EUROPEAN LAW

Foundations of European Criminal Law

This monograph is financed by UEFISCDI, CNCS, on the basis of the financing contract no. 27/28.07.2010.

Bucharest, 2014

Norel Neagu (Ed.)
Clara Tracogna **Tudor Avrigeanu**
Ferenc Sántha **Lamya-Diana Al-Kawadri**
Erika Váradi-Csema **Mirela Gorunescu**
Andrea Jánosi **Renate Van Lijssel**

Foundations of European Criminal Law

Editura C.H. Beck
Bucureşti 2014

Editura C.H. Beck este acreditată CNATDCU și este considerată editură cu prestigiu recunoscut.

Foundations of European Criminal Law
Norel Neagu (Ed.), Clara Tracogna, Tudor Avrigeanu, Ferenc Sántha, Lamya-Diana Al-Kawadri, Erika Váradi-Csema, Mirela Gorunescu, Andrea Jánosi, Renate Van Lijssel

Descrierea CIP a Bibliotecii Naționale a României
Foundations of European criminal law / Neagu Norel, Avrigeanu Tudor, Lamya-Diana Al-Kawadri, ... - București : Editura C.H.
Beck, 2014
Bibliogr.
ISBN 978-606-18-0290-6

I. Neagu, Norel
II. Avrigeanu, Tudor
III. Al-Kawadri, Lamya-Diana

343.9(4)

Editura C.H. Beck Str. Serg. Nuțu Ion nr. 2, sector 5, București
Tel.: 021.410.08.47; 021.410.08.09
Fax: 021.410.08.48
E-mail: comenzi@beck.ro

Redactor: Cezara Grama

Content

List of abbreviations

Art.	– article
CFREU	– Charter of Fundamental Rights of the European Union
CISA	– Convention Implementing the Schengen Agreement
e.g.	– example given
EAW	– European Arrest Warrant
ECHR	– European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950
ECJ	– Court of Justice of the European Union
ECtHR	– European Court of Human Rights (Strasbourg)
EU	– European Union
ibidem	– same author and source, same page/paragraph
ICC	– International Criminal Court
ICCPR	– International Covenant on Civil and Political Rights
idem	– same author and source, different page/paragraph
infra	– cited below (lat.)
no.	– number
OJ	– Official Journal of the European Union
OLAF	– European Anti-Fraud Office
p.	– page(s)
para.	– paragraph
SIS	– Schengen Information System
supra	– cited above (lat.)
TEC	– Treaty establishing the European Community

TEU	– Treaty on European Union
TFEU	– Treaty on the Functioning of the European Union
v.	– versus

Introduction

§1. Rationale

European Criminal Law is an emerging field. It is not a classical criminal law field, with detailed rules (such as a substantial Criminal Code, or a Procedural Criminal Code), as can be seen at the national law level. That is why for criminal law scholars or practitioners, it is difficult sometimes to grasp the particularities of this field and even the idea that such a field indeed exists.

In order to understand the particularities of this field, a sound knowledge of national (and even comparative) criminal law is necessary, but also knowledge of European Union law, institutions and policies.

Not being a classical criminal law field, it is difficult to categorize European Criminal Law in the patterns already established at national level or in comparative criminal law. However, a successful attempt in this direction has already taken place in literature[1]. This is not the direction this study is heading for.

This book is trying to address several questions which should be asked before establishing a European Criminal Law field or science. And these questions are: when and why should we criminalize conduct, which are the foundations of national criminal law, are these foundations also the same for the European Criminal Law, and if not, which ones should constitute the foundations of the latter?

But can we discuss about such field, European Criminal Law, in order to establish its foundations? Is it not a little premature to discuss such issues? I personally believe it isn't.

The European Union is a relatively young organization, which suffered important transformations in the late years, including here

[1] *A. Klip*, European Criminal Law, an Integrative Approach, Intersentia, Antwerp-Oxford-Portland, 2009.

criminal law measures as well. If we recall the first acquired competences in criminal law at European level, we cannot go back more than 20 years, to the Treaty of Maastricht. It was an intergovernmental cooperation in the field of serious transnational crime, established in concrete terms starting from 1999, with the Tampere Council. At this particular Council, two fundamental principles of judicial cooperation were established, which enhanced criminal law legislative action and case law at the EU level: mutual recognition and mutual trust[2].

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[3], and continuing with the improved cooperation in the field of recognition of custodial and non-custodial sentences and transfer of convicted persons[4].

Also, a crucial event in the development of both substantial and procedural criminal law within the EU was the entering into force with the Lisbon Treaty in December 2009[5]. 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.

---

[2] *N. Neagu*, The European Public Prosecutor's Office - Necessary Instrument or Political Compromise?, 3(2) Law Review (2013) 52-62.

[3] 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.

[4] 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.

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

However, imposing mutual recognition and mutual trust upon the Member States of the European Union, was not enough to solve an important issue which this kind of cooperation may raise: due to the lack of harmonization of the national criminal law provisions, sometimes courts from different member states were faced with the implementation of judicial decisions stemming from other national legal systems, which, if taken on their own territory, might have led to different solutions.

In this context, a harmonization of at least some fundamental aspects of a criminal trial, starting with the ECHR and ECtHR case law as the common lowest denominator, was required.

An ambitious roadmap for procedural rights in criminal trials has been established in the EU[6]. It included measures related to translation and interpretation, information on rights and information about charges, the right to legal advice and legal aid, the right to communication with relatives, employers and consular authorities, and special safeguards for suspects or accused persons who are vulnerable.

But criminal procedure is not the only field developed in the late years in the European Union. Substantial criminal law was also given a particular attention in the last decade, both in the field of transnational crime[7], and protection of the effectiveness of EU policies[8].

---

[6] 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, p. 1-3.

[7] Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims, OJ L 101, 15.04.2011, p. 1-11, Directive 2013/40/EU of the European Parliament and of the Council on attacks against information systems and replacing Council Framework Decision 2005/222/JHA, OJ L 218, 14.08.2013, p. 8-14, 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, p. 1-3, 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, Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, OJ L 164, 22.6.2002, p. 3-7, Council Framework Decision 2004/757/JHA of 25 october 2004 laying down

As it can be seen, criminal law is already a European Union policy, and it has the full attention of the European legislator. Ignoring the legislation in force and the plans for the future by denying the existence of a European Criminal Law because of the lack of existence of European criminal codes and the lack of harmonization in all fields, means hiding from existing realities of an emerging European legislation in the field of criminal law, with tremendous influence over national criminal law.

This is why I think it is time to accept the existence of an emerging European criminal law system, shaped to respond to the particularities of the European Union (a unique system framed between international organization and federal state), with (in)direct influence over the national criminal law system of the Member States. Accepting the existence of such a system takes us to the next step, which is the setup of a European criminal science. And the first thing to address, in my opinion, is the foundations of European criminal law.

---

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, 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, 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, OJ L 182, 5.7.2001, p. 1-2, 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.

[8] 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, Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation, COM (2011) 0654 final, Directive 2009/52/EC of the European Parliament and of the Council providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ L 168, 30.06.2009, p. 24-32, Proposal for a Directive of the European Parliament and of the Council on the protection of the financial interests of the European Union by criminal law [COM(2012) 363 final].

§2. Structure of the book

European Criminal Law is an emerging field, which needs to be approached in a principled manner. There are three reasons encouraging us to look closely at the foundations of criminal law in the European Union: the adoption of legislative criminal instruments at the EU level which is increasing in numbers in recent years; new powers of the EU as regards the adoption of legislative instruments in the field of criminal law (shared competences); an ambitious plan at the European level in the next five years about ensuring a space of freedom, security and justice, including the use of criminal law to achieve this objective.

We believe that this necessarily requires a study to establish the main foundations on which it could be built a possible (future) European Criminal Law. For a healthy penal policy at the European level, a framework based on principles is needed firstly, not on the needs of the moment that creates the premise of not correlated criminal instruments at European and national level, both in the drafting and in the implementation stage.

2.1. Foundations of national Criminal Law

In order to devise such a framework, national input is necessary, from various legislative systems in the EU. As EU law is based primarily on common national traditions and principles, this is also true for criminal law. To establish a principled approached to criminal law at the European level, it is first necessary to analyze how the foundations of criminal law are dealt with at national level.

The following information needs to be obtained: which are the general principles guiding the national criminal law, what is the definition of criminal offence and its constituent elements, which are (if any) the criteria for criminalizing conduct at the national level, what is the difference (quantitative or qualitative) between administrative and criminal offences.

For this reason the first part of the book (entitled “Foundations of national criminal law”) deals with responses from national criminal

systems to a questionnaire addressed to several countries, such as Italy (Chapter 1), Hungary (Chapter 2), the Netherlands (Chapter 3), and Romania (Chapter 4).

I will leave to the reader to find out the particularities of each system, and I will include here only the questions addressed to each respondent. The questionnaire is composed of four parts.

(A) General principles

A1) Which are the general principles of national criminal law? Are they provided for in legislation, or in literature?

A2) Is there a difference between general principles governing all (or several) branches of law (e.g. legality, equality), including criminal law, and principles specific only to criminal law (e.g. general or specific prevention through penalty)? If so, is there a hierarchy of those principles in legislation, literature or case law?

(B) Criteria for criminalizing conduct at national level

B1) Are there any criteria for criminalizing conduct at national level? Are they provided for in legislation, literature or case law?

B2) Is there any theory for criminalizing conduct in literature in your country (e.g. harm principle, legal goods theory, economic analysis of law etc.)? Are these theories (if present) influential over the legislative process in criminal law in your country?

B3) Are there limits to criminalizing conduct at national level (e.g. conferral of powers, subsidiarity, proportionality, which are provided for at European level)? If so, is there any judicial remedy for abuse of power from the legislator in crossing those limits?

(C) Criminal offence (definition, constituent elements)

C1) What is the definition (if any) of the criminal offence in your country? Is it provided for in legislation, literature or case law?

C2) What are the constituents elements of the criminal offence (e.g. actus reus/mens rea; *elements legal*, *materiel* et *moral*, respectively *Tatbestand – Rechtswidrigkeit – Schuld* etc.)?

(D) Administrative offence v. criminal offence

D1) Is there a difference between administrative and criminal offences in your country, or are they all part of the criminal law system?

D2) If there is a difference, is it based on qualitative or quantitative criteria, and what are these criteria? Are they provided for in legislation, literature, or case law?

2.2. Foundations of European Criminal Law

The second part of the book, entitled 'Foundations of European Criminal Law', deals with the same questions, from a European perspective.

Chapter 1 (**General principles**) briefly analyses the main principles which can be found in the preambles of legislative acts, the case law of the Court of Justice of the European Union, or the criminal policies established by the main bodies involved in the legislative process [the European Commission (initiator), the Council and the European Parliament (co-legislators)]. Not all general principles are analyzed in this section. Several fundamental principles are included in the next chapter (Criteria for criminalizing conduct). The distinction between principles included in these two chapters is made according to the addressability of each principle: if it concerns mainly the legislative process, it is included in Chapter 2; if it concerns the legislative process, but also the enforcement phase, affecting also European citizens, it is included in Chapter 1. The principles from Chapter 1 are divided in three main categories: substantial criminal law principles (e.g., legality, equality, guilt, *mitior lex*), procedural criminal law principles (e.g., presumption of innocence, right of defense), and judicial cooperation principles (e.g. mutual recognition, mutual trust, *ne bis in idem*, speciality).

Chapter 2 (**Criteria for criminalizing conduct**) tries to establish, based on theories developed in literature *(i)*, reasons for criminalization included in the preamble of European legislative acts *(ii)*, and also the criminal law policies of the main actors involved in the legislative process at the EU level *(iii)*, a principled approach to criminalization in the European Union. The main criterion for criminalization seems to be a specific version of the "harm principle", and several limits to criminalizing conduct are also proposed here: the conferral of powers principle, subsidiarity and proportionality, effectiveness of EU policies, and judicial control of the legislative process.

Chapter 3 (**Towards a common definition of criminal offence**) tries to establish, based on common traditions of national criminal systems in the European Union, a definition of the criminal offence

which might be acceptable in most (if not all) of the national legislative systems. Since this problem was not addressed in the legislative instruments adopted so far at European level, the approach is mostly theoretical and doctrinal, stemming from historical comparative analysis. A common definition of criminal offence in the European science of criminal law should start from the interpretation of *actus reus* and *mens rea,* but it should also include the German normative doctrine of the unwarranted conduct, departing from objective social roles and the competencies assigned thereto and constituting the core of the objective side of crime.

Chapter 4 (**Criminal offence v. administrative offence**) tries to establish the main differences, as stipulated in the case law of the European Court of Justice, and also the criteria for differentiating between criminal and administrative offences. This is a backward analysis of criminal offence, through its penalty. That is, if a penalty is deemed as having a criminal nature (thus determining a criminal procedure), then the forbidden conduct must necessarily be of criminal nature, hence a criminal offence has been committed.

§3. Purpose of the book

The purpose of this book is not to offer comprehensive answers to the problems identified here (though some answers are proposed), but to raise questions for debate in literature. Establishing a principled approach towards a European criminal law science necessarily involves a concerted approach by literature, legislator and judicial authorities involved in the enforcement process. This book being part of a national research project (funded by the Romanian authorities), its electronic distribution is free of charges, trying to trigger debate on the problems identified herein.

The collective of authors wishes you a pleasant reading!

Norel Neagu

PART I
Foundations of National Criminal Law

Chapter I
Foundations of (European) Criminal Law
– National perspectives –
Italy

Ph.D. Clara Tracogna*

§1. General principles

Focusing on the rule of criminal law in contemporary societies, scholars displayed a set of principles inspiring and influencing legislation and its interpretation in the criminal field. Here below is a summary of the **leading principles** in contemporary criminal law[1].

---

* Ph.D. in Law at the University of Padova (Italy), Lawyer. My main research fields are European Judicial Cooperation in Criminal Matters, European Penal Law and Procedure, Comparative Criminal Law and Procedure, Legal Entities Criminal Liability. Email: clara.tracogna @gmail.com

[1] For an overview on general principles of Italian criminal law, the cornerstone in literature is *C. Beccaria*, Dei delitti e delle pene, Feltrinelli, first ed. in 1764. In his masterpiece, which is consistent with Enlightenment thoughts, Beccaria introduced for the first time liberal concepts in the framework of criminal law, together with a firm rejection of life sentence. Beccaria's work influenced all the following Authors and is always mentioned in Scholars studies. More recently, a complete description of criminal law features can be found in one of the main Italian contemporary Philosophy of Law Authors: *L. Ferrajoli*, Diritto e ragione. Teoria del garantismo penale, IX ed., Laterza, 2009.

Among the main contemporary Scholars, a summary of the main principles ruling Italian criminal law can be found in the main Academic criminal law handbooks: *F. Antolisei*, Manuale di diritto penale. Parte generale, XV ed., 2003*; A. Cadoppi, P. Veneziani*, Elementi di diritto penale. Parte generale, V ed., Cedam, 2012; *S. Canestrari, L. Cornacchia,*

1. *Principio di materialità* (materiality principle), stating that no one can be punished if his criminal will doesn't appear through a material conduct, perceivable from the outside. This principle is also known as a modern translation of the Latin legal maxim *cogitationis poenam nemo patitur*: no one should be punished for his thoughts, even if they are evil thoughts. A material conduct is socially required in order to verify if it's likely to risk a protected interest.

2. *Principio di offensività* (principle of the offence): expressed by the Latin maxim *nullum crimen sine iniuria*, this principle provides that, since criminal law has been created to protect socially relevant interests (the so called legal goods, *beni giuridici*), thus a conduct should be punished only if it results in a risk for the protected legal good.

3. *Principio di colpevolezza* (culpability principle): a material conduct resulting in a risk for a protected interest is punishable only if the offender is culpable and blameable for his/her conduct. The Latin maxim summarizing this principle is *nullum crimen sine culpa*.

The abovementioned principles influence also the following ones, expressing the main features of penal law.

4. *Principio di sussidiarietà* (subsidiarity principle), based on the theory that criminal law should be the *extrema ratio*, that is the unavoidable conclusion to a criminal offence. In the subsidiary use of criminal law lays indeed its effectiveness towards both the offender (special prevention) and the community (general prevention) overall.

G. De Simone, Manuale di diritto penale. Parte generale, 2008; *G. Fiandaca, G. Di Chiara*, Una introduzione al sistema penale. Per una lettura costituzionalmente orientata, Jovene, 2003 and G. *Fiandaca, E. Musco*, Diritto penale. Parte generale, X ed., Zanichelli, 2010, p. 3 ss.; *C. Fiore*, Manuale di diritto penale. Parte generale, vol. 1, UTET, 2008; *R. Garofoli*, Manuale di diritto penale. Parte generale, IX ed., Neldiritto.it, 2013; *F. Mantovani*, Diritto penale. Parte generale, VII ed., Cedam, 2011; *G. Marinucci, E. Dolcini*, Diritto penale. Parte generale, IV ed., 2012; *A. Nappi*, Manuale di diritto penale. Parte generale, Giuffré, 2010; *T. Padovani*, Diritto penale, X ed., Giuffrè, 2012; *A. Pagliaro*, Principi di diritto penale. Parte generale, VIII ed., Giuffrè, 2003; *D. Pulitanò*, Diritto penale, IV ed., Giappichelli, 2011.

5. *Principio di meritevolezza della pena* (punishment worthiness principle), stating that a conduct should be punished only when the risk towards the protected interested is intolerable and inexcusable. The higher the position of the interest in an ideal rank, the more justifiable will be a penal punishment; the lower the position of the interest in the rank, the lesser justifiable will be a penal reaction to the conduct affecting the interest.

6. *Principio di frammentarietà del diritto penale* (disjointedness of criminal law principle), ruling as follows: first, criminal law protects interests which deserve defence towards determined forms of risk (i.e. criminal offences towards property do not include breach of contract, even if it may cause enormous monetary damages); second, criminal law is a small system not including the whole unlawful conducts; third, criminal conducts shouldn't be assimilated to (nor be confused with) morally blameworthy conducts, which are not part of criminal law and are not judged in a liberal and democratic State.

7. *Principio di autonomia del diritto penale* (criminal law autonomy principle), stating that criminal law shouldn't be considered as an appendix to other branches of law, in that it may punish conducts which are unlawful under civil or administrative law. Indeed, criminal law is, as confirmed by the abovementioned subsidiarity and disjointedness principles, an *extrema ratio*, in that it punishes only certain breaches of protected interest; moreover, even when criminal law recalls other branches of law (e.g. corporate crimes) there are concepts and categories that are necessary and consistent only within the criminal law system (e.g. subjective element in liability and culpability).

Focusing now the analysis on *droit écrit*, it should be underlined that the Italian system is based on positive legislation, therefore foundations of Italian law are embedded within the Constitution and primary legislation, whereas a few of the Constitutional principles are referred only to criminal law. Before considering these

principles, a short description of the hierarchy of the Italian sources of law will be useful[2].

The Italian **Constitution** entered into force in 1948. It provides general principles on the law-making process, on different types of primary legislation and on the constitutional bodies legitimate to suggest and issue them. Respect towards the Constitution by primary and secondary legislation is granted by means of the Constitutional Court.

There are three kinds of primary legislation acts: a) *legge ordinaria* (statutory act), approved by the Parliament; b) *decreto legge*, originally issued by the Government in situations of necessity and emergency and confirmed by the Parliament within 60 days; c) *decreto legislativo*, a Government primary act, within an area limited by a statutory act: when the Parliament wishes to rule complex topics, it delegates the Government through a *legge delega*, a statutory act providing for the subject, the main principles and the time-table that the Government should respect in the drafting process.

The Government is entitled to implement primary legislation through sub-primary rules (*regolamenti del Governo*): it issues supplementary rules, provided that these are limited to implement primary legislation and do not change, add or modify basic rules contained in primary legislation.

It is possible now to analyse the main principles provided by the Constitution[3]. The **equality** principle is embedded in Art. 3,

---

[2] For a complete survey on the Italian sources' of law hiearchy and features, see *F. Modugno*, Appunti dalle lezioni sulle fonti del diritto, Giappichelli, 2005; *A. Ruggeri*, Fonti, norme, criteri ordinatori. Lezioni, Giappichelli, 2009. By the same author, see also Dal caos delle fonti, secondo forma, all'ordine delle norme, secondo valore: note dolenti su un'annosa e spinosa questione, in www.gruppodipisa.it, 2011 and Sistema di fonti o sistema di norme? (*www.giurcost.org*), 2012.

[3] As far as regards criminal principles included in the Italian Constitution, see, for a contemporary comprehensive explanation and interpretation, *G. Fiandaca, G. Di Chiara*, Una introduzione al sistema penale. Per una lettura costituzionalmente orientata, Jovene, 2003;

which should be interpreted in both formal and substantial way: first, citizens are equal before the law and different treatments are admitted only in different circumstances (*principio di ragionevolezza*, principle of reasonableness). Second, the State should make any possible effort in order to remove all the hindrances that cause differences among citizens. This principle permeates all the branches of law.

Art. 24 of the Constitution provides for the **right to defense**: this principle is applied in all branches of procedural law (i.e. civil, penal, administrative, tax law processes etc.) and acknowledges the right at any stage of the process.

Art. 111 of the Constitution provides **rights during the trial**. Paragraphs 1, 2, and 6 can be applied to all kind of processes stating as follows: a) jurisdiction is ruled by law; b) any process should be based on cross examination procedure, in equal conditions for the parties and in front of a judge which is impartial and not involved in the process; c) any judicial decision should be provided of a rationale. Paragraphs 3, 4, 5 and 7 are indeed only related to criminal trials in providing: a) the right of the indicted person to be informed in short time about the charges; b) the cross-examination rule; c) specific cases in which the cross-examination rule can be avoided; d) that court decisions on persons' freedom can always be revised in front of the *Corte di Cassazione* (Supreme Court).

Art. 25 para. 1 states that the judge entitled to rule criminal proceedings must be determined by a primary act entered into force before the crime was committed. Moreover, it provides the right to be judged by a "**natural judge**". Jurisprudence and Scholars have not yet clarified the concept of "natural judge". However, the most important doctrine suggests that "natural judge" should be the judge of the *locus commissi delicti*, whom is closer to the facts and the evidences to be presented at court.

The **legality principle** (*principio di legalità*) has particular effects on criminal law. It is embedded in Art. 25 para. 2 of the

---

N. Zanon, F. Biondi, Il sistema costituzionale della magistratura, III ed., Zanichelli, 2011.

Constitution, stating that no one can be punished if not in compliance with a law entered into force before the act was committed. The principle is also confirmed by primary legislation: Art. 1 of the criminal code (approved in 1933 and still in force) provides that no one can be punished for an act that is not expressly considered a criminal offence by law, nor can sanctions be imposed if they are not provided by law.

In criminal matters, the Italian principle of legality includes also a *riserva di legge* (**law saving clause**), by means of which only the Parliament (the constitutional body expressing Italian citizens' sovereignty) is entitled to rule on criminal matters. This is an implementation of Ludwig Feuerbach's rule expressed by the Latin maxim *nulla poena sine lege*. Moreover, the saving clause in criminal matters is absolute, which means that a criminal rule should be created or modified only by means of primary legislation (statutory act, *decreto legge* and *decreto legislativo*). Secondary legislation can only provide formal aspects and should not contradict primary legislation provisions.

The principle of legality includes also the *principio di determinatezza e tassatività della legge penale*, stating that a criminal law should be clear and complete, thus **prohibiting interpretation by means of analogy in the criminal system**. Italian Scholars consider that this limit should be valid only when the analogy is *in malam partem* (against the defendant's interest), while analogy *in bonam partem* should be lawful. In light of this principle, a criminal provision must exactly and precisely distinguish an unlawful act from a lawful one, thus avoiding ambiguous formulations that would entitle the judge to use too wide interpretations that would be inconsistent with the role of the Judiciary as described by the Constitution.

Finally, the legality principle also **forbids a retrospective application of criminal law**. A person should be confident and aware that his/her conduct wouldn't be punished under the law in force at the moment of action (*principio di irretroattività*). However, a retrospective implementation of law is possible when the new provision is more favourable than the one in force at the time the act was committed.

Art. 25 para. 3 extending the law saving clause to security measures, acknowledges the so called **"double-track" system in criminal sanctions**, thus validating the one in force in the 1930 criminal code. As a matter of fact, the criminal code distinguishes between: a) criminal sanctions and b) penalties and security measures (*misura di sicurezza*). The former, which have a set maximum length in time, are applied to people sentenced for criminal offences. The latter don't have a fixed length in time and are applied to socially dangerous people, in particular to people who, on the basis of a judicial prognosis, are likely to commit other crimes in the future: a security measure can thus be removed only when the entitled judge considers the person no longer socially dangerous. Security measures must be based on determined and objective grounds, such as the commission of an offence or of a *quasi* offence (i.e. an instigation to commit an offence or an agreement to commit an offence without actually realising the purpose). In other words, the perpetrator intends to commit a crime, but the act doesn't fulfil a criminal offence under the criminal law[4] (Art. 49 of the Criminal code).

Art. 27 para. 1 of the Constitution states that **criminal responsibility is personal**. Some Scholars interpret this provision in the sense that, in order to be consistent with the Constitution (*nullum*

[4] For an overview on the "double-track system" in criminal sanctions, see *S. Giliberti*, Il sistema del "doppio binario", in P. Pittaro (ed.), Scuola Positiva e sistema penale: quale eredità?, EUT Edizioni Università di Trieste, 2012, p. 11 ss.; *G. Fiandaca, E. Musco*, Diritto penale. Parte generale, X ed., Zanichelli, 2010, p. 789 ss.; *E. Musco*, La misura di sicurezza detentiva: profili storici e costituzionali, Giuffré, 1978; *T. Padovani*, L'utopia punitiva, il problema delle alternative alla detenzione nella sua dimensione storica, Giuffrè, 1981, p. 1 ss.; *M. Pellissero*, Pericolosità sociale e doppio binario. Vecchi e nuovi modelli di incapacitazione, Giappichelli, 2008. In English, by the same Author, The doppio binario in Italian Criminal Law, paper presented at the "Fourth Conference On The Future Of Adversary Systems" (11th-12th May, 2012, Ravenna, Italy), that can be found on the web at: (*http://www.law.unc.edu/documents/faculty/adversaryconference/doppiobinario-english-pelissero.pdf*).

crimen sine culpa), an indictment should always require culpability. In 1988, the Constitutional Court (decisions no. 364 and no. 1055) accepted the above-mentioned interpretation. Thus, absolute liability in criminal matters is inconsistent with the Italian Constitution.

Absolute liability is however expressly provided in the criminal code. In particular, it is included in Art. 42 para. 3 which, after stating that no one can be punished for an act committed without awareness and intent, entitles the law to specify cases in which the defendant should be otherwise charged of a fact which is the result of his/her act or omission. Therefore, absolute liability is an exceptional case for indictment, while the general principle is that of culpability. It is necessary to precise that the criminal code was approved in 1930, under the Fascist regime, and that absolute liability was consistent with the Fascist ideology.

The outcome of the Constitutional Court decisions of 1988 brought to interpret the cases of absolute liability present in the criminal code into offences based on the culpability principle.

However, some offences are still punished even if committed without intent (i.e. the death of a kidnapped person during the kidnapping; mistaking the age of the victim in a sexual offence). All these cases of unintentional consequences are considered from the point of view of the direct cause, and there is no in depth exam whether the consequence could have been avoided. Therefore, there are still some provisions in the criminal code that are inconsistent with the constitutional principle *nullum crimen sine culpa*[5].

A second consequence of Art. 27 is that criminal responsibility must be limited exclusively to human persons. Legal entities cannot be subjected to any type of penal sanction and this rule is consistent with the Latin maxim *societas delinquere non potest*.

[5] On absolute liability, see *F. Basile*, La responsabilità oggettiva nella più recente giurisprudenza della Cassazione relativa agli art. 116, 584 e 586 c.p. (*www.dirittopenalecontemporaneo.it*), 2012; *G. Marinucci, E. Dolcini*, Diritto penale. Parte generale, IV ed., 2012, p. 338 ss.; *E. Dolcini*, Qualche indicazione per l'interprete in attesa di un nuovo codice penale, in Rivista Italiana di Diritto e Procedura Penale, 2000, p. 863 ss.

However, this interpretation has been increasingly criticized by Scholars: as a matter of fact, most serious economic crimes, environmental crimes and financial crimes are often the outcome of conscious corporate policies. Therefore, the fact that legal entities were immune from any form of sanction represented, for many years, a frustration of an effective protection of relevant interests. Eventually, this interpretation was abandoned when, by means of *decreto legislativo* no. 231/2001, the Parliament and the Government passed the rules on the **legal entities liability for criminal offences committed in their interest**. The new act was approved in order to comply with the obligations deriving from international conventions[6].

However, it should be specified that legal entities' responsibility has no criminal features: in fact, it's an administrative responsibility (even if connected with a criminal offence committed by persons working within the legal entity itself) and the consequences for the entity, when proved culpable, are monetary sanctions or sanctions that interdict the legal entity from doing some activities for a determined period.

Art. 27 para. 2 provides the **presumption of non culpability principle** (*presunzione di non colpevolezza*), which differs from the presumption of innocence of Art. 6 para. 2 of the ECHR in that the presumption of non culpability is longer in time than the presumption of innocence: the first lasts until the decision convicting the defendant is final, while the second lasts until a decision, even not final, convicts the defendant.

Finally, Art. 27 para. 3 of the Constitution provides an **aim for the criminal punishment** (*principio della rieducazione della pena*):

---

[6] For in depth analisys on legal entities liability related to criminal offences, see *AA.VV*., D.lgs. 231: dieci anni di esperienze nella legislazione e nella prassi, in Le Società, 2011, special number; *C. Angelici*, Responsabilità sociale dell'impresa, codici etici e autodisciplina, in Giurisprudenza commerciale, I, 2011, p. 168 ss.; *C. De Maglie*, L'etica e il mercato, Giuffrè, 2002; *G. De Simone*, La responsabilità da reato degli enti: natura giuridica e criteri (oggettivi) di imputazione (*www.penalecontemporaneo.it*); *G. De Vero*, La responsabilità penale delle persone giuridiche, Giuffrè, 2008.

it should be useful to reeducate the sentenced person in order for him/her to understand the blame deserved and would no longer commit a crime. This principle gives also a new perspective for the role of criminal law, which is oriented not only towards the protection of State interests', but is indeed focused on persons and their role in the society.

§2. Criteria for criminalising conduct at national level

As explained above, criminal law punishes behaviours affecting socially relevant goods and interests[7]. "Goods" and "interest" have different literal meanings: the first stands for anything that can satisfy a human need; the second stands for a comparison between a need and the means to satisfy it. However, in law literature, they are used basically as synonyms.

It is also important to clarify the difference between the legal object and the material object of the crime. The first is a conceptual entity: a value protected by the criminal rule. The second is a material entity: e.g., in theft, the material object is the cash within the stolen wallet. The difference allows us to introduce the theory of legal goods, which are explained differently by scholars.

The connection between criminal offence, legal good and interest is the expression of the **objective concept of crime**: the meaning shouldn't be quested in the offender's will and is indeed perceivable by the outside, even if what is perceived has not necessarily a material substance. As a matter of fact, this theory states that the legal goods' substance is a value: it can be estimated even if it's not material.

[7] See *S. Maffei, I. Merzagora Betsos*, Crime and Criminal Policy in Italy. Tradition and Modernity in a Troubled Country, in European Journal of Criminology, 2007, p. 461 ss.; *A. Manna, E. Infante*, Criminal Justice System in Europe and North America. Italy, Heuni (The European Institute for Crime Prevention and Control, affiliated with the United Nations), 2000.

This theory is opposed by the **subjective concept of crime**, which has been developed during the Nazi's regime and has been followed in totalitarian dictatorships. The subjective theory embeds the criminal offence in the rebel's will to break the regime principles. What is important is not that the conduct risks an interest, but that it's a betrayal to the loyalty bond to the State. This theory of course enlarges the area of criminal offences and focuses not on a single act or conduct, but on the entire way of life of a person.

Fortunately the subjective theory parenthesis has been closed and the crime is nowadays interpreted as an offence towards a legal good. The concept of legal good can have different aims[8]:

a) An **interpretation and implementation** aim, in that knowing the legal good protected by criminal legislation paves the way to a teleological interpretation;

b) A **Classification aim**, in that, on the basis of common underlayers, crimes can be categorized in different groups. As a matter of fact, the Italian criminal code is divided in a general and a special part. **The general part** provides basic principles, while the special part is divided in the following sections: crimes against the State, against public administration, against justice, against religion, against law and order, against public safeness, against public faith, against economy, against morality and decency, against animals, against the family, against property, other minor offences. More provisions are included in special legislation, outside the code. One can guess the interest protected by knowing the section where the rule is published in the code or in special legislation. However, the criminal code choice is not binding for the interpreter. After the entering into force of the Constitution, the mainly acknowledged theory states that legal goods and interest deserving protection through criminal law should be consistent with the Constitution provisions. Thus, it is possible for a criminal provision to protect many more interests than the single interest related to the category including the criminal provision itself.

[8] See, for a complete summary of the concept of legal good aims, by *T. Padovani*, Diritto penale, X ed., Giuffrè, 2012, p. 80 ss.

c) A **Descriptive aim**, in that the crime is described as a necessary offence to a legal good or interest.

d) **Criminal policies and criminalization aims**, in that the offence to a legal good should be the criterion used by the legislator to identify conducts deserving a criminal punishment.

The two main theories on the concept of legal goods focus on the perspectives described on points c) and d). First of all, the **methodological concept of legal good** states that all crimes consist in an offence aimed towards a legal good. Thus, the shared underlayer among crimes is the protection of legal goods, which overlaps with the main aim of the legislation, namely protecting the legal good itself. This theory is however not satisfactory: it only enriches the definition with a teleological aim, but doesn't provide any criteria in order to identify which are the legal goods deserving protection through criminal law. A crime is thus an event that risks a legal good, which is protected by law.

The **realistic conception of the legal good** states indeed that a certain good is legal when embedded in a criminal provision. However, that good has a substantial value and a material relevance that can be perceived. This value entitles the legislator to protect the good through a criminal provision (so called *reati di offesa* – offence crimes). Nevertheless, a criminal provision can also be used for a particular political aim (so called *reati di scopo*, aim crimes): i.e. unlawful possession of weapons is as risky as the lawful one; however, criminal law punishes only the first for a broader aim to forbid a spread use of weapons that will result in a broader danger for the whole society.

The realistic conception is the most useful to identify facts deserving criminal punishment. Two approaches are possible: 1) the legislator is free to use criminal sanctions both to protect goods already existing and for political aims. In this case there is no possibility to limit the legislator's will; 2) the legislator should use criminal law only to protect legal goods. Thus, a legal good must always be considered in criminal provisions drafting. Therefore, this theory limits legislator's power in that the criterion for criminalizing a conduct should be the offence towards a legal good. However, this

theory paves the way for another challenging problem: **which should be the legal limit of the legislator**.

Pursuant to a modern theory, legal goods deserving protection should be found in the Constitution. This thesis has been developed by Franco Bricola and can be summarized as follows[9].

a) Every penal sanction affects freedom (even criminal monetary punishments, if not paid off by, turn to prison punishments). Thus, criminal provisions clash with the fundamental principle of freedom provided by Art. 13 of the Constitution.

b) Criminal punishments, as provided by Art. 27 para. 3 of the Constitution, should always be aimed to educate the sentenced person in order that he/she can understand the blame deserved and would no longer commit a crime.

c) Criminal provisions, as stated above, must respect the legality principle and thus can be provided only by primary legislation (Art. 25 of the Constitution).

d) Criminal liability is personal (Art. 27 para. 1 of the Constitution), therefore criminal provisions should be based not only on the event (the material offence to a legal good), but also on the possibility to blame the person who committed the criminal conduct, in that the person should be able to commit the crime (capacity of crime, i.e. be at least 18 years old) and be blameworthy for that (culpability).

The premises at letters a) and b) theorize a link between punishment and legal goods: a substantial nexus as far as regards freedom; a teleological nexus as far as regards the aim of the punishment. If the punishment affects a fundamental good (freedom), then criminal provisions should be aimed at protecting goods as relevant as

[9] Francola Bricola's Theory is published in *F. Bricola*, Teoria generale del reato, in Novissimo Digesto Italiano, vol. XIX, Utet, 1973. Bricola's theory contemporary interpretations and explanations can be found in *M. Donini*, L'eredità di Bricola e il costituzionalismo penale come metodo. Radici nazionali e sviluppi sovranazionali, in Diritto penale contemporaneo, 2012, issue no. 2, p. 51 ss., *T. Padovani*, Diritto penale, X ed., Giuffrè, 2012, p. 84 ss.

freedom. This is an implementation of the proportionality principle mentioned in para. 1.

The premises at letters c) and d) theorize that criminal punishment should be used in very restricted cases, as *extrema ratio* in protecting relevant interests. The restriction responds to both social and individual interests: the cost of prisons should be limited as it involves the whole society, the use of prison should limited as it affects persons' freedom. This is an implementation of the subsidiarity principle mentioned in para. 1.

This theory has been opposed on four grounds. First, it appears that the Constitution provides heterogeneous legal goods. Even if limiting criminal protection to the most relevant ones, there still is the problem of defining which legal good is relevant and which is not.

Secondly, there are some criminal provisions apparently inconsistent with the set of legal goods provided by the Constitution. For exemple, false declarations, false documents and the use of false documents seem not to correspond to a relevant Constitutional interest. An answer to this critique is that these criminal provisions protect indirectly other relevant goods that can be affected by falsity. However, this perspective acknowledges the existence of implicit goods in the Constitution: the result is that there is no certainty in limiting the relevant legal goods.

Thirdly, entitling the legislator to estimate and evaluate which are the Constitutional relevant goods deserving protection through criminal law is a slippery slope towards arbitrary choices.

Fourthly, crimes of aim appear to be inconsistent with the premises of the theory, in that they don't refer to a Constitutional legal good. An answer to this fourth critique is that crimes of aim should only pursue goals consistent with the Constitution.

The abovementioned theory, even if it doesn't offer absolute limits for the legislator, provides hints and clues to primary legislation and has been also used by the Ministries Council's document approved on the 19th of December 1983[10]. The document

[10] The complete document "Circolare della Presidenza del Consiglio dei Ministri 19.12.1983" is published in the Official Gazette, 23.1.1984,

is aimed at offering useful criteria in choosing a criminal punishment rather than an administrative one. The addressee of the provision is the Government when acting as a primary legislation drafter in criminal matters (*decreti legge* and *decreti legislativi*). Even if the Parliament isn't the addressee of the document, the document is nevertheless an important acknowledgment of the legal goods theory, in that it states that the choice between administrative and criminal sanction should be based on two main criteria: 1) the proportionality principle, because the aim of education embedded in Art. 27 of the Constitution cannot be pursued if the punishment is excessive in respect to the seriousness of the crime; 2) the subsidiarity principle, because the criminal sanction affects the fundamental right to freedom protected by art. 13 of the Constitution.

As clarified in para. 1 respect for the Italian Constitution provisions by primary and secondary legislation is ensured by means of the **Constitutional Court**. However, respecting the division of powers principle, in the field of criminalization the Constitutional Court adopts a self-restraint in evaluating the legislator's choices in criminal policy: the Court would only decide towards a provision criminalising a conduct that shouldn't be considered as a crime on the basis of proportionality and subsidiarity principles. On the opposite, the Court wouldn't suggest that a conduct deserves a criminal punishment instead of the administrative one provided by the legislator, because the choice on the most effective means to protect an interest or a legal good is that of the legislator. An example is given by Constitutional Court ordinance no. 70/2006 and Constitutional Court decision no. 161/2004 on the *decreto legislativo* no. 61/2002, which, abrogating criminal provisions on accounting/financial frauds and the forging of documents, provided administrative punishment for the offences: the Constitutional Court ruled that the choice on the kind of punishment is on the legislator[11].

---

no. 22 (supplement). For a comment on the abovementioned document, see *T. Padovani*, Diritto penale, X ed., Giuffrè, 2012, p. 88 ss.

[11] See comments by Scholars in AA.VV., Ai confini del favor rei. Il falso in bilancio davanti alle Corti costituzionale e di giustizia. Atti del Seminario Ferrara, 6 maggio 2005, Giappichelli, 2005; *L. Mezzetti*, Il

To be through with the topic of the limits of criminalization, a particular provision should be mentioned: **art. 13 para. 4 of the Constitution** provides that any act of moral or physical violence towards persons that are already suffering a restriction of their personal freedom (e.g. serving a sentence or a pre-trial measure) is punished. Throughout the whole Constitution, the verb "punished" is used only in this provision, proving the gravity of the act and the necessity of a strong measure against such a breach of law. Some authors thus consider that in these cases a criminal punishment is needed. At present, criminal sanctions for this kind of violence towards persons restricted in their liberty are provided in the criminal code (Art. 608). However, these authors also say that, if the legislator decided to punish these acts of violence by means of administrative sanctions, then the Constitutional Court should withdraw the law as being inconsistent with the provision of art. 13 paraa 4 of the Constitution.

§3. Criminal offence (definition, constituent elements)

The noun ***reato*** has been used in Italy since 1889, when the criminal code of the Kingdom of Italy entered into force. The 1889 code was replaced by the 1930 criminal code, which is still in force in the Italian Republic. *Reato* is therefore a criminal offence, and the name is used to distinguish a criminal act from other acts which are unlawful but don't deserve penal punishment (civil wrongs and administrative unlawful acts). A punishment is penal when it affects the sentenced persons' freedom.

However, it is also necessary to consider law no. 689/1981, which decriminalized all criminal offences punished only with a monetary sanction. In this case, the abovementioned formal

---

falso in bilancio fra Corte di giustizia e Corte costituzionale italiana (passando attraverso i principi supremi dell'ordinamento costituzionale) (*www.giurcost.org*); *I. Pellizzone, V. Sciarabb*a, La (ripetuta) riforma del falso in bilancio e il problema dei "confini" del favor rei, in Forum Quad. Cost., 2006.

criterion isn't useful. In order to verify if a criminal offence is still criminal or has shifted to an administrative offence is to check if it can be included or not in the exceptions provided by Art. 34 of law no. 689/1981: as a matter of fact, this article specifies a number of acts that, even if punished only with a monetary sanction, have not been decriminalized and are still considered as criminal offences.

This is of course a **formal definition of a criminal offence**: in stating that any act punished by the legislator through a criminal sanction is a criminal offence, the formal definition is based only to the consequences of an act, that are determined by law.

Other Authors tried to find a **substantive underlayer of the criminal offence** and developed different theories: 1) a criminal offence is the act that offends ethical order; 2) criminal offence affects the moral sensibility in a determined historical period; 3) a criminal offence is the act that risks the existence and preservation of a society; 4) a criminal offence is the behaviour that, due to the legislator's evaluation, is inconsistent with the State's aims and thus demands a criminal punishment[12].

None of the substantive theories is satisfying: for example, morality shouldn't be relevant in criminal matters and criminal facts don't have a constant relevance in time.

Therefore, some Scholars prefer an **objective-substantive theory**: not leaving the legality principle out of consideration, this theory focuses on values that can qualify an act as a criminal offence. Ferrando Mantovani states that these values are to be found in the Constitution and they lead the legislator's law drafting procedures. Also Giovanni Fiandaca and Enzo Musco support this theory, defining criminal offence as "a human fact that risks legal goods deserving protection by the legislator in the framework of constitutional values, provided that the aggression is serious and only criminal punishment can be applied because any other punishment (i.e. administrative sanctions) wouldn't be efficient".

Criminal offences are divided into two main categories: ***delitti*** (crimes) and ***contravvenzioni*** (misdemeanours). The discretionary criterion used in the criminal code to distinguish between crimes

[12] See *T. Padovani*, Diritto penale, X ed., Giuffrè, 2012, p. 73 ss.

and misdemeanours depends on the different types of punishment following the offence. Crimes are punished with life sentence, prison sentence or heavy fines, while misdemeanours are punished with sentence to arrest or lighter fines. *Contravvenzioni* represent less serious infringements of law, as confirmed by the provided punishments.

The substantive difference between crimes and misdemeanours was acknowledged in older laws. *Contravvenzioni* are the heirs of law and order crimes; while *delitti* are the heirs of offences affecting natural legal goods (life, safety etc.). The first were the so-called *mala quia prohibita*: acts punished only in relation to law and order needs; the second were the so called *mala in se*: acts punished because inherently harmful to preexisting goods[13].

The main differences in the implementation of the categories of criminal offences consist in the following aspects: 1) attempt is envisaged for crimes only; 2) crimes must be intentional to be punished, while negligence is punished only when specifically envisaged by the law; misdemeanours are punishable indifferently for both negligence and intentional will; 3) causes of expiry are different.

Among scholars, there are two different approaches in the analysis of the criminal offence. The first is the so called theory of the **unity of the crime**: a crime cannot be divided in different elements and because it totally corresponds with the event. This theory is connected with the subjective concept of crime, that considers a criminal act as a rebel's offence to the legal order. Developed in dictatorship regimes, the unity theory has been abandoned in favour of the so called **analytical theory of crime**, which studies the criminal offence in legal perspective focusing on different elements creating a crime: an event fulfilling the criminal provision, the absence of any justification, the offender's psychological behaviour and will.

[13] See *G. Fiandaca, E. Musco*, Diritto penale. Parte generale, X ed., Zanichelli, 2010, p. 136 ss.; *T. Padovani*, Diritto penale, X ed., Giuffrè, 2012, p. 75.

The analytical theory has different interpretations. The older one has been presented by two authors of the *Scuola classica del diritto penale* (Classic School on Penal Law) during the 19th century (Francesco Carrara and Giovanni Carmignani) and distinguishes between moral and physical strength and is therefore called **double classical theory**. The elements can be divided in turn from a subjective and objective perspective:

1a) physical subjective strength is the offender's behaviour or conduct;

1b) physical objective strength is the damage caused by the offender's act;

2a) moral subjective strength is the offender's will;

2b) moral objective strength is the moral damage of the offence, that is the threat or the bad example given to society.

The **contemporary double theory** (mainly supported by Ferrando Mantovani) describes the criminal offence as a human fact committed with criminal intention[14]. Thus, the fundamental elements of the criminal offence are:

1) the objective element (or material fact), that is formed by commission or omission, event and causality nexus between them;

2) the subjective element (or culpability), that is the psychological attitude required by law (intention, unintentionality, negligence).

The unlawfulness of the fact, that is any conflict between the fact and the criminal rule, is not considered as an element of the criminal offence, because unlawfulness it's indeed its intrinsic feature. Therefore, the presence of any justification doesn't simply exclude that the conduct is unlawful, but erases any criminal relevance from the fact: objective and subjective requirements are positive elements, while justification is a negative element, thus bringing to zero the final result of the conduct in terms of criminal significance.

[14] Among double theory supporters, see *F. Antolisei*, Manuale di diritto penale. Parte generale, XV ed., 2003; *F. Mantovani*, Diritto penale. Parte generale, VII ed., Cedam, 2011.

During the 30' the **treble theory** was proposed by Delitala, who indeed imported in Italy the ideas developed in Germany at the beginning of the XX Century. The treble theory is at present supported by Giovanni Fiandaca, Enzo Musco and Tullio Padovani. Pursuant to this theory, a criminal offence is composed of three elements[15].

- *The first element* is the so called *fatto tipico* (fact), that is a material circumstance which is formed by *condotta* (conduct), *evento* (event) and *nesso di causa* (causality nexus) between them.

The conduct is displayed through an action or an omission. The action is the movement of the body which is capable to put at risk the interest protected by criminal provisions or pursued by the legislator through criminal rules. The omission is instead expressed by *non facere*, that is a restraint in doing something one should do on the basis of its position or its role towards the legal good at risk (i.e. a rule stating that a person should control something; a general duty to protect interests avoiding damages and preventing risks).

The event is the result of the action or the omission. A naturalistic concept of the event outlines it as an external entity, which is chronologically and logically different from the conduct, to which it is nevertheless bound by a causality nexus. Indeed, a legal concept of the event describes it as the offence to the legal good or interest protected by the criminal provision. However, the two different models of the event are both used by the legislator, thus validating both the two concepts of event.

The causality nexus connects the event to the conduct (either action or omission). Explaining the concept of causality is one of the most challenging tasks for a criminal lawyer. Different theories have been presented and overtaken in time[16].

---

[15] Among treble theory supporters, see *G. Fiandaca, E. Musco*, Diritto penale. Parte generale, X ed., Zanichelli, 2010; *A. Cadoppi, P. Veneziani*, Elementi di diritto penale. Parte generale, V ed., Cedam, 2012; *T. Padovani*, Diritto penale, X ed., Giuffrè, 2012.

[16] On causality theories, see *O. Di Giovine*, Lo statuto epistemologico della causalità penale tra cause efficienti e condizioni necessarie, in Rivista Italiana di Diritto e Procedura Penale, 2002, p. 634 ss.; *G. Fiandaca*, Causalità (rapporto di), in Digesto delle discipline

First of all, *the naturalist theory* considers causality as the total amount of elements and circumstances adequate to produce the event (*condicio sine qua non* theory). However, this is a theory too broad in that it takes into consideration all the circumstances, even the more distant ones.

The adequate causality theory considers only circumstances adequate and proportionate to the event, in that they are suitable to provoke the event on the basis of the *id quod plerumque accidit* rule (that is, what, given the same elements, usually happens). However, this theory is not scientific and is based on common sense and experience, which of course doesn't respond to the legality principle.

The human causality theory states that human conduct provokes the event when the event is itself not provoked by external and extraordinary circumstances. However, in considering that the event is not caused by human conduct when it is out of human control, the theory again is based on the *id quod plerumque accidit* approach and is therefore objectionable as the adequate causality theory.

The scientific causality theory, which is the most recent and is followed by jurisprudence in its interpretations, states that it can be said that a conduct causes the event when, on the basis of the scientific results and the best practices of a determined historical period, the event is given or highly likely to happen.

- *The second element* is unlawfulness, which is the breach of law that happens through the offender's behaviour. The Italian criminal code provides various legal excuses/justifications. Some of these are located in the general part of the code (Artt. 50-54), since they can be applied to any type of offence, while others are provided in the special part, alongside specific crimes applying only to those. Common legal excuses are: approval of the injured

---

penalistiche, II, Utet, 1988; *A. Pagliaro*, Causalità e diritto penale, in Cassazione Penale, 2005, 1037 ss.; *F. Stella*, Leggi scientifiche e spiegazione causale nel diritto penale, Giuffrè, 1990; *K. Summerer*, Premesse per uno studio su causalità e imputazione: il rapporto tra causalità scientifica e formula della condicio sine qua non, in Indice Penale, 2011, 69 ss.

party, justifiable defence, case of need, use of a right, compliance to a duty and lawful use of arms.

Jurisprudence tends to avoid analogical application of the rules providing justification because it would be inconsistent with the legality principle. Some Scholars agree with jurisprudence, while others support analogical interpretation because, since the legality principle is based also on the Latin maxim *favor libertatis*, thus the solution excluding unlawfulness should always be favoured to the one that would affect liberty.

In the treble theory, unlawfulness is therefore a fundamental element of the criminal offence, has a valuable consistency (while the two others – fact and culpability – have descriptive features), and can be described as the absence of any justification, that is the presence of a general rule admitting or dictating the behaviour that apparently breaches criminal provisions[17].

- *The third element* is culpability, which is consistent with the principle *nulla poena sine culpa*, and it's the offender's blameworthy attitude towards the event. The psychological theory of culpability considers it as a psychological nexus between the offender and the fact. The legal theory indeed states that culpability (and blameworthiness) lays in the fact that the unlawful conduct could be avoided trough a different and lawful one.

Culpability must, first of all, respond to the *suitas* principle: in order to be punishable, the offence must be the result of the offender's awareness and will. This means that the event is thus the result of a person's act or omission, in that it has not been provoked by external circumstances.

Culpability can be displayed in the forms of intentional offence (*reato doloso*), unintentional offence (*reato preterintenzionale*, that is when the offence goes beyond what the offender wanted to commit: i.e. the offender wants to knock a person down, but the person falls and dies) and offence of negligence (*reato colposo*), which can be divided in general negligence (including negligence,

[17] See *G. Fiandaca, E. Musco*, Diritto penale. Parte generale, X ed., Zanichelli, 2010, p. 225 ss.; *T. Padovani*, Diritto penale, X ed., Giuffrè, 2012, p. 141 ss.

malpractice and rashness) and specific negligence[18] (breach of laws, rules, orders and protocols).

A recent **fourth-parts theory** (by Giorgio Marinucci and Emilio Dolcini) adds one more element to the treble theory, that is the indictability element, also described as a circumstance, external to the criminal offences, that stops the possibility to apply the penal punishment to the offender[19] (amnesty, pardon, prescription period etc.).

§4. Administrative offence v. Criminal offence

Until 1967 only criminal and civil wrongs were admitted in Italy. However, as the legislator thought that some traffic offences where not so serious as to deserve a penal punishment, law no. 317/1967 introduced the first administrative offences with the aim to decriminalize the previous criminal provisions.

Thus, administrative offences are located between civil wrongs and criminal offences, in that the provided administrative sanction doesn't affect a persons' freedom but are provided in order to protect public relevant interests.

At present, **administrative offences are a separate and autonomous branch of law**. However, it rarely happens that a legal provision directly defines the nature of the sanction. As a matter of fact, the main criterion to classify civil, administrative and criminal offences is the formal one, which analyses the kind of sanction

---

[18] *S. Canestrari*, L'illecito penale preterintenzionale, Cedam, 1989; *S. Canestrari*, Dolo eventuale e colpa cosciente. Ai confini tra dolo e colpa nella struttura delle tipologie delittuose, Giuffrè, 1999; *G. De Francesco*, Dolo eventuale, dolo di pericolo, colpa cosciente e "colpa grave" alla luce dei diversi modelli di incriminazione, in Cassazione Penale, 2009, p. 5028 e ss.; *F. Mantovani*, Colpa, in Digesto delle discipline penalistiche, vol. II, Utet, 1988; *G. Marini*, Colpevolezza, in Digesto delle discipline penalistiche, vol. II, Utet, 1988; *S. Prosdocimi*, Il reato doloso, in Digesto delle discipline penalistiche, vol. XI, Utet, 1996. As far as regards absolute liability, see above note 5.

[19] See *G. Marinucci, E. Dolcini*, Diritto penale. Parte generale, IV ed., 2012.

provided by law: since the criminal punishment is the only one affecting freedom (even as a result of a non fulfilment of a criminal – monetary – fine), thus all other sanctions are not criminal. Moreover, an administrative offence differs from a civil wrong in that it affects social and public interests, while a civil wrong is related to private interests.

The **area of administrative offences widened in time**: since 1967 many laws decriminalizing conducts or introducing administrative sanctions entered into force. At present, administrative sanctions are provided in many different areas: traffic; law and order (see decree no. 733/1931); commerce; labour; food, drink and hygiene; city planning and building; mandatory welfare; litter and environment; healthcare; telecommunication; gambles and lotteries; privacy; hunting and fishing; industry; tax and fiscal; economic competition; elections and vote rules; brokering; disciplinary rules[20].

Primary legislation including administrative sanctions often delivers general and procedural rules for the specific area. However, **law no. 689/1981 is usually considered as the framework-law for**

[20] For a complete overview on administrative offences (included administrative sanctions towards legal persons), see *E.M. Ambrosetti, E. Mezzetti, A. Ronco*, Diritto penale dell'impresa, III ed., Zanichelli, 2012; *A. Cagnazzo, S. Toschei*, La sanzione amministrativa. Principi generali, Giappichelli, 2012; *M. Delmas-Marty*, I problemi giuridici e pratici posti dalla distinzione tra diritto penale e diritto amministrativo penale, in Rivista Italiana di Diritto e Procedura Penale, 1987, p. 731 ss.; *A. Di Amato*, Diritto penale dell'impresa, VII ed., 2011, Giuffrè; *C.E. Paliero*, La legge 689 del 1981: prima codificazione del diritto penale amministrativo in Italia, in Politica del Diritto, 1983, p. 117 ss.; *C.E. Paliero*, La sanzione amministrativa come moderno strumento di lotta alla criminalità economica, in Rivista Trimestrale di Diritto Penale dell'Economia, 1993, p. 1040 ss.; *C. Ruga Riva*, Diritto penale dell'ambiente, Giappichelli, 2011; *F. Sgubbi*, Depenalizzazione e principi dell'illecito amministrativo, in Indice penale, 1983, p. 253 ss.; *R. Zannotti*, Il nuovo diritto penale dell'economia. Reati societari e reati in materia di mercato finanziario, II ed., 2008, Giuffrè; *F. Giunta, D. Micheletti* (eds.), Il nuovo diritto penale della sicurezza nei luoghi di lavoro, Giuffrè, 2010; *T. Padovani*, Il nuovo volto del diritto penale del lavoro, in Rivista Trimestrale di Dirito Penale dell'Economia, 1996.

administrative offences, in that it provides general principles, sanctions (minimum and maximum limits), procedure and rules on the implementation of administrative punishments, means of appeal and review of the decisions. It should be however mentioned that this law is applied only to administrative rules providing monetary sanctions.

The cornerstone governing administrative offences is the legality principle (Art. 1 of the abovementioned law), which includes the law saving clause and forbids analogical interpretation together with any retrospective implementation of administrative punishments provisions.

In general, the offender has to be at least 18 years old in order to be charged of the offence. However, there are some areas in which a minor can be held responsible for the conduct: i.e., it is admitted to drive a moped at 14, then also a teenager can be charged with administrative sanctions when breaching traffic rules.

The **main differences between administrative and criminal offences** are the following[21]:

a) the time when the offence became statute-barred is different: five years for administrative offences; a length of time related to the duration of the punishment for criminal offences;

b) administrative punishments can never affect a person's freedom, while criminal sanctions tend to affect freedom;

c) presumption of guiltiness rules administrative offences proceedings, while presumption of innocence rules criminal proceedings;

d) as far as regards culpability, in order to be punished, an act breaching a criminal rule must be intentional, unintentional or due to negligence; a person's will is indeed irrelevant when charging him/her with administrative offences. However, the psychological attitude becomes relevant when the authority has to decide the entity of the administrative punishment (together with criteria such as the

[21] See *C.E. Paliero*, La sanzione amministrativa come moderno strumento di lotta alla criminalità economica, in Rivista Trimestrale di Diritto Penale dell'Economia, 1993, p. 1040 ss.; *F. Sgubbi*, Depenalizzazione e principi dell'illecito amministrativo, in Indice penale, 1983, p. 253 ss.

gravity of the offence, any offender's fact repairing the offence, the offender's personal and economic situation);

e) a magistrate (both a public prosecutor and a judge) is in charge of the criminal procedure, while the authority entitled to verify, issue and implement an administrative punishment is determined by law. If the law doesn't provide any special provision on jurisdiction within the public administration, then the authority in charge of the procedure will be the representative of the Home Office Affairs Ministry at local level (*Prefetto*);

f) criminal liability is personal and each offender involved in the crime has to serve the sentence in person (Art. 27 of the Constitution); in administrative offences, a particular rule provides indeed that any fulfilment of the monetary sanction by one (or more) of the persons indebted with each other results in the pay off of the sanction towards all the offenders. The duty in bound for administrative offenders is a classic civil wrong feature, in that it provides three main areas in which the offender will be charged together with another person, that could be the owner of (or anyone who has a right on) the object/thing used to commit crime or the persons who have supervision and a management position towards the offender or the legal entity that received a benefit from the crime.

The consequence of an administrative offence is the implementation of an administrative punishment (except the cases of justifiable defence, case of need, use of a right, compliance with a duty). The administrative sanction is issued at first by a written report by the administrative authority in charge and should be immediately and formally notified to the offender. If it's not possible to inform the offender immediately after the fact happened, the report should be notified within 90 days; where else the punishment couldn't be implemented as its relevance expiries. Moreover, the authority in charge of the administrative offence is entitled to ask for the payment to any of the co-offenders for the whole amount issued in the sanction.

Afterwards, the offender has 60 days to pay the monetary sanction (when expressly provided, the amount is reduced if the person pays before the deadline) or 30 days to produce defence documents and evidences and to ask for the review of the report

issuing the sanction before a judge (*giudice di pace* or tribunal, depending on the gravity of the sanction).

The authority dismisses the charges if the offence is not proved; otherwise, it confirms the punishment issuing one (or both) of the two following **administrative sanctions**:

a) monetary, which is an injunction to pay a certain sum of money;

b) non monetary, which can be divided into personal sanctions, such as disciplinary sanctions, suspension, dismissal, disqualification from a profession, an art or other economic activities etc.; and material sanctions, such as seizure and confiscation of assets.

In this framework, it can be said that the criterion to distinguish an administrative offence from a criminal one is formal: the legislator is entitled to establish whether a fact should be punished with an administrative or a criminal sanction.

The main reason to protect a relevant interest through an administrative offence instead of a criminal one often depends on criminal policy and judiciary policy aims (i.e. reduce criminal courts' overload of cases). This decision may of course change in time. However, from this choice depend the procedural rules that will be used in the case: they will be administrative rules if the conduct is considered an administrative offence or criminal procedure rules if the conduct is considered a criminal offence.

Bibliography

AA.VV., Ai confini del favor rei. Il falso in bilancio davanti alle Corti costituzionale e di giustizia. Atti del Seminario Ferrara, 6 maggio 2005, Giappichelli, 2005.

AA.VV., D.lgs. 231: dieci anni di esperienze nella legislazione e nella prassi, in Le Società, 2011, special number.

Ambrosetti, E.M., Mezzetti, E., Ronco, A., Diritto penale dell'impresa, III ed., Zanichelli, 2012.

Angelici, C., Responsabilità sociale dell'impresa, codici etici e autodisciplina, in Giurisprudenza commerciale, I, 2011, p. 168 ss.

Antolisei, F., Manuale di diritto penale. Parte generale, XV ed., 2003.

Basile, F., La responsabilità oggettiva nella più recente giurisprudenza della Cassazione relativa agli art. 116, 584 e 586 c.p., in www.dirittopenalecontemporaneo.it, 2012.

Beccaria, C., Dei delitti e delle pene, Feltrinelli, first ed. in 1764.

Bricola, F., Teoria generale del reato, in Novissimo Digesto Italiano, vol. XIX, Utet, 1973.

Cadoppi, A., Veneziani, P., Elementi di diritto penale. Parte generale, V ed., Cedam, 2012.

Cagnazzo, A., Toschei, S., La sanzione amministrativa. Principi generali, Giappichelli, 2012.

Canestrari, S., L'illecito penale preterintenzionale, Cedam, 1989.

Canestrari, S., Dolo eventuale e colpa cosciente. Ai confini tra dolo e colpa nella struttura delle tipologie delittuose, Giuffrè, 1999.

Canestrari, S., Cornacchia, L., De Simone, G., Manuale di diritto penale. Parte generale, 2008.

De Francesco, G., Dolo eventuale, dolo di pericolo, colpa cosciente e "colpa grave" alla luce dei diversi modelli di incriminazione, in Cassazione Penale, 2009, p. 5028 e ss.

De Maglie, C., L'etica e il mercato, Giuffrè, 2002.

De Simone, G., La responsabilità da reato degli enti: natura giuridica e criteri (oggettivi) di imputazione, in www.penalecontemporaneo.it.

De Vero, G., La responsabilità penale delle persone giuridiche, Giuffrè, 2008.

Delmas-Marty, M., I problemi giuridici e pratici posti dalla distinzione tra diritto penale e diritto amministrativo penale, in Italiana di Diritto e Procedura Penale, 1987, p. 731 ss.

Di Amato, A., Diritto penale dell'impresa, VII ed., 2011, Giuffrè.

Di Giovine, O., Lo statuto epistemologico della causalità penale tra cause efficienti e condizioni necessarie, in Rivista Italiana di Diritto e Procedura Penale, 2002, p. 634 ss.

Dolcini, E., Qualche indicazione per l'interprete in attesa di un nuovo codice penale, in Rivista Italiana di Diritto e Procedura Penale, 2000, p. 863 ss.

Donini, M., L'eredità di Bricola e il costituzionalismo penale come metodo. Radici nazionali e sviluppi sovranazionali, in Diritto penale contemporaneo, 2012, issue no. 2, p. 51 ss.

Ferrajoli, L., Diritto e ragione. Teoria del garantismo penale, IX ed., Laterza, 2009.

Fiandaca, G., Causalità (rapporto di), in Digesto delle discipline penalistiche, II, Utet, 1988.

Fiandaca, G., Musco, E., Diritto penale. Parte generale, X ed., Zanichelli, 2010.

Fiandaca, G., Di Chiara, G., Una introduzione al sistema penale. Per una lettura costituzionalmente orientata, Jovene, 2003.

Fiore, C., Manuale di diritto penale. Parte generale, vol. 1, UTET, 2008.

Garofoli, R., Manuale di diritto penale. Parte generale, IX ed., Neldiritto.it, 2013.

Giliberti, S., Il sistema del "doppio binario", in P. Pittaro (ed.), Scuola Positiva e sistema penale: quale eredità?, EUT Edizioni Università di Trieste, 2012, p. 11 ss.

Giunta, F., Micheletti, D. (eds.), Il nuovo diritto penale della sicurezza nei luoghi di lavoro, Giuffrè, 2010.

Maffei, S., Merzagora Betsos, I., Crime and Criminal Policy in Italy. Tradition and Modernity in a Troubled Country, in European Journal of Criminology, 2007, p. 461 ss.

Manna, A., Infante, E., Criminal Justice System in Europe and North America. Italy, Heuni (The European Institute for Crime Prevention and Control, affiliated with the United Nations), 2000.

Mantovani, F., Colpa, in Digesto delle discipline penalistiche, vol. II, Utet, 1988.

Mantovani, F., Diritto penale. Parte generale, VII ed., Cedam, 2011.

Marini, G., Colpevolezza, in Digesto delle discipline penalistiche, vol. II, Utet, 1988.

Marinucci, G., Dolcini, E., Diritto penale. Parte generale, IV ed., 2012.

Mezzetti, L., Il falso in bilancio fra Corte di giustizia e Corte costituzionale italiana (passando attraverso i principi supremi dell'ordinamento costituzionale…) (*www.giurcost.org*).

Modugno, F., Appunti dalle lezioni sulle fonti del diritto, Giappichelli, 2005.

Musco, E., La misura di sicurezza detentiva: profili storici e costituzionali, Giuffré, 1978.

Nappi, A., Manuale di diritto penale. Parte generale, Giuffré, 2010.

Padovani, T., L'utopia punitiva, il problema delle alternative alla detenzione nella sua dimensione storica, Giuffrè, 1981, p. 1 ss.

Padovani, T., Il nuovo volto del diritto penale del lavoro, in Rivista Trimestrale di Dirito Penale dell'Economia, 1996.

Padovani, T., Diritto penale, X ed., Giuffrè, 2012.

Paliero, C.E., La legge 689 del 1981: prima codificazione del diritto penale amministrativo in Italia, in Politica del Diritto, 1983, p. 117 ss.

Paliero, C.E., La sanzione amministrativa come moderno strumento di lotta alla criminalità economica, in Rivista Trimestrale di Diritto Penale dell'Economia, 1993, p. 1040 ss.

Pagliaro, A., Principi di diritto penale. Parte generale, VIII ed., Giuffrè, 2003.

Pagliaro, A., Causalità e diritto penale, in Cassazione Penale, 2005, 1037 ss.

Pellissero, M., Pericolosità sociale e doppio binario. Vecchi e nuovi modelli di incapacitazione, Giappichelli, 2008.

Pellissero, M., The doppio binario in Italian Criminal Law, paper presented at the "Fourth Conference On The Future Of Adversary Systems" (11th-12th May, 2012, Ravenna, Italy), (*http://www.law.unc.edu/documents/faculty/adversaryconference/doppiobinario-english-pelissero.pdf*)

Pellizzone, I., Sciarabba, V., La (ripetuta) riforma del falso in bilancio e il problema dei "confini" del favor rei, in Forum Quad. Cost., 2006.

Prosdocimi, S., Il reato doloso, in Digesto delle discipline penalistiche, vol. XI, Utet, 1996.

Pulitanò, D., Diritto penale, IV ed., Giappichelli, 2011.

Ruga Riva, C., Diritto penale dell'ambiente, Giappichelli, 2011.

Ruggeri, A., Fonti, norme, criteri ordinatori. Lezioni, Giappichelli, 2009.

Ruggeri, A., Dal caos delle fonti, secondo forma, all'ordine delle norme, secondo valore: note dolenti su un'annosa e spinosa questione, (*www.gruppodipisa.it*), 2011.

Ruggeri, A., Sistema di fonti o sistema di norme?, (*www.giurcost.org*), 2012.

Sgubbi, F., Depenalizzazione e principi dell'illecito amministrativo, in Indice penale, 1983, p. 253 ss.

Stella, F., Leggi scientifiche e spiegazione causale nel diritto penale, Giuffrè, 1990.

Summerer, K., Premesse per uno studio su causalità e imputazione: il rapporto tra causalità scientifica e formula della condicio sine qua non, in Indice Penale, 2011, 69 ss.

Zanon, N., Biondi, F., Il sistema costituzionale della magistratura, III ed., Zanichelli, 2011.

Zannotti, R., Il nuovo diritto penale dell'economia. Reati societari e reati in materia di mercato finanziario, II ed., Giuffrè, 2008.

On-line sources on Italian criminal law and justice

Italian Constitution: (*www.quirinale.it/qrnw/statico/costituzione/costituzione.htm*)

Italian penal code: (*www.altalex.com/index.php?idnot=36653*)

Italian primary legislation: (*www.normattiva.it*)

Constitutional Court decisions: (*www.cortecostituzionale.it*)

Supreme Court decisions – a selection of the most important decisions in criminal and civil law: (*www.cortedicassazione.it*)

Supreme Administrative Court (administrative law): (*www.giustizia-amministrativa.it*)

Chapter II
Foundations of (European) Criminal Law
– National perspectives –
Hungary

Dr. Ferenc Sántha
Dr. Erika Váradi-Csema
Dr. Andrea Jánosi [*]

§1. General principles

The principles of criminal law are traditionally divided into two main groups in the Hungarian professional legal literature[1]. One of them is the group that contains principles governing all branches of law, like the conception and the requirements of the rule of law. The other group contains the specific principles of criminal law. Such as:

- principle of legality
- principle of humanity

[*] **Dr. Ferenc Sántha:** associate professor. University of Miskolc, Faculty of Law, Institute of Criminal Sciences, Department of Criminal Law and Criminology. E-mail: santhaferenc@hotmail.com

Dr. Erika Varadi-Csema: associate professor. University of Miskolc, Faculty of Law, Institute of Criminal Sciences, Department of Criminal Law and Criminology. Email: jogvarad@uni-miskolc.hu

Dr. Andrea Jánosi: professor assistant. University of Miskolc, Faculty of Law, Institute of Criminal Sciences, Department of Criminal Procedural Law and Criminal Enforcement. Email: jogandi@uni-miskolc.hu

[1] GÖRGÉNYI, Ilona - GULA, József - HORVÁTH, Tibor - JACSÓ, Judit - LÉVAY, Miklós - SÁNTHA, Ferenc - VÁRADI, Erika: Magyar büntetőjog. Általános rész. Complex Publisher, Budapest, 2012, p. 64-71.

BELOVICS, Ervin - GELLÉR, Balázs - NAGY, Ferenc - TÓTH, Mihály: Büntetőjog I. HVG-ORAC Publisher, 2012, p. 60-79.

- principle of criminal liability based on the act of the perpetrator
- principle of criminal liability based on individual guilt
- principle of proportionality
- principle of subsidiarity
- principle of *ne (non) bis in idem*[2]

The new Hungarian Criminal Code (Act No. C of 2012, which came into force on the 1st of July 2013[3]) does not determine the principles of criminal law exactly. In their first appearance these guidelines had a rather philosophical, social and politically charged aspect; they were later worked out in detail by the representatives of criminal science. However, the lack of legal regulation of these basic principles does not reduce their significance. Their function is to demonstrate and guarantee values by exercising an influence on how legislation and judicature should be approached. *"The criminal law is not merely an instrument but it protects and embodies values: the principles and guarantees of the constitutional criminal law"*[4]. There is no hierarchy between the principles of criminal law, which means that all of them have the same notability.

1.1. Principle affecting all branches of law – the rule of law

The idea of the rule of law has two kind of interpretations in the Hungarian legal literature. There is a so called "formal" rule of law, which basically means the enforcement of the requirements of legal certainty. Contrary to this, the concept of "material" rule of law also requires the enforcement of justice. It is well-known that these kinds of interpretations could be in conflict with each other

[2] See details in GÖRGÉNYI - GULA - HORVÁTH - JACSÓ - LÉVAY - SÁNTHA - VÁRADI (2012), p. 64-71.

[3] Act IV of 1978 on the Criminal Code is repealed.

[4] Decision 11/1992 of 5 March 1992 the Hungarian Constitutional Court.

in different historical circumstances[5]. Pursuant to Art. B Section (1) of the Fundamental Law of Hungary: *"Hungary shall be an independent, democratic, constitutional state"*. The Hungarian Constitutional Court always committed itself to the primacy of legal certainty in its decisions, because according to the interpretations of the Court, a just legal system is based on the application of the law and not on the creation of it. *"(...) Legal certainty based on formal and objective principles is more important than necessarily partial and subjective justice"*[6]. The meaning of legal certainty requires that the entire legal system and its provisions be clear, unambiguous, their functioning predictable and their consequences foreseeable by those to whom the laws are addressed.

1.2. Specific principles of criminal law

Principle of legality. Its historical origin can be dated to the formation of the principle of *nullum crimen sine lege*, *nulla poena sine lege*. This principle can be found in every Hungarian Criminal Code (from the first Hungarian Criminal Code, the so-called Code-Csemegi, after its creator, Károly Csemegi, which was adopted in 1878[7]), usually in the section containing the notional definition of crime. The Criminal Code contains the principle of legality in its general provisions. [Art. 1 Section (1)] Moreover it can also be found in the provisions guaranteeing the presumption of innocence in the Fundamental Law of Hungary [Art. XXVIII Section (4)]. According to this section *"No person shall be found guilty or be punished for an act which, at the time when it was committed, was not an offence under the law of Hungary or of any other state by virtue of an international agreement or any legal act of the European Union"*. Moreover a sanction can be imposed only if at

[5] According to Art. XXVIII of the Fundamental Law of Hungary, the principles of the "material" rule of law get priority in the legislation of criminal law.

[6] Decision 11/1992 of 5 March 1992 the Hungarian Constitutional Court.

[7] Act V of 1878 on the Criminal Code by Károly Csemegi.

the time when the act was committed, it was applicable under the law. This principle contains four different positive requirements and prohibitions. These are the following:

1. requirement: use of the rules which were in effect, when the crime was committed[8].

prohibition: retroactive application of the more severe criminal code – nullum crimen/nulla poena sine lege praevia*;*

2. requirement: legal rules should be clear;

prohibition: use of indeterminate legal norms (disposition) or legal consequences (sanction) – *nullum crimen/nulla poena sine lege certa*;

3. requirement: use of written criminal code.

prohibition: use of aggravating unwritten law resulting in culpability and sanction. – *nullum crimen/nulla poena sine lege scripta*;

4. requirement: written legal norms are binding for the judicature;

5. prohibition: use of analogy – *nullum crimen/nulla poena sine lege stricta*[9].

Principle of humanity. The principle of humanity simply means that during a criminal procedure it cannot be forgotten that the perpetrator is also a person. However, this principle has a function in the entire procedure of judicature, it has a significant role in the penal phase. The exclusion of death penalty and different physical and ignominious penalties from the sanction system is a result of this principle[10]. It also has a role during criminal enforcement, which has to promote the reintegration of the convicted persons (According to

[8] MARGITÁN, Éva (ed.): Büntetőjog. Budapest, ELTE Eötvös Publisher, 2010, p. 17-18.

[9] BELOVICS - GELLÉR - NAGY - TÓTH (2012), p. 65.

KIS, Norbert - HOLÁN, Miklós: Bünterőjog I. Az anyagi büntetőjog általános része. Dialóg Campus Publisher, Budapest - Pécs, 2011, p. 27.

[10] GÖRGÉNYI - GULA - HORVÁTH - JACSÓ - LÉVAY - SÁNTHA - VÁRADI (2012), p. 67.

other literatures this principle can be found among "principles affecting all branches of law" [11]).

Principle of criminal liability based on the act of the perpetrator. This principle means that judging on criminal liability should be based on the criminal act; criminal liability is connected to the act and its consequences. Consequently, the penalty should be proportionate to the criminal act. In addition this, it is a requirement that individual circumstances and personal characteristics should be taken into account during criminal sentencing and enforcement, and also during impeachment of juveniles and recidivists.

Principle of criminal liability based on individual guilt. It means that criminal intent is an essential element of every crime. The convicted person can be punished for only the act and its consequences that were criminally conducted. This principle can be found in the section [Art. 4 Section (1)] of the Criminal Code, which determines the notion of criminal conduct. According to this, one of the elements of the "act of a crime" is the liability based on individual guilt, which has two forms: (1) an act perpetrated intentionally or (2) by negligence. No act conductedby an innocent person is punishable, even if it has harmful consequences, such as death of a person or physical injury. The principle of guilt has a role in imposing penalty. The different degrees of intention (i. e. *dolus directus, dolus eventualis*) and negligence have an influence on imposing sanctions, they are able to increase or mitigate punishment. Moreover according to the interpretation of the Hungarian Constitutional Court, *"the right to human dignity dictates that «mens rea» be a constitutional requirement for holding a person criminally liable"*[12].

Principle of proportionality. This principle of proportionality covers different concepts. Primarily it contains the requirement that the legislator should measure (1) that the decision to criminalize the given act is necessary; (2) the decision is suitable to the interest of the constitutional state; (3) the intervention of the state is

[11] BELOVICS - GELLÉR - NAGY - TÓTH (2012), p. 64-65.

[12] Decision 11/1992 of 5 March 1992 the Hungarian Constitutional Court.

proportionate with the social aim. In the second step the justification of the used punishment should be measured. The punishment established for the given criminal act is proportionate to the seriousness of the criminal act and its dangerousness for the society. Moreover, proportionality has a function at the level of judicature as well. This means that the imposed punishment should not only be proportionate to the seriousness of the crime but also be comparable to other punishments imposed on the ground of similar crimes[13]. These elements of the principle will ensure the uniformity of case-law, the calculability of judgments and finally, legal certainty.

Principle of subsidiarity. To maintain social order, many legal instruments are available for the state. The criminal law constitutes the most serious interference from the perspective of citizens. From this it follows that the state should choose that legal instrument – among the instruments that are available for the defense of society – which is proportionate to the dangerousness of the conduct against society. The instruments of criminal law should be chosen only if other instruments are insufficient. It comes from this logical argument, that criminal law has a subsidiary function in the legal system and has a so called "*ultima ratio*" nature. *"Criminal law is the ultima ratio in the system of legal responsibility. Its social function is to serve as the sanctioning cornerstone of the overall legal system. The role and function of criminal sanctions, i.e. punishment, is the preservation of legal and moral norms when no other legal sanction can be of assistance"*[14].

Principle of ne bis in idem[15] **(principle of double adjudication).** This principle originates from the principle of legality. From the most ordinary aspect it means that no person should be punished twice for the same act. Besides, it should be noted that this

[13] BELOVICS - GELLÉR - NAGY - TÓTH (2012), p. 75.

[14] Decision 30/1992 of 26 May 1992 the Hungarian Constitutional Court.

[15] See details in GELLÉR, Balázs J.: The ne bis in idem Principle and Some Connected Tasks Facing the Hungarian Legal System. In: MÁTHÉ, G. - KIS, N. (eds.): European Administrative Penal Law. Budapest, 2004, p. 155-184.

requirement also exists when imposing a punishment. Pursuant to this, the circumstances that, on one hand, are elements of a relevant statutory provision and, on the other hand, constitute other aggravating and mitigating circumstances, should be taken only once into consideration For example, if the offender is a juvenile, his age cannot be taken into account as a mitigating factor. The reason for that is the Criminal Code which contains special, less stringent rules in case of juveniles. Just like in a qualified case of homicide, when it is committed with special cruelty. Usually the act of special cruelty cannot be taken into consideration as an aggravating factor in the penalty phase. Finally it should be noted that the *ne bis in idem* principle also exists in the area of criminal procedural law (the prohibition of double prosecution, the principle of *res judicata*) and in criminal enforcement (the prohibition of double punishment).

1.3. Principles of criminal law in the legal practice

The general or special principles of criminal law are reflected in criminal legislation and in legal practice. They serve as a guideline for the practice. Some examples could be found, when the principles were not taken into account with sufficient effect in the legislation. For instance, in the case of the principle of "*ne bis in idem*", the change of the constituent elements of „rape" or of „assault against decency" is a good example for this. By criminalizing these activities, the legislator intended to protect children, who are less capable to defend themselves and to impose their will. From the Code-Csemegi, the criminal legislative approach is coherent in the question that the person, who has not yet reached his or her twelfth year of age, shall be deemed as incapable of defense[16]. This has resulted that the offender shall be held liable for rape or assault against decency even when the child has agreed to the sexual activity or has took part actively in the process. The

[16] KEREKES, Viktória - VÁRADI, Erika: A nemi erkölcs elleni bűncselekmények egyes kriminológiai kérdései. In: Prof. Dr. STIPTA, István (ed.): Miskolci Doktoranduszok Jogtudományi Tanulmányai, Miskolc, 2013. under press.

ratification of the New York Convention in Hungary[17] made it necessary to provide greater criminal legal protection for children. The Hungarian Parliament modified the Criminal Code in 1997[18]. According to this amendment, without any other special condition the offenders were threatened with a more serious punishment, if the victim was under the age of 12. In the opinion of experts and the representatives of the criminal sciences this modification contradicted one of the most important criminal legal principles, the principle of "*ne bis in idem*" (principle of double adjudication). In a case when the offender had sexual intercourse or was sodomizing together with a person younger than 12 years old, who consented to these activities, there was only one cause for the punishment of the offender, the age of the partner. In addition to that, due to the age of the partner (the victim), the criminal act was punishable more seriously (*"The punishment shall be imprisonment from five years to ten years, if [...] the victim is under twelve years of age"*. [Art. 197 Section (2) of the Criminal Code] This legislative default was corrected only 8 years later; however, the judges took it into account in their judgments by applying the principle of "*ne bis in idem*", and imposing the lowest possible punishment applicable for the case. By the Act XCI of 2005 the legislator completed the Criminal Code: the offender is punishable with a more serious sentence, if he/she committed the crime against a victim younger than twelve years of age by violent action or direct menace against life or limb.

§2. Criteria for criminalising conduct at national level

2.1. Criteria for criminalizing conduct

The principles worked out in foreign professional legal literature and called as the criteria and obstacles for criminalizing a conduct are also known in Hungarian criminal law. For example the works of one of the leading criminal law philosophers, Joel

[17] Act LXIV of 1991on the Convention on the Right of the Child.

[18] Art. 22 of Act LXXIII of 1997 on the modification of Act No. IV of 1978 on the Criminal Code.

Feinberg, and the principles he mentioned: the harm principle, the offence principle, principle of legal paternalism and legal moralism. Many sections of the Fundamental Law of Hungary are connected with the criteria for criminalization. For example, the principle of legality (*nulla crimen sine lege, nulla poena sine lege*) and legal certainty, rules regarding fundamental rights[19], right to life and human dignity, prohibition of discrimination etc. Regarding the criteria for criminalization, the Criminal Code constitutes the principle of legality (See below: The consequences and prohibitions derived from this principle.) The criteria and obstacles of criminalization can be determined on the ground of the provisions of the Fundamental Law of Hungary (especially the principle of legality), the decisions of the Hungarian Constitutional Court, and the related international tendencies (international legal documents: for example the ECHR, the case-law of the ECtHR).

- Criminalization of an offence and the threatened sanctions shall be determined in the acts of the Parliament (not in lower degree of legal instrument). These legal norms should comply with the requirement of calculability. One of the elements of calculability is that the legal norm is available. It means that this norm was adopted and declared observing the relevant legal rules, and citizens are able to access it. The psychic availability is another obligation, which means that it should be understandable for an ordinary person[20] (ordinary lawyer).

- The principle of calculability and legal certainty also requires the clear phrasing of legal norms. The disposition, which contains the offence, should be clear and obvious. The prohibition of the retroactive application of law is also derived from the requirement of calculability.

---

[19] "The rules for fundamental rights and obligations shall be determined by special Acts. A fundamental right may be restricted to allow the exercise of another fundamental right or to defend any constitutional value to the extent absolutely necessary, in proportion to the desired goal and in respect of the essential content of such fundamental right" [Art. I Section (3) of the Fundamental law of Hungary].

[20] BELOVICS - GELLÉR - NAGY - TÓTH (2012), p. 101.

- Criminalization and threatening with a criminal sanction should be based on constitutional reasons: it should be necessary, proportionate and have the characteristics of *ultima ratio*.

Necessity and proportionality (i.e. test of necessity). The criminalization of an offence necessarily results in the restriction of a fundamental right or fundamental rights. According to the explanation of the Hungarian Constitutional Court: *"The State may only use the tool of restricting a fundamental right if it is the only way to secure the protection or the enforcement of another fundamental right or liberty or to protect another constitutional value. Therefore, it is not enough for the constitutionality of restricting a fundamental right to refer to the protection of another fundamental right, liberty or constitutional objective, but the requirement of proportionality must be complied with as well: the importance of the objective to be achieved must be proportionate to the restriction of the fundamental right concerned. In enacting a limitation, the legislator is bound to employ the most moderate means suitable for reaching the specified purpose. Restricting the content of a right arbitrarily, without a forcing cause is unconstitutional, just like doing so by using a restriction of disproportionate weight compared to the purported objective"*[21]. During the test of necessity[22], it should be examined whether the restriction of a fundamental right is necessary, proportional, and determine if it is adequate to achieve the aims of the punishment. The existence or the absence of a social consensus regarding the criminalization of an act could influence the examination. In international context the existence of a universal approach should be examined and it should be determined whether a fundamental right is protected in the same way in similar cultural circumstances.

[21] Decision 30/1992 of 26 May 1992 of the Hungarian Constitutional Court.

[22] It should be noted, that when the Constitutional Court is assessing the constitutionality of restricting a not-fundamental right, the Court apply the so called: test of "necessity/proportionality". It means that the restriction of a non-fundamental right violates a provision of the Constitution, if it has not reasonable justification.

The ultima ratio character of criminal law. According to the Decision 30/1992 of 26 May 1992 of the Hungarian Constitutional Court: *"Criminal law is the ultima ratio in the system of legal responsibility. Its social function is to serve as the sanctioning cornerstone of the overall legal system. The role and function of criminal sanctions, i.e. punishment, is the preservation of legal and moral norms when no other legal sanction can be of assistance. It is a requirement of content following from constitutional criminal law that the legislature may not act arbitrarily when defining the scope of conducts to be punished. A strict standard is to be applied in assessing the necessity of ordering the punishment of a specific conduct: with the purpose of protecting various life situations as well as moral and legal norms, the tools of criminal law, which necessarily restricts human rights and liberties, may only be used if such use is proportionate and there is no other way to protect the objectives and values of the state, society and the economy that can be traced back to the Constitution"*.

- It should be noted that it is the task of the legislature to define whether a conduct should be punished or to examine its dangerousness for the society. However, this does not mean that the obligation of criminalization does not exist in the Hungarian legal system. According to Balázs Gellért, this obligation could be based on either national or international law. For example, criminalization of crimes against the state (for instance: violent changing of the constitutional order) is based on the Constitution of Hungary. While crimes against peace and war crimes were enacted on the ground of international law, the obligation of criminalization is based on the ECHR in case of infringement of fundamental rights (i. e. right to life and body integrity). The obligation is the same in case of the binding legal sources of the European Union[23] (i.e. acts of terrorism).

Moreover, changing in morality and moral values, changing in physical circumstances has an effect on criminal policy and criminal legislation[24].

[23] BELOVICS - GELLÉR - NAGY - TÓTH (2012), p. 105.
[24] Idem, p. 85.

2.2. The forms of judicial remedy for abuse of power from the legislator in crossing those limits at national level are the followings:

- *ex ante review of conformity with the Fundamental Law (Preliminary Norm Control)*

It means that: *"Based on a petition containing an explicit request submitted by an authorized person, the Constitutional Court shall (...) examine for conformity with the Fundamental Law the provisions of adopted but not yet promulgated Acts referred to in the petition"* [Art. 23 Section (1) of Act CLI of 2011 on the Constitutional Court].

- *ex post review of conformity with the Fundamental Law (Posterior Norm Control)*

"It means that the Constitutional Court shall (...) review the conformity of legal regulations with the Fundamental Law" [Art. 24 Section (1) of Act CLI of 2011 on the Constitutional Court].

- *judicial initiative for norm control in concrete cases*

"If a judge, in the course of the adjudication of a concrete case in progress, is bound to apply a legal regulation that he or she perceives to be contrary to the Fundamental Law, or which has already been declared to be contrary to the Fundamental Law by the Constitutional Court, the judge shall suspend the judicial proceedings and (....) submit a petition for declaring that the legal regulation or a provision thereof is contrary to the Fundamental Law, and/or the exclusion of the application of the legal regulation contrary to the Fundamental Law" [Art. 25 of Act CLI of 2011 on the Constitutional Court].

- *constitutional complaint*

"(...) person or organization affected by a concrete case may submit a constitutional complaint to the Constitutional Court if, due to the application of a legal regulation contrary to the Fundamental Law in their judicial proceedings

a) their rights enshrined in the Fundamental Law were violated, and

b) the possibilities for legal remedy have already been exhausted or no possibility for legal remedy is available".

"Constitutional Court proceedings may also be initiated by exception if:

• *due to the application of a legal provision contrary to the Fundamental Law, or when such legal provision becomes effective, rights were violated directly, without a judicial decision, and*

• *there is no procedure for legal remedy designed to repair the violation of rights, or the petitioner has already exhausted the possibilities for remedy"*.

"The Prosecutor General may request the Constitutional Court to examine the conformity with the Fundamental Law of legal regulations applied in concrete cases tried with the participation of a prosecutor with regard to the violation of rights laid down in the Fundamental Law, if the person concerned is unable to defend his or her rights personally or if the violation of rights affects a larger group of people" [Art. 26 of Act CLI of 2011 on the Constitutional Court].

- *judicial review of the final judgment (procedure of the Curia of Hungary)*

The final and enforceable criminal judgment may also be subject to judicial review. One of the possible reasons of it, *"if the criminal liability was established, the sentence imposed or a measure applied under a criminal act which was declared unconstitutional by the Court of Constitution"*. The requirement of this procedure that: *"defendant has already been relieved from the detrimental consequences relating to his criminal record, or the sentence imposed has been completely executed or its enforceability ceased, or the defendant is no longer subject to the effect of the measure"* [Art. 416 Section (1) of the Act XIX of 1998 on the criminal procedure].

At European level the procedure of the European Court of Human Rights and the Court of Justice of the European Union should be noted.

2.3. Criminalization and decriminalization in the practice

In addition to the legal principles, and the constitutional and procedural rules, the current trends of the criminal policy also have an important effect on the legislation in practice. The complexity of the procedure of criminalization is well demonstrated by the process of the latest modifications of the Hungarian Criminal Code. After the social and economic changes in 1989/1990, the two main aims were to re-socialize the offenders and to incorporate the international conventions and norms into the Hungarian legal system[25]. Until these changes, the Hungarian system had some deficiencies, e.g. the imprisonment was not regarded as "*ultima ratio*" punishment and the system of alternative sanctions was missing. The amendments to the criminal law, which showed a more liberal direction, were adopted even though the criminal statistical data represented the peak of the criminal activity in this period. Although from 2007 no radical changes were observed in the criminal activity, and the decreasing trend in the number of offences continued, the criminal policy had been altered. The liberal criminal policy of the first political period, which, for example, resulted in the decriminalization of prostitution, was followed by a double track criminal policy[26]. There was only one governmental period (1998-2002), which aimed stricter action against crimes. However, beginning from the parliamentary elections of 1998, special attention focused on the question of public safety, and it became a hot topic in the political discussions as from the second half of 2007, especially with the emergence of the "New Order and Liberty" Program. Although there was no significant increase in the number of criminal offences from 2007,

[25] CSEMÁNÉ VÁRADI, Erika: A Janus-arcú kriminálpolitika - avagy a fiatalkori bűnözéssel szembeni fellépés aktuális kérdései. In: Collegium Doctorum Konferencia elektronikus megjelentetése, Bíbor Publisher, Miskolc 2012, p. 1-14

[26] KEREZSI, Klára: Kriminálpolitikai törekvések és reformok. In: CSEMÁNÉ VÁRADI, Erika (ed.): Koncepciók és megvalósulásuk a rendszerváltozás utáni kriminálpolitikában. MKT, Bíbor Publisher, Miskolc, 2009, p. 29-34.

the general feeling of security in the society was decreased primarily in the smaller cities and villages due to the increasing number of crimes committed against the elders. The number of crimes increased to a greater extent in the poorer parts of the country, where the unemployment rate was higher. No effective measures were taken by the government concerning these offences, which were not crimes but only infractions, or which were committed by children and juveniles. This problem slowly became rather a political, not a legal question. The opposition parties at that time have regularly lifted up their voice against the low level of public security, and that's why the government aimed to reinforce public safety and apply more strict measures. Therefore, while the opposition party asserted the need for the introduction of the so-called 'three strikes' criminal policy, the then-Minister of Justice was talking about the introduction of the "10-15 strikes" criminal policy[27].

Due to these special reform plans, the Hungarian criminal laws have been modified several times in the last years. As a result of these changes, a stricter criminal system was established. For instance, the Hungarian Criminal Code was amended in 2009 partly in order to realize stricter actions. For instance, this amendment broadened the number of qualified cases and created the notion of "violent multiple recidivist".

After the general parliamentary election in April 2010, the new right-wing government introduced the so-called "three strikes"[28], which made possible to aggravate the punishment of those offenders who committed violent crimes against person for three or more times. In the gravest cases, it has the consequence that the courts are obliged to sentence such offenders for life imprisonment. In order to improve the status of public security, the government decided to take stricter actions against those who commit infraction (administrative offence), including juveniles as well. Similar legislative goals motivated the amendments of the Hungarian Criminal Procedural Code, which aimed the acceleration of criminal procedure.

---

[27] (*www.irm.gov.hu/?katid=1&id=104&cikkid=4960*) (05.04.2009.)

[28] Act LVI of 2010 on the modification of Act No. IV of 1978 on the Criminal Code.

Both behind the criminalization and the criminal policy there are actual political reasons. Political parties in Hungary are, similarly to the political parties in other European countries, trying to please the society, especially the potential voters. Also in the field of criminal policy the professional decisions are often influenced, and sometimes overwritten by other aspects. Also due to this reason, the legal principles are very important, which could be the limits of the influence of the politics on the legislation processes. Also in Hungary, those institutions whose task is to guarantee the observance of the legal principles have an important role. The Hungarian Constitutional Court has the most prominent role in this respect, and it has the right and obligation to ensure the consistency of the legislation with the legal principles set out in the Constitution and international treaties. The decision of the Constitutional Court made in respect of the crime "fornication against nature" may serve as a good example to demonstrate the role of this institution in the criminalization and decriminalization of criminal behaviour[29]. According to the act which was reviewed by the Constitutional Court, "fornication against nature" is committed if an adult carries on a sexual act with a younger same-sex person. The Constitutional Court annulled the provision because of its discriminative elements, even though there was a political will to penalize this action. As demonstrated by this case, the Constitutional Court could be the limit of the process of criminalization.

§3. Criminal offence (definition, constituent elements)

3.1. Introduction

In the Hungarian criminal law, the concept and the conceptual elements of criminal offence had been formulated by the science of criminal law at the end of the 19th, and at the beginning of the 20th century, and during this, it utilized the findings of the German legal science to a great extent. Currently, the standpoint of the legal

[29] Decision 37/2002 of 4 September of the Hungarian Constitutional Court.

scientists is not entirely unified regarding the concept of criminal offence; we may find differences among the conceptual elements used by different authors. For example, according to Ferenc Nagy, criminal offence is a conduct that fulfills the statutory elements of the definition of a criminal offence, the conduct is unlawful and the perpetrator is guilty[30]. According to József Földvári, the conceptual characteristics of a criminal offence are: the action, the punishability, the social dangerousness and the guilt[31]. In our opinion, the differently named conceptual elements conform to each other in their content, they can be correlated to each other substantially[32], and so, *the following elements of the academic concept of criminal offence* can be differentiated:

- action (human behaviour),
- social dangerousness (material unlawfulness),
- guilt,
- punishability (fulfillment of the statutory elements of a criminal offence).

It is important however, that in Hungary we can mention the so called *statutory concept of criminal offence* as well, as Art. 4 of the Criminal Code defines the concept of the criminal offence. This has a great significance, because according to our standpoint, the theoretical background of the conceptual elements needs to be explained by starting from the statutory concept, so for the academic person, the starting point is necessarily the concept defined in the Criminal Code[33].

[30] BELOVICS - GELLÉR - NAGY - TÓTH (2012), p. 166-167.

[31] FÖLDVÁRI, József: Magyar büntetőjog. Általános rész. Osiris Publisher, Budapest, 1997, p. 75-85.

[32] Similarly see: KARSAI, Krisztina - SZOMORA, Zsolt: Criminal Law in Hungary. Kluwer Law International. Alphen aan den Rijn, 2010, p. 59.

[33] GÖRGÉNYI - GULA - HORVÁTH - JACSÓ - LÉVAY - SÁNTHA - VÁRADI (2012), p. 126.

3.2. The statutory concept of criminal offence

The first Hungarian Criminal Code provided the formal definition of the criminal offence by laying down the principle of *nullum crimen sine lege*: conduct does not constitute criminal offence unless it has previously been declared by the law. From the second half of the 20th century, the Hungarian Criminal Codes formulated the content-related, material definition of criminal offence. According to Art. 4 of the Criminal Code:

"Criminal offence is an act perpetrated intentionally or – if this Act also punishes negligent perpetration – by negligence, which is dangerous for society and punishable by this Act".

According to this, *the elements of the legal concept of the criminal offence* are: *the action, guilt (intent or negligence), social dangerousness and punishability.*

- A criminal offence can only be a human action, stemming from human behaviour, which is a movement of body controlled by human willpower and leading to a change in the outside world. Consequently, animal behaviour and events of nature fall out of the scope of criminal law.

- Punishability is the appearance of the principle of *nullum crimen sine lege, nulla poena sine lege* in the text of the law. Consequently, no one can take criminal responsibility for a conduct which has not been declared a criminal offence by the law. Furthermore, it should be emphasized that the criterion of punishability includes the concept of the fulfillment of the statutory elements of an offence. Namely, law orders the punishment of a human action by defining all the significant legal criteria of the given action. The total of these legal criteria is called the statutory elements of a criminal offence. This is why the phrases "punishability" and the "fulfillment of the statutory elements of an offence" are basically synonymous.

- Social dangerousness is the content-related, material characteristic of a criminal offence. It answers the question why the legislator declares a given human behaviour a criminal offence. A given human action endangers society if the situation that is or can be the result of this action is harmful or disadvantageous for the

society. It is questionable though, that which are those circumstances of life, the changing of which is considered harmful by the society. Answer is given by the Criminal Code itself: "That activity or omission shall be an act dangerous for society, which violates or endangers the state, social or economic order of Hungary based on the Fundamental Law, the person or rights of the citizens" (Art. 4 Section 2). The circumstances of social life enlisted here – namely, values and interests that need to be protected by law – are called the legal subjects of the criminal offence[34]. Thus, that conduct is dangerous to society, which violates or endangers a certain legal subject. From the circle of conducts posing public danger, those become criminal offences, which are declared punishable and unlawful by the legislator. The legislator, based on the predominant scale of values in the given historical-social situation, recognizes and evaluates those conducts that appear in the given circumstances of life and are harmful or dangerous for the society[35]. Then, from these conducts the legislator picks those, the chance of which to be punished by criminal law is in proportion with the threat the conduct poses on society. It appears from the above described concept of social dangerousness that it basically corresponds to the concept of material unlawfulness.

- In absence of guilt, we cannot talk of a criminal offence, and the perpetrators cannot be made responsible by criminal law. Guilt is a psychic process going down in the mind of the perpetrators, a psychic relation between the perpetrators and their action – which is expressed in intent or negligence – based on which they can be made responsible for their action. Having a psychic relation assumes that the perpetrators have been, or could have been, aware of the fact and possible consequences of their action. Their mind realized the nature of their action as a public danger, as something harmful and dangerous to society. The basis of the evaluation manifesting in guilt is that the perpetrators realized the nature of

[34] BELOVICS - GELLÉR - NAGY - TÓTH (2012), p. 204.

[35] GÖRGÉNYI - GULA - HORVÁTH - JACSÓ - LÉVAY - SÁNTHA - VÁRADI (2012), p. 131.

their action being dangerous, and that this realization, as opposed to public expectation, did not happen through their own fault. Thus, guilt is made up of the unity of psychological and normative elements. It should be emphasized, that according to the Hungarian dogmatic opinion, guilt is a category that can be related only to natural person. Consequently, a legal person or other organization cannot be guilty and cannot commit a crime, albeit since May, 2004 – according to a particular law – special criminal measures may be applied against a legal person. In the Hungarian criminal law, guilt has two forms, intent and negligence. The more serious form of intent is the direct intent (*dolus directus*), the lighter form is eventual (indirect) intent (*dolus eventualis*). In a similar way, one of the forms of negligence is conscious negligence (*luxuria*), the other is unconscious negligence (*negligentia*).

3.3. The differentiation of criminal offences based on weight

According to the Criminal Code a criminal offence is either a felony or a misdemeanour. *Felony* is a criminal offence perpetrated intentionally, for which the law orders the infliction of a punishment graver than imprisonment of two years. *Misdemeanour* is any other criminal offence, namely, misdemeanour is every negligent crime, and those crimes perpetrated intentionally, for which the law orders the infliction of a punishment not graver than imprisonment of two years. The differentiation between felony and misdemeanour has significance at, for example, the levels of execution of imprisonment.

3.4. The question of *mens rea* and *actus reus*

Finally, we have to mention that the Hungarian criminal law is unfamiliar with the *actus reus/mens rea* differentiation known to the common law legal systems[36]. But the science of Hungarian criminal law has long before formulated the so called 'theory of

[36] KARSAI - SZOMORA (2010) 59-60.

the statutory elements of the criminal offence'. In this system, we can differentiate between subjective and objective statutory elements of a criminal offence.

Subjective statutory elements of a criminal offence:

- any form of guilt (intent or negligence), this can be found in the statutory elements of all criminal offences;
- the purpose (e.g. unlawful gain in the case of fraud) and the motive (e.g. the greed for gain in the case of a qualified murder), these cannot be found in the statutory elements of all criminal offences.

Objective statutory elements of a criminal offence:

- the behaviour of perpetration (e.g. getting hold of the object in case of theft), this can be found in the statutory elements of all criminal offences;
- the object of the perpetration (the object of another person in case of theft);
- the result (e.g. the damage in case of fraud);
- the casual relation between the behaviour and result of the perpetration;
- the place (e.g. public event), the time (e.g. at night), the means (e.g. armed) and the method of the perpetration (e.g. with force).

The last four elements cannot be found in the statutory elements of all criminal offences.

§4. Administrative offence v. Criminal offence

4.1. Short historical background[37]

The first Hungarian Criminal Code utilized the threefold division of the criminal offences. Act V of 1878 included felonies and misdemeanors, and *contravention*s ('kihágások') were

[37] About the history of infraction see details in MÁTHÉ, Gábor: Codification of Administrative Penal Law in Hungary. In: MÁTHÉ, G. - KIS, N. (eds.): European Administrative Penal Law. Budapest, 2004.

regulated by the Act XL 1879 (The two Acts formulate together the first Hungarian Criminal Code, which is called "Code Csemegi".) Thus, contraventions are the lightest type of a criminal offence regarding their weight, they are part of substantive criminal law, but even at that time, two distinct groups of contraventions could be distinguished:

- "minor offences" of a criminal nature (e.g. contraventions against property), and
- offences against public administration[38] (e.g. contraventions against the state).

The legislator terminated the institute of contravention in 1955, ranked a part of the contraventions as felonies but classified a bigger part of them under the new type of unlawful act, the collective notion of *infraction* ("szabálysértés"). The first standalone Act on Infractions had been formulated in 1968, which collected the legal material regarding infractions in a unified system, together with the related, lower-level rules of law. Currently, the most important legal source of substantive criminal law is Act C of 2012 on Criminal Code, which divides the criminal offences (crimes) based on their weight to felonies and misdemeanors. Infractions are regulated by a separate Act (Act II of 2012), which includes the regulations of substantive law, procedural law and law of execution as well. *Thus, infractions are not part of criminal law, but they have a substantial relation to it.*

4.2. The standpoint of the legal literature

The legal nature of infractions and the place of infraction law in the legal system has been the subject of a still ongoing debate in the literature. We represent the standpoint according to which infraction law is part of the so called administrative criminal law (in a wider sense). According to the related definition, all those legal norms may be included in the administrative criminal law, based on which a public administrative body applies criminal

[38] JACSÓ, Judit - SÁNTHA, Ferenc: Közigazgatási büntetőjog. University of Miskolc Publisher, Miskolc, 2012, p. 25.

sanctions[39] (repression). The major part of the administrative criminal sanctions, the so called (public) administrative fines, have the characteristics of the public administrative law fundamentally, so they can be undoubtedly considered as part of the public administrative law. But the other field of the administrative criminal law, the infraction law, has such substantial connections to the criminal law, that in a narrow sense, it might be called the "criminal law of public administration". In the field of the substantive infraction law, the number of the connection points to the criminal law is quite high. Thus, the legal definition of infraction is very similar to the definition of criminal offence in the Criminal Code (see below), and conduct, just as in the case of crimes, does not constitute infraction unless it has previously been declared by the law (*nullum crimen sine lege*). Responsibility for infractions is also a responsibility based on culpability, only a natural person can be made responsible for an infraction, as opposed to a legal person or other organization. Finally, we must note that the infraction law refers back to the provisions of the Criminal Code in case of many definitions (attempt, instigator, accessory etc.), and many crimes (e.g. theft, fraud) have a formation as an infraction, in the case of which the statutory elements of the crime established in the Criminal Code should be applied. It should be emphasized, that the infraction procedure law bears in many instances the traits of the public administrative law as well. So in a case of an infraction, according to main rule, a public administrative body must proceed on primary level (the secondary level is the court), the procedure fundamentally shows the characteristics of the public administrative procedure, and the goal is to conduct a fast and effective procedure. We must note however, that many guaranteed rules of the criminal procedure are also valid in the infraction procedure (e.g. presumption of innocence, prohibition of forcing self-incrimination, the perpetrator has no obligation for veraciousness etc.), and infractions punishable even with incarceration belong under the scope of the court, on primary level already.

[39] JACSÓ - SÁNTHA (2012), p. 15.

Regarding *the grouping of infractions*, the literature has a relatively unified standpoint, according to which we can distinguish between two basic types of infractions:

- the so called "minor crimes" that violate or threaten the order of the common coexistence, and
- the offences against public administration ("civil disobediences").

The first group of actions includes for example trespassing (it is considered a crime, when it is committed – among others – violently, by night or with arms), offences against property, like e.g. theft (it is considered a crime, when the value of the stolen property is more than 50 000 HUF), and the unlawful use of a vehicle (it is considered a crime, when another person's motor vehicle is taken for the sake of use).

There are examples for the second group as well, like the violation of the public traffic regulations, or the violation of the regulation about staying on ice. We must note however, that infractions cannot be sharply divided into criminal and non-criminal acts, but it can rather be said that criminal nature or criminality characterizes infractions to a different extent.

Connection between infractions and crimes:

In the Hungarian legal literature, many standpoints had been formulated regarding the relation between infractions (previously: contraventions) and crimes.

- According to the positivistic approach, when we are making a distinction between infraction and crime, it is not a question of content, but a decision of the legislator. This means that those acts can be considered infractions, that are qualified as such by the legislator, who orders them to be punished as infractions[40] (Ferenc Finkey);
- According to the quantitative approach, there is only a quantitative difference between infraction and crime, regarding to what extent the act violates the law, and to what extent is it a threat

[40] See details in KIS, Norbert - PAPP, László: A szabálysértésekről szóló 1999. évi LXIX. törvény magyarázata. I. Magyar Hivatalos Közlönykiadó, Budapest, 2007, p. 12.

to the society. The objective weight and the danger of the infraction is smaller than that of the crime, that is why it is sanctioned in a lighter way[41] (Tibor Horváth);

- According to a third theoretical approach, there is more of a qualitative difference between infractions (contraventions) and crimes, instead of a quantitative one. While the infraction is a morally neutral act against public administration (an "anti-administrative" act), the crime is a (materially unlawful) behaviour that violates or endangers common public values. As Pál Angyal says:

"The perpetrator of a crime is an evil person, while the perpetrator of a contravention is a careless person"[42].

4.3. The standpoint of the legislator

The preamble of the new Act on Infractions (Act II of 2012) calls infractions "criminal acts", which violate or endanger the generally accepted rules of social coexistence, but which are not as dangerous as crimes. The Act gives us the definition of infraction. According to this, "*an infraction is an act or omission, ordered punishable by the law, which is dangerous for society* (Art. 1 Section 1). This definition must be completed with the provision of the Act regarding the principle of guilt, and thus, *the elements of the legal definition of infraction* are: (1) human behaviour; (2) a danger to society, although to a smaller extent than a crime; (3) guilt (intent or negligence); (4) an act ordered punishable by the law.

Based on the above, on the one hand, it can be said that the legal definition of infraction and crime are very similar, the conceptual elements are basically the same, and the only difference is that to what extent the two acts pose a threat to society. The preamble of the Act and the legal definition of infraction reflect the so called quantitative standpoint – mentioned previously in connection with differentiating between crimes and infractions – as

[41] GÖRGÉNYI - GULA - HORVÁTH - JACSÓ - LÉVAY - SÁNTHA - VÁRADI (2012), p. 29.

[42] ANGYAL, Pál: A közigazgatás-ellenesség büntetőjogi értékelése. MTA, Budapest, 1931.

infraction is a criminal act as well, which differs only from a crime in that it poses a smaller threat to society. On the other hand, in our opinion, the legislator wanted to conduct with the help of the new Act on infractions a certain "profile-clearance" in the infraction law material: they took out from the infraction law all the acts, that they considered fundamentally anti-administrative (offences against public administration), and transferred these to the other field of the administrative criminal law, under the scope of the administrative penalization. Theoretically, they have only left those acts in the infraction law, which they considered as having a criminal nature. We must note, however, that – as we have referred to this earlier – the major part of the infractions featured in the new Act retain to a certain extent an anti-administrative quality[43].

Similarities and distinctions

	criminal offence (crime)	**infraction**
legal background	Act C of 2012 (Criminal Code)	Act II of 2012 (on Infractions)
definition	*„Criminal offence is an act perpetrated intentionally or – if this Act also punishes negligent perpetration – by negligence, which is dangerous for society and punishable by this Act"* (Art. 4 Section 1)	"*An infraction is an act or omission, ordered punishable by the law, which is dangerous for society"* (Art. 1 Section 1)
legal principles	e.g.: *nullum crimen sine lege*, principle of criminal liability based on individual guilt, responsibility based on culpability	
constituent elements	human behaviour	
	social dangerousness/a danger to the society	
	guilt (intent or negligence)	
	punishability (the act ordered punishable by the law)	

[43] Similarly see KIS - PAPP (2007), p. 28-29.

	criminal offence (crime)	**infraction**
distinction – generally		Smaller extent of social dangerousness than a crime → many crimes (e.g. theft, fraud) also have a formation as an infraction.
distinction – special examples:		
- *degree, extent of the damage etc.*	financial crimes/financial infractions among crimes/infractions against property e.g.: theft	
- *the different form of guilt*	deterioration with intent	deterioration with intent or negligence
- *the frequency of the illegal conduct*	organizing prohibited gambling (more times)	organizing prohibited gambling (once time)
- *special factors of relevant statutory facts*	disorderly conduct (with violence)	disorderly conduct (without violence)
common definitions	Infraction law refers back to the provisions of Criminal Code in case of many definitions (attempt, instigator, accessory etc.)	
legal background of the procedure	Act XIX of 1998 on the Criminal Procedure	Act II of 2012 on Infractions (infraction procedure law)
guaranteed rules during the procedure	e.g. presumption of innocence, prohibition of forcing self-incrimination, the perpetrator has no obligation for veraciousness	
the institutes of the procedure	all level: (criminal) court	primary level: public administrative body (but in some cases special jurisdiction for a court) secondary level: court

	criminal offence (crime)	infraction
the goal of the procedure	(generally:) criminal justice (in special cases e.g. in connection of juveniles:) to contribute the respect of the acts among juveniles	to conduct a fast and effective procedure
the characteristics of the procedure	criminal procedure	public administrative procedure
punishability	criminal offences punishable only under the scope of the court (but public prosecutors can apply some measures e.g.: reprimand)	infractions punishable even with incarceration belong under the scope of the court (on primary level already)

Finally, we must note that the infraction law refers back to the provisions of the Criminal Code in case of many definitions (attempt, instigator, accessory etc.), and many crimes (e.g. theft, fraud) have a formation as an infraction, in the case of which the statutory elements of the crime established in the Criminal Code should be applied. It should be emphasized, that infraction procedure law bears in many instances the traits of the public administrative law as well. So in a case of an infraction, according to the main rule, a public administrative body must proceed on primary level (the secondary level is the court), the procedure fundamentally shows the characteristics of the public administrative procedure, and the goal of it is to conduct a fast and effective procedure. Moreover we must note that many guaranteed rules of the criminal procedure are also valid in the infraction procedure (e.g. presumption of innocence, prohibition of forcing self-incrimination, the perpetrator has no obligation for veraciousness etc.), and infractions punishable even with incarceration belong under the scope of the court, on primary level already.

Bibliography

Hungarian literature of criminal law

ANGYAL, Pál: A közigazgatás-ellenesség büntetőjogi értékelése. MTA, Budapest, 1931.

BELOVICS, Ervin – GELLÉR, Balázs – NAGY, Ferenc – TÓTH, Mihály: Büntetőjog I. HVG-ORAC Publisher, 2012.

CSEMÁNÉ VÁRADI, Erika: A Janus-arcú kriminálpolitika - avagy a fiatalkori bűnözéssel szembeni fellépés aktuális kérdései. In: Collegium Doctorum Konferencia elektronikus megjelentetése, Bíbor Publisher, Miskolc 2012.

FÖLDVÁRI, József: Magyar büntetőjog. Általános rész. Osiris Publisher, Budapest, 1997, p. 75-85.

GELLÉR, Balázs J.: The ne bis in idem Principle and Some Connected Tasks Facing the Hungarian Legal System. In: MÁTHÉ, G. – KIS, N. (eds.): European Administrative Penal Law. Budapest, 2004.

GÖRGÉNYI, Ilona – GULA, József – HORVÁTH, Tibor – JACSÓ, Judit – LÉVAY, Miklós – SÁNTHA, Ferenc – VÁRADI, Erika: Magyar büntetőjog. Általános rész. Complex Publisher, Budapest, 2012.

JACSÓ, Judit – SÁNTHA, Ferenc: Közigazgatási büntetőjog. University of Miskolc Publisher, Miskolc, 2012.

KARSAI, Krisztina – SZOMORA, Zsolt: Criminal Law in Hungary. Kluwer Law International. Alphen aan den Rijn, 2010.

KEREKES, Viktória – VÁRADI, Erika: A nemi erkölcs elleni bűncselekmények egyes kriminológiai kérdései. In: Prof. Dr. STIPTA, István (ed.): Miskolci Doktoranduszok Jogtudományi Tanulmányai, Miskolc, 2013. under press.

KEREZSI, Klára: Kriminálpolitikai törekvések és reformok. In: CSEMÁNÉ VÁRADI, Erika (ed.): Koncepciók és megvalósulásuk a rendszerváltozás utáni kriminálpolitikában. MKT, Bíbor Publisher, Miskolc, 2009.

KIS, Norbert – PAPP, László: A szabálysértésekről szóló 1999. évi LXIX. törvény magyarázata. I. Magyar Hivatalos Közlönykiadó, Budapest, 2007.

KIS, Norbert – HOLÁN, Miklós: Bünterőjog I. Az anyagi büntetőjog általános része. Dialóg Campus Publisher, Budapest – Pécs, 2011.

MARGITÁN, Éva (ed.): Büntetőjog. Budapest, ELTE Eötvös Publisher, 2010.

MÁTHÉ, Gábor: Codification of Administrative Penal Law in Hungary. In: MÁTHÉ, G. – KIS, N. (eds.): European Administrative Penal Law. Budapest, 2004.

Hungarian legal norms/instruments

Fundamental Law of Hungary

Act C of 2012 on the Criminal Code

Act No. II of 2012 on Infractions

Act XIX of 1998 on the Criminal Procedure

Act CLI of 2011 on the Constitutional Court

Act LXIV of 1991on the Convention on the Right of the Child

Act LXXIII of 1997 on the modification of Act No. IV of 1978 on the Criminal Code

Act LVI of 2010 on the modification of Act No. IV of 1978 on the Criminal Code

Decision 11/1992 of 5 March 1992 the Hungarian Constitutional Court

Decision 30/1992 of 26 May 1992 the Hungarian Constitutional Court

Decision 37/2002 of 4 September of the Hungarian Constitutional Court

Chapter III
Foundations of (European) Criminal Law
– National perspectives –
The Netherlands

Renate Johanna Maria Wilhelmina van Lijssel*

§1. General principles

All actions that are carried out in criminal proceedings, should not only comply with the requirements of the law, but also with the general principles of national criminal law. These principles have been developed by case law and are not always guaranteed by law. The Dutch Supreme Court recognized the existence of these principles for the first time in a judgment of 1978[1]. Since a ruling by the Supreme Court in 1981[2], the decision to prosecute must also comply with these general principles.

International treaties and case law affect the national legislation and case law. Many of these general principles, which are relevant in the Netherlands, are therefore based on these international treaties and case law.

There is no exhaustive list of general principles of national criminal law. Principles come in all shapes and sizes. A strict separation of the principles is not even always possible. There is no specific hierarchy of those general principles, but a lower regulation will expire if it conflicts with a higher one, the ***Lex Superior.*** A general regulation will expire if it conflicts with a higher/special one, the ***Lex Specialis***.

---

* Bachelor of Law of Maastricht University.

[1] 12.12.1978 - NJ 1979, 142.

[2] 22.12.1981 - NJ 1982, 233.

Principle of Subsidiarity and Proportionality. In the first place, it should be examined whether there is a less restrictive alternative route available, which can achieve the same goal. If no lighter alternative is available, the chosen method should be proportionate to the purpose that needs to be achieved.

This principle implies that measured decisions should be taken. There is a ***Prohibition of Arbitrariness***.

Prohibition of Détournement de Pouvoir. A power shall be used for no other purpose than the purpose for which the power has been granted. For criminal law, the purpose can be described as the enforcement of law[3].

Principle of Equality. Every citizen has equal rights and enjoys equal treatment in equal circumstances. This implies the criminal principle of ***Equality of Arms.*** Parties have equal access to files and pleadings.

Principle of Legitimate Expectation. It applies the principles of fairness and reasonableness to the situation where a person has an expectation or interest in a public body retaining a long-standing practice or keeping a promise[4].

These principles are general principles governing all branches of law, intended to control the rules of conduct of state authorities towards the citizens. Next to these principles governing, all branches of law there are **principles specific only to criminal law**.

Principle of Legality. There is no competence without a valid statutory basis; there is no competence without responsibility and there is no responsibility without accountability[5].

A lot of sub principles are traceable from the principle of legality. First of all the ***lex scripta***, the conduct must be punishable

---

[3] For more information about the principle of proportionality and subsidiarity and about the prohibition of détournement de pouvoir see: *M.J. Kronenberg, B. de Wilde*, Grondtrekken van het Nederlandse strafrecht, Deventer 2012, p. 172.

[4] For more information about the principle of equality and the principle of legitimate expactations, see: *M.J. Kronenberg, B. de Wilde*, Grondtrekken van het Nederlandse strafrecht, Deventer 2012, p. 227-229.

[5] The principle of legality of criminal law is laid down in Art. 1 of the Dutch Criminal Code.

by law. There should be no judgment of an offence before the offence was punishable by law, ***Nulla Poena*** (non-retroactivity). Nevertheless, changes in favour of the accused can still be implemented with retroactive effect[6] (***Lex Mitior***). Next to that, law needs to be foreseeable, ***Lex Certa***. But sometimes vagueness is inevitable. Decisive is whether the standard makes (sufficiently concrete) clear which behaviours are prohibited and punishable in order for the accused to be able to attune his behaviour to that norm[7]. Next to the inevitableness of vagueness, there is another reason to accept vague norms: law needs to be able to keep pace with changing circumstances[8]. The principle of legality also brings a ***Prohibition of Analogy*** with it. There are limits of interpretation of the words of the law[9].

Fair trial. For all those are prosecuted, a fair trial is guaranteed. This principle implies a lot of sub principles. Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law, the ***Praesumptio Innocentiae***. An elaboration of this in Dutch law is that during the trial a judge should not show his/her belief that the accused has committed the crime[10]. The presumption of innocence implies the ***Dubio Pro Reo***, a defendant may not be convicted by the court when doubts about

[6] The *Lex Mitior* is laid down in Art. 1 para. 2 of the Dutch Criminal Code.

[7] HR 28.05.2002, NJ 2002, 483.

[8] ECtHR 26.04.1979, NJ 1980, 146.

[9] The method of the ECtHR, like in the C.R. against UK, must be used: 'that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. However, there's an inevitable element of judicial interpretation. There will always be a need for adaption to changing circumstances. Art. 7 cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably the foreseen'

[10] This is laid down in Art. 271 para. 2 of the Dutch Code of Criminal Procedure.

his/her guilt remain[11]. Next to that, the principle of fair trial implies an ***independent and impartial court***. The judge must be independent with respect to the parties and to the executive power. In addition, the court must also be impartial. This means that he/she should not be prejudiced. The judge's decision must be based on the facts. Even the appearance of partiality should be avoided. The magistrate may, for example, not be part of the court hearing in a case he/she investigated as magistrate earlier on during the proceedings[12].

The latter must be submitted to the court within a reasonable time. The suspect has the ***right to a reasonable time***. If the reasonable time is exceeded, reduction of sentence may be the result[13].

Other sub principles of Fair Trial are the ***Nemo tenetur se ipsum prodere*** and ***Ne bis in idem.*** Nobody is required to participate actively in his/her conviction[14] and no legal action can be instituted twice for the same cause of action[15]. The suspect also enjoys the ***right to defense*** and ***legal assistance***. The suspect has the right to defend himself/herself against the accusation made against him/her. That defense should be effective. Therefore, he/she also has the right to legal aid[16].

---

[11] The *Dubio Pro Reo* is laid down in Art. 338 of the Dutch Code of Criminal Procedure.

[12] Art. 268 of the Dutch Code of Criminal Procedure.

[13] HR 17.06.2008 NJ 2008, 358.

[14] For example, Art. 29 of the Dutch Code of Criminal Procedure.

[15] Art. 68 of the Dutch Criminal Code and Art. 255 of the Dutch Code of Criminal Procedure. The Code does not define what is meant by act. According to the Supreme Court's case law, where one act constitutes more than one criminal offence, each of them can be prosecuted, provided the offences are different in the objective of prohibition and in the nature of the blame that can be imputed to the offender, e.g., a joyrider who drives dangerously can be prosecuted both for the offence of joyriding and for the offence of dangerous driving.

[16] For more information about the principle of Fair Trial and the sub principles, see: *M.J. Kronenberg, B. de Wilde*, Grondtrekken van het Nederlandse strafrecht, Deventer 2012, p. 365-368.

Prosecutorial discretion. It is the ability to decide if charges should be brought before the court and to determine the nature of those charges[17]. It is possible not to prosecute an offence because of general interest[18]. A directly interested party may appeal against this decision[19].

§2. Criteria for criminalising conduct at the national level

A criterion for criminalizing conduct is not provided in legislation. Nevertheless, much has been written about this subject.

At the formation of the Dutch Criminal Code of 1886, the former Minister of Justice, Modderman, set out the criteria of criminalizing conduct: „Only that may be punished what is injustice in the first place. This is a condition *sine qua non*. Secondly, there is the requirement that it is injustice, where experience has shown that it cannot be restrained by any other means. The threat of prosecution should stay an *ultimum remedium*. From the nature of the case, there are objections concerning any threat of prosecution. Any wise man can understand this without explanation. This does not mean that it shouldn't criminalize, but it should always weigh the advantages and disadvantages of criminalization, and ensure that the punishment does not become a medicine worse than the disease"[20]. Shortly put: criminalization proves necessary. Firstly because other resources

[17] For more information about the principle of prosecutorial discretion, see: *N. Jörg, C. Kelk, A.H. Klip*, Strafrecht met mate, Deventer 2012, p. 263.

[18] This is laid down in Art. 167 and 242 of the Dutch Code of Criminal Procedure.

[19] This is laid down in Art. 12 of the Dutch Code of Criminal Procedure.

[20] Anthony Ewoud Jan Modderman was Minister of Justice from 1879-1883. His main task as Minister was to establish a new Criminal Code. Later on he became Councilor of the Supreme Court. For more information about Modderman (*http://www.parlement.com/id/ vg09lljdp9x2/a_e_j_modderman*).

do not provide enough support in the fight against injustice and secondly, because a consideration of pros' and cons' of criminalization leads to this outcome. The starting point at criminalizing conduct is reluctance by criminalizing behaviour.

The Classic Movement appears to have had the most influence on the establishment of the Dutch Criminal Code of 1886. Criminal law has an ordering and instrumental function, but at the same time, criminal law has to be protective and skeptical towards the governmental power. It must protect the citizens against social chaos and insecurity as well as against governmental excesses and arbitrariness.

Efforts have been made to design general schemes with criteria for criminalizing conduct. These criteria could be helpful for answering the frequently looming question: criminalize or not? Some studies will be clarified below:

Hulsman[21]**:** At a conference of European Ministers in 1970, a resolution that argued for decriminalization was adopted. Professor Hulsman was part of the committee that was set up for this purpose. At that time, he just presented a study „Criteria for criminalization", a system of negative criteria. He formulated four „absolute criteria" and eight „relative criteria". If one of the absolute criteria is met, criminalization must be omitted. The relative criteria are „danger signs".

The absolute criteria: criminalization should never take place (*i*) solely on the grounds that it would create a certain dominant moral conception of certain behaviour; (*ii*) from the primary consideration to create opportunities to support the (potential) offenders; (*iii*) when the capacity of the public administration therefore will be exceeded; (*iv*) as „crumb" of the problem.

The relative criteria: criminalization is not an obvious choice when it comes to behaviour that (*i*) occurs primarily among socially disadvantaged groups in society or those groups who are exposed to discrimination, or where the risk of discrimination is

[21] Hulsman was known for instigating change in thinking on Criminal Law and all areas of interest that are involved. For more information about Hulsman (*http://www.loukhulsman.org/Pages/cv_nl/*).

high; (*ii*) in general, does not come to the knowledge of the police by a declaration; (*iii*) very frequent; (*iv*) is common to a very large number of persons; (*v*) takes place in emergencies only; (*vi*) can be difficult to define precisely; (*vii*) is primarily found in the private sphere of the individual; (*viii*) is considered licit by a significant group in the population[22].

De Roos[23]**:** In 1987 he designed a scheme for criminalization. The criteria are from different angles, and together they form a grid that can work as a sieve. The two criteria he postulates are the principle of plausibility and justification of the damage and the principle of tolerance.From his point of view, criminalization should only be used when behaviours can be designated to damage third parties or the society. It should also meet the requirement that the damage judgment is established in a rational way. Then, the principle of tolerance stipulates that the damage caused cannot be tolerated in a society where you should respect individual freedom[24].

Van Bemmelen: He created positive criteria for criminalization. He put the emphasis on the last resort principle and the immorality and harmfulness of the behaviour. He also formulated the „golden rule": in society you must be willing to settle disagree or interest through consultation. Worthy of punishment is the conduct that shows that the perpetrator, in order to achieve his/her goal, excludes any form of consultation by the use of violence, threat of violence, falsehood or deception[25].

---

[22] For more information about the criteria, see: *L.H.C. Hulsman*, Kriteria voor strafbaarstelling, in: Strafrecht te-recht? Over dekriminalisering en depenalisering, Baarn 1972, p. 107-116.

[23] Prof. mr. Th.A. de Roos was associated with Tilburg University. For more information about de Roos (*http://www.tilburguniversity.edu/nl/webwijs/show/?uid=t.a.deroos*).

[24] For more information about the criteria, see: *Th. A. De Roos*, Strafbaarstelling van economische delicten, Arnhem 1987.

[25] For more information about the criteria set up by Van Bemmelen, see: *J. van Bemmelen*, Positieve criteria voor strafbaarstelling, in: Speculum Langemeijer (Langemeijer-bundel), Zwolle: W.E.J. Tjeenk Willink 1973, p. 1 -14.

Hullu[26]**:** It seems impossible to lay down criteria from which it can be determined if behaviour should be criminalized or not. In addition, in individual cases the value of the different criteria differs greatly. Finally, most fertile seems to be a careful search for and a consideration for arguments *pro* and *contra* criminalizing conduct in a specific case. The same will apply to the choices to be made in the elaboration of general doctrines of criminal liability[27].

If all described approaches on the conditions of criminalizing conduct would be put in a row, it stands out that most studies are very similar in essence. The starting point is always to restrain the government, to control the system and resolve conflicts (prevent damage). Also, proportionality and subsidiarity return[28].

Today, **the Modern Movement** is adhered. The focus is placed more on social protection by an effective fight against crime and on the identity of the accused. Security thinking is central. Crime is seen as a social problem that should be managed by the government. They call this change in general *the development of codification to modification*. The law is not only used to lay down existing views, but also to change attitudes and behaviour in society. The modern organization theory has also been described as the principle that in the implementation of sanctions, improvement of the convicted, or at least prevention of further deterioration of the convicted, is intended.

Of old, much weight is given to retaliation, general prevention and specific deterrence. Today, the same goes for repair. That does not say a lot, but it indicates that the old absolute theories are no longer to be considered. The same applies to the so-called relative theories which, for example, do not satisfy since a limitation is missing.

---

[26] Mr. Jaap de Hullu is linked to Tilburg University and since 2003 Councilor of the Supreme Court.

[27] *J. de Hullu*, Materieel Strafrecht, Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht, p. 19.

[28] *J.M.W. Lindeman*, Waarom tóch het strafrecht? In Juncto 2003/04, p. 33-37.

It may be assumed, that, through the ages, a the principal concern is the pursuit of an ideal mix of the concepts of freedom, security and justice. But the value of those concepts and thus the ideal mixture of that fluctuate unmistakable over time.

§3. Criminal offence (definition, constituent elements)

3.1. Definition of the criminal offence

The Dutch Criminal Code does not give a definition of the concept of a criminal offence. In the memorandum of reply of the Dutch Code of Criminal Procedure was said: "Criminal offence means a legal classification of the criminal act". If it is present, then unlawfulness and guilt will be assumed. But if one of the two is absent, the fact will lose its criminal nature with regards to the one who acted without unlawfulness or guilt.

A criminal offence deals with the conditions that have to be met before an offender can be punished and provides statutory definitions of different punishable conducts. The statutory definition of an offence contains the constituent elements of the criminal offence. The constituent elements must be summed up by the Public Prosecutor in the charge, and the presence of these elements must be proven by facts presented by the prosecution service before a court may sentence the offender[29]. Where a constituent element is missing in the charge, a discharge must follow[30]. Where the public prosecutor cannot prove by evidence that the charge is matched by the facts, an acquittal must follow[31].

All criminal offences are classified as either crimes or infractions. There is no clear and conclusive qualitative criterion. The division is used for all criminal law statutes. The legislature

[29] This is laid down in Art. 338 and 350 of the Dutch Code of Criminal Procedure.

[30] This is laid down in Art. 352 para. 2 of the Dutch Code of Criminal Procedure.

[31] This is laid down in Art. 352 para. 1 of the Dutch Code of Criminal Procedure.

decides whether an offence constitutes a crime or an infraction. The statutory definition of crimes as a rule contains a mental element. This mental element must be proven in order to trigger criminal liability. Two forms are distinguished: intent and negligence.

3.2. The constituent elements of the criminal offence

A crime is a human conduct which falls within the boundaries of an offence, is unlawful and negligent. Some elements of a criminal offence can be distinguished: a conduct of criminal offence, unlawfulness and negligence. In case of substantive offences, causality is required as an element as well.

A conduct of criminal offence. An act must have been carried out by a legal entity. The legal entity can be a natural or a legal person[32]. Private or public corporate bodies can also be held liable for committing an offence. Prosecution may be instituted against the corporation and/or against the persons in the corporation who have ordered the commission of the criminal offence and against those in control of such unlawful conduct. A person is considered to be in control when he/she is in the position to decide whether the conduct takes place and accepts the actual performance, or when he/she is in the position to take measures to prevent the conduct but fails to do so and consciously takes the risk that the prohibited act is performed[33]. Both the natural and the legal person may be sentenced for the offence. A corporate body commits a criminal offence if the corporation itself or the management is in the position to control the occurrence of the criminal activities and, moreover, if it turns out in the course of the events that these activities had been accepted by the corporate body. Animal behaviour and events of nature fall out of the scope of criminal law.

Only when someone gives by means of behaviour, whole or partial implementation of such plans, the condition is fulfilled for criminality. The behaviour can be both an act or an omission. Thoughts are free. Having criminal thoughts is only a personal

[32] This is laid down in Art. 51 of the Dutch Criminal Code.
[33] 23.02.1954, NJ 1954, 378 and 21.10.2003, NJ 2006, 328.

matter and should always be protected from governmental involvement.

The act must fall within the limits of a statutory offence. There is no competence without a valid statutory basis. After determining that the accused has committed the fact, the court must determine which legal offence is applicable to the facts[34].

Unlawfulness. Behaviour in violation of a substantive standard is unlawful. If someone acts in conflict with the law, unlawfulness is assumed. But, there may be circumstances that justify the behaviour. If grounds for justification are present, the violation of the law does not constitute a criminal offence.

The statutory grounds for justification are:

- *necessity*[35]: a situation in which a person has to choose between conflicting duties. If the person in such a situation, obeys the most important one and violates by doing so the criminal law, his act is justified;

- *self-defense*[36]: As a rule, one may not take justice in one's own hands, but in the case of an immediate unlawful attack one may repel force by force, provided that there is no other convenient reasonable mode of escape;

- *public duty*[37] *and obeying the official order of a competent authority*[38]: anyone who commits an offence in carrying out a legal requirement or an official order issued by a competent authority is not criminally liable.

Negligence. A penalty should only be applied if there is a reason to reproach (*culpa*). There is culpability if one behaved differently than one should behave. Those who reasonably can refrain from an offence should do so. If someone acts in conflict with the law, culpability is assumed. But there may be circumstances that excuse that behaviour. If grounds for excuse are

[34] This is laid down in Art. 350 of the Dutch Code of Criminal Procedure.

[35] This is laid down in Art. 40 of the Dutch Criminal Code

[36] This is laid down in Art. 41 of the Dutch Criminal Code

[37] This is laid down in Art. 42 of the Dutch Criminal Code

[38] This is laid down in Art. 43 of the Dutch Criminal Code

present, the violation of the law constitutes a criminal offence, but the offender cannot be blamed for having committed the offence.

The statutory grounds for excuse are:

- *duress*[39]: an offender, who acts under the pressure of an external force he/she could not reasonably resist, is excused;

- *excessive self-defense*[40]: when the unlawful attack causes strong emotions, such as rage, anger, fear or desperation, the person attacked may not react properly by using a reasonable means of escape. Due to the emotions, he/she may overreact and use an amount of force that is disproportionate. Due to strong emotions, the offender's will is impaired so that he/she cannot be blamed for that act. This is excessive self-defense.

- *obeying an unlawful order*[41]: obeying an official order issued without authority does not remove criminal liability unless the order was assumed by the subordinate in good faith to have been issued with authority and he/she complied with it in his/her capacity as subordinate.

Causality. For substantive offences causality is required. A forbidden effect has resulted out of the act of the offender. In order to resolve these questions different *causation theories* have developed over the years. The two main groups are **the equivalent** and **the adequacy theories**.

According to **the equivalent theory**, any conduct is to be regarded as the cause, which is a precondition for the commencement of the concrete reprehensible event, if by its removal, the effect would be lost. One is liable for what has caused one's conduct. Then there is the group of **adequacy theories**. These theories only accept criminally relevant causal links between the conduct and the reprehensible event, if it is reasonably foreseeable that the conduct will result out of the act.

[39] This is laid down in Art. 40 of the Dutch Criminal Code.
[40] This is laid down in Art. 41 para. 2 of the Dutch Criminal Code.
[41] This is laid down in Art. 43 para. 2 of the Dutch Criminal Code.

§4. Administrative offence v. Criminal offence

There is a difference between administrative and criminal offences. Criminal law is at least eligible if the nature of the offence, the seriousness of the offence, its consistency with other offences or the need for an investigation associated with coercive and investigative powers so require. Administrative law is at least eligible if the offence is easy to determine, if there is no need for an investigation associated with coercive and investigative powers and if no severe punishments are necessary, even for deterrence[42]. There is no strict separation of administrative and criminal offences. It is not a question of a uniform defined jurisdiction, but more of a partially overlapping jurisdiction.

Disposal by administrative law is emerging more and more. It is impossible to mention them all. Firstly, the common law on administrative offences will be discussed and some examples will be set out. Afterwards, some attention will be paid to The Law on Prosecutions Disposal.

Administrative offences. When an administrative body makes rules or draws up regulations, every citizen is supposed to abide by it. An example of such possibility is to impose an administrative fine. Since the mid-nineties, according to a large number of laws, governing bodies have the power to impose fines on citizens. Firstly, due to the introduction of the Act on Administrative Enforcement, traffic regulations were transferred from criminal law to administrative law. Then a series of laws followed, the criminal penalties were replaced or supplemented by administrative fines. Some examples are the Competition Act, the Telecommunications Act, the Postal Act, the Working Conditions Act 1998, the Commodities and most social insurance[43].

---

[42] This is said about the Law of Prosecutoral Dispusal by the former minister of Justice, P.H. Donner.

[43] See fot a complete list of administrative fines (*http://www.st-ab.nl/awbor02mvt.htm#bijlage2*).

The General Administrative Law Act provides a scheme for administrative fines[44]. In the Act, the administrative fine is described as "the punitive sanction, containing an unconditional obligation to pay a sum of money[45]". Other than the administrative order and the cease and desist, the administrative fine is punitive, meaning that it seeks to add suffering.

In European Law, the administrative penalty is considered a criminal charge. This implies that, in addition to the general standards of the General Administrative Law Act and unwritten principles of good governance, Art. 6 and 7 of the ECHR should be respected.

As mentioned before, there are a lot of different administrative fines and the list is still increasing. Some examples will be given, to illustrate the system.

Nuisance in public space. This kind of administrative fine is a collaboration between various cooperating organizations: the municipality, the police and, to a lesser extent, the Public Prosecutor. The aim of the fine is clear, reducing the nuisance in public space. For proper implementation, it is important that all parties involved know what to do, how to do it and what to expect.

The administrative fine of nuisance in public space is a discretionary power. Political decisions are required for entering the administrative fine

The administrative fine of nuisance in public space applies to the entire General Local Regulation[46] minus a limited number of offences. Excluded are heavy, dangerous behaviours and offences that are part of the law enforcement powers of the police[47]. The

[44] Title 5.4 of the General Administrative Law Act provides the scheme for administrative fines.

[45] This is laid down in Art. 5:40 para. 1 of the General Administrative Law Act.

[46] Act of June 1992 laying down general rules of administrative law.

[47] Examples of heavy, dangerous behaviours and offences that are part of the law enforcement powers of the police, are gatherings, riots, protests and demonstrations.

same applies to behaviours that are strongly related to criminal law[48].

For individuals, the fine may not be over €340 per legal conduct. For legal entities, the fine may not exceed €2250 per practice.

Administrative fine for health insurance. Anyone who lives or works in the Netherlands is obliged to have health insurance. The College for Health Insurance is entitled to give a fine if no response is given to the urgent request of the College to join a health insurance. In addition, after paying the fine, a health insurance must still be concluded.

In addition to the fines, there are also other administrative penalties. But as a rule, it cannot be a custodial[49]. In some cases, a favorable decision will be repealed in response to an unlawful conduct. The punitive administrative sanctions are also disciplinary sanctions in the sphere of the civil service law. It is possible for competent institutions officials to impose disciplinary punishment. These are sanctions such as a reprimand, a deduction of salary, a fine, a suspension or a dismissal for some time[50]. Just like the administrative fines, the guarantees of Art. 6 and 7 of the ECHR apply.

The Law on Prosecution Disposal. Since the 1st of February 2008, the Public Prosecutor may impose sanctions themselves for a number of common criminal offences. The Law on Prosecution Disposal helps to reduce the workload of the courts and to accelerate the execution of sentences. Some of the main ambitions of the government were to increase the safety. The capacity of the justice system must be adapted to the increasing need for law enforcement. Increasing the opportunities for and effectiveness of the extrajudicial settlement of criminal cases is of great importance. The Law on Prosecution Disposal contributes to this. It promotes that not every case ends up in the Criminal Courts. The system is not to prevent the prosecution. It is a form in which the

[48] Examples of behaviours that are strongly related to criminal law are drugstrafficking, healing and the entrainment of stabbing weapons.

[49] This is laid down in Art. 113 of the Constitution.

[50] This is laid down in Art. 125 of the Civil Service Law.

prosecutor may prosecute the case and punish. This brings it, as to its legal nature, more in line with a court judgment. It is, in terms of legality, important that the punishment is an act of prosecution and provides a punishment. This reinforces the basis of extrajudicial settlement of criminal cases.

Also other bodies have the ability to issue transactions. Bodies charged with public duties may settle administrative and environmental offences[51]. You should think of disturbing public order as urinating and walking with a stray dog. To issue the punishment, an administrative body should have employed a special investigating officer (SIO). The fines are of up to €350,-. The Public Prosecutor is the supervisor of the SIO.

[51] This is laid down in Art. 257b and 257ba of the Decision on Public Prosecutor settlement.

Bibliography

1. Literature

Corstens, G.J.M., het Nederlands strafprocesrecht, Deventer 2008.

Damen, L.J.A., Boxum, J.L, De Graaf, K.J., Jans, J.H., Klap, A.P., Marseille, A.T., Neerhof, A.R., Nicolai, P., Olivier, B.K., Schueler, B.J., Vermeer, F.R., Vucsan, R.L., Bestuursrecht, Den Haag 2009.

Hullu, J. de, Materieel strafrecht, Over algemene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht, Deventer 2012.

Keulen, B.F., Knigge, G., Strafprocesrecht, Deventer 2010.

Kronenberg, M.J., Wilde, B. de, Grondtrekken van het Nederlandse strafrecht, Deventer 2012.

Tak, P.J.P., The Dutch criminal justice system, Organization and operation

2. Parliamentary Papers

Explanatory Memorandum of The Law on Prosecution Disposal

Explanatory Memorandum of The Law on Administrative Fine of Nuisance in Public Space

3. Websites

www.overheid.nl

Chapter IV
Foundations of (European) Criminal Law
– National perspectives –
Romania

PhD Mirela Gorunescu
Associate Professor*

§1. General principles

The notion of "criminal law principle" is a basic idea and a value judgment which is generally applied in criminal law but which is not recognized by all criminal law institutions.

The system of criminal law principles, with its components and structures, has been the subject of intense controversies in the Romanian doctrine[1], which lacks a unanimously recognized general classification model.

In the present paper we refer to the structure of the Romanian criminal law system and to its principles, which – according to their source – can be split into three categories: principles derived from the fundamental principles of law, principles derived from criminal law policy, principles that are specific to certain criminal law institutions[2].

---

* Associate Professor, Criminal Law Department, "Nicolae Titulescu" University, Bucharest, Romania.

[1] *M.A. Hotca*, Drept penal. Partea generală - Legea penală şi infracţiunea, Ed. C.H. Beck, Bucureşti, 2012, p. 27.

[2] *G. Antoniu, E. Dobrescu, T. Dianu, Gh. Stroie, T. Avrigeanu*, Reforma legislaţiei penale, Ed. Academiei Române, Bucureşti, 2003, p. 48.

1.1. Principles derived from the fundamental principles of law

The principle of legality. Internationally defined, the principle of legality is also set forth by the Constitution of Romania, Art. 72 letters h) and i) (the present Romanian Constitution was adopted in 1991, it was revised and republished in 2003) and it is applied in the entire Romanian system, thus, influencing the criminal branch of law too. According to this principle, no one can be prosecuted for a deed which, when perpetrated, was not provided as an offence by domestic or international law; similarly, the penalty applied for a committed criminal act cannot be more severe than the penalty provided by law at the time when the criminal act was perpetrated.

The principle of legality as provided by Romanian law implies two aspects:

a) The first aspect refers to the **legality of incrimination,** as expressed by the Latin maxim: *"nullum crimen sine lege*", according to which a person's conduct is not an offence unless a legal provision in force defines it as such. Furthermore, it is binding for the legal provision to be written, to accurately define the interdicted act, not to allow incrimination through analogy and to have been adopted before the act was committed;

b) The second aspect of the legality principle, as provided by criminal law, refers to **the legality of the sanction** which is to be applied for the committed act, as expressed by the Latin maxim: *"nulla poena sine lege"*. From this point of view, the principle of legality refers to the obligation to subject the offender only to the sanctions (penalties or any other measures) which the law stipulates for the committed act at the moment when the offence is perpetrated; thus, more severe penalties, which surpass the limits established by the law at the moment the crime was committed, cannot be applied.

According to recent studies, this principle has direct practical consequences upon the elaboration of legal norms, as well as on the application of these norms[3]. In the legislative activity, the

[3] *F. Streteanu,* Drept penal, Partea generală, Ed. Rosetti, Bucureşti, 2003, p. 59.

principle of legality is applied both in a substantive and a formal way. *From a substantive perspective*, the principle of legality binds the lawmaker to observe two fundamental obligations: crimes and the penalties applied for them must be provided by the law (*lex scripta)* and the legal text must be drawn up in a clear way so that any person could understand which actions or non-actions are incriminated (*lex certa). The formal aspect* refers to the obligation of adopting criminal norms in the form of organic laws, according to Art. 72 of the Constitution of Romania. The principle of legality binds the judge to observe two essential obligations in his/her jurisdiction: to strictly interpret criminal law and to interdict analogy (*lex stricta*), respectively to interdict the retroactive application of the law (*lex praevia*).

The principle of equality before criminal law. The principle of equality before the law is a fundamental principle of the Romanian legal system and it is provided by Art. 16 of the Constitution of Romania: "Citizens are equal before the law and public authorities, without any privileges or discrimination. No one is above the law" [4].

In criminal law, according to this principle, all persons have the same rights and obligations, no matter their race, nationality, religion or gender.

The principle of humanism in criminal law. The principle of humanism is fundamental for the Romanian system of law; according to it, any legal provision must aim to protect the fundamental human rights and interests. Criminal law must protect fundamental human rights and freedoms not only when criminal laws are created, but also when a person must serve a penalty.

1.2. The principles derived from Criminal Law Policy

The principle of deterrence. Criminal law is not meant to punish the offender by all means but to protect fundamental social

[4] Original text: „Cetățenii sunt egali în fața legii şi a autorităților publice, fără privilegii şi fără discriminări. Nimeni nu este mai presus de lege".

values. Consequently, criminal law attempts to deter the infringement or threat of fundamental social values.

Criminal deterrence functions at two levels. At the first level, criminal law classifies certain acts as crimes and it sets forth the special sanctioning limits for the incrimination of those acts. In this way, any person who is tempted to commit a crime knows what risks it assumes because the law abstractly provides the sanction(s) applied for that criminal act (*general deterrence*).

The second level refers to crime deterrence understood as the application and execution of a sanction for an act which was committed by a person (*special deterrence*). Thus, the law has legal effect since it is applied and it demonstrates its force, discouraging criminals to re-adopt an anti-social behaviour, respectively other persons that could be tempted to adopt such behaviour in the future.

The incrimination principle applied for acts which constitute social threat (the principle of subsidiarity). This principle is provided by Art. 18^1 of the Criminal Code of 1969, according to which an act is not a crime unless it constitutes social threat, as any other crime does. In the entire legal system, criminal law provides the most severe sanctions which can be applied; however, they must be proportional to the seriousness of the committed crime because, otherwise, social order could be disturbed due to excessively repressive measures[5].

The principle of the observance of individual human rights as they are provided by international conventions in the matter.

1.3. Basic principles of Criminal Law, specific to some criminal institutions

Crime is the only ground for criminal liability. This principle is stipulated by Art. 17 § 2 of the Criminal Code, which explicitly provides that "Crime is the only ground for criminal liability". According to this principle, it is only the perpetration of the crime which justifies why a person is held criminally liable.

[5] *G. Antoniu, E. Dobrescu, T. Dianu, Gh. Stroie, T. Avrigeanu*, op.cit., p. 33.

This principle is meant to be a guarantee of personal freedom[6] because the ground for criminal liability is not the social threat that a person may constitute or his/her criminal antecedents, but the very circumstance that he/she committed a crime and that this crime can be used as a ground for criminal liability.

The principle of personal criminal liability and criminal sanctions. According to this principle, criminal liability for a perpetrated act lies exclusively with the one who committed it. By correlation, the criminal sanction can be applied only to the offender and not to another person. Thus, criminal law does not provide liability for the acts committed by another person, as civil law does. This principle is further applied subsequent to the reintroduction by the lawmaker of the criminal liability principle for the legal person[7].

The principle of individualized criminal sanctions that are established in accordance with the degree of social threat that a crime may amount to. According to this principle, for criminal sanctions to be efficient they have to be adapted to the degree of social threat which the committed crime amounts to.

The principle of prompt social reaction to a crime that was committed[8] (also known as the principle of celerity in criminal law). This principle is meant to ensure the efficiency of criminal liability and it aims to identify crimes and criminals as close as possible to the moment when the criminal act was committed; this principle also stipulates the prompt and thorough execution of criminal investigation, the prosecution of the culprit and the immediate execution of the penalties, as well as of the other applied sanctions. In strict correlation with this principle, criminal liability can be prescribed, i.e. it may be removed after a certain period, as provided by the law.**The principle of double jeopardy**

---

[6] *C. Bulai*, Manual de drept penal, Ed. ALL, Bucureşti, 1997, p. 52.

[7] *F. Streteanu, R. Chiriţă*, Răspunderea penală a persoanei juridice, Ed. Rosetti, Bucureşti, 2012.

[8] *I. Pascu*, Drept penal, Partea generală, Ed. Hamangiu, Bucureşti, 2010, p. 328-329.

(“*non bis in idem*”) according to which no one can be held criminally liable twice for the same act.

§2. Criteria for criminalising conduct at national level

As previously mentioned, the entire Romanian legal system, including the criminal law branch, is governed by the principle of legality, which is also illustrated by the Latin maxim *“nullum crimen sine lege*”. Thus, an act is considered to be a crime only when it is defined as such by the criminal law. The concept of criminal law refers to any criminal provision that is set forth by laws and Government emergency ordinances[9].

The Constitutional Court of Romania has set up a control instrument for ensuring the compliance of incrimination norms with the constitutional provisions. From a temporal perspective, the constitutional control of laws may be classified into: (*i*) the control exercised prior to the adoption of the laws (prior, preventive, *a priori*). This control is exercised before a bill becomes a law; that is why it is not regarded as a real control but rather as a guarantee of legality and, thus, of constitutionality; (*ii*) posterior control (*a posteriori*), which is exercised for existing laws and legal acts whose legal effect is similar to the one of the laws.

For an act to be incriminated it must amount to a quite high degree of social threat. Acts which do not amount to this degree of social threat are considered contraventions.

The degree of social threat may also be assessed in relation to the existing jurisdictions; thus, Art. 18^1, which defines the deeds that do not amount to the same degree of social threat as crimes do, was introduced through Law no. 6/1973 in the Criminal Code (the Criminal Code which has been enforced since 1969).

In the Romanian Criminal Code (which has been enforced since 1969), the provisions of Art. 18 of the Criminal Code regarding

[9] These normative acts are issued by the Government on the basis of a special law and it is compulsory for them to be approved by the Parliament through an organic law.

social threat were completed with the provisions of Art. 18^1 of the Criminal Code, which defines "the deed that does not amount to the same degree of social threat as a crime does".

When drawing up this text, I took into consideration the fact that sometimes judicial practice illustrates situations in which acts that were formally committed have the essential characteristics of crimes; however, they do not amount to a high degree of social threat; consequently, the degree to which they infringe upon social values would not justify the intervention of criminal law. Thus, theoreticians and practitioners consider that it is possible for the committed act to be totally insignificant and, consequently, its deterrence does not require holding the criminal liable for the perpetration of that act. According to Art. 18^1 of the Criminal Code (enforced in 1969): "An act provided by the criminal law shall not be an offence if, by the minimal harm inflicted upon one of the values protected by law and due to its insignificant content, it does not amount to the degree of social threat that an offence does since it lacks the serious character of a crime".

The text above excludes from the criminal law sphere those acts that lack the serious character of a crime and that do not constitute social threat. What matters is the evaluation of the social threat that the committed act amounts to. However, if the committed act does not constitute social threat, criminal law enforcement bodies do not decriminalize the act (because this is exclusively the task of lawmaker); they merely apply the law accordingly, i.e. in consideration of the limits that the law provides[10].

In order to eliminate subjectivism, abuses and arbitrariness in assessing the degree of social threat that a criminal act amounts to, Art. 18^1 §(2) of the Criminal Code provides some criteria that judicial bodies must consider: a) the manner and the means used to commit the criminal act; b) the purpose for which the perpetrator commits the act; c) the circumstances within which the crime was committed; d) the consequences that the crime has or could have generated; e) the perpetrator's person and his/her conduct. From a judicial perspective, it has been appreciated that this institution

[10] *C. Bulai*, op. cit., p. 92.

cannot be included in the category of causes which exempt the criminal nature of the act and that it does not judicially decriminalize the act, as special doctrine points out[11].

Recently, Romanian criminal law has intensely disputed the matter of incriminating certain types of conduct. Thus, Art. 205, 206 and 207 of the Criminal Code, which incriminate insult and defamation and regulate the proof of truthfulness, were repealed by Art. I § 56 of Law no. 278/2006.

The justification for the abrogation was that the law attempted to ensure freedom of speech (particularly in the mass media, and, more precisely, in the press) and to protect it from the threat that a criminal sanction could be applied for exercising this fundamental right, especially that criminal sanctions and penalties represent the most severe measures adopted within a legal system. Being under a permanent threat that by exercising the right to freedom of speech one could be criminally sanctioned, this right is significantly affected for it obliges anyone to censure himself/herself, whereas censure should only be ethically grounded. It has also been pointed out that if human dignity is aggrieved due to the exercise of freedom of speech, no matter the caused damage, the application of a criminal penalty is not proportional to the seriousness of such an act. If a person exercises freedom of speech abusively, the aggrieved person may obtain compensation for the caused damage in a lawsuit.

Subsequent to analyzing the provisions regarding freedom of speech which are stipulated by Art. 30 of the Romanian Constitution, Art. 10 para. 2 of the ECHR and Art. 19 para. 3 of the ICCPR[12], the Constitutional Court found that the repealing of Art. 205-207 of the Criminal Code through the provisions of Art. I § 56 of Law no. 278/2006 were unconstitutional. When motivating the solution to the cause, the Constitutional Court of Romania established that the abrogation of Art. 205-207 of the Criminal Code and the dis-incrimination of insult and defamation were in

[11] *I. Pascu*, op.cit., p. 108.

[12] See the Decision of the Constitutional Court no. 62/2007, published in the Official Gazette of Romania no. 104 of the 12th of February 2007.

breach of the provisions stipulated by Art. 1 § (3) and 21 of the Romanian Constitution for they infringed the values that are guaranteed by our Rule-of-Law State; they also infringed the principle of free access to justice, correlated with the right to a fair trial and to an efficient recourse as they are regulated by Art. 6 and 13 of the ECHR. Thus, the Constitutional Court found that the abrogation of the 3 articles of the Criminal Code also infringed the equality of rights principle, which is provided by Art. 16 of the Constitution, while also breaching the interdiction to aggrieve human dignity, honor, privacy and the rights to one's own image subsequent to the execution of the right to freedom of speech under Art. 30 § (6) and (8) of the Romanian Constitution.

According to Art. 147 § 1 of the Constitution: "The provisions of the laws and ordinances in force, as well as those of the regulations which are found to be unconstitutional, shall cease their legal effects within 45 days of the publication of the decision of the Constitutional Court if, in the meantime, the Parliament or the Government, as the case may be, cannot bring into line the unconstitutional provisions with the provisions of the Constitution. For this limited length of time the provisions found to be unconstitutional shall be suspended *de jure*"[13].

Subsequent to the publication of the Decision no. 62/2007, the Parliament did not accomplish its duty. Consequently, under the effects generated by this decision, judicial doctrine and practice witnessed two trends. According to the former one, the provisions of Art. 205-207 of the Criminal Code are still in force: due to the fact that the decisions adopted by the Constitutional Court are binding and the provisions of Art. I § 56 of the Law no. 278/2006 ceased to have legal effect since the Parliament did not accomplish

[13] Original text: „Dispozițiile din legile şi ordonanțele în vigoare, precum şi cele din regulamente, constatate ca fiind neconstituționale, îşi încetează efectele juridice la 45 de zile de la publicarea deciziei Curții Constituționale dacă, în acest interval, Parlamentul sau Guvernul, după caz, nu pun de acord prevederile neconstituționale cu dispozițiile Constituției. Pe durata acestui termen, dispozițiile constatate ca fiind neconstituționale sunt suspendate de drept".

the duty to bring into line the regulations stipulated by this unconstitutional legal text with the provisions set forth by the Constitution. According to the latter one, the provisions of Art. 205-207of the Criminal Code are no longer in force: re-incrimination of insult and defamation in compliance with the Constitutional Court decision to consider as unconstitutional the abrogation of the articles which incriminated the two offences would be inconsistent with the principle of legal incrimination which the Constitution sets forth.

Against this background, the High Court of Cassation and Justice (the Romanian Supreme Court of Justice) has settled the matter in its Joint Sections, admitting a second appeal in the interest of the law through Decision no. 8/2010[14], whereby it established that "the norms for incriminating insult and defamation – set forth by Art. 205-206 of the Criminal Code, as well as by Art. 207 on the proof of truthfulness, which were abrogated by the provisions of Art. I § 56 of Law no. 278/2006 that the Constitutional Court found unconstitutional through its Decision no. 62/2997 – are not in force".

The Constitutional Court argued that it is only the Parliament which is entitled to incriminate offences (Art. 2 of the Criminal Code) and, thus, it is not possible for the initial normative act to be reinforced through the abrogation of a previous abrogating act.

When reconsidering this matter, the Constitutional Court found that "the solution given to the judged legal matters – through the Decision no. 8/2010 adopted by the Joint Sections of the High Court of Cassation and Justice – is unconstitutional since it is inconsistent with the Constitution and the Decision of CCCR no. 62/2007".

Actually, with Decision no. 1039/2012, the Constitutional Court also found that "if certain abrogation provisions are found unconstitutional, they cease to have legal effects under the provisions of Art. 147 § (1) of the Constitution, while the legal provisions that were abrogated continue to produce legal effects because

[14] Published in the Official Gazette of Romania no. 416 of the 14th of June 2011.

this effect is specific to the loss of constitutional legitimacy (…), a fact which represents a different and more serious sanction in comparison with the simple abrogation of a normative text"[15].

Moreover, the Constitutional Court pointed out that no public authority, including a court of law, is entitled to contest the principles that can be derived from the Constitutional Court jurisprudence; in fact, public authorities are bound to apply the principles that result from the Constitutional Court jurisprudence accordingly, especially that the observance of the Constitutional Court decisions are an essential component for a the Rule-of-Law State.

§3. Criminal offence (definition, constituent elements)

According to the provisions of Art. 17 § (1) of the Criminal Code (which has been in force since 1969), a deed can be considered a crime if it has the following three characteristics: it presents social peril, it is committed with guilt and it is provided by criminal law. Thus, in the Romanian system of law, crime is explicitly defined in relation to the characteristics enumerated above[16].

[15] Original text: „în cazul constatării neconstituționalității unor dispoziții de abrogare, acestea își încetează efectele juridice în condițiile prevăzute de art. 147 alin. (1) din Constituție, iar prevederile legale care au format obiectul abrogării continuă să producă efecte, deoarece acesta este un efect specific al pierderii legitimității constituționale (…), sancțiune diferită şi mult mai gravă decât o simplă abrogare a unui text normativ".

[16] See also the New Criminal Code, which is going to be enforced starting with the 1st of February 2014 and according to which crime is defined as follows (Art. 15): "A crime is the act provided by criminal law, which is committed with guilt, it is not justified and for whose perpetration the author of the crime shall be held criminally liable" (Original text: „infracțiunea este fapta prevăzută de legea penală, săvârşită cu vinovăție, nejustificată şi imputabilă persoanei care a săvârşit-o)".

3.1. Social threat

The first and main characteristic of crime is that it constitutes ***social threat.***The Romanian Criminal Code (which has been in force since 1969) provides in Art. 18 that: "An act that constitutes a social threat, as understood by the criminal law, is any action or non-action that infringes upon one of the values presented in Art. 1 of the Criminal Code and for whose sanctioning a penalty needs to be applied[17]".

Thus, the deed which constitutes social threat is an external manifestation which results in damaging or endangering those social values upon whose integrity and security the normal evolution of social relations depends. The values that may be aggrieved or endangered by these acts are protected by criminal law, e.g.: state security, patrimony, the person and his/her rights, the economic system etc.

According to the doctrine, social peril may also manifest itself as a state of social anxiety and insecurity which the crime may generate; thus, the doctrine underlines one of the negative consequences which the damage produced by the crime generates[18].

In order to be considered an essential characteristic of crime, social threat must amount to a certain degree of seriousness, which is specific to crime, it must be understood as a criminally illicit act, and it must be defined differently from other forms of illicit acts (administrative, civil etc.); consequently, the social threat that a crime may constitute justifies the application of a penalty.

The level which social threat may amount to is established in relation to a set of factors like: the value of the damaged relation, the causal value of the action-non-action, the type of consequences that it has or it could have generated, the criminal's person, the type of guilt, the purpose for which the crime was committed, the means that were used etc.

---

[17] Original text: „fapta care prezintă pericol social este orice acțiune sau inacțiune prin care se aduce atingere uneia din valorile sociale enumerate în art. 1 C.pen. şi pentru sancționarea căreia este necesară aplicarea unei pedepse".

[18] *C. Bulai*, op. cit., p. 153.

According to criminal law and criminal judicial practice, social threat is depicted as: **general** (abstract) **social peril** and **concrete social peril**.

a) The abstract social peril is seen as having a general character by the lawmaker and it is reflected in the criminal norm. This is assessed by the lawmaker in an abstract way because the lawmaker considers a set of factors when assessing its impact on the protected social value, as well as the seriousness of the potential infringement, the situation and the dynamics of the criminal manifestations, the circumstances in which such acts can occur etc. The result of the assessment is expressed within the special limits of the punishment interval which is established by the lawmaker for every crime;

b) The concrete social threat that a crime may amount to is the social threat of the committed crime, i.e. of an individual crime. The concrete social threat is going to be found by the court of law during the trial and it is reflected in the criminal sanction that is applied. The concrete social threat is established in relation to the damage produced to the object of the crime, to the concrete circumstances under which the act was committed, as well as in relation to the characteristics of the act and the features of the material element or to other circumstances that reveal the concrete content of the crime.

In the Romanian Criminal Code (which has been in force since 1969), the provisions of Art. 18 of the Criminal Code, regarding the characteristics of social threat, are completed by the provisions of Art. 18^1 that refer to "the criminal act which does not amount to the same degree of social threat as a crime does".

3.2. The perpetration of the act with guilt

This is explicitly provided by Art. 17 of the Criminal Code and it must be corroborated with Art. 19 of the Criminal Code on the forms of guilt.

For an act to be considered a crime and to require the application of a penalty it is not enough for it to materially belong to the perpetrator; the perpetrator must also be held criminally liable for that act.

Guilt has been defined in criminal doctrine as "the psychical attitude of the person who – after having deliberately and by free will committed an act which constitutes social threat, while being aware of the act and the socially dangerous consequences thereof or, even if the perpetrator was not aware of the act and its consequences – had the real and subjective possibility to represent the criminal act to himself/herself"[19].

Art. 19 of the Criminal Code provides that there is guilt when the deed was committed with intent or by negligence. The act is committed with intent (see Art. 19 § 1) when the perpetrator:

"a) foresees the result of his/her act and intends to produce it by committing that act (direct intention), as well as when: b) the perpetrator foresees the result of his/her act and, even if he/she does not intend to produce it, he/she accepts the possibility of its occurrence (indirect intention)"[20].

According to Art. 19 § 2 of the Criminal Code, an act is committed by negligence when:

"a) the perpetrator foresees the dangerous consequences of his/her action or non-action, which he/she does not accept, considering, without ground, that they will not be produced [Art. 19 § 2 letter a) of the Criminal Code – negligence through foreseeability and carelessness], as well as when: b) the perpetrator did not foresee the dangerous consequences of his/her acts although, given the circumstances of the cause and his/her capacity, he/she should have and could have foreseen them [Art. 19 § 2 letter b) of the Criminal Code – actionable negligence or negligence]"[21].

---

[19] *C. Bulai*, op. cit., p. 118.

[20] Orginial text: „a) prevede rezultatul faptei sale şi urmăreşte producerea lui prin săvârşirea acelei fapte (intenţia directă), precum şi atunci când b) prevede rezultatul faptei sale şi, deşi nu îl urmăreşte, acceptă posibilitatea producerii lui (intenţia indirectă)".

[21] Original text: a) făptuitorul prevede urmările periculoasă ale acţiunii sau inacţiunii sale, pe care nu le acceptă, socotind fără temei însă că ele nu se vor produce [art. 19 pct. 2 lit. a) C. pen. - culpă cu prevedere sau uşurinţă], precum şi atunci când b) făptuitorul nu a prevăzut urmările periculoase ale faptei sale, deşi din toate împrejurările cauzei şi pe baza

Besides the two mentioned forms of guilt, specialized literature[22] also makes reference to a form of guilt which is known as *praeterintentia*.

3.3. Provision of criminal acts by Criminal Law

This is the third essential characteristic of crime and it is provided by Art. 17 of the Criminal Code, as well as by Art. 2 of the Criminal Code, thesis I, which clearly states that: "the law provides which acts are crimes".

According to this principle, for an act to be considered a crime it is not enough to argue that this act presents social peril and that it is committed with guilt; that criminal act must be provided by law as a crime and sanctioned with a penalty[23].

Criminal law provides which acts are dangerous for society firstly by defining the notion of crime in the General Part of the Criminal Code and secondly by providing (in the Special Part of the Criminal Code and in special laws) what acts are considered to be crimes and the sanctions that are applied for them.

In general, it is accepted that in the structure of crime there are **pre-existing conditions** and a **constitutive content**.

Pre-existing conditions. They are represented by the object of the crime and its subjects.

The object of the crime is defined as a social value and the social relation established for and thanks to this value, which are aggrieved and damaged or endangered through the perpetration of

---

capacității sale trebuia şi putea să le prevadă [art. 19 pct. 2 lit. b) C.pen. - culpă simplă sau neglijență]".

[22] On the very date the new Criminal Code comes into force, praeterintention will be explicitly regulated by law (Art. 16 para. 5 of the new Criminal Code).

[23] *L. Lefterache*, Drept penal, Partea generală, Ed. Universul Juridic, Bucureşti, 2010, p. 165.

a socially dangerous act[24]; criminal law differentiates between the legal object of the crime and the material object thereof[25].

In its turn, the legal object can appear as a general (or group) legal object and as a specific legal object.

The general (group) legal object consists of the set of social values which are defended through criminal norms and which represent the criterion used by the lawmaker to classify crimes included in the Special Part of the Criminal Code.

The special legal object is the concrete social value that is aggrieved through the perpetration of a crime.

The material object is the good against which the incriminated action or non-action is directed and which the crime aggrieves; the material object represents the social value which is protected by the criminal norm.

As to the subjects of the crime, they are the persons involved in the perpetration of the crime either through the commission of the execution act or through the damage caused by the perpetration of this act[26]. Thus, Romanian doctrine distinguishes between the active and the passive subject of the crime.

The active subject of the crime is the physical/natural or legal[27] person who commits a crime and who is held criminally liable. The characteristics of the active subject of a crime are different for the natural and the legal person.

For the *physical person* to be the active subject of a crime it is necessary to be of *a certain age.* This is necessary because being the active subject of a crime requires a person to have the bio-

---

[24] *I. Pascu, A.S. Uzlău*, Drept penal, partea generală, Ed. Hamangiu, Bucureşti, 2013, p. 123.

[25] *C. Bulai, B. Bulai*, Manual de Drept penal, Ed. C.H. Beck, Bucureşti, 2007, p. 198.

[26] *V. Paşca*, Curs de drept penal. Partea generală, Ed. Universul Juridic, Bucureşti, 2012, p. 164.

[27] Law no. 278/2006, which modifies and completes the Criminal Code provides that a legal person may be also held criminally liable for a committed act. This law was published in the Official Gazette of Romania no. 601 of the 12th of July 2006.

psychical capacity of understanding and assuming the conduct obligations that are provided by the criminal law norms, as well as to have the capacity to consciously control and direct his/her conduct in relation to the existing norms[28]. Considering the bio-psychical characteristics of the juvenile, the Romanian Criminal Code of 1968 provided in Art. 99 that the minor who did not attain the age of 14 cannot be the subject of a crime and, thus, he/she shall not be held criminally liable. The minor who is 14-16 years old will be considered the subject of a crime only if it is proved that he/she was aware of his deed when committing it. The minor who has attained the age of 16 years old is held criminally liable and is considered the subject of a crime.

Another condition which is necessary to be met for a person to be considered the subject of a crime is *responsibility*; in other words, the subject of the crime must have the power to understand the consequences of his actions/non-actions and must have the power to control his/her conduct.

A third condition that must be met when it comes to considering a physical person as an active subject of a crime is *freedom of will and action*. This conditions requires for a person to have had the possibility to freely decide whether to perpetrate or not the criminal action/non-action and, similarly, to have deliberately decided to commit the crime.

For a *legal person* to be considered an active subject, it is necessary to meet certain general conditions[29].

First of all, it is necessary for the collective entity which is held criminally liable for the perpetration of a crime *to be a legal entity* in accordance with the legal provisions in force.

Secondly, it is necessary to have *legal capacity*, in other words, not to belong to those categories that are exempted from criminal liability under Art. 19^1 of the Criminal Code. These categories are: the state, the public authorities, the public institutions which perform an activity which cannot be performed by the private sector.

---

[28] *C. Bulai*, op. cit., p. 84.

[29] *M.A. Hotca*, Drept penal. Partea generală - Legea penală şi infracţiunea, Ed. C.H. Beck, Bucureşti, 2012, p. 175-185.

Thirdly, the crime must have been committed in order to *accomplish the object of activity* or in the interest or *in the name* of the legal person.

Fourthly, the legal person must have committed the crime with the form of *guilt* that is provided by criminal law.

The passive subject of the crime is the person who was criminally aggrieved, i.e. the person who suffers or upon whom the material effect of the crime/the danger is inflicted through the perpetration of the crime[30].

Constitutive content. Besides the pre-existing conditions, the structure of the crime also includes a constitutive content which, in its turn, has an objective and a subjective dimension.

The objective dimension generally consists of three elements.

The first of them is the *material element*, identified as a main component and consisting of the committed material act, i.e. of the conduct that is interdicted by criminal law. This element can appear as an action or non-action and it is indicated by the incrimination norm through a word or an expression designated as *verbum regens*.

The dangerous consequence is the second component of the objective dimension of crime and it refers to the negative modification of reality which the committed act produced or which is supposed to produce. The dangerous consequence may endanger, damage or threaten social values that are defended by the criminal law[31].

The third component of the objective dimension of crime is *the causal proportion*. This is the cause-effect link between the voluntary and conscious actions or non-actions committed by the criminal, as well as the socially dangerous result of the crime.

The subjective dimension of crime consists of a certain psychical attitude, which is characterized by intellectual, deliberate and affective elements that determine and characterize the

[30] *I. Pascu*, op.cit., 2013, p. 135.
[31] *V. Paşca*, op. cit., p. 168.

execution of the crime[32]. The subjective dimension of the crime consists of the following elements: guilt, mobile and purpose.

Being one of the elements that make up the subjective dimension of crime, *guilt* will exist only when the material element of the crime was committed with the form of guilt that the law provided.

The mobile of the crime is defined as the reason and the inner drive which trigger in a person the determination to commit a crime[33].

The purpose is the criminal's mental representation of the result that is generated subsequent to the perpetration of the crime. Sometimes one can distinguish between a final and an immediate purpose.

3.4. Definition of a criminal offence in the new Criminal code

According to the new Criminal Code (entered into force 1st of February 2014) a human behaviour will be considered a crime if it fulfills four conditions: a) it corresponds to a particular type of crime described by the law; b) it is committed with guilt; c) it has an unjustified nature; d) it is imputable to its author.

First condition regards the fact that, in order to consider a deed as a crime, it is required a full consistency between the concrete features of the deed and the incrimination norm. This consistency can appear under a typical, perfect form (in case of an attempt or a contribution to the crime as an instigator or accomplice), or a more than perfect form (in the case of a crime which, after having taken place, reaches a moment of exhaustion).

The second condition has the role to complete the *typicity* of the deed, because it refers to the subjective aspect of this feature. That means that, in order to be considered a crime, a deed must correspond to a legal type of crime, as well from the objective point of view and from a subjective point of view. The incrimination norm incorporates, in the deed description, not only objective elements,

[32] *L. Lefterache*, op. cit., p. 212.
[33] *I. Pascu*, op. cit., p. 150.

but also subjective elements. Thus, the incriminated deed, deprived of the subjective element (intention, culpable, or *praeter intentionem*), would have no significance for the legal order. In these conditions, the subjective *typicity* represents the offender's mental attitude towards the deed and the results of it, required by the legal norm from a particular human behaviour.

The unjustified character of the crime concerns the fact that, in order to be considered a crime, a particular deed must be committed with lack of justificatory causes. That is because, in some particular cases, the state does not consider a typical behaviour as a crime, but approves it. It is, for, instance the self defense case – the fact corresponds to a legal type of crime, but it is not considered illegal because it does not contravene to the social order, being in accordance with it.

The *imputability* concerns the fact that the deed should be imputable to the person who committed it. This condition corresponds to the normative theory of guilt. That means that the society reproaches the behaviour to its author, because there is a contradiction between the social order and his will. But, in order to establish the *imputability* of the deed, three conditions must be fulfilled: the unaffected responsibility of the perpetrator, knowledge of the *antijuridical* character of the deed, and the exigibility of a legal norm compliant behaviour[34].

§4. Administrative offence v. Criminal offence

In Romania, the general regime of administrative liability is regulated by the Government Ordinance no. 2/2001[35]. In the first article of this law it is stated that "the law on contraventions defends social values which are not protected by the criminal law".

According to its legal definition, contravention is the act committed with guilt, which is provided and sanctioned by law,

[34] *F. Streteanu*, op. cit., p. 456.

[35] Published in the Romanian Official Journal no. 410/2001, approved by Law no. 180/2002, as amended by Law no. 202/2010.

through an ordinance or governmental decision, and, if the case may be, through a decision adopted by the local council.

As regards the above given definition, the doctrine lays out that contravention is an antisocial act which should meet three basic conditions[36]: a) it should be committed with guilt; b) it should be less socially harmful than a crime; c) it should be sanctioned accordingly by the law in force.

Of the enumerated characteristics, the second one is no longer provided by law; however, it was preserved in the doctrine and it is known as *the characteristic which is able to make the difference between contravention and crime*. The removal of this requirement was made according to the specialists' observations who appreciated that, in the interrelated crime-contravention dispute, social danger is no more relevant for the difference between a criminal act and another one, especially that in some cases the punishments applied for contraventions were tougher than those applied for crimes[37].

Similarly, in order to differentiate contraventions from crimes, one can refer to the provisions of Art. 1 para. l sentence 1 of the Emergency Ordinance no. 2/2001, according to which: "the law on contraventions defends social values which are not protected by the penal law". However, the above-mentioned provision is not really useful because the laws in force abound in provisions which describe contraventions in a way that is very similar to those which describe crimes. One can find many similar cases in Law no. 61/1991 on incriminating the disobedience of community rules, public order and social peace. This law protects the same social value as the one protected by articles incriminating acts committed against the community, which are provided in Title IX, the Special Part of the Criminal Code in force. The same situation is noticeable as regards forestry contraventions, which are regulated both by Law no. 171/2010 and also by Law no. 46/2008, the Forestry Code.

---

[36] *I. Alexandru, M. Cărăuşan, S. Bucur*, Drept administrativ, Ed. Lumina Lex, Bucureşti, 2005, p. 470.

[37] *A. Iorgovan*, Tratat de drept administrativ, Ed. Nemira, Bucureşti, 1996, p. 247.

In these cases the protected social value is similar. However, its protection is stipulated both in criminal provisions and also in administrative provisions. The only factor that makes the difference between the two types of criminal behaviour is the anti-social dimension of the criminal act.

The administrative law doctrine contains further clarifications on how to correlate the difference existing between the seriousness of the crime and the penalties applied for it; these clarifications are supported by legislative realities. In fact, this matter can be solved in an appropriate way if any new legal regulatory edict observes the rules of the system it becomes part of. In this way, there will no longer appear situations such as those reported.

For a committed offence, one may apply one of the sanctions indicated by Art. 5 of the Government Emergency no. 2/2001: main sanctions (warning, administrative fine, community service[38]); complementary sanctions (the seizure of property which was used or resulted subsequent to the perpetration of a crime; the abeyance or cancellation of permit, approval or authorization for exercising an activity; closing the unit; blocking the bank account; the suspension of trader activity; the withdrawal of license or approval for certain operations or activities of foreign trade to be temporarily or permanently performed; the demolition of the building and bring the land to its original state).

The quoted text creates, however, the possibility to establish other principal and supplementary penalties, namely by special laws. This is the reason why we raise some question marks as to the observance of the legality principle in applying administrative sanctions. At the same time, however, para. 5 of Art. 5 of the Emergency Ordinance no. 2/2001 provides that "the applied penalty must always be proportional to the seriousness of the committed act".

Crime, understood as an antisocial act which constitutes a high level of social threat, is defined by the Criminal Code (enforced ever since 1969) as being a "socially dangerous act, committed with guilt and provided by the criminal law". At the same time, the code

[38] Contraventional Prison Sanction was abolished from the system of administrative law.

explicitly provides that "crime is the only ground for criminal liability". In consideration of this definition, criminal law doctrine stipulates that an act must have three key characteristics in order to be considered a crime: it must constitute social threat, it must be committed with guilt and it must be provided by the criminal law. Similarly, in order to be considered an essential characteristic of a crime, social danger must be criminal, i.e., to some degree, it must be criminally unlawful, and it must be distinguished from other forms of illicit acts (administrative, civil etc.) so that it will finally lead to a sentence[39].

Considering the elements of doctrine that we have presented above, one can see that there are no clear criteria for distinguishing crime and contravention. Moreover, this problem is not clarified by jurisprudence, either. For example, in the area of forestry legislation[40], the same act of cutting standing trees can represent a contravention or a crime depending on the damage produced by the committed act or, alternatively, depending on the persistence in the antisocial behaviour over a period of two years. In some cases, the first act of illegally cutting trees is sanctioned with a penalty applied for a contravention; if this act is repeated over a period of two years, it will be considered a crime. This situation exists in our country due to the national doctrine on *res judicata*; however, in our opinion, this situation is contrary to the ECtHR rulings[41].

As to the so-called *offences by habit*, the situation could be similar. This is because, in fact, the proof of recurrent antisocial behaviour, as a fundamental characteristic of such a criminal act, is the report on sanctioning the same contraventions. For example, in the case of the prostitution offence (see Art. 328 of the Criminal Code), repeated acts of sexual intercourse finally make up the concrete element of the crime, which is proven by the report

[39] *Al. Boroi*, Drept penal, Partea specială, Ed. C.H. Beck, Bucureşti, 2008, p. 80.

[40] The law that settles this field is Law no. 46/2008 (Published in the Official Gazette, First part, no. 238 on 27 March 2008).

[41] ECtHR decision, *Tsonyo v. Tsonev v. Bulgaria* 2376/03, decision dated the 14th of January 2010 (*www.ecthr.coe.int*).

sanctioning the contraventions, as defined by Art. 2, Paragraph 6 of Law no. 61/1991. In fact, the legal content of this contravention is very close to the crime of prostitution (soliciting people, by any means, loitering in restaurants, parks, in the streets and other public places, in order to practice sexual intercourses in exchange of material benefits).

Bibliography

Alexandru, I., Cărăuşan, M., Bucur, S., Drept administrativ, Ed. Lumina Lex, Bucureşti, 2005.

Antoniu, G., Dobrescu, E., Dianu, T., Stroie, Gh., Avrigeanu, T., Reforma legislației penale, Ed. Academiei Române, Bucureşti, 2003.

Boroi, Al., Drept penal. Partea specială, Ed.C.H. Beck, Bucureşti, 2008.

Bulai, C., Manual de drept penal, Ed. ALL, Bucureşti, 1997.

Bulai, C., Bulai, B., Manual de Drept penal, Ed. C.H. Beck, Bucureşti, 2007.

Hotca, M.A., Drept penal. Partea generală – Legea penală şi infracțiunea, Ed. C.H. Beck, Bucureşti, 2012.

Iorgovan, A., Tratat de drept administrativ, Ed. Nemira, Bucureşti, 1996.

Lefterache, L., Drept penal, partea generală, Ed. Universul Juridic, Bucureşti, 2010.

Pascu, I., Uzlău, A.S., Drept penal, partea generală, Ed. Hamangiu, Bucureşti, 2013.

Pascu, I., Drept penal, Partea generală, Ed. Hamangiu, Bucureşti, 2010.

Paşca, V., Curs de drept penal. Partea generală, Ed. Universul Juridic, Bucureşti, 2012.

Streteanu, F., Drept penal, Parte generală, Ed. Rosetti, Bucureşti, 2003.

Streteanu, F., Chiriță, R., Răspunderea penală a persoanei juridice, Ed. Rosetti, Bucureşti, 2003.

Part II
Foundations of European Criminal Law

Chapter I
General principles

Norel Neagu*

§1. Introduction

In the EU context, there are a certain number of 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 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[1] (the so called general principles of EU law).

Chapter 1 (General principles) briefly analyses the main principles which can be found in the preambles of legislative acts, the case law of the Court of Justice of the European Union, or the criminal policies established by the main bodies involved in the legislative process [the European Commission (initiator), the Council and the European Parliament (co-legislators)]. Not all general principles are analyzed in this section. Several fundamental principles are included in the next chapter (Criteria for criminalizing conduct). The distinction between principles included in these two chapters is made according to the addressability of each principle: if it concerns mainly the legislative process, it is included in Chapter 2;

* Researcher, Centre for Legal, Economic and Socio-Administrative Studies, "Nicolae Titulescu" University, Bucharest, Romania.

[1] *M. Fletcher, R. Loof, B. Gilmore*, EU Criminal Law and Justice, Edward Elgar Publishing Limited.

if it concerns the legislative process, but also the enforcement phase, affecting also European citizens, it is included in Chapter 1. The principles found in Chapter 1 are divided in three main categories: substantial criminal law principles (e.g., legality, equality, guilt, *mitior lex*), procedural criminal law principles (e.g., presumption of innocence, right of defense), and judicial cooperation principles (e.g. mutual recognition, mutual trust, *ne bis in idem*, speciality).

§2. Substantial Criminal Law principles

2.1. The Legality 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 Art. 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms[2], and Art. 49(1) of the Charter of Fundamental Rights of the European Union[3].

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*).

---

[2] See in this regard, *inter alia*, Joined Cases C-74/95 and C-129/95 X [1996] ECR I-6609, para. 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 Rørindustri and Others v Commission* [2005] ECR I-5425, para. 215 to 219.

[3] According to Art. 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".

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*).

The legality of criminal offences and penalties is one of the most important limitations of *jus puniendi,* constituting the main guarantee of citizens' juridical security facing criminal law[4].

The principle of legality has immediate practical consequences both in the elaboration of legal rules and their application process. In other words, the principle addresses both legislator and judge. In the legislative activity, the principle of legality has two main aspects: material and formal. In terms of the material aspect, the principle of legality requires the legislature two fundamental conditions: to provide in a legislative (written) text acts or omissions considered as offences and sanctions for these acts or omissions (*lex scripta*), and also to draft the text of the law with sufficient clarity for any person to be able to understand what actions or omissions covered the prescribed forbidden conduct (*lex certa*). In the judicial activity, the principle of legality requires two essential obligations for the judge: strict interpretation of criminal law and the prohibition of analogy (*lex stricta*) and prohibition of retroactive application of the law[5] (*lex praevia*).

Respecting the legality principle, especially the *lex certa* requirement is problematic in EU law, because of its specific legislative and enforcement process in criminal law, which involves the adoption of a directive implemented thereafter in the national criminal law of Member States. Therefore, there are opinions in literature that the *lex certa* requirement is not always fulfilled by EU legislative acts[6].

---

[4] *F. Streteanu*, Drept penal. Partea generală, Ed. Rosetti, Bucureşti, 2003, p. 47.

[5] Idem, p. 48-49.

[6] See, as an example, the Manifesto on the EU Criminal Policy (2009) (*http://www.crimpol.eu*), (last visited 09 January 2014), drafted by an academic group of 14 criminal law professors from ten Member States of the European Union.

The *lex certa* aspect of the legality principle was also addressed in an action before the ECJ for lack of compliance of the Framework Decision on the European arrest warrant with the legality principle[7].

According to Art. 2(2) of the Framework Decision[8], double-criminality should not be verified for a list of 32 serious offences, when those offences are punished in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years. Since each of those offences have not been defined in the Framework Decision and since the wording adopted for them can be considered quite vague (e.g. "computer-related crime"), Member States may adopt different definitions in their legal systems[9].

According to the complainant, the list of more than 30 offences in respect of which the traditional condition of double criminality is henceforth abandoned is so vague and imprecise that it breaches, or at the very least is capable of breaching, the principle of legality in criminal matters. The offences set out in that list are not accompanied by their legal definition but constitute very vaguely defined categories of undesirable conduct. A person deprived of his/her liberty on foot of a European arrest warrant without verification of double criminality does not benefit from the guarantee that criminal legislation must satisfy conditions such asprecision, clarity and predictability, allowing each person to know, at the time when an act is committed, whether that act does or does not constitute an offence, by contrast to those who are deprived of their liberty otherwise than pursuant to a European arrest warrant.

The ECJ dismissed the complaint in succinct argumentation, which is presented in the following paragraphs.

The ECJ stated that the European Union is founded on the principle of the rule of law and it respects fundamental rights, as

---

[7] Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633.

[8] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, published in JO L 190 from 18 July 2002, p. 1-20.

[9] For a thorough analysis of the double-criminality rule, see *S. Manacorda*, L'exception a la double incrimination dans le mandate d'arrêt européen et le principe légalité, Cahiers de droit européen (2007), vol. 43, no. 1/2, p. 149-177.

guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and as they result from the constitutional provisions common to the Member States, as general principles of Community law. It follows that the institutions are subject to review regarding the conformity of their acts with the Treaties and the general principles of law, just like the Member States when they implement the law of the European Union[10]. It is common ground that those principles include the principle of the legality of criminal offences and penalties and the principle of equality and non-discrimination, which are also reaffirmed respectively in Art. 49, 20 and 21 of the Charter of Fundamental Rights of the European Union[11].

The *lex certa* aspect of the legality principle implies that legislation must define clearly offences and the penalties which they attract. That condition is met when the individual concerned is in a position, on the basis of the wording of the relevant provision and with the help of the interpretative assistance given by the courts, to know which acts or omissions will make him criminally liable[12].

In accordance with Art. 2(2) of the Framework Decision, the offences listed in that provision give rise to surrender pursuant to a European arrest warrant, without verification of the double criminality of the act, "if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State". Consequently, even if the Member States reproduce word-for-word the list of the categories of offences set out in Art. 2(2) of the Framework Decision for the purposes of its implementation, the actual definition of those

---

[10] See, *inter alia*, Case C-354/04 P *Gestoras Pro Amnistía and Others v Council* [2007] ECR I-5179, para. 51, and Case C-355/04 P *Segi and Others v Council* [2007] ECR I-6157, para. 51.

[11] Proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1).

[12] See, *inter alia*, ECtHR judgment of 22 June 2000 in *Coëme and Others v Belgium*, Reports 2000-VII, § 145.

offences and the penalties applicable are those which follow from the law of "the issuing Member State".

The Framework Decision does not seek to harmonize the criminal offences in question in respect of their constituent elements or of the penalties which they attract. Accordingly, while Art. 2(2) of the Framework Decision dispenses with verification of double criminality for the categories of offences mentioned therein, the definition of those offences and of the penalties applicable continue to be matters determined by the law of the issuing Member State, which, as is, moreover, stated in Art. 1(3) of the Framework Decision, must respect fundamental rights and fundamental legal principles as enshrined in the Treaties, and, consequently, the principle of the legality of criminal offences and penalties. It follows that, in so far as it dispenses with verification of the requirement of double criminality in respect of the offences listed in that provision, Art. 2(2) of the Framework Decision is not invalid on the ground that it infringes the principle of the legality of criminal offences and penalties[13].

I cannot prevent myself from noticing that the ECJ transferred the legality issue from the European to the national level based on two presumptions: firstly, that there is no harmonization obligation for the European institutions in respect to the European arrest warrant, and secondly, that Member States must respect fundamental rights and fundamental legal principles as enshrined in the Treaties. While this argumentation solves the problem of judicial co-operation in criminal matters and preserves the legality of the legislation on the European arrest warrant, it does not solve the problem of the European citizens[14], which should benefit from an Area of Freedom, Security and Justice where they are able to move freely, but with 27 different sets of legislation in the field of Criminal law, each legislation with its own definitions in respect to offences which can give rise to an European arrest warrant. That is

[13] Advocaten voor de Wereld, *supra*, para. 44-54.

[14] For a somewhat different opinion, see Nial Fennelly, The European Arrest Warrant: Recent Developments, ERA-Forum: scripta iuris europaei (2007), vol.8, no. 4, p. 534.

a real journey to the unknown, as citizens in other Member States are not in the position to know how other national systems have developed[15].

So, at least one aspect of the legality principle (*lex certa*) was not addressed or solved by the ECJ and can be solved only through harmonization of legislation. In order for citizens to know the exact requirements of criminal offences in a field which can give rise to surrender on the basis of a European Arrest Warrant, harmonization of legislation is needed if the double-criminality rule is waived for a certain category of offences.

2.2. The principle of Equality and Non-discrimination

The principle of non-discrimination is set forth in Art. 10 and 18 of the Treaty on the Functioning of the European Union[16] ("**TFEU**") and, also in Art. 21 of the Charter of Fundamental Rights of the European Union[17].

"In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation" (art. 10 of the TFEU);

"Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

---

[15] *V. Mitsilegas*, EU Criminal Law, Hart Publishing (2009), p. 124.

[16] 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 Art. 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECtHR), 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".

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

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination" (Art. 18 of the TFEU); and

"1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited" (Art. 21 of the Charter).

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[18] " [see, in particular, Case C-248/04 *Koninklijke Coöperatie Cosun* (2006) ECR I-0000, para. 72 and the case-law there cited]

In several of its judgments, the ECJ has accepted that a Member State may take different measures in the field of criminal law, regarding its own nationals compared with those of other Member States provided that the difference in treatment is objectively justified[19]. Justification of different treatment can be based on ithe necessity and the proportionality with regard to the aim which is being pursued[20].

Thus, in the field of judicial cooperation in criminal matters, the ECJ decided that similar protection than that awarded to its

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

[19] Case C-29/95 *Pastoors and Trans-Cap* [1997] ECR I-285; Case C-44/94 *Fishermen's Organisations and Others* [1995] ECR I-3115, para. 46, and Joined Cases C-87/03 and C-100/03 *Spain v Council* [2006] ECR I-2915, para. 48.

[20] Ibidem. *Pastoors and Trans-Cap*, para. 26. See, also, Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257; Case C-158/07 *Förster* [2008] ECR I-8507, para. 53.

own nationals should be granted by Member States in respect to at least permanent residents, if not also to other categories of persons having a significant link[21] with the Member State on which territory they are found. Protection of the *nationals* of a particular state – in the field of judicial cooperation in criminal matters – has been placed, both in EU legislation and case law, on the same level as that of *non-nationals* residing or staying in the Member State. While grounds for refusing to honor an EAW are optional at the national level, if they are inserted into domestic legislation they need to address all categories mentioned in EU law and not only nationals of the executing state[22].

The equality and non-discrimination principle was also addressed in the *Advocaten voor de Wereld* case. The complainant argued that the principle of equality and non-discrimination is

[21] In order to determine whether, in a specific situation, there are connections between the requested person and the executing Member State which may lead to a conclusion that the person in question is covered by the term "staying" within the meaning of Art. 4(6) of the EAW Framework Decision, it is necessary to make an overall assessment of various objective factors characterizing the situation of that person, which include, in particular, the length, nature and conditions of his presence and the family and economic connections which he has with the executing Member State" (Case C-66/08, Szymon Kozłowski [2008] ECR I-6041, para. 48).

[22] See, in this respect, Art. 4(6) of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Official Journal (OJ) (2002) L 190 (18 July 2002), Art. 4(1)(c) of the Council Framework Decision 2008/909/JHA (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, Official Journal (OJ) (2008) L 327 (5 December 2008), Art. 5(1) of the Council Framework Decision 2008/947/JHA (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, Official Journal (OJ) (2008) L 337 (16 December 2008), Case C-66/08, Szymon Kozłowski [2008] ECR I-6041, Case C-123/08 Wolzenburg [2009] ECR I-9621, Case C-306/09, I.B., [2010] ECR I-10341, Case C-42/11, João Pedro Lopes Da Silva Jorge (nyr).

infringed by the EAW Framework Decision inasmuch as, for offences other than those covered by Art. 2(2) thereof, surrender may take place subject to the condition that the facts in respect of which the European arrest warrant was issued constitute an offence under the law of the Member State of execution. That is, for certain categories of offences listed in Art. 2(2) the double-criminality rule is waived, while for all other criminal offences there is a condition that the conduct must be incriminated in both Member States. That distinction, according to the complainant, is not objectively justified. The removal of verification of double criminality is all the more open to question as no detailed definition of the facts in respect of which surrender is requested features in the Framework Decision. The system established by the latter gives rise to an unjustified difference in treatment between individuals depending on whether the facts alleged to constitute the offence occurred in the Member State of execution or outside that State. Those individuals will thus be judged differently with regard to the deprivation of their liberty without any justification for that difference.

In response, the ECJ emphasized that the principle of equality and non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified[23].

Firstly, with regard to the choice of the 32 categories of offences listed in Art. 2(2) of the Framework Decision, the Council was able to form the view, on the basis of the principle of mutual recognition and in the light of the high degree of trust and solidarity between the Member States, that, whether by reason of their inherent nature or by reason of the punishment incurred of a maximum of at least three years, the categories of offences in question feature among those the seriousness of which in terms of adversely affecting public order and public safety justifies dispensing with the verification of double criminality. Consequently, even if one were to assume that the situation of

[23] See, in particular, Case C-248/04 *Koninklijke Coöperatie Cosun* [2006] ECR I- 10211, para. 72 and the case-law there cited.

persons suspected of having committed offences featuring on the list set out in Art. 2(2) of the Framework Decision or convicted of having committed such offences is comparable to the situation of persons suspected of having committed or convicted for having committed offences other than those listed in that provision, the distinction is, in any event, objectively justified.

Secondly, with regard to the fact that the lack of precision in the definition of the categories of offences in question risks giving rise to disparate implementation of the Framework Decision within the various national legal orders, suffice it to point out that it is not the objective of the Framework Decision to harmonize the substantive criminal law of the Member States and that nothing in the Treaties which were indicated as forming the legal basis of the Framework Decision makes the application of the European arrest warrant conditional on the harmonization of the criminal laws of the Member States within the area of the offences in question[24].

The Court concluded that, in so far as it dispenses with verification of double criminality in respect of the offences listed therein, Art. 2(2) of the Framework Decision is not invalid inasmuch as it does not breach the principle of equality and non-discrimination[25].

I tend to agree with the Court's reasoning as regards the objectively justified difference between the categories of offences for which double-criminality is not required and other categories of offences, where this condition is imposed for surrender of the requested person. The offences provided for in Art. 2(2) of the Framework Decision are serious ones and there is no national legislative system in the European Union which does not incriminate every category as a criminal offence. However, even if there is no obligation of harmonization in respect to those offences, different rules in different Member States can lead to different treatment of comparable situations and consequently a breach of

[24] See by way of analogy, inter alia, Joined Cases C-187/01 and C-385/01 *Gözütok and Brügge* [2003] ECR I-1345, para. 32, and Case C-467/04 *Gasparini and Others* [2006] ECR I-9199, para. 29.

[25] Advocaten voor de Wereld, *supra*, para. 55-60.

the non-discrimination principle. That is why, even if not mandatory, harmonization of legislation in this field must occur in order to comply with fundamental rights and fundamental legal principles as enshrined in the Treaties.

2.3. Guilt principle

European legislation requiring Member States to criminalize 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 criminalization 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 Art. 48(1) of the EU Charter of Fundamental Rights[26].

The guilt principle is treated in literature according to two main theories: the psychological and the normative theory of guilt. The first one is related to the fact that the perpetrator must be aware or must intend to behave in a certain manner (intentional or negligent conduct). The normative theory of guilt presupposes the fact that the deed should be imputable to the person who has committed it. That means that the society reproaches the behaviour to its author, because there is a contradiction between the social order and his/her will, and there is no justificatory cause for his/her action or omission. As the normative theory of guilt will be analyzed extensively in Chapter III, I will address here some aspects of the psychological theory of guilt resulting from the EU legislative acts and ECJ case-law.

Generally speaking, the legal instruments of the EU criminalizing conduct refer to "intentional conduct"[27], or to acts that have

[26] Manifesto on the EU Criminal Policy (2009), *supra*.

[27] 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

been "intentionally" committed[28]. 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[29].

Recklessness is not defined by the ECJ in its case law. This does not mean that certain definitions are not provided for by other parties to the proceedings. According to the European Commission, "«reckless» acts are foolhardy acts, committed with the knowledge of the risks involved so that it may be said there is a willingness to accept risks"[30].

Also, "a «reckless» act may be defined as the act of a person who, overestimating his/her chances, pursues a course of action with such audacity that he/she fails to foresee the dangers to which he/she exposes himself/herself and of which he/she could not have been unaware"[31].

---

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 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.

[28] *A. Klip*, European Criminal Law, an Integrative Approach, *supra*, p. 188-189.

[29] Case C-157/80 *Criminal proceedings against Siegfried Ewald Rinkau* [1981] ECR 1395, para. 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."

[30] Case 23/81 *Commission v Royale Belge* [1983] ECR 2685.

[31] Idem, para. 4.

"Serious negligence" […] must be understood as entailing an unintentional act or omission by which the person responsible commits a patent breach of the duty of care which he/she should have and could have complied with in view of his/her attributes, knowledge, abilities and individual situation[32].

As regards objective responsibility in criminal law, both literature[33] and case law have expressed the opinion that such responsibility is incompatible with criminal proceedings: "a general principle of law, developed in order to limit the exercise of *ius puniendi* by the public authorities: the principle that punishment should only be applied to the offender, which complements the principle of culpability, whose first and most important manifestation is that only the perpetrator can be charged in respect of unlawful conduct. That principle, like all the safeguards derived from criminal law, requires great caution […], when it comes to imposing penalties or making compensation for unlawful conduct, a system of objective responsibility, or strict responsibility, is unacceptable"[34].

2.4. *Mitior lex* principle

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*[35].

The *mitior lex* principle is provided for in international and EU instruments. Art. 15 of the International Covenant on Civil and

---

[32] Case C-308/06 *The Queen*, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport [2008] ECR I-04057 par.77.

[33] André Klip, European Criminal Law, an Integrative Approach, *supra*, p. 189.

[34] Opinion of Advocate General Ruiz-Jarabo Colomer of 11 February 2003, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 *Aalborg Portland and Others v Commission*, [2004] ECR I-123, par.63-64.

[35] *W.A. Schabas*, Lex mitior (*http://humanrightsdoctorate.blogspot.ro/2010/08/lex-mitior.html*).

Political Rights, adopted by the General Assembly of the United Nations in Resolution 2200 A (XXI) of the 16th of December 1966, which entered into force on the 23rd of March 1976, is worded basically in the same terms as Art. 49(1) of the EU Charter of Fundamental Rights.

According to Art. 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 ECtHR. 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 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 [see, *inter alia*, Case C-112/00 *Schmidberger* (2003) ECR I-5659, para. 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, para. 65 and the case-law there cited[. […] 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"[36].

Initially, the ECtHR had decided that unlike Art. 15 § 1 *in fine* of the United Nations Covenant on Civil and Political Rights, Art. 7 of the Convention did not guarantee the right to a more lenient penalty provided for in a law subsequent to the offence[37]. However, in 2009, the ECtHR reconsidered its position, stating that:

"[…] apart from the entry into force of the American Convention on Human Rights, Art. 9 of which guarantees the retrospective effect of a law providing for a more lenient penalty enacted after the commission of the relevant offence […], mention should be made of the proclamation of the European Union's Charter of Fundamental Rights. […] The Court therefore concludes that since the *X v. Germany* decision, a consensus has gradually emerged in Europe and internationally around the view that application of a criminal law providing for a more lenient penalty, even one enacted after the commission of the offence, has become a fundamental principle of criminal law. […] Admittedly, Art. 7 of the Convention does not expressly mention an obligation for Contracting States to grant an accused the benefit of a change in the law subsequent to the commission of the offence. It was precisely on the basis of that argument relating to the wording of the Convention that the Commission rejected the applicant's complaint in the case of *X v. Germany*. However, taking into account the developments mentioned above, the Court cannot regard that argument as decisive. Moreover, it observes that in prohibiting the imposition of «a heavier penalty (...) than the one

---

[36] 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.

[37] See *X v. Germany*, no. 7900/77, Commission decision of 6 March 1978, Decisions and Reports (DR) 13, p. 70-72. That ruling has been repeated by the ECtHR, which has reiterated that Art. 7 does not afford the right of an offender to application of a more favourable criminal law [see *Le Petit v. the United Kingdom* (dec.), no. 35574/97, 5 December 2000, and *Zaprianov v. Bulgaria* (dec.), no. 41171/98, 6 March 2003].

that was applicable at the time the criminal offence was committed», para. 1 *in fine* of Art. 7 does not exclude granting the accused the benefit of a more lenient sentence, prescribed by legislation subsequent to the offence.

In the Court's opinion, it is consistent with the principle of the rule of law, of which Art. 7 forms an essential part, to expect a trial court to apply to each punishable act the penalty which the legislator considers proportionate. Inflicting a heavier penalty for the sole reason that it was prescribed at the time of the commission of the offence would mean applying to the defendant's detriment the rules governing the succession of criminal laws in time. In addition, it would amount to disregarding any legislative change favorable to the accused which might have come in before the conviction and continuing to impose penalties which the State – and the community it represents – now consider excessive. The Court notes that the obligation to apply, from among several criminal laws, the one whose provisions are the most favorable to the accused is a clarification of the rules on the succession of criminal laws, which is in accord with another essential element of Art. 7, namely the foreseeability of penalties.

In the light of the foregoing considerations, the Court takes the view that it is necessary to depart from the case-law established by the Commission in the case of *X v. Germany* and affirm that Art. 7 § 1 of the Convention guarantees not only the principle of non-retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law. That principle is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favorable to the defendant"[38].

[38] ECtHR, *Scoppola v. Italy*, 17 September 2009, §§ 103 to 109.

§3. Procedural Criminal Law principles

It is very difficult to distinguish between procedural criminal law principles and to establish clear boundaries, as each principle is closely linked with the others. This is why some of the guarantees offered by one of these principles can be also found in another (according to legislation or case law). I decided to group the procedural criminal law principles as they are mentioned in the Charter of Fundamental Rights of the European Union.

3.1. The presumption of innocence principle and the right of defense

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. Art. 6(3) of the Treaty on the 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 *"presumption of innocence"* is mentioned in Art. 6(2) of ECHR (the right to a fair trial):

"Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law" and art. 48 CFREU (the presumption of innocence and the right of defense):

"1. Everyone who has been charged shall be presumed innocent until proven guilty according to law.

2. Respect for the rights of the defense of anyone who has been charged shall be guaranteed".

Guidance is found in the case-law of the ECtHR as to what constitutes the presumption of innocence. It can only benefit a person who is "subject to a criminal charge"[39]. The accused must

[39] ECtHR, *X v. FRG* no. 4483/70 - application held inadmissible.

be treated as not having committed any offence until the State, through the prosecuting authorities, adduces sufficient evidence to satisfy an independent and impartial tribunal that he/she is guilty. The presumption of innocence "requires […] that members of a court should not start with the preconceived idea that the accused has committed the offence charged"[40]. There should be no judicial pronouncement of his/her guilt prior to a finding of guilt by a court. He/she should not be detained in pre-trial custody unless there are overriding reasons. If he/she is detained in pre-trial custody, he/she should benefit from detention conditions consistent with his/her presumed innocence. The burden of proving his/her guilt is on the State and any doubt should benefit the accused. He/she should be able to refuse to answer questions. He/she should generally not be expected to provide self-incriminating evidence. He/she should not have his/her property confiscated without due process[41].

The right of defense 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 disclosure), the right to review of decisions and/or appeal proceedings, specific guarantees covering detention, either pre or post-sentence[42].

To enhance the right of defense, harmonization of at least some fundamental aspects of a criminal trial, starting with the ECtHR and ECtHR case law as the common lowest denominator was decided at the EU level. Hence, an ambitious roadmap for procedural rights in criminal trials has been established in the

[40] ECtHR, *Barberà, Messegué and Jabardo v. Spain*, A146 (1989) para 77.

[41] Green Paper on the Pressumption of Innocence, COM (2006) 174 final.

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

EU[43]. It included measures related to translation and interpretation[44], information on rights and information about charges[45], the right to legal advice and legal aid[46], the right to communication with relatives, employers and consular

[43] 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.

[44] According to this, the suspected or accused person must be able to understand what is happening and to make him/herself understood. A suspected or accused person who does not speak or understand the language that is used in the proceedings will need an interpreter and translation of essential procedural documents. Particular attention should also be paid to the needs of suspected or accused persons with hearing impediments. This measure was already adopted at EU level (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).

[45] A person that is suspected or accused of a crime should get information on his/her basic rights orally or, where appropriate, in writing, e.g. by way of a Letter of Rights. Furthermore, that person should also receive information promptly about the nature and cause of the accusation against him or her. A person who has been charged should be entitled, at the appropriate time, to the information necessary for the preparation of his or her defence, it being understood that this should not prejudice the due course of the criminal proceedings. This measure has also been adopted at EU level (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.)

[46] The right to legal advice (through a legal counsel) for the suspected or accused person in criminal proceedings at the earliest appropriate stage of such proceedings is fundamental in order to safeguard the fairness of the proceedings; the right to legal aid should ensure effective access to the aforementioned right to legal advice. 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.

authorities[47], and special safeguards for suspects or accused persons who are vulnerable[48].

3.2. The right to an effective remedy and the right to a fair trial

According to Art. 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 principle is required by the notion of respect of effective rights of individuals

[47] A suspected or accused person who is deprived of his or her liberty shall be promptly informed of the right to have at least one person, such as a relative or employer, informed of the deprivation of liberty, it being understood that this should not prejudice the due course of the criminal proceedings. In addition, a suspected or accused person who is deprived of his or her liberty in a State other than his or her own shall be informed of the right to have the competent consular authorities informed of the deprivation of liberty.

[48] In order to safeguard the fairness of the proceedings, it is important that special attention is shown to suspected or accused persons who cannot understand or follow the content or the meaning of the proceedings, owing, for example, to their age, mental or physical condition.

and constitutes an essential aspect of democratic accountability[49]. The ECJ has attributed special importance to the principle guaranteed by Art. 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 Art. 47 guarantees the right to 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].

---

[49] *L. Cariolou*, Commentary of Art. 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] *L. Cariolou*, Commentary of Art. 47 of the Charter of Fundamental Rights of the European Union, *supra*, p. 367.

§4. Judicial cooperation in criminal matters principles

4.1. Mutual recognition and mutual trust principles

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.

The 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 in 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 fundamental rights.

The Programme of Measures to Implement the Principle of Mutual Recognition[56] indicated areas in which European legislation to implement mutual recognition was desirable. It was "designed to strengthen cooperation between Members States but

---

[54] *A. 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), no. 3, p. 114.

[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 and Commission's Programme of Measures - OJ. C 12, 15.1.01

also to enhance the protection of individual rights". Mutual recognition depends on mutual trust.

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[57], and continuing with the improved cooperation in the field of recognition of custodial and non-custodial sentences and transfer of convicted persons[58].

Mutual recognition is a guiding principle in the field of judicial cooperation, but it is not the only principle governing this field. Several other principles were taken into account when analyzing the legislation and its practical implementation in the Member States. In the case law of the ECJ, particular attention was also given to specialty, as well as the *ne bis in idem* principle and to compliance of the legislation in this field with these principles.

4.2. The specialty principle

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.

---

[57] 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.

[58] 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.

In this context, several cases were brought before the ECJ asking to establish the notion of offence committed prior to his/her surrender *(i),* what is to be understood by executing Member State, in proceedings involving several subsequent surrenders *(ii)*, and what judicial remedies are required according to EU law against the decision of the executing Member State to surrender the offender.

The same offence. In a case brought before the ECJ, the indictment in the requesting Member State relates to the importation of hashish, whereas the European Arrest Warrant which gave rise to surrender by the executing Member State referred to the importation of amphetamines[59].

By its question, the referring court asks, essentially, what the decisive criteria are which would enable it to determine whether the person surrendered is being prosecuted for an "offence other" than that for which he/she was surrendered within the meaning of Art. 27(2) of the Framework Decision on the European Arrest Warrant, making it necessary to apply the consent procedure laid down in Art. 27(3) (g) and 27(4)[60].

The ECJ answered that in order to decide on the surrender of the person requested for the purposes of prosecution of an offence defined by the national law applicable in the issuing Member State, the judicial authority of the executing Member State, acting on the basis of Art. 2 of the Framework Decision, will examine the description of the offence in the European arrest warrant. That description must contain information on the nature and legal classification of the offence, a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person and the prescribed scale of penalties for the offence. The surrender request is based on information which reflects the state of investigations at the time of issue of the European arrest warrant. It is therefore possible that, in the course of the proceedings, the

[59] Case C-388/08 *PPU Leymann and Pustovarov* [2008] ECR I-8983.

[60] 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.

description of the offence no longer corresponds in all respects to the original description. The evidence which has been gathered can lead to a clarification or even a modification of the constituent elements of the offence which initially justified the issue of the European arrest warrant.

In order to assess, in the light of the consent requirement, whether it is possible to infer from a procedural document an "offence other" than that referred to in the European arrest warrant, the description of the offence in the European arrest warrant must be compared with that in the latter procedural document. To require the consent of the executing Member State for every modification of the description of the offence would go beyond what is implied by the specialty rule and would interfere with the objective of speeding up and simplifying judicial cooperation of the kind referred to in the Framework Decision between the Member States.

In order to establish whether what is at issue is an "offence other" than that for which the person was surrendered, it is necessary to ascertain whether the constituent elements of the offence, according to the legal description given by the issuing State, are those for which the person was surrendered and whether there is a sufficient correspondence between the information given in the arrest warrant and that contained in the later procedural document.

Modifications concerning the time or place of the offence are allowed, in so far as they derive from evidence gathered in the course of the proceedings conducted in the issuing State concerning the conduct described in the arrest warrant and they do not alter the nature of the offence and do not lead to grounds for non-execution under Art. 3 and 4 of the Framework Decision[61].

Consent in subsequent procedures. In subsequent surrenders based on different European arrest warrants, according to Art. 28(4) of the Framework Decision 2002/584/JHA, "[…] a person who has been surrendered pursuant to a European arrest warrant shall not be extradited to a third State without the consent

[61] *Leymann and Pustovarov*, *supra*, para. 41-59.

of the competent authority of the Member State which surrendered the person".

Such a case appeared recently, giving rise to a question for the State required to give its consent in subsequent procedures[62]. In this case, a person was the subject of three successive European arrest warrants, basically for thefts carried out by him at the university libraries from three different Member States. After being surrendered successively from the first State to the second and from the second to the third, the problem appeared in executing the last European arrest warrant and surrendering the requested person from the third to the fourth state. In order to comply with the specialty principle, the executing Member State was required to obtain the consent of the competent Member State which previously surrendered the person. In this particular case, there were two previous surrenders, thus two Member States involved in obtaining the required consent. The question was if the consent should have been given by the first Member State, which initially surrendered the requested person, by the second Member State, which surrendered the requested person to the (now) executing Member State, or by both Member States.

The rule laid down in Art. 28(2) of that Framework Decision confers on the requested person the right not to be surrendered to a Member State other than the executing Member State for the purposes of conducting a criminal prosecution or executing a custodial sentence for an offence committed prior to his/her surrender to the issuing Member State. The requirement of consent of the Member State of execution pursuant to Art. 28(2) of the Framework Decision is not a question of national law. The sound functioning of the system established by the Framework Decision requires in that regard a uniform interpretation.

The ECJ decided that with regard to the objective pursued by the Framework Decision, it must be pointed out that it seeks, inter alia, to facilitate and accelerate judicial cooperation. In a case such as that in the main proceedings, to require for consent to be given by both the first and second executing Member States, could

[62] Case C-192/12 PPU, *Melvin West*, nyr.

undermine the attainment of the objective pursued by the Framework Decision of accelerating and simplifying judicial cooperation between the Member States. The requirement to obtain the consent of several Member States can complicate and slow down the execution of a European arrest warrant because the obligation to obtain the consent of a number of Member States for the purposes of carrying out a subsequent surrender of the person convicted or suspected may cause those Member States to send multiple requests for supplementary information and, in any case, increase the possibility of divergent decisions both between the Member States whose consent is required under Art. 28(2) of that Framework Decision and between them and the Member State responsible for the execution of that European arrest warrant. That applies all the more since the underlying logic of that interpretation would clearly have the consequence that every Member State executing a European arrest warrant in respect of a certain person would have to give its consent in the case of his/her subsequent surrender[63].

It follows from the above that the interpretation according to which the concept of "executing Member State" refers only to the Member State which carried out the last surrender of the person concerned, reinforcing the system of surrender established by the Framework Decision for the good of the area of freedom, security and justice, in accordance with the mutual confidence which must exist between the Member States. By limiting the situations in which the executing judicial authorities of the Member States involved in the successive surrenders of the same person may refuse to consent to the execution of a European arrest warrant, such an interpretation only facilitates the surrender of requested persons, in accordance with the principle of mutual recognition set out in Art. 1(2) of the Framework Decision, which constitutes the essential rule introduced by that decision[64].

---

[63] West, *supra*, para. 53, 56, 58.
[64] Idem, para. 62.

Judicial remedies against a decision of the executing Member State. The reference has been made in proceedings in connection with an appeal brought by the requested person against the judgment of the competent authority from the executing Member State consenting to an application for extension of surrender, made by the judicial authorities of the issuing Member State, for an offence committed before his/her surrender other than that which was the basis of the original European arrest warrant issued against him/her[65].

As regards the possibility of bringing an appeal with suspensive effect against a decision to execute a European arrest warrant or a decision giving consent to an extension of the warrant or to an onward surrender, it is clear that the Framework Decision makes no express provision for such a possibility. However, that absence of express provision does not mean that the Framework Decision prevents the Member States from providing for such an appeal or requires them to do so. In the first place, the Framework Decision itself ensures that decisions relating to European arrest warrants are attended by all the guarantees appropriate for decisions of such a kind[66].

The ECJ stated that the surrender decision is not to have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Art. 6 TEU, an obligation which concerns all the Member States, in particular both the issuing and the executing Member States. Moreover, while corresponding to the objective of facilitating and accelerating judicial cooperation with a view to contributing to the objective set for the European Union to become an area of freedom, security and justice, the Framework Decision itself, as stated in the first paragraph of recital 12 in its preamble, also respects fundamental rights and observes the principles recognized by Art. 6 EU and reflected in the Charter, in particular Chapter VI, as regards the person for whom a European arrest warrant has been issued. On this point, it must be noted that, as in extradition procedures, in the

[65] Case C-168/13 PPU, *Jeremy F.*, nyr.
[66] Idem, para. 37-39.

surrender procedure established by the Framework Decision, the right to an effective remedy, set out in Art. 13 of the Convention and Art. 47 of the Charter, which is at issue in the main proceedings, is of special importance[67].

The ECJ concluded that EU law must be interpreted as not precluding Member States from providing for an appeal suspending execution of the decision of the judicial authority which rules on giving consent either to the prosecution, sentencing or detention with a view to the carrying out of a custodial sentence or detention order of a person for an offence committed prior to his/her surrender pursuant to a European arrest warrant, other than that for which he/she was surrendered, or to the surrender of a person to a Member State other than the executing Member State, pursuant to a European arrest warrant issued for an offence committed prior to his/her surrender[68].

4.3. The *"ne bis in idem"* principle[69]

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.

In EU law, the principle is drafted in Art. 50 of the Charter of Fundamental Rights of the European Union[70], and also in Art. 54 of the Convention Implementing the Schengen Agreement[71].

---

[67] Idem, para. 40-42.

[68] Idem, para. 52.

[69] This section is developed on the basis of a previous article, Norel Neagu, The "ne bis in idem" Principle in the Interpretation of European Courts: Towards Uniform Interpretation, 4 Leiden Journal of International Law (2012) 955-977.

[70] According to Art. 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.'

The *"ne bis in idem"* principle raises a lot of questions as regards judicial co-operation in criminal matters in the European Union. Some of them have been solved in the case law of the ECJ. Some of these questions will be addressed in the following lines, especially those related to the concept of criminal proceedings, the notion of final judgment, the same act problem and the enforcement issue.

The concept of "criminal proceedings". As a general rule, the *"ne bis in idem"* principle applies mainly in criminal proceedings. This means that parallel or subsequent administrative or civil proceedings regarding the same acts are not prohibited. However, at the international level, there are different views of what is to be understood by "criminal proceedings" and by their scope. Each sovereign state applies its own interpretation of this notion, according to national legislation. This is why there is a tendency in international courts' case-law, especially at the European level, to extend the notion of "criminal proceedings" to other proceedings having similar effect.

In the case-law of the ECtHR, the legal characterization of the procedure under national law does not constitute the only relevant criterion for the applicability of the *"ne bis in idem"* principle. Leaving the application of this provision at the discretion of the Contracting States might lead to results incompatible with the object and purpose of the Convention[72]. The Court interpreted the notion of "penal procedure" in the context of Art. 4 of Protocol No. 7 in the light of the general principles concerning the corresponding words "criminal charge" and "penalty" in Art. 6 and 7 of the Convention

---

[71] Art. 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."

[72] See, most recently, *Storbråten v Norway*, Decision of 1 February 2007, [2008] ECtHR, with further references.

respectively[73]. Thus, the concept of a "criminal charge" bears an "autonomous" meaning, independent of the categorizations employed by the national legal systems of the Member States[74].

The Court's established case-law set out three criteria – commonly known as the "*Engel* criteria"[75] – to be considered in determining whether or not there was a "criminal charge". The first one is the legal classification of the offence under national law, the second is the nature of the offence and the third is the degree of severity of the penalty that the person concerned risks incurring. The first criterion is of relative weight and serves only as a starting point. If domestic law classifies an offence as criminal, then this will be decisive. Otherwise, the Court will look behind the national classification and examine the substantive reality of the procedure in question.

In evaluating the second criterion, which is considered more important[76], the following factors can be taken into consideration: *(i)* whether the legal rule in question is addressed exclusively to a specific group or is of a generally binding character[77]; *(ii)* whether

---

[73] See *Haarvig v Norway*, Decision of 11 December 2007, [2008] ECtHR; *Rosenquist v Sweden*, Decision of 14 September 2004, [2005] ECtHR; *Manasson v Sweden*, Decision of 8 April 2003, [2004] ECtHR; Göktan v France Decision of 2 July 2002, [2003] ECtHR; *Malige v France*, Decision of 23 September 1998, [1999] ECtHR; *Nilsson v Sweden*, Decision of 13 December 2005, [2006] ECtHR.

[74] The concept of "charge" has to be understood within the meaning of the Convention. It may thus be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", a definition that also corresponds to the test whether "the situation of the [suspect] has been substantially affected" (See, for example, *Deweer v Belgium*, Decision of 27 February 1980, [1981] ECtHR para. 42 and 46, and *Eckle v Germany*, Decision of 15 July 1982, [1983] ECtHR para. 73).

[75] See *Engel and Others v. the Netherlands*, Decision of 8 June 1976, [1977] ECtHR.

[76] See *Jussila v Finland*, Decision of 23 November 2006, [2007] ECtHR, para. 38.

[77] See, for example, *Bendenoun v France*, Decision of 24 February 1994, [1995] ECtHR, para. 47.

the proceedings are instituted by a public body with statutory powers of enforcement[78]; *(iii)* whether the legal rule has a punitive or deterrent purpose[79]; *(iv)* whether the imposition of any penalty is dependent upon a finding of guilt[80]; *(v)* how comparable procedures are classified in other Council of Europe Member states[81]. The fact that an offence does not give rise to a criminal record may be relevant, but it is not decisive, since it is usually a reflection of the domestic classification[82].

The third criterion is determined by reference to the maximum potential penalty which the relevant law provides for[83]. The second and third criteria are alternative and not necessarily cumulative. This, however, does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge[84].

Thus, in the Court's interpretation, an administrative penalty under national law can fulfill at least one of the criteria mentioned above and qualify as a criminal penalty, falling, as a consequence, under the scope of the *"ne bis in idem"* principle.

After a period of refusal of applying the "*Engel* criteria" in its case law, the ECJ has recently relied upon them to solve the issue of (potentially) previous criminal proceedings[85].

---

[78] See *Benham v the United Kingdom*, Decision of 10 June 1996, [1997] ECtHR, para. 56.

[79] See *Bendenoun v France* case, *supra*, para. 47.

[80] See *Benham v the United Kingdom*, *supra*, para. 56.

[81] See *Öztürk v Germany*, Decision of 21 February 1984, [1985] ECtHR, para. 53.

[82] See, for example, *Ravnsborg v Sweden*, Decision of 23 March 1994, [1995] ECtHR, para. 38.

[83] See *Campbell and Fell v the United Kingdom*, Decision of 28 June 1984, [1985] ECtHR, para. 72; *Demicoli v Malta*, Decision of 27 August 1991, [1992] ECtHR, para. 34.

[84] See *Jussila v Finland* case, *supra*, and *Ezeh and Connors v the United Kingdom*, Decision of 15 July 2002, [2003] ECtHR.

[85] Case C-489/10, *Bonda*, ECJ Decision from 5 July 2012, nyr, par. 37, Case C-617/10, *Fransson*, ECJ Decision from 26 February 2013, nyr, par 35.

The notion of "final judgment". There is a common agreement in national and international instruments that the *"ne bis in idem"* principle applies in respect of final judgments. That is, the principle can be invoked insofar as a final decision has been issued and a further prosecution for the same offence/conduct/act is foreseeable.

An extended interpretation of the "final judgment" criterion is to be found in the case-law of the Court of Justice of The European Union, not only in judgments addressing the merits of the case, but also in judgments delivered on procedural matters (for example, lack of evidence, limitation period, pardon etc.).

The Court held in *Gozutok and Brugge*[86] that the condition of the case being "finally disposed of" for the purpose of Art. 54 of the CISA is met if proceedings are discontinued by the Public Prosecutor without involvement of the Court following a settlement with the accused. This constitutes an extension of the strict interpretation of the principle from *decisions taken by a court* [emphasis added] to *all forms of judicial decisions* [emphasis added] taken by an authority required to play a part in the administration of criminal justice in the concerned national legal system.

On the contrary, in *Miraglia*[87] the Court stated that this condition is not fulfilled when proceedings are discontinued because of parallel proceedings instituted in another Member State.

The Court ruled in favour of the extension of the *ne bis in idem* principle in *Gasparini*[88], stating that the *ne bis in idem* principle applies in the case of a final acquittal because prosecution of the offence is time-barred. The Court avoided by this provision the danger of forum shopping for the conviction of the defendants and applied for the first time the principle *even if there was no assessment of the merits of the case* [emphasis added]. Also, in *Gasparini,* the Court ruled that the *ne bis in idem* principle falls to be applied in respect of a decision of the judicial authorities of a Contracting State by which the accused is finally acquitted for lack

[86] Joined Cases C-187/01 and C-385/01, *Hüseyn Gözütok and Klaus Brügge*, [2003] ECR I-1345.

[87] Case C-469/03, *Filomeno Mario Miraglia*, [2005] ECR I-2009.

[88] Case C-467/04, *Gasparini and Others*, [2006] ECR I-9199.

of evidence. The Court argued that not to apply that article to a final decision acquitting the defendant for lack of evidence would have the effect of jeopardizing exercise of the right to freedom of movement[89]. Another problem addressed in *Gasparini* is whether the *ne bis in idem* principle also applies to persons other than those whose trial has been finally disposed of in a Contracting State[90] (accessories to the crime). The Court's answer was negative, stating that in this case the condition of the case being "finally disposed of" for these persons is not met.

The scope of this decision is somewhat limited in *Turansky*[91]. The Court held that in order to be considered as a final disposal for the purposes of Art. 54 of the CISA, a decision must bring the criminal proceedings to an end and *definitively bar* [emphasis added] further prosecution. A decision which does not definitively bar further prosecution at national level under the law of the first Contracting State which instituted criminal proceedings against a person cannot, in principle, constitute a procedural obstacle to the opening or continuation of criminal proceedings in respect of the same acts against that person in another Contracting State. As a conclusion, if the national legislation provides that a case can be reopened if new evidence is found after the acquittal of the accused for lack of evidence, the acquittal decision is not "final".

The same offence/conduct/act: the core problem of the *"ne bis in idem"* principle. One of the most disputed element and the core problem of the "*ne bis in idem"* principle is the "idem" element. Does it refer to the legal classification of the offence or the conduct of the offender? The ECJ case law seems to favour the latter approach.

Initially, the Court of Justice of the European Union addressed the issue of the *"ne bis in idem"* principle in competition law, as a "fundamental principle of EC law", requiring a "threefold

[89] See, to this effect, Case C-436/04, *Léopold Henri van Esbroeck*, [2006] ECR I-2333, para. 34.

[90] *Gasparini* case, *supra*, para. 27-37.

[91] Case C-491/07, *Vladimir Turanský*, [2008] ECR I-11039.

condition": "identity of the facts, unity of offender and unity of the legal interest protected" before that principle is applicable[92].

When addressing the principle in respect of Art. 54 of the CISA, the Court removed the additional criterion used in competition law[93] (the unity of the legal interest protected) and switched to the "same act" test, establishing also the criteria for determining if the conduct of the offender constitutes the same act prohibited by the *"ne bis in idem"* principle.

In *Van Esbroeck*, the Court chose to interpret *"ne bis in idem"* more broadly than it had previously in that area of EC law. According to the Court, the "only relevant criterion" for the purposes of Art. 54 of the CISA is that there should be an *"identity of the material facts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together in time, in space and by their object"*"[94] [emphasis added].

The Court also stated that the relevant national authorities, which have to determine whether there is identity of material facts, must confine themselves to examining whether they constitute a set of facts inextricably linked together.

The notion of "enforced penalty". There are two options once the penalty imposed on the convicted person has been enforced or is in the process to be enforced in a certain jurisdiction. The first one is to take into account the first judgment as an impediment to further prosecution (*Elrledigungsprinzip*). The second one is to take into account the penalty previously imposed in the new trial and deduct it from the new penalty (*Anrechnungsprinzip – ne bis poena in idem*). There is no consensus on deciding which of the two solutions should apply. It is clear that in the same jurisdiction the *Elrledigungsprinzip*

---

[92] Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00, *Aalborg Portland and Others v Commission*, [2004] ECR I-123, para. 338.

[93] *Van Esbroeck* case, *supra*, para. 42.

[94] *Van Esbroeck* case, *supra*, para. 36-38. It is perhaps unfortunate that the neither the Court nor the Advocate General appear to have considered Aalborg Portland and Others in their examination of Van Esbroeck.

should apply. But in the international environment, where there is no harmonization of legislation, it is hard to impose to one particular jurisdiction to take into account and recognize automatically the solution given in another jurisdiction, whether national or international.

As regards the interpretation of the notion of "enforced penalty", this seems to be a neglected issue, since all jurisdictions apparently adopt a conservative approach and leave the solution to the national jurisdiction. The solution of national definition in respect to enforcing criminal penalties raises the same problems as the national "criminal proceedings" solution.

As a general rule, there should be a bar to further prosecution if there is a previous final judgment followed by an enforced penalty, in cases where the final judgment ends with a conviction of the accused.

In its case law, the ECJ held that once the accused has complied with his/her obligations, the penalty entailed in the procedure whereby further prosecution is barred must be regarded as having been "enforced" for the purposes of Art. 54. This decision was taken by the Court in Case *Gözütok and Brügge*, following a discontinuance of criminal proceedings brought in a Member State by the Public Prosecutor, imposing a fine and without the involvement of a court[95].

Further clarification upon the concept of "enforcement" was given by the Court in *Kretzinger*.

The Court stated that the penalty had been "enforced" or "was actually in the process of being enforced" when the defendant was sentenced to a term of imprisonment the execution of which has been accompanied by a suspension, in accordance with the law of that Contracting State[96]. However, this condition is not fulfilled if the accused was briefly taken into custody and/or remand and when, according to the law of the state of conviction, that deprivation of liberty shall be charged against subsequent enforcement of imprisonment.

---

[95] *Gözütok and Brügge* case, *supra*, para. 48.

[96] Case C-288/05, *Jürgen Kretzinger*, [2007] ECR I-6641, para. 44-66.

Also in *Kretzinger*, the Court answered to the referring court essentially asking whether, and to what extent, the provisions of the Framework Decision on the European arrest warrant have an effect on the interpretation of the notion of "enforcement" within the meaning of Art. 54 of the CISA. The Court concluded that the fact that a Member State in which a person has been convicted by a final judgment of conviction in domestic law can issue a European arrest warrant designed to arrest that person to carry out this trial under the Framework Decision should not affect the interpretation of the concept of "enforcement". In the same spirit, the option open to a Member State to issue a European arrest warrant does not affect the interpretation of the concept of "enforcement", even if the judgment relied upon in support of a possible European arrest warrant has been given *in absentia*.

The actual wording of the *ne bis in idem* principle, apart from the existence of a final and binding conviction in respect of the same acts, expressly requires the enforcement condition to be satisfied. That enforcement condition could not, by definition, be satisfied where a European arrest warrant were to be issued after trial and conviction in a first Member State precisely in order to ensure the execution of a custodial sentence which had not yet been enforced within the meaning of Art. 54 of the CISA. That is confirmed by the Framework Decision itself which, in Art. 3(2), requires the Member State addressed to refuse to execute a European arrest warrant if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts and that, where there has been sentence, the enforcement condition has been satisfied. The Court's conclusion is, in other words, that an option of a Member State to enforce a penalty by issuing a European arrest warrant[97] cannot affect the meaning of "enforcement".

The Court stated in *Bourquain* that the condition regarding enforcement is satisfied when, at the time when the second criminal proceedings were instituted, the penalty imposed in that

[97] The State may decide to issue an EAW for the enforcement of the penalty or may renounce to the enforcement of the penalty.

first State can no longer be enforced even if enforcement of the penalty given *in absentia* is conditional on a further conviction pronounced in the presence of the accused[98].

§5. Conclusion

A set of principles is established in EU legislation and case law, both in substantial criminal law and criminal procedure, guaranteeing that the objective set out at the EU level, of establishing an area of freedom, security and justice, can be achieved through implementing EU law in the setting of these principles. However, further harmonization is needed in the field of criminal offences giving rise to a European arrest warrant in order to fully comply with the principles of legality, equality and non-discrimination. Mutual recognition and mutual trust may establish a functional system, but these principles cannot prevent inequities in specific cases, due to lack of harmonization at the EU level. The current trend of establishing minimum thresholds and guarantees in criminal procedure at the EU level is encouraging, but attention should be also given to limiting EU intervention in criminal law at what is necessary to achieve EU interests, in full observance of the principles of conferral of powers, subsidiarity and proportionality, aspects which are going to be addressed in the next chapter.

[98] Case C-297/07, *Klaus Bourquain*, [2008] ECR I-2245, para. 48.

Bibliography

Atti, A., 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), no. 3

Cariolou, L., Commentary of Article 47 of the Charter of Fundamental Rights of the European Union, EU Network of Independent Experts on Fundamental Rights (June 2006)

Fennelly, N., The European Arrest Warrant: Recent Developments, ERA-Forum: scripta iuris europaei (2007), vol. 8, n. 4

Fletcher, M., Loof, R., Gilmore, B., EU Criminal Law and Justice, Edward Elgar Publishing Limited (2008)

Klip, A., European Criminal Law, an Integrative Approach, Intersentia, Antwerp-Oxford-Portland, 2009

Manacorda, S., L'exception a la double incrimination dans le mandate d'arrêt européen et le principe légalité, Cahiers de droit européen (2007), vol.43, no.1/2

Manifesto on the EU criminal policy (2009) (*http://www.crimpol.eu*)

Mitsilegas, V., EU Criminal Law, Hart Publishing (2009)

Schabas, W.A., Lex mitior (*http://humanrightsdoctorate.blogspot.ro/2010/08/lex-mitior.html*)

Streteanu, F., Drept penal, partea generală, Editura Rosetti, Bucureşti, 2003

van Bockel, B., The Ne Bis in Idem Principle in EU Law, Kluwer Law International (2010)

Chapter II
Criteria for criminalizing conduct in the European Union Law

Norel Neagu*

§1. Introduction

There has been a long debate over the years in literature on necessity and criteria for criminalizing conduct. Who is going to decide whether certain behaviours should be considered a criminal offence, when this decision should be taken and what is the motivation behind it?

At the national level, several theories were put forward to justify recourse to criminal law instruments in regulating human conduct in society. In time, supranational organizations have received competence in adopting and/or applying criminal law instruments. The question is whether theories enacted for justifying criminal law measures at national level are also valid at international or supranational level. The European Union has a specific construction at the international level, being, at this point, more than an international organization, but less than a federal state[1].

---

* Researcher, Centre for Legal, Economic and Socio-Administrative Studies, "Nicolae Titulescu" University, Bucharest, Romania.

[1] For a comprehensive analysis of opinions on the European Union's legal nature, see *U. Everling*, "The European Union between Community and National Policies", in *A. von Bogdandy, J. Bast* (Eds) Principles of European Constitutional Law (Hart Publishing, 2006), p. 717-725. The author considers that "the Union can be understood as a federally constituted compound system of states and citizens, in which the Constitutions of the states are increasingly Europeanised and the decision makers on all

But is there a need for a European Criminal Law Policy at this moment?

Increasing legislative activity in the field of substantive criminal law at EU level (several Framework Decisions and Directives in the last 10 years) necessarily requires a coherent approach to criminal law. The legislative activity is already consistent in this field and bolder plans are made for the future, both in the field of substantive criminal law and criminal procedure. Neglect of a coherent approach to criminal law may have negative impact at the EU level, which is necessarily transferred at national level through implementation measures.

The main goal of the following study is to trigger attention towards a need for analyzing criteria and limits to criminalizing conduct within the European Union. The analysis will focus firstly on theories in literature in respect to criminalizing conduct, which are likely to, or were taken in consideration at the EU level, than on motivation for using criminal law in EU adopted legislation and policy in the field, and finally on reflecting motivation for criminalizing conduct in the criminal law policies of the institutions involved in the legislative process of the European Union: the European Commission (right of initiative in criminal law), the Council and the European Parliament (co-legislators), the European Council (establishing political agreement over main directions to be followed in the EU, including criminal law).

The analyzed theories, criteria and limiting principles are addressing mainly the law maker, but also the European citizens, who should be able to control the legislative process and prevent or correct an eventual abuse of law.

The study will conclude that literature, institutions and bodies are to establish a serious dialogue on the foundations of European Criminal Law, especially criteria for criminalizing conduct, in order to offer a coherent approach in this field at the EU level.

---

levels interweave in a polycentric network, in which reciprocal tensions exist and must constantly be resolved".

§2. Main theories criminalizing conduct in literature

There are several theories regarding criminalizing conduct in literature. The present study focuses on briefly describing the theories which have triggered the interest of the European legislator and their relevance in adopted criminal legislation at European level.

2.1. Harm principle

Leading criminal law philosophers have argued that conduct should only be criminalized when it is fair to do so[2], when further normative reasons can be invoked to justify the use of criminal law as a means for deterring unwanted conduct[3].

A basic principle for criminalization 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"[4].

While "harm to others" is not the only normative reason that can be used to demonstrate that it is fair to criminalize a given act, it is considered to be the justification that has the greatest reach[5].

In labeling conduct as criminal, the legislature is declaring that it is unacceptable for its citizens to engage in the proscribed conduct – this effectively limits choices available to citizens. A responsible legislature should only apply the crime label to conduct that wrongfully harm or offend others[6]. Consequently, it would not be

---

[2] *D.J. Baker*, The Moral Limits of Criminalizing Remote Harms, 11 NEW CRIMINAL LAW REVIEW (2007), 371, *J. Feinberg*, Harm to Others: the Moral Limits of the Criminal Law (OUP 1984).

[3] *D.J. Baker*, The Harm Principle vs Kantian Criteria for Ensuring Fair, Principled and Just Criminalisation, 33 AUSTRALIAN JOURNAL OF LEGAL PHILOSOPHY (2008), 66.

[4] *J.S. Mill*, On Liberty and Other Essays (Oxford University Press 1991, orig.1859), p. 14.

[5] *Baker*, cited *supra*, at 66.

[6] See *Feinberg*, cited *supra*, at 26.

unfair to criminalize activities that wrongfully harm or offend others. If a person wrongfully harms others, he/she gets his/her just deserts when he/she is held criminally responsible.

Harm can be understood in three senses: *(i)* harm as damage, *(ii)* harm as setback to interests, and *(iii)* harm as wrongdoing. Harm as used in the harm principle is an amalgamation of senses two and three. Harm must be caused by wrongful conduct to be a candidate for criminalization. Harm occurs under the harm principle when *x*'s interests are setback by the wrongful conduct of *y*[7]. The term "interest", when used in this way, refers to a stake that a person has in his/her well-being. The interests delineated in the harm principle include welfare interests and those security and accumulative interests that cushion our welfare interests: prolonging the continuance of our life for a foreseeable period of time, preserving our physical health and security, maintaining minimum intellectual acuity and emotional stability, being able to engage in social intercourse and to benefit from friendships, sustaining minimum financial security, sustaining reasonable life conditions, avoiding pain and grotesque disfigurement, preventing unjustified anxieties and resentments (intimidation) and to be free from unwarranted coercion[8].

Criminalization is decided from an *ex ante* perspective. Criminalizing conduct from an *ex ante* perspective is possible so long as the conduct poses a real risk of harm or normally results in harm, regardless of whether the particular victim discovered the harm in his/her individual case[9].

The main open question/problem with the harm principle, however, is the lack of proper explanation of what "harm" really is, conceptually and substantively[10]. Does it include indirect, remote or psychological harm? The term "interest" from the definition of harm as a "setback to an interest" should be more precisely configured. Is conduct to be criminalized only if it causes harm, or also in the situation when it is likely to cause harm? What is the scope of

[7] Idem, at 33-34.

[8] Idem, at 37.

[9] *Bake*r, cited *supra*, at 81-82.

[10] *N. Persak*, Criminalising Harmful Conduct. The Harm Principle, its Limits and Continental Counterparts (Springer, 2007), p. 14.

"others"? Does it include only individuals, or also groups of individuals or even the society as a whole?

These questions, however, while remaining important, are not the only factor to be considered in a proposed principled approach to criminalization. Harm is seen as an objective category, being only a good *prima facie* reason for state intervention, but not the only, or a sufficient reason[11]. Harm merely tells us when we may restrain liberty, but not when we are right to do so[12].

Extending the principle to explain all possible situations for criminalizing conduct or every decision to criminalize conduct of the law maker may stretch the principle thin, lead to contradiction, or alter its meaning. If used alone, the principle may remain thus only a theoretical benchmark of no real use, or else an explanation of positive law approach to criminalization, but not a real criterion for limiting overcriminalization.

But if the principle is considered a mere first step in the criminalization process, followed by limiting principles[13], then the burden is shifted towards justifying a legitimate approach to criminalization through thorough analysis of limiting factors and principles.

2.2. "Legal goods" theory

Rechtsgut, or legal good, is one of the foundational concepts underpinning the German criminal law system[14]. The concept of legal good serves several crucial functions, at various levels of

[11] *N. Persak*, Criminalising Harmful Conduct. The Harm Principle, its Limits and Continental Counterparts (Springer, 2007), at 86.

[12] *J. Gray*, Introduction, p. XVIII, XIX, in *J.S. Mill*, On Liberty and Other Essays, Oxford University Press 1991, (originally, 1859).

[13] *Persak*, cited *supra*, at 92. The proposed limiting factors/principles are the rule of law requirements, the principle of ultima ratio and of legality, the financial costs of criminalization and enforcement, the social costs of criminalization, the practical feasibility of enforcement.

[14] Diethelm Kienapfel, Stafrecht: Allgemeiner Teil (de Gruyter, 4th ed., 1984), p. 39.

generality within the criminal law system[15]. Most fundamentally, the concept of "legal good" defines the very scope of criminal law. By common consensus, the function of criminal law is the protection of legal goods and nothing else[16]. Anything that does not qualify as a legal good falls outside the scope of criminal law and may not be criminalized. A criminal statute, in other words, that does not even seek to protect a legal good is *prima facie* illegitimate[17].

Crime is understood as any behaviour that seriously harms the legal goods and thus the basic conditions for coexistence of citizens in society, in a given place and time[18]. Each person must, as part of social interactions, endure threats which a reasonable person would disregard[19].

Legal goods are enumerated in literature[20] and even defined[21]. The legal goods principle founded in the constitutional values

---

[15] *M.D. Dubber*, Theories of Crime and Punishment in German Criminal Law", 53 AMERICAN JOURNAL OF COMPARATIVE LAW (2005), 683.

[16] *A. Kaufmann*, Die Aufgabe Des Strafrechts (Westdeutscher Verlag, 1983), p. 5.

[17] *M.D. Dubber*, cited *supra*, at 684.

[18] *M.A. Vasquez*, Acerca de la teoría de bienes jurídicos, 18 REVISTA PENAL (2006), 5.

[19] *B. Schünemann*, The System of Criminal Wrongs: The Concept of Legal Goods and Victim-based Jurisprudence as a Bridge between the General and Special Parts of the Criminal Code, 7 BUFFALO CRIMINAL LAW REVIEW (2004), 582.

[20] *H.-H. Jescheck, T. Weigend*, Lehrbuch Des Strafrechts: Allgemeiner Teil, (Duncker & Humblot, 5th ed., 1996), p. 6-7. According to the authors, legal goods, or life goods, come in two varieties: elementary life goods, which are indispensible for the coexistence of humans in the community and therefore must be protected by the coercive power of the state thorugh public punishment (e.g. human life, bodily integrity, personal freedom of action and movement, property, wealth, traffic safety, the constitutional order, the public peace, international peace etc.), and also those goods which consist exclusively of deeply rooted ethical convictions of society (e.g. the protection good of the criminal prohibition of cruelty against animals).

[21] *C. Roxin*, Strafrecht: Allgemeiner Teil, vol.I (C.H. Beck, 3rd ed., 1997), p. 15. According to Roxin, legal goods derive from constitutional

establishes limits to criminalization in respect to social values worthy of protection. Thus, the limits imposed amount to protecting legal interests of the individual and other legal interest of first order derived thereto[22].

The theory evolved from protecting individual rights to protecting individual and also supraindividual (collective) rights. The principle of protection of legal goods became the principle of social damage or, put differently, the injury or damage to individual or collective legal goods.

Where criminal law was once, at least in theory, limited to the punishment of individual rights, it now reached the prevention of threats to any good, individual or not, that the state declared worthy of its penal protection. There are limits within which modern criminal law must operate if it is to claim legitimacy, and ultimately obedience, and therefore effectiveness[23].

It is argued in literature that allegedly it is not possible to develop a concept of a legal good, which would bind the simple legislator and serve as the constitutional foundation of the criminal law. Hence, just as it was during the legal-positivist era pre-1933, a legal good is simply seen as an "abbreviation of the purpose" of an individual legal norm. That it is not possible to build a system on top of the individual criminal offences using this limited notion goes without saying[24].

---

principles, and not from some more or less explicit notion of "law" or "good", for only they can limit legislative discretion in a modern democratic state. Legal goods are "conditions or chosen ends, which are useful either to the individual and his free development within the context of an overall social system based on this objective or to the functioning of this system itself".

[22] *Vasquez*, cited *supra*, at 11.

[23] *Dubber*, cited *supra*, at 688, 694.

[24] *Schünemann*, cited *supra*, at 553. The author invoked in support of his assertion, from the almost endless discussion, *H.L Günther*, Das viktimodogmatische Prinzip aus anderer Perspektive: Opferschutz statt Entkriminalisierung", in Festschrift Für Lenckner (1998), p. 69; *G. Stratenwerth*, Zum Begriff des Rechtsgutes, in Festschrift Für Lenckner (1998), p. 377; *H. Koriath*, Zum Streit um den Begriff des Rechtsguts,

Thus, that the principle of the protection of legal goods is a necessary, but not a sufficient, condition for the application of the criminal law. Indeed, one must consider by means of a thorough teleological analysis the suitability, necessity, and proportionality of the measure before the criminal law may be employed[25]. Limits to criminalization should also imply the degree of harmfulness of the conduct against these social values and also the *ultima ratio* principle: there is no other form of adequate reaction of the society against the said harmful conduct. To "deserve" punishment for serious injury against a socially valuable legal good, the harmful conduct must be characterized by creating a social conflict that cannot be solved other than resorting to criminal law. Other proposed limits to criminalization are the test of "suitability" (*idoneidad*, i.e. if the conduct of the individual is susceptible of harming legal goods) and "necessity" of criminal means and the exclusion of conflict with the objectives of other laws[26].

2.3. Economic analysis of law

The "Economic Analysis of Law" aims to explain legal phenomena in an exclusively economic manner: according to "effectiveness". In this view, in any area of law it should always be sought the greatest possible economic effectiveness, by creating legal rules that either enable, remove or modify the existing ones if

---

146 GA [GOLTDAMMER'S ARCHIV FÜR STRAFRECHT] (1999), 561. For views which go even further and practically deny any constitutional limitations on the criminal law, see *O. Lagodny*, Strafrecht Vor Den Schranken Der Grundrechte (Mohr Siebeck, 1996), p. 64, 130, 247, 455; *J. Vogel*, 16 StV [STRAFVERTEIDIGER] (1996), 110; Detlev Steinberg-Lieben, Die Objektiven Schranken Der Einwilligung Im Strafrecht (1997), p. 508-509; *I. Appel*, Verfassung Und Strafe (Duncker & Humblot, 1998) (following in the footsteps of Lagodny); for further references, see *K. Lackner, K. Kühl*, Strafgesetzbuch, (C.H. Beck, 24th ed. 2001), vor § 13, p. 4, and for recent comprehensive discussion, Die Rechtsgutstheorie (Roland Hefendehl et al. eds., 2003).

[25] *Schünemann*, cited *supra*, at 559.

[26] *Vasquez*, cited *supra*, at 11.

they were opposed to the appearance or the maintenance of such effectiveness. Previously, of course, you have to define the concept of "[economic] effectiveness" and take a "human model" useful for analyzing behaviours of people in the society[27]. "Efficiency allocation" (i.e. the best possible allocation of resources operation), according to the usual criterion called "Kaldor-Hicks", would occur when a group of people obtain an economic benefit in such manner that, besides compensating the losing side, there is still a remnant of profit. As individuals, they, in their social interactions, will always lead a rational, thoughtful life, looking for a (economic) profit for themselves[28].

The same criteria also work in criminal law. According to the economic analysis of law, an individual committing a crime would always try to "maximize his own economic benefit" (the "*Homo economicus*"). Then, the offence would constitute an option among many: only when the crime results more profitable, the offender shall decide this option, although this will lead to an inefficient society. The criminal policy should be aimed at realizing the literally thought summed up in the colloquial expression that "crime does not pay"[29].

This theory is dispensing altogether with any other concept or principle prior than the guiding criterion of (economic) "effectiveness". The penalty will then touch on the "motivation" of the subject in the pure sense of "intimidation" to raise the "cost" of crime against the "benefits" that the offender believes will obtain. Variables would range from an increase in the chances of detection and prosecution of crimes to increase of sanctions (imprisonment, fines) and other measures of the largest variety[30] (forfeiture of profits, measures against legal persons etc.).

As a critical analysis of this theory, it should be pointed out that the economic model of a rational behaviour does not work to

---

[27] *M.A. Vasquez*, Derecho Penal Económico. Consideraciones Jurídicas Y Económicas (Pie Imprenta: Lima: Idemsa 1997), p. 45.

[28] *Vasquez*, cited *supra*, at 31.

[29] *Vasquez*, cited *supra*, at 99.

[30] *Vasquez*, cited *supra*, at 31.

account for the romantic attraction of violence to suicide bombers, street gangs and terrorists. The whole range of modern mass criminality, from the Holocaust to 9/11, is simply beyond the ambit of rational thought. Also the costs-benefits model falls short in respect to criminalizing harmful conduct against persons: we cannot accept the idea that it might be too expensive to prevent crimes such as rape, child abuse or other crimes of violence[31].

2.4. Relevance for further analysis

Two important ideas for the following argumentation in the study may be extracted from the analysis above: the imposed limits to the theories for criminalizing conduct and the similarity between the "'harm" principle and the "legal goods" theory.

All the above mentioned theories for criminalizing conduct were criticized in literature for not offering a holistic approach to criminalization. It is argued that these theories, even when necessary, are not sufficient for the desired goal. Several limiting factors/principles were put forward to correct and offer legitimacy to the criminalization process. It is important to analyze which limiting factors/principles (if they exist at all) are required at the EU level in the legislative process in the field of criminal law.

Also, both continental and common law legal scholars can find roots in two of the above proposed theories: "harm" principle and "legal goods" theory.

In my opinion, both "harm" principle and "legal goods" theory express the same idea, in different words. It is like looking at the same picture, but from different angles. The harm principle talks about harm to others, which is essentially about harm to "legal goods" seen mainly from the perspective of the individual rights (libertarianism), while the "legal goods" principle talks about prevention and protection of social predetermined values from harm, seen both from an individual and from a state oriented perspective. While the two theories can be reconciled at most points, frictions

[31] *G.P. Fletcher*, The Grammar of Criminal Law: American, Comparative and International (Oxford University Press, 2007), p. 60-61.

arise when individual rights and state interests collide and apparently the two theories can reach different results.

It is not for me to say which of these theories covers more ground or is more consistent, as discussion in literature is heated on the subject, supporters of each principle claiming its superiority over others theories on criminalizing conduct, and even between supporters of the same theory appear frictions about its foundation, limits and substantial content.

I would like to emphasize, though, that as a particularity of the European Union, the legal system is blending several principles, theories and approaches both from the common law and the continental system. Even if the "harm" principle is relevant for the common law system, its similarity with the "legal goods" theory will provide sufficient ground for acceptance of the principle in the continental system. Also, as I will show in this study, the EU approach to the "harm" principle in criminalizing conduct is somewhat different to the classical approach described above.

As regards the "Economic analysis of law" theory, I consider it, as will be detailed further in the study, to be a limiting factor to criminalizing conduct in the field of economic policies of the European Union.

§3. Preparatory studies, legislative acts and their impact upon an EU Criminal Law Policy

Several reasons were put forward to justify recourse to criminal law measures at the EU level. In order to be able to perform a structured analysis of these reasons and establish a criminal law policy to fit or encompass one or several of the theories for criminalizing conduct briefly described above, an analysis of the legal basis for adopting criminal law measures at EU level is necessary. This analysis will provide the framework of a principled approach to criminalizing conduct further in the study (Section 5).

Also, an analysis of the preparatory studies and the preamble of the legislative acts adopted in the field of criminal law, will show the actual trends in criminalizing conduct, the existing

misconceptions, as well as gaps or different approaches, and a need for a more coherent and structured criminal law policy at the EU level, as well as their link with the proposed theories briefly described in Section 2.

3.1. Legal basis for drafting instruments in the field of Criminal Law

Legislative action at the EU level is governed by the principle of conferral of powers. This principle is defined in Art. 1(1), 4(1) 5(1) and 5(2) of the TEU[32]. 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 [Art. 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 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 [Art. 5(4) TEU],

"The content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties".

Art. 7 of the TFEU states that the Union shall ensure consistency between its policies and activities, taking all of its objectives

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

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[33].

The shared competence is defined in Art. 2(2) of the 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.

Art. 4(2) (j) of the 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.

To sum up, so far the Union has shared competence with the Member States in the field of criminal law and has respected the general principles of conferral of powers, subsidiarity and proportionality. But there are also two specific competences for criminalizing conduct provided for in the TFEU.

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

[33] Consolidated Version of the Treaty on the Functioning of the European Union, O.J. 2010, C83/47.

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[34]. There are also limits imposed to the 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. Art. 83(2) of the 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 harmonization measure".

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

A complementary legal basis to Art. 83 (2) can be found in Art. 325 (4) of the 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[35]. It is an area of great importance for both EU and

[34] 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.

[35] 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[36].

3.2. Impact assessment and preamble of the legislative act

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.

The first idea stressed in the preamble of legislative acts relates to the importance of the social values protected (the "legal goods" theory). Thus, it is emphasized the special European significance and worldwide importance of the euro[37], which makes it necessary to ensure that severe criminal penalties and other sanctions can be imposed. Also, the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law are directly violated through racism and xenophobia[38]. The universal values of human dignity, liberty, equality and solidarity, respect for human rights and fundamental freedoms, the principle of democracy and the principle of the rule of law, are protected through measures to combat terrorism[39]. Illicit drug trafficking constitutes a threat to health, safety and the quality of life of citizens of the

[36] 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.

[37] 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, recitals 6 and 7.

[38] 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, recital 1.

[39] Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, O.J. 2002, L 164/3, recital 1.

European Union and to the legal economy, stability and security of the Member States[40].

Another important reason for criminalizing conduct relates to the serious violation caused to individuals or groups of persons and the significance of crime (the "harm" principle). Serious economic consequences are mentioned to justify recourse to criminal law protection against counterfeiting of the euro[41]. Sexual exploitation of children and child pornography constitute serious violations of human rights and of the fundamental right of a child to a harmonious upbringing and development, and therefore need protection through criminal law instruments[42]. Serious forms of crime having increasingly tax and duty aspects, call on Member States for the approximation of criminal law and procedures on money laundering[43] (in particular, confiscating funds). Terrorism constitutes one of the most serious violations of the principle of democracy and the principle of the rule of law, deserving thus criminalization[44]. It is also mentioned that the European Union action should focus on the most serious types of drug offence[45]. Trafficking in human beings is a serious crime, often committed within the framework of organized crime, a gross violation of fundamental rights and explicitly prohibited by the Charter of

[40] 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, recital 1.

[41] Council Framework Decision 2000/383/JHA, cited *supra*, recital 9.

[42] 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.

[43] 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.

[44] Council Framework Decision 2002/475/JHA, cited *supra*, recitals 1 and 2.

[45] Council Framework Decision 2004/757/JHA, cited *supra*, recital 8.

Fundamental Rights of the European Union[46] and, consequently, needs to be tackled through criminal law instruments.

The gravity of the violation is also mentioned in the impact assessments accompanying the proposed legislative acts[47]. Thus, adoption of criminal law measures in the field of informatics systems was mainly determined by malware or botnets attacks[48]

---

[46] 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.

[47] At EU level, a proposed directive with criminal law provisions should be accompanyied by an impact assessement, which should prove, between others, the necessity to adopt criminal law provisions.

[48] The term 'botnet' indicates a network of computers that have been infected by malicious software (computer virus). Such a network of compromised computers ('zombies') may be activated to perform specific actions, such as attacking information systems (cyber attacks). These 'zombies' can be controlled - often without the knowledge of the users of the compromised computers - by another computer. This "controlling" computer is also known as the "command-and-control centre". The persons who control this centre are among the offenders, as they use the compromised computers to launch attacks against information systems. Attacks from such botnets can be very dangerous for the affected country as a whole, and can also be used by terrorists or others as a tool to put political pressure on a state. This became clear in Estonia in April-May 2007, where important parts of the critical information infrastructure in government and the private sector were taken out for days due to large scale attacks against them. As a result, the Parliament was forced to close down its e-mail system for 12 hours. Due to extensive access attacks two major banks present in Estonia (Hansabank and SEB Eesti Unisbank) completely stopped their online business and blocked their contacts with foreign countries for a long time. There have also been reports of attacks on the Estonian telephone system stating that at least one public telephone exchange was put out of service. A similar attack occurred in Lithuania on 28 June 2008 when more than 300 private and official sites were attacked from proxy servers located outside of Lithuania. The world witnessed the spread of a botnet called 'Conficker' (also known as Downup, Downadup and Kido), which has propagated and acted in an unprecedented scale and scope since November 2008, affecting millions of computers worldwide. In terms of the potential capacity of current botnets, the above-mentioned botnet 'Conficker', with an alleged bot

and also trafficking in human being was addressed at the EU level due to the widespread dimension of transnational crime[49].

The significance of the damage to individual or collective interests is also what triggered recourse to criminal law instruments in the field of EU policies. The protection of environmental policy

---

capacity number of 12 million infected computers (February 2009 estimate) and a capacity to send 10 billion of spam emails per day, is considered the biggest and fastest botnet currently affecting the world. It infected at a rate of more than a million computers worldwide per day. Inside the EU, damages from this botnet were reported in France, the UK and Germany. French fighter planes were unable to take off after military computers were infected by Conficker in January 2009. The German army reported in February 2009 that parts of its computer network were infected by Conficker, making the websites of the German army, and the Defence ministry unreachable and preventing them from being updated by their administrators. Certain IT services, including e-mails, were unavailable for weeks to the UK Ministry of Defence personnel in January/February 2009 after they were infected by the Conficker botnet. In March 2009, computer systems of government and private organizations of 103 countries (including a number of Member States, such as Cyprus, Germany, Latvia, Malta, Portugal and Romania) were attacked by malware installed to extract sensitive and classified documents. See the Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council on attacks against information systems, and repealing Council Framework Decision 2005/222/JHA [COM(2010) 517 final].

[49] The International Organization for Migration (IOM) database includes data collected from 12.627 victims who have been assisted by IOM worldwide from November 1999 to December 2007. Out of these, 10.473 are female and 2.154 are male. 630 persons are below 14 years of age, 1.416 between 14 and 17, 5.880 between 18 and 24, 2.485 between 25 and 30, 2.092 over 30 (124 not recorded). The most represented countries of origin are Ukraine, Republic of Moldova, Belarus, and Romania. Among the countries to which people are trafficked there are several EU countries: Italy (500 victims), Greece (105), Germany (136), Czech Republic (303), Bulgaria (204), Austria (101), and Poland (778). 188 recorded cases concern international trafficking, 2.389 are cases of internal trafficking. See the Impact Assessment accompanying the document Proposal for a Council Framework Decision on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA, [COM(2009) 136 final].

through criminal law measures was first put into question by the ecological disaster of Erika's shipwreck[50], the criminal law protection of EU's financial interests was justified by significant loss to EU budget due to fraud[51], criminal law measures in the field of

[50] On 12 December 1999, the Erika sank some 60 nautical miles off the Brittany coast, spilling some 20.000 tonnes of heavy fuel which in due course polluted some 400 km of the French coastline. Also, in recital 5 of the 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, 2008 OJ (L 328) 28, it is mentioned that in order to achieve effective protection of the environment, there is a particular need for more dissuasive penalties for environmentally harmful activities, which typically cause or are likely to cause **substantial damage** (emphasis added) to the air, including the stratosphere, to soil, water, animals or plants, including to the conservation of species. The Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law [COM(2007)51 final], estimates that the worldwide earnings from illegal trade in environmentally sensitive commodities, such as ozone depleting substances, toxic chemicals, hazardous waste and endangered species at between 22 and 31 billion dollars. Also, the illegal treatment and shipment of waste generates earnings of 10-12 billion dollars per year. The illegal trade in animal parts - in particular elephant, whale and hawksbill turtle parts - and endangered animal species is a very lucrative business, as well. The illegal trade in exotic birds, ivory and rhino horn, reptiles and insects, rare tigers and wild game is estimated by the US Government to earn criminal groups 6-10 billion dollars per year. Illegal trade in endangered species is estimated, in terms of profits, as being second in importance only to drug trafficking as a global smuggling activity. Figures from the British Central Office of Information gave the following information: every year as many as 5 million wild birds, 30.000 primates, 15 million furs, 12 million orchids, 8 million cacti and countless other species are sold on the international market. Of the estimated 350 million animals and plants being traded worldwide every year, it is believed that 25% of the transactions are carried out illegally. The European Union is the world's largest importer of CITES specimens. Between 1996 and 2002 the EU-15 imported approxi--mately 6 million live birds, 1.6 million live reptiles, 10 million reptile skins and almost 600 tons of sturgeon caviar.

[51] According to the statistics collected by OLAF on the basis of reports from Member States, from EU expenditures (EAGF, EAFRD, ERDF, ESF

insider dealings and market manipulation were proposed after the 2008 financial crisis[52]. Also, serious and repeated infringements were invoked for criminal law protection in the field of the employment of illegally staying third-country nationals[53].

---

and the Cohesion Fund) and revenues (TOR) implemented or collected by Member States alone, a total of 13.631 cases of illegal activities involving EU funds (so-called "irregularities") took place in 2010. These cases caused a cumulated damage to EU public money of approximately € 2.07 billion29. The number of reported cases and amounts involved has increased since 2008, with the average value of each case almost doubling over that period from € 87.934 in 2008 to € 152.112 in 2010. Within the amount of the illegal activities in 2010 suspicion of fraud amounted to € 617 million of EU public money potentially lost to crime. See the Impact Assessment (Part I) accompanying the document Proposal for a Directive of the European Parliament and of the Council on the protection of the financial interests of the European Union by criminal law [COM(2012) 363 final].

[52] The importance of market integrity has been highlighted by the current global economic and financial crisis. When applied to the market turnover on equity markets within the EU in 2010, the value of market abuse due to market manipulation and insider dealing is estimated at EUR 13.3 billion in 2010. This is an annual estimate of market abuse which evolves with the size of the market. It likely underestimates the true extent of market abuse as it only encompasses equity markets. See the Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation, [COM(2011) 651 final].

[53] 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, recital 22: "To guarantee the full effectiveness of the general prohibition, there is therefore a particular need for more dissuasive sanctions in serious cases, such as persistently repeated infringements, the illegal employment of a significant number of third-country nationals, particularly exploitative working conditions, the employer knowing that the worker is a victim of trafficking in human beings and the illegal employment of a minor. This Directive obliges Member States to provide for criminal penalties in their national legislation in respect of those serious infringements. It creates no obligations regarding the application of such penalties, or any other available system of law enforcement, in individual cases".

Another idea mentioned for supporting recourse to criminal law instruments relates to the divergence of legal approaches in the Member States and the contribution to the development of efficient judicial and law enforcement cooperation and the importance of cooperation in preventing and combating crime at the EU level[54]. Also, deterrence was invoked as a supporting reason for criminalizing conduct or increasing criminal penalties[55].

Additional support to criminalization is to be found in international commitments (international conventions), provisions of the EU Treaties, strategical programmes in the field of Freedom, Security and Justice, and also political agreements within the European Council[56].

---

[54] See in this respect Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, O.J. 2008, L 300/42, recital 3, Council Framework Decision 2004/68/JHA, cited *supra*, recital 2, Council Framework Decision 2008/913/JHA, cited *supra*, recital 4, Proposal for a Directive of the European Parliament and of the Council on attacks against information systems, and repealing Council Framework Decision 2005/222/JHA [COM(2010) 517 final], recital 13.

[55] See the Directive 2009/52/EC, cited *supra*, recital 21, the Impact Assessment on the protection of the environment through criminal law, cited *supra*, the Impact Assessment on attacks against information systems, cited *supra*. It is argued that the higher the penalties, the higher their deterrent function is and this is one of the fundamental principles of modern criminal policy from its beginning. This should go hand-in-hand with a stronger and more publicly visible prosecution of the crimes. I consider this to be a common misconception in criminal law (that deterrence always goes hand in hand with more severe penalties - see in this respect Ester Herlin-Karnell, "Subsidiarity in the Area of EU Justice and Home Affairs Law - A Lost Cause?", 15 EUROPEAN LAW JOURNAL (2009), 356. It is true, though, that stronger enforcement may lead to the desired effect.

[56] For example, point 14 of the conclusions of the Brussels European Council of 4 and 5 November 2004 and point 3.3.2 of the Hague Programme were invoked to support approximation of substantive criminal law in the field of organized crime; Council Joint Action 97/154/JHA of 24 February 1997, Council Decision 2000/375/JHA of 29 May 2000 and the European Parliament Resolution of 30 March 2000 were taken into account in criminalization of sexual exploitation of children and child pornography; Joint Action 96/443/JHA supported criminal law measures to combat

It can be observed that some legislative acts focus on the importance of the social value protected, which seems to be an approach based on the "legal goods" theory, others on the serious violation of those values ("harm" principle) and other include both ideas. Several other reasons (deterrence, EU wide judicial cooperation, respect of international agreements) seem to deal with the effectiveness of the proposed measures in ensuring the proposed goal (the "economic analysis of law" theory).

Thus, each of the three theories mentioned in Section 2 for justifying recourse to criminal law seems to be taken in consideration in the drafting of legislative proposals at the EU level. However, no systematic approach is used in the process.

§4. Criminal Law Policy and European Institutions

The increasing number of legislative acts at the EU level in the field of criminal law has triggered the response of European

---

racism and xenophobia; The European Council in Tampere noted that money laundering is at the very heart of organised crime and should be rooted out wherever it occurs; The La Gomera Declaration adopted at the informal Council meeting on 14 October 1995 was invoked in support to criminalizing terrorism at EU level; the need for legislative action to tackle illicit drug trafficking has been recognised in particular in the Action Plan of the Council and the Commission on how best to implement the provisions of the Amsterdam Treaty on an area of freedom, security and justice, adopted by the Justice and Home Affairs Council in Vienna on 3 December 1998, the conclusions of the Tampere European Council of 15 and 16 October 1999, in particular point 48 thereof, the European Union's Drugs Strategy (2000-2004) endorsed by the Helsinki European Council from 10 to 12 December 1999 and the European Union's Action Plan on Drugs (2000-2004) endorsed by the European Council in Santa Maria da Feira on 19 and 20 June 2000; the 2000 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime and the 2005 Council of Europe Convention on Action against Trafficking in Human Beings were at the basis of adopting criminal law provisions in this field at EU level etc.

institutions in establishing a criminal law policy. However, as the analysis below will argue, each European institution with competence in the field has established its own criminal policy and there is no integrated approach at the EU level.

4.1. The European Council: giving impetus and direction

The European Council did not address specifically the issue of a European Criminal Policy. However, in the Stockholm Programme, several aspects were emphasized in this field. The first important mention is that criminal law provisions should be introduced when they are considered essential in order for the interests to be protected and, as a rule, be used only as a last resort. Minimum rules with regard to the definition of criminal offences and sanctions may also be established when the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy which has been subject to harmonization measures[57].

The prime objective of Union law enforcement cooperation is to combat forms of crime that have typically a cross-border dimension. Focus should not only be placed on combating terrorism and organized crime, but also cross-border wide-spread crime that has a significant impact on the daily life of the citizens of the Union. The European Council invited Member States and the Commission to actively promote and support crime prevention measures focusing on prevention of mass criminality and cross-border crime affecting the daily life of our citizens in accordance with Art. 84 TFEU.

The European Council also invited the Commission to submit a proposal building on the evaluation of the work carried out within the European Crime Prevention Network (EUCPN) with a view to setting up an Observatory for the Prevention of Crime (OPC), the tasks of which will be to collect, analyze and disseminate knowledge on crime, including organized crime (including statistics) and crime prevention, to support and promote Member States and Union

[57] The Stockholm Programme - An open and secure Europe serving and protecting citizens, O.J. 2010, C 115/1.

institutions when they take preventive measures and to exchange best practice. This include continuing developing statistical tools to measure crime and criminal activities and reflect on how to further develop, after 2010, the actions outlined and partly implemented in the Union Action plan for 2006-2010 on developing a comprehensive and coherent Union strategy to measure crime and criminal justice, in view of the increased need for such statistics in a number of areas within the area of freedom, security and justice.

4.2. The Council: an increased concern for coherence in Criminal Law

The first institution to react in the field of criminal law was the Council[58]. There were two reasons indicated for establishing a criminal law policy. The first one relates to the new competence in the field of criminal law established through the Lisbon Treaty, which is likely to have the effect that criminal law provisions will be discussed within the Council to an even greater extent in the future. This may result in incoherent and inconsistent criminal provisions in EU legislation. Furthermore, provisions negotiated within the Council might unjustifiably deviate from wording that is normally used in EU criminal legislation, thus creating unnecessary difficulties when implementing and interpreting EU law. The second one refers to establishing some form of standard model provisions pertaining to both internal legislation and international agreements.

In the Council's opinion, foreseeable advantages of guidelines and model provisions for criminal law include facilitating negotiations by leaving room to focus on the substance of the specific provisions; increasing coherence in the transposition of EU provisions in national law; and facilitating legal interpretation when new criminal legislation is drafted in accordance with agreed guidelines which build on common elements.

A very important general rule established in the Council's guidelines refers to the need to criminalize and limits to

[58] Draft Council conclusions on model provisions, guiding the Council's criminal law deliberations, 16542/2/09 REV 2 JAI 868 DROIPEN 160.

criminalizing conduct. Thus, criminal law provisions should be introduced *when they are considered essential in order for the interests to be protected and, as a rule, be used only as a last resort*.

Criminal provisions should be adopted in accordance with the principles laid out in the Treaties, which include the principles of proportionality and of subsidiarity, to address clearly defined and delimited conduct, which cannot be addressed effectively by less severe measures:

a) 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, or

b) 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 harmonization measures.

When there seems to be a need for adopting new criminal provisions, the following factors should be further considered, while taking fully into account the impact assessments that have been made:

• the expected added value or effectiveness of criminal provisions compared to other measures, taking into account the possibility to investigate and prosecute the crime through reasonable efforts, as well as its seriousness and implications;

• how serious and/or widespread and frequent the harmful conduct is, both regionally and locally within the EU;

• the possible impact on existing criminal provisions in EU legislation and on different legal systems within the EU.

4.3. The Commission: an approach in several steps

A criminal law policy was also established at the European Commission's level[59]. The Commission considered that an EU

[59] 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

Criminal Policy should have as overall goal to foster citizens' confidence in the fact that they live in a Europe of freedom, security and justice, that EU law protecting their interests is fully implemented and enforced and that at the same time the EU will act in full respect of subsidiarity and proportionality and other basic Treaty principles.

The Commission argued its position by the concern of EU citizens in this field[60], the added value of EU criminal law[61], strengthening mutual trust[62], ensuring effective enforcement[63], coherence and consistency[64] and also the new legal framework at the

---

effective implementation of EU policies through criminal law, COM(2011) 573 final.

[60] EU citizens consider crime an important problem facing the Union. When asked to identify the issues on which the European institutions should focus action in the coming years to strengthen the European Union, citizens rank the fight against crime in the top four of areas of action. See Eurobarometer 75, Spring 2011. The top four areas where EU action should focus are: economic and monetary policy, immigration policy, health policy and the fight against crime.

[61] The EU can tackle gaps and shortcomings wherever EU action adds value. In view of the cross-border dimension of many crimes, the adoption of EU criminal law measures can help ensuring that criminals can neither hide behind borders nor abuse differences between national legal systems for criminal purposes.

[62] This high level of trust is indispensable for smooth cooperation among the judiciary in different Member States. The principle of mutual recognition of judicial measures, which is the cornerstone of judicial cooperation in criminal matters [Art. 82(1) TFEU], can only work effectively on this basis.

[63] In cases where the enforcement choices in the Member States do not yield the desired result and levels of enforcement remain uneven, the Union itself may set common rules on how to ensure implementation, including, if necessary, the requirement for criminal sanctions for breaches of EU law.

[64] On the need for more coherence in the development of EU criminal law, see, as an example, the MANIFESTO ON THE EU CRIMINAL POLICY (2009), drafted by an academic group of 14 criminal law professors from ten Member States of the European Union.

European level. The focus of the Commission's criminal law policy is on strengthening the enforcement of EU policies[65].

In drafting criminal law legislation, general principles of EU law should be respected. The general **subsidiarity** (emphasis added) requirement for EU legislation must be given special attention with regard to criminal law. This means that the EU can only legislate if the goal cannot be reached more effectively by measures at national or regional and local level but rather due to the scale or effects of the proposed measure can be better achieved at Union level. In addition, **fundamental rights** (emphasis added), as guaranteed in the EU Charter of Fundamental Rights and in the European Convention on the Protection on Human Rights and Fundamental Freedoms, must be respected in any policy field of the Union. Criminal law measures are fundamental rights-sensitive. They unavoidably interfere with individual rights, be it those of the suspect, of the victim or of witnesses. Ultimately, they can result in deprivation of liberty and therefore require particular attention by the legislator.

The Commission envisaged a two-step approach in criminal law legislation. The first step should demonstrate the need for criminal law and whether to adopt criminal measures at all. This approach is

[65] In its EU Criminal Policy, the Commission identified the policy areas which have been harmonized and where it has been established that criminal law measures at EU level are required: the financial sector, e.g. concerning market manipulation or insider trading; the fight against fraud affecting the financial interests of the European Union; the protection of the euro against counterfeiting through criminal law. In other harmonized policy areas, the potential role of criminal law as a necessary tool to ensure effective enforcement could also be explored further: road transport, concerning, e.g., serious infringements of EU social, technical, safety and market rules for professional transports; data protection, for cases of serious breaches of existing EU rules; customs rules concerning the approximation of customs offences and penalties; environmental protection, if the existing criminal law legislation in this area requires further strengthening in the future, in order to prevent and sanction environmental damage; fisheries policy, where the EU has adopted a "zero tolerance" campaign against illegal, unreported and unregulated fishing; internal market policies to fight serious illegal practices such as counterfeiting and corruption or undeclared conflict of interests in the context of public procurement.

based on the principles of necessity and proportionality and criminal law as a means of last resort (*ultima ratio*). The legislator needs to analyze whether measures other than criminal law measures, e.g. sanction regimes of administrative or civil nature, could not sufficiently ensure the policy implementation and whether criminal law could address the problems more effectively[66].

Step 2 should establish the principles guiding the decision on what kind of criminal law measures to adopt. EU legislation regarding the definition of criminal offences and sanctions is limited to "minimum rules"[67] under Art. 83 of the Treaty. This limitation rules out a full harmonization. At the same time, the principle of legal certainty requires that the conduct to be considered criminal must be defined clearly. The condition of "necessity" and "proportionality"[68] set out in step 1 also applies at the level of deciding which criminal law measures to include in a particular legislative instrument. The **seriousness** and the **character**

[66] This will require a thorough analysis in the Impact Assessments preceding any legislative proposal, including for instance and depending on the specificities of the policy area concerned, an assessment of whether Member States' sanction regimes achieve the desired result and difficulties faced by national authorities implementing EU law on the ground.

[67] The Commission defined the minimum rules as including at least the following: the definition of the offences, i.e. the description of conduct considered to be criminal, always covers the conduct of the main perpetrator but also in most cases ancillary conduct such as instigating, aiding and abetting (in some cases, the attempt to commit the offence is also covered); including in the definition intentional conduct, but in some cases also seriously negligent conduct; categories of persons committing the crime (natural persons as well as legal persons); rules on jurisdiction; rules regarding sanctions (effective, proportionate and dissuasive criminal sanctions for a specific conduct).

[68] The Commission clearly expressed the need to tailor the sanctions to the crime, establishing whether to include types of sanctions other than imprisonment and fines to ensure a maximum level of effectiveness, proportionality and dissuasiveness, as well as the need for additional measures, such as confiscation; and whether to impose criminal or non-criminal liability on legal persons, in particular with regard to crime areas where legal entities play a particularly important role as perpetrators.

(emphasis added) of the breach of law must be taken into account. In addition, clear factual evidence should be provided about the nature or effects of the crime in question and about a diverging legal situation in all Member States which could jeopardize the effective enforcement of an EU policy subject to harmonization.

4.4. The European Parliament: a more holistic approach

A proposed report on an EU approach to criminal law of the Committee on Civil Liberties, Justice and Home Affairs within the European Parliament envisaged a more structured and principled approach in drafting a European criminal policy[69]. There are three main areas addressed in its communication: a coherent and structured approach to criminal law, establishing criteria for and limits to criminalizing conduct, establishing general principles of substantive and procedural criminal law.

Criteria for criminalizing conduct and the imposed limits are briefly described at point 3 of the Report:

"The necessity of new substantive criminal law provisions must be demonstrated by the necessary factual evidence making it clear that:

- criminal provisions focus on conduct causing **significant** (emphasis added) pecuniary or non-pecuniary damage to society, individuals or a group of individuals;

- there are no other less intrusive measures available for addressing such conduct;

- the crime involved is of a particularly serious nature with a cross-border dimension or has a direct negative impact on the effective implementation of a Union policy in an area which has been subject to harmonization measures;

- there is a need to combat the criminal offence concerned on a common basis, i.e. that there is added practical value in a common EU approach, taking into account, *inter alia*, how widespread and frequent the offence is in the Member States, and

[69] Report on an EU approach on criminal law (2010/2310(INI), A7-0144/2012, Committee on Civil Liberties, Justice and Home Affairs.

- in conformity with Art. 49(3) of the EU Charter on Fundamental Rights, the severity of the proposed sanctions is not disproportionate to the criminal offence".

The general principles of criminal law mentioned in the report have a wider scope that the ones mentioned in the Commission's or the Council's policies, including substantive, but also procedural criminal law principles, such as: the legality principle[70] (especially the *lex certa* requirement), the principle of individual guilt[71], the principle of non-retroactivity and of *lex mitior*, the principle of *ne bis in idem* and also the principle of the presumption of innocence. Also, general principles of EU law, with particularly relevance in criminal law are emphasized: subsidiarity and proportionality, mutual recognition and mutual trust.

The third direction of the Parliament's Criminal Law Policy is towards guaranteeing a coherent and structured approach. The European Parliament welcomed the existence of an inter-service coordination group on criminal law within the Commission and of a Council Working Party on Substantive Criminal Law and called for an inter-institutional agreement on the principles and working methods governing proposals for future EU substantive criminal law provisions, with a view to ensuring coherence in EU criminal law.

The already mentioned principle of last resort (*ultima ratio*) was further emphasized in the Report. Thus, the European Parliament welcomed the recognition by the Commission in its recent Communication on an EU criminal law policy that the first step in criminal law legislation should always be to decide whether to adopt substantive criminal law measures at all. Also, in drafting initiatives in the field of criminal law, the Commission and the Member States were invited to first consider non-legislative measures that consolidate trust among the different legal systems in the Member

[70] The description of the elements of a criminal offence must be worded precisely to the effect that an individual shall be able to predict actions that will make him/her criminally liable.

[71] *Nulla poena sine culpa* principle, prescribing penalties only for acts which have been committed intentionally, or in exceptional cases, for acts involving serious negligence.

States. Harmonization measures should be proposed primarily with a view to supporting the application of the principle of mutual recognition in practice, rather than merely expanding the scope of harmonized EU criminal law.

The Parliament encouraged the Commission to continue to include in its impact assessments the necessity and proportionality test, to draw on the best practices of those Member States with a high level of procedural rights guarantees, to include an evaluation based on its fundamental rights checklist and to introduce a test specifying how its proposals reflect the aforementioned general principles governing criminal law.

Also, the need to establish uniform minimum standards of protection at the highest possible level for suspects and defendants in criminal proceedings, in order to strengthen mutual trust, was stressed.

Even though the procedural principles are mixed with the substantial ones, the criteria envisaged and the limits imposed thereto include several of the general principles mentioned afterwards and the steps to be taken towards a coherent approach in criminal law are scattered throughout the Report, thus reflecting a confusing image, the Parliament's approach to criminal law policy is wider and more complete that the ones adopted by the Council or the Commission.

§5. Criteria for and limits to criminalizing conduct at European Union level

In the following lines a more structured and principled approach to criminalizing conduct at the EU level will be proposed for debate, based on reasons extracted from a critical analysis of the existing criminal law policies in the field, compared with theories for criminalizing conduct developed in literature and also based on reasons for criminalizing conduct extracted from legislative acts or initiatives at EU level. The several steps

approach suggested by the Commission and also by literature[72] will follow.

The first step to be taken is establishing a criminalization principle to be observed as a precondition to recourse to criminal law instruments. This is a necessary, but not sufficient step to criminalization. The second step consists of several limiting principles, which can be grouped in two categories: general and specific limits. General limits are imposed in all EU legislation and should be observed also in the criminal law field (the principles of conferral of powers, subsidiarity and proportionality). These principles will be analyzed in relation to general principles and theories for criminalizing conduct (*ultima ratio* principle and the "legal goods" theory). Specific limits are addressing one of the two particular fields in which the EU may legislate (the transnational dimension in the field of "Eurocrimes" and the effectiveness principle in the field of European policies).

A very important idea already stressed in this study is that these principles address only the law maker and are without relevance for subsequent enforcement of legislative act criminalizing conduct. The society has the possibility to amend the law maker, as I will show in the last section, for drafting legislation in the field of criminal law without respecting these principles, thereby committing an abuse of law.

However, these principles and criteria are not the only ones the legislative bodies should keep in mind when adopting criminal law instruments. Other important principles already mentioned in the criminal law policies studied above (the guilt principle, the legality principle, *mitior lex*, non-retroactivity, presumption of innocence, *ne bis in idem*, right of defense) are only slightly addressing the law maker, in the sense that they should be taken into consideration in the process of drafting legislative acts. These principles, however, are crucial in the enforcement phase of the act in concrete cases. As I already mentioned before, this was the main distinction between Chapter 1 and Chapter 2 of this study. Therefore, the present section is focusing only on principles and criteria for criminalizing conduct.

---

[72] *Persak*, cited *supra*, at 92-94.

5.1. Criminalizing conduct: the "harm" principle

From the analysis of the legal basis and also several of the legislative acts drafted in the field of criminal law at the EU level, there seems to be two preferred theories for criminalizing conduct: the harm theory in the field of "Eurocrimes" [Art. 83(1) of the TFEU] and the economic analysis of law in the field of the effective implementation of a Union policy in an area which has been subject to a harmonization measure [Art. 83(2) TFEU].

The Eurocrimes are very serious crimes with cross-border dimension: terrorism, trafficking in human beings and 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. It is understandable that these crimes cause significant damage to individuals and society. Therefore, applying the "harm" principle in this field is not surprising.

On the contrary, Art. 83(2) does not mention whatsoever the seriousness of the crime, or the significant damage to individuals or society, but only that criminal law measures prove essential to ensure effectiveness of EU policies. Which seems to be the very economic analysis of law theory for criminalizing conduct. Does this mean that in this field the "harm" principle is excluded?

Several reasons may be put forward to answer negatively to this question.

Firstly, criminal law policy papers adopted by European institutions seem to infer that the "harm" principle should also be applied in this field. The Council concluded that a need for adopting new criminal provisions should rely, *inter alia*, on **how serious and/or widespread and frequent the harmful conduct is** (emphasis added). The Commission relies in its evaluation on the **seriousness** and the **character** of the breach of law. Also, according to the Commission, EU criminal law measures at the EU level are required to fight **serious damaging practices and illegal profits** (emphasis added) in some economic sectors in order to protect activities of legitimate businesses and safeguard the interest of taxpayers. The European Parliament stressed that the criminal provisions should

focus on **conduct causing significant pecuniary or non-pecuniary damage to society, individuals or a group of individuals** (emphasis added).

Secondly, the significance of the damage to individual or collective interests is also what triggered recourse to criminal law instruments in the field of EU policies. The protection of environmental policy through criminal law measures was first put into question by the ecological disaster of Erika's shipwreck, the criminal law protection of EU's financial interests was justified by significant loss to the EU budget due to fraud, criminal law measures in the field of insider dealings and market manipulation were proposed after the 2008 financial crisis.

As a conclusion, the criterion of criminalizing conduct causing significant pecuniary or non-pecuniary damage to society, individuals or a group of individuals should be observed generally in the field of criminal law, no matter which area is subject to harmonization measures at the EU level ("Eurocrimes" or economic policies). Even if not mentioned in the legal basis, the harm principle tends to be reflected in the criminal law policies of all three bodies involved in the European legislative process (the Commission, the Council, the Parliament).

But does this mean that the "harm" principle, as understood in the common law doctrine, is adopted as a criminalizing principle at the EU level?

As concluded in the analysis of the harm principle at the beginning of the study, I should point out that **the general idea** included in the harm principle is stressed in these criminal law policies. That is, conduct should be criminalized only if it causes significant damage to society, individuals or a group of individuals. The "harm" principle, thus emphasized, is a European concept, slightly different from the common law counterpart, which needs further elaboration.

In concrete terms, when legislating in the field of EU law, all institutions involved in the legislative process should analyze that clear factual evidence about the nature or effects of the crime in question should be provided. Clear factual evidence on significant damage caused can be secured through different means: through

analyzing trends in different sectors of crime by the Europol or through the European Crime Prevention Network (EUCPN) and the Observatory for the Prevention of Crime (OPC), through studies developed by third parties at the initiative of the European Commission. This evidence should be analyzed in the impact assessments accompanying the legislative proposals of the Commission.

Of course, an inter-institutional agreement between all institutions involved in the legislative process is expected to develop further the notion of "significant damage" and also to ensure a single coordinated criminal policy at the EU level, in order to increase consistency in this field.

5.2. General limiting principles: conferral of powers and the "legal goods" theory

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.

Combining the provisions of the principle of conferral of powers with the special provisions of Art. 83 of the TFEU may give a special insight upon the legal goods worthy of criminal law protection at EU level.

Under Art. 83[1] of the TFEU, a list of explicitly listed ten offences (the so-called **"Euro crimes")** which 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, provides a hint towards the legal goods protected in this field at the EU level. No other legal goods, even if worthy of protection, can lead to criminalizing

conduct at the EU level in other areas of crime, without a unanimous decision of the Council[73].

Also, Art. 83[2] of the TFEU establishes minimum rules with regard to the definition of criminal offences and sanctions if the approximation of criminal laws and regulations of the Member States which proves essential to ensure the effective implementation of a Union policy in an area which has been subject to a harmonization measure[74].

But even if theoretically narrowing the scope of the "legal goods" susceptible of criminal law protection, this limitation is however, not very helpful. The legal goods encompassed in the aforementioned policies are very general and may range practically, for example, from every social value linked to the harmonized policy of agriculture, to legal goods in relation to the protection of endangered species of birds under the environment policy.

In conclusion, this instrument may establish a framework of legal goods which can be protected thorough criminal law, but this framework in itself can be stretched very far and may permit, practically, to criminalize conduct in every already harmonized field. It offers a more restrictive approach than at national level,

---

[73] According to Art. 83[1] para. 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 para. (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.

[74] The policies mentioned in Part 3 of the TFUE which may give way to harmonization measures are the internal market, free movement of goods (including the customs union, customs cooperation and the prohibition of quantitative restrictions between Member States), agriculture and fisheries, free movement of persons, services and capital, the area of freedom, security and justice, 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, research, technological development and space, environment, energy, tourism, civil protection, administrative cooperation.

but caution is still needed when applying the conferral of powers principle.

That is why, in my opinion, the "legal goods" theory, viewed from the perspective of the conferral of powers principle, may provide a helpful insight and also a relative limitation in relation to criminalizing conduct, but cannot be considered, in itself, a determinant theory for criminalizing conduct at the EU level.

5.3. General limiting principles: proportionality v. last resort (*ultima ratio*) principle

The "harm" theory is a precondition for criminalizing conduct, necessary, but also not sufficient. There might be significant damage to society and/or individuals or group of individuals and this clearly indicates a need for a legislative reaction at the EU or national level, but this reaction should not necessarily be shaped in criminal law terms. Besides general EU principles (such as subsidiarity or proportionality), which justify a reaction at the EU level, instead of a national law initiative, all three bodies emphasized the need for a limiting principle in adopting criminal law measures: the last resort (*ultima ratio*) principle.

How this principle should be applied, however, gives rise to different interpretations: the European Council and the Council stated that criminal law **as a rule** (emphasis added), to be used only as a last resort, while the Commission and the European Parliament stressed that criminal law must **always** (emphasis added) remain a measure of last resort. From the wording of the principle by some institutions, it may be inferred that the principle should be applied as a rule, but there might be cases when criminal law measures may be adopted, even if other measures are available. The opposite interpretation, however, states that *ultima ratio* is a mandatory principle, to be applied in all cases.

But do we really need a new principle in limiting criminalization at the EU level, or is this principle already included in other general principles? In other words, what is the link between proportionality and last resort (*ultima ratio*) principle?

It is emphasized in literature that criminal law is not the only appropriate means by which to pursue the proper end of protecting legitimate values and interests. On the contrary, the whole arsenal of the legal order must be put to use and criminal law is actually the last means of protection to be considered. It may only be employed where other means (e.g. private law litigation, administrative solutions, non-criminal sanctions etc.) fail. That is why punishment is called the *"ultima ratio"* of social policy[75].

Under the EU principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties [Art. 5(4) of the TEU]. The principle of proportionality, in simple terms, entails that the means 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 means that is unsuitable and/or unnecessary to reach a goal would not be in accordance with the principle[76].

According to the conventional understanding of the proportionality principle, it consists of three tests applied to the allegedly infringing measure, respectively the suitability, the necessity and the proportionality *stricto sensu* test. The *suitability test*, or appropriateness test, refers to the relationship between the means and the end. The question asked is whether the measure chosen is suitable or appropriate in order to achieve the given aim proposed to achieve by using the chosen measure. The *necessity test* implies an assessment whether the chosen measure is necessary to achieve the proposed goal, in the meaning that the measure chosen should be the least restrictive on the given norm. In the third test the measure's proportionality is assessed *stricto sensu*, meaning that a measure is disproportionate if it, although suitable and necessary, nevertheless imposes an excessive burden on the individual[77].

---

[75] *N. Jareborg*, Criminalization as Last Resort (Ultima Ratio), 2 OHIO ST. J. CRIM. L. (2005), 524-525.

[76] *T.-I. Harbo*, The Function of the Proportionality Principle in EU Law", 16 EUROPEAN LAW JOURNAL (2010), 161.

[77] Idem, at 165.

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.

But isn't this the exact meaning of the *ultima ratio* principle? As I will show in the following lines, yes and no. It is true that the last resort (*ultima ratio*) principle implies that criminal law must be employed when no other means are effectively dealing with the criminalized conduct. But, while recourse to criminal law may be the last resort to tackle certain behaviour, it is not altogether clear if criminalization is necessary. In other words, even if used as a last resort, criminalization of conduct may not be necessary or is not efficient in tackling the negative effects of the conduct in question.

On the other hand, applying the EU proportionality principle offers a fairer balance, dealing not only with the best means of tackling certain behaviour significantly affecting certain social values or legal goods, but also with the necessity of employing criminal law measures in the process. It is for this reason that, in my opinion, not only that proportionality principle covers the same ground as *ultima ratio* principle, but it also goes beyond that. The proportionality principle allows recourse to criminalization when it is the last resort, and also necessary in dealing with the negative effect of the conduct in question[78].

Therefore, some guidelines from the criminal law policies adopted by the institutions at EU level appear redundant, when imposing that the proposed legislative measure should respect the necessity, proportionality and *ultima ratio* test[79].

---

[78] This approach, with some nuances, is already mentioned in literature. See in this respect Vasquez, cited *supra*, note 18, at 13. The author stresses that necessity of criminal law measures (ultima ratio) implies respecting the principles of subsidiarity and proportionality, leaving ample scope for action to the legislature to set the criminal law according to the particularities and needs of the society.

[79] See in this respect the Report on an EU approach on criminal law of the Committee on Civil Liberties, Justice and Home Affairs, cited *supra*, note 69. Also, in the Commission's Proposal for a Directive of the European Parliament and of the Council on the protection of the financial interests of

5.4. General limiting principles: subsidiarity

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence[80], 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 the 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[81] [Art. 5(3) of the TEU].

Subsidiarity at the EU level does not address the problem whether the EU institutions may intervene or not in criminal law (the minimum intervention requirement), this problem being addressed by other principles mentioned above (such as the "harm" principle and proportionality), but whether action at the EU level should be taken instead of action at national level. Therefore, the problem is not whether to criminalize or not, but whether to offer a transnational harmonized dimension to criminalization or not.

When analyzing the special competences in criminal law enacted in Art. 83 of the TFEU, the subsidiarity principle seem to be already addressed by the special limits imposed to criminalization thereto. Thus, Art. 83(1) allows criminalization of conduct only in case of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to

---

the European Union by criminal law [COM(2012) 363 final], it is stated that EU criminal law should not go further than what is **necessary and proportionate** (emphasis added) in relation to its objectives.

[80] Obviously, subsidiarity does not apply to exclusive competences [Art. 5(3) TEU], but, as already stated before, criminal law belongs to a shared competence, thus in this area there is the matter of assessing the compliance with the principle of subsidiarity.

[81] I should emphasise that, in the analysis performed in this study, the principles of subsidiarity and proportionality are employed according to their meaning in EU law. Different meanings of these principles may be encountered in criminal law literature analisying them at national level. See in this respect, for an analysis of principles of proportionality and subsidiarity and their link with ultima ratio principle, *Jareborg*, cited *supra*, note 76, at 531-534, *Herlin-Karnell*, cited *supra*, at 361.

combat them on a common basis. Also, Art. 83(2) enables criminalization only in the field of European policies which have already been subject to harmonization measures. It can be plainly observed that in the field of Eurocrimes, if the cross border-dimension is proved by using one of the criteria mentioned in Art. 83(1), it already addresses the core problem of the subsidiarity principle, and in this case there is no need for a separate analysis of the principle.

However, the problem is not that clear in the field of European policies. It is true that criminalization may address only a previous harmonized field, but this does not mean that subsidiarity should be taken for granted because of previous harmonization. More restrictive measures to be taken (which implies recourse to criminal law instruments) should be preceded by clear evidence that the new action, involving criminal law measures, cannot be sufficiently achieved by the Member States, either at 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.

Subsidiarity must be addressed also in fields which are not covered by Art. 83 of the TFEU. As already mentioned in Section 3, Art. 83 of the TFEU is not the only possible legal basis for enacting legislation in the criminal law field. Therefore, special attention should be paid to proving the need for transnational harmonization, and therefore a separate analysis of the subsidiarity principle, in other fields than Eurocrimes.

An increased importance of the subsidiarity principle is offered by the subsidiarity and proportionality Protocol, annexed to the Lisbon Treaty[82], which imposes an obligation to consult the national Parliaments of the Members States on compliance of all proposed legislative acts with the subsidiarity requirement, before

[82] Art. 6 from Protocol no. 2 on the application of the principles of subsidiarity and proportionality, O.J. 2010, C 83/206. Art. 7(2) of the Protocol also offers a possibility for national Parliaments to block the legislative process at Eu level for non-compliance with the subsidiarity principle: "Where reasoned opinions on a draft legislative act's non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national Parliaments in accordance with the second subparagraph of para. 1, the draft must be reviewed".

action is taken at the EU level. Even if this provision is meant to address the democracy gap[83] in the legislative process at the EU level, this objective is hindered by not including in the scrutiny the proportionality principle, which addresses the more fundamental problem of whether action should be taken at all. Art. 5 of the Protocol mentions that the reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators.

One last problem in the field of the subsidiarity principle is the enhanced cooperation issue, in the context of the "emergency brake" procedure. According to Art. 83(3) of the TFEU, where a Member State of the EU considers that a draft directive as referred to in Art. 83(1) or 83(2) would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In case of disagreement, the proposed act shall not be adopted at EU level (the so called "emergency brake" procedure). However, in this case, an enhanced cooperation on the basis of the draft directive concerned may be put in place by at least nine Member States, enabling thus a "two speed" European Union: one with the harmonized measure in criminal law, comprising the Member States within the enhanced cooperation, and one without the harmonized measure, of the Member States blocking it. Concern is manifested in literature that in this case there might be a devoiding of substance of the principle

[83] The democracy gap issue deals with the actors involved in the legislative process at EU level: one of the main legislative actors is the Council, formed by representatives of the Member States, who are essentially members of the executive bodies of their countries. Thus an intrusion of the executive power within the legislative one can be observed at EU level. The problem was slightly improved by the Lisbon Treaty, which enabled the European Parliament (elected body throughout the EU) as a co-legislative body in the field of criminal law (with a possibility to block any proposed act in this field), and also allowed the national Parliaments of the Member States to be more involved in the legislative process.

of subsidiarity[84], if action is not deemed necessary throughout the whole EU territory.

But is this established framework respected in concrete cases? Here a distinction should be made between legislative acts adopted before and after the Lisbon Treaty.

Legislative acts in the field of criminal law adopted by the EU institutions before the entering into force of the Lisbon Treaty did not have an accompanying impact assessment. The compliance with the principle of subsidiarity (and also the principle of proportionality) was merely stated as a fact, but not proven[85], while in some acts not being mentioned at all[86]. In the case law, the aforementioned compliance was inferred from the political agreement at the EU level to adopt a certain legislative act; the act was deemed necessary or essential at the EU level, therefore it was adopted[87]. I consider that agreement at political level cannot replace evidence of the need to combat certain behaviour through criminal law measures at the EU level, instead of the national one. Criminalization of conduct is not necessary merely because the legislative body says so. Otherwise, no critical assessment may be made and criteria already established for criminalization are voided of content.

The situation changed slightly after the entering into force of the Lisbon Treaty. Proposed legislative acts in the field of criminal law are accompanied by impact assessments, where different policy options (including criminal law measures) are weighted against each other, to establish the best policy available for attaining the proposed goals. Even qualitative and quantitative indicators may be found in

---

[84] *Herlin-Karnell*, cited *supra*, at 358.

[85] Council Framework Decision 2008/913/JHA, cited *supra*, recital 13, Council Framework Decision 2002/475/JHA, cited *supra*, recital 9, Council Framework Decision 2004/68/JHA, cited *supra*, recital 8, Council Framework Decision 2004/757/JHA, cited *supra*, recital 4, Council Framework Decision 2008/841/JHA, cited *supra*, recital 7.

[86] Council framework Decision 2000/383/JHA, cited *supra*, Council Framework Decision 2001/500/JHA, cited *supra*.

[87] Case C-176/03, *Commission v. Council*, 2005 ECR I-07879, P 50; Case C-440/05, *Commission v. Council*, 2007 ECR I-9097, para. 68.

some impact assessments[88]. However, no clear connection is indicated between the best approach sought to attain the goal (in our case, criminal law measures) and subsidiarity (or even proportionality).

5.5. Specific limiting principles/criteria: effectiveness v. transnational dimension

In Section 5.1. it was mentioned that the economic analysis of law seems to be the preferred theory for criminalizing conduct in the field of the effective implementation of a Union policy in an area which has been subject to a harmonization measure [Art. 83(2) of the TFEU].

As regards justifying recourse to criminal law measures in respect to protection of European policies [Art. 83(2) of the TFEU], I need to state here why, in my opinion, the economic analysis of law should not be a criminalizing principle, but a principle/criteria limiting criminalization. The economic analysis of law theory, applied to EU law, is based on ensuring effectiveness of European policies. Or, in my opinion, ensuring effectiveness of a European policy is not a reason, *per se*, for criminalizing conduct. Ensuring effectiveness of European policies, especially economical ones, in itself, cannot justify recourse to criminal law. On the other hand, significant damage to society, individuals or group of individuals (including significant financial loss), can fulfill this requirement. Ineffective policies which do not cause significant damage to society, individuals or groups of individuals do not need criminal law protection. Thus, if such policies do cause significant damage to the said categories, than the reason for criminalizing conduct is the EU concept of the "harm" principle. That is why I consider that the sole reason for criminalizing conduct should be the "harm"

[88] See the Impact Assessment on preventing and combating trafficking in human beings, and protecting victims, cited *supra*; the Impact Assessment (Part I) on the protection of the financial interests of the European Union by criminal law, cited *supra*.

principle, adapted to EU specifics, while the economic analysis of law should be used as a specific limit to criminalization.

As regards specific limits imposed to the harm principle, they may differ slightly, depending on the field subject to criminal law measures. In the field of Eurocrimes [art. 83(1)], criminal law instruments should be adopted in case of particularly serious crimes 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. Thus, recourse to criminal law is justified by the transnational dimension of the crime in question. So, besides the precondition of significant damage caused to individuals, groups of individuals or society previously stated, in order to legislate in this field, there is a need to prove the transnational dimension of the crime, through one of the three criteria provided for in the legal text: the nature of the crime, its impact or the special need to combat it on a common basis.

On the contrary, in the field of European policies, the transnational dimension is not specifically required. According to Art. 83(2), legislative steps should be taken if 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 harmonization measures. Thus, one of the limiting principles imposed in the field of European policies is ensuring effectiveness, which encompasses the theory of the economic analysis of law.

However, this is an ambitious goal, which may hinder instead of helping the legislative process. When is a policy effective and how can it be proved *ex ante* that criminal law measures may ensure effectiveness if adopted? Is the obligation imposed in Art. 83(2) an obligation to attain a specific result (ensure effectiveness), or an obligation of diligence (to strive towards achieving the result)? From the literal interpretation of the text, it seems to be an obligation of result, otherwise, the obligation would have had a different form (e.g. to ensure a more effective implementation of the policy or which is likely to lead to effectiveness of the policy). Instead, the terms of Art. 83(2) are clear: criminal law measures should be adopted if they prove essential to ensure the effective implementation of a Union policy.

To establish what kind of obligation is imposed in the Lisbon Treaty, several legislative proposals containing criminal law provisions in the field of European policies are further analyzed.

If ensuring effectiveness is an obligation of result, this benchmark is clearly not attained in the legislative proposals in the field.

Thus, in the field of environment, the general objective is ensuring a **more effective** (emphasis added) protection of the environment, and the adoption of all specific measures (harmonization of the most serious environmental offences, a harmonization of the liability of legal persons for those offences and an approximation of the penalties applicable to natural and legal persons if those offences are committed under aggravating circumstances) **promises significant progress** (emphasis added) with a view to obtaining the above mentioned objective[89].

In the field of insider dealings and market manipulation, EU-wide minimum rules on the forms of market abuse that are considered to be a criminal conduct **would further contribute** (emphasis added) to the effectiveness of enforcement of the Union's legislative framework on market abuse. A specific objective is to **enhance** (emphasis added) the effectiveness of the market abuse regime by ensuring greater clarity and legal certainty. The preffered options **more effectively** (emphasis added) strengthen the consistency, effectiveness and dissuasive effect of administrative and criminal sanctions. Also, in accordance with Art. 83 (2) of the TFEU, the introduction of a requirement for criminal sanctions to address market abuse **is likely to lead** (emphasis added) to increased successful prosecution of market abuse offences and to contribute to ensuring the effective functioning of the internal market[90].

In the field of illegally staying third-country nationals, whilst the overall objective is to contribute to reducing illegal immigration, the specific focus of this initiative is to tackle the pull factor for illegal immigration that is the employment of illegally staying third-country nationals. The impact and effectiveness of the preferred option is heavily dependent upon whether the legislation envisaged is

[89] Impact Assessment, cited *supra*.
[90] Ibidem.

transposed and enforced in practice. For this reason, the preferred option includes a requirement for Member States to undertake a particular level of enforcement activity. Requiring Member States to inspect 10% of registered companies, as foreseen in the legislative proposal, would be a **significant step towards improving the enforcement** (emphasis added) of harmonised sanctions across the EU. It is concluded that, in terms of reduction of illegal immigration to the EU, as only one pull factor (employment) is affected by the preferred option, **impacts are likely to be limited**[91] (emphasis added). I may conclude that there is no effectivenness of the policy ensured if the proposed objective is not attained. But, in the first place, effectiveness of the policy is not sought: only significant steps to be taken towards improving enforcement, and therefore effectiveness.

A similar situation is to be found in the field of protecting the EU financial interests. The objectives of the proposed criminal law instrument in the field range from general objectives, like **preventing and reducing loss of money** (emphasis added) for the EU, to specific objectives, like **better enforcing** (emphasis added) the prohibitions of certain conducts illegally affecting EU public money, or **adequately improving** (emphasis added) levels recovery of EU public money subject to illegal acts. But can this be done solely by means of criminal law, as long as administrative irregularities amount to almost 75% of the lost money?[92] It is also mentioned in the Impact Assessment that an empirical demonstration of exactly how much EU

[91] Impact Assessment accompanying the Proposal for a Directive ff the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals, [COM(2007) 249 final].

[92] According to the statistics collected by OLAF, cases of illegal activities involving EU funds (so-called "irregularities") caused a cumulated damage to EU public money of approximately € 2.07 billion in 2010. Within the amount of the illegal activities in 2010 suspicion of fraud amounted to € 617 million of EU public money potentially lost to crime. It appears reasonable to assume that **not all the losses of EU funds to illegal activities can be avoided or recovered by criminal law** (emphasis added). See in this respect the Impact Assessment (Part I) on the protection of the financial interests of the European Union by criminal law, cited *supra*.

public money could be recovered, or losses of it be avoided, by criminal law measures is not possible due to the absence of, and methodological challenges in generating, empirical data on the preventive effect and thus financial impact of any given criminal law provision.

I can conclude that the effectiveness of protection of financial interests of the EU cannot be ensured solely through criminal law measures (which deal with only 25% of the lost funds), and also that the impact of criminal law measures cannot be estimated *ex ante*, but through evaluation and monitoring measures[93].

---

[93] Several instruments deal with ex post monitoring and evaluation measures to assess effectiveness of the proposed measures. Thus, the Impact Assessment on sanctions against employers of illegally staying third-country nationals, cited *supra*, note 92, establishes as criteria for determining effectiveness the number of illegally staying third-country nationals detected through inspections, estimates of the numbers of illegally employed third country nationals, the numbers of illegal migrants apprehended at EU borders, the number of overstayers, estimates of flows of illegal migrants, estimates of the stocks of illegal migrants, conditions of work of illegally employed third country nationals detected through inspections, the numbers of successful administrative proceedings and criminal prosecutions, the numbers of administrative proceedings and criminal prosecutions relative to estimates of scale of the problem, the number of successful prosecutions originally detected through inspections. The Impact Assessment on criminal sanctions for insider dealing and market manipulation, cited *supra*, establishes an obligation for monitoring the number of market abuse cases investigated and sanctioned after the implementation of the proposed legislative act. The Impact Assessment (Part I) on the protection of the financial interests of the European Union by criminal law, cited *supra*, stipulates as benchmarks the number of cases, and amounts involved (as compared to total amounts involved), where one a criminal investigation and/or proceeding was commenced under the heading of a provision within the scope of the Directive; the number of cases, and amounts involved (as compared to total amounts involved), where a criminal proceeding under the heading of a provision within the scope of the Directive was dismissed before trial stage, and reason for such dismissal; the number of cases, and amounts involved (as compared to total amounts involved), where a criminal proceeding under the heading of a provision within the scope of the Directive was brought to court by the competent

In all legislative instruments analyzed so far, there is no guarantee that the effectiveness of the European policy (whose protection through criminal law instruments is sought) would be realized. In fact, all of the above mentioned instruments strive for a more effective approach to achieving the proposed goals. However, a more effective approach is not equivalent to effectiveness. But if effectiveness of a European policy cannot be proved *ex ante*, why was it introduced in the Lisbon Treaty in the first place?

There are two possible responses to this question. The first one is that, from the beginning, the drafters of the Treaty intended to include a benchmark impossible to attain (a sort of *probatio diabolica*), in order to oppose a proposal in the field of criminal law politically, when the need arises. It is common knowledge that criminal law is linked to national sovereignty, and Member States are reluctant to give up traditionally sovereign attributes in favor of the European Union. So, a hindering mechanism may be instituted, to block the process when national interests so require. However, this assumption cannot stand, because such a blocking mechanism already exists [the "emergency brake" provided for in Art. 83(3)][94].

On the other hand, effectiveness of the dispositions of the Treaties was established by the Court of Justice of the European Union since 1964, and several decisions of the Court invoked effectiveness (*l'effet utile*) to avoid rendering meaningless the provisions of the EU Treaties[95]. The provisions of the Treaties should be interpreted in a sense which can render them effective.

---

authority; the number of cases, and amounts involved (as compared to total amounts involved), where a criminal proceeding under the heading of a provision within the scope of the Directive was dismissed by the court without judgment; the number of cases, and amounts involved (as compared to total amounts involved), where a criminal proceeding under the heading of a provision within the scope of the Directive led to a judgment, and outcome and, if applicable, sanction type and level of such judgment.

[94] See *supra*, Section 5.4., Subsidiarity.

[95] Case C-6/64, *Costa v. ENEL*, ECtHR (1964), 585; ECJ, Case C-303/05, *Advocaten voor de Wereld v. Leden van de Ministerraad*, 2007 ECR I-3633, para. 42.

It would be a paradox to have an interpretation of the Treaties which could lead to their ineffectiveness, in a text which is about ensuring effectiveness of a previously harmonized European policy. The provisions of Art. 83(2) of the TFEU should be interpreted in such a way as to ensure that the objective sought in fulfilled. Therefore, the assumption that the provisions of the Treaties were drafted for ensuring a limited approach to criminal law, on a strictly political basis, is not in line with the above mentioned interpretation of the Court.

That leads us to the second possible interpretation of the provisions of Art. 83(2) TFEU. The expression "approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy" does not entail an obligation of result, to be proved *ex ante*, which I have already showed is impossible to prove [and has not been attained in the legislative proposals already submitted on the basis of Art. 83(2)], but an obligation of diligence (to strive towards ensuring effectiveness, to adopt criminal law measures which are likely to improve effectiveness of an already harmonized EU policy).

The limit imposed in this case is that the criminal law measure should prove essential in the challenge of ensuring effectiveness of a European policy. What does it mean "essential" in this context? In my opinion, this limit should be analyzed in the framework of the EU proportionality principle, having two dimensions: a measure is essential if it is the best (most effective) measure in place to fulfill the desired goal[96] (the "last resort" dimension of the proportionality principle) and also if it does not go beyond what is necessary to attain the proposed objective (the "necessity" dimension of the proportionality principle). I consider that the provision of Art. 83(2) does not introduce a new benchmark in limiting criminalization of conduct, but rephrases the EU principle of proportionality in a specific positive dimension (i.e. in relation to criminal law).

It results from this analysis that this specific limit to criminalizing conduct (as a specific enactment of the proportionality

[96] See *supra*, Section 5.3., *Proportionality v. Last Resort* (Ultima Ratio) Principle.

principle) should be analyzed not only when Art. 83(2) of the TFUE is used as a legal basis for criminalizing conduct in the field of European policies, but also when other legal basis is used in the criminalization process in this field[97].

5.6. Judicial control of the legislative process

Judicial control of the legislative process means restricting the power of democratically elected legislative bodies to exercise their competence in the field of criminal law. But how can that power be restricted? If there are to be legally binding restrictions, they require constitutional support, and courts whose task it is to ensure that the legislators do not exceed their constitutional competence[98].

Are such instruments to be found in the EU legislation?

One of the ideas stressed at the beginning of this analysis was that the society has the possibility to amend the law maker. At the EU level this goal can be achieved through two instruments: an action in annulment and an action for failure to act.

According to Art. 263 of the TFUE, the ECJ has jurisdiction to review the legality of legislative acts intended to produce legal effects vis-à-vis third parties. It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers. Also, any natural or legal person may, under the conditions mentioned above, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

---

[97] For example, the Proposal for a Directive of the European Parliament and of the Council on the protection of the financial interests of the European Union by criminal law, cited *supra*, employs as a legal basis Art. 325(4) TFUE, the Directive 2009/52/EC, cited *supra*, employs as a legal basis Art. 63(3)(b) TFUE.

[98] *Jareborg*, cited *supra*, at 522.

In simple terms, this article deals, between other issues, with remedies in the situation of a breach of the principle of conferral of powers or the principle of proportionality. If the EU legislative bodies adopt a criminal law act in a field not confer upon them by the treaties (lack of competence), or if the goal of the legislative act may be achieved by lesser means (misuse of power), an action in annulment may be brought before the ECJ, which shall declare the act concerned to be void, if the action is well founded.

But this is a judicial remedy against action of the legislative bodies in infringement of their constitutional duties. What if the legislative bodies do not act upon a required legislative initiative, supposing there is a need identified to adopt criminal law measures in a certain field?

In this case, an action for failure to act may be brought before the ECJ. According to Art. 265 of the TFUE, should the European Parliament, the Council or the Commission, in infringement of the Treaties, fail to act, the Member States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have the infringement established. Any natural or legal person may, under the same conditions, complain to the Court that an institution of the Union has failed to address to that person.

Under Art. 266 of the TFUE, the institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the ECJ.

However, these legal remedies have not been used so far, in concrete circumstances, to seek annulment of a legislative act adopted in the field of criminal law[99], or to force the European institutions to act upon a certain legislative proposal.

---

[99] With the exception of two decision of the Court of Justice of the European Union in actions in annulment brought before the Court by the Commission against the Council for erroneous choosing of the legal basis. See in this respect, Case C-176/03 and Case C-440/05, cited *supra*. It is questionable, however, if these two constitutional decisions which paved the way for a shared criminal law competence at EU level were in line

§6. Conclusions

As opposed to national law, where there is no enacted legislation to limit criminalizing conduct, at the EU level several principles and criteria are instituted, both in legislative instruments and criminal law policies of EU institutions involved in the legislative process. However, several weaknesses were identified in the analysis of the practical enforcement of these principles in the legislative process.

Properly applied, the existing fundamentals principles of EU law are sufficient in themselves for providing good quality, adequate and necessary criminal instruments. In other words, the principle of conferral of powers, subsidiarity and proportionality provide a serious impediment to potential abuse of criminal law instruments.

So far, an empirical, and not scientific and methodical approach in legislation in adopting criminal law instruments at the EU level resulted from the analysis of the proposed or enacted legislative acts; it is an approach dictated by the immediate interest, and not a systematical approach.

Criminal law instruments adopted so far at the EU level are seldom consistent with each other; in a comparative analysis, criminal law terms used are often different, and sometimes the same term has different meaning in different acts[100]. An increased attention towards coherence in the criminal law field at the EU level is necessary. An interinstitutional agreement between the main actors (the Commission, the Council, the European Parliament), which should establish a common criminal law policy, including the link between general principles of EU law (conferral of powers, subsidiarity, proportionality) and general criminal law principles for criminalizing conduct and/or limiting criminalization (harm

---

with the principle of conferral of powers at the time of the ruling [see in this respect *N. Neagu*, Entrapment between Two Pillars: The European Court of Justice Rulings in Criminal Law, 15 EUROPEAN LAW JOURNAL (2009), 536].

[100] See examples of inconsistencies in the MANIFESTO ON THE EU CRIMINAL POLICY, cited *supra*.

principle, legal goods theory, *ultima ratio* principle) is to be concluded in the near future.

Also, steps should be taken towards transforming the European Parliament in the main body with competences in adopting criminal law at European level; national Parliaments should be involved in assessing both the subsidiarity and proportionality of a legislative act in the field of criminal law (the democracy gap[101]).

Literature, institutions and bodies are to establish a serious dialogue on the foundations of European Criminal Law; it is no use on criminalizing conduct if necessary instruments and criteria are not in place for a scientific, converging approach. It is better to start with the basis of criminal law and institute criteria for criminalizing conduct before adopting criminal law instruments in the field of EU law.

There should be a certain discretion of legislature in respect to criminalizing conduct for regulating conduct and imposing certain rules in society; but there should also be in place certain limits to prevent abuse of power and overcriminalization when not necessary.

In conclusion, the EU concept of the "harm" principle can be used as a tool to identify potential conduct susceptible for criminalization. General principles of EU law (such as conferral of powers, including identifying the legal goods in need of criminal law protection, proportionality and subsidiarity) and special limits enacted in Art. 83 of the TFEU (effectiveness of EU policies and transnational dimension of Eurocrimes) offer a principled approach to limiting criminalization in EU law, and special attention should be awarded to respecting these principle in the criminalization process.

[101] See also about separation of powers and democratic authorization for EU institutions, *U. Sieber*, European Unification and European Criminal Law, 2 EUROPEAN JOURNAL OF CRIME, CRIMINAL LAW AND CRIMINAL JUSTICE (1994), 96.

Bibliography

Appel, I., Verfassung Und Strafe (Duncker & Humblot, 1998)

Baker, D.J., The Moral Limits of Criminalizing Remote Harms", 11 NEW CRIMINAL LAW REVIEW (2007), 371

Baker, D.J., The Harm Principle vs Kantian Criteria for Ensuring Fair, Principled and Just Criminalisation, 33 AUSTRALIAN JOURNAL OF LEGAL PHILOSOPHY (2008), 66

Dubber, M.D., Theories of Crime and Punishment in German Criminal Law, 53 AMERICAN JOURNAL OF COMPARATIVE LAW (2005), 683

Everling, U., The European Union between Community and National Policies, in Armin von Bogdandy, Jurgen Bast (Eds) Principles of European Constitutional Law (Hart Publishing, 2006)

Feinberg, J., Harm to Others: the Moral Limits of the Criminal Law (OUP 1984)

Fletcher, G.P., The Grammar of Criminal Law: American, Comparative and International (Oxford University Press, 2007)

Gray, J., Introduction, in J.S. Mill, On Liberty and Other Essays (Oxford University Press 1991, orig.1859)

Günther, H.-L., Das viktimodogmatische Prinzip aus anderer Perspektive: Opferschutz statt Entkriminalisierung, in Festschrift Für Lenckner (1998)

Harbo, T.-I., The Function of the Proportionality Principle in EU Law, 16 EUROPEAN LAW JOURNAL (2010), 161

Herlin-Karnell, E., Subsidiarity in the Area of EU Justice and Home Affairs Law – A Lost Cause?, 15 EUROPEAN LAW JOURNAL (2009), 356

Jareborg, N., Criminalization as Last Resort (Ultima Ratio), 2 OHIO ST. J. CRIM. L. (2005), 524

Jescheck, H.-H., Weigend, T., Lehrbuch Des Strafrechts: Allgemeiner Teil (Duncker & Humblot, 5th edition, 1996)

Roxin, C., Strafrecht: Allgemeiner Teil, vol.I (C.H. Beck, 3rd edition, 1997)

Kaufmann, A., Die Aufgabe Des Strafrechts (Westdeutscher Verlag, 1983)

Kienapfel, D., Stafrecht: Allgemeiner Teil (de Gruyter, 4th ed. 1984)

Koriath, H., Zum Streit um den Begriff des Rechtsguts, 146 GA [GOLTDAMMER'S ARCHIV FÜR STRAFRECHT] (1999), 561

Lackner, K., Kühl, K., Strafgesetzbuch (C.H. Beck, 24th ed. 2001)

Lagodny, O., Strafrecht Vor Den Schranken Der Grundrechte (Mohr Siebeck, 1996)

Mill, J.S., On Liberty and Other Essays (Oxford University Press 1991, orig.1859)

Neagu, N., Entrapment between Two Pillars: The European Court of Justice Rulings in Criminal Law, 15 EUROPEAN LAW JOURNAL (2009), 536

Persak, N., Criminalising Harmful Conduct. The Harm Principle, its Limits and Continental Counterparts (Springer, 2007)

Schünemann, B., The System of Criminal Wrongs: The Concept of Legal Goods and Victim-based Jurisprudence as a Bridge between the General and Special Parts of the Criminal Code, 7 BUFFALO CRIMINAL LAW REVIEW (2004), 582

Sieber, U., European Unification and European Criminal Law, 2 EUROPEAN JOURNAL OF CRIME, CRIMINAL LAW AND CRIMINAL JUSTICE (1994), 96

Steinberg-Lieben, D., Die Objektiven Schranken Der Einwilligung Im Strafrecht (1997)

Stratenwerth, G., Zum Begriff des Rechtsgutes, in Festschrift Für Lenckner (1998)

Vasquez, M.A., Acerca de la teoría de bienes jurídicos, 18 REVISTA PENAL (2006), 5

Vasquez, M. A., Derecho Penal Económico. Consideraciones Jurídicas Y Económicas (Pie Imprenta: Lima: Idemsa 1997)

Vogel, J., 16 StV [STRAFVERTEIDIGER] (1996)

Chapter III
Towards a common definition of criminal offence in EU Law

Tudor Avrigeanu*

§1. Introduction

While the reality of a European criminal law as at least transnational legal order seems to pass rather unquestioned beyond any reasonable doubt, "there is no common concept of crime within the EU" and also "some comparative groundwork is necessary before substantive harmonization of European criminal laws is feasible"[1]. Even more necessary seems to be indeed a common frame of theoretical reference which should open the path to a "genuinely European, as opposed to national, legal scholarship, based on historical and comparative study"[2]. The comparative efforts[3] alone

* Researcher, Centre for Legal, Economic and Socio-Administrative Studies, "Nicolae Titulescu" University, Bucharest, Romania.

[1] *K. Ambos*, Is the Development of a Common Substantive Criminal Law for Europe Possible?, (2005) 12 Maastricht Journal of European and Comparative Law 173

[2] *R. Zimmermann*, The Present State of European Private Law,(2009) 57 American Journal of Comparative Law 479 at 512

[3] *K. Tiedemann*, Der Allgemeine Teil des Strafrechts im Lichte der europäischen Rechtsvergleichung, in *A. Eser et al* (eds.), Festschrift für Theodor Lenckner (C.H. Beck, 1998), at 411; *J. Vogel*, Elemente der Straftat: Bemerkungen zur französischen Straftatlehre und zur Straftatlehre des common law, (1998) Goltdammer's Archiv für Strafrecht 127; *U. Sieber*, Strafrechtsvergleichung im Wandel (2006), in *U. Sieber, H.-J. Albrecht* (eds.), Strafrecht und Kriminalpolitik unter einem Dach (Duncker & Humblot, 2006), at 65.

could not fulfill this task, even if the major part of the literature accept that arguments in criminal law theory as "universal claims of principle" are "transnational in nature"[4] and also even if the philosophy is directly called to assist these efforts on the path "towards a universal system of crime"[5]. (**II**) The common conceptual background of the actual European criminal law theory are to be found in the structures of the *imputatio* developed within the Modern natural law and especially in their built-in oscillation between natural mechanicism and spiritual teleology[6]. (**III**) A closer look to the following era of the legal positivism will sketch the way to the actual European definitions of crime. While the legal positivism realized the complete development of the first alternative (**IV**), the structure of crime to be developed within the latter one should testify the revival of the old European tradition of the Romanist legal thought as opposed to the Modern one (**V**)

§2. Status *quaestionis*

Under the present circumstances, a common European definition of crime would be hardly something more than a mere collection of *nomina*, even if mandatory stated within a European regulation. For instance, a first European scholar could understand from this definition, let us imagine, that crime means "an act which is unlawful, culpable and legally menaced with punishment"[7].

---

[4] *Fletcher*, The Grammar of Criminal Law Vol. I (Oxford University Press, 2007), 55

[5] *Ambos*, Toward a Universal System of Crime: Comments on George Fletcher's Grammar of Criminal Law, (2007) 28 Cardozo Law Review 2647

[6] *H. Welzel*, Naturrecht und materiale Gerechtigkeit (Vandenhoeck & Ruprecht, 4th ed., 1962), 131.

[7] *A. Benakis*, Die Unrechtslehre von Nikolaos Chorafas', (1970) 82 Zeitschrift für die gesamte Strafrechtswissenschaft 54 ('eine rechtswidrige, schuldhafte und vom Gesetz mit Strafe bedrohte Handlung'); See also *A. Benakis*, Relaciones entre el Derecho penal griego y el Derecho penal alemán, (1975) 28 Anuario del Derecho Penal y

A second scholar understands the same definition as "a fact which is illegal, imputable to its author and punishable", and also makes clear that the regulation itself grounds on Aristotle's conception on punishment as just retaliation of the crime[8]. A third scholar does not show any special concern for philosophical issues, yet sees in the same definition a consecration of the usual German tripartite structure and therefore understands "the constituents of the act" as being "the stipulation under criminal law" (referring "both to the *actus reus* and *mens rea* as constituents of offence"), then "the unlawfulness" and lastly "the imputability" understood as a sign for the acceptance of the normative theory of culpability and for the rejection of the psychological one[9]. But there is also a fourth (French) scholar who reads into the same definition "an act which is not justified, imputable to its author and punished by the law" as well as a "consecration of the doctrinal presentation which sees in the crime a legal element (the unjustified act), a material element (the act considered for itself) and a psychological element (the imputable act)" opposed to the German normative culpability[10]. This opposition is confirmed, last but not least, by a fifth (German) scholar, who discerns in the same definition yet no tripartition anymore, but the "classical objective-subjective division in the concept of crime" similar to the Italian one "between *fatto* (material element) and *colpevolezza* (moral element)" and to the

---

de las Ciencias Penales 229 at 230 ('acción antijurídica y culpable amenazada por la ley con una pena').

[8] *D.J. Karanicas*, Le nouveau code pénal hellenique, (1951) Revue de Science Criminelle et de Droit Pénal Comparè 633 at 637 and 634 .

[9] *F. Streteanu*, Proiectul noului Cod penal şi reconfigurarea teoriei infracţiunii în dreptul român (The Penal Code Draft - Reshaping the Theory of the Offence in Romanian Law), (2009) 2 Caiete de Drept Penal 50 at 50, 52 and 53 .

[10] *J. Pradel*, Droit pénal comparé (Dalloz, 3rd ed, 2008), 54 ("l'infraction est un acte injustifie, imputable a son auteur et puni par la loi") and 90 ("le droit allemand insiste beaucoup sur la necessite d'une faute (Schuld), sur la culpabilite").

French one "between the objective *élément matériel* and the subjective *élément moral* or *psychologique*"[11].

This exercise along the definition of crime in Art. 14 of the Greek penal code from 1951 shows how great is the distance that separates the actual situation of the European criminal law science from the times until the end of the 18th century, when the European criminalists could rest confidently on the "unity of sources" consisting in Roman law and canon law, the "unity of doctrine" represented by jurisprudence and the "unity of language" around Latin[12]. To be sure, a good part of modern theory of criminal law in Europe still continues to be figured in Roman distinctions like *error facti* and *error iuris* and Medieval ones like *error vincibilis* and *error invincibilis*[13], even if not without significant changes produced during the Modern times, as particularly evident in the case of *dolus directus* and *dolus indirectus*[14]. The reason why the present efforts to "europeanize" criminal law science mention this common tradition rather in passing[15] and the few attempts to "reinvigorate it as basis of, or model for, an academic, transnational" criminal law[16] remain isolated[17] is brought into full

[11] *Ambos*, 100 Jahre Belings Lehre vom Verbrechen: Renaissance des kausalen Verbrechensbegriffs auf internationaler Ebene? (2006) 10 Zeitschrift für Internationale Strafrechtsdogmatik 464 at 468 .

[12] *J. Ortolan*, Coup d'oeil général sur le droit pénal en Europe, (1843) 17 Revue de législation et de jurisprudence 121-123.

[13] *H.-H. Jescheck*, La conscience humaine et la responsabilité penale de l'individu, (1961) 8 Annales de la Faculte de Droit et des Sciences Politiques et Economiques de Strasbourg 415 at 427.

[14] *H.H. Lesch*, Dolus directus, indirectus und eventualis, (1997) Juristische Arbeitsblätter 802.

[15] *U. Sieber*, European Unification and European Criminal Law, (1994) 2 European Journal of Crime, Criminal Law and Criminal Justice 86 at 103; K. Kühl, Europäisierung der Strafrechtswissenschaft, (1997) 109 Zeitschrift für die gesamte Strafrechtswissenschaft 777 at 794-795

[16] Using the term private law the same formula is to be found in *R. Michaels, N. Jansen*, Private Law Beyond the State? Europeanization, Globalization, Privatization, (2006) 54 American Journal of Comparative Law 843 at 863

light by the recent proposal to consider "the preventive and retributive theories which since the 17th century made visible the requirements as well as the limits of legitimacy concerning the criminal law" the very Roman Law of the European criminal law science[18]. Even by apparently underestimating the fact that the ancient or the medieval Roman law could suffer the influence of various philosophies without ceasing to be first of all a body of legal concepts, this proposal reveals the essence of the diametrally opposite type of legal thought initiating in the 16th century's opposition between the *mos gallicus* and the *mos italicus*[19], flourishing during the early modern natural law doctrines of the 17th century and finally brought to completion by the fact that "the main object of the French legislation at the beginning of the 19th century was to put into the form of positive laws those fundamental ideas of the eighteenth century which had been developed theoretically under the conception of the Law of Nature"[20].

There is hardly any doubt on the question that the "europeanization" of criminal law science[21] takes place in a framework which is previously configured by the criteria of the Enlightenment. In order to achieve a "*théorie générale*"[22] of the criminal law under these ideologically particularized conditions, one may raise the question about an Enlightenment- specific definition of the "criminal law" itself. Recalling the fact that it was the Enlightment which has replaced the imperative of "conserving the good order"

---

[17] *D. Bock*, Die erste Europäisierung der Strafrechtswissenschaft: Das gemeine Strafrecht auf römischrechtlicher Grundlage, (2006) 1 Zeitschrift für Internationale Strafrechtsdogmatik 7.

[18] *M. Kubiciel*, Strafrechtswissenschaft und europäische Kriminalpolitik, (2010) 5 Zeitschrift für Internationale Strafrechts-dogmatik 742 at 746.

[19] *F. Carpintero Benítez*, Historia breve del derecho natural (Colex, 2000), 148 sq (El Derecho obtenido desde la Filosofía).

[20] *H. Gerland*, The German Draft Penal Code and Its Place in the History of Penal Law, (1929) 11 Journal of Comparative Legislation and International Law 19 at 20).

[21] *Sieber*, European Unification and European Criminal Law, (1994) 2 European Journal of Crime, Criminal Law and Criminal Justice 86 at 103

[22] *J. Pradel and G. Corstens*, Droit pénal européen (Dalloz, 1999), 2-3.

with the one of "making freedom possible"[23], the answer is given by Professor George Fletcher's famous statement about criminal law as "a species of political and moral philosophy", whose "central question" consists in "justifying the use of the state's coercive power against free and autonomous persons"[24]. Should this mean the same as obtaining the criminal law from some philosophical system? No, as Fletcher's immediately following phrase shows: "If the rationale or a limiting condition of criminal punishment is personal desert, then legal theory invariably interweaves with philosophical claims about wrongdoing, culpability, justifying circumstances and excuses". This can only mean that understanding the criminal law as philosophical species does not make the former a part of the philosophical discourse insofar it is regarded as being "a *received* body of interrelated concepts and practices"[25], whose better comprehension may require some philosophical investigation, but which are not primarily to be derived from the philosophy itself. This latter variant seems to apply rather to the finalist project of Hans Welzel (1904-1977), which set up to build a "systematical" criminal law science with the "ultimate radices in the basic concepts of practical philosophy", i.e. in a "theory of just and unjust human action"[26] i.e. in the "thing-logical structures"[27] of the human action as essentially defined by the goal of the agent and the culpability as essentially defined by the blameworthiness of the agent's will to not

---

[23] *G. Jakobs*, Strafrecht als wissenschaftliche Disziplin in C. Engel and W. Schön (eds.) Das Proprium der Rechtswissen-schaft (Mohr Siebeck, 2007), at 103 and 108.

[24] *Fletcher*, Rethinking Criminal Law (Oxfort University Press, 2nd edition, 2000), XIX.

[25] Idem, at 407 (italics not original).

[26] *Welzel*, Das Deutsche Strafrecht: Eine systematische Darstellung (W. De Gruyter, 11th ed., 1969), 1.

[27] *M.D. Dubber*, 'The Promise of German Criminal Law: A Science of Crime and Punishment', (2005) 6 German Law Journal 1049 at 1063. This is a rather literally translation of sachlogische Strukturen, ie structures of things logically and cogently correlated to valuations', so Arm. Kaufmann, 'Problems of Cognition in Legal Science with Reference to Penal Law', (1970) 1 Law and State 18 at 26.

comply with the law. The application of this peculiar variant of natural law[28] to the comparative research means necessarily rising some rationally deduced, universal, models' concerning above everything which at the first side appears as national peculiarity[29].

In spite of having rejected the main finalist idea as such, the majority of the German scholars have accepted many of its consequences[30] and the same step seems to be partially performed by Professor Kai Ambos in analyzing the European structures of crime. The finalist scholarship "overcame the classical and neo-classical distinction between the objective and subjective aspect of on offence" and also "goes hand in hand with the recognition of a normative concept of guilt or culpability: culpa is no longer (only) the intent to cause a certain result but the blameworthiness of the perpetrator's conduct". Yet, the tripartite structure cannot expect any more to be embraced by the numerous national doctrines which rejected it up to date and, on the other side, the distinction between the descriptive and the normative aspects of *mens rea* should be also maintained. For these reasons and because a unitary European approach seems to build a quasi-categorical imperative, Ambos suggests that a bipartite structure conceived like "a mixed system accepting the existence of certain subjective elements as part of the offence (*actus reus*) (...) should form a basis for a General Part of European criminal law, and it should not be too difficult to implement them on a supranational European level"[31].

Since the reasons for such implementation are not scientifical, but pragmatical ones, it must be assumed that the task itself does not actually concern anymore the European science of criminal law, but European politics, its realization being conditioned by a new political decision regarding the creation of a European Penal Code.

---

[28] *O. Sticht*, Sachlogik as Naturrecht? Zur Rechtsphilosophie Hans Welzels (1904-1977) (Schöningh, 2000), 37 sq.

[29] *Hirsch*, Gibt es eine national unabhängige Strafrechtswissenschaft? M. Seeebode (ed.), Festschrift für G. Spendel (W. de Gruyter, 1988), 43 at 46 and 58.

[30] *H.-H. Jescheck, T. Weigend*, Lehrbuch des Strafrechts, Allgemeiner Teil (Duncker & Humblot, 5 edn, 1995), 213.

[31] *Ambos*, "Is the Development..." *supra*, at 180 and 190.

Given the fact that under the domination of the legal positivism it became not unusual to use the powerful instrument of the legislation in matters which traditionally have been considered as an exclusive domain of the scholarship, the possibility to achieve a European legal structure of crime in this way is undoubtfully real. Yet the recent criminal law reforms in some new Member States of the EU like Estonia and Romania[32] have chosen to impose by statutory provisions the Germanic tripartite structure of the crime in replacement of that which, according to a widely shared opinion, was seen as the (never legally prescribed as such) "quadripartite system, which is a creature primarily of the Communist literature on criminal liability" and whose specific feature in relation to the bipartite system "lies in the notions of subject and object of the offence"[33]. It could be nevertheless objected that this solution is more similar to the "imperialistic" one of the US American Model Penal Code[34] than to the traditional European standards, and that it departs also from a wrong supposition, since precisely the notions of the *Objekt* and the *Subjekt* can be found as structural elements of crime in the German treatises from the 19th century like the one of Albert Friedrich Berner, a major work of the Hegelian School on criminal law theory[35]. But first of all, the significance of such legislative interventions in matters which traditionally form an exclusive domain of the scholarship may be seen in confirming the

[32] *M. Luts, J. Sootak*, Das estnische Strafgesetzbuch von 2002 - Ende oder Beginn der Strafrechtsreform?, (2005) 117 Zeitschrift für die gesamte Strafrechtswissenschaft 651, at 660 sq; J. Rinceanu, Auf der Suche nach einem Straftatbegriff in Rumänien, (2009) 121 Zeitschrift für die gesamte Strafrechtswissenschaft 792, 800 sq.

[33] *Fletcher*, Criminal Theory in the Twentieth Century, (2001) 2 Theoretical Inquiries in Law 265, at 270.

[34] *Fletcher*, Dogmas of the Model Penal Code, (1998) 2 Buffalo Criminal Law Review 2 at 7.

[35] *A.F. Berner*, Lehrbuch des Deutschen Strafrechts (Tauchnitz, 18th ed., 1898), 75 sq and 92 sq.

doctrinal tendency to treat results achieved in certain national doctrines *de facto* like "neo-natural law"[36].

This permanence of "an historical irony", as Helmut Coing aptly characterized the fact that "the Enlightenment, which had set out to seek a universal law reflecting universal human nature, should lead straight into the era of the national codes"[37] and of the subsequent "parochial"[38] doctrines, is not surprising. Still around the end of the 20th century the general impression was that German, English or French scholars considered the divisions between *Tatbestandsmässigkeit*, *Rechtswidrigkeit* and *Schuld*, *actus reus* and *mens rea,* respectively *éléments légal*, *matériel* and *moral* like being constructed according to some "quasi-natural laws"[39]. Yet the same Welzel who did celebrate the Germanic tripartite structure as "one of the most impressive achievements in the last two or three generations", did not hesitate to deplore the price which had to be paid for, namely the destruction of "the concept in which for hundreds of years the criminal law scholarship since Pufendorf (…) identified the core of the penal functions, namely the concept of the imputation"[40]. Or, more precisely stated, the modern German system of crime is the consequence of a theoretical development within which the doctrine of imputation, "as understood by Aristotle, Thomas Aquinas and Pufendorf" was "reduced to silence firstly under the influence of Kant's philosophy in the form given by Feuerbach,

---

[36] *G. Licci*, Quelques remarques sur les racines allemandes du droit pénal italien, (2003) Revue Internationale de Droit Comparé 309 at 314.

[37] *H. Coing*, The Original Unity of European Legal Science, (1975) 11 Law and State 76 at 89.

[38] *Fletcher*, Parochial versus Universal Criminal Law, (2005) 3 Journal of International Criminal Justice 20.

[39] *A. Eser*, Funktionen, Methoden und Grenzen der Rechtsvergleichung, in H. J. Albrecht (ed.), Festschrift für Günther Kaiser, II. Band (W. de Gruyter, 1998), 1499 at 1525 ("quasi-naturgesetzlich").

[40] *Welzel*, Die deutsche strafrechtliche Dogmatik der letzten 100 Jahre und die finale Handlungslehre, (1966) Juristische Schulung 421 at 422.

and thereafter under the influence of a natural science oriented towards causality, and of the implicit determinism"[41].

§3. The ambivalent legacy of the modern natural law

According to Welzel, the imputation and "the equivalent concept of action" regard the fact that "not all the consequences which a man caused, but only those which depended on his will or were dominated by him and so only could be imputed to him as work of his will"; considering the will as the active factor which informs the external happening through the "inner of the agent" (i.e. the "simple fundamental idea of the teleological theory of action") is for Welzel "nothing new, but an old truth, already formulated by Aristotle and taken over by Pufendorf from natural law into the legal science"[42]. It is quite out of question that Aristotle's theorizing on the voluntary act, the arts of wrongdoing, justice and punishment in the *Nicomachean Ethics* did not cease even today to be considered the point of departure for "the study of the grammar and the principles of criminal law"[43]. Yet it does not make much sense to use either the 3rd or the 5th Book in order to involve Aristotle in disputes between Modern Greek and German criminal law scholars concerning the appropriate systematic place of the *dolus* within the structure of the crime[44]. Along the reception of the Aristotelian structures into the Roman Criminal Law[45] and Medieval *ius commune*[46], the problem of such a general structure

---

[41] *W. Hardwig*, Die Zurechnung: Ein Zentralprolem des Strafrechts (Cram, de Gruyter, 1957), 173.

[42] *Welzel*, Die deutsche strafrechtliche Dogmatik... *supra*, at 422.

[43] *Fletcher*, The Grammar... *supra*, at 9.

[44] See *A. Benakis*, Über den Begriff des Unrechttuns bei Aristoteles anlässlich einer Kritik der finalen Handlungslehre, in G. Stratenwerth et al (eds.), Festschrift für Hans Welzel (W. de Gruyter, 1974), at 213.

[45] *M. Shalgi*, Aristotle's Concept of Responsibility and Its Reflection in Roman Jurisprudence, (1971) 6 Israel Law Review 39 at 55 sq.

[46] See *J. Hruschka*, Der Einfluss des Aristoteles und der Aristoteles-Rezeption auf Rechtsbegriffe, in *H. de Wall, M. Germann* (eds.), Festschrift

did not exist. Only the work of Samuel Pufendorf (1632-1694), which is commonly considered to be at the same time "the central synthesis of the (modern) natural law"[47] did open the path towards the General Part[48] and this was made possible precisely by the invention of *imputatio* as a legal concept[49].

3.1. *Imputationes* and *leges*

As "the first one who introduced the technical term *imputatio* into the science of law"[50], Pufendorf departed from the difference between the so called physical entities (*entia physica*) and moral entities (*entia moralia*), the latter ones being as such essentially related to the moral liberty of the man and expressing herewith the *meanings* which this free and rational man imposes on the rest of the nature. Following this difference, the human actions can be viewed *either* as causal processes governed by the laws of nature *or* as moral actions, when the natural process is properly subjected to imputation to a person, i.e. put in relation with the human freedom[51]. According to Professor Ambos:

"The doctrine of imputation in its *original* sense, related to natural law, can best be described by the opposing concepts of *imputatio facti – imputatio iuris* or *imputatio physica – imputatio moralis*. Accordingly, we are concerned first with a factual or physical imputation of an event controlled by (human) will (a "natural act") to a particular *person* (the perpetrator or agent);

---

für Christoph Link (Mohr Siebeck, 2003), at 687; *H.J. Berman*, Law and Revolution: the formation of the Western legal tradition (Harvard University Press, 1983), 165 sq and especially 184 sq.

[47] *J. Schneewind*, The invention of autonomy: a history of modern moral philosophy (Cambridge University Press, 1998), 118.

[48] *R. v. Stintzing, E. Landsberg*, Geschichte der Deutschen Rechtswissenschaft (Oldenbourg, 1898), 14.

[49] *Hardwig*, op. cit., *supra*, 35.

[50] *R. Loening*, Die Zurechnungslehre des Aristoteles (G. Fischer, 1903), X.

[51] *Welzel*, Die Naturrechtslehre Samuel Pufendorfs (W. De Gruyter, 1958), 24 sq; E. Schmidt, Einführung in die Geschichte der deutschen Strafrechtspflege (Vanderhoeck & Ruprecht, 3rd ed., 1965), 169 sq.

then we have to qualify this event legally or morally in the sense of normative imputation, that is, to perform a normative evaluation of the act as wrongful or immoral and thus in need of a sanction"[52].

Applying this reading to the comparative legal history, it seems like the difference expressed through the Latin concepts builds something like an originary (Continental) European bipartite structure of crime, coming from the natural law treatises of the 18th century into the treatises of criminal law. Indeed, the distinction established by Christian Wolff (1679-1754) between *imputatio psychica* and *imputatio moralis* informs the French[53] criminal law scholarship, while the origins of the Germanic structure of crime are tied by the German criminalists to the distinction made by Joachim Georg Daries (1714-1791) between *imputatio facti* and *imputatio iuris*[54]. Yet this would be quite wrong, since:

'Daries' distinction between *imputatio facti* and *imputatio iuris* should not be confounded with Wolff's distinction between *imputatio physica* and *imputatio moralis*. The *imputatio physica* of Wolff is the mere verification of a causal chain between an event to which a subject takes part, and an effect of that event, "*seposita omni moralitate actionis*" – if it is abstracted from any morality of the event. On the other side, by the *imputatio moralis* events (*actiones*) are attributed to a subject (*agens*). Therefore one must conceive both *imputatio facti* and *imputatio iuris* as *imputationes morales*[55].

---

[52] *Ambos*, "Toward...", *supra*, at 2665.

[53] *Hruschka*, Das Strafrecht neu durchdenken!, (1981) Goltdammer's Archiv für Strafrecht 237 at 247 referring to the distinction between la contrainte physique and la contrainte morale [R. Merle and A. Vitu, Traité de droit criminel, Tome I (Cujas, 7th ed., 1997), 778 sq].

[54] *Hruschka*, Strafrecht nach logisch-analytischer Methode (W. De Gruyter, 2nd ed., 1988), 347; the origins are traced back to the ius commune by H.-H. Jescheck and T. Weigend, Lehrbuch..., *supra*, at 202; K. Seelmann, Strafrecht, Allgemeiner Teil (Helbing & Lichtenhahn, 2nd ed., 2005), 32 (mentioning also the *applicatio legis ad factum*).

[55] *Hruschka*, Ordentliche und ausserordentliche Zurechnung bei Pufendorf, (1984) 96 Zeitschrift für die gesamte Strafrechtswissenschaft 661 at 696.

If now *imputatio facti* and *imputatio iuris* are to be conceived as the two levels of the *imputatio moralis*, then it follows that any of them suppose the freedom of the subject: the freedom of the action and the freedom of will. On the first level, a subject is said to have freely acted, when it stood in his/her power to apply the practical rules of daily experience in order to achieve his/her individual concrete goals. The second level deals with the liberty of the subject to comply with the law while setting the goals and pursuing their achievement. If any of these forms of freedom is lawfully considered as having been absent, then the imputation on the respective level is *qua ordinary* excluded, but can yet take place *qua extraordinary*, if the subject is deemed responsible for having previously (freely) causing his/her (actual) impossibility to comply with the law[56].

Latest at this point must be recalled a third couple historical concepts missing in each of both variants mentioned by Professor Ambos. Between the *imputatio facti* and *imputatio iuris*, Daries did intercalate the *applicatio legis ad factum*, i.e. the correspondence into which the real conduct of the agent deed and the legal requirements which are mandatory for conducts. Similarly, Johann Jacob Lehmann (1683-1740) has added the *imputatio legis* to Christian Wolff's *imputatio physica* and *imputatio moralis*, forming a tripartition which was explicitly adopted by Francesco Carrara[57] (1805-1888), the founding father of the modern science of criminal law in Italy[58]. The difference between *applicatio legis ad factum* and *imputatio legis* consists in the fact that the former is not governed by the same set of rules which serve to attribute

[56] *Hruschka*, Zurechnung und Notstand: Begriffsanalysen von Pufendorf bis Daries in J. Schröder (ed.), Entwicklung der Methodenlehre in der Rechtswissenschaft und Philosophie vom 16. bis zum 18. Jahrhundert (Steiner 1998), at 163; Idem, Zurechnung seit Pufendorf. Insbesondere die Unterscheidungen des 18. Jahrhunderts in *M. Kaufmann, J. Renzikowski* (eds.), Zurechnung als Operationalisierung von Verantwortung (P. Lang, 2004), at 17.

[57] *F. Carrara*, Programma del corso di diritto criminale, (Canovetti, 1863), 31.

[58] *A. Baratta*, Philosophie und Strafrecht (C. Heymanns, 1985), 332.

results and blame to persons, but by another set of rules which say what the agents themselves are (not) allowed to shape their conducts. This difference is the fundamental premise for the one between justification and excuse[59]: if there should be a difference between justification and excuse, then the *lex* governing the conduct must be *obligatory* even in the absence of any menace with punishment due to the incidence of an excuse. This is the reason why the difference itself appears as a "legal-ethical postulate"[60], with the consequence that it can be successfully opposed only by rejecting any "legal-ethical blame" as constitutive feature of the punishment[61], i.e. by refusing to admit that the law can be morally obligatory and not only naturally compulsory: "That which totally excuseth a fact, and takes away from it the nature of a crime, can be none but that which at the same time taketh away the obligation of the law"[62]. Nevertheless, whoever refers to these words of Thomas Hobbes in order to reject the difference between justification and excuse in criminal law[63] must also accept that for Hobbes, law means "decision and command in the sense of a psychologically calculable compulsory motivation", so that "the typical law of such a compulsory order is criminal law, the *lex mere poenalis*, and the order thus obtained through such a law is a mere *ordo poenalis*"[64]. The radical supposition behind such an order is that the human will

[59] See *S.B. Byrd*, Wrongdoing and Attribution: Implications Beyond the Justification-Excuse Distinction, (1987) 33 Wayne Law Review 1289 at 1341; *Hruschka*, Justification and Excuse: A Systematic Approach, (2004) 2 Ohio State Journal of Criminal Law 407.

[60] *Eser*, Die Unterscheidung von Rechtfertigung und Entschuldigung: Ein Schlüsselproblem des Verbrechensbegriffs, in R. Lahti (ed.), Criminal law theory in transition: Finnish and comparative perspectives (Finnish Lawyers' Publ., 1992), at 301 and 303 sq ('rechtsethisches Postulat').

[61] *U. Kindhäuser*, Strafe, Strafrechtsgut und Rechtsgüterschutz in K. Lüderssen et al (eds.), Modernes Strafrecht und ultima-ratio-Prinzip (P. Lang, 1990), at 29 ('rechtsethische Tadel').

[62] *T. Hobbes*, Leviathan (Hackett, 1994), 198.

[63] *J. Hall*, Comment on Justification and Excuse, (1976) 24 American Journal of Comparative Law 638 at 645.

[64] *C. Schmitt*, The Leviathan in the state theory of Thomas Hobbes (Greenwood Press, 1996), 70.

"may be compelled to obey both reason's dictates and political norms, but only through fear of punishment"[65] and that is the very reason for considering *lex distributiva* and *lex vindicativa* as being *non duae legum species*, but *eiusdem legis duae partes*[66]. This is but the basic theorem of *lex imperfecta non est lex*, where imperfect laws are those which unlike the laws in mathematics, logics or physics "suffer from a weakness: their preference is not fixed *ex ante*" so that their transgression "brings with it sooner or later a *poena naturalis*"[67].

3.2. Two traditions in modern Criminal Law thinking

The demonstration of this theorem was provided by no other than Samuel Pufendorf himself. Pufendorf understands under law "a decree by which a superior obliges a subject to conform his arts to his own prescription" and in the state it is by the laws of the sovereign that "is usually denned what ought to be regarded as a man's own, and what another's; what is to be held lawful or unlawful in that state, what honourable or dishonourable; what part of his natural freedom each one retains, or how each should adapt the enjoyment of his rights to the peace of the state; and finally what each has the right to exact of the other, and in what manner". In order to assure that such laws do not remain merely words, "there is need of the fear of punishment, and of the power to enforce it. And the punishment, if it is to suffice for our purpose, must be so regulated that violation of the law is manifestly a greater hardship than the observance; and thus that the severity of

[65] *T. Hochstrasser*, Natural Law Theories in the Early Enlightenment (Cambridge University Press, 2000), 131.

[66] *Hobbes*, De cive, in W. Molesworth (ed.), Thomae Hobbes Opera Latina, Vol. II (Londini, 1839), at 317.

[67] *Jakobs*, Imputation in Criminal Law and the Conditions for Norm Validity, (2004) 7 Buffalo Criminal Law Review 491 at 498 and 497.

the penalty outweigh the pleasure or profit received, or hoped for, from the injury. For, of two evils, men can only choose the less"[68].

If it is true that Pufendorf did use the doctrine of the *entia moralia* in order to oppose Hobbes[69], nevertheless it is also true that "Pufendorf – at least on questions of criminal law – sides with Hobbes' critique of the natural law tradition"[70]. "Whenever man is seen as resembling all other creatures, namely as entirely governed by the laws of nature even when making a choice between various possibilities, there can be no question of moral guilt; for that case his actions are neither moral nor immoral but amoral"[71]. Now, if Pufendorf's distinction between *entia physica* and *entia moralia* is nevertheless considered only meaningful, but even a forerunner of Immanuel Kant's one between *homo phaenomenon* and *homo noumenon*[72], then also Pufendorf's *imputatio* and its subsequent development by Daries will merge into an appendix to the latter distinction[73], as parts of a criminal law theory that "replaces the cognitive approach of the Enlightenment – «how to conduct human individuals?» – with the normative one – «What pertains to a person?» and gaining in this way a concept of punishment where the one who is to be punished mutates from an object of instrumentalist treatment to a subject" who can admit claims relative to the justice of his own punishment[74]. It remains then to underline the fact that the total separation between *moralis* and the legal *imputatio* was imposed first by Christian Thomasius

---

[68] *S. Pufendorf*, The Two Books on the Duty of Man and Citizen According to Natural Law (Oceana Publ., 1964), 12 and 111.

[69] *F. Wieacker*, Naturrecht und materiale Gerechtigkeit, (1964) Juristenzeitung 633 at 637.

[70] *D. Hüning*, Hobbes on the Right to Punish in P. Springborg (ed.), The Cambridge Companion to Hobbes (Cambridge University Press, 2007), 217 at 233.

[71] *G. Küchenhoff*, The Problem of Guilt in the Philosophy of Law, (1975) 11 Law and State 67, at 67-68.

[72] *Welzel*, Naturrecht … *supra*, at 132.

[73] *Byrd and Hruschka*, Kant's Doctrine of Right: A Commentary (Cambridge University Press, 2010), 290 sq and 298 sq.

[74] *Jakobs*, Staatliche Strafe: Bedeutung und Zweck (Schöningh, 2004), 15.

(1655-1728), against Pufendorf – so that "since Thomasius the category of *imputatio* has consolidated itself as a notion which is necessary in law"[75] – in the same manner as Paul Johann Anselm Feuerbach (1775-1833) made the criminal law against Kant "into what Hobbes sees in it – namely, a means of compulsory influencing the psychological motivation of the people"[76]. Within this transformation the category of i*mputatio* had to play a decisive role, namely "to replace the category of duty (*obligatio*, *meritum*, *Pflicht* or *Verbindlichkeit*), so that the latter one resulted as unnecessary for the legal science"[77].

The way in which Feuerbach has read Pufendorf's *imputatio* was indeed "quite unclear"[78], yet he has rendered Daries' *imputatio facti* and *imputatio iuris* from *imputationes morales* to mere physical and psychical causalities, which only concords with his Hobbesian doctrine on punishment as well as with the underlying view on the perpetrator as mere source of perils[79]. In Feuerbach's hands, *imputatio* became therefore a main tool for building the "empiricist positivist tradition which treats the man – one cannot say: the person – as a rational being presenting a danger to the sovereign legal order"[80]. This approach found the sharp reaction of Georg Wilhelm Friedrich Hegel, who accused that "in this view of

---

[75] *Carpintero*, Imputatio, (2004) 81 Rivista internazionale di filosofia del diritto 25 at 74.

[76] *Schmitt*, op. cit., at 72.

[77] *Carpintero*, La cómoda función de Dios en el iusnaturalismo otoñal op. cit., in J. Ballesteros et al (eds.), Justicia, Solidaridad, Paz, Vol. I (Valencia, Dpto. de Filosofía de Derecho, Moral y Política, 1995), at 41 and 44.

[78] *Hardwig*, op. cit., *supra*, at 35. See also M. Köhler, 'Feuerbachs Zurechnungslehre', in R. Gröschner and G. Haney (ed.), Die Bedeutung P.J.A. Feurbachs (1775-1833) für die Gegenwart (F. Steiner, 2003), at 67; A. Sinn, Straffreistellung aufgrund von Drittverhalten (Mohr Siebeck, 2007), 232 sq.

[79] *W. Schild*, 'Die unterschiedliche Notwendigkeit des Strafens' in K.-M. Kodalle (ed.), Strafe muss sein! Muss Strafe sein?, (Königshausen & Neumann, 1998), at 81 and 96.

[80] *M. Köhler*, Le droit pénal entre public et privé, (1991) 41 Archives de la Philosophie du Droit 199, at 202.

punishment it is much the same as when one raises a cane against a dog; a man is not treated in accordance with his dignity and honour, but as a dog"[81]. One may see in this opposition of *dignitas* to the nature the traces of Pufendorf's *ens morale* and of Kant's person, and also in the way in which Hegel integrated the concept of imputation in his own theory of criminal law, being followed therein by an entire school of German "Hegelian" criminalists in the second half of the 19th century[82]. One may also question whether Hans Welzel's consideration of these scholars who should have "conceived the action by walking entirely in Pufendorf's footsteps, but using Hegel's words"[83] does really make justice to the specific Hegelian traces in the works of these scholars. Yet Hegel's words were already the ones of a German idealist philosopher and not anymore a common frame of reference for the European (criminal) law scholars. The "astonishing similarity" between the doctrines of imputation of the German Hegelian criminal law scholars[84] and the French ones became less and less visible[85], as well as the Hegelian background in Francesco Carrara's concept of crime as "moral damage" (*danno morale*) done to the social order and to be repaired through the punishment[86].

§4. Legal Positivism

The *lex* which Carrrara had set at the basis of his criminal law theory was "the eternal law of the order, so as it is perceived by the humanity", that is: "the law of the nature, as it was understood by

---

[81] *G.W.F. Hegel*, Philosophy of Right (Cosimo Inc., 2008), 36.

[82] See *Schild*, Verbrechen und Strafe in der Rechtsphilosophie Hegels und seiner „Schule" im 19 Jahrhundert (2002) 1 Zeitschrift für Rechtsphilosophie 30.

[83] *Welzel*, Das Deutsche Strafrecht...., *supra*, 38-39.

[84] *W. Hardwig*, op. cit., at 56.

[85] *E. Bacigalupo*, Die Europäisierung der Strafrechtswissenschaft, in B. Schünemann et al. (eds.), Festschrift für Claus Roxin (C.H. Beck, 2001), at 1361 and 1369.

[86] *F. Carrara*, op. cit., at 270 and 271.

Aristotle: the law of the order, promulgated for the humanity by the supreme mind", or also "the eternal, absolute law, consisting in precepts that govern the external conduct of the man and being gave to the man by God through the pure reason"[87]. In the middle of the 19th century such a stance must already have looked outdated and its chances to be taken seriously disappeared completely when the legal positivism was definitively established in the criminal law science at the beginning 20th century. Yet, Carrara had already deduced from the Pufendorfian definition of crime as legal *ens* that its "essence consists in the violation of a right"[88]. This very definition was previously made famous by Feuerbach[89] as application of Kant's legal philosophy in the area of criminal law, yet it was clearly stated already in Thomas Hobbes' definition of the "Distributive" laws as "those that determine the Rights of Subjects"[90]. Within the "mixture of Catholicism, Enlightenment and Kantian influences" characterizing Carrara's work[91], the most deciding for the system of crime were "the naturalistic influences"[92] which made him to enter into the history of the criminal law theory as carrier not of Lehmann's tripartite structure of *imputationes*, but of "the twofold distinction between *fatto* (*elemento fisico*) and *colpevolezza* (*elemento morale*)" still representative for the Italian criminal law scholarship[93]. "The idea of the crime is nothing else than the idea of a relation: of the contradictory relation between the deed of the man and the law (*la legge*): only in this consists the legal entity (*ente giuridico*)" which "in order to exist needs determinate material elements (*certi elementi materiali*) and determinate moral elements (*certi elementi*

[87] Idem, at 256, 258 and 259.

[88] Idem, at 41.

[89] *P.J.A. Feuerbach*, Lehrbuch des gemeinen in Deutschland geltenden peinlichen Rechts, (Heyer, 1801), 21-22.

[90] *Hobbes,* Leviathan..., *supra*, at 185.

[91] *M.A. Cattaneo*, Francesco Carrara e la filosofia del diritto penale (G. Giappichelli, 1988), 58-59.

[92] *G. Dannert*, Die finale Handlungslehre Welzels im Spiegel der italienischen Strafrechtsdogmatik (O. Schwartz, 1963), 6-7.

[93] *Ambos*, 'Is the Development...' *supra* 180.

morali), the complex of which makes its unity"[94]. This relation between the concept of crime and its structure formed by natural elements is the reason why the Italian traditionalist scholars arguing for the bipartite structure of the crime against the German *Rechtswidrigkeit* stated that the unlawfulness is the very essence of the crime and not a mere element within its structure[95]. The objection was basically consistent, since the later German scholars also understood Daries' *imputatio facti* and *imputatio iuris* as staying for external nature (acts and caused results) and internal nature[96] (psychical processes) so that the unlawfulness cannot be but a 'foreign body'[97]. The *applicatio legis ad factum* cannot build anymore the inter-mediate stadium between *imputatio fact* and *imputatio iuris* as in Daries, but becomes the definitive declaration of the conduct as crime, provided that external and internal natural facts fulfill the requirements of the *lax*.

This issue involved also the French scholarship and became a common European dimension[98] as soon as "by separating «norm» from «penal provision» Binding had shown a way to separate the notion of unlawfulness from the statutory text and thus give unlawfulness an autonomous function"[99]. While Karl Binding (1841-1920) made this separation to "the most influential doctrine"[100] in Germany, French criminal law treatises conserve

---

[94] *Carrara*, op. cit., *supra*, at 41.

[95] *A. Rocco*, L'oggetto del reato e della tutela giuridica penale (Giapichelli, 1913), 475.

[96] *G. Radbruch*, Der Handlungsbegriff in seiner Bedeutung für den Verbrechensbegriff (J. Guttentag, 1904), 129 and 131.

[97] *Schünemann*, Einführung in das strafrechtliche Systemdenken, in B. Schünemann, (ed.), Grundfragen des modernen Strafrechtssystems (W. De Gruyter, 1984), at 1 and 19.

[98] See *L. Jimenez de Asua*, L'Antijuridicité, (1951) Revue Internationale de Droit Pénal 273 at 283-284; Jescheck, Neue Strafrechtsdogmatik und Kriminalpolitik in rechtsvergleichender Sicht, (1986) 98 Zeitschrift für die gesamte Strafrechtswissenschaft 1 at 4.

[99] *Eser*, Justification and Excuse, (1976) 24 American Journal of Comparative Law 621 at 625.

[100] *H. Koriath*, Grundlagen strafrechtlicher Zurechnung (Duncker & Humblot, 1994), 267.

the unity between the two ones[101] but not without significant exceptions. Assuming that "*il n'appartient pas au droit pénal de régler; il lui appartient de sanctionner*"[102], Rene Garraud (1849-1930) introduced even a supplementary fourth *élément* in the French tripartite structure of crime i.e. the *élément injuste* which was subsequently characterized as *"l'équivalent de la theorie germanique de l'Unrecht, ennoncée en 1872 par Binding"*[103]. Seen from historical perspective, this was simply adding Daries'*applicatio legis ad factum* to Lehmann's three *imputationes*. Since both systems rest on quite different normative suppositions, this step was condemned logically to fall down and this is also the reason why Garraud's quadripartition did not find many followers in France. On the contrary, the same type of compromise made Binding's disciple Ernst Beling (1866-1932) and Binding's fierce rival Franz von Liszt (1951-1919) to the founding fathers of the German tripartite structure, also a composition which departs from an "erroneous understanding of its grounding structures"[104].

According to French scholars, one should recognize to Binding "the merit to have pointed out to the nature and origins of the rules protected by the penal law"[105]. Yet even those very origins are leaved in "half-obscurity", and Binding "conducted a hard fight against the subtle sociological derivation of the norms from the cultural norms of the society" proposed by Max Ernst Mayer[106].

---

[101] *A. Roux*, Cours de droit criminel français, Tome I (Sirey, 2th ed., 1927), 25 (On n'est pas en présence d'une loi pénale lorsque, ni directement ni indirectement, la loi n'indique pas de peine, quelque catégoriques ou formelles que soient ses prescriptions... Une loi imparfaite est une œuvre stérile et inutile.).

[102] *R. Garraud*, Traité theorique et pratique de droit penal français, Tome I (Sirey, 3rd ed., 1913), 203.

[103] *J.-H. Robert*, L'histoire des éléments de l'infraction, (1977) Revue de Science Criminelle et de Droit Pènal Comparè 269 at 277.

[104] *Hruschka*, Verhaltensregeln und Zurechnungsregeln, (1991) 22 Rechtstheorie 449 at 460.

[105] *R. Merle, A. Vitu*, op. cit., *supra*, at 263.

[106] *Jakobs*, Strafrecht..., *supra*, at 104 reffering to M. E. Mayer, Rechtsnormen und Kulturnormen (1903).

While Mayer had assumed the existence of such norms which are prior to legislation and constitute the material for the legal norms[107], Binding located them exclusively in the realm of the positive state law, assigning as their task the configuration of the legal goods (*Rechtsgüter*) whose protection constitutes the task of the criminal law. This new concept was firstly introduced by Johann Michael Franz Birnbaum in a famous piece written in 1834 as reaction to the insufficiencies of Feuerbach's conception concerning the rights and marked most clearly the transition of the criminal law theory from natural law to legal positivism[108]. Now, although it is true that "since Binding's rediscovery of Birnbaum, the basic framework of the occasionally heated debate about the definition and the function of the concept of legal good has remained fairly constant"[109], nevertheless it was the one who not only had clearly defined the legal goods as "the juridically protected interests" (because "the protection of interests is the essence of the legal order"), but has also shown their very theoretical radices: "In order to avoid the war against all is necessary to create an order of peace, to delimitate the spheres of power, to ensure the protection of some interests and to sacrifice another ones"[110], nothing other than the Hobbesian *bellum omnium contra omnes*.

As representative product of the legal positivism, the doctrine of legal goods had to fulfill the same function as previously the philosophical requirements. Yet, to expect "natural law limits"[111]

---

[107] *Mayer*, Der Allgemeine Teil des deutschen Strafrechts (C. Winter, 1915), 44 sq.

[108] See *K. Amelung*, J.M.F. Birnbaums Lehre vom strafrechtlichen «Güter»-Schutz als Übergang vom naturrechtlichen zum positivistischen Rechtsdenken in D. Klippel (ed), Naturrecht im 19. Jahrhundert. Kontinuität - Inhalt - Funktion - Wirkung (F. Keip, 1997), at 349.

[109] *Dubber*, Theories of Crime and Punishment in German Criminal Law, (2005) 53 American Journal of Comparative Law 679 at 688.

[110] *F. von Liszt*, Lehrbuch des deutschen Strafrechts (J. Guttentag, 10th ed., 1900), 53-54.

[111] *K. Kühl*, Naturrechtliche Grenzen strafwürdigen Verhaltens in O. Dann and D. Klippel (eds.), Naturrecht - Spätauf-klärung - Revolution.

of criminalization from a "dogma designed to serve the criminal policy"[112], is nothing but an "irony of the legal history"[113]. The logic of a controversial discourse as old as "confused and confusing"[114] does not leave any further expectations open. This and also the fact that the legal positivism has no place for a real duality of norms was shown again by Arturo Rocco (1876-1942), the neo-Carrarian scholar who was considered *il Binding italiano*[115] and whose theoretical credo was condensed in the imperative of a "firm, religious and scrupulous dedication to the study of the positive law"[116]. Rocco, the great theoretician of the legal good in Italy, did not accept anything from Carrara's commitment to the Old Catholic natural law and saw also no reason for adopting a compromise solution like Garraud's one. Instead, he did "postulate" against Binding's separation, the Hobbesian unity of the *praeceptum legis* and the *sanctio legis*[117], building nevertheless a doctrine which was properly characterized as "the most complete and rigorous expression of the legal positivistic formalism"[118]. The similitude of this approach to Hans Kelsen's pure theory of law is striking[119] and recalls the very essence of the *imputatio* within the tradition inspired by the Hobbesian "foundation of the positive law by means of the

---

Das europäische Naturrecht im ausgehenden 18. Jahrhundert (F. Meiner, 1995), at 182.

[112] *E. Dolcini*, Il reato come offesa a un bene giuridico: un dogma al servizio della politica criminale, in S. Canestrari (ed.), Il diritto penale alla svolta di fine millenio (UTET, 1998), at 211.

[113] *J. Renzikowski*, Normentheorie und Strafrechtsdogmatik in R. Alexy (ed.), Juristische Grundlagenforschung (Steiner, 2005), at 115 and 126.

[114] *N. Jareborg*, Crime Ideologies, (2000) 40 Scandinavian Studies in Law 431 at 436.

[115] *Cattaneo*, Pena, diritto e dignità umana (G. Giapichelli, 1998), 41.

[116] *Rocco*,Il problema e il metodo della scienza del diritto penale, (1910) Rivista italiana di diritto penale 493 at 505-506 (tenersi fermi, religiosamente e scrupolosamente attaccatti allo studio del diritto positivo).

[117] *M. Donini*, Illecito e colpevolezza nell' imputazione del reato (Giuffre, 1991), 142.

[118] *F. Mantovani*, Diritto penale, parte generale, (Cedam 1992), 64.

[119] See *G. Maggiore*, Normativismo e anti-normativismo nel diritto penale, (1949) Archivio penale 3.

natural law"[120]. "If it is assumed that the first norm which forbids theft is valid only if the second norm attaches a sanction to theft, then the first norm is certainly superfluous in an exact exposition of law. If at all existent, the first norm is contained in the second, which is the only genuine legal norm"[121]. If therefore some human conduct fulfills the conditions required by a norm in order to apply a legal sanction, then this sanction will be also imputed[122] and it does not make sense anymore to seek after a structure of crime dealing with the said conditions[123]. Law is nothing more than "the specific social technique of a coercive order"[124], "society is the ordering of the living together of *individuals*"[125] (not of *persons*) and nothing opposes, Kelsen also says, "that an individual is to be punished although he has not acted willfully and maliciously or with culpable negligence, so-called «absolute liability», is not completely excluded, even in modern criminal law"[126].

§5. Towards a common definition of Criminal offence in the EU Law

According to some German reports, the leading tripartite system did become in time nothing more than "a mere collection of wholly

---

[120] *Welzel*, Naturrecht...., *supra*, 116 (naturrechtliche Begründung des positiven Rechts).

[121] *H. Kelsen*, General Theory of Law and State, (Transaction Publishers, 2006), 61.

[122] See *Hruschka*, Die Zurechnungslehre Kants im Vergleich mit der Zurechnungslehre Kants in S. Paulson and M. Stolleis (eds.), Hans Kelsen. Staatslehrer und Rechtstheoretiker des 20. Jahrhunderts (Mohr Siebeck, 2005), at 2.

[123] *Schild*, Reine Rechtslehre und Strafrechtswissenschaft; *Seelmann*, Kelsen und das Strafrecht in A. Carrino and G. Winkler (ed.), Rechtserfahrung und Reine Rechtslehre (Springer, 1995), at 59 and 83

[124] *Kelsen*, General Theory …. *supra*, at 21.

[125] *Kelsen*, What is Justice? Justice, Law and Politics in the Mirror of Science (University of California Press, 1957), 231.

[126] *Kelsen,* Peace Through Law (The University of North Carolina Press, 1944), 72-73.

heterogeneous parts which cannot be brought to a denominator and which changed from the very beginning continuously their place within and/or were added to from without"[127], in short: there are good reasons to consider this system as being a "logically erroneous traditionalism" exactly like the French one[128]. And similarly, instead of some monolithic unity around the tripartite structure of *éléments*, the French scholarship seems to offer the image of an academic state of nature where "every author develops a partially different approach which often springs from a *souci d'originalité* rather than from a veritable deepening"[129]. This may be the ground why the weightening of all these approaches[130] can finally lead to the conclusion that the French criminal law is characterized by a bipartite structure which may also be expressed by using the "classical Latin terms *actus reus* and *mens rea*"[131]. Let us recall again the two main features distinguishing this latter system from the tripartite one.

Firstly, it does not distinguish between the subjective/mental element of the offence in the sense of a *Tatvorsatz* (*dolus*) and specific intentions (descriptive *mens rea*) on the one hand, and the blameworthiness of the act belonging to a separate and autonomous (third) level of culpability (*Schuld*, normative *mens rea*) on the other. *Secondly*, it does not distinguish between wrongfulness/justification and culpability/excuse as the two/or threefold structure of an offence as applied in the Germanic systems[132].

"It is not to question the fact that «there is no way within the system to represent defensive claims of justification and excuse» if

---

[127] *Lesch*, Unrecht und Schuld im Strafrecht, (2002) Juristische Arbeitsblätter 602 at 605.

[128] *Schünemann*, El propio sistema de la teoría del delito, (2008) 1 InDret: Revista para el Análisis del Derecho 27.

[129] *S. Manacorda*, La théorie générale de l'infraction pénale en France: lacunes ou specificités de la science pénale, (1999) Revue de droit pénal et de criminologie 35 at 40.

[130] See *Ambos*, Zur Entwicklung der französischen Strafrechtslehre: Bemerkungen aus deutscher Sicht, (2008) 120 Zeit-schrift für die gesamte Strafrechtswissenschaft 30.

[131] *Ambos*, Is the Development..., *supra*, at 178 and 180.

[132] *Ambos*, Toward..., *supra*, at 2668.

actus reus and *mens rea* are regarded as descriptive notions related to natural (physical and psychical) facts"[133]. On the other side, because of its logical derivation from the distinction between the rules of conduct and the rules of sanction, the difference between justification and excuse can coexist with a bipartite structure allowing the corresponding normative judgments. "Justification defines the sphere of the normative order in a society" while excuse "marks the limits within which behaviour by citizens in accordance with norms may be expected"[134]. Furthermore, it is also true that "equating of guilt with intent" as proposed by the so-called psychological doctrine of guilt – supposed that "by intent we understand a descriptive category, namely a state of mind of the actor" – cannot be conceived as "a theory of guilt in a proper sense"[135]. There is however no ground for considering the tripartite structure as a proper way to avoid this consequence instead of rethinking the bipartition itself. Otherwise stated, instead of replacing the descriptive bipartition by the tripartite structure, it should be also considered the possibility of the normative redefinition of the bipartition itself. Yet, if "the difficulties in analyzing *mens rea* render the claimed superiority of the tripartite structure unclear"[136], the remedy is not to be found in Hans Welzel's division of the subjective side in guilt or culpability as purely normative judgment on the one side and the *dolus* as purely natural description of psychological processes[137] on

---

[133] *Fletcher*, The Grammar... *supra*, at 48.

[134] *W. Hassemer*, Justification and Excuse in Criminal Law: Theses and Comments, (1986) Brigham Young University Law Review 573 at 595. See also Jakobs, Norm, Person, Gesellschaft (Duncker & Humblot, 3rd edn, 2008), 102.

[135] *H. Silving*, Guilt: A Methodological Study, (1963) 32 Revista Juridica de la Universidad de Puerto Rico 12 at 19-20.

[136] *R.L. Christopher*, Tripartite Structures of Criminal Law in Germany and Other Civil Law Jurisdictions, (2007) 28 Cardozo Law Review 2675, at 2695.

[137] See *D. Oehler*, La conception juridique allemande de la culpabilité, (1976) 24 Annales de l'Université des Sciences Sociales de Toulouse 73 at 79; C. Snyman, The Normative Concept of Mens Rea: A New Development in Germany, (1979) 28 International and Comparative Law Quarterly 211

the other side, but in the normative reconstruction of an unitary *subjective side* of the crime by revitalizing the ancient concept of *dolus malus*[138] in conjunction with an *actus reus* build around the ancient concept of *persona* as social role defined by objective conduct requirements and expectations (*unus homo sustinere potest plures personas*) which informed the ancient common European legal tradition attacked in its foundations by the radical supporters of the modern natural law[139].

The way thereto may be shown by no other that Hans Welzel himself, the allegedly strong advocate of the tripartite structure of crime. Welzel considered this structure of crime a "product of historical chance", characterized by "the lack of concern or the dismissal of the action doctrines of Binding, of the Hegelian scholars and, in the first place, of the Natural Law"[140]. Yet nothing shows better the discrepancy between this critical statement and Welzel's own results than Professor Ambos' observation that Welzel's approach "fits Austin's concept of laws or rules as commands"[141]: such a fitting makes the action necessarily to a matter of "psycho-mechanics"[142], so that "Welzel's action pertains to the world of the

---

at 214 sq. For the inconsistence of this division within Welzel's system see Lesch, Dogmatische Grundlagen zur Behandlung des Verbotsirrtums, (1996) Juristische Arbeitsblätter 346, at 349.

[138] *Jakobs*, Dolus malus in *K. Rogall et al* (eds.), Festschrift für Hans-Joachim Rudolphi (Luchterhand, 2004), 107.

[139] See *Carpintero*, Persona y "officium": derechos y competencias', (1996) 73 Rivista internazionale di filosofia del diritto 3, see also Carpintero, Voluntad, ausencias, y normas: el sustrato histórico del positivismo en el derecho, (2005) 15 Dikaiosyne 29 at 30: «The first task of these innovators was that of destroying the Romanist notion of legal person. During the XVIII century, they also destroyed the notion of natural person».

[140] *Welzel*, Abhandlungen zum Strafrecht und zur Rechtsphilosophie (W. de Gruyter, 1975), 364.

[141] *Ambos*, Is the Development... *supra*, at 178.

[142] *Jakobs*, Die strafrechtliche Zurechnung von Tun und Unterlassen (Westdeutscher Verlag, 1996), 18.

individual, the culpability to the one of the person"[143]. This precisely is where Welzel's division of the subjective side leads to and this originates in nothing other than the connection between the "thing-logical structures" and the doctrine of Samuel Pufendorf, i.e. "the main source of the modern science of criminal law" precisely because of the opposition to the Aristotelian paradigm[144]. While Pufendorf made clear that for him the word *persona* means isolated and free individual[145], i.e. the point of departure for the modern theory of natural law and the reason for identifying the obligation with the mere compulsion[146], Welzel's powerful insistence on the correlation between the person and the legal obligation leads finally to the Aristotelian natural law, i.e. to the concrete historical rationality of the social institutions configuring the human praxis[147].

One may hope that the European science of criminal law will set up during the 21st century to restore these notions by integrating them into the interpretation of *actus reus* and *mens rea*. This reconfiguring was already made by the German author Günther Jakobs[148].

In a nutshell,

Actus reus: So it was by eliminating the equivocal background of Pufendorf's *imputatio*, that Welzel's seminal thoughts concerning

---

[143] *Jakobs*, Handlungssteuerung und Antriebssteuerung. Zu Hans Welzels Verbrechensbegriff in K. Amelung et al (eds.), Festschrift für Hans-Joachim Rudolphi (C.F. Müller, 2003), at 949 and 955.

[144] *A. Giuliani*, Imputation et justification, (1977) 22 Archives de la Philosophie du Droit 85 at 89.

[145] *Carpintero*, Historia del derecho natural (UAM, 1999), 235.

[146] *Jakobs*, Zur Genese der Rechtsverbindlichkeit in G. Höver (ed.) Verbindlichkeit unter den Bedingungen der Pluralität (Dr. Kovač, 1999), at 5 and 27 sq.

[147] *J. Ritter*, Naturrecht bei Aristoteles Zum Problem einer Erneuerung des Naturrechts in Idem, Metaphysik und Politik (Suhrkamp, 1969), at 133. See also *R. Spaemann*, Die Aktualität des Naturrechts in Idem, Zur Kritik der politischen Utopie (E. Klett, 1977), at 183 and 187; *Jakobs*, Zum Begriff der Person im Recht in H. Koriath et al (eds.) Grundfragen des Strafrechts, Rechtsphilosophie und die Reform der Juristenausbildung (Universitätsverlag Göttingen, 2010), at 69 and 77.

[148] See mot recently, *G. Jakobs*, System der strafrechtlichen Zurechnung (Heymanns, 2012), 25 sq.

the social (in)adequacy of the conduct[149] could be developed as a normative doctrine of the unwarranted conduct, departing from objective social roles and the competencies assigned thereto and constituting the core of the objective side of crime[150].

Mens rea: *Dolus* and *culpa* are conceivable with Binding as forms of culpability, if they are regarded as normative legal concepts instead of natural psychological ones[151] and also Berner regards *actus reus* and *mens rea* as *sides* – an animated body (*Leib*) and an animating soul (*Seele*) – of the crime[152].

Concept of crime: The "holistic conception"[153] of Jakobs envisages the crime as *meaningful* conduct of a *person*[154] i.e. as infringement of the obligation to obey the norm of conduct.

We may conclude by recalling the correlation between such a normative understanding of *actus reus* and *mens rea* and this material concept of crime as it was stated at the beginning of the 20th century by the Romanian scholar Traian Pop.

"The society lives through the cooperation of its members" and "this cooperation is assured by certain norms", "the social formation reestablishes its violated order and protects it for the future", more precisely: "the social formation need the punishment in order to preserve its established order"[155]. The function of the punishment

---

[149] See *Y. Reyes*, Theoretische Grundlagen der objektiven Zurechnung, (1993) 105 Zeitschrift für die gesamte Strafrechtswissenschaft 108 at114-115; M. Cancio Melia, La teoría de la adecuación social en Welzel, (1993) 46 Anuario del Derecho Penal y de las Ciencias Penales 697.

[150] *Jakobs*, La imputación objetiva en Derecho penal (Civitas, 1996), 91 sq.

[151] *L. Jimenez de Asua*, Les problemes modernes de la culpabilitè, in [without ed.], En Hommage a Jean Constant (Faculté de droit de Liège, 1971), at 147 and 153-154 (si nous prenons le dolus et la culpa comme notions normatives resultant du jugement de reproche, Binding aura raison).

[152] *Berner*, op. cit., *supra*, at 70.

[153] *Fletcher*, The Grammar... *supra*, at 291.

[154] *Jakobs*, Imputation …, *supra*, at 495.

[155] *T. Pop*, Drept penal comparat III (1926), p. 10/11, 21; *Francesco Carrara*, Programma, cit., § 615; for the correspondence between Carrara and Günther Jakobs in this respect see *Juan Peñaranda Ramos/Carlos Suarez Gonzales/Manuel Cancio Melia*, Consideraciones sobre la teoría de

conceived as "social relation against anti-social deeds"[156] consists therefore in the conservation of the social order which is threatened by the commission of a crime, that is: of a deed which endanger "the social existence", that is: of a socially dangerous deed, whose meaning is: "not this society"[157]. The members of the society being objectively as such conceived even by the social cooperation itself, that is, by the will to conform themselves to the legal order, the punishment reveals itself in the same time applicable "only to that individual (...) about whom may be said, that he does not will to cooperate in the maintaining of the social formation" even because this "individual" just being "in state of imputability (...) worked against his obligation, knowing or being capable to know it, although he had the possibility to work in conformity to his obligation"[158]; "in respect to the non-culpable the punishment has no ground and makes no sense"[159].

Furthermore, being aware of the fact that "the very idea of individual, as we think about it in the law, does not refer to an purely biologically individual, but to an individual which find itself in social relationships", so that his will must be considered "in a way which should not lead to the confusion between social and psychological meaning"[160], the culpability in the criminal law does not regard the factual will of an individual who seeks the achievement of his natural goals, but the conduct of an individual –

---

la imputación de Günther Jakobs, in: *G. Jakobs*, Estudios de derecho penal, (Civitas, 1998), p. 25 sq., 29.

[156] *T. Pop*, Drept penal comparat III, *supra*, p. 19.

[157] *Jakobs*, Zur gegenwärtigen Straftheorie, (K.M.Kodale, ed, Strafe muss sein! Muss Strafe sein?, Konigshausen & Neumann, 1998), p. 29 sq., 34.

[158] *T. Pop*, Drept penal comparat III, cit., p. 25; Günther Küchenhoff, The Problem of Guilt in the Philosophy of Law, Law and State 11 (1975), p. 67 sq., 71: «the failure to contribute to the shaping of a collective behaviour that makes human coexistence possible is a (conscious or unconscious) lack of consideration. In a legal context guilt is a lack of consideration».

[159] *T. Pop*, Drept penal comparat II (1924), p. 333/334.

[160] *M. Djuvara*, Eseuri de filosofie a dreptului, edited by N. Culic, Ed. Trei, Bucureşti, 1997, p. 107, 110, 111, 222.

conceived as externalization of a "subjective will"[161], which reveals the missing objectively as obligation required will of social cooperation through the mere external conformity[162] to the laws of conduct – is attributed to the legal subject as criminal culpability. In other words stated: that a member of the society which "commits a socially blamable deed" is "culpable" and "subject of blame, that is: called to answer"[163], because through his deed is seen as "refusing to the legal order and to the members of the lawful organized society the owed recognition"[164]. Finally, the theory of imputation in criminal law reveals itself as a theory of those normative conditions in virtue of which the material conduct receives the specific meaning of expressing the missing personal will of the individual perpetrator to comply with the legal order.

These normative conditions regulate the attribution of a natural process to an „individual" conceived as a "member of the society", as the refusal to comply with the social order (culpability), that is: as a protest against that order, that is: as an offence. They are provided by the "constitutive act" of the criminal statute, conceived as "the totality of the conditions required for the existence of an offence"[165], that is: for the imputation of a deed in the sense of the criminal law[166].

---

[161] *G.W.F. Hegel*, Philosophy of Right, cit., para. 113.

[162] *Urs Kindhäuser*, Rechtstreue als Schuldkategorie, ZStW 107 (1995), p. 701 sq, 706/707.

[163] *T. Pop*, Drept penal comparat II, p. 346; Hans Welzel, Das Deutsche Strafrecht, cit., p. 16.

[164] *W. Frisch*, Schwächen und berechtigte Aspekte der Theorie der positiven Generalprävention, in: B. Schünemann et.al. (eds.), Positive Generalprävention, Verlag C.F.Müller, Heidelberg 1998, p. 125 sq., 139/140; *H. Kaiser*, The Three Dimensions of Freedom, Crime and Punishment, Buffalo Criminal Law Review vol. 9 (2006), p. 691 sq., 697: «transcendental free riding».

[165] *T. Pop*, Drept penal comparat II, p. 83.

[166] *G. Jakobs*, Der strafrechtliche Handlungsbegriff, Verlag C.H. Beck, München, 1992, p. 20 sq., 27 sq.

Bibliography

Ambos, K., Is the Development of a Common Substantive Criminal Law for Europe Possible?, (2005) 12 Maastricht Journal of European and Comparative Law 173

Ambos, K., 100 Jahre Belings "Lehre vom Verbrechen": Renaissance des kausalen Verbrechensbegriffs auf internationaler Ebene? (2006) 10 Zeitschrift für Internationale Strafrechtsdogmatik 464

Ambos, K., Toward a Universal System of Crime: Comments on George Fletcher's Grammar of Criminal Law (2007) 28 Cardozo Law Review 2647

Ambos, K., Zur Entwicklung der französischen Strafrechtslehre: Bemerkungen aus deutscher Sicht (2008) 120 Zeit-schrift für die gesamte Strafrechtswissenschaft 30

Amelung, K., J.M.F. Birnbaums Lehre vom strafrechtlichen «Güter»-Schutz als Übergang vom naturrechtlichen zum positivistischen Rechtsdenken in D. Klippel (ed), Naturrecht im 19. Jahrhundert. Kontinuität - Inhalt - Funktion – Wirkung (F. Keip, 1997)

Bacigalupo, E.,Die Europäisierung der Strafrechtswissenschaft, in B. Schünemann et al. (eds.), Festschrift für Claus Roxin (C.H. Beck, 2001)

Baratta, A., Philosophie und Strafrecht (C. Heymanns, 1985)

Benakis, A., Die Unrechtslehre von Nikolaos Chorafas (1970) 82 Zeitschrift für die gesamte Strafrechtswissenschaft 54

Benakis, A., Über den Begriff des Unrechttuns bei Aristoteles anlässlich einer Kritik der finalen Handlungslehre, in G. Stratenwerth et al (eds.), Festschrift für Hans Welzel (W. de Gruyter, 1974)

Benakis, A., Relaciones entre el Derecho penal griego y el Derecho penal alemán (1975) 28 Anuario del Derecho Penal y de las Ciencias Penales 229

Berman, H.J., Law and Revolution: the formation of the Western legal tradition (Harvard University Press, 1983)

Berner, A.F., Lehrbuch des Deutschen Strafrechts (Tauchnitz, 18th ed., 1898)

Bock, D., Die erste Europäisierung der Strafrechtswissenschaft: Das gemeine Strafrecht auf römischrechtlicher Grundlage (2006) 1 Zeitschrift für Internationale Strafrechtsdogmatik 7

Byrd, S.B., Wrongdoing and Attribution: Implications Beyond the Justification-Excuse Distinction (1987) 33 Wayne Law Review 1289

Byrd, S.B.; Hruschka, Kant's Doctrine of Right: A Commentary (Cambridge University Press, 2010)

Cancio Melia, M., La teoría de la adecuación social en Welzel (1993) 46 Anuario del Derecho Penal y de las Ciencias Penales 697

Carpintero, F., La cómoda función de Dios en el iusnaturalismo otoñal in J. Ballesteros et al (eds.), Justicia, Solidaridad, Paz, Vol. I (Valencia, Dpto. de Filosofía de Derecho, Moral y Política, 1995)

Carpintero, F., Persona y "officium": derechos y competencias (1996) 73 Rivista internazionale di filosofia del diritto 3

Carpintero, F., Historia del derecho natural (UAM, 1999)

Carpintero, F., Historia breve del derecho natural (Colex, 2000)

Carpintero, F., Imputatio (2004) 81 Rivista internazionale di filosofia del diritto 25

Carpintero, F., Voluntad, ausencias, y normas: el sustrato histórico del positivismo en el derecho (2005) 15 Dikaiosyne 29

Carrara, F., Programma del corso di diritto criminale (Canovetti, 1863)

Cattaneo, M.A., Francesco Carrara e la filosofia del diritto penale (G. Giappichelli, 1988)

Cattaneo, M.A., Pena, diritto e dignità umana (G. Giapichelli, 1998)

Christopher, R.L., Tripartite Structures of Criminal Law in Germany and Other Civil Law Jurisdictions (2007) 28 Cardozo Law Review 2675

Coing, H., The Original Unity of European Legal Science (1975) 11 Law and State 76

Dannert, G., Die finale Handlungslehre Welzels im Spiegel der italienischen Strafrechtsdogmatik (O. Schwartz, 1963)

Dolcini, E., Il reato come offesa a un bene giuridico: un dogma al servizio della politica criminale, in S. Canestrari (ed.), Il diritto penale alla svolta di fine millenio (UTET, 1998)

Donini, M., Illecito e colpevolezza nell' imputazione del reato (Giuffre, 1991)

Dubber, M.D., The Promise of German Criminal Law: A Science of Crime and Punishment (2005) 6 German Law Journal 1049

Dubber, M.D., Theories of Crime and Punishment in German Criminal Law (2005) 53 American Journal of Comparative Law 679

Eser, A., Justification and Excuse, (1976) 24 American Journal of Comparative Law 621

Eser, A., Die Unterscheidung von Rechtfertigung und Entschuldigung: Ein Schlüsselproblem des Verbrechensbegriffs, in R. Lahti (ed.), Criminal law theory in transition : Finnish and comparative perspectives (Finnish Lawyers' Publ., 1992)

Eser, A., Funktionen, Methoden und Grenzen der Rechtsvergleichung, in H. J. Albrecht (ed.), Festschrift für Günther Kaiser, II. Band (W. de Gruyter, 1998)

Feuerbach, P.J.A., Lehrbuch des gemeinen in Deutschland geltenden peinlichen Rechts, (Heyer, 1801)

Fletcher, Dogmas of the Model Penal Code, (1998) 2 Buffalo Criminal Law Review 2

Fletcher, Rethinking Criminal Law (Oxfort University Press, 2nd edition, 2000), XIX

Fletcher, Criminal Theory in the Twentieth Century, (2001) 2 Theoretical Inquiries in Law 265

Fletcher, Parochial versus Universal Criminal Law, (2005) 3 Journal of International Criminal Justice 20

Fletcher, The Grammar of Criminal Law Vol. I (Oxford University Press, 2007)

Garraud, R., Traité theorique et pratique de droit penal français, Tome I (Sirey, 3rd ed., 1913)

Gerland, H., The German Draft Penal Code and Its Place in the History of Penal Law, (1929) 11 Journal of Comparative Legislation and International Law 19

Giuliani, A., Imputation et justification, (1977) 22 Archives de la Philosophie du Droit 85

Hall, J., Comment on Justification and Excuse, (1976) 24 American Journal of Comparative Law 638

Hardwig, W., Die Zurechnung: Ein Zentralprolem des Strafrechts (Cram, de Gruyter, 1957)

Hassemer, W., Justification and Excuse in Criminal Law: Theses and Comments, (1986) Brigham Young University Law Review 573

Hegel, G.W.F., Philosophy of Right (Cosimo Inc., 2008)

Hirsch, Gibt es eine national unabhängige Strafrechtswissenschaft? *M. Seeebode* (ed.), Festschrift für G. Spendel (W. de Gruyter, 1988)

Hobbes, T., Leviathan (Hackett, 1994)

Hobbes, T., De cive, in W. Molesworth (ed.), Thomae Hobbes Opera Latina, Vol. II (Londini, 1839)

Hochstrasser, T., Natural Law Theories in the Early Enlightenment (Cambridge University Press, 2000)

Hruschka, J., Der Einfluss des Aristoteles und der Aristoteles-Rezeption auf Rechtsbegriffe, in *Wall, H. de; Germann, M.* (eds.), Festschrift für Christoph Link (Mohr Siebeck, 2003)

Hruschka, J., Justification and Excuse: A Systematic Approach, (2004) 2 Ohio State Journal of Criminal Law 407

Hruschka, J., Die Zurechnungslehre Kants im Vergleich mit der Zurechnungslehre Kants, in S. Paulson and M. Stolleis (eds.), Hans Kelsen. Staatslehrer und Rechtstheoretiker des 20. Jahrhunderts (Mohr Siebeck, 2005)

Hruschka, J., Das Strafrecht neu durchdenken!, (1981) Goltdammer's Archiv für Strafrecht 237

Hruschka, J., Ordentliche und ausserordentliche Zurechnung bei Pufendorf, (1984) 96 Zeitschrift für die gesamte Strafrechtswissenschaft 661

Hruschka, J., Strafrecht nach logisch-analytischer Methode (W. De Gruyter, 2nd ed., 1988)

Hruschka, J.,Verhaltensregeln und Zurechnungsregeln, (1991) 22 Rechtstheorie 449

Hruschka, J., Zurechnung und Notstand: Begriffsanalysen von Pufendorf bis Daries in J. Schröder (ed.), Entwicklung der Methodenlehre in der Rechtswissenschaft und Philosophie vom 16. bis zum 18. Jahrhundert (Steiner 1998)

Hruschka, J., Zurechnung seit Pufendorf. Insbesondere die Unterscheidungen des 18. Jahrhunderts in M. Kaufmann and

J. Renzikowski (eds.), Zurechnung als Operationalisierung von Verantwortung (P. Lang, 2004)

Hüning, D., Hobbes on the Right to Punish in P. Springborg (ed.), The Cambridge Companion to Hobbes (Cambridge University Press, 2007)

Jakobs, G., Die strafrechtliche Zurechnung von Tun und Unterlassen (Westdeutscher Verlag, 1996)

Jakobs, G., La imputación objetiva en Derecho penal (Civitas, 1996)

Jakobs, G., Zur Genese der Rechtsverbindlichkeit in G. Höver (ed.) Verbindlichkeit unter den Bedingungen der Pluralität (Dr. Kovač, 1999)

Jakobs, G., Handlungssteuerung und Antriebssteuerung. Zu Hans Welzels Verbrechensbegriff in K. Amelung et al (eds.), Festschrift für Hans-Joachim Rudolphi (C.F. Müller, 2003)

Jakobs, G., Dolus malus in K. Rogall et al (eds.), Festschrift für Hans-Joachim Rudolphi (Luchterhand, 2004)

Jakobs, G., Imputation in Criminal Law and the Conditions for Norm Validity, (2004) 7 Buffalo Criminal Law Review 491

Jakobs, G., Staatliche Strafe: Bedeutung und Zweck (Schöningh, 2004)

Jakobs, G., Strafrecht als wissenschaftliche Disziplin in C. Engel and W. Schön (eds.) Das Proprium der Rechtswissen-schaft (Mohr Siebeck, 2007)

Jakobs, G., Norm, Person, Gesellschaft (Duncker & Humblot, 3rd ed., 2008)

Jareborg, N., Crime Ideologies, (2000) 40 Scandinavian Studies in Law 431

Jescheck, H.-H., La conscience humaine et la responsabilité penale de l'individu, (1961) 8 Annales de la Faculte de Droit et des Sciences Politiques et Economiques de Strasbourg 415

Jescheck, H.-H., Neue Strafrechtsdogmatik und Kriminalpolitik in rechtsvergleichender Sicht, (1986) 98 Zeitschrift für die gesamte Strafrechtswissenschaft 1

Jescheck, H.-H.; Weigend, T., Lehrbuch des Strafrechts, Allgemeiner Teil (Duncker & Humblot, 5 ed., 1995)

Jimenez de Asua, L., L'Antijuridicité, (1951) Revue Internationale de Droit Pénal 273

Jimenez de Asua, L., Les problemes modernes de la culpabilitè, in [without ed.], En Hommage a Jean Constant (Faculté de droit de Liège, 1971)

Karanicas, D.J., Le nouveau code pénal hellenique, (1951) Revue de Science Criminelle et de Droit Pénal Comparè 633

Kaufmann, Arm., Problems of Cognition in Legal Science with Reference to Penal Law, (1970) 1 Law and State 18

Kelsen, H., Peace Through Law (The University of North Carolina Press, 1944)

Kelsen, H., What is Justice? Justice, Law and Politics in the Mirror of Science (University of California Press, 1957)

Kelsen, H., General Theory of Law and State (Transaction Publishers, 2006)

Kindhäuser, U., Strafe, Strafrechtsgut und Rechtsgüterschutz in K. Lüderssen et al (eds.), Modernes Strafrecht und ultima-ratio-Prinzip (P. Lang, 1990)

Köhler, M., Le droit pénal entre public et privé, (1991) 41 Archives de la Philosophie du Droit 199

Köhler, M., Feuerbachs Zurechnungslehre, in R. Gröschner and G. Haney (ed.), Die Bedeutung P.J.A. Feurbachs (1775-1833) für die Gegenwart (F. Steiner, 2003)

Koriath, H., Grundlagen strafrechtlicher Zurechnung (Duncker & Humblot, 1994)

Kubiciel, M., Strafrechtswissenschaft und europäische Kriminalpolitik, (2010) 5 Zeitschrift für Internationale Strafrechtsdogmatik 742

Küchenhoff, G., The Problem of Guilt in the Philosophy of Law, (1975) 11 Law and State 67

Kühl, K., Naturrechtliche Grenzen strafwürdigen Verhaltens in O. Dann and D. Klippel (eds.), Naturrecht – Spätauf-klärung – Revolution. Das europäische Naturrecht im ausgehenden 18. Jahrhundert (F. Meiner, 1995)

Kühl, K., Europäisierung der Strafrechtswissenschaft, (1997) 109 Zeitschrift für die gesamte Strafrechtswissenschaft 777

Lesch, H.H., Dogmatische Grundlagen zur Behandlung des Verbotsirrtums, (1996) Juristische Arbeitsblätter 346

Lesch, H.H., Dolus directus, indirectus und eventualis, (1997) Juristische Arbeitsblätter 802

Lesch, H.H.,Unrecht und Schuld im Strafrecht, (2002) Juristische Arbeitsblätter 602

Licci, G., Quelques remarques sur les racines allemandes du droit pénal italien, (2003) Revue Internationale de Droit Comparé 309

Liszt, F. von, Lehrbuch des deutschen Strafrechts (J. Guttentag, 10th ed., 1900)

Loening, R., Die Zurechnungslehre des Aristoteles (G. Fischer, 1903), X

Luts, M.; Sootak, J., Das estnische Strafgesetzbuch von 2002 – Ende oder Beginn der Strafrechtsreform?, (2005) 117 Zeitschrift für die gesamte Strafrechtswissenschaft 651

Maggiore, G., Normativismo e anti-normativismo nel diritto penale, (1949) Archivio penale 3

Manacorda, S., La théorie générale de l'infraction pénale en France: lacunes ou specificités de la science pénale, (1999) Revue de droit pénal et de criminologie 35

Mantovani, F., Diritto penale, parte generale, (Cedam 1992)

Mayer, Der Allgemeine Teil des deutschen Strafrechts (C. Winter, 1915)

Merle, R.; Vitu, A., Traité de droit criminel, Tome I (Cujas, 7th ed., 1997)

Michaels, R.; Jansen, A., Private Law Beyond the State? Europeanization, Globalization, Privatization, (2006) 54 American Journal of Comparative Law 843

Oehler, D., La conception juridique allemande de la culpabilité, (1976) 24 Annales de l'Université des Sciences Sociales de Toulouse 73

Ortolan, J., Coup d'oeil général sur le droit pénal en Europe, (1843) 17 Revue de législation et de jurisprudence 121

Pradel, J.; Corstens, G., Droit pénal européen (Dalloz, 1999)

Pradel, J., Droit pénal comparé (Dalloz, 3rd ed., 2008)

Pufendorf, S., The Two Books on the Duty of Man and Citizen According to Natural Law (Oceana Publ., 1964)

Radbruch, G., Der Handlungsbegriff in seiner Bedeutung für den Verbrechensbegriff (J. Guttentag, 1904)

Renzikowski, J., Normentheorie und Strafrechtsdogmatik in R. Alexy (ed.), Juristische Grundlagenforschung (Steiner, 2005)

Reyes, Y., Theoretische Grundlagen der objektiven Zurechnung, (1993) 105 Zeitschrift für die gesamte Strafrechts-wissenschaft 108

Rinceanu, J., Auf der Suche nach einem Straftatbegriff in Rumänien, (2009) 121 Zeitschrift für die gesamte Strafrechtswissenschaft 792

Robert, J.-H., L'histoire des éléments de l'infraction, (1977) Revue de Science Criminelle et de Droit Pènal Comparè 269

Rocco, A.,Il problema e il metodo della scienza del diritto penale, (1910) Rivista italiana di diritto penale 493

Rocco, A., L'oggetto del reato e della tutela giuridica penale (Giapichelli, 1913)

Roux, A., Cours de droit criminel français, Tome I (Sirey, 2nd ed., 1927)

Schmidt, E., Einführung in die Geschichte der deutschen Strafrechtspflege (Vanderhoeck & Ruprecht, 3rd ed., 1965)

Schild, W., Die unterschiedliche Notwendigkeit des Strafens in K.-M. Kodalle (ed.), Strafe muss sein! Muss Strafe sein?, (Königshausen & Neumann, 1998)

Schild, W., Reine Rechtslehre und Strafrechtswissenschaft and Seelmann, Kelsen und das Strafrecht in A. Carrino and G. Winkler (ed.), Rechtserfahrung und Reine Rechtslehre (Springer, 1995)

Schild, W., Verbrechen und Strafe in der Rechtsphilosophie Hegels und seiner „Schule" im 19.Jahrhundert (2002) 1 Zeitschrift für Rechtsphilosophie 30

Schmitt, C., The Leviathan in the state theory of Thomas Hobbes (Greenwood Press, 1996)

Schneewind, J., The invention of autonomy: a history of modern moral philosophy (Cambridge University Press, 1998), 118

Schünemann, Einführung in das strafrechtliche Systemdenken, in B. Schünemann, (ed.), Grundfragen des modernen Strafrechtssystems (W. De Gruyter, 1984)

Schünemann, El propio sistema de la teoría del delito, (2008) 1 InDret: Revista para el Análisis del Derecho 27

Seelmann, K., Strafrecht, Allgemeiner Teil (Helbing & Lichtenhahn, 2nd ed., 2005)

Shalgi, M., Aristotle's Concept of Responsibility and Its Reflection in Roman Jurisprudence, (1971) 6 Israel Law Review 39

Sieber, U., European Unification and European Criminal Law, (1994) 2 European Journal of Crime, Criminal Law and Criminal Justice 86

Sieber, U., Strafrechtsvergleichung im Wandel (2006), in U. Sieber and H.-J. Albrecht (eds.), Strafrecht und Kriminalpolitik unter einem Dach (Duncker & Humblot, 2006)

Silving, H., Guilt: A Methodological Study, (1963) 32 Revista Juridica de la Universidad de Puerto Rico 12

Sinn, A., Straffreistellung aufgrund von Drittverhalten (Mohr Siebeck, 2007)

Snyman, C., The Normative Concept of Mens Rea: A New Development in Germany, (1979) 28 International and Comparative Law Quarterly 211

Sticht, O., Sachlogik as Naturrecht? Zur Rechtsphilosophie Hans Welzels (1904-1977) (Schöningh, 2000)

Stintzing, R. v.; Landsberg, E., Geschichte der Deutschen Rechtswissenschaft (Oldenbourg, 1898)

Streteanu, F., Proiectul noului Cod penal şi reconfigurarea teoriei infracţiunii în dreptul român (The Penal Code Draft – Reshaping the Theory of the Offence in Romanian Law), (2009) 2 Caiete de Drept Penal 50

Tiedemann, K., Der Allgemeine Teil des Strafrechts im Lichte der europäischen Rechtsvergleichung, in A. Eser et al (eds.), Festschrift für Theodor Lenckner (C.H. Beck, 1998)

Vogel, J., Elemente der Straftat: Bemerkungen zur französischen Straftatlehre und zur Straftatlehre des common law, (1998) Goltdammer's Archiv für Strafrecht 127

Welzel, H., Die Naturrechtslehre Samuel Pufendorfs (W. De Gruyter, 1958)

Welzel, H., Naturrecht und materiale Gerechtigkeit (Vandenhoeck & Ruprecht, 4th ed., 1962), 131

Welzel, H., Die deutsche strafrechtliche Dogmatik der letzten 100 Jahre und die finale Handlungslehre, (1966) Juristische Schulung 421

Welzel, H., Das Deutsche Strafrecht: Eine systematische Darstellung (W. De Gruyter, 11th ed., 1969)

Welzel, H., Abhandlungen zum Strafrecht und zur Rechtsphilosophie (W. de Gruyter, 1975)

Wieacker, F., Naturrecht und materiale Gerechtigkeit (1964) Juristenzeitung 633

Zimmermann, R., The Present State of European Private Law (2009) 57 American Journal of Comparative Law 479

Chapter IV
Administrative offence v. criminal offence in EU Law

Lamya-Diana Al-Kawadri*

§1. Introduction

This study aims to analize the case law of the Court of Justice of the European Union (ECJ) and European Court of Human Rights (ECtHR) on the nature of administrative sanctions and their relation to criminal law. Also, some important criteria used by different Member States in their own legal systems in differentianting between criminal and administrative sanctions are presented.

As it will be shown in this study, in establishing the difference between administrative and criminal offence sanctions, the case law of both the ECtHR and the ECJ offer an indirect definition of criminal offence through its penalty.

Thus, a certain behaviour, if sanctioned in a procedure that could be labeled as a "criminal procedure", is necessarily a criminal offence.

*Young Researcher, Centre for Legal, Economic and Socio-Administrative Studies, "Nicolae Titulescu" University, Bucharest, Romania. The comparative aspects of different European legal systems from this study were presented based on theoretical and practical research studies from Hungary, Italy and Netherlands.

§2. Comparative national law analysis

2.1. Preliminary remarks

In the old Romanian regulations, according to art. 1 of Law no. 32/1968, a *contravention* (administrative offence) was an "act committed with guilt, posing a danger of social crime and lower than is provided and sanctioned as such by laws, decrees or regulations of the bodies referred to in the present law".

The 1864 Criminal Code settled the *contravention* as the offence which the law punishes by imprisonment or by a police fine" (art. 1).

Present national regulations, G.O. no. 2/2001[1], states that "the *contraventional* law protects social values that are not protected by the criminal law".

We will see how the *contravention* is determined by the national legislator comparative with different other legislators.

2.2. Comparative national law analysis. Romania. Hungary. Italy. The Netherlands

Romanian legislator drew a difference between criminal offence and administrative offence, in the sense that the same conduct cannot be punished at the same time as criminal offence and also a *contravention*. In case such situation happens, the only punishment would be a criminal penalty.

In the same way, to describe *contravention*, Hungarian legislation settles that *contraventions* are the lightest type of a criminal offence regarding their weight. In 1955, it ranked a part of the *contraventions* as felonies but classified a bigger part of them under the new type of unlawful acts, under the collective notion of *infraction*[2]. Currently, *infractions* are regulated by a separate Act (Act II of 2012), which includes the regulations of substantive law, procedural law and law of execution as well.

---

[1] Official Journal no. 268/22 of April 2002.

[2] Ferenc Sántha, Erika Váradi-Csema, Andrea Jánosi, Foundations of (European) Criminal Law - National Perspectives, Hungary, *supra*.

Thus, *infractions/contraventions* are not part of criminal law, but they have a *substantial relation to it.*

Social values can be protected by criminal law, administrative law or by civil law, under different aspects[3]. For example, if a professional driver exceedes the accepted speed limit, its act constitutes a *contravention* and can also be sanctioned by the employer.

In Italy, until 1967, only criminal and civil wrongs were admitted[4]. However, as the legislator thought that some traffic offences where not so serious as to deserve a penal punishment, the Law no. 317/1967 introduced the first administrative offences with the aim to decriminalize the previous criminal provisions.

In Netherlands there is a difference between administrative and criminal offences[5].

Criminal law is at least eligible if the nature of the offence, the seriousness of the offence, its consistency with other offences or the need for an investigation associated with coercive and investigative powers so require. Administrative law is at least eligible if the offence is easy to determine, if there is no need for an investigation associated with coercive and investigative powers and if no severe punishments are necessary, even for deterrence[6]. There is no strict separation of administrative and criminal offences. It is not a question of a uniform defined jurisdiction, but more a partially overlapping jurisdiction.

Romanian specialized literature sets that the administrative law has a subsidiary character in relation to criminal law, because administrative sanctions occur only if the same act is not a criminal offence that would be criminally sanctioned.

The lack of qualitative diferences between criminal offences and *contraventions* should determine some juridical consequences,

---

[3] *M.A. Hotca*, Juridical regime of contraventions, ed. Ch. Beck, Bucharest, 2012.

[4] *C. Tracogna*, Foundations of (European) Criminal Law - National Perspectives, Italy, *supra*.

[5] *R. van Lijssel*, Foundations of (European) Criminal Law - National Perspectives, The Netherlands, *supra*.

[6] This is said about the Law of Prosecutoral Dispusal by the former minister of Justice, P.H. Donner.

as some specialists in this field highlighted. The first one is the consequence of inadmisibility of coexistence between the two types of liability. Secondly, the inadmisibility of establishing more sever administrative sanctions than the criminal ones.

In Romania, there is an infringement of this rule, since there are administrative sanctions more sever than criminal penalties, such as Law no. 297/2004 regarding capital markets. Such provisions violate the principle of proportionality. Indeed, there should be equivalence between the nature and gravity of the offence committed and the corresponding punishment.

In Hungarian legal literature, many standpoints have been formulated regarding the relation between *infractions* (previously: *contraventions*) and crimes[7].

According to the positivistic approach, making a distinction between *infraction* and crime is not a question of content, but a decision of the legislator. This means that those acts can be considered *infractions* if they are to be qualified as such by the legislator.

According to the quantitative approach, there is only a quantitative difference between *infraction* and criminal offence. This means analyzing to what extent the act violates the law and to what extent is it a threat to the society. The objective weight and the danger of the *infraction* are smaller than that of the criminal offence, and this is the reason for its lighter sanctioning.

According to a third theoretical approach, there is more of a qualitative difference between *infractions* (*contraventions*) and criminal offences, instead of a quantitative one. While the *infraction* is a morally neutral act against public administration (an "anti-administrative" act), the criminal offence is a (materially unlawful) behaviour that violates or endangers common public values.

Italian administrative offences are a separate and autonomous branch of law[8]. However, it rarely happens that a legal provision

[7] *F. Sántha, E. Váradi-Csema, A. Jánosi*, Foundations of (European) Criminal Law - National Perspectives, Hungary, *supra*.

[8] *C.Tracogna*, Foundations of (European) Criminal Law - National Perspectives, Italy, *supra*.

directly defines the nature of the sanction. As a matter of fact, the main criterion to classify civil, administrative and criminal offences is the formal one, which analyses the kind of sanction provided by law: since the criminal punishment is the only one affecting freedom (even as a result of a non-fulfilment of a criminal – monetary – fine), thus all other sanctions are not criminal. Moreover, an administrative offence differs from a civil wrong in that it affects social and public interests, while a civil wrong is related to private interests.

The Romanian general definition of the contravention is found in art. 1 para. (2) of G.O. no. 2/2001, under which:

"a contravention is committed with guilt, established and sanctioned by law, Ordinance, Decree of Government or, where appropriate, by decision of the local Council of the village, town, or municipality of Bucharest, sector of the County Council or General Council of Bucharest".

Also, according to the explanatory Dictionary of the Romanian language, "slight negligence" shall mean a violation of the provisions of a law, a regulation, which, given a degree of social danger, is sanctioned with a mild punishment.

The preamble of the new Hungarian Act on Infractions (Act II of 2012) calls *infractions* "criminal acts" which violate or endanger the generally accepted rules of social coexistence, but which are not as dangerous as crimes. The Act gives us the definition of "infraction". According to this,

"an infraction is an act or omission, ordered punishable by the law, which is dangerous for society" (Art. 1 Section 1).

This definition is completed, like the Romanian one, with the provision of the Act regarding the principle of guilt, and thus, *the elements of the legal definition of infraction* are: (1) human behaviour; (2) a danger to society, although to a smaller extent than a crime; (3) guilt (intent or negligence); (4) an act ordered punishable by the law.

Based on the above, on the one hand, it can be said that the legal definitions of *infraction* and criminal offence are very similar, the conceptual elements are basically the same, and the only difference is the extent to which the two acts pose a threat to society.

In Romanian criminal law system, contraventional law has as sources of law: the Constitution, organic laws and emergency ordinances; ordinary laws and ordinances of the Government; decisions of the Government; decisions of the county councils and the General Council of Bucharest; local councils decisions.

Likewise, the Constitutional Court of Romania, by Decision no. 251/2003[9], notes that the "notion of criminal proceedings for the purposes of the Convention is an autonomous one in relation to the meaning given in the national legislation, and for the purposes of art. 6 of the Convention, one must take into account three criteria: 1. the qualification of the offence under national law; 2. the nature of the offence; 3. the nature and the severity of the penalties that could be imposed on the person concerned".

The contraventional sanctions in the Romanian law system are main and complementary. Main sanctions are: warning, fine, and community service work.

Complementary contraventional sanctions are: confiscation of goods intended for, used or resulted from the offence; suspension or cancellation, where appropriate, of approval, agreement or authorization for the exercise of an activity; closure of the establishment; blocking a bank account; the suspension of the trader; the withdrawal of the licence or permit for specific operations or for foreign trade activities, either temporarily or permanently; dismantling work and bringing the land to its original state.

Romanian law system stipulates also technical and administrative measures which can be taken in addition to an administrative penalty.

For example, according to the Art. 97 of O.U.G. no. 195/2002, in addition to criminal penalties, "the policeman can aplly one of the following technical and administrative measures: retaining driving licence and/or registration certificate or, where appropriate, proof of their replacement; the withdrawal of the driving licence, registration certificate or registration number plates; the cancellation of the driving licence; raising vehicles stationed illegally etc."

[9] Official Journal no. 553/31 June 2003.

Also, in the Netherlands law system[10], the General Administrative Law Act provides a scheme for administrative fines. In the Act, the administrative fine is described as "the punitive sanction, containing an unconditional obligation to pay a sum of money". Other than the administrative order of the cease and desist, the administrative fine is punitive, meaning that it seeks to add suffering. In addition to the fines, there are also other administrative penalties. But as a rule, it cannot be a custodial sentence. In some cases, a favorable decision will be repealed in response to unlawful conduct. The punitive administrative sanctions are also disciplinary sanctions in the sphere of the civil service law. It is possible for a competent institutions official to impose disciplinary punishment. These are sanctions such as a reprimand, a deduction of salary, a fine, a suspension or a dismissal for some time. Just like the administrative fines, the guarantees of art. 6 and 7 of the ECtHR apply.

In Italy, the consequence of an administrative offence is the implementation of an administrative punishment (except the cases of justifiable defence, case of need, use of a right, comply with a duty). The administrative sanction is issued at first by a written report by the administrative authority in charge and should be immediately and formally notified to the offender. If it's not possible to inform the offender immediately after the fact happened, the report should be notified within 90 days; where else the punishment couldn't be implemented as its relevance expires. Moreover, the authority in charge of the administrative offence is entitled to ask for the payment from any of the co-offenders for the whole amount issued in the sanction.

Afterwards, the offender has 60 days to pay the monetary sanction (when expressly provided, the amount is reduced if the person pays before the deadline) or 30 days to produce defence documents and evidences and to ask for the review of the report issuing the sanction before a judge (*giudice di pace* or tribunal, depending on the gravity of the sanction).

[10] *R. van Lijssel*, Foundations of (European) Criminal Law - National Perspectives, The Netherlands, *supra*.

The authority dismisses the charges if the offence is not proved; otherwise, it confirms the punishment issuing one (or both) of the two following administrative sanctions: monetary (which is an injunction to pay a certain sum of money) or non-monetary (which can be divided into personal sanctions, such as disciplinary sanctions, suspension, dismissal, disqualification from a profession, or other economic activities etc.) sanctions, and material sanctions, such as seizure and confiscation.

We can observe until now that in all these law systems, these offences are regulated as distinct ones, that they borrow constitutive elements from criminal offences, maintaining the guilt requirement. The only difference is that an administrative offence can not affect the freedom of the individual, as can happen in case of a criminal offence.

§3. European Court of Human Rights and European Cour of Justice case-law

3.1. European Court of Human Rights (ECtHR)

The ECtHR has dealt with the distinction between criminal and administrative procedures in the case *Engel v. the Netherlands***.**

The case originated in five applications against the Kingdom of the Netherlands which were lodged with the Commission in 1971 by Cornelis J.M. Engel, Peter van der Wiel, Gerrit Jan de Wit, Johannes C. Dona and Willem A.C. Schul, all Netherland nationals.

As to the facts presented in this decision, all applicants were, when submitting their applications to the Commission, conscript soldiers serving in different non-commissioned ranks in the Netherlands armed forces. On separate occasions, various penalties had been passed on them by their respective commanding officers for offences against military discipline (unallowed absences, reckless driving of a vehicle, failure to comply with orders received and the publication of articles intended to undermine military discipline). The applicants had appealed to the complaints officer (*beklagmeerdere*) and finally to the Supreme Military Court (*Hoog*

Militair Gerechtshof) which in substance confirmed the decisions challenged but, in two cases, reduced the punishment imposed[11].

The applicants complained that the penalties imposed constituted deprivation of liberty contrary to art. 5 of the Convention, that the proceedings before the military authorities and the Supreme Military Court were not in conformity with the requirements of art. 6 and that the manner in which they were treated was discriminatory and in breach of art. 14 read in conjunction with art. 5 and 6.

The Court investigated whether the proceedings against the applicants concerned "any criminal charge" within the meaning of Art. 6 of the Convention. The Court stated that the Convention without any doubt allows the States, in the performance of their function as guardians of the public interest, to maintain or establish a distinction between criminal law and disciplinary law, and to draw the dividing line, but only subject to certain conditions. The Convention leaves the States free to designate as a criminal offence an act or omission not constituting the normal exercise of one of the rights that it protects.

The converse choice, for its part, is subject to stricter rules. If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of articles 6 and 7 would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction, under art. 6 and even without reference to Art. 17 and 18, to satisfy itself that the disciplinary does not improperly encroach upon the criminal.

In short, the "autonomy" of the concept of "criminal" operates, as it were, one way only.

In this connection, it is first necessary to know whether the provision(s) defining the offence charged belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and

[11] ECtHR, *Engel and Others v. the Netherlands*, 8 June 1976, para. 12.

relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States.

The very nature of the offence is a factor of greater import. In evaluating this second criterion, which is considered more important[12], the following factors can be taken into consideration: whether the legal rule in question is addressed exclusively to a specific group, or is of a generally binding character[13]; whether the proceedings are instituted by a public body with statutory powers of enforcement[14]; whether the legal rule has a punitive or deterrent purpose[15]; whether the imposition of any penalty is dependent upon a finding of guilt[16]; how comparable procedures are classified in other Council of Europe Member states[17]. The fact that an offence does not give rise to a criminal record may be relevant, but is not decisive, since it is usually a reflection of the domestic classification[18].

However, supervision by the Court does not stop there. Such supervision would generally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring. In a society subscribing to the rule of law, deprivations of liberty liable to be imposed as a punishment belong to the "criminal" sphere, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to the respect for the physical liberty of the person all require that this should be

---

[12] See *Jussila v. Finland*, Decision of 23 November 2006, [2007] ECtHR, para. 38.

[13] See, for example, *Bendenoun v. France*, Decision of 24 February 1994, [1995] ECtHR, para. 47.

[14] See *Benham v. the United Kingdom*, Decision of 10 June 1996, [1997] ECtHR, para. 56.

[15] See *Bendenoun v. France* case, *supra*, para. 47.

[16] See *Benham v. the United Kingdom*, *supra*, para. 56.

[17] See *Öztürk v. Germany*, Decision of 21 February 1984, [1985] ECtHR, para. 53.

[18] See, for example, *Ravnsborg v. Sweden*, Decision of 23 March 1994, [1995] ECtHR, para. 38.

so[19]. Thus, the third criterion is determined by reference to the maximum potential penalty which the relevant law provides for[20].

The second and third criteria are alternative and not necessarily cumulative. This, however, does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge[21].

3.2. Court of Justice of the European Union

The ECJ also addressed the matter of differentiating between administrative and criminal law penalties.

The ECJ adopted the ECtHR *Engel* criteria in two recent decisions, cases C-489/10[22] and C-617/10[23].

In the *Bonda* case, as the Advocate General pointed out, as a result of incorrect declarations in an application for the European Union agricultural aid, the national administration imposed on a farmer the reductions provided for in a European Union Regulation in the aid applied for. Subsequently, on the basis of the same false declarations, the farmer was charged with subsidy fraud in proceedings before a criminal court.

Consequently, the main issue in this case is the question whether the administrative proceedings were of a criminal nature, with the consequence that criminal proceedings may not also be brought against the recipient of aid, as a result of the prohibition of double penalties (*ne bis in idem* principle).

As a legal basis, there were mentioned the following provisions:

- Art. 50 of the Charter of Fundamental Rights of the European Union:

---

[19] *Engel*, *supra*, para. 81-82.

[20] See *Campbell and Fell v. the United Kingdom,* Decision of 28 June 1984, [1985] ECtHR, para. 72; Demicoli v Malta, Decision of 27 August 1991, [1992] ECtHR, para. 34.

[21] See *Jussila v. Finland* case, *supra*, and *Ezeh and Connors v. the United Kingdom*, Decision of 15 July 2002, [2003] ECtHR.

[22] C-489/10, Sąd Najwyższy v. Łukasz Marcin Bonda, nyr.

[23] C-617/10, Åklagaren v Hans Åkerberg Fransson, nyr.

"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.";

- Art. 138(1) of Regulation (EC) no. 1973/2004, in the version in force at the time the aid application at issue was lodged (16th of May 2005) and at the time of the administrative decision (25th of June 2006), stated as follows:

"Except in cases of *force majeure* or exceptional circumstances as defined in article 72 of Regulation (EC) no. 796/2004, where, as a result of an administrative or on-the-spot check, it is found that the established difference between the area declared and the area determined, within the meaning of point (22) of Art. 2 of Regulation (EC) no. 796/2004, is more than 3% but no more than 30% of the area determined, the amount to be granted under the single area payment scheme shall be reduced, for the year in question, by twice the difference found. If the difference is more than 30% of the area determined, no aid shall be granted for the year in question. If the difference is more than 50%, the farmer shall be excluded once again from receiving aid up to an amount which corresponds to the difference between the area declared and the area determined. That amount shall be off-set against aid payments to which the farmer is entitled in the context of applications he lodges in the course of the three calendar years following the calendar year of the finding."

Taking into account that on the 14th of July 2009, as a result of the above incorrect declarations in his aid application, Mr. Bonda was convicted by the *Sąd Rejonowy w Goleniowie* for the offence of subsidy fraud under Art. 297(1) of the Polish Criminal Code and sentenced to a term of imprisonment of eight months suspended for two years and a fine of 80 daily rates of PLN 20 each, Mr. Bonda appealed against the above judgment to the *Sąd Okręgowy w Szczecinie*. That court allowed the appeal and discontinued the criminal proceedings against Mr. Bonda. It held that as a result of the fact that a penalty had already been imposed on Mr. Bonda pursuant to Art. 138 of Regulation no. 1973/2004 for the same conduct, criminal proceedings against him were not admissible. As a result of the appeal on a point of law lodged by the Prokurator

Generalny, the proceedings are now pending before the *Sąd Najwyższy*, the referring court.

The main issue of the preliminary question is whether Art. 138(1) of Regulation no. 1973/2004 must be interpreted as meaning that the measures provided for in the second and third subparagraphs of that provision, consisting in excluding a farmer from receiving aid for the year in which he made a false declaration of the eligible area and reducing the aid he can claim within the following three calendar years by an amount corresponding to the difference between the area declared and the area determined, constitute criminal penalties.

The most important aspect that the Court highlighted based on this decision is that administrative penalties laid down in pursuance of the objectives of the common agricultural policy form an integral part of the schemes of aid, that they have a purpose of their own, and that they may be applied independently of any criminal penalties, if and in so far they are not equivalent to such penalties.

The Court also settled that the administrative nature of the measures provided for in the second and third subparagraphs of Art. 138(1) of Regulation No 1973/2004 is not called into question by an examination of the case-law of the ECtHR rights on the concept of "criminal proceedings" within the meaning of Art. 4(1) of Protocol No. 7, to which the national court refers.

The Court expressly reffered in its analysis to the *Engel* criteria[24]: legal classification of the offence under national law, the very nature of the offence, the nature and degree of severity of the penalty that the person concerned is liable to incur.

It is shown that the measures provided for in the second and third subparagraphs of Art. 138(1) of Regulation no. 1973/2004 are to apply only to economic operators who have recourse to the aid scheme set up by that regulation, and that the purpose of those measures is not punitive, but is essentially to protect the management

[24] ECtHR, *Engel and Others v. the Netherlands*, 8 June 1976, §§ 80 to 82, Series A no. 22, and *Sergey Zolotukhin v. Russia*, no. 14939/03, §§ 52 and 53, 10 February 2009.

of European Union funds by temporarily excluding a recipient who has made incorrect statements in his application for aid.

An interesting approach regarding the analysis of the third Engel criterion was made by the Advocate General in her conclusions, highlighting that in assessing the severity of the penalty which is liable to be imposed, the assessment may not be based on whether, at face value, a measure ultimately has a financially disadvantageous effect. On the contrary, an evaluatory consideration is advisable, which should include whether the penalty adversely affects interests of the person concerned which are worthy of protection. If this must be answered in the negative, there is no severe penalty within the meaning of the third *Engel* criterion. In making this examination it is conspicuous in connection with the case at issue that the penalty does not adversely affect the current property of the person concerned, as would be the case with a fine. Neither is there any interference with legitimate expectations. By means of the reduction, the person concerned is merely faced with the loss of the prospect of aid. However, with regard to this prospect of aid, there is no legitimate expectation of aid where a beneficiary of aid has knowingly made false declarations: he knew from the start that he would not get any aid which was not reduced if he made false declarations.

So, through the analysis of the *Engel* criteria, the Court concluded that the sanctions provided for in Art. 138 (1) of Regulation No 17. 1973/2004 are not to be qualified as criminal sanctions.

In the second case, ***Fransson*** (C-617/10), Mr. Fransson was accused of having provided, in his tax returns for 2004 and 2005, false information which exposed the national exchequer to a loss of revenue linked to the levying of income tax and value added tax, and also prosecuted for failing to declare employers' contributions for the accounting periods from October 2004 and October 2005, which exposed the social security bodies to a loss of revenue amounting to SEK 35.690 and SEK 35.862 respectively. According to the indictment, the offences were to be regarded as serious, firstly, because they related to very large amounts and, secondly, because they formed part of a criminal activity committed systematically on a large scale.

As legal basis, the following provisions were invoked, the most important in our opionion:

- The European Convention for the Protection of Human Rights and Fundamental Freedoms;

- Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms:

"1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Art. 15 of the [European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950;]".

European Union law

- Charter of Fundamental Rights of the European Union

Art. 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".

Art. 51:

"1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or

task for the Union, or modify powers and tasks as defined in the Treaties".

- Sixth Directive 77/388/EEC

Swedish law

Para. 2 of Law 1971:69 on tax offences:

"Any person who intentionally provides false information to the authorities, other than orally, or fails to submit to the authorities declarations, statements of income or other required information and thereby creates the risk that tax will be withheld from the community or will be wrongly credited or repaid to him or a third party shall be sentenced to a maximum of two years' imprisonment for tax offences".

Para. 4:

"If an offence within the meaning of para. 2 is to be regarded as serious, the sentence for such a tax offence shall be a minimum of six months imprisonment and a maximum of six years.

In determining whether the offence is serious, particular regard shall be had to whether it relates to very large amounts, whether the perpetrator used false documents or misleading accounts or whether the conduct formed part of a criminal activity which was committed systematically or on a large scale or was otherwise particularly grave".

- Law 1990:324 on tax assessment

They addressed to the Court 5 preliminary questions.

Through these questions the Court is requested to determine whether the *ne bis in idem* principle set out in art. 50 of the Charter should be interpreted in the sense that it opposes the deployment of prosecution in respect of a defendant under the aspect of tax offences, since the latter was already a fiscal penalty applied for the same acts of false declarations.

The Court grouped the second, third, fourth and fifth questions focusing on the application of the principle *ne bis in idem*, embodied in art.e 50 of the Charter, in the case of administrative and criminal penalties double imposed by Member States.

The first preliminary question which the Court addressed refers to the conditions imposed by the Swedish Supreme Court pursuant to the ECtHR and the Charter of the courts of that State.

The most important issue that rises here is if whether or not the prior existence of administrative proceedings in which there is a final judgment imposing a penalty precludes the commencement of criminal proceedings, and a possible criminal conviction, on the part of the Member States.

This shows that Art. 50 of the Charter does not imply, as the existence of a prior administrative penalties to prevent final definitely switching to proceedings before the Criminal Court and finally apply for a conviction.

Also, it adds, the principle of the prohibition of arbitration, linked to the principle of the rule of law (Art. 2 of the TEU), obliges the national legal order permitting criminal court to take into account, in one way or another, the existence of a prior administrative penalties, in order to reduce the criminal penalty.

Most important, the Advocate General concludes that art. 50 of the Charter must be interpreted as meaning that it does not preclude the Member States from bringing criminal proceedings relating to facts in respect of which a final penalty has already been imposed in administrative proceedings relating to the same conduct, provided that the criminal court is in a position to take into account the prior existence of an administrative penalty for the purposes of mitigating the punishment to be imposed by it.

Analyzing the first preliminary question, the Court understands that the national court asks, in essence, whether a national judicial practice is compatible with European Union law if it makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the ECHR and by the Charter conditional upon that infringement being clear from the instruments concerned or the case-law relating to them.

At this preliminary question, the Court settles that European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law.

§4. Conclusion

We can observe from the three decisions that we've shortly presented, that the issue that arises is if the same act of the same person can be punished at the same time with an administrative and a criminal penalty without violating the principle of *ne bis in idem*.

The European Courts solved this problem in two stages.

The first one is to establish whether the administrative penalty applied is in fact a criminal penalty, and this is accomplished by analyzing the three Engel criteria, as we've shown above.

The second stage is to establish if the same act can also be administrative and criminally sanctioned at the same time.

In the *Fransson* case, the last analyzed, the Advocate General and the Court found out that art. 50 of the Charter would not be infringed if the national court considered that there are necessary both of the sanctions at the same time, however, with the condition that where administrative penalty remains final before applying and criminal sanction (or vice versa), it should be taken into account in the determination of its amount and intensity of the first.

Only in such a situation, the *ne bis in idem* rule would not be violated.

We believe that the reasoning of the Court is quite clear and effective, but there is still a question we think that needs to be clarified. We can also observe that national Courts have adopted the criteria established by the ECtHR and the ECJ in its case-law.

We appreciate that administrative sanctions are removed from the illicit criminal sphere, while having a distinct character of criminal sanctions, but even in this case they are still instruments of punishment. As a result, concurrent application would not be a violation of the principle of *ne bis in idem*.

So, why does the Court establish that criminal penalty should be reduced in case of the application by an administrative sanction? In our opinion, a criminal penalty should be appreciated and reduced only depending on criminal instruments that the legislator of each member-state provides, and not be influenced by an administrative sanction.

The only accepted situation that an administrative sanction could influence in that sort of way, is only when the first applied is the criminal penalty, the only one that can influence other types of sanctions.

Bibliography

Literature

Avrigeanu, T., Foundations of (European) Criminal Law – National Perspectives, Germany.

Gorunescu, M., Foundations of (European) Criminal Law – National Perspectives, Romania.

Hotca, M.A., Juridical regime of contraventions, ed. Ch. Beck, Bucharest, 2002.

Sántha, F., Váradi-Csema, E., Jánosi, A., Foundations of (European) Criminal Law – National Perspectives, Hungary.

Tracogna, C., Foundations of (European) Criminal Law – National Perspectives, Italy.

van Lijssel, R., Foundations of (European) Criminal Law – National Perspectives, The Netherlands.

Case-law

ECJ, Case C-489/10, *Sąd Najwyższy v. Łukasz Marcin Bonda* (Reference for a preliminary ruling from the Sąd Najwyższy (Republic of Poland)

ECJ, Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson* [Reference for a preliminary ruling from the Haparanda tingsrätt (Sweden)]

ECtHR, *Engel and Others v. the Netherlands*, 8 June 1976, §§ 80 to 82, Series A no. 22

ECtHR, *Sergey Zolotukhin v. Russia*, no. 14939/03, §§ 52 and 53, 10 February 2009

Websites

(*http://eur-lex.europa.eu/JOIndex.do*)

(*http://curia.europa.eu/*)

Conclusion

When analyzing the national reports and the situation at the EU level in respect to the problems identified as part of the foundations of criminal law, one can observe that the main principles identified in national law constitute also the core principles at the EU level, the criteria for criminalizing conduct pose the same problems, also the notion of criminal offence and the distinction between criminal and administrative offences are usually solved using the same criteria for differentiation. And this is understandable, since the EU principles are based on common principles and traditions stemming from the Member States. The solutions adopted at the national level can be transferred at EU level with certain chances of success.

Does this mean that we can find at the EU level a European criminal law system similar to the ones developed at national level?

If we interpret the concept of criminal law in the classical sense of the existence of European criminal codes, which unifies law throughout the Union, with judicial bodies having extended jurisdiction at the EU level, with a European federal court before which are subject to judgment causes of transnational crime, affecting fundamental interests of European citizens, the answer is no, there is no European criminal law and there will be none in the near or more distant future.

But European criminal law should be envisaged as a different concept as the one conceived at national level. If one develops a European criminal law paradigm as an existing reality which cannot be denied, influencing, whether we like it or not, the national criminal law in the Member States, it is obvious that we are dealing with a European criminal law, at least in its infancy. Indeed, it is already known the extent of regulation in criminal matters within the European Union over the last decade, both in substantive criminal law (environmental criminal law protection, computer crime, drug trafficking, trafficking in human beings, organized crime, child

pornography etc.), criminal procedure (establishing minimum criteria for the rights of suspects in criminal proceedings: the right to interpretation and translation, the right to information, the right of access to a lawyer etc.) and judicial cooperation in criminal matters (the European arrest warrant, recognition and enforcement of custodial and non-custodial sentences, transfer of convicted persons etc.). Even if there is no direct effect, the European intervention in criminal law leads to harmonization of the criminal laws of the Member States which are bound to implement into national law the documents adopted at the EU level.

In respect to criminal law, the EU has proposed an ambitious goal: creating an area of freedom, security and justice. Numerous laws were adopted in the early 2000s to facilitate the achievement of this objective, including harmonization of the criminal laws of the Member States relating to the granting of guarantees fundamental rights of the person sought in criminal proceedings, but also to facilitating transnational cooperation by accelerating procedures, reducing the reasons for refusal and time of execution of requests for mutual assistance in criminal matters. The principles of mutual recognition and mutual trust have become fundamental principles governing the European judicial area and on which the whole European criminal law is based.

In these circumstances, I consider legitimate the following question: is the emerging European criminal law scientifically based or are legal acts adopted without any systematic approach, depending on the interest of the moment?

I will restate below the conclusions drawn from the analysis at the EU level of the main problems identified in constructing a solid foundation for criminal law instruments adopted by the European Union.

§1. General principles

A set of principles is established in EU legislation and case law, both in substantial criminal law and criminal procedure, guaranteeing that the objective set out at EU level, of establishing

an area of freedom, security and justice, can be achieved through implementing EU law in the setting of these principles. However, further harmonization is needed in the field of criminal offences giving rise to a European arrest warrant in order to fully comply with the principles of legality, equality and non-discrimination. Mutual recognition and mutual trust may establish a functional system, but these principles cannot prevent inequities in specific cases, due to lack of harmonization at EU level. The current trend of establishing minimum thresholds and guarantees in criminal procedure at EU level is encouraging, but attention should be also given to limiting EU intervention in criminal law at what is necessary to achieve EU interests, in full observance of the principles of conferral of powers, subsidiarity and proportionality.

§2. Criteria for criminalizing conduct

As opposed to national law, where there is no enacted legislation to limit criminalizing conduct, at EU level several principles and criteria are enacted, both in legislative instruments and criminal law policies of EU institutions involved in the legislative process. However, several weaknesses were identified in the analysis of the practical enforcement of these principles in the legislative process.

Properly applied, the existing fundamentals principles of EU law are sufficient in themselves for providing good quality, adequate and necessary criminal instruments. In other words, the principle of conferral of powers, subsidiarity and proportionality provide a serious impediment to potential abuse of criminal law instruments.

So far, an empirical, and not scientifically and methodical approach in legislation in adopting criminal law instruments at the EU level resulted from the analysis of the adopted or proposed legislative acts; it is an approach dictated by the immediate interest, and not by a systemic approach.

Criminal law instruments adopted so far at the EU level are seldom consistent with each other; in a comparative analysis, criminal law terms used are often different, and sometimes the same term has different meaning in different acts. An increased attention

towards coherence in the criminal law field at EU level is necessary. An interinstitutional agreement between the main actors (the Commission, the Council, the European Parliament), which should establish a common criminal law policy, including the link between general principles of EU law (conferral of powers, subsidiarity, proportionality) and general criminal law principles for criminalizing conduct and/or limiting criminalization (harm principle, legal goods theory, *ultima ratio* principle) is to be concluded in the near future.

Also, steps should be taken towards transforming the European Parliament in the main body with competences in adopting criminal law at European level; national Parliaments should be involved in assessing both the subsidiarity and proportionality of a legislative act in the field of criminal law (the democracy gap).

Literature, institutions and bodies are to establish a serious dialogue on the foundations of European Criminal Law; it is no use on criminalizing conduct if necessary instruments and criteria are not in place for a scientific, converging approach. It is better to start with the basis of criminal law and institute criteria for criminalizing conduct before adopting criminal law instruments in the field of EU law.

There should be a certain discretion of legislature in respect to criminalizing conduct for regulating conduct and imposing certain rules in society; but also certain limits to prevent abuse of power and overcriminalization when not necessary.

In conclusion, the EU concept of the "harm" principle can be used as a tool to identify potential conduct susceptible for criminalization. General principles of EU law (such as conferral of powers, including identifying the legal goods in need of criminal law protection, proportionality and subsidiarity) and special limits enacted in Art. 83 of the TFEU (effectiveness of EU policies and transnational dimension of Eurocrimes) offer a principled approach to criminalizing conduct in EU law and special attention should be awarded to respecting those principle in the criminalization process.

§3. Criminal offence definition in EU law

One may hope that the European science of criminal law will set up during the 21st century to reinterpret the notions of *actus reus* and *mens rea,* thus creating a definition of criminal offence with a true European dimension.

The *actus reus* could be developed as a normative doctrine of the unwarranted conduct, departing from objective social roles and the competencies assigned thereto and constituting the core of the objective side of crime.

The *mens rea* might be established through the concepts of *dolus* and *culpa,* if they are regarded as normative legal concepts instead of natural psychological ones.

It results a *concept* of crime as *meaningful* conduct*, i.e.* as questioning of the norm validity, and through it, of the normative identity of the society itself.

§4. Criminal offence v. administrative offence

In establishing the difference between administrative and criminal offence sanctions, the case law of both the European Court of Human Rights and the Court of Justice of the European Union offered an indirect definition of criminal offence through its penalty.

Thus, a certain behaviour, if sanctioned in a procedure that could be labeled as "criminal procedure", is necessarily a criminal offence.

The Court's established case-law set out three criteria – commonly known as the "*Engel* criteria" – to be considered in determining whether or not there was a "criminal charge". The first one is the legal classification of the offence under national law, the second is the nature of the offence and the third is the degree of severity of the penalty that the person concerned risks incurring. The first criterion is of relative weight and serves only as a starting point. If domestic law classifies an offence as criminal, then this will be decisive. Otherwise the Courts will look behind the national classification and examine the substantive reality of the procedure in question.

The first criterion is also of diminished importance for this study, because the label of criminal offence is given by the national law, according to its national procedures. Thus, a criminal offence, according to this criterion, is what is established at national level to be criminal, with no other benchmark for analysis. And this does not offer a definition or criteria to identify conduct which can be labeled as a criminal law offence.

In evaluating the second criterion, which is considered more important, the following factors can be taken into consideration: whether the legal rule in question is addressed exclusively to a specific group, or is of a generally binding character; whether the proceedings are instituted by a public body with statutory powers of enforcement; whether the legal rule has a punitive or deterrent purpose; whether the imposition of any penalty is dependent upon a finding of guilt; how comparable procedures are classified in other Council of Europe Member states. The fact that an offence does not give rise to a criminal record may be relevant, but is not decisive, since it is usually a reflection of the domestic classification.

The third criterion is determined by reference to the maximum potential penalty which the relevant law provides for. The second and third criteria are alternative and not necessarily cumulative. This, however, does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge.

Thus, in the court's interpretation, an administrative penalty under national law can fulfill at least one of the criteria mentioned above and qualify as a criminal penalty. This could be seen as a reversed process in establishing a criminal offence at EU level, through its penalty, which can be labeled, according to autonomous criteria, as being a criminal penalty.

§5. Final remarks: freedom and security, effectiveness of EU law and fundamental rights

Under the above mentioned conditions, two diverging interests have to be reconciled at EU level: the need for the European

legislator to give EU citizens a space governed by security and the obligation to ensure respect for fundamental human rights by creating an area of freedom. Both the European legislator and the ECJ have sought a precarious balance between the two interests.

"Freedom versus security" is the leitmotif that governs ECJ decisions in criminal matters which have been shown in the present study. But is there indeed a balance between the two interests?

From the examined legislation and case law to date, one can extract an interesting conclusion: when it comes to protecting an individual interest only, the European institutions and bodies favor the right to liberty over security and fulfilling the objectives of the Treaties. Assuming, however, that the protection of individual interests can be achieved only by affecting the functioning of European law, the right to liberty enjoys no chance in ECJ interpretation, when seated in balance with the achievement of the effectiveness of EU law.

However, it is to be noted that the ECJ case law in criminal matters puts a special emphasis on criminal justice policy issues, and the analysis is performed in the majority of decisions in principle, in the spirit of the law, to the detriment of its literal interpretation. And this may be a source of inspiration also for national courts.

Meanwhile, the European legislator criminal activity is based on fundamental principles that can be simultaneously criminalization criteria, but also its limits: protecting the fundamental interests of citizens on the basis of their production of a major injury ("harm" theory), limit criminalization based on the protection of certain social values (the "legal goods" theory), subsidiarity and proportionality of the intervention of the European legislator in criminal law. What happens in reality is the criminalization of acts to protect the effectiveness of EU law, which favors the theory of criminalization based on the economic analysis of law, *i.e.* on cost-benefit relationship. And this reality should trigger a serious discussion in literature on the foundations of European criminal law, based on the fundamental principles assumed and recognized by the European Union.