d03414872b427e57fccb703634dcd/basic_law-data.pdf (Unless otherwise provided, translations are mine).

right is assessed against countervailing rights or protected values, is necessary. Dignity, being absolute, acts as a trump and, in a way, also as a gag-rule on further constitutional analysis. Second and related, dignity is interpreted as a protection against state action which aims to 'instrumentalize' or objectify a human being. This is the recognizable legal rendition of the Kantian prohibition on instrumentalism (*Instrumentalisierungsverbot)*, the second of the three formulations of the categorical imperative: "So act that you treat humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means [to an end]."[18] Thus, in the "object formula" (*Objektformel*) and the claim on absoluteness, an element of metaphysics or 'positivised' natural law was entrenched in the *Grundgesetz.* In Josef Isensee's deft formulations dignity is "posited meta-positive law" (*positiviertes überpositives Recht*).[19] Another author postulates that the absolute character of dignity in the German constitutional order would mark a transition from "Christ to Kant"[20].

Furthermore, by placing dignity at the forefront of the constitution and by making the guarantee itself a supra-constitutional absolute, sheltered from amendment by the "eternity clause" (*Ewigkeitsklausel*) of Art. 79 par. 3, the constitution-makers of 1949 subjected and subordinated all other provisions to this principle, in perpetuity. Although some proposals have been made in the doctrine to reduce the scope of Art. 1 (1) to a principle and background norm (i.e., not a subjective right) or to make the right subject to the usual hurdles of proportionality analysis, convergence on the orthodox dogma is so deeply entrenched in the texture of constitutional adjudication and constitutional doctrine that it can safely be described as unanimous or, in German legal theoretical jargon, 'completely dominant opinion' (*v.h.M., völlig herrschende Meinung*).[21]

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[18] Immanuel Kant, *Groundwork of the Metaphysics of Morals* in *Immanuel Kant: Practical Philosophy* trans. Mary Gregor (Cambridge, 1996), p. 429, italics omitted.

[19] See Josef Isensee, "Menschenwürde: die säkulare Gesellschaft auf der Suche nach dem Absoluten", in *Archiv des öffentlichen Rechts*, Volume 131, Number 2, April 2006, pp. 173-218(46).

[20] Rosemarie Will, "Christus oder Kant. Der Glaubenskrieg um die Menschenwürde", in *Blätter für deutsche und internationale Politik*, 2004, 1228-1241.

[21] *See* Isensee, *supra*, arguing that the subjective right to dignity ought to reassessed as an 'idea', general principle or a 'foundation of basic rights' (*Grund der Grundrechte*), against the background and in the light of which other rights could be construed. For a critique of the 'absoluteness thesis', see also Manfred Baldus, "Menschenwürdegarantie und Absolutheitsthese:

A standard textbook example is the prohibition of torture. Torture is arguably the ideal-typical case of instrumentalism and thus of an impermissible encroachment upon dignity. The ban on state action is categorical; no balancing or proportionality, irrespective of the countervailing values at stake, would justify torture. The case-law of the Tribunal has grappled with the implications of human dignity on a number of occasions; two examples would suffice to illustrate its general approach. In the 'Life Imprisonment Judgment' (of 1977, the Tribunal held that the Criminal Code imposition of life imprisonment without the possibility of parole for murder would have been incompatible with the Basic Law (human dignity and the rule of law principle), if and insofar as the condemned were deprived of any possibility (a real chance) of petitioning for early release, provided that he or she could be ascertained – *e.g.*, by an independent parole board – to no longer present danger to the community. A hypothetical possibility of early release by pardon or amnesty would not suffice to save the rule, since the question was whether the individual could have a chance to redeem him- or herself and ask for reinsertion in the community, by using a clear legal procedure.[22] Every convict would have to be accorded by the law *a realistic chance* of being eventually released and clear standards regarding the individualized evaluation of his or her aptness for social reinsertion.

Another, more recent example of dignity in action is provided by the 2006 decision of the Federal Tribunal of Karlsruhe, which struck down as unconstitutional a provision of the federal Air Security Act of 2005 (*Luftsicherheitsgesetz*). Adopted in the trail of the 2001 terror attacks in the US and of a 2003 Frankfurt incident in which a man threatened to crash a hijacked sport airplane in the building of the ECB, the law authorized the Minister of Defense, in consultation with the Minister of the Interior, to order the Air Force to shoot down a hijacked aircraft, as a last resort option, should it be ascertained, under the circumstances, that the aircraft would be used against selected targets and human lives would be endangered.[23] The provision was declared

Zwischenbericht zu einer zukunftsweisenden Debatte", *Archiv des öffentlichen Rechts*, Volume 136, Number 4, November 2011, pp. 529-552, arguing that discarding the absoluteness element and making dignity subject to proportionality analysis and balancing would be truer to actual recent developments in the jurisprudence of the Tribunal, whereby judges do already undertake, albeit not overtly, proportionality analysis.

[22] BVerfGE 45, 187-*Lebenslange Freiheitsstrafe*.

[23] *Luftsicherheitsgesetz Entscheidung*, 1 BvR 357/05, available at: http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2006/02/rs20060215_1bvr035705.html

unconstitutional since such state action would violate the right to life guaranteed by Art. 2 (2), in conjunction with the guarantee of human dignity (Art. 1 (1)), insofar as the innocent people on board (crew, passengers) were objectified in order to avert a perceived danger to the lives of others (in a nice Kantian twist, the terrorists are understood to have objectified themselves).[24]

Although not all decisions of the Constitutional Tribunal present such dramatic and clear-cut applications of the 'object-formula', the methodology as such, allowing for a relatively restrained interpretation of the dignity guarantee, has withstood the test of time. Moreover, due to the relative clarity of the heuristic framework, German dignity-related jurisprudence and constitutional doctrine have exerted a considerable influence on the way in which other constitutional systems have approached this concept. Similarities are apparent for example in the reasoning of the French Council of State in the so-called "Dwarf Tossing" Case of 1995. The Council annulled on appeal an administrative tribunal judgment and confirmed an administrative order of French commune mayor, banning a dwarf-tossing show. The reasoning of the Council was that the concept of public order as an element of police powers, includes respect for the dignity of human beings, which would be undermined by a show presenting a person thrown about as a missile, for the amusement of spectators.[25] The object formula was also adopted by the European Court of Justice. In its 'Omega Judgment', the Luxemburg Court had to determine

[24] At pars. 37-39: Das Luftsicherheitsgesetz verstoße gegen die Grundrechte der Beschwerdeführer auf Menschenwürde und Leben gemäß Art. 1 Abs. l und Art. 2 Abs. 2 Satz l GG. Es mache sie zum bloßen Objekt staatlichen Handelns. Wert und Erhaltung ihres Lebens würden unter mengenmäßigen Gesichtspunkten und nach der ihnen 'den Umständen nach' vermutlich verbleibenden Lebenserwartung in das Ermessen des Bundesministers der Verteidigung gestellt. Sie sollten im Ernstfall geopfert und vorsätzlich getötet werden, wenn der Minister auf der Grundlage der ihm vorliegenden Informationen annehme, dass ihr Leben nur noch kurze Zeit dauern werde und daher im Vergleich zu den sonst drohenden Verlusten keinen Wert mehr habe oder jedenfalls nur noch minderwertig sei. Der Staat dürfe eine Mehrheit seiner Bürger nicht dadurch schützen, dass er eine Minderheit – hier die Besatzung und die Passagiere eines Flugzeugs – vorsätzlich töte. Eine Abwägung Leben gegen Leben nach dem Maßstab, wie viele Menschen möglicherweise auf der einen und wie viele auf der anderen Seite betroffen seien, sei unzulässig. Der Staat dürfe Menschen nicht deswegen töten, weil es weniger seien, als er durch ihre Tötung zu retten hoffe…Eine Relativierung des Lebensrechts der Passagiere lasse sich auch nicht damit begründen, dass diese als Teil der Waffe Flugzeug angesehen würden. Wer so argumentiere, mache sie zum bloßen Objekt staatlichen Handelns und beraube sie ihrer menschlichen Qualität und Würde.

[25] CE, Ass., 27 Octobre 1995, p. 372 Case Commune de Morsang-sur-Orge.

whether a limitation of the freedom to provide services (a ban by the Mayor of Bonn of a 'Laser tag' game produced by the British company Pulsar) could be justified on the grounds of dignity (which was, in the mayor's argument, confirmed by the German Federal Administrative Court, affronted by the logic of such games, *i.e.*, "playing at killing").[26] The reception of dignity into EU law (as an autonomous right to dignity, guaranteed as a general principle of law, derived from the common constitutional traditions) modified the right in an important respect. Whereas the German guarantee is absolute, the Community general principle, albeit interpreted symmetrically, as prohibition on objectifying human beings, is made subject to proportionality and balancing.[27]

IV. Lost in Translation-Human Dignity in Harmony with the Environment

Various elements of Romanian constitutionalism were borrowed in adapted form from Western constitutions or from international documents. Most aspects of the separation of powers arrangements or constitutionality review are exemplary of the traditional 'French obsession'[28] of Romanian law and lawyers, but three of the general principles enumerated in Art. 1 (3) (The State) are of recognizable German origin: "the democratic social rule of law state" (*soziale Rechtsstaatlichkeit*), human dignity, and the notion of free development of personality. Direct German influences on the Romanian constitution-makers of 1991 were scant to non-existent, due to language barriers and the absence (at that time) of influential German 'norm entrepreneurs' such as the Konrad Adenauer Foundation or the GEZ. It is most likely, albeit impossible to prove beyond

[26] Case C-36/02 *Omega* [2004] ECR I-09609.

[27] *Omega*, at pars. 37-39: "It is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected… In this case, it should be noted, first, that, according to the referring court, the prohibition on the commercial exploitation of games involving the simulation of acts of violence against persons, in particular the representation of acts of homicide, corresponds to the level of protection of human dignity which the national constitution seeks to guarantee in the territory of the Federal Republic of Germany. It should also be noted that, by prohibiting only the variant of the laser game the object of which is to fire on human targets and thus 'play at killing' people, *the contested order did not go beyond what is necessary in order to attain the objective pursued by the competent national authorities*." [emphasis supplied].

[28] Manuel Guțan, "Transplantul constituțional şi obsesia modelului semiprezidențial francez în România contemporană" (I), 5 *Pandectele române* 35 (2010).

doubt, that the concepts were adopted from the Spanish constitution of 1978 which is in turn clearly and notoriously tributary to the 1949 *Grundgesetz*.[29] Contacts of the constitution-drafting committee with Spanish counterparts are documented, as is the infatuation of Romanian post-communist constitution-makers with the Spanish model. The chair of the Constitutional Committee, Senator and law professor Antonie Iorgovan described the committee's documentation trip to Spain in encomiastic terms: "[I]n our opinion, the Spanish constitution was the most successful in Europe and relatively recent, dating back in 1978. About the Constitution of Spain, it is said that its mother is the French Constitution (1958) and its grandmother the German (1949)."[30]

The principle of human dignity appears in its Romanian avatar as a general principle of state functioning ("supreme value"), rather than, as in the original jurisdiction, as a preeminent self-standing absolute value. The general values provided by Art. 1 did not play a central role in the jurisprudence of the Romanian Constitutional Court until relatively recently, since the formulas were implicitly considered to be open-ended and thus not justiciable.

In January 2012 the Constitutional Court was called to render a decision regarding an objection of unconstitutionality concerning a law ratifying and amending a 2001 Governmental Emergency Ordinance concerning the of stray dog population management.[31] Stray dogs have been, until very recently, a resilient problem of post-communist Romania, with animal rights activists pressuring for milder solutions (often unfeasible within the realm of the financial constraints) and general polls showing a pressure for euthanasia (a cruel option, given the size of the dog population in Bucharest and other major Romanian

[29] César Landa, "The 50th Anniversary of the Bonn Basic Law: Its Significance and Contribution to the Strengthening of the Democratic State", in Peter Häberle (Hrsg.), *Jahrbuch des Öffentlichen Rechts der Gegenwart. Neue Folge,* Bd. 48 (Mohr Siebeck, Tübingen, 2000), pp. 25-38, describing the same mediated influence in the case of the Peruvian constitution of 1979.

[30] The works of the Constitutional Drafting Committee (which adopted draft theses) and the Constituent Assembly (*i.e.,* the Parliament working as a constituent) were published by the President of the Constitutional Drafting Committee, Senator and law professor Antonie Iorgovan, *Odiseea elaborării Constituției, fapte şi documente, oameni şi caractere; - cronică şi explicații, dezvăluiri şi meditații*, Editura Uniunii Vatra Românească, Târgu Mureş, 1998 (*The Constitution-Making Odyssey 1990-1991-deeds and documents, people and characters; - chronicle and explanation, unraveling and meditation*), at p. 66.

[31] D.C.C. no. 1 of 11.01.2012, M. Of. no. 53 of 23 January 2012. An English translation is available at https://www.ccr.ro/en/jurisprudenta-decizii-de-admitere?search_item=&letter=&year=2012

cities). The impugned provision delegated the choice to each local council and the General Council of the Municipality of Bucharest, respectively, to opt, after consulting the population of each administrative unit, among three solutions or a combination thereof:

i. to catch the stray dogs, neuter (spay) and release them;

ii. to impound them and keep the dogs in dog pounds (shelters) at public expense;

iii. to euthanize animals not adopted or claimed by their owners, after keeping them in the shelter for a period of 30 days. A number of exceptions and qualifications were provided, for example, puppies under five months would not be euthanized, even if unclaimed or not adopted, until they reached 12 months.

The signatories of the objection listed a number of arguments regarding the alleged unconstitutionality of the Law approving the 'stray dog management ordinance', among which the claim that the solution infringed human dignity because it impeded the free development of human personality.[32] A number of subsequent, somewhat garbled, reasons were adduced in support of this hybrid, free development/human dignity claim, namely the assertion that 'euthanasia is individual, not collective', the speculation that 'communities would be tempted to favor mass euthanasia as a first option', and the affirmation that allowing each community to choose would produce different solutions in the application of the law and breach a hypothetical principle according to which 'in Romania the law must be applied uniformly at the national level'.

The Court responded positively to the argument, by incorporating a human dignity strain of analysis in its reasoning. The relevant paragraph is worth citing at length:

"*Likewise, the Court finds that as a result of the use of an inadequate legal technique the legislator eventually undermined human dignity, a supreme value enshrined under Article 1 paragraph (3) of the Constitution.* ***Human dignity****, as from the constitutional aspect, involves two inherent dimensions, namely* ***relations between people****, which concerns people's right and obligation to have their rights and freedoms respected and, accordingly, to respect fundamental*

[32] "Euthanasia of stray dogs is contrary to human dignity as 'euthanasia is a violent, traumatic measure, impeding the free development of human personality.' Such a measure lacks proportionality in relation to the situation that caused it, because it removes their right to life; euthanasia should be regarded as an exceptional measure within certain disease control programmes, and the rule should consist in the reduction of the unplanned breeding of dogs, through their sterilization."

rights and freedoms of their peers (see, in this respect, also Decision no. 62 of 18 January 2007, published in the Official Gazette, Part I, no. 104 of 12 February 2007), as well as ***humans' relationship with the environment, including the animal world****, which involves, as concerns the animals, man's moral responsibility to care for these creatures in such a way to illustrate the attained level of civilization*."[33]

This reasoning is attached, almost as an afterthought, to the main argument that the vagueness of the provision ran counter to the principle of legality (Art. 1 (5)). What stands out in the analysis is the fully autonomous interpretation of human dignity, as implying a human obligation to deal with the environment responsibly. No attempt is made to grapple with the interpretation of dignity in the jurisdictions of origin (Germany, via Spain) or with the meaning of human dignity in EC/EU law (Omega).

More problematic still was a subsequent decision, rendered a year later, regarding the constitutionality of 2013 amendments to the ordinance. In the trail of a public scandal, following the slaying by stray dogs of a child left unattended, the law amended the ordinance, to permit euthanizing stray dogs impounded and kept in dog pens for 14 days, providing however (Art. 7, pars. 2 and 3) that "Dogs unclaimed by their owners or not adopted shall be euthanized on the basis of a decision adopted by a person deputized by the mayor, within the term set by such decision. Such term will be established with due regard to the capacity of shelters and budgetary restrictions. The term may be modified on the basis of a reasoned decision. The decision to euthanize shall issue for each dog, once it is ascertained that all procedural requirements have been fulfilled."[34] This time over, the Court modified its stand, essentially arguing that dignity would not be infringed by a norm establishing a procedure according to which each dog is processed individually, according to a process within the logic of which euthanasia is a last resort solution.[35] This flies in the face of a reality in which the purposes and actual results of the two procedures, aside from the admittedly significant paperwork differentials, were hardly any different.

[33] Citation from the authorized translation available on the Court website. Emphases in bold in the original text.

[34] Legea nr. 258/2013 pentru modificarea şi completarea O.U.G. nr. 155/2001 privind aprobarea programului de gestionare a câinilor fără stăpân, M. Of. nr. 601 din 26 septembrie 2013.

[35] D.C.C. no. 383 of 25.09.2013, M. Of. no. 644 of 21 October 2013.

The argument pursued here was not necessarily that the German concept of human dignity ought to have been transposed slavishly in Romanian constitutional doctrine but that the rudimentary manner in which the adopting system reacted to this transfer, treating the concept as a mere word translation, to be interpreted in a ludic, open-ended manner, produced impoverished hermeneutics and unpredictable, pliable decisions. More generally, the tribulations of the Romanian Constitutional Court in its approach to this borrowed phrase (human dignity) show that the simple transfer of notions from one system to another, without transposing or at least internalizing and addressing the attendant network of shared --and contested-- meanings in the jurisdiction of origin does not produce necessarily a transfer of norms. The exercise of borrowing may often result in mere word translations.

6. European (Criminal) Law *v.* National (Criminal) Law – a Two Way Street

Norel NEAGU*

I. Historical Perspective of European Union's jurisdiction in the field on criminal law – from non-existent to minimal influence

European Union institutions' jurisdiction in imposing provisions in the field of criminal law has represented until recently a controversial issue.

Starting with the Rome Treaty and until the beginning of the '70s, the European Union institutions did not have jurisdiction in the field of criminal law. This field was considered as part of national sovereignty of Member States. Consequently, at the beginning of the European Union integration process, this subject was 'taboo' in respect to European intervention in this field.

The Schengen Agreements[1] have touched upon this subject, only to specifically exclude direct intervention of European Union institutions in criminal law[2].

Criminal law field comes into European Union jurisdiction starting with the adoption of the European Union Treaty[3], which instituted judicial

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[1] *Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders*, *Official Journal L 239, 22/09/2000, p. 0019 - 0062*. The Schengen area and cooperation are founded on the Schengen Agreement of 1985. The Schengen area represents a territory where the free movement of persons is guaranteed. The signatory states to the agreement have abolished all internal borders in lieu of a single external border. Here common rules and procedures are applied with regard to visas for short stays, asylum requests and border controls. Simultaneously, to guarantee security within the Schengen area, cooperation and coordination between police services and judicial authorities have been stepped up. Schengen cooperation has been incorporated into the European Union (EU) legal framework by the Treaty of Amsterdam of 1997.

[2] H. Labayle, *L'application du titre VI du Traite sur L'Union europeenne*, RSC, January-March 1995, p. 34.

[3] Treaty on the European Union, *OJ C 191, 29/07/1992, p. 1 – 110.*

cooperation in criminal matters as a problem of common interest (art.K1 of the Maastricht Treaty, corresponding to art. 29 in the Treaty of Amsterdam)[4].

Two reasons have determined the change in optic of the Member States in respect to European Union intervention in the field of criminal law. The first one consisted of the scope of the reform of the Treaties. Thus, several new policies were added in the European Union's jurisdiction, and also several changes were necessary due to the implementation of the four freedoms: free movement of persons, goods, services, capital. In the interval of less than a decade the European Union's legislative framework and its implementation has taken a huge step forward. More integration and less border control have logically conducted to a raise in transnational criminal activities. European Union coordinated action in the field of criminal law was suddenly needed.

The second reason for the change in optic was that European Union intervention in this field was minimal[5]. The legislative instruments available were conventions[6]

[4] According to article K1, for the purposes of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community, Member States shall regard the following areas as matters of common interest: asylum policy; rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon; immigration policy and policy regarding nationals of third countries; combatting drug addiction; combatting fraud on an international scale; judicial cooperation in civil matters; judicial cooperation in criminal matters; customs cooperation; police cooperation for the purposes of preventing and combatting terrorism, unlawful drug trafficking and other serious forms of international crime, including if necessary certain aspects of customs cooperation, in connection with the organization of a Union-wide system for exchanging information within a European Police Office (Europol).

[5] The inclusion of criminal law by the Treaties of Maastricht, Amsterdam and Nice in the field of intergovernmental cooperation has had deep implications for the adoption and implementation of legal instruments in this field. Both national criminal law influence over EU law and EU law influence over national criminal law were negligent though.

[6] According to Article K2 of the Maastricht Treaty, the Council may draw up conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements. For example, Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests, *OJ C 316, 27.11.1995, p. 48–57;* Council Act of 26 July 1995 drawing up the Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention), *OJ C 316, 27.11.1995, p. 1–32;* Council Act of 10 March 1995 drawing up the Convention on simplified extradition procedure between the Member States of the European Union, *OJ C 78, 30.3.1995, p. 1–1*.

between Member States, joint actions[7], common positions[8] and later on, framework decisions[9]. Drawbacks existed regarding the non-compliance penalty on the implementation of the provisions these legislative instruments provided, which was inexistent. Also, decision making process required unanimity for adoption of these legislative instruments, which was difficult to achieve[10]. Thus,

[7] According to Article K2 of the Maastricht Treaty, the Council may adopt joint action in so far as the objectives of the Union can be attained better by joint action than by the Member States acting individually on account of the scale or effects of the action envisaged. For example, Joint Action 96/443/JHA of 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia, *OJ L 185, 24.7.1996, p. 5–7;* Joint Action 96/277/JHA of 22 April 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union, *OJ L 105, 27.4.1996, p. 1–2;* Joint Action 95/73/JHA of 10 March 1995 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the Europol Drugs Unit, *OJ L 62, 20.3.1995, p. 1–3.*

[8] According to Article K2 of the Maastricht Treaty, the Council may adopt joint positions and promote, using the appropriate form and procedures, any cooperation contributing to the pursuit of the objectives of the Union. For example, Joint Position 1999/235/JHA of 29 March 1999 defined by the Council on the basis of Article K.3 of the Treaty on European Union, on the proposed United Nations convention against organised crime , *OJ L 87, 31.3.1999, p. 1–2* ; Second Joint Position 97/783/JHA of 13 November 1997 defined by the Council on the basis of Article K.3 of the Treaty on European Union on negotiations held in the Council of Europe and the OECD on the fight against corruption, *OJ L 320, 21.11.1997, p. 1–2;* Joint Position 96/622/JHA of 25 October 1996 defined by the Council on the basis of Article K.3 (2) (a) of the Treaty on European Union, on pre-frontier assistance and training assignments, *OJ L 281, 31.10.1996, p. 1–2*.

[9] According to article 34 TUE (in force after the Treaty of Amsterdam) acting unanimously on the initiative of any Member State or of the Commission, the Council may adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect. For example, Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, *OJ L 328, 6.12.2008, p. 55–58;* Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, *OJ L 300, 11.11.2008, p. 42–45;* Council Framework Decision 2004/757/JHA of 25October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, *OJ L 335, 11.11.2004, p. 8–11*.

[10] There were three main aspects that distinguished first pillar from the third pillar instruments: the legislative procedure, the legal effect and the control of implementation. As

with minimal cooperation instruments, in order to achieve effectiveness in tackling cross-border crime, sectorial cooperation was needed. This was realised, until the Lisbon Treaty, through several framework decisions in the field of criminal law, both substantial and procedural[11]. The evolution of legislative instruments in the field of criminal law was slow, but irreversible in the European Union.

Progressively, discussions on renouncing at the pillars structure in European Union legislation were gaining support. The impetus in the field of criminal law was given by two constitutional decisions[12] of the European Court of Justice, which established, without being provided for in the Treaties, that criminal law measures may by adopted by means of a Directive as a legislative instrument (thus a first pillar instrument), when implementing measures are necessary in the field of an already harmonised policy subject to European Union jurisdiction[13].

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regards the legislative procedure, framework decisions were proposed either by a Member State or by the Commission and adopted unanimously by the Council after consulting the European Parliament. Directives, however, can only be proposed by the Commission and, in most cases, are adopted by a qualified majority via the co-decision procedure. The legal effect of third pillar instruments differed from that of Community law instruments. Under Article 34(2)(b) TEU, framework decisions were binding on the Member States as to the result to be achieved, but they did not entail direct effect. In the context of the first pillar, on the other hand, there is no doubt that directives can have direct effect, as the ECJ has consistently held in its case-law (see in respect to this P. Craig and G. Burca, '*EU Law: Text, Cases and Materials,* Oxford University Press, 2003, p. 178–229). As regards the possibility of verifying the implementation of policies by national authorities, in the third pillar the Court could review the legality of framework and other decisions. However, there was no infringement procedure as in the first pillar. See also for reference N. Neagu, *Entrapment between Two Pillars: The European Court of Justice Rulings in Criminal Law*, European Law Journal, Vol. 15, No. 4, July 2009, pp. 538-539.

[11] The most effective and utilised instrument was the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *OJ L 190, 18.7.2002, p. 1–20.*

[12] Case C-176/03, Commission v. Council, 2005 ECR I-07879; Case C-440/05, Commission v. Council, 2007 ECR I-9097.

[13] European Union policies which may give rise to harmonisation measures are the internal market, free movement of goods, agriculture and fisheries, free movement of persons, services and capital, transport, competition and taxation, the economic and monetary policy, employment, social policy, educational, vocational training, youth and sport, culture, public health, consumer protection, trans-European networks, industry, economic, social and territorial cohesion,

Consequently, the time was ripe for a shared competence between the European Union and the Member States in the field of criminal law. And this was achieved by the Lisbon Treaty, after the failed Constitutional Treaty[14].

II. Today's perspective – shared competence in the field of criminal law

Criminal law measures have constantly developed throughout European integration process, thus contributing to the higher level of security within the Union. Contemporary security challenges, risks and threats, like international terrorism, organized crime and migrations, have influenced eve-closer cooperation of Member states in this area. At the same time, there was a persistent need to achieve balance between ensuring higher level of security as an answer to the more complex security challenges, risks and threats, and human rights and freedom protection at the European level on the other side.[15]

A crucial event in the development of both substantial and procedural criminal law within the EU was the entering into force of the Lisbon Treaty in December 2009.[16] It provided for a shared competence in the field of criminal law between the EU and the Member States, the latter being able to exercise their competence as long and insofar as the EU has decided not to exercise its own.[17]

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research, technological development and space, environment, energy, tourism, civil protection, administrative cooperation.

[14] The Treaty establishing a Constitution for Europe (TCE), (commonly referred to as the European Constitution or as the Constitutional Treaty), was an unratified international treaty intended to create a consolidated constitution for the European Union. It would have replaced the existing European Union treaties with a single text, given legal force to the Charter of Fundamental Rights, and expanded Qualified Majority Voting into policy areas which had previously been decided by unanimity among member states. The Treaty was signed on 29 October 2004 by representatives of the then 25 member states of the European Union. It was later ratified by 18 member states, which included referendums endorsing it in Spain and Luxembourg. However the rejection of the document by French and Dutch voters in May and June 2005 brought the ratification process to an end. Following a period of reflection, the Treaty of Lisbon was created to replace the Constitutional Treaty. This contained many of the changes that were originally placed in the Constitutional Treaty but was formulated as amendments to the existing treaties. Signed on 13 December 2007, the Lisbon Treaty entered into force on 1 December 2009.

[15] http://cep.org.rs/en/european-policies/24-justice-freedom-and-security.html.

[16] Consolidated version of the Treaty on the Functioning of the European Union (TFEU), OJ C 83, 30.03.2010, pp. 47-201.

[17] N. Neagu, *The European Public Prosecutor's Office – Necessary Instrument or Political Compromise?*, Law Review, vol. III, no.2/2013, p. 52-53.

After the adoption and coming into force of the Lisbon Treaty, the institutional pillar system was abandoned and ordinary legislative procedure was introduced, with qualified majority required for making decisions, also in the area of criminal law. Democratic control was improved by enhancing European Parliament's jurisdiction and national parliaments' role as well. Jurisdiction of the Court of Justice of the EU was widened and the European Convention of the Human Rights gained access to the EU as a legal person.[18]

Having jurisdiction over several harmonized policies, the European Union needs to ensure consistency between the said policies and its activities, taking all of its objectives into account and in accordance with the principle of conferral of powers. The competence conferred on the Union could be exclusive, shared, to coordinate, define or implement policies, to carry out actions to support, coordinate or supplement the actions of the Member States.[19]

The shared competence is defined in Article 2(2) TFEU. That is, when the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

Article 4(2)(j) TFEU states that shared competence between the Union and the Member States applies in the area of freedom, security and justice. This is an innovative step in the Treaty of Lisbon, since before that criminal law measures were to be found in the so-called „third pillar", in the form of inter-governmental co-operation.

There are two specific competences for criminalizing conduct provided for in the TFEU.

First of all, measures can be adopted under Article 83(1) TFEU concerning a list of explicitly listed ten offences[20] (the so-called **"Eurocrimes")** which

[18] http://cep.org.rs/en/european-policies/23-judiciary-and-fundamental-rights.html.

[19] Article 7 of the consolidated Version of the Treaty on the Functioning of the European Union.

[20] According to Article 83[1] par. 3, on the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph (areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis). It shall act unanimously after obtaining the consent of the European Parliament.

refers to terrorism, trafficking in human beings, sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime. These are crimes that merit, by definition, an EU approach due to their particularly serious nature and their cross-border dimension, according to the Treaty itself. Most of the crime areas are already covered by pre-Lisbon legislation, which has been or is in the process of being updated. Additional "Euro crimes" can only be defined by the Council acting unanimously, with the consent of the European Parliament.[21] There are also limits imposed to Union's competence in this field. Thus, the Union is limited to establishing **minimum rules concerning the definition of criminal offences and sanctions** (emphasis added) in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

Same limits seem to be imposed to the second specific competence of the Union in the field of criminal law. Article 83(2) TFEU allows the European Parliament and the Council, on a proposal from the Commission, to establish

'[…] minimum rules with regard to the definition of criminal offences and sanctions if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to a harmonisation measure.'

In this field there are not specific crimes listed, but fulfilment of certain legal criteria is made a precondition for the adoption of criminal law measures at EU level, with emphasize on ensuring effectiveness of EU policies.

A complementary legal basis to Article 83 (2) can be found in Article 325 (4) TFEU, which provides for the specific possibility to take measures in the field of the **prevention of and fight against fraud affecting the financial interests of the Union** (emphasis added)**,** a field where some pre-Lisbon legislation already exists.[22] It is an area of great importance for both EU and

[21] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, COM (2011) 573 final.

[22] See Convention of 1995 on the protection of financial interests of the EU and its protocols, and Council Regulation (EC, Euratom) No 2988/95 of 18.12.1995 on the protection of the European Communities' financial interests concerning administrative sanctions, O.J. 1995, L312/1.

taxpayers, who are funding the EU budget and who legitimately expect effective measures against illegal activities targeting EU public money (*e.g.* in the context of the EU's agricultural and regional funds or development aid), but also for European institutions, especially the Commission.[23]

On a superficial analysis of the provisions of the Lisbon Treaty (especially the provisions related to the shared competence), one can conclude that the European Union as a body can force the Member States, by exercising its right to legislate in the field of criminal law, to adopt certain legislation in this sector and impose over the Member State the obligation to refrain from adopting diverging legislation in the same sector. However, it should be kept in mind that European Union co-legislator in this field is the Council of the European Union, body composed of the representatives of the Member States. Legislation in the field of criminal law can be conceived at European Union level and implemented in the Member States, but only as a result of a broad political consensus of the Member States' representatives.[24]

III. National (Criminal) Law Influence over European (Criminal) Law

European criminal law is highly influenced by national criminal law, starting from general principles, up to definition of criminal law institutions (such as guilt, aiding and abetting etc.). Usually national criminal law notions are imported into European law when common to several different traditions. It is said that national law influences European law through principles stemming from common tradition.

In the EU context, there are certain principles which permeate the system as a whole and with which any individual piece of legislation needs to be in conformity. Some of these principles are formally higher law in that they are explicit in the treaties (such as the principle of non-discrimination on grounds of

[23] See Communication on the protection of the financial interests of the European Union by criminal law and by administrative investigations – An integrated policy to safeguard taxpayers' money, COM (2011) 293.

[24] Usually, though, in the field of criminal law, legislative action is taken only when consensus is reached through unanimity. Some actions may be imposed upon qualified majority, as is a recent example in the field of migration: no unanimous consensus was reached at the European Council from September 2015, but upon qualified majority migration quotas were ascribed to Member States to prevent and solve the migration crisis flow from Syria to certain Member States of the European Union.

nationality). Others can only indirectly be linked to the treaties and are rather explicable on the grounds that no European judge could imagine giving effect to a legal system which does not respect them (the so called 'general principles of EU law').[25]

Several traditional national principles in the field of (criminal) law, imported into European Treaties and European secondary law are going to be briefly analysed in the following lines. I will start with several fundamental principles which constitute the basis for the whole European law (hence also criminal law), than focus on principles specific to substantial criminal law (*e.g.,* legality, equality, guilt, *mitior lex*) and procedural criminal law (*e.g.,* mutual recognition, mutual trust, *ne bis in idem*, speciality).

III.1. Constitutional principles

Several guiding principles (especially in the field of drafting legislation and the limits imposed therein upon the European legislator) are provided for in the Treaty on the European Union. The European law drafter is subject to respecting the principles of conferral of powers, subsidiarity, proportionality and non-discrimination, which are, in fact, constitutional principles known to every national legislator.

Legislative action at EU level is governed by the principle of **conferral of powers**. This principle is defined in Articles 1(1), 4(1) 5(1) and 5(2) TEU.[26] According to the said articles, the High Contracting Parties establish among themselves a European Union, on which the Member States confer competences to attain objectives they have in common. The limits of Union competences are governed by the principle of conferral. Under this principle, '*The Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States*.'

Exercising competence by the Union is governed also by the principles of subsidiarity and proportionality. Under the principle of **subsidiarity**, according to [Article 5(3) TEU], '*In areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at*

[25] Maria Fletcher, Robin Loof, Bill Gilmore, *EU Criminal Law and Justice*, Edward Elgar Publishing Limited (2008), p. 13.

[26] Consolidated Version of the Treaty on the European Union, O.J. 2010, C 83/13.

central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.'

Under the principle of **proportionality**, according to [Article 5(4) TEU], '*The content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties*.'

The principle of proportionality, in simple terms, means that the mean has to be suitable and necessary in order to reach the goal. In other words, to state the obvious, according to the principle, arguments that would be supportive of a mean that is unsuitable and/or unnecessary to reach a goal would not be in accordance with the principle.[27] Thus, applying criminal law to tackle behaviour which can be effectively dealt with by other means (*e.g.* civil or administrative measures) is unnecessary, and breaching the proportionality principle. In this understanding of the proportionality principle, it seems to have the same content as one of the principles of criminal law (*ultima ratio* principle).[28]

The principle of **non-discrimination** is set forth in Articles 10 and 18 of the Treaty on the Functioning of the European Union (TFEU)[29] and, also, in Article 21 of the Charter of Fundamental Rights of the European Union.[30]

According to the case law of the ECJ: "*the principle of equality and non-discrimination requires that comparable situations must not be treated differently unless such treatment is objectively justified*."[31]

III.2. Substantial Criminal Law Principles

Under this heading I will briefly present several principles which stem from the common traditions of the Member States and which can be found or

[27] Tor-Inge Harbo, *The Function of the Proportionality Principle in EU Law,* 16 European Law Journal (2010), p. 161.

[28] See, in this respect, N. Neagu (ed.), *Foundations of European Criminal Law*, C.H. Beck Publishing House, Bucharest, 2015, p. 194-195.

[29] Consolidated version of the Treaty on the Functioning of the European Union, *Official Journal* (*OJ*) (2010) C-83/164 (30 March 2010). The principle of non-discrimination is a fundamental principle which is also enshrined in Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), adopted by the Council of Europe (4 November 1950): "*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*."

[30] Charter of Fundamental Rights of the European Union, *Official Journal* (*OJ*) (2000) C-364/01 (18 December 2000).

[31] Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, para.45.

mentioned in several legislative instruments adopted at European Union level (the legality principle, the harm principle, the guilt principle, the *mitior lex* principle)

The principle of the **legality** of criminal offences and penalties (*nullum crimen, nulla poena sine lege*), which is one of the general legal principles underlying the constitutional traditions common to the Member States, has also been enshrined in various international treaties, in particular in Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[32] and Article 49(1) of the Charter of Fundamental Rights of the European Union.[33]

According to the legality principle, no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed (*nullum crimen sine lege*). Also, no penalty shall be imposed which was not provided for by the law that was applicable at the time the criminal offence was committed (*nulla poena sine lege*).

A basic principle for criminalisation in the Anglo-American legal theory is the **'harm'** principle. According to Mill, "[…] the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others".[34] Studying the preamble and the impact assessment of legislative acts in the field of criminal law may offer valuable information on the reasons of the law maker for criminalizing conduct. An important reason for criminalising conduct relates to the serious violation caused to individuals or groups of persons and the significance of crime ('harm'

[32] See in this regard, inter alia, Joined Cases C-74/95 and C-129/95 *X* [1996] ECR I-6609, paragraph 25, and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rorindustri and Others* v *Commission* [2005] ECR I-5425, paragraphs 215 to 219.

[33] According to article 49(1) of the Charter, entitled 'Principles of legality and proportionality of criminal offences and penalties': '*No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable*'.

[34] John Stuart Mill, *On Liberty and Other Essays* (Oxford University Press 1991, orig.1859), pp. 14.

principle).[35] The 'harm' principle is also mentioned in the criminal law policies of European institutions.[36]

European legislation requiring Member States to criminalise certain acts must be based, without exception, on the principle of **individual guilt** (*nulla poena sine culpa*). This requirement captures not only the fact that criminalisation should be used solely against conduct which is seriously prejudicial to society, but that it should also be regarded as a guarantee that human dignity will be respected by criminal law. Furthermore, the requirement of individual guilt is inferred from the presumption of innocence provided for in Article 48(1) of the EU Charter of Fundamental Rights.[37]

Generally speaking, the legal instruments of the EU criminalizing conduct refer to 'intentional conduct',[38] or to acts that have been 'intentionally'

[35] See in this respect, Council framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, *OJ L 140, 14.6.2000,* recital 9; Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, O.J. 2004, L 13/44, recitals 5 and 7; Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, O.J. 2001, L 182/1, recitals 3 and 4; Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, OJ L 164, 22.6.2002, recitals 1 and 2; Council Framework Decision 2004/757/JHA of 25 october 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, *OJ L 335, 11.11.2004,* recital 8; Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, O.J. 2011, L 101/1, recital 1.

[36] Draft Council conclusions on model provisions, guiding the Council's criminal law deliberations, 16542/2/09 REV 2 JAI 868 DROIPEN 160; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, COM(2011) 573 final; European Parliament, Report on an EU approach on criminal law (2010/2310(INI), A7-0144/2012, Committee on Civil Liberties, Justice and Home Affairs.

[37] MANIFESTO ON THE EU CRIMINAL POLICY (2009), available at <http://www.crimpol.eu/manifesto/>, (last visited 02 Oct. 2015), drafted by an academic group of 14 criminal law professors from ten Member States of the European Union.

[38] Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, *OJ L 300, 11.11.2008, p. 42–45;* Council framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, *OJ L 13, 20.1.2004, p. 44–48;* Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, *OJ L 328, 6.12.2008, p. 28–37;* Directive 2011/36/EU of the European Parliament and of the Council of 5

committed.[39] The ECJ distinguishes between two main categories of offences: intentional (the general rule) and non-intentional (the exception). The second category is subdivided into lack of care (recklessness), (serious) negligence and objective responsibility.[40]

The principle by which a person is to benefit from the lighter penalty where there has been a change in the law is known by the Latin phrase ***lex mitior***.[41]

The *mitior lex* principle is provided for in international and EU instruments. Article 15 of the International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations in Resolution 2200 A (XXI) of 16 December 1966, which entered into force on 23 March 1976, is worded basically in the same terms as Article 49(1) of the EU Charter of Fundamental Rights.

According to article 49(1) of the Charter, entitled 'Principles of legality and proportionality of criminal offences and penalties': '*No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable'*.

The *mitior lex* principle has also been asserted as a fundamental principle of criminal law in the case law of ECJ and ECHR. Thus, the ECJ decided that: '*According to settled case-law, fundamental rights form an integral part of the general principles of law, the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common*

April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, *OJ L 101, 15.4.2011, p. 1–11 etc.*

[39] André Klip, *European Criminal Law, an Integrative Approach*, Intersentia, Antwerp-Oxford-Portland, 2009, p.188-189.

[40] Case C-157/80 *Criminal proceedings against Siegfried Ewald Rinkau* [1981] ECR 1395, par. 14-15: 'The national laws of most of the contracting States distinguish in one way or another between offences committed intentionally and those not so committed. […] Whereas offences which were intentionally committed, if they are to be punishable, require an intent to commit them on the part of the person concerned, offences which were not intentionally committed may result from carelessness, negligence or even the mere objective breach of a legal provision.'

[41] William A. Schabas, *Lex mitior,* http://humanrightsdoctorate.blogspot.ro/2010/08/lex-mitior.html.

to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories.[42] *[...] The principle of the retroactive application of the more lenient penalty forms part of the constitutional traditions common to the Member States. It follows that this principle must be regarded as forming part of the general principles of Community law which national courts must respect when applying the national legislation adopted for the purpose of implementing Community law.*'[43]

III.3. Procedural Criminal Law Principles

Several guiding procedural criminal law principles, not only recognized in all Member States of the European Union, but also enshrined in international instruments and treaties, are going to be briefly mentioned in the following section, to emphasise the importance of common traditions in European legislative development. I decided to group the procedural criminal law principles as they are mentioned in the Charter of Fundamental Rights of the European Union.

The **presumption of innocence** is a fundamental right, laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights of the European Union. Article 6(3) of the Treaty on European Union (TEU) provides that the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to Member States.

The **right of defence** includes, inter alia, the right to have someone informed of the detention, the right to legal advice and assistance, the right to a competent, qualified (or certified) interpreter and/or translator, the right to bail (provisional release) where appropriate, the right against self-incrimination, the right to consular assistance (if not a national of the State of prosecution), fairness in obtaining and handling evidence (including the prosecution's duty of

[42] See, inter alia, Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 71 and the case-law there cited, and Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood* [2003] ECR I-7411, paragraph 65 and the case-law there cited.

[43] Joined cases C-387/02, C-391/02 and C-403/02, *Criminal proceedings against Silvio Berlusconi, Sergio Adelchi and Marcello Dell'Utri and Others* [2005] ECR I-03565, par.66-69.

disclosure), the right to review of decisions and/or appeal proceedings, specific guarantees covering detention, either pre- or post-sentence.[44]

To enhance the right of defence, harmonization of at least some fundamental aspects of a criminal trial, starting from the European Convention of Human Rights and ECHR case law as the common lowest denominator, was decided at EU level. Hence, an ambitious roadmap for procedural rights in criminal trials has been established in the EU.[45] It included measures related to translation and interpretation,[46] information on rights and information about charges,[47] the right to legal advice and legal aid,[48] the right to communication with relatives, employers and consular authorities, and special safeguards for suspects or accused persons who are vulnerable.

According to Article 47 CFREU, '*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the* ***right to an effective remedy*** *before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice*.'

Access to justice is considered a constitutional right in EU law. Thus the principle of the rule of law requiring judicial review of an act interfering with a right of an individual and the corresponding need for grant of an effective remedy, in cases of unjustified infringement is guaranteed by the Charter. This

[44] Green Paper from the Commission, Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM(2003) 75 final, p.21.

[45] Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, *OJ C 295, 4.12.2009, p1-3.*

[46] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L280, 26.10.2010, p.1-7.

[47] Directive 2012/13/EU of the European Parliament and of the Council on the right to information in criminal proceedings, OJ L 142, 01.06.2012, p.1-7.

[48] The first part of the measure (right to legal advice) is already adopted (Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 06.11.2013, p. 1-12). The second part (right to legal aid) implies delicate negotiations, due to the impact on national budget of the Member States.

principle is required by the notion of respect of effective rights of individuals and constitutes an essential aspect of democratic accountability.[49] The ECJ has attributed special importance to the principle guaranteed by Article 47 from an early stage, in demanding that individuals should enjoy the opportunity to assert their rights through the courts as indeed required by the notion of judicial control of the executive that underlies the constitutional traditions common to the Member States.[50] "Individuals are entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law.[51]

The second paragraph of Article 47 guarantees the **right to a fair trial** (a fair hearing in all proceedings of criminal, civil and administrative nature). It provides that all its guarantees are to be respected upon the violation of rights and freedoms conferred by EU law.[52] The principles of 'the rule of law' and 'due process' are at the core of the substantive protection of the individual against state power and as such form an ancient achievement of the law. They are found in the Magna Carta of 1215 and have been ever since widely included in different constitutions.[53]

Judicial cooperation in criminal matters is based on the implementation by the Member States of the principle of **mutual recognition**.[54] This principle was recognized by the Tampere European Council as the "cornerstone of judicial cooperation in both civil and criminal matters". It entails quasi-automatic recognition and execution of judicial decisions among Member States, as if the executing judicial authority was implementing a national judicial order.

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[49] Leto Cariolou, *Commentary of Article 47 of the Charter of Fundamental Rights of the European Union*, EU Network of Independent Experts on Fundamental Rights (June 2006), p.359.

[50] Case C-222/84, *Johnston*, [1986] *ECR* 1651; Case C-222/86, *Heylens*, [1987] *ECR* 4097; Case C-97/91, *Oleificio Borelli*, [1992] *ECR* I-6313; Case C-224/01, *Kobler v. Republik Osterreich*, [2003] *ECR* I-10239.

[51] Case C-222/84, *Johnston*, [1986] *ECR* 1651, para. 18; Case C-50/00 P, *Union de Pequenos Agricultores v. Council*, [2002] *ECR* I-6677, para. 39; Case C-263/02 P, *Commission v. Jego-Quere &Cie SA*, [2004] *ECR* I-3425, para. 29.

[52] Case C-85/76, *Hoffmann-La Roche v. Commission,* [1979] *ECR* 461.

[53] Leto Cariolou, *Commentary of Article 47 of the Charter of Fundamental Rights of the European Union*, supra, p.367.

[54] Annachiara Atti, *La decisione quadro 2002/584/GAI sul mandato d'arresto europeo: la Corte di giustizia "disolve" I dubbi sulla doppia incriminazione*, Dirrito pubblico comparato ed europeo (2007), n.3, p.114.

Mutual recognition principle alone is difficult to impose to Member States of the EU without another principle, which can make mutual recognition possible: **mutual trust**. Mutual recognition of judicial decisions involves criminal justice systems at all levels. It only operates effectively if there is trust in other justice systems, if each person coming into contact with a foreign judicial decision is confident that it has been taken fairly. An area of freedom, security and justice means that European citizens should be able to expect safeguards of an equivalent standard[55] throughout the EU. More effective prosecution achieved by mutual recognition must be reconciled with respect for rights.

These two principles have given during the years a strong impetus to judicial cooperation in criminal matters within the European Union, starting with the European Arrest Warrant legislative instrument,[56] and continuing with the improved cooperation in the field of recognition of custodial and non-custodial sentences and transfer of convicted persons.[57]

The **specialty principle** is considered an important guarantee in judicial cooperation in criminal matters, stating that a person who has been surrendered may not be prosecuted, sentenced or otherwise deprived of liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered. That rule is linked to the sovereignty of the executing Member State, which may waive the application of the specialty rule.

In the vast majority of national and international instruments, the *'ne bis in idem' principle* is to be understood as a rule forbidding further prosecution/judgment/conviction for the same offence/conduct/act.[58] In EU law,

[55] Commission Communication, Towards an Area of Freedom, Security and Justice: "procedural rules should respond to broadly the same guarantees, ensuring that people will not be treated unevenly according to the jurisdiction dealing with their case" and "the rules may be different provided that they are equivalent". COM(1998)459, 14 July 1998.

[56] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest warrant and the surrender procedures between Member States, *OJ L 190, 18.7.2002, p. 1–20.*

[57] Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ L *327, 5.12.2008, p.27-46;* Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ L 337, *16.12.2008, p.102-122.*

[58] J. A. E. Vervaele, *Joined cases C-187/01 and C-385/01, 'Criminal Proceedings against Huseyin Gozutok and Klaus Brugge', Judgment of the Court of Justice of 11 February 2003, Full Court [2003] ECR 1–5689*, (2004) 41 CMLR 795, p. 802.

the principle is drafted in Article 50 of the Charter of Fundamental Rights of the European Union,[59] and also in Article 54 of the Convention Implementing the Schengen Agreement.[60]

IV. European (Criminal) Law Influence over National (Criminal) Law

European criminal law is a blending of principles stemming from common traditions of the Member States, standing at the crossroads between common law and continental law and borrowing from both. European criminal law is not only heavily influenced by the national criminal law of the Member States, but aids also to the constant evolution of the latter.

European Union influence over national criminal law can be summarized in three directions: policy making, legislation drafting and judicial interpretation through mandatory case law.

IV.1. Policy making

Policy making is not to be underestimated as regards its influence over criminal law. European criminal law policy was informal at the beginning of the 90', without any mention of it in the European legislation. Still, from the meeting of heads of states and government in the European Council have stemmed several policy programmes in the field of Justice and Home Affairs, which contain guiding rules to adopt criminal law legislation at European level according to the said programmes. Following the Lisbon Reform of the Treaties, this informal guidance was inserted in the legislation. Thus, according to Article 68 TFUE, *"The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice."*

[59] According to Article 50 of the Charter of Fundamental Rights of the European Union, '*No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law*.'

[60] Article 54 of the Convention Implementing the Schengen Agreement of 14 June 1985 ('the CISA') provides as follows: '*A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party*.'

Also, according to Article 67 par. (1) and (3), *"1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States. ... 3. The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws."*

Several programmes were adopted in the meetings of the European Council, giving impetus and direction in the area of freedom, security and justice, usually for a 5 years period.

The first adopted programme was at Tampere, in 1999.[61] The main objective of the programme was to establish the area of freedom, security and justice in an interval of 5 years. The implementation of the programme was closely monitored by the European Commission.[62] Even if there were some successes in pursuing the proposed goal, the original ambition was limited by institutional constraints, and sometimes also by a lack of sufficient political consensus. A new programme was established in 2004, with broader ambitions, given the delicate political context offered by the terrorist attacks of 2001 and 2004.

The multiannual Hague Programme, adopted at the European Council of 4 and 5 November 2004, sets out 10 priorities for the Union with a view to strengthening the area of freedom, security and justice in the next five years.[63]

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[61] See for a detailed analysis the *Communication from the Commission to the Council and the European Parliament - Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations {SEC(2004)680 et SEC(2004)693},* COM/2004/0401 final.

[62] A Commission Communication to the Council and Parliament "Scoreboard to review progress on the creation of an area of freedom, security and justice in the European Union" has been presented every six-month since the Tampere European Council. The references are as follows: COM(2000)167 final, 24.3.2000; COM(2000)782 final, 30.11.2000; COM(2001)278 final, 23.05.2001; COM(2001)628 final, 30.10.2001; COM(2002)261 final, 30.5.2002; COM(2002)738 final, 16.12.2002; COM(2003)291 final, 22.5.2003; COM(2003)812 final, 30.12.2003.

[63] The priorities were: strengthening fundamental rights and citizenship; anti-terrorist measures; defining a balanced approach to migration; developing integrated management of the Union's external borders; setting up a common asylum procedure; maximising the positive impact of immigration; striking the right balance between privacy and security while sharing

Although much more successful than the Tampere Programme, the Hague Programme proposed several long lasting challenges to be tackled, needing a long term action,[64] and thus its main issues were not fully addressed during its implementation. A new and very ambitious programme was set in place in 2010.

The Stockholm programme, five-year strategic plan for 2010-2014, represented the most relevant cooperation framework within the EU to date.[65] The Stockholm Programme sets out the European Union's priorities for the area of justice, freedom and security for the period 2010-2014. Building on the achievements of its predecessors the Tampere and Hague programmes, it aimed to meet future challenges and further strengthen the area of justice, freedom and security with actions focusing on the interests and needs of citizens.[66] This programme was so ambitious and far reaching, that it triggered discussions on its successor, the conclusion being that it is necessary to fully implement the objectives of the Stockholm programme for the period 2015-2020 and not to come up with a new programme with new objectives. The period 2010-2015 was the period with the most adopted legislative proposals in the field of criminal law and criminal procedural law.

To conclude, policy making in the form of European Council meetings at the level of heads of states and governments is a major influence over national criminal law, establishing the directions to follow, negotiating political compromise and ultimately approving the legislative packages proposed. For the common citizen, though, more tangible than policy making is the European

information; developing a strategic concept on tackling organised crime; a genuine European area of justice; sharing responsibility and solidarity.

[64] *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Justice, freedom and security in Europe since 2005 : an evaluation of The Hague programme and action plan {SEC(2009) 765 final} {SEC(2009) 766 final} {SEC(2009) 767 final},* COM/2009/0263 final.

[65] The Stockholm Programme – An open and secure Europe serving and protecting citizens [Official Journal C 115 of 4.5.2010.

[66] In order to provide a secure Europe where the fundamental rights and freedoms of citizens are respected, the Stockholm Programme focuses on the following priorities: Europe of rights; Europe of justice; Europe that protects; Access to Europe; Europe of solidarity; Europe in a globalised world. An important accent was placed on cooperation between judicial authorities and the mutual recognition of court decisions within the EU in criminal cases and also on fight against cross-border crime, such as: trafficking in human beings; sexual abuse, sexual exploitation of children and child pornography; cyber crime; economic crime, corruption, counterfeiting and piracy; drugs.

legislation already adopted (in force), which needs to be implemented in the national legislation.

IV.2. Drafting legislation

The most influential legislative act over national criminal law is the Charter of Fundamental Rights of the European Union. The Charter of Fundamental Rights of the EU brings together in a single document the fundamental rights protected in the EU. The Charter is consistent with the European Convention on Human Rights adopted in the framework of the Council of Europe: when the Charter contains rights that stem from this Convention, their meaning and scope are the same.[67] There are two differences: firstly, the Charter can be invoked during the criminal trial in a national court and a request for a preliminary ruling may be sent to the European Court of Justice for interpretation on the provisions of the Charter, while the Convention can be invoked in front of the European Court of Human Rights after all domestic available effective remedies have been used. Secondly, the Charter can be invoked only concerning national provisions transposing EU law, [68] while the Convention can be invoked directly against national legislation.

In the period 2000-2015 several legislative acts in the field of substantial criminal law and also criminal procedure have been drafted and implemented. In the field of substantial criminal law there are two categories of legislative acts: those adopted in the field of combating transnational organized crime[69]

[67] http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm.

[68] See ECJ, C-45/14, ayant pour objet une demande de décision préjudicielle au titre de l'article 267 TFUE, introduite par la Fővárosi Ítélőtábla (Hongrie), par décision du 21 janvier 2014, parvenue à la Cour le 27 janvier 2014, par. 20-25.

[69] Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, O.J. 2010, L140/1; Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, O.J. 2008, *L 328/55;* Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, O.J. 2002, L 164/3; Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, O.J. 2004, L 335/8; Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, O.J. 2004, L 13/44; Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, O.J. 2001, L 182/1; Directive 2011/36/EU of the

[according to Article 83 (1) TFEU], and those adopted for ensuring effectiveness of European Union's policies in already harmonized fields[70] [according to Article 83(2) TFEU]. Also, an ambitious roadmap was developed recently in respect to criminal procedural rights for the accused or the victim,[71] and also in respect to judicial cooperation[72]. The legislation adopted at European Union level does not entail direct effect, but an obligation for the Member States to implement it. There is an obligation of result, leaving the means to do it to each national jurisdiction, according to its own tradition.

IV.3. Case law

Apparently, there is no influence of the case law of the European Court of Justice over national criminal law. The European Court of Justice has no

European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, O.J. 2011, L 101/1; Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, O.J. 2008, L 300/42.

[70] Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, O.J. 2009, L 168/24; *Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law* , *OJ L 328, 6.12.2008*, *p. 28–37; Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse*, *OJ L 173, 12.6.2014, p. 179–189.*

[71] Directive 2012/13/EU of the European Parliament and of the Council on the right to information in criminal proceedings, OJ L 142, 01.06.2012, p. 1-7; Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 06.11.2013, p. 1-12.

[72] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest warrant and the surrender procedures between Member States, *OJ L 190, 18.7.2002,* Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ L *327, 5.12.2008, p.27-46;* Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ L 337, *16.12.2008, p.102-122;* Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130/1, 01.05.2014.

jurisdiction in criminal trials, and it is not supervising the decisions taken by national criminal courts. However, this influence exists and manifests itself in the form of judicial decision given by the court in preliminary rulings.

This is a very powerful instrument, inserted in Article 267 TFEU.[73] The decisions of the Court are mandatory as regards the interpretation of the Treaties and of the secondary legislation throughout the whole territory of the European Union, not only in the case pending, but also in all subsequent cases were an identical issue may arise.

Several decisions adopted by the court have significantly influenced the relationship between European law and national law, hence also criminal law. Starting from asserting fundamental principles stemming from the Treaties (which were not manifestly there at the time), such as primordiality and direct effect of European Union law,[74] than moving criminal law jurisdiction from the third pillar to the first in 2005-2007,[75] or asserting the same effects of a Framework Decision with a Directive,[76] the Court has constantly given impetus to interpretation of European Law towards harmonization and effectiveness. There is also a manifest influence of the ECJ's decisions in the field of judicial cooperation in criminal matters, starting from the interpretation of the *ne bis in idem* principle,[77]

[73] According to Article 267, The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union, Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

[74] Case 26/62 *Van Gend en Loos*, [1963] ECR 1; Case 6/64, *Costa v. ENEL*, [1964] ECR 585.

[75] Case C-176/03 *Commission/Council* [2005] ECR I-07879; Case C-440/05 *Commission/Council* [2007], ECR I-9097.

[76] Case C-105/03, *Pupino*, [2005] ECR I-05285.

[77] Cases C-187/01 and C-385/01 *Hüseyn Gözütok şi Klaus Brugge*, [2003] ECR I-1345; Case C-469/03 *Filomeno Mario Miraglia*, [2005] ECR I-2009; Case C-436/04 *Leopold Henri Van Esbroeck* [2006] ECR I-2333; Case C-288/05 *Kretzinger,* [2007] ECR I-06441; Case C-367/05 *Kraaijenbrink,* [2007] ECR I-06619; Case C-467/04 *Gasparini* [2006] ECR I-9199; Case C-491/07 *Turansky,* [2008] ECR I-11039; Case C-150/05, *Van Straaten,* [2006] ECR I-9327; Case C-261/09, *Mantello*, [2010] ECR I-11477.

moving to ensuring the effectiveness of the European arrest warrant,[78] and also giving effect to the specialty principle.[79]

V. Conclusions

European criminal law is an emerging field, both influencing and being influenced by national criminal law. European (criminal) law draws its roots from constitutional principles stemming from common traditions of the Member States. Also, European Union instruments are highly influential over national criminal law, through policy making, legislative instruments and interpreting case law.

The influence coming towards and from European criminal law is highly positivistic in approach. There is no dogmatic influence as such, given the diversity of traditions of the Member States in the field of criminal law. It would be a tremendous mistake to try to impose a common law approach and justification to national legislations of continental origin, or continental dogmatic to common law jurisdictions. The European Union is only setting common goals to be achieved in the field of (positivistic) criminal law, and leaving to each national jurisdiction the possibility to adapt the EU legal instruments in its national law according to its traditions. Also, only the most common principles stemming from common traditions of the Member States are taken in consideration at European Union level. The motto of the European Union, "united in diversity", can be applied successfully also in respect to criminal law.

To conclude, one can imagine European *versus* national criminal law as a two way street, where each turn of one of the traffic participants shall necessarily influence the actions of the other one.

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[78] Case C-303/05, *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, [2007] ECR I-3633; Case C-123/08 *Wolzenburg* [2009] ECR I-9621; Case C-396/11, *Radu*, ECLI:EU:C:2013:39; Case C-399/11, *Stefano Melloni*, ECLI:EU:C:2013:107; Case C-66/08, *Kozłowski*, [2008] ECR I-6041; Case C-42/11, *Joao Pedro Lopes Da Silva Jorge*, ECLI:EU:C:2012:517; Case C-306/09, *I.B.*, [2010] ECR I-10341.

[79] Case C-192/12 PPU, *Melvin West*, ECLI:EU:C:2012:404; Case C-388/08 PPU, *Leymann şi Pustovarov*, [2008] ECR I-8993; Case C-168/13 PPU, *Jeremy F.*, ECLI:EU:C:2013:358.

7. Strict Liability *versus* Schuldprinzip. Lessons from *Common Law*

Dr. Laura STĂNILĂ*

Criminal responsibility is a fundamental institution of criminal law, representing along with the institutions of crime and punishment, one of the "three pillars of the criminal law". Criminal liability is usually defined as a form of legal liability which is incident when a person by his conduct, violates the precept of criminal legal norm. Modern criminal law has created a dogma of the principle of subjective criminal liability, but various criminal laws do not fall on the same barricades when they have to explain the subjective element of the offense. In this context the imposition of strict liability in the field of criminal law was thought to be unjustified by the most of the doctrine. Scholars argued that it is wrong to convict an innocent because, a person who did not act with a guilty mind is innocent in the sense of criminal law. The strict liability issue deals also with moral questions which are quite difficult to answer. That's why, strict liability in criminal law was, is and will be a "hot" matter.

I. Is there something left to learn on the issue of guilt?

The current trend of international organizations to develop criminal rules that questions both the sacred principle of legality and determination of criminal law[1], and especially, the principle according to which criminal liability is based on the idea of guilt[2], led Western doctrine[3] to identify a real crisis of criminal dogmatics. The scholars[4] have shown that, in fact, this trend has been driven in turn by the impasse in which the theory of guilt itself sits, by the ambiguities of normative theory, so extolled and yet so duplicitous.

Most authors show guilt as a condition for general legal liability and for the criminal liability in particular. The principle of criminal liability based on fault is presented as a dogma of modern criminal law. But unfortunately, the authors

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[1] M.K. Guiu, *Criza dogmaticii penale şi teoria vinovăţiei,* in *R.D.P. nr. 2/2010*, p. 48.

[2] O. Jerez, *Le blanchiment de l´argent,* Revue Banque Edition, Paris Cedex, 2003, p. 247.

[3] A. Demichel, *Le droit pénal en marche arrière*, Recueil Dalloz, 1995.

[4] M.K. Guiu, *op. cit.,* p.48.

have not reached a consensus neither on the terminology used (*Schuld* – German law, *colpevolezza* – Italian law, *faute penale* – French law, *guilt*/*mens rea* – common law, *vinovăție* – Romanian law), the words having a different meaning, nor the importance of the institution for imposing criminal liability to a person.

German criminal doctrine is considered the "mother" of normative theory, whose major achievement was the "weaning" of the concept of *guilt* and the abandonment of psychological theory that was worshiped by the scholars for decades. The influence of these achievements on European criminal law was overwhelming. The process was initiated early in the 40s of the twentieth century, although some European criminal legislations (including the Romanian legislation[5]) still define the concept of *guilt* in terms of psychological theory, describing the intellectual and volitional mental processes that precede or accompany physical act. According to psychological theory, guilt is conceived as a psychic link between the agent and his/hers wrongful act in total contrast with the normative theory, according to which the concept of *guilt* nominates a ratio of contrariety between the agent's will and the rule of law. [6]

For decades or even centuries, the issue of guilt is debated both from a philosophical and ethical perspective and a purely legal one, and it is perhaps

[5] New Romanian Criminal Code – Law no. 286/2009, Art. 16 *Guilt.*

(1) An action only constitutes an offense if committed under the form of guilt required by criminal law.

(2) Guilt exists when an action is committed with direct intent, with basic intent or oblique intent.

(3) An action is committed with intent when the perpetrator:

a) can foresee the outcome of their actions, in the expectation of causing such outcome by perpetrating the act;

b) can foresee the outcome of their actions and, while not intending to produce it, nevertheless accepts the likelihood that it will occur.

(4) An action is committed with basic intent when the perpetrator:

a) can foresee the outcome of their actions but does not accept it, believing without reason that such outcome will not occur;

b) cannot foresee the outcome of their actions, though they should and could have done so.

(5) Oblique intent exists when an act, consisting of an intentional action or inaction, causes unintended more serious consequences and is attributable to the perpetrator.

(6) The act consisting of an action or inaction shall constitute an offense when committed with direct intent. The act committed with basic intent constituted an offense only when the law specifically establishes it as such.

[6] G. Antoniu, *Vinovăția penală*, Ed. Academiei Române, Bucureşti, 1995, pp. 20-36; G. Antoniu, *Vinovăția în perspectiva reformei penale*, RDP no. 2, 2003, p. 9-28

one of the most debated topics nowadays. Our approach would seem superfluous in this light. What novelty could be discovered in this area so treaded and over examined? Our salvation comes from the inevitable of the social life. Society evolves, so does its perception on the basic institutions and values. Change brings new perspectives to approach and proposes new solutions.

II.The failure of normative theory and the moral blame concept

Criminal guilt or culpability is defined by art. 2.02. of Model American Penal Code – „*General Requirements of Culpability*" as: *„(1) Minimum Requirements of Culpability. Except as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense*". In par. (2) of the same article, the American legislator al defines the types of culpabilty (*Kinds of Culpability Defined*).

In a laborious work, Larry Alexander and Kimberly Kessler Ferzan analyze the concept of culpability in terms of moral guilt (moral blame) and reach the surprising conclusion that the essence of guilt would imply only the acts showing insufficient concern for the interests of others, interests that are legally protected[7]. In this context, carelessness (*negligence*) is not culpable because "we can not be held morally culpable because we take risks that we do not know" and the "obligation to retain, to remember and to be fully informed about any activity that carries risks is an obligation that no man might fulfill". That is why any "breach of that duty does not show a moral defect" [8].

Common-law doctrine identifies *criminal guilt* with the concept of *mens rea (guilty mind)* and, based on the same moral foundation of criminal responsibility, states: "moral culpability, *i.e.* personal guilt, includes both mens rea and motivation (...). The moral judgment implied in the penal law is absolute: no matter how good the actor's motive, since he voluntarily (*mens rea*) committed a penal harm, he is, to some degree, morally culpable, sufficiently so to warrant at least control under probation"[9]. From this point of view, criminal liability does not identify with the moral responsibility and criminal guilt is a

[7] L. Alexander, K. Kessler Ferzan, *Crime and Culpability. A Theory of Criminal Law*, Cambridge University Press, New York, 2009, p. 70.

[8] *Idem*, p. 71.

[9] J. Hall, *General Principles of Criminal Law*, 2nd ed., Bobbs-Merrill, Indianapolis, NY, 1960, p. 92-93.

different concept of moral culpability (guilt). Exclusion of motive from the grounds of theoretical analysis of the concept of mens rea only lead to the exclusion of moral guilt, but not of the legal guilt.

Criminal guilt/mens rea/culpability can be defined as a set of mental processes underlying the correlation between the wrongful act and the agent (psychological theory) or as a criticism addressed to the agent who failed to adapt his conduct to the requirements of legal order, a normative concept expressing the contrariety between the will of the agent and the rule of law (normative theory). [10] "Culpability lies in a reproach judgement about the perpetrator of an offense and is the reason for imposing the punishment and, in the same time, the indicator for the measure of punishment".[11]

The commition of a criminal act with criminal guilt reveals the requirement for culpability as a *sine qua non* condition for the existence of the crime an, for imposing criminal liability on the person who committed it.

Culpability or guilt represents, therefore, a synthetic expression of the subjective aspect of the offense. It involves an act of conscience, an attitude of consciousness in relation to the consequences of the offense and an act of will, under the impulse which the act is performed. Consciousness creates mental causality, while the will creates physical causality[12].

The concept of criminal guilt has different meanings in the theory of criminal law and in the criminal legislation of various states. Thus, French law uses the term *faute penale* while the Italian law uses the term *colpevolezza.* Both the French criminal justice system and the Italian one examine the guilt issue in the broader area of criminal responsibility, understood as legal liability. A literal translation of the French term *faute* sends signals in the sense of the author's moral attitude towards the act committed. Guilt as judgment of reproach transpires from the term *colpevolezza* in Italian law and from the term *Schuld* in German law[13]. In the English penal system, *guilt* is designated by the expression

[10] G. Antoniu, *Vinovăţia penală*, ed. a 2-a, Ed. Academiei, Bucureşti 2002, p. 21 şi 27.

[11] C. Rotaru, *Fundamentul pedepsei. Teorii moderne*, Ed. C.H. Beck, Bucureşti, 2006, p. 219.

[12] V. Paşca, *Curs de drept penal. Partea generală*, Ed. Universul Juridic, Bucureşti, 2010, p. 232.

[13] R. Merle, A. Vitu, *Traité de droit criminel. Problèmes généraux de la science criminelle. Droit pénal général*, tome I, Cujas, Paris, 1997, p. 649; F. Mantovani, *Diritto penale*, CEDAM, Padova, 1992, p. 294; V.G. Fornasari, *I principi del diritto penale tedesco*, CEDAM, Padova, 1993 p. 58.

mens rea. "There is no crime without guilty mind" ("no crime without a guilty conscience"). Criminal liability for an offense necessarily implies the existence of a form of imputable guilt[14].

Even if many German authors continue to explain guilt as a legal "reproach" or a legal "disavowal"[15], they argue, however, that the accusation of guilt does not and could not reffere to the mental attitude or the way of thinking of the offender (because, if they accept the mental atitude, they would despise his freedom of thought and conscience). The legal reproach refferes to the act of the offender, his illegal conduct, revealing a lack or insufficient motivation towards compliance with the rule of law. Guilt was defined by german scholars as an "internal connection between the author – the recipient – and the legitimacy of the rule"[16] under which an "emotional component of deception for violation of norms"[17] occurs. The evaluation of guilt process claims an evaluation of the agent's conduct in relation to the degree of his attachment to the values or "legal goods" protected by the rule of law.

On the other hand, the German authors failed to identify the criterion under which such an evaluation should occur[18]. This lead to the division of the German doctrine, part of it showing a tend to remove the whole concept of guilt and replace it with different "criteria for objective imputation"[19] of the conduct or or of the result (*e.g.,* "permitted risk", "social role of the citizen" etc.) through which they articulated various "normative theories". Such theories (especially that of the "permitted risk") have made significant contributions to the clarification of matters related to the science of criminal law – for example, specifying the link between the illicit action and the state of mind attributed to the agent. Kindhäuser states, for example, that "the permitted risk" should be considered neither as a justificative cause, nor a cause that eliminates the non-

[14] D. Aikenhead Stroud, *Mens Rea or Imputability under the Law of England*, Sweet & Maxwell Ltd, London, 1914, p. 13, available online at http://www.archive.org/texts/flipbook/flippy.php?id=mensreaorimputab00strouoft (accessed 26.10.2015).

[15] H. Jescheck, *Lehrbuch des Strafrechts,* Berlin, 1988, p. 384.

[16] U. Kindhäuser, *Derecho penal de la culpabilidad y conducta peligrosa*, Universidad Externado de Columbia, 1996, p. 34

[17] U. Kindhäuser, *op. cit.*, p. 29

[18] G. Antoniu, *op. cit.*, p. 28-29

[19] M.K. Guiu, *op.cit.,* p. 49.

value of a result, but a cause which removes a violation of the duty of care, in case of offenses comitted with negligence.[20]

Among German authors, Welzel[21] came to the presentation of criminal guilt as a "judgment of value" starting with a general examination of positive law, which allowed him to observe that the legal rules are the result of a whole series of "judgments of value". By virtue of such an examination, he concluded that the criminalizing rules first involve a determination and a hierarchy of the social values (first judgment), secondly, a determination and a hierachy of dangerous conducts that perill those values (second judgment) and, thirdly, an assessment of these behaviors depending on the agent's purpose (third judgment). The conclusion is that Welzel saw guilt as an abstract "judgment of value" which is inherent the criminalizing rule and has nothing to do with the individual who disregarded this rule. In Welzel's opinion, the individual must remain "loyal" to the scope of the legal rule, be respectuful to the values enshrined in it and to allways act in respect to the "legitimacy" (justice), which is a feature of the legal rule and not of an individual conduct[22].

Like psychological theory, normative theory fails because it omits that there is no such a thing as natural offenses and because it overlooks the fact that the law is not descriptive, and will not describe the action or the will of action, but turns them into concepts that invariably distort reality.

III. Mens rea, moral blame and strict liability – Meanings and confusions

J.Hall said that „the principle of *mens rea* is the ultimate evaluation of criminal conduct and, because of that, it is deeply involved in theories of punishment, mental disease, negligence, strict liability and other issues"[23] and a normative definition of this concept is avoided because „there are areas of modern penal law where it is very doubtful, and others where it is certainly not true, that what is forbidden is harmful or that the intention to bring it about is

[20] G. Jakobs, *La imputacion objectiva en derecho penal*, Universidad Externado de Columbia, Bogota, 1994, p. 22.

[21] H. Welzel cited by M.K. Guiu, *op. cit.,* p.50.

[22] *Idem,* p. 51.

[23] J. Hall, *General Principles of Criminal Law,* 2nd ed., Bobbs-Merrill, Indianapolis, NY, 1960, p. 70.

immoral"[24]. In the old cases mens rea did involve moral blame and did mean a guilty mind, but in the modern penal law mens rea involves criminal intent, necessary to convict normal people acting without compulsion for a crime, other than a public welfare offence which is not based upon negligence and does not require any particular form of specific intent.[25]

The traditional meaning of mens rea is its moral connotation expressed in terms of „evil mind" or „evil will" but, in modern criminal law it is expressed in terms of „guilt" or „moral culpability". The traditional adaggium *actus non facit reum nici mens sit rea* was wrongly translated as „there cannot be such a thing as legal guilt where is no moral guilt". It is obvious that „there is always a possibility of a conflict between law and morals"[26]. This asumption lead to another problem: „how to make sense of an ethical principle in non-ethical law?"[27]. Than no act is a crime if it is done from laudable motives and the immorality element is essential to crime[28].

In this context, the theory of strict liability has challenged the ethical feature of penal law and made the doctrine change its view on the mens rea concept: „the truth is that there is no single precise state of mind common to all crime (...) The old conception of mens rea must be discarded and in its replace must be substituted the new conception of *mentes reae*"[29].

The conclusion so far is that in early law *mens rea* meant little more than a general immorality of motive while today is quite different, meaning a particular kind of intent, a criminal intent, an intent to do that which, whether the defendant knew it or not, constitutes a breach of the criminal law[30].

In the common law sistem the personal guilt is the same thing as moral culpability, including both *mens rea* and motive. So, no matter how good the agent's motive, since he voluntarily (with *mens rea*) committed a penal harm, he is to some degree morally culpable.[31]

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[24] *Idem,* p. 71.

[25] F. Sayre, *The present signification of mens rea in the criminal law,* in M.C. Campbell, J.H. Beale, S. Williston, *Harvard Legal Essays,* Harvard University Press, 1934, p. 411.

[26] J.F. Stephen, *a History of Criminal Law of England,* London: Macmillan, 1883, p. 94-95, available online https://archive.org/details/historyofcrimina03step (accessed 26.10.2015).

[27] J. Hall, *op. cit*., p. 73.

[28] J.F. Stephen, *op. cit*., p.95.

[29] F. Sayre, *op. cit.,* p. 404.

[30] *Idem,* p. 412.

[31] J. Hall, *op. cit*., p.94.

The actual criminal law rests no longer on moral culpability, but on an objective non-moral foundation. In Holmes' opinion the history of criminal law represents a devolusion, a regression from liability based on moral blame to one resting on non-moral criteria: „while the terminology of morals is still retained, the law (...) by the very necessity of its nature, is continually transmutting those moral standards into external and objectives ones, from which the actual guilt of the party concerned is wholly eliminated"[32].

Thus, strict liability seems to be a natural result of the evolution of penal law reflecting the changes of a more industrialized society. This „objective" liability ignores the defendat's actual state of mind and holds him liable to the standard of a reasonable man.

The area of strict liability concerns minor harms, but was extended to felony-murder, misdemeanor manslaughter, negligence, bigamy or sexual offenses. It is often met in the public welfare offences field (sale of narcotics, traffic offences, etc.). During its development, the doctrine has presented the *pro* and *versus* arguments as a battle between *risk* and *fault*. If a human conduct implies a risk for the society, then it's strict liability. If a human conduct implies the agent's fault, the we have *mens rea* as necessary element for „subjective" liability.

As Hamon stated, people don't have free will in order to be held criminally responsible for their acts. They only have the illusion of free will. „Man is responssible because he leaves in the society, and for no other cause than this social existance. (...) Man is responsible exclusively because, in the life of society, every act produces effects and reactions, whether individual or social, which reboud upon the author of the act, and are useful or injurious to him, according as the action itself is useful or injurious to society"[33]. This approach makes sens in regard with strict liability and points to the element of risk as the major argument to justify the institution of strict liability.

The „moral blame" issue is probably more disputed in the Common law sistem. As a matter of fact, the Common law doctrine speaks about the "elementary moral distinction" between people an their lives. One author, citing

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[32] O.W. Holmes, *The Common Law*, London: Macmillan, 1881, p. 38, available online https://archive.org/details/commonlaw00holmuoft (accessed 27.10.2015).

[33] A. Hamon, *The Universal Illusion of Free Will and Criminal Responsibility*, The University Press Limited, Watford, London, 1899, , p. 59 available online la

http://www.archive.org/stream/universalillusi00hamogoog#page/n8/mode/2up (accesed 26.10.2015).

Kant said: ”a morally perfect person cannot but lead a morally perfect life”. But Kant did not deny, nor show any reason to doubt, that morally imperfect people can live lives that are morally worse or morally better, than those that they deserve to live.[34] So, what should we do?

Can we say that the criminalizing rule is the measure of our own immorality? If we agree with Hegel, the answer is Yes. But the burden of moral blame does not pressure only the persons that have to obey the precept of the punishing rule. It pressures at the same time the State organs which have the duty to impose criminal liability. Is it all right to say that? Can the conduct of a state organ be immoral? That is hard to say. If we agree that every punishing rule is legitimate and just, than the previous question we raised was a nonsens. But if we agree that the law sets abstract models of conduct with an evident objective feature, sometimes the imposing of the criminal liability seems so immoral and so injust. What is moral in punishing a pour son who stills medicine for his cancerous mother, because that was the only way he could get that medicine (he had no money, no job, no health inssurance)? What is moral in punishing a husband who terminates the life of his dying wife, as she repeatedly and conciously asked him to do so and he couldn’t see her suffering any longer with atrocious pain. What is moral in punishing a troubled father who kills his daughter’s rapist as he noticed that the state organs failed to impose criminal liability for his criminal act?

All we learned in the law school was that the state organs should impose the punishing rule every time a breach of its precept occurs. In doing that, the state organs should verify, in the vision of the Romanian criminal legislator, if the four features of the offense provided by art. 15 NRCC are present – the act is stipulated by criminal law, has been committed under guilt, without justification and for the commission of which a person can be charged –; then, in this case the official act of imposing the criminal liability is just and in consequence, moral. But in the particular situations we exemplified such an act is immoral due to the inherent motivations that led to its comission.

The moral blame is in fact a Sword of Damocles hanging over and threatening both the justification of a human conduct that breaches a criminal rule and the official act of imposing the criminal liability.

[34] J. Gardner, *Wrongs and Faults,* in A.P. Simester, *Appraising Strict Liability,* Oxford university Press, 2007, p. 51.

In this context we must discuss the issue of strict liability. The imposition of strict liability in the criminal law is widely thought by the scholars to be unjustified, because leads to the conviction of persons who are, morally speaking, innocent. Convicting and punishing those who do not deserve it perpetrates a serious wrong.[35] That is why some authors say that strict liability may be legitimate only in non-stigmatic offences (quasi-criminal regulations) but never in case of stigmatic offences (such as murder). The distinction between the two categories is not identical with the distiction between *mala in se* and *mala prohibita* crimes and offences because, some *mala prohibita* offenses (such as those regulating trades in financial markets) have the stigmatic feature in regard with the social echo of their consequences.

The criminal conviction as the final stage of a criminal trial is, as a matter of fact, a statement of censure in the name of the society for the agent who breaches the punishing rule. By „labeling" the perpetrator as "criminal, murderer", the conviction verdict publicly states that he is a punishing criminal. However, not any offense involves public censure, which is inherent in case of serious deeds, such as murder. Thus, it was shown that "there is a large number of punishing rules that prohibit acts that are not criminal in the real sense of the term, but are prohibited under a criminal penalty on behalf of public interest" [36] although they are not „criminal" in their true nature.[37]

Undoubtedly, the idea of guilt is based, as the Germans authors stated, on the assumption that the rule infringed by the agent is legitimate and just (otherwise we could not impute their disregard). In any case, it is a mistake to claim[38], as these authors do (following the ideas of some illustrious thinkers as Grotius, Hobbes, Spinoza and others), that the rule is legitimate, because it is legal, emanating from a legitimate authority, leading to the conclusion that justice prevails social order. However, in reality, the social order is not superior, but under the law. If we identify, as German authors do, the legitimacy of the rule with its legality, we risk to empty the concept of guilt of any rational content and to assign a false significance.

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[35] A.P. Simester, *Is strict liability always Wrong?* in A.P. Simester, *Appraising Strict Liability,* Oxford university Press, 2007, p. 21.

[36] Judecătorul Wright, în *Sherras v. De Rutzen* (1895), citat de *A.P. Simester*, Is Strict Liability..., p. 23.

[37] Judecătorul Mitchell, în *London Borrough of Harrow v. Shah* (2000), citat de A.P. Simester, *Is Strict Liability...*, p. 24.

[38] M.K.Guiu, *op. cit.* p. 55.

By thinking so, we can get a wrong conclusion, that the activity of the judges would be reduced to a mechanical application of the legal rules. In fact, the presumption of legitimacy of the rule is a rebuttable presumption – that is, on the one hand, the validity of the rule remains dependent on its rational and, secondly, that its validity must be investigated, every time when the rule has been violated[39].

IV. Strict liability – What's to understand? What's to learn?

The doctrine stated that, at a first glance, any form of strict liability is the anathema to the Continental criminal lawyer.[40] In the doctrinal context in which he operates, the requirement that fault be established in relation to every element of the *actus reus* flows straightforwardly from the fundamental principle that criminal responsability be based on culpability. Since the first years in Law School, the future practitioners in the common law sistem learn about the correspondence principle as a major element of the interpretetion of the criminalizing rules. According to this principle, every element of *mens rea* should correspond to every element of *actus reus.*

If a person acted to produce a result, that person will be held responsible even for the worst result of his/hers action. The principle of correspondence was severely criticized in the doctrine on the grounds that it would help create an unnecessary criminalization by the need to establish even artificial guilt of the agent.[41]

Strict criminal liability therefore is characterized by the absence of subjective premise – guilt/fault – in relation to each element of the actus reus of the offense. The expresion "implicit criminal responsibility" is used whenever, in the case of an offense, the defendant's guilt must be determined in relation to an element or elements of actus reus (usually the conduct), but is not required to establish a relationship between guilt and other elements of *actus reus* (such as a circumstantial or consequential element). The literature has shown that elements of such an offense – constructive crimes – in relation to which fault is

[39] M. Djuvara, *Enciclopedia juridică,* Ed. All, Bucureşti, 1995, p. 486.

[40] J.R. Spencer, A. Pedain, *Approaches to Strict and Constructive Liability in Continental Criminal Law*, în A.P. Simester, *Appraising...*, p. 237.

[41] A. Ashworth, *Conceptions of Overcriminalization*, in Ohio State Journal of Criminal Law, vol. 5:407, 2008, pp. 407-425, available online at http://moritzlaw.osu.edu/osjcl/Articles/Volume5_2/Ashworth-PDF.pdf (accessed 26.10.2015).

not required, are reffered to as "strict liability elements" for this constructive offense[42].

Any analysis of comparative law on the issue of strict criminal liability encounters ab initio major difficulties: doctrinal constructions and the terminology used to express those theoretical schemes have only few similarities or even no equivalent in the Continental criminal law systems. There are major differences between English criminal law, German, French or Italian criminal law, starting, as we have shown, with the basic concepts such as *guilt*/*fault*. Moreover, the Continental systems can establish boundaries for criminal repression differently from the Anglo-Saxon system: state reactions to a harmful and dangerous conduct are purely administrative (preventive) in the French law, and raise no question of incompatibility with the principles of criminal law, while the same reaction in Common law system will require a criminal conviction.

Under the common law, strict liability is frequently justified under causal, evidentiary or non-culpability theories.

A causal theory justifies strict liability because the defendants have created a dangerous situation. This theory holds that those who profit from engaging in potentially dangerous business ought to ensure the safety of others.[43]

The evidentiary theory holds that, maybe a required mental element of the offence probably exists, but the prosecution needs not to prove that element since requiring such proof would allow many culpable persons to escape conviction or would make their convictions too costly to obtain.[44] In these cases, the agent was at least negligent because he failed to prevent the harm.

A non-culpability theory is purely utilitarian and uses a single criterion to impose criminal liability: the social interest.

V. Schuldprinzip and strict liability – The German Law

German criminal law pays its tribute to the culpability principle (*Schuldprinzip*). In German criminal law doctrine, the culpability principle means that criminal liability requires blameworthiness, and that the reaction of

[42] J.R. Spencer, A. Pedain, *op.cit*., p. 238.

[43] P.H. Robinson, *Imputed Criminal Liability*, in The Yale Law Journal, vol. 93, nr. 4/1984, p. 611.

[44] In Romanian doctrine prof. Antoniu called it "occult strict liability". G. Antoniu, *Vinovăția*..., p. 198

the law must be commensurate with the measure of blame that attaches to the defendant's conduct. According to the German Constitutional Court, which has ascribed a constitutional rank to the culpability principle, the principle is intrinsically linked to the substantive dimension of the rule of law ("Rechtsstaatsprinzip") and rooted in human dignity and in recognition of the human being's capacity for responsible agency, principles which the German Constitution states and protects by art. 1 para. (1) and 2 (1) and which the German legislature has to acknowledge and respect in the formulation of its criminal laws[45]. While the culpability principle has a strong doctrinal basis, the correspondence principle (which in practice prevents German courts from interpreting criminal law provisions as containing strict liability elements) is considered to be a simple rule of statutory interpretation, which emanates from the culpability principle as a matter of course.[46]

Thus, all elements of the actus reus, not just the conduct, combine to constitute the illegality of the act and thus the defendant is liable only to the extent that he is at fault regarding every aspect defining the injustice of his act, in other words, in respect of all elements of the actus reus. For this reason, the German practicioners will not question the need for an element of guilt regarding the victim's age in case of sexual offenses with minors or the nature of an object that the defendant has in his possession, whether drugs or firearms[47].

In its actual form, the culpability principle is a reflection of the German criminal law theorist's confrontation, and engagement with Kantian, Hegelian and Schopenhauerian philosophical ideas regarding the nature of the human responsibility and the basis for blame. Binding grounded his views on the proper basis of criminal liability firmly on a philosophy of action that defines human conduct as a realisation of an impulse of the will or a willed act. Human deeds are consequently conceptualized as realizations of an impulse of the will, meaning that the realization of the decision to act is the act itself, including its consequences.[48]

The definitive formulation of the culpability principle dates from 1907, thanks to Reinhard Frank. According to Frank, the culpability of an agent comprises three elements: (1) the normal psichological state of the agent; (2) an actual or at least actualizable connection between the agent's state of mind and

[45] J.R. Spencer, A. Pedain, *op. cit*., p. 249.

[46] *Ibidem.*

[47] J.R. Spencer, A. Pedain, *op.cit*., p. 250.

[48] K. Binding, *op. cit.,* 1872, apud J.R. Spencer, A. Pedain, *op. cit*., p. 251.

his deed (intention od recklesness) and (3) the absence of unusual circumstances that affect the moral quality of the actor's conduct, or the expectations society can legitimately have of him (*i.e.* the absence of exculpatory circumstances). The dimension of blamewortiness consists in what holds these three elements together. Frank stated: „someone can be held criminally responsible for a prohibited act when he can be blamed for having engaged in this behaviour"[49].

There is only one area of German criminal law in which the implications of culpability principle have long been shrouded in uncertainty while the views on real conditions of culpability principle have changed significantly over time: the liability of the indictee for any harmful, unexpected and unwanted results of its illegal act.

According to the distinction between *versari in re licita* and *versari in re illicita* formulated for the first time in Canonic law, our liability for the unintended and unanticipated results depends entirely on the nature and quality of our previous deeds. If we were involved in legal and useful activities and acted reasonably and diligently in performing them, then we can deny responsibility for the damage, however arising. But when our conduct is inherently wrong and forbidden, how can we deny responsibility for the consequences of this behavior? If we choose to do evil or wrong things, "indirectly" we choose to determine and cause the results of our actions[50].

In 1884, Franz von Liszt described the results of aggravated offenses as "objective conditions of liabilty", thereby indicating that he viewed them as criteria to which the defendant's *mens rea* need not extend, issue often criticized in the doctrine in the coming decades. But in 1953 the German legislator adopted § 18 StGB, which restricted the defendant's liability for serious consequences of his unlawful acts to those that he brought about at least recklessly[51].

There are authors that challenge even the limited effect of the results caused by negligence under this law. They admit that criminal liability for negligent acts is a liability for the harmful consequences of our risky actions; hence, whether or not we become criminaly liable for our reckless conduct is essentially a matter of luck[52]. They argue that it is a hidden form of liability for the result of the acts,

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[49] R. Frank, *Über den Aufbau des Schuldbegriffs*, in Festschrift für die juristische Fakultät Giessen, Giessen, 1907, p. 3, available online at www.archive.org/festschriftfrdi00 fakugoog/festschriftfrdi00fakugoog_djvu.txt (accessed 26.10.2015).

[50] J.R. Spencer, A. Pedain, *op. cit*., p. 254.

[51] *Strafrechtsänderungsgesetz*, 4th of March 1953.

[52] J.R. Spencer, A. Pedain, *op. cit*., p. 255.

that really raises questions on the culpability principle. Ludwig von Bar, in his fundamental work "Gesetz und Schuld im Strafrecht"[53] in 1907, notes that "liability for the reckless conduct hinges in many cases purely on coincidence, since, luckily, many even very risky acts remain without harmful consequences"[54]. He argued that in cases of recklessness, the punishment (...) always contains an element of injustice, provided that the recklessness was not extreme[55].

There are still authors who think that the operation of § 18 StGB is too severe and leads to the imposition of disproportionate punishments. According to them, combinations of intent and recklessness that impose a heavier penalty on an offender than he would receive if convicted under the intent-base offence and a separate outcome-related recklessness-offence, effectively impose a form of outcome liability on defendants that goes beyond what i justified by their moral blameworthiness. Some authors noted that the current positions, which represents the culmination of more than two centuries of academic debate, may still be subject to additional subsequent changes[56].

VI. Strict liability in Romanian Criminal Law? Realities and appearances

Tributary to *nullum crimen sine culpa* principle (culpability principle), the Romanian legislator does not explicitly admit strict liability. The denial of strict criminal liability meets a long tradition that perpetuated the dogma of liability based on fault postulated by the Classical School of criminal law.

The complexity and ambiguity of this issue have led many Romanian scholars to elegantly bypass the subject, by forgetting to debate on strict liability although it is, as noted in previous sections, recognized and perpetuated by other European legislators. However, there are references to various forms of strict criminal liability in the works of G. Antoniu and V. Paşca and sporadic approach by younger authors such as Fl. Streteanu or S. Bogdan.

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[53] L. von Bar, *Gesetz und Schuld im Strafrecht: Fragen des geltenden deutschen Strafrechts und seiner Reform*, vol. I, p. 473, available online at http://www.archive.org/details/gesetzundschuld00bargoog (accessed 28.10.2015).

[54] *Ibidem.*

[55] L. von Bar, *op. cit*., p. 475.

[56] J.R. Spencer, A. Pedain, *op. cit*., p. 255.

In 2002 G. Antoniu stated: "Romanian criminal law does not allow the imposing of criminal liability on a person only for the result of his act. (...) If the Romanian legislation does not expressly provide a strict liability, we are conviced that occult forms of such liability can be found in the practice of judicial bodies". The author vehemently denies an explicit or implicit legislative consecration of strict liability, but accepts it as a practical implication of excessive application of the presumption of fault without in concreto research on the particular circumstances under which the offense was committed[57].

V. Paşca holds the same view, but he militate for its implicit admition. According to this author, the following situations could be qualified as forms of strict liability in Romanian criminal law: the offense was committed in a state of complete voluntary intoxication with alcohol or other psychoactive substances, when such state was induced with a view to committing the offense (art. 77 lit. f NRCC) or without it; the imposing of security measures (art. 107-112 NRCC), and forms of occult strict liability encountered in practice by the failure of the judge to respect the principles of criminal procedure. This author argues that if the offens is commited by the agent who acts in a state of complete and voluntary intoxication with alcohol or other psychoactive substances he will be held liable according to the Romanian criminal law, with disregard of the culpability principle. It is scientifically proven, he says, "that in case of complete intoxication with alcohol or other psycoactive substances, there is a complete abolition of cognitive and volitional functions of consciousness"[58]. If we talk about premeditated ingestion of such substances that led to a complete state o intoxication, the criminal thought is previous to the ingestion act. But if the ingestion is not premeditated, but still led to an complete state of intoxication it is very difficult to demonstrate the presence of fault/mens rea necessary to impose criminal liability under Romanian criminal law, because its intelectual and volitional functions of consciousness are paralized. "In this case, the defendant's *mens rea* slides from the time of the offense to the previous time of intentional ingestion of the substances, moment which is irrelevant for prosecution without the following act of the offence. So in this case the offender is liable only under causal relation between the act and the harmful result"[59].

NRCC mantains intoxication as a cause of non-imputability if it is accidental and complete. In cases of voluntary complete intoxication, the only

[57] G. Antoniu, *Vinovăţia...*, p. 199.

[58] V. Paşca, *op. cit.,* p. 419.

[59] *Ibidem.*

logical solution is that the Romanian legislator implicitly provided a form of strict liability.

The second example of strict liability implicitly provided by Romanian criminal law is that of the safety measures that are to be taken if a person commits an act stipulated by the criminal law[60]. The legal provisions indicate „an act stipulated by the criminal law" and not „an offense". According to the cited author, safety measures are criminal sanctions that are imposed without considering the specific psychological processes of mens rea[61]. Author's logic is simple: recognizing causal nexus between criminal liability and criminal sanctions, it must be accepted that, even imposing only a security measure, we impose a form of criminal liability. In order to impose a security measure, two conditions need to be met: the act must be stipulated by the criminal law and, secondly, the existence of a state of social danger of the perpetrator or of the things he holds. However, as just noted, we can not equate the status of social danger with the specific mental state that characterizes *mens rea*. [62]

The legal liability imposed by applying a safety measure is without any doubt, a strict liability with an essential preventive nature[63].

VII. Conclusions

As noted throughout this study, strict liability can be imposed in case of commission of an offense if mens rea needs not to be identified with reference to at least one of the elements of *actus reus.*[64].

Concerns for defining criminal responsibility goals proved to be, as we have seen, extremely laborious. Eventually, however, we consider that the definition of Stuart P. Green is probably the clearest of them all, because seeks to cover all forms of strict liability[65]. As a matter of fact Green suggests six

[60] Art. 111 alin. (2) C. pen. 1968.

[61] V. Paşca, *op. cit*., p. 419.

[62] V. Paşca, *Măsurile de siguranţă – sancţiuni penale*, Ed. Lumina Lex, Bucureşti, 1993, p. 23.

[63] *Ibidem.*

[64] Whitehouse v. Gays News, cited by K. Reid, *Strict Liability: Some Principles for Parliament*, in Statute Law Review, vol. 29, nr. 3, p. 173.

[65] S.P. Green, *Six Senses of Strict Liability: A Plea for Formalism*, in A.P. Simester, *op. cit*., p. 2.

senses of strict criminal liability that cover all situations where mens rea it is not necessary or required only in a very limited extent[66]:

- offences that contain at least one material element for which there is no corresponding *mens rea* element;
- statutory schemes that bar the use of one or more mens rea – negating defences;
- procedural devices that require a defendant's intent to be presumed for other facts;
- offenses that require a less serious form of mens rea than has traditionally been required by the criminal law;
- offences that require a less serious form of harmfulness than has traditionally been required by the criminal law;
- offences that require a less serious form of wrongfulness than has traditionally been required by the criminal law.

Even if we remain reluctant to the idea of strict liability, we can certainly identify arguments in favor of strict liability on practical grounds in cases that endanger public health or public safety. In those areas related to public protection and environmental protection, there is a consensus among the authors and judges to support strict liability.

The key issue for a coherent law system is the absence of clear, express provisions that state whether certain offenses lead to strict liability. According to an author, would be even more useful for future interpretations if the moment of criminalizing a human conduct that could led to strict liability could be preceded by a debate clearly demonstrating that Parliament analised the issue of *mens rea* and specificly decided that those offences do not require full mens rea[67].

Professor Gardner drew attention to significant issues on the grounds of strict liability that deserve, in his opinion, a serious analysis. The author points out that the visions on the fundaments of strict liability differ and may or may not be reconciled. Thus, some writers regard strict liability as a form legal liability defective of fault. Others think that strict liability occurs for non-intentional acts. Finally, one last category of authors tend to believe that these two ideas are substitutable[68].

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[66] *Ibidem.*

[67] K. Reid, *op. cit*., p. 175.

[68] J. Gardner, *Wrongs and Faults*, in A.P. Simester, *op. cit*., p. 68-69.

According to Reid, the vision of strict liability depends on the vision on the purpose of the law and on the principles of the criminal justice. These may vary from person to person, reflecting in fact a person's vision on morality. As Norrie argued in another context, it is actually the key background to any discussion refferring to mens rea: "these issues, the contradiction between good and evil, come from the moral unstable essence of the *mens rea*"[69], ignored at its own risk by the dominant subjectivist approach.

[69] A. Norrie, *After „Woollin" 1999*, in Criminal Law Review nr. 532, p. 533.

8. Criminal Law Doctrine and the Rule of Law. On possible drawbacks of normative coherence

Dr. ***Benjamin VOGEL****

The systematic and rational nature of German criminal law doctrine can prove highly useful for curtailing arbitrariness within criminal justice systems. However, as will be demonstrated through an analysis of developments in the criminal law of England, an overemphasis on legal doctrine and the underlying idea of uniform justice can also contribute to the weakening of two crucial preconditions of the rule of law: an effective separation of powers and clarity of the law. In particular, when transferring criminal law doctrine to other jurisdictions, awareness for such potential drawbacks is crucial, as it can help strike a proper balance between legal doctrine and institutional considerations. These observations can also offer new perspectives for critically assessing the influence of criminal doctrine on German law today.

I. The attractiveness of German criminal law doctrine

Criminal doctrine endeavors to conceptualize a rational and systematic law,[1] and post-war Germany's welcoming of a more humanistic and rehabilitation-focused idea of criminal justice[2] has certainly contributed to its status as a law-exporting country. In this respect, the key feature of German criminal law is the "principle of culpability."[3] According to it, criminal liability and punishment always require the citizen's ability to foresee and to avoid the

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[1] Cf. *Feuerbach*, Lehrbuch des gemeinen in Deutschland geltenden peinlichen Rechts, 1st ed. 1801; *Binding*, Die Normen und ihre Übertretung, vol. I, 3ed ed. 1916; *Greco*, Lebendiges und Totes in Feuerbachs Straftheorie, 2009; *Frisch/Jakobs/Kubiciel/Pawlik/Stuckenberg*, Lebendiges und Totes in der Verbrechenslehre Hans Welzels, 2015.

[2] Notably, by means of two landmark reform laws: Erstes Gesetz zur Reform des Strafrechts of 25 June 1969 (BGBl. I S. 645); Zweites Gesetz zur Reform des Strafrechts of 4 July 1969 (BGBl. I S. 717); see *Roxin*, Strafrecht Allgemeiner Teil vol. I, 4th ed. 2006, § 4 para. 24 ff.; *Schönke/Schröder*, Strafgesetzbuch, 28th ed. 2010, Einführung para. 3 ff.

[3] BVerfGE 50, 5, 12; 73, 206, 253 f.; 86, 288, 313; 96, 245, 249.

unlawful consequences of his action. The central ground for criminal sanctions is the perpetrator's individual fault, not the utility of punishment.[4] In this way, German criminal law substantially limits an instrumental justification of punishment. This deontological element often contrasts sharply with more utilitarian approaches to criminal justice, arguably strengthening the moral credibility of German criminal law as an export.

Yet the primary appeal of German criminal law dogma arguably stems from its technique of providing a systematic and rational structure for judicial decision-making.[5] This structure can provide a high level of uniformity of adjudication, thereby strengthening legal certainty and the rule of law, leaving fairly little space for judges' individual sense of justice and hence for individual punitiveness.[6] Notably, as a result of the law's rational nature, German criminal courts are obliged to avoid moralizing language and to found their sentencing decisions exclusively on clear and specific facts.[7] Through structured and transparent judicial decision-making, German criminal law offers useful tools to harmonize a country's criminal justice practice, limit the discretion of local judges, and thereby protect citizens form arbitrariness.

However, despite such potentially positive effects of criminal law doctrine, it might be necessary to partially question the pursuit of an overly systematic criminal law. It is of particular interest to understand the reasons why some countries show relatively little appetite for doctrinal sophistication. In this context, England seems a good starting point: a jurisdiction that has remained firmly attached to the common law tradition of criminal justice.[8] While this is not the place to engage in a sociological comparison of legal cultures, the

[4] For a recent and powerful affirmation of the culpability principle by the German Constitutional Court, cf. Bundesverfassungsgericht, Decision of 15 December 2015 – 2 BvR 2735/14-, paras. 56-58.

[5] Cf. §§ 38 ff. StGB (German Penal Code).

[6] Cf. *Hilgendorf*, in: *Kudlich/Montiel/Schuhr* (eds.), Gesetzlichkeit und Strafrecht, 2012, p. 21.

[7] Cf. the decision of the Federal High Court in BGH NJW 1987, 2685, 2686: "Moralizing language [which does not clarify its underlying factual basis] is meaningless and thus dispensable. It entails the danger of providing pseudo-reasons or the danger of a sentencing decision that is based merely on emotional and unclear factors." (Translation by the author).

[8] On the historic foundations of the criminal law of England, cf. *Sieber*, in: *Sieber/Böse*, Europäisches Strafrecht, 2nd ed. 2014, p. 58 ff.

criminal law of England might provide some interesting clues on possible drawbacks of a highly doctrinal criminal law.

II. Criminal law and the idea of uniform justice

The criminal law of England is much less concerned with systematic coherence than its German counterpart. This becomes particularly clear in the fact that English courts do not even accept a normative hierarchy between private law and criminal law; according to the jurisprudence of English courts, there is no rule that, in case of a conflict between private law and criminal law, private law should prevail.[9] To understand its reluctance towards overly doctrinal concepts, one can single out two crucial characteristics of the criminal law of England: first, a belief that effective inter-institutional checks and balances are to be preferred over an idealistic concept of uniform justice (1); second, a criminal law culture that places great weight on the "ordinary meaning" of legislative language (2).

1. Decentralizing the enforcement of criminal law

Prosecuting agencies in England enjoy broad discretion when determining whether prosecution is in the public interest and, in this respect, face relatively little judicial scrutiny.[10] Courts scrutinize the *evidential* basis of a decision to prosecute or not to prosecute, although, even in the latter case, they grant prosecutors a wide margin of appreciation.[11] In contrast, they leave it to prosecutorial guidelines to determine prosecutorial *policy*.[12] Only in very limited circumstances will a prosecutorial policy decision be overturned by the courts: if a policy is unlawful, if it fails to comply with the prosecution's own settled

[9] *Hinks* [2001] 2 A.C. 241, 252 f.; cf. *Ormerod/Williams*, Smith's Law of Theft, para. 2.43 ff.; *Shute*, Criminal Law Review 2002, 445, 454.

[10] *R. v. Director of Public Prosecutions, ex parte Manning*, [2001] QB 330.

[11] *R. (on the application of Da Silva) v. D.P.P.* [2006] EWHC 3204.

[12] This approach is underlined in the judgement of *R. (on the application of Da Silva) v. D.P.P.* [2006] EWHC 3204 (Admin), para 53: "we note that the decision [not to prosecute] was taken by a senior and highly experienced Crown prosecutor and was reviewed by the Director [of Public Prosecutions] himself and by leading counsel, both of whom have very great practical experience of serious criminal trials. The informed judgment of such people on a matter of this kind is one that […] it will often be impossible to stigmatise as wrong even if one disagrees with it."

policy, or if it was perverse in a way that no reasonable prosecutor could have come to the same result.[13] In fact, prosecutorial policy is hardly ever questioned by the English courts.[14] It is clearly perceived as an executive decision that does not, in principle, fall into the remits of the judiciary.[15]

As a consequence, the prosecution and punishment of offenders can depend as much on the criminal statute as on police and prosecutors' policy.[16] The significance of prosecutorial discretion is illustrated by the legislator's willingness to deliberately draft substantive criminal laws that, in order to alleviate the prosecution's evidential burden, cover behavior that is not meant to be prosecuted. Such a legislative approach is deemed acceptable with the expectation that the law's ambit would, in practice, be reasonably delimited through the exercise of prosecutorial discretion and vetted through jury scrutiny.[17] Not least in the context of plea bargaining, the broadness of prosecutorial discretion can emerge with great clarity. Courts are forced to limit the trial and the guilty verdict to rather minor offences, even if all the elements before the court point to much more severe crimes having been committed by the accused, if the prosecution, for lawful policy reasons, declines to file an indictment for more serious charges.[18]

From a German perspective, this discretionary power of law enforcement officials can sometimes appear unconceivable. German criminal law is, of course, no stranger to prosecutorial discretion.[19] However, according to the respective key provisions in German procedural law,[20] a decision *not* to prosecute a criminal offence is only legal when two conditions are cumulatively fulfilled: first, that the prosecution would not be in the public interest and, second, that the "culpability of the offender" can be considered minor. This latter

[13] *R. v. Director of Public Prosecutions, ex parte C*. [1995] 1Cr. App. R. 136.

[14] *Sanders/Young/Burton*, Criminal Justice, 4th ed. 2010, p. 374.

[15] Cf. *R. v. Director of Public Prosecutions, ex parte Manning*, [2001] QB 330.

[16] Cf. *Crown Prosecution Service*, The Code for Crown Prosecutors, 2013, para. 4.7 ff.

[17] Cf. *Law Commission*, Report on Fraud, Law Com. No. 276 (2002), para. 7.49.

[18] Cf. *R v. BAE Systems Plc* [2010] EW Misc 16 (CC), in which a company had agreed to plead guilty to the rather minor offence of false accounting, despite the evidence strongly indicating its involvement in corruption. As the prosecution, for tactical reasons, was unwilling to bring corruption charges, the court was prevented from finding the company guilty of this more serious offence – despite the court's explicit acknowledgement that overlooking the corrupt purpose of the payments in questions would be "naïve in the extreme"; cf. *Vogel*, ZStW 124 (2012) 257, 280.

[19] Cf. §§ 153 ff. StPO (German Code of Criminal Procedure).

[20] § 153, § 153a StPO.

criterion – the offender's culpability (which consists of both the level of objective seriousness of the crime and the level of subjective fault of the offender) – represents a deontological parameter that puts significant limits on public interest arguments within the exercise of discretion. Prosecutorial discretion thus requires both a *policy* decision (*i.e.,* whether prosecution is in the public interest) and a *value* judgement (whether non-prosecution of the offence would be "just"). The latter question is not considered to be a decision on policy (although it might, under the cloak of "culpability", sometimes hide policy considerations[21]) but instead a decision on substantive justice. Accordingly, for more serious crimes (i.e., all those offences for which the law provides for a minimum penalty[22]), German procedural law requires that the decision not to prosecute a criminal offence be approved by a court, and thus it is not left to the sole discretion of prosecutors.

The aforementioned discretion of English prosecutors to bring charges is closely related to a particular understanding of the purpose of the criminal trial. English prosecutors are not obliged to bring charges even if, from an evidential point of view, there is a realistic prospect of conviction.[23] It is clear from the prosecutor's discretion to select charges that, in England – in sharp contrast to the firm conviction of the German Constitutional Court[24] –, the primary purpose of the criminal process is not to ensure the best possible discovery of truth. To be sure, once a particular charge has been brought before the court and the defendant found guilty of it, the "sentence cannot be passed on an artificial basis."[25] However, due to the adversarial nature of the English criminal trial, it is the task of the prosecutor, not the court, to produce evidence. Consequently, when the prosecutor and the defendant agree on the charge and the underlying facts as part of a defendant's guilty plea, this consensus will normally prevent the criminal court from further investigating the case. Again, unlike German constitutional law,[26] English criminal justice thus allows for a "consensual" procedural model, to the possible detriment of the truth-seeking purpose of

[21] *Rogers*, Oxford Journal of Legal Studies, Vol. 26, No. 4 (2006), p. 784.

[22] Cf. § 153 para. 1, § 153a para. 1 StPO.

[23] *Crown Prosecution Service*, The Code for Crown Prosecutors, 2013, para. 4.7.

[24] BVerfG, judgement of 19 March 2013 – 2 BvR 2628/10, 2 BvR 2883/10, 2 BvR 2155/11 – para. 65.

[25] *R v. BAE Systems Plc* [2010] EW Misc 16 (CC), para. 13.

[26] BVerfG, judgement of 19 March 2013 – 2 BvR 2628/10, 2 BvR 2883/10, 2 BvR 2155/11 – para. 67.

criminal proceedings. This, in the end, is a necessary consequence of English law's strict separation of the functions of the police and prosecutors, on one side, and the courts, on the other. Assigning an unqualified truth-seeking function to the courts would undermine this separation, as it would necessarily transform the courts into investigative organs.

Prosecutorial discretion and the strict separation between prosecuting agencies and courts have disadvantages. Not only does it give rise to potential for abuse.[27] Some offenders might also not even be charged, despite the availability of strong inculpatory evidence, or the punishment might not sufficiently reflect the seriousness of a crime. This would be hard to accept in a legal system in which – as in Germany – the idea of a just, proportionate punishment not only *limits* the severity of the criminal sanction but, in principle, also *obliges* the courts to "compensate guilt,"[28] *i.e.,* to punish if the seriousness of the crime so requires. The seriousness of the crime is, of course, also a crucial factor to be taken into account by English prosecutors when exercising their discretion.[29] Yet here the desire to enforce "just" punishment is not taken to be a good enough reason for abandoning the separation of powers that are deemed crucial for the legitimacy of criminal justice. English courts appear to be well aware that their involvement in prosecutorial decision-making would signify a profound change in the judiciary's role. Namely, when the courts become involved in prosecutorial discretion and the collection of evidence in pursuit of an ideal of uniform justice, they would risk compromising their role as independent arbiter over guilt and innocence. Judicial control over prosecutorial discretion and fact-finding would, ultimately, monopolize criminal law enforcement in the hands of judges. Whereas, in Germany, considerations that are treated as impacting on the offender's guilt and thus as matters of *law*, are more often approached as matters of *policy* under English law.[30] This significant weight of prosecutorial *policy* within criminal procedure clearly limits the persuasiveness and feasibility of any comprehensive normative doctrine. A preference for a strict separation of powers outweighs the pursuit of uniform justice.

[27] *Starmer*, Prosecutorial Discretion and the Rule of Law, 16 July 2013, accessible under www.biicl.org.

[28] BVerfGE 45, 187, 253 f.; 109, 133, 173; 120, 224, 253 f.

[29] Cf. *Crown Prosecution Service*, The Code for Crown Prosecutors, 2013, para. 4.12.

[30] Cf. *Starmer*, Prosecutorial Discretion and the Rule of Law, 16 July 2013.

2. Maintaining the separation between Parliament and the courts

Beside its reluctance to put too much emphasis on idealistic normative concepts, criminal justice in England is marked by the strong role of laypersons, both magistrates and the jury.[31] Consequently, when interpreting an act of Parliament, English criminal courts emphasize the "literal"[32] or "ordinary"[33] meaning of statutory language. This certainly does not prevent courts from adopting a purposive and contextualized interpretation[34] that, in its result, can sometimes go well beyond the ordinary meaning of a statute's wording.[35] However, as the law must be applied and hence understood by laypeople, this approach constitutes a significant constraint on any interpretation of statutory language and, in particular, on the legislative use of abstract normative terms. If an explicit statutory definition or firmly established legal terminology is lacking, an extensive interpretation risks disconnecting the law from laypeople.[36] Two aspects illustrate English criminal law's concern for the correlation between statutory and ordinary language:

First, in subject matters where the legislator is confronted with a high degree of uncertainty regarding the desirable scope of criminalization, English law accepts the use of strongly moralizing language to define an offence. This is particularly the case in property offences.[37] From the perspective of German criminal law, the use of moralizing language for the definition of crimes is highly problematic because such language is unclear (as it invites intuitive judgements) and obscures the purpose of criminalization (thereby exposing the defendant to the risk of irrational punishment). Yet, against the background of a strong role of laypeople in the administration of criminal justice, moralizing statutory language can also be conceived as a legislative technique to ensure consistency

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[31] Darbyshire, in: McConville/Wilson, The Criminal Justice Process, 2002, p. 285 ff.; *Padfield*, Criminal Justice Process, 4th ed. 2008, p. 261, 373 ff.

[32] *Bennion*, Understanding Common Law Legislation, 2001, p. 40.

[33] *Bell/Engle*, Statutory Interpretation, 3ed ed. 1995, p. 50 ff.

[34] *Allan*, Cambridge Law Journal 2004, 685, 688.

[35] Cf. Gomez [1993] AC 442; Hinks [2001] 2 AC 241; *Bennion*, Understanding Common Law Legislation, 2001, p. 43.

[36] Cf. *Bell/Engle*, Statutory Interpretation, 3ed ed. 1995, p. 59 f.

[37] Cf. Section 1 of the Theft Act 1968; Sections 2 ff. of the Fraud Act 2006; *Vogel*, Grenzen eines beweisfunktionalen Strafrechts, 2014, p. 60 ff. See also the common law offence of "outraging public decency", *Knuller v. DPP* [1973] AC 435.

between criminal justice and the constantly evolving moral practice of society.[38] By allowing lay judges to introduce their own value judgements into adjudication, the use of moralizing language by the legislator can thus prevent prosecutorial policies from manifestly contradicting moral views of the community. Seen in this way, maximum certainty is not desirable if it could lead to the enforcement of laws that are not or no longer in line with dominant moral convictions. Once again, at the level of legislative drafting techniques, uniformity of the law is limited in the interest of balancing power within the criminal justice process.

Second, for the purpose of statutory interpretation, English criminal courts remain prudent when taking into account parliamentary material that does not form part of a respective statute.[39] In fact, since the 18th century[40] and up to the year 1992, the use of such material in statutory interpretation was categorically prohibited.[41] This "exclusionary rule" limited the courts' ability to inquire into the intentions of the statute's drafters, and thereby specifically restricted – though certainly not excluded[42] – the feasibility of a teleological, purposive interpretation.[43] To be sure, in recent years, courts have demonstrated a greater willingness to go beyond the wording of the statute and to consult ministerial or parliamentary material produced in the legislative process in order to discern the purpose or meaning of statutory language. With respect to a statute's purpose – *i.e.,* "the mischief at which it is aimed" – parliamentary materials are now, in principle, "always admissible aids to construction."[44] Beyond this, courts can refer to parliamentary material as an aid to determine a statute's scope "where legislation was ambiguous or obscure or led to absurdity."[45] However, the extent

[38] *Simester/Spencer/Sullivan/Virgo*, Criminal Law, 5th ed. 2013, p. 29.

[39] Cf. *Bennion*, Understanding Common Law Legislation, 2001, p. 152: "Study of our interpretative method in relation to statutes forms the best and most useful introduction to the entire British legal system."

[40] This followed the consolidation of the legislative power of Parliament through the 1688 Bill of Rights.

[41] Cf. *Millar v. Taylor* (1769) 4 Burr. 2303, 2332; *Davis v. Johnson* [1979] A.C. 264; *Pepper v. Hart* [1993] A.C. 593.

[42] *Ashworth*, Law Quarterly Review 1991, 419, 427 f.; *Bell/Engle*, Statutory Interpretation, 3ed ed. 1995, p. 33; *Bennion*, Understanding Common Law Legislation, 2001, p. 41 f.

[43] *Laws*, Plus ça change? Continuity and change in UK legislative drafting practice, Sir William Dale Lecture 2008, p. 25.

[44] *Lord Steyn in R (Westminster City Council) v. National Asylum Support Service* [2002] UKHL 38.

[45] *Pepper v. Hart* [1993] A.C. 593, 640.

to which *criminal* courts are allowed to consider such material remains controversial.[46] In general, the meaning of statutory language as intended by Parliament must be discernable without recourse to extra-statutory sources. Insofar as the words of a statute have a clear meaning, recourse to parliamentary material remains inadmissible.[47] The courts of England are certainly no strangers to systematic statutory interpretation – understood as the coherent application of substantive law principles[48] – and are insofar willing to supplement statutory content beyond the statute's express wording.[49] However, as *Bennion* points out, "The British doctrine of purposive construction … is markedly more literalist than the [continental] European variety, and permits strained construction only in comparatively rare cases."[50] Unsurprisingly then, the drafting of substantive criminal law still remains rather descriptive.

It is of particular interest to look at the reasons for courts' traditional refusal to consider a statue's parliamentary history. Not only did courts express concern over practical difficulties in searching parliamentary records, including the increase in litigants' expenses,[51] as well as concerns that individual statements

[46] *Thet v. Director of Public Prosecutions* [2006] EWHC 2701 (Admin.); *R v. JTB* [2009] UKHL Crim 20; *Bennion*, Criminal Law Review 2009, 757, 767; *Simester/Spencer/Sullivan/ Virgo*, Criminal Law, 5th ed. 2013, p. 47.

[47] *Cf. R (on the application of Haw) v. Secretary of State for the Home Department* [2005] EWHC 2061 (Admin); *Taylor*, Journal of Criminal Law 2006, 103, 106.

[48] *Bennion*, Understanding Common Law Legislation, 2001, p. 171 thus makes reference to *Dworkin*, Law's Empire, 1998, p. 273: "A judge 'tries to impose order over doctrine, not to discover order in the forces that created it. He struggles toward a set of principles he can offer to integrity, a scheme for transforming the varied links in the chain of law into a vision of government now speaking with one voice'."

[49] See the UK House of Lords decisions in *R v. Miller* [1983] 2 AC 161, formulating what can be described as the (albeit uncodified) "general part" of the criminal law: "[Criminal statutes] will fall to be construed in the light of general principles of English criminal law so well established that it is the practice of parliamentary draftsmen to leave them unexpressed in criminal statutes, on the confident assumption that a court of law will treat those principles as intended by parliament to be applicable to the particular offence unless expressly modified or excluded."; cf. *Bennion*, Understanding Common Law Legislation, 2001, p. 27 f.; for the presumption of *mens rea* in case of an offence that does not explicitly require intent, see *Sweet v. Parsley* [1970] A.C. 132. *Allan*, Cambridge Law Journal 2004, 685, 695, summarizes this judicial stance in that "Meaning must be constructed in the light of the background values we treat as fundamental."

[50] *Bennion*, Understanding Common Law Legislation, 2001, p. 154; see also *Bell/Engle*, Statutory Interpretation, 3ed ed. 1995, p. 154.

[51] *Beswick v. Beswick* [1968] A.C. 58, 74.

in Parliament would constitute an unreliable source of meaning.[52] It was also held that "the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him … or by a competent lawyer advising him … by reference to identifiable sources that are publicly accessible."[53] "Legislative intent" was thus to be deduced from the objective meaning in context of the statute,[54] given that "in a society living under the rule of law citizens are entitled to regulate their conduct according to what a statute has said, rather than by what it was meant to say."[55]

Reluctance to consider parliamentary material does not necessarily, of course, imply greater respect for ordinary language. English courts' long-running self-restriction in the interpretation of statutes can conversely be perceived as a form of judicial self-empowerment,[56] because any deeper inquiry into the real motives and intentions of Parliament would effectively lead to a limitation of the courts' interpretative autonomy.[57] Having said this, the exclusionary rule reflected the judiciary's unwillingness to strain the meaning of statutory language for the benefit of the (assumed) intent of the statute's drafters. The courts' reluctance to investigate the drafters' intent beyond the statute's wording provided an incentive for Parliament to use clear language and not to expect the courts to translate ministerial or parliamentary statements of intent into law. This concern is pointedly summarized by *Allan* when he emphasizes that one "must remember always that it is the text that was enacted, and not the opinions or expectations of its authors."[58] Thus, until quite recently, statutory language served as the only means of communication between Parliament and the courts,[59] thus implicating a rather high degree of linguistic precision.

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[52] Cf. *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.* [1975] A.C. 591, 629; *R (on the application of Spath Holme Ltd) v. Secretary of State for the Environment, Transport and the Regions* [2002] 2 A.C. 349; *Ashworth*, Law Quarterly Review 1991, 419, 430 f.; *Allan*, Cambridge Law Journal 2004, 685, 696.

[53] *Fothergill v. Monarch Airlines Ltd.* [1981] A.C. 252, 279.

[54] *Bell/Engle*, Statutory Interpretation, 3rd ed. 1995, p. 26 ff.

[55] *Lord Glaisdale* in *Stock v. Frank Jones* (Tipton) Ltd [1978] 1 W.L.R. 231.

[56] Cf. *Allan*, Cambridge Law Journal 2004, 685, 693 f.; *Bennion*, Understanding Common Law Legislation, 2001, p. 154.

[57] Cf. *Pepper v. Hart* [1993] A.C. 593, 634 f.

[58] *Allan*, Cambridge Law Journal 2004, 685, 694 f.

[59] See *Lord Reid* in *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.* [1975] A.C. 591, 613: "We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words that

In the last several years, the courts of England have become more willing to expand their interpretative analysis beyond statutory texts, particularly taking into account initial government reform proposals, draft bills, ministerial statements in Parliament,[60] and even unsuccessful proposed amendments to the respective bill.[61] Furthermore, since 1999, bills are now regularly accompanied by so-called "explanatory notes" explaining the scope of individual provisions of a statute, which are laid before Parliament prior to the adoption of the bill and which are drafted by the ministry responsible for the respective legislation (although they do not form part of the statute and are not endorsed by Parliament).[62] Courts now make frequent reference to such explanatory notes in order to ascertain the meaning of ambiguous statutory language,[63] even in the criminal law.[64] However, this growing use, by courts, of parliamentary material has raised concerns that the resulting extension of statutory interpretation might prejudice the clarity of the law[65] and incentivize the legislator to be less diligent in the drafting process.[66]

In light of English courts' longstanding reluctance to inquire into the parliamentary history of statutes and the recognizable interplay between the scope of statutory interpretation and legal certainty, one should indeed question the extensive use of interpretative tools found outside statutes. Obviously, the "ordinary meaning" alone will not always provide sufficient guidance for interpretation, even if read in the context of the statute's purpose. Insofar, external tools, such as parliamentary materials and academic commentaries, can mitigate the risk of an arbitrary determination of ordinary meaning. However, in

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Parliament used. We are seeking not what Parliament meant but the true meaning of what they said." Cf. *Bell/Engle*, Statutory Interpretation, 3rd ed. 1995, p. 23.

[60] *R v. JTB* [2009] UKHL Crim 20.

[61] *Innes v. Information Commissioner &Anor* [2014] EWCA Civ 1086.

[62] *R (Westminster City Council) v. National Asylum Support Service* [2002] UKHL 38; *Munday*, Criminal Law Review 2005, 337, 341.

[63] *Munday*, Criminal Law Review 2005, 337, 344 ff.

[64] *R v. Montila & Ors* [2004] UKHL 50; *R v. Massey* [2007] EWCA Crim 2664; *R v. Gurpinar*, *R v. Kono-Smith & Anor* [2015] EWCA Crim 178.

[65] On the judicial use of explanatory notes, see *Lord Steyn* in *R (Westminster City Council) v. National Asylum Support Service* [2002] UKHL 38: "What is impermissible is to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament. The aims of the Government in respect of the meaning of clauses as revealed in Explanatory Notes cannot be attributed to Parliament."

[66] *Laws*, Plus ça change? Continuity and change in UK legislative drafting practice, Amicus Curiae 77 (2009), p. 26; *Munday*, Criminal Law Review 2005, 337, 349.

this respect, the institutional setting of English criminal law already provides rather strong safeguards of a procedural nature. Namely, where applicable, the trial judge (*i.e.,* a professional lawyer), law enforcement agencies (independent from a judge's assessment), and the members of the jury (*i.e.,* laypeople) must all agree that the facts before them do fall under the statute's wording.[67] It does not come as a surprise then that the role of academic commentary as a tool for ensuring legal certainty remains rather marginal in English law. At the same time, courts' frequent reliance on the parliamentary history of statutes as well as academic commentary can lead to an overly strained construction of a statute's literal meaning and to less legislative precision in the drafting process.[68] Academic commentators might be much more concerned by doctrinal coherence than by the pursuit of legal certainty.[69] Furthermore, when courts, as is the case in Germany, are willing to complement poorly drafted statutory language with extensive reference to parliamentary material and doctrinal commentary,[70] they are certainly not stimulating better legislative draftsmanship and may even be inviting parliamentary deference to the judiciary. Thereby, a greater role of external aids for statutory interpretation – not least academic commentaries – can hamper the accessibility and clarity of the law.

From this point of view, the attractiveness of sophisticated criminal law doctrine might not so much rest on a gain of legal certainty but rather on the expectation that doctrine provides a more coherent and hence rational justification for punishment. Legal doctrine can indeed be an important tool to ensure respect for "requirements of political morality"[71] in the application of statutes. Furthermore, a systematic criminal law can also improve the law's

[67] A similarly shared responsibility can be found in Magistrates Courts, *i.e.,* those courts that are responsible for minor crimes and do not provide for a jury trial. As the Magistrates (*i.e.,* the judges) do not need to have legal qualifications, they are advised by a professional lawyer (called the Justices' Clerk) on matters of law.

[68] Cf. *Bell/Engle*, Statutory Interpretation, 3ed ed. 1995, p. 200 f.

[69] As a pertinent example of the academic overstretching of statutory language, see *Jakobs*, System der strafrechtlichen Zurechnung, 2012, p. 24; *Lesch*, Der Verbrechensbegriff, 1999, p. 218; *Pawlik*, Das Unrecht des Bürgers, 2012, p. 376, whose normative reconceptualisation of the term "intent" leads to the claim that intentional wrongdoing does not require a "volitional element," but merely the actor's awareness of a particularly high objective dangerousness of his behavior.

[70] BGHSt 14, 116, 119 f.; 18, 153 f; 22, 14, 16; 24, 41 ff.; 25, 97, 99 f.; 27, 28; 28, 224, 230; 30, 328, 330; 34, 211, 213; 41, 285, 286 f.; 43, 346, 350; 44, 233, 239; 47, 354, 361; 52, 89, 92; 52, 257, 261;

[71] *Allan*, Cambridge Law Journal 2004, 685, 696.

accessibility,[72] whereas such accessibility will be hampered by a lack of legislative coherence.[73] However, in light of the previous observations, while a rational criminal law is undoubtedly of great importance, any critique of "undoctrinal" law should always reflect on whether the desire for normative coherence does not unduly curtail the clarity of the law.

III. Concluding observations

The foregoing analysis of English law indicates two possible drawbacks of any highly systematic criminal law. Overly strong adherence to idealistic notions of criminal justice constitutes a challenge to an effective separation of powers. Furthermore, extensive doctrinal influence on the substantive criminal law can have negative consequences for the precision of legislative drafting, thereby potentially impairing legal certainty.

German criminal law doctrine rests on the assumption that arbitrariness within the criminal justice system is best prevented by providing detailed legal guidance and extensive judicial oversight. Within this doctrinal system, the principle of culpability constitutes the central cornerstone and overreaching reference point that provides a uniform normative basis for the decisions of prosecutors and courts. As a consequence, not only is the exercise of prosecutorial discretion considered a question of law. More importantly, the establishment of *truth* is also taken to be the precondition for conforming to the principle of culpability and therefore constitutes the primary purpose of the criminal process. Because of this truth-seeking purpose, courts are, in principle, not allowed to confine the taking of evidence to the material produced by the parties – even if the accused accepts the prosecution's evidence as being accurate[74] – but have to independently verify all the relevant facts as well as possible.[75] Thus, resulting from the substantive law's pursuit of a uniform idea of justice, German criminal procedure is characterized by the strong inquisitorial role of the courts.

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[72] *Wenzel*, NJW 2008, 345, 348.

[73] On the numerous failed attempts to codify the criminal law of England and the resulting lack of clarity of law: *Stevenson/Harris*, Journal of Criminal Law 2010, p. 516 ff.

[74] BVerfG, judgement of 19 March 2013 – 2 BvR 2628/10, 2 BvR 2883/10, 2 BvR 2155/11 – para. 71.

[75] BVerfG, judgement of 19 March 2013 – 2 BvR 2628/10, 2 BvR 2883/10, 2 BvR 2155/11 – para. 104.

In contrast, to prevent arbitrary decision-making, the English criminal justice system is far more characterized by a desire to ensure a clear separation of powers. Compared to the situation in Germany, this might indeed entail two major advantages. First, despite the very detailed provisions of the German Criminal Code and the continuing existence of the procedural legality principle (according to which the prosecutor has to investigate and prosecute each crime and does not, in principle, have discretion to this effect), German practice displays a high measure of discretion.[76] However, although the German Code of Criminal Procedure provides normative criteria for the exercise of this discretion, they effectively offer little specific guidance to prosecutors and judges. This demonstrates that prosecutorial discretion is quintessentially a question of executive policy – not least strongly influenced by considerations of resource input – and rather unsuitable for being treated as a question of substantive justice. Indeed, it appears that a rather unrealistic belief in the normative nature of prosecutorial discretion has, so far, prevented German criminal justice from tackling the opacity of prosecutorial policies, in particular by improving the transparency of such highly political decisions. Second, German law's procedural truth paradigm and the resulting investigative function of criminal courts can prevent the courts from being truly impartial arbiters over the taking of evidence. In this respect, from an English perspective, the German Constitutional Court's strong commitment to the notions of "culpability" and "truth" can appear highly problematic, as they lead to a significant strengthening of the inquisitorial role of courts and a weakening of the adversarial criminal process. One might therefore question whether German criminal law's principled stance is not, in the end, self-defeating. The aspiration to improve truth-seeking and thus justice through strong inquisitorial elements runs counter to English law's firm belief that, to protect citizens against arbitrariness, a system of procedural checks and balances is to be preferred over the good intentions of judges.

Finally, in addition to concerns related to an effective separation of powers, one must question to what extent a strong doctrinal impact on criminal law effectively serves the interest of legal certainty. In respect of the latter, it seems necessary to differentiate between two possible meanings: the law's capacity to provide guidance to the judiciary, on the one hand, and the law's capacity to

[76] Cf. *Boyne*, Prosecutorial discretion in Germany's Rechtsstaat, 2007; *Horstmann*, Zur Präzisierung und Kontrolle von Opportunitätseinstellungen, 2002.

provide guidance to citizens, on the other. A coherent justification of punishment is, of course, crucial for the criminal law in a democratic society, as citizens are thereby respected as rational actors. Yet, the pursuit of maximum coherence of judicial decisions can come at the expense of respect for ordinary language, as it will often lead to an extensive teleological interpretation of statutory language and incentivize the legislator to be less precise in the drafting of criminal statutes. While close correlation between the legislator, the courts, and academic commentators will surely lead to a harmonization of judicial decision-making, the law's clarity in the eyes of laypeople might be compromised in the process. English law's often highly descriptive drafting method[77] should thus not only be considered in respect of possible deficits of systematic coherence but also as expression of a legal tradition that favors intelligibility of the law over normative idealism.

[77] As a good example, compare the rather recent laws on female genital mutilation in both jurisdictions. Given that such or similar behavior might be perceived as acceptable by significant parts of the population, particularly within certain migrant communities with a rather recent migration history, the UK legislator was obviously careful to provide clear legal guidance. The respective German legislation does not demonstrate similar concerns:

Section 226a of the German Criminal Code states as follows:

"(1) Whosoever mutilates the external genitalia of a female shall be liable to a term of imprisonment of no less than one year."

In contrast, the English Female Genital Mutilation Act 2003 contains much more detail:

"(1) A person is guilty of an offence if he excises, infibulates or otherwise mutilates the whole or any part of a girl's labia majora, labia minora or clitoris.

(2) But no offence is committed by an approved person who performs –

(a) a surgical operation on a girl which is necessary for her physical or mental health, or

(b) a surgical operation on a girl who is in any stage of labour, or has just given birth, for purposes connected with the labour or birth.

(3) The following are approved persons –

(a) in relation to an operation falling within subsection (2)(a), a registered medical practitioner,

(b) in relation to an operation falling within subsection (2)(b), a registered medical practitioner, a registered midwife or a person undergoing a course of training with a view to becoming such a practitioner or midwife. […]

(5) For the purpose of determining whether an operation is necessary for the mental health of a girl it is immaterial whether she or any other person believes that the operation is required as a matter of custom or ritual."

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