

## CONSENT AND OBVIOUS VULNERABILITY

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**ABSTRACT:** *While the penal codes includes certain offences that one may regard as falling under the species of „crimen natural” (e.g. homicide or theft), human trafficking is conceivable as crime only in the framework of the Modern social order. In the same time, the criminalization itself, as it presents itself exemplary in the new Romanian penal code, shows the limits of the legal paradigm, that departs from the (extreme) vulnerability of the human individuals, forced by their own reason to submit themselves under an authority, whose exercise is legitimated by their own consent.*

**KEYWORDS:** *human trafficking, consent, Romanian criminal Code, criminal or non-criminal nature of some offences*

**JEL CLASSIFICATION:** *K 14, K 19*

1. „If we know what type of society and state a Criminal Law system serves, we implicitly learn whose will and conscience the rules of that system express, what social relations they protect, who profits by this protection and against whom it is directed and, lastly, what aims and objectives are pursued by that criminal law system”<sup>1</sup>. These words that the Romanian criminal law scholar Vintila Dongoroy wrote 1960 did not have lost anything of their actuality, even if the political context differs now in some ideological respects. The communist theory of criminal law not only provided a material definition of the crime as socially dangerous deed, but also claimed that this way of conceiving crime is a definitory feature for socialist theory at all: any attempt of the bourgeois doctrine to provide a similar definition would force it to admit the class nature of the criminal law in a society based on exploitation<sup>2</sup>. The correctness of this thesis was not put in question after the fall of the communist political regimes, when it was consequently used further as ideological tool: non communist scholarship on criminal law shall content itself with a

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<sup>1</sup> Vintilă Dongoroz, *Main Changes Of Criminal Law in the Rumanian People’s Republic in the Light of the Marxist-Leninist Concept*, *Revue des Sciences Sociales, Série Économie-Sciences Juridiques* 4 (1960), pp. 269-308, 273.

<sup>2</sup> Igor Andrejew, *Zur vergleichenden Darstellung des Strafrechts der sozialistischen Staaten*, *Zeitschrift für die gesamte Strafrechtswissenschaft* 99 (1987), p. 152; for a clarifying answer see but Stanislas Pomorski, *Communists and Their Criminal Law*, *Revue of Socialist Law* 7 (1981), p. 7.

formal definition of the offense<sup>3</sup>. Beyond the difficulties that such a mistaken claim bears for any dogmatic of criminal law<sup>4</sup>, there is also a manifest consequence of it for the theoretical explanation: the theory of criminal law does not succeed to legitimate convincingly the criminalization process because it fails to understand it as system generated by the very society which the criminal law is designated to protect. It is quite undisputedly that „harm in the sense of a „material“ wrong denotes the fact that the crime, in addition to the mere breach of law, injured the object which the criminal provision is designed to protect”<sup>5</sup>. The discourse about the concept of crime has nevertheless to clarify whether this object consists in a (subjective) *right*, in an (individual or collective) *good* or in the normative *order* of society, better said: of a particular society. Modern criminal law was born as part of a general theory of law and state<sup>6</sup> in an ideal framework dominated by the modern, individualistic natural law doctrines. The social order is defined no more by objective institutions of some concrete society which are naturally parte of the self conscience of every human being<sup>7</sup>, but by the geometrics of the isolated individuals who associate themselves rationally because this is the fulfillment of their well-conceived interests. Nothing is objectively good anymore because the „good in itself” does not exist as such, since everyone calls good what he likes and bad what he dislikes<sup>8</sup>. The offense is something that violates the rights of an individual<sup>9</sup> and not some mere moral duties as well or public interests<sup>10</sup>.

The translation from modern natural law to legal positivism<sup>11</sup> has brought the new concept of the legal good, firstly through a famous piece of Johann Michael Franz Birnbaum from 1834, later through the two famous protagonists of the so-called debate of the criminal law schools. „Since the theory of the legal good was developed by Karl Binding as well as adopted and spread by Franz von Liszt it is generally naturalized. Since then – that is, since about one hundred years – the sentence that the task of criminal law consists in protection of legal goods is not seriously disputed in the science of criminal law”<sup>12</sup>. These memorable words written two decades ago by the famous German scholar

<sup>3</sup> See e. g. Jan Musil, *Die Bestrebungen zu einer demokratischen Strafrechtsreform in der Tschecho-slowakei*, Zeitschrift für die gesamte Strafrechtswissenschaft 103 (1991), p. 1030; Siegfried Lammich, *Das neue russische Strafgesetzbuch von 1996*, Zeitschrift für die gesamte Strafrechtswissenschaft 109 (1997), pp. 417-430, 422; Jan Sootak, *The Civil Law Institutes as Part of Criminal Law*, Juridica International VI/2001, pp. 178-185, 179.

<sup>4</sup> Włodzimirz Wrobel, *Zum Aufbau der Straftat, insbesondere zum formellen/materiellen Straftatbegriff*, in A. Eser et al. (eds.), *Strafrechtsentwicklung in Osteuropa*, 2005, pp. 141-168.

<sup>5</sup> Albin Eser, *The Principle of «Harm» in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests*, Duquesne Law Review 4 (1966), pp. 345-417, 348.

<sup>6</sup> Wolfgang Naucke, *Der materielle Verbrechensbegriff im 19. Jahrhundert*, in D. Klippel (ed.), *Naturrecht im 19. Jahrhundert*, 1997, pp. 269-291, 289.

<sup>7</sup> Giorgio Del Vecchio, *Lezioni di filosofia jurídica*, 1944, p. 300; Günther Jakobs, *Das Straf-recht zwischen Funktionalismus und „alteuropäischen“ Prinzipien*, Zeitschrift für die gesamte Strafrechtswissenschaft 107 (1995), pp. 843-876, 854.

<sup>8</sup> Thomas Hobbes, *De Cive* VIII, 1; *Elements of Law, Naturall and Politic* VII, 3.

<sup>9</sup> Paul Johann Anselm von Feuerbach, *Lehrbuch des gemeinen in Deutschland gültigen perinlichen Rechts*, 1832, § 24; Francesco Carrara, *Programma del corso di diritto criminale, Parte Generale*, 1867, § 36. („L'ente giuridico non puo avere per suo oggetto che un'idea – il diritto violato, che la legge col suo divieto protegge”).

<sup>10</sup> Thomas Vormbaum, *Einführung in die moderne Strafrechtsgeschichte*, 2009, § 3.

<sup>11</sup> See Knut Amelung, *J.M.F. Birnbaums Lehre vom strafrechtlichen «Güter»-Schutz als Übergang vom natur-rechtlichen zum positivistischen Rechtsdenken*, in: D. Klippel (ed), *Naturrecht im 19. Jahrhundert*, 1997, p. 349.

<sup>12</sup> Armin Kaufmann, *Die Aufgabe des Strafrechts*, 1987, p. 5 („Seit Karl Binding die Lehre vom Rechtsgut entfalten hat, Franz von Liszt diesen Begriff übernommen und verbreitet hat, ist er allgemein eingebürgert.

*Armin Kaufmann* may serve as proof for the broad agreement of the criminal law theory regarding that formula *by and large*. One decade later *Claus Roxin* completed insofar the picture as he concluded in not less memorably words from the highly controversial *details* which inevitably arise when we take a closer look at the same formula: „The substantial concept of crime and the doctrine of legal goods are still among the least precisely clarified fundamental problems of the criminal law”<sup>13</sup>. Instead of some progress in clarifying the details of this doctrine<sup>14</sup>, the last fifteen years witnessed the increasing of doubts regarding its very core and we can take a look at the definition provided by Roxin – „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”<sup>15</sup> – in order to understand the difficulties which have to be faced by every attempt to make it somehow operational. While Binding could be understood as pointing to some norms of culture that expressed in the last analysis the given social structure of the time, Liszt was quite clear in pointing out to the fact that legal goods are nothing but „the juridically protected interests” because „the protection of interests is the essence of the legal order”, moreover: his statement indicates the starting point of his analysis: „In order to avoid the war of all 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”<sup>16</sup>. This is nothing other than the famous Hobbesian *bellum omnium contra omnes*<sup>17</sup> and it is not at all surprisingly that the further development of his theory – somehow contrary to his own intentions – was a concept of legal good as „dogma serving the criminal policy”<sup>18</sup>. The Romanian criminal law scholar Vintilă Dongoroz conceived so already before 1945 in the same vein of the function that the legal good has to fulfill as „the political (explanatory) element” of the statutory provision, in short as *ratio legis*<sup>19</sup>, according to the German neokantian scholarship<sup>20</sup> and also with Hobbes’ equivalence between the sovereign will manifested in

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Seither – also seit etwa einhundert Jahren – wird auch in der Strafrechts-wissenschaft der Satz nicht ernsthaft bestritten, dass Rechtsgüterschutz Aufgabe des Strafrechts ist“).

<sup>13</sup> Claus Roxin, *Strafrecht, Allgemeiner Teil I*, 31997 § 2/48 („Der materielle Verbrechensbegriff und die Rechtsgutslehre gehören noch heute zu den am wenigsten exakt geklärten Grundlagenproblemen des Strafrechts“).

<sup>14</sup> Sabine Swoboda, *Die Lehre vom Rechtsgut und ihre Alternativen*, Zeitschrift für die gesamte Strafrechtswissenschaft 122 (2010), pp. 24-50; Santiago Mir Puig, *Legal Goods Protected by the Law and Legal Goods Protected by Criminal Law As Limits to the State’s Power to Criminalize Conduct*, New Criminal Law Review 11 (2008), pp. 409-418; Manuel Abanto Vazquez, *Acerca de la teoría de bienes jurídicos*, Revista Penal 17 (2006), pp. 3-44; Claus Roxin, *Das strafrechtliche Unrecht im Spannungsfeld von Rechtsgüterschutz und individueller Freiheit*, Zeitschrift für die gesamte Strafrechtswissenschaft 116 (2004), pp. 929-944; Bernd Schünemann, *The System of Criminal Wrongs: The Concept of Legal Goods and Victim-based Jurisprudence as a Bridge between General and Special Parts of the Criminal Code*, Buffalo Criminal Law Review 7 (2004), pp. 551-582, 553; Roland Hefendehl (ed), *Die Rechtsgutstheorie: Legitimationsbasis des Strafrechts oder dogmatisches Glasperlenspiel?*, 2003.

<sup>15</sup> Cf. Markus Dirk Dubber, *Theories of Crime and Punishment in German Criminal Law*, American Journal of Comparative Law 53 (2005), pp. 679-707, 685.

<sup>16</sup> Franz von Liszt, *Traité de droit pénal allemand, partie generale I*, trans. R. Lobstein, 1911, § 13.

<sup>17</sup> Thomas Hobbes, *Leviathan*, chap. XIII, 8.

<sup>18</sup> Emilio 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*, 1998, p. 211-215.

<sup>19</sup> Vintilă Dongoroz, *Drept penal*, 1939, § 45.

<sup>20</sup> Erich Schwinge, *Teleologische Begriffsbildung im Strafrecht*, 1930, p. 22.

the law and the *recta ratio*<sup>21</sup>. It is therefore not surprising that any attempt to explain the criminal law starting from „the essential social values of our society”<sup>22</sup> before 1989 and „the important values on which our society grounds”<sup>23</sup> after 1989 is nothing more than applying a dogma – the lawmaker acts always in considering a social necessity<sup>24</sup> – that can justify any criminal policy.

Trying to develop on this ground a „critical function”<sup>25,26</sup> for the legal good, i.e. for a doctrine born out of the legal positivism, is hardly anything more than an „irony of the legal history”<sup>27</sup> which reflects itself today in a diametrically opposed function of the legal goods doctrine in respect to its ordinary goals, namely in providing (any) grounds for (any) criminalisation. That’s why famous criminal law scholars „find the literature about *Rechtsgüter* both confusing and confused. The distinction between word and concept is not always kept clear; the object of discussion is then taken to be the same although it is different, and the real dispute concerns how a term should be used. The discussion also tends to move in circles: if there is a crime, there must be a *Rechtsgut* – if there is a *Rechtsgut*, there should be a crime. We are badly in need of a better articulated, more rational, and less abstract theory of reasons for (and against) criminalization”<sup>28</sup>. Such a theory may be hardly found in a context where the law and state continue to proceed from the paradigm of Hobbes’ *Leviathan*, therefore from the „deep paradox of a mechanistic vision on the human animal, that leads to the necessity of sovereignty and self submission”<sup>29</sup>. The modern state has lost today any meaning that reaches beyond the functional aspect<sup>30</sup>, being itself legitimated through satisfying his citizens’ interests as individuals and therefore conditioned by the proper functioning of the economic system that guarantees the peace through welfare<sup>31</sup>. „L’actuelle ruine de la composante providence de l’Etat et le processus de dérégulation n’ont pas seulement causé la crise de notre modèle juridico-pénal, mais ils nous obligent à repenser la relation entre le *ius puniendi* et la politique criminelle, entre la normativité juridique et la fonctionnalité sociale du droit”<sup>32</sup>.

2. There is among the Romanian criminal law scholars a broad agreement on the non-criminal nature of suicide. „Although suicide appertains to the homicide acts, it is not a

<sup>21</sup> Thomas Hobbes, *De cive* II, 1.

<sup>22</sup> Constantin Bulai, *Drept penal, partea generală* I, 1979, p. 6 apud Constantin Mitache, *Drept penal, partea generală*, 1983, p. 3.

<sup>23</sup> Constantin Mitache / Cristian Mitache, *Drept penal român, partea generală*, 2004, p. 19; George Antoniu, *Reforma penală și ocrotirea valorilor funda-mentale ale societății*, Revista de Drept Penal 2/1996, pp. 9-20; Tudor Avriganu, *Reflecții asupra valorii sociale ca obiect al ocrotirii penale*, Revista de Drept Penal 3/1997, pp. 68-74.

<sup>24</sup> George Antoniu, *Vinovăția penală*, 2004, p. 65, 68.

<sup>25</sup> Winfried Hassemer, *Strafrecht im Wandel*, Journal für Rechtspolitik 15 (2007), pp. 79-86, 83.

<sup>26</sup> Vasile Drăghici, *Obiectul juridic al infracțiunii*, 2004, p. 132.

<sup>27</sup> Joachim Renzikowski, *Normentheorie und Strafrechtsdogmatik*, Archiv für Rechts- und Sozialphilosophie – Beiheft 104 (2005), pp. 115-137, 126.

<sup>28</sup> Nils Jareborg, *Crime Ideologies*, Scandinavian Studies in Law 40 (2000), pp. 431-443, 436.

<sup>29</sup> Louis Dumont, *Eseu asupra individualismului*, 1996, p. 104.

<sup>30</sup> Ernst-Wolfgang Böckenförde, *Der Staat als sittlicher Staat*, 1986, p. 10.

<sup>31</sup> Günther Jakobs, *Norm, Person, Gesellschaft*, 2008, p. 123.

<sup>32</sup> Jean Vervaele, *La naissance de l’Etat-Providence et le modèle des sciences pénales intégrées (gesamte Strafrechtswissenschaft)*, Déviance et Société 13 (1989), pp. 141-154, 150:

crime due to the fact that self-harming does not involve a legal conflict”<sup>33</sup>, i.e. „there is no violation of another one’s right to life”<sup>34</sup>. Yet the participants to suicide are not in the same position as the author himself: According to article 191 of the new Romanian Penal Code, „determining or providing help to the suicide of a person” is to be punished with imprisonment between 3 and 7 years, „if the suicide was accomplished”; if the same acts were followed by an attempted suicide, the punishment limits are to be reduced to the half. It is not difficult to observe the similitude to the general principles regarding firstly the definitions of the participants as instigator (art. 47) and accomplice (art. 48) and secondly the punishment of the attempt (art. 33 al. 2), whose application area covers also the „coauthor, instigator and accomplice to a crime committed with intention (art. 49) if the committed crime remained in the attempt stadium. From a *formal* point of view, those who determine or provide help to the suicide of another person are regarded as *authors* of a distinct crime, and not as participants to an (attempted) suicide accomplished from this latter person as author, because „participation implies committing a crime, while suicide is not defined as crime by the criminal law”. Nevertheless the rationale of this independent criminalisation is remarkably vague: we are facing „*some sort of* contribution to a homicide act”<sup>35</sup> through which „the right to life that is guaranteed to any man is violated *in a certain manner*”<sup>36</sup>.

We cannot escape the manifest inconsistency of the whole argumentative context unless we choose to revise the *prima vista* obvious assumption that suicide is not criminalised by the Romanian penal code. The opposite is rather correct, and the absence of an express provision cannot be viewed as the absence of *lex* as understood under the principle *nullum crimen sine lege*. Let us part from the assumption that the Romanian lawmaker of the years 1968 and 2009 had no doubts whether suicide should be a crime. How could he write this explicitly? „The suicide of a person should be punished with ...” would have been today not possible for the case of consummation due to external grounds: there are today (otherwise than during the old times) no more punishments applied to dead bodies and it is also not anymore accepted that the punishment should be directed against another person or collectivity. But one could imagine very well the punishment of the author himself for the case of attempted suicide, and such a provision could be without problems contained in any modern penal code. However this would make sense logically only if the same legislator would be in the same time willing to make an exception for the general rule in attempts as stated by art. 34 al 1. Who attempts to murder another person and yet gives up at the still right time avoids being punished and if we do not accept that the same should apply also to whom attempts to kill himself, than we should think about considering the provision „killing of a person” as applying – *hic et nunc lex non distinguit* – to every person, and not only to another person than the perpetrator himself. Suicide would be in this case a normal homicide and the perpetrator would still avoid the punishment if he fulfill the general condition. But if he is saved by third parties? In this case one will have to choose between two decisions of criminal policy: suicide is not a crime, because the legislator could have expressly provide the

<sup>33</sup> Vintilă Dongoroz / Rodica-Mihaela Stănoiu, *Explicații teoretice ale codului penal român, partea specială III / Determinarea și înlesnirea sinuciderii*, 1971, pp. 212-217, 212.

<sup>34</sup> Octavian Loghin / Tudorel Toader, *Drept penal, partea specială*, 1994, p. 101.

<sup>35</sup> V. Dongoroz / R.-M. Stănoiu, *op. cit.*, p. 213, 212.

<sup>36</sup> O. Loghin / T. Toader, *op.cit.*, p. 101.

disposition leading to punishment for attempt where the consumtion was impeded by third parties and did not choose this solution, *or* suicide is a crime because the legislator has chosen to grant to the perpetrator a special personal ground of non-responsibility *and* decided to catch the accessory participants by stating a special legal provision applying only to these ones. There is not only the logical principle of *accessorium sequitur principale* that speaks for this latter alternative, and also not only the philosophical arguments who lead from Aristotle's description of suicide as „injustice towards the city and not toward himself”<sup>37</sup> to Wittgenstein's dictum about the impossibility of any interdiction as consequence of suicide's exemption from being injustice<sup>38</sup>, but also the comparative law and the consequences that derive from exempting the suicide from being a crime: where, as in German criminal law, there is no criminalisation of participation in suicide, there is no more consistent possibility to avoid interpreting the killing on victim's demand not as crime directed against life, but only as provision that should provide a certain grade of certitude regarding the very seriosity of victim's decision in the presence of objectively (socially as such accepted) grounds making death a better alternative than the remaining life time<sup>39</sup>, in other words: the way to (active) euthanasia would be open. Inversely, the fact that the new Romanian penal code choose to incriminate the (substantially) lesser form of homicide which consists in killing at victim's demand as a (formally) distinct crime – the 1936 penal code had it provided in the same article with contribution to suicide – speaks convincingly for the opposite solution. The suicide is a crime and this is also provided by the law indirectly through the direct criminalization of its accessory parts, the latter representing the former.

It is not difficult to find the grounding substratum of the legal regulation in crimes against human life. Even if the most representatives philosophies of law and state in the Modern Age maintain that suicide is a crime (Thomas Hobbes's silence in this matter being an outstanding and quite significant exception), the wholly consistent argumentation is to be found rather by those who, like Aristotle or Thomas Aquinas, put at the center of their thought not the autonomous individual and his natural rights and his rights but the social institutions of the city and the objectively defined duties of every citizen. As the theoretical explanations through their inconsistencies demonstrate, the modern penal codes maintain the traditional regulations more or less extensively but rather inertially. There is a province however, where the transition and its effects can be shown quite clearly: the domain of the sexual crimes, beginning with the *nomen iuris* of their caput. Reading some central passages from the section on the „crimes regardin the sexual life” in the *Theoretical Explanations* of the Romanian old penal code from 1968, everyone could have the feeling of being immersed in the world of the classical natural law. This code puts explicitly the „raport sexual” understood as „normal sexual relation” in a sharp opposition to the „relațiile sexuale între persoanele de același sex” and the

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<sup>37</sup> Aristotle, *Nicomachean Ethics*, 1138a 11.

<sup>38</sup> Daniel Crone, *Historical Attitudes Toward Suicide*, *Duquesne Law Review* 35 (1996), pp. 7-42; from the viewpoint of the comparative law see Heinz Zimmermann, *Self-Determination, Paternalism or Human Care? Suicide and criminal responsibility in South African and German law*, *Journal of South African Law*, 1979, pp. 183-200.

<sup>39</sup> See at large Günther Jakobs, *Tötung auf Verlangen, Euthanasie und Strafrechtssystem*, 1998; also Julius Ebbinghaus, *Die Strafen für die Tötung eines Menschen nach Prinzipien einer Rechtsphilosophie der Freiheit*, 1968, p. 52-53.

„perversiunea sexuală”, both understood as „unnatural or abnormal sexual relations”, in short: „the sexual rapport is characterized by its physiological function that is missing in the unnatural sexual relations”<sup>40</sup>.

Nothing in this trias has something to do with some freely expressed consent and is also not to understand from a materialist-dialectical point of view, but only in the framework of the traditional meaning of the „sexual life” as integrating part of the „good life” of the *zoon logon echon și politikon*<sup>41</sup>, i.e. of the natural law institution of marriage (Dig. 1, 1, 1, 2: *hinc descendit maris atque feminae coniunctio, quam nos matrimonium apellamus, hinc librorum procreatio, hinc educatio*), as it was adopted and transformed by the Church<sup>42</sup>. Succeeding the older term of Sittlichkeitsdelikte, these crimes prolonge in the middle of the real-existing socialism the traditional conception, where adultery was also a crime and the only thing that missed was the crime of sexual intercourse between unmarried persons. West Germany was more careful in this matter. Here was it, where the Federal Court of Justice condemned among others the parents of a young girl who permitted her remaining home alone together with her fiance, and the motivation is quite clear: „Due to the fact that the moral law prescribed to the man the monogam marriage and the family as mandatory form of life, putting this order at the ground of peoples’ and states’ life, this moral law prescribes in the same time that sexual rapport should principally take place only in the framework of the marriage; doing otherwise would mean breaking an elementary precept of the sexual decency”. The court states also that „the child represents the meaning and the consequence of the sexual rapport”, underlying also that „the child can develop himself according to his human background only inside the order of marriage and in the familial community”<sup>43</sup>. For the spirit of our days all this sounds quite foreign, strange and quite difficult to understand. Both in Germany and Romania, the crimes related to the morals were conversed in the new coined category of the crimes against sexual liberty selfdetermination. Missing the objective socio-ethical background, the classification of sexual conduct formes<sup>44</sup> becomes hardy to understand and the whole matter begins to be treated in law treaties and court decisions in a manner quite similar to the sexual physiology<sup>45</sup>. Beyond accepting or rejecting the transformation, it is important first to see this distinction in all its depth and in all its consequences: there is a traditional approach of sexuality in institutional terms which came to be replaced by the modern view centered on individualistic legal goods<sup>46</sup>, i.e. the one individual defined naturally only by the unconditional pursuit of lust and socially by the power of the state that may choose perhaps to grant some role also to the free choice of the other individual.

<sup>40</sup> Vintilă Dongoroz / Constantin Bulai, *Explicații teoretice ale codului penal român, partea specială III / Infrațiuni privitoare la viața sexuală*, 1971, pp. 347-400, 352.

<sup>41</sup> See Otfried Höffe, *Grundaussagen über den Menschen bei Aristoteles*, *Zeitschrift für philosophische Forschung*, 30 (1976), pp. 227-245.

<sup>42</sup> Dan Horia Mazilu, *Lege și fărâdelege în lumea românească veche*, 2006, p. 361.

<sup>43</sup> BGHSt 6, p. 53-54.

<sup>44</sup> Valerian Cioclei, *Drept penal, partea specială*. 2009, p. 230.

<sup>45</sup> Daniel Nițu, *Perversiunea sexuală, corupția sexuală și incestul. Infrațiuni contra persoanei sau contra familiei?*, *Studia Universitatis Babeș-Bolyai, Series Iurisprudentia nr. 1-2*, 2004, pp. 17-27.

<sup>46</sup> Herbert Jäger, *Strafgesetzgebung und Rechtsgüterschutz bei Sittlichkeitsdelikten*, 1957; Albin Eser, *Die Sexualität in der Strafrechtsreform*, *Juristische Analysen* 2 (1970), pp. 218-242; Tatjana Hörnle, *Penal Law and Sexuality: Recent Reforms in German Criminal Law*, *Buffalo Criminal Law Review* 3 (2000), pp. 639-685. – For the Romanian scholarship see Valerian Cioclei, *Viață sexuală și politică penală*, 1994.

In opposition to the Soviet contractual conception on marriage (if not even fast free of legal forms), the Romanian socialist criminal law favoured the family as „well configured social institution”, and also decided – in opposition to the whole former East European region, but concurring to the Western legislations of the time – to see abortion as crime. And if this difference disappears today, it is due to the very fact that the individualist dissolution of marriage and family does not represent a socialist claim, but a result of capitalism’s development<sup>47</sup>.

The general consensus on the fact that the crime of rape can be committed by one husband and against the other one was unimaginable a few decades ago. Under the penal code from 1968 Romanian criminal law scholarship recasts the traditional doctrine of an „irrevocable personal consent” but the institutional terms are partially replaced by individualistic ones. The married woman is considered as implicitly consenting to sexual intercourse with her husband, which makes the rape unconceivable. Still the sexual freedom is considered in the same time as inalienable and „what constitutes a criminal violation in this case is not women's freedom to consent to sexual intercourse, but acts of coercion used for that purpose”<sup>48</sup>. The whole context is obscured by the abundant use of „consent” in different senses and different meanings, but the result can be easily understood if we start not from the individual spouse and his subjective consent, but from the institution of marriage and the objective duties that it brings with it. Unlike so-called external marital duties, the fulfilling of duties belonging to the so-called inner sphere of marriage cannot be obtained by any form of constraint and that is the reason why the constraint itself has to be punished as such, while the rape itself must be inconceivable as long as the divorce – regarded as exceptional remedy and pronounced against the faulty spouse – can be also requested in court because of the poor performance of the marital (internal) duties<sup>49</sup>. But today the fault principle has disappeared from the divorce settlement and marriage itself – far from being regarded as a social institution (not to speak about a socially relevant „*sacramentum*”) – is now reduced to a mere arrangement between individuals. Consequently, rape between spouses should also be considered a criminal offense, just as sexuality itself –regardless of the legal position of those involved – is a combination of natural physiological phenomena, to which may be assigned a more or less developed meaning (always an individual one), and which can become relevant for the criminal law only when individual freedom is in some way touched.

The same transformation can be observed in the fall of incest, where the same arguments did not however succeed to provide the decriminalization that they consequently asked for. Traditionally justified in terms of the institutional relations between the family members, the criminalization of the incest between consenting partner can be considered in the framework of the modern criminal law only under the viewpoint of the natural (abstract) danger of species degeneration. The Romanian doctrine developed under the 1968 Penal Code considered verbally both ways of justification while excluded from the material element the unnatural sexual relations (where the natural purpose of procreation is missing, but not also the harm to the family relations). The project of the

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<sup>47</sup> Gustav Radbruch, *Rechtsphilosophie*, 51956, p. 252, 254-255.

<sup>48</sup> V. Dongoroz / C. Bulai, *Explicatii teoretice ... op. cit.*, p. 351.

<sup>49</sup> Anne Sanders, *Die Verletzung ehelicher Pflichten und ihre Folgen*, Forum Familienrecht nr. 1-2 / 1995, pp. 12-17.



new Romanian penal code opted consequently for decriminalization, in the same time as the notion of the „family member” relevant for the criminal law was redefined in order to embrace also merely factual life in common (art. 177 letter a), due to the fact that the extremely low degree of the danger to the integrity of the human species as well as to the fact that committing such deed „contrary to some laws of the human nature as well as to some social laws consolidated in time” (and also allegedly seldom to meet in the reality) points rather to a sickness that is not able to be met properly by the criminal law<sup>50</sup>. Because of the reference to objective laws of the human nature (but how are they to be conceived in modern legal terms?), this view also mixes institutional with individualistic reasons and does not reach the decisive argument of any modern criminal law theory, namely the missing reason to restrict the freedom of the individual to choose any sexual partners at wish, provided only that these latter consent at their part. This reason was still 2008 raised in front of the German Constitutional Court, in order to arrive to consider the criminalization of incest as being unconstitutional<sup>51</sup>. In Germany as well as in Romania, such reasons did not succeed: judges, politicians and also voices belonging to real society dismissed for the present the attempt to decriminalize incest, but herewith, at least for this particular case, also the modern discourse on function and limits of the criminal law.

3. „Criminal law is a species of political and moral philosophy. Its central question is justifying the use of the state's coercive power against free and autonomous persons. The link with moral philosophy derives from one answer to the problem of justifying the use of state power. 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<sup>52</sup>. This celebrated statement of George Fletcher regarding that process which he called 1978 *Rethinking Criminal Law* should be of utmost importance every time when redrafting criminal code is at issue, especially when the reform of criminal law should meet deep political and social changes within the society or even of the society itself. If, as Hegel states, „a penal code belongs to its time and to the condition in which the civic community at that time is”<sup>53</sup>, then rethinking criminal law means rethinking society in legal categories, more precisely: discovering those legal categories through which the social consciousness thinks about itself and consequently understands its own order as a real order of *social relations* between *persons*. On the opposite side are situated all those doctrines which "return again to the state of nature and consider men as if even now [they] sprung up out of the earth, and suddenly, like mushrooms, come to full maturity, without all kind of engagement to each other”<sup>54</sup>, so that „society is the ordering of the living together of *individuals*”<sup>55</sup> and not of *persons*: «selon la tradition empiriste positiviste, l’homme – on ne peut pas dire la

<sup>50</sup> V. Cioclei, *Drept penal... op.cit.*, p. 275.

<sup>51</sup> See Bettina Noltenius, *Grenzenloser Spielraum des Gesetzesgebers im Strafrecht? - Kritische Bemerkungen zur Inzestentscheidung des Bundesverfassungsgerichts*, Zeitschrift für Juristisches Studium 1/2009, pp. 15-21.

<sup>52</sup> George P. Fletcher, *Rethinking Criminal Law*, 1978, p. XIX.

<sup>53</sup> Georg Wilhelm Friedrich Hegel, *Philosophy of Right*, par. 218.

<sup>54</sup> Thomas Hobbes, *Philosophical Rudiments Concerning Government and Society* (The English works, II), 1841, p. 108-109.

<sup>55</sup> Hans Kelsen, *What is Justice? Justice, Law and Politics in the Mirror of Science*, 1957, p. 231.

personne – est conçu comme un être rationnel et, bien au contraire, dangereux à l'ordre juridique souverain»<sup>56</sup>.

The naissance of the legal goods doctrine from the positivist tradition explains why this doctrine fails to explain the criminal law as normative social subsystem whose function consists in safeguarding the normative identity of the society, i.e. the institutionalized normative order of persons as carriers of rights and duties, differentiated from rules imposed by an arbitrary dealing lawmaker and also from imaginary rules deduced from abstract principles independently from the very social reality<sup>57</sup>. The implications of this approach as opposed to the usual search after the protected legal goods can be easily traced on traffic in persons, a crime that is characteristic for the modern societies of our times. We may just from the beginning observe that the nomen iuris „traffic in persons”, as chosen by the Romanian criminal law, is strictly speaking meaningless. Traffic, i.e. *commercium* having as object a person or something which intrinsically belongs to a person. Persons cannot be seen as objects of any kind of traffic, if they are juridically *personae* and not simply *res*. But if we chose the German name of the same crime, referring to traffic in humans (*Menschenhandel*), then we have a starting point in order to understand its matter: traffic in humans is a special variant of treating humans not as *persons*, but exclusively as *things*. Since Kant's famous second formula of the categorical imperative in the *Groundwork of the Metaphysics of Morals* is usual to see such conduct as the very essence of the immoral conduct and latest since Hegel's *Principles of the Legal Philosophy* as the very essence of the crime or at least of all crimes against persons insofar as it regards the legal personality of human beings, i.e. their being-in-law as carrier of rights and (legal) duties. Not only the nomen iuris, but also the classification provided by the Romanian (new) penal code for this deed are therefore of little help. Then if we read how the Romanian Highest Court defined it under the old code as crime against freedom of will and action, we may feel ourselves deeply impressed by the way in which our highest judges make use of philosophical terms that have always frightened the philosophers themselves, nevertheless: even if we choose to understand the crimes against liberty as usual among the other criminal lawyers, it is still not everything clear and it will certainly not become clearer thanks to the nominalistic invention of the new caput of traffic and exploitation of vulnerable persons.

Recruitment, transportation, transfer, harboring or receipt of persons are no *specific* violation of freedom when they are committed by means of coercion, of abduction, of fraud, of deception, or of the abuse of authority (litt. a): these are only factual ways of committing the crime under art. 205, with the partial exception of the last modality, where another crime may be taken in consideration. Nothing changes on this aspect by taking in consideration the specific aim (better: the objective directedness) of the conduct to the exploitation of these persons: we face herewith *preparatory* (and as such not specifically harmful) acts to the specific violation of personal freedom consisting in future acts of exploitation. If these latter acts are also committed, then the preparatory conduct should be absorbed in them, as authorship or complicity and thereby becoming a specific offence –

<sup>56</sup> Michael Köhler, *Le droit pénal entre public et privé*, Archives de la Philosophie du Droit 41 (1997), pp. 199-208, 202.

<sup>57</sup> See at large Günther Jakobs, *Imputation in Criminal Law and the Conditions for Norm Validity*, Buffalo Criminal Law Review 7 (2004), pp. 491-511; *Wie und was schützt das Strafrecht? Widerspruch und Prävention; Rechtsgüterschutz und Normgeltung*, Himeji Law Journal, 2005, 22-32.

but which one? The answer could indicate the offences provided by the arts. 212-216, but there is a problem: the offences under arts. 213-215 are not intrinsically bound to any violation of personal freedom, but present themselves substantially as *participation* to crimes directed specifically „against some relations of social life in common” and have little in common with those under arts 212 and 216, which could be rather viewed as specific form of „exploitation”. Still there is also the text of art. 210 al. 1 litt. b, that puts together one well-known form of constraint and one conduct whose clarification is indispensable in order to gain some clarity on that what „exploitation” could mean, namely: „speculating the state of obvious vulnerability of that person”. The meaning of this variant is not difficult to understand: the person subjects herself willingly to the over mentioned acts because of a state of affairs that seems not to be open to a better choice. But what means „to speculate” such a state of affairs? Opening to the „victim” an alternative that she did not take in consideration before, however bad it may sound, cannot be described easily as violation of freedom, but rather as the opposite, even if the alternative means „exploitation”, so that the provision of art. 210 al. 2 excluding the „consent of the victim” as „justificatory ground” (why not: tipicity excluding ground, as usual in crimes against liberty?) can be legitimated only by arguing on some essentials of the human nature that no man is allowed to give up.

In such vein tried also Vintila Dongoroz in his early work to distinguish the „innate rights” to whose violation no consent can be juridically recognised, from the other „acquired rights”, following in this matter John Locke. But Dongoroz himself gave up later this distinction, as the rest of the criminal law scholarship also has done till today, letting this quite important matter in the same state of uncertainty and for the same reasons as its correlate: the doctrine of the legal goods that the criminal law as *ultima ratio* has to protect. Moreover, it seems that the criminalized deed shows with frightening clarity the result of carrying the logic that governs the functionment of the society itself to the last consequences. „The national economists speak in quite untroubled manner about the man in the economical process as «human capital» and this shows what is to understand by applying which categories. The value and the usefulness of the human beings is measured on their contribution to productivity, proffitability and concurential aptitude; since they are conceived as human capital, the human beings have to be cheap, flexible, always at the top and recyclable, and as persons they are not at all taken into consideration”<sup>58</sup>. More drastically: In times where „the appearance is taken for reality” and for which „what counts is the price and not anymore the dignity”<sup>59</sup>, the legal thought may „dance around the golden calf and close the eye in front of the monstrosities”, failing thus to understand the future dangers: „as long as the subjects understand themselves as mere objects of the economic process” the way to totalitarian programs „evidentiated by the 20th century” will be let open<sup>60</sup>. Since on the crime of traffic in persons can hardly be established a rational communication about the normative identity

<sup>58</sup> Ernst-Wolfgang Böckenförde, *Vom Wandel des Menschenbildes im Recht*, in Gerda-Henkel-Stiftung (ed.), *Das Bild des Menschen in den Wissenschaften*, 2002, pp. 193-224, 217.

<sup>59</sup> Rainer Zaczek, *Zum Strafrecht*, 1998, p. 3; *Gerechtigkeit in der Universität*, in A. W. Müller/R. Hettich (eds.), *Die gute Universität*, 2000, p. 73-81, 80.

<sup>60</sup> Michael Köhler, *Iustitia fundamentum regnorum*, in R. Schmücker/U. Steinvorth (Hrsg.), *Gerechtigkeit und Politik*, 2002, pp. 25-42, 26; Id., *Begriff der freiheitlichen Rechtsverfassung*, *Rechtstheorie* 27 (1995), pp. 387-396, 395/396.

of our societies (this is the general ground on which the normal criminal law is established), it is not surprising that the regulation of this crime meets the characteristics of the so-called „criminal law of the enemy”<sup>61</sup>, as well as all other crimes mentioned by the art. 83 (1) of the Lisbon Treaty. Since no society can have a better (criminal) law than its real constitution<sup>62</sup>, the development of an european criminal law conceived not in personal, but in instrumental manner<sup>63</sup> may point out to the dangers of a future „european economic society in instrumental legal forms correlated to the police state”<sup>64</sup>, urging for entirely rethinking of that sort of legal regulations which could guarantee both at national and european level a personal (criminal) law in a real society of persons.

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<sup>61</sup> Günther Jakobs, *Das Selbstverständnis der Strafrechtswissenschaft vor den Herausforderungen der Gegenwart*, in A. Eser et al. (Hrsg.), *Die deutsche Strafrechtswissenschaft vor der Jahrtausendwende. Ruckbesinnung und Ausblick*, 2000, p. 47; *Bürgerstrafrecht und Feindstrafrecht*, Höchststrichterliche Rechtssprechung in Strafsachen 3/2004, p. 88; *Terroristen als Personen im Recht?*, Zeitschrift für die gesamte Strafrechtswissenschaft 117 (2005), p. 839; *Feindstrafrecht? – Eine Untersuchung zu den Bedingungen der Rechlichkeit*, Höchststrichterliche Rechtssprechung in Strafsachen 8-9 / 2006, p. 289; *Die Schuld der Fremden*, Zeitschrift für die gesamte Strafrechtswissenschaft 118 (2006), p. 831.

<sup>62</sup> Diethelm Kleszczewski, *Auswirkungen von Umbruch und Krise einer Bürger-Gesellschaft auf das Strafrecht. Eine Hege-ianische Perspektive*, Archiv für Rechts- und Sozialphilosophie-Beiheft 71 (1996), p. 140; Kimmo Nuotio, *Das Bild des Strafrechts im Zeitalter der Risikogesellschaft*, in R. Lahti / K. Nuotio (eds.), *Strafrechtstheorie im Umbruch*, 1992, p. 175; Günter Stratenwerth, *Das Strafrecht in der Krise der Industriegesellschaft*, 1993; Pierette Poncela, *Le droit pénal en folie ou l'impossible vérité*, Revue de Science Criminelle et de Droit Penal Compare 1986, p. 3.

<sup>63</sup> Michael Köhler, *Rechtsstaatliches Strafrecht und europäische Rechtsangleichung*, in G. Bemann, D. Spinellis (eds.), *Festschrift f. G. A. Mangakis*, 1999, p. 751.

<sup>64</sup> M. Köhler, *Entwicklungslinien der deutschen Strafrechtsgeschichte*, Budapest 1998, p. 10; see also Maria Kaiafa-Gbandi, *Aktuelle Strafrechtsentwicklungen in der EU und rechtsstaatliche Defizite*, Zeitschrift für Internationale Strafrechtsdogmatik 11/2006, p. 521; B. Schünemann, *Europäischer Sicherheitsstaat = europäischer Polizeistaat?*, Zeitschrift für Internationale Strafrechtsdogmatik 14/2007, p. 523.