

JUSTIFICATION, IMPUTATION AND PUNISHMENT*

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Abstract: *The new legal definition of the offense as provided by the Romanian Penal Code (Art. 15) from 2009 refers to a deed that complies with a statutory description, is culpable, unjustified and imputable to the person who committed it. The initial Draft proposal to eliminate the mention about culpability was finally rejected, but the mention about the imputability – considered by the Draft Explanatory Note as covering the domain which is traditionally correlated with culpability – was also maintained in the final form of the legal text and indicates together with the mention about the lack of justification the new direction in that the Romanian criminal law theory should further be developed. The aim of this paper is to provide arguments for stopping this development, pleading in the same time for a new lecture of the traded definition in the Art. 17 of the vigent Penal Code from 1968. Other than the innovations from 2009, the text stemming from 1968 may be considered even today at the stand of the present achieving in the criminal law theory.*

Keywords: justification and excuse, imputation, natural law, person, punishment

JEL Classification: K 00, K 14.

As the official Explanatory Note to the Draft version states, the new legal definition of the offense in the new Romanian penal code (art. 15) was inspired from two sources. Firstly there should be the definition proposed in 1923 by the Romanian scholar Traian Pop: offense as antijuridical and imputable deed, which is provided by the penal law under sanction. So states the Note. But Traian Pop states it himself a little bit differently. The offense is an „antijuridical and culpable (!) deed, which is provided by the penal law under sanction”, whereas imputability and culpability are not to be seen as synonymous term: „the imputability is the condition of the culpability, and the latest one is the condition of the penal responsibility”. The most striking consequence of *this* definition is the fact, that Traian Pop distinguishes between three types of grounds that exclude the penal responsibility of a deed by „blocking the imputability, excluding the culpability or justifying the deed”¹, a distinction which the Romanian legislator does *not* respect, collapsing the exclusion of the culpability into the non-imputability.

* This paper is part of a broader research activity which was carried out under the CNCSIS-Bucharest PN-II Contract No. 220/2007.

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The reference to the Romanian criminal law scholarship fails therefore dramatically. The insisting accent which the Note sets on the „European criminal law” does not help in this matter and this should have been evident from the beginning, because „at this very moment there does not exist a general systematic conception or even a system of the European criminal law”². What else? References to several European penal codes, which are inseminated as disparately as possible throughout the entire material, without making visible any tentative of a systematic construction and suggesting the full reversion of the normal relationship between the conceptual construction and the mere auxiliary role of the comparative legal researches basic operations of a serious criminal law reform³. In our case, the Note refers us to the similar text in the Greek penal code, without making any translation. The French version provided by Jean Pradel sounds in fact very close: «le code grec de 1951 dispose que „l’infraction est un acte injustifié, imputable à son auteur et puni par la loi” (art. 14), ce qui laisse transparaître une consécration doctrinale qui voit dans l’infraction un élément légal (l’acte injustifié), un élément matériel (l’acte en lui-même) et un élément psychologique (l’acte imputable)”⁴, meanwhile the German Version provided by Anna Benakis – „Verbrechen ist eine rechtswidrige, schuldhaft und vom Gesetz mit Strafe bedrohte Handlung”, in English: „the offense is an antijudicial, culpable and legally with punishment threaten deed”⁵. This would have been sound more familiar to the Romanian lawyers, because the old-traded definition of the actual penal code enforced since 1968 refers also to a deed „committed with culpability” (art. 17). Which of the two variants? Instead of making a choice between „culpable deed” and „imputable deed”, the final version of art. 15 of the new code, as resulted from the Parliamentary Commission debates, the legislator maintains both proprieties.

This is surely the easiest way to solve such a problem, especially when the real problem is not even acknowledged as such. The definition which the Note deliver to what is meant to be assumed by the doctrine about the culpability – „according to the normative doctrine, the culpability as general characteristic of the offense is regarded as a blame, as an imputation made to the offender because he acted otherwise as required to him by the law, although he has had the accurate representation of his deed and full freedom in the manifestation of the will” – respects in its mix of vagueness and conceptual *faux pas* the general pattern of the this document. Should any kind of mistake take the culpability away? Surely not, since the arguable solution of desincriminating the negligence offenses were not adopted yet. The strange metaphysics of a full liberty - whatever this should mean – obliterates the fact that the normative doctrine of culpability, exactly as the old natural law doctrine of *imputatio*, sets the accent not on the manifestation, but on the

¹ Traian Pop, *Drept penal comparat Partea Generala*, t. II, Institutul de Arte Grafice Ardealul, Cluj, 1923, p. 189, 331; see today in France also Gaston Stefani / Georges Levasseur / Bernard Bouloc, *Droit pénal général*, 17^{ème} édition, Dalloz, Paris, 2000, par. 369: «tandis que la culpabilité est l’élément moral de l’infraction, c’est-à-dire le rapport entre le sujet et sa conduite, l’imputabilité est un état, une qualification du sujet lui-même»; in the same way distinguishing between “mental capacities” and “mental states” Leo Zaibert, *Philosophical Analysis and Criminal Law*, Buffalo Criminal Law Review vol. 4 (2000), pp. 101 sq., 111; for Germany see Hans Heinrich Jescheck & Thomas Weigend, *Lehrbuch des Strafrechts, Allgemeiner Teil*, 5th edition, Berlin: Duncker & Humblot 1995, par. 40.

² Ulrich Sieber, *Die Zukunft des Europäischen Strafrechts: Ein neuer Ansatz zu den Zielen und Modellen des europäischen Strafrechtssystems*, Zeitschrift für die gesamte Strafrechtswissenschaft vol. 121 (2009), p. 1.

³ See Hans Heinrich Jescheck, *Methoden der Vorbereitung und Durchführung der deutschen Strafrechtsreform*, in: Id. (Hrsg.), *Strafrechtsreform in Deutschland und Italien*, Nomos Verlag, Baden-Baden: 1981, pp. 11 sq., 17; see further on the theoretical questions of a criminal law reform in this matter Jerome Hall, *Science and Reform in Criminal Law*, University of Pennsylvania Law Review vol. 100 (1952), pp. 787 sq. ; Paul K. Ryu & Helen Silving, *Misleading Issues in Criminal Law Codification*, Israel Law Review 9 (1974), pp. 311 sq.; Wolfgang Frisch, *Wesentliche Voraussetzungen einer modernen Strafgesetzgebung*, in: A. Eser et. al. (Eds.), *Von totalitärem zu rechtsstaatlichem Strafrecht*, iuscrim verlag, Freiburg, 1993, pp. 201 sq.; Marcello Sancinetti, *Exigencias mínimas de la dogmática del hecho punible en la parte general de los códigos penales*, in: E. Montealegre Lynett (ed.), *Libro homenaje al profesor Günther Jakobs t. I*, Editorial Themis, Bogotá, 2003, pp. 133 sq.

⁴ Jean Pradel, *Droit pénal comparé*, 3^{ème} édition, Dalloz, Paris, 2008, par. 38.

⁵ Anna Benakis, *Die Unrechtslehre von Nikolaos Chorafas*, Zeitschrift für die gesamte Strafrechtswissenschaft vol. 82 (1970), p. 54.

formation of the will. Known in Romania as the scholar „who further developed the normative doctrine of the culpability on the basis of the goal-directed action doctrine”⁶, Hans Welzel (1904-1977) defines the culpability as „reprochabilidad de la resolución de la voluntad (*Vorwerfbarkeit des Willensbildung*)», so that „the judgment of personal blame” is directed on „forming of the will ... of non-abstention from the illegal action, although this abstention would have been possible to the offender”⁷. It was also his doctrine of action, which led to a highly interesting debate between Welzel and the main figure of the Greek criminal law scholarship of the time as the Greek penal code was adopted: After closing a conference held 1955 in Athens by saying that his finalist doctrine of action was not invented by himself, but from Aristotle, Welzel saw himself confronted with a powerful replica provided by the causalist Nikolaos Chorafas, who argued that Aristotle has to be regarded on the contrary, as founding father of the – at that time also in Germany still dominant – naturalist doctrine of criminal law. The 5th Book of the *Nichomachean Ethics*, so argues Chorafas, separates the injustice of an action from its voluntariness, and therefore the doctrine of Welzel on the essential correlation between illegality and voluntariness – Welzel draws mainly on the 3rd Book of the *Ethics* – leading to the doctrine of the „personal illegality” (*personales Unrecht*) would have nothing in common with Aristotle’s own views. The debate between the two scholars did not continued⁸; nevertheless it may be taken for granted that „Aristotle’s view of moral censure has gradually taken root as a principle of punishment – namely, punishment is justified only when the actor is properly to blame for the action” so that „those who act involuntarily are not fairly subject to blame and punishment”⁹. Welzel’s main concern was nevertheless “to establish a connection between criminal law and philosophy” by “permanently refining the concept of the responsible person during his entire life”¹⁰. But the concept of person is not to be found in Aristotle’s work. Its origins are connected with the Christian theology and its role in the moral and legal philosophy achieves the full development only in the context of the European Modernity. In order if not to solve, then at least to give some light on the problems concerning the concepts in the title, we have to start by contouring this context.

I.

„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”¹¹. This celebrated statement of George Fletcher regarding the process that he called in 1978 *Rethinking Criminal Law* should be of utmost importance every time when redrafting a 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 Georg Wilhelm Friedrich Hegel in his *Philosophy of Right* (1820) states, „a penal code belongs to its time and to the condition in which the civic

⁶ G. Antoniu, *Vinovăția penală*, Editura Academiei, 2nd edition, Bucuresti, 2004, p. 27.

⁷ H. Welzel, *El nuevo sistema del derecho penal*, trans. J. Cerezo Mir, Editorial B de F, Montevideo/Buenos Aires, 2004, Chap. V, par. 2 no. 1; Id., *Das Deutsche Strafrecht: Eine systematische Darstellung*, 11th edition, Walter de Gruyter, Berlin, 1969, p. 137.

⁸ Anna Benakis, *Über den Begriff des Unrechttuns bei Aristoteles anlässlich einer Kritik der finalen Handlungslehre*, in: G. Stratenwerth et.al (eds.), *Festschrift für H. Welzel*, Walter de Gruyter Berlin, 1974, pp. 213 sq.

⁹ George P. Fletcher, *The Grammar of Criminal Law*, vol. I, Oxford University Press 2007, p. 9.

¹⁰ Günther Jakobs, *Oliver Sticht, Sachlogik als Naturrecht?* (book review), *Goldammer’s Archiv für Strafrecht* vol. 2001, p. 492.

¹¹ George P. Fletcher, *Rethinking Criminal Law*, 1978, reprinted Oxford University Press, 2000, p. XIX.

community at that time is"¹², 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. It may lead already to significant differences whether these persons are to be thought as subjectively free and autonomous (Kant) or as objectively free and socially bound (Hegel), but these are internal differences in thinking a society of free *persons*; on the opposite side are situated all those doctrines which, considering themselves in open opposition to Aristotle, "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"¹³ (Hobbes), so that „society is the ordering of the living together of *individuals*"¹⁴ (Kelsen) and not of *persons*¹⁵: «selon la tradition empiriste positiviste, l'homme – on ne peut pas dire la personne – est conçu comme un être rationnel et, bien au contraire, dangereux à l'ordre juridique souverain»¹⁶.

Thomas Hobbes is widely recognized as the founding father of the punishment doctrine which is defined through „what we are calling today the special and general prevention"¹⁷. In Romania we call this doctrine also on this name¹⁸, and even more: especially in Germany today the so-called positive general prevention¹⁹ was clearly advocated here – in its empirical version²⁰ – insofar the punishment was put in relation with the aptitude of the offense to create „inquietude and social uncertainty” regarding the aptitude of the legal order to be generally obeyed. Within this frame, the Romanian criminal law scholars place itself unequivocally on the side of the naturalist doctrines. For Ioan Tanoviceanu (1858-1917), the founder of the criminal law „the measures of defense even through destruction, if there is no other mean at disposal, are in the whole nature – from inorganically material passing over the vegetal and animal reign forward to the man and to our entire body – are the law of nature, whose explanation does not need anymore metaphysical notion of free choice and the trilogy free – culpable – worthy of punishment.

¹² Georg Wilhelm Friedrich Hegel, *Philosophy of Right*, transl. by S.W Dyde, Batoche Books, Kitchener 2001, par. 218.

¹³ Thomas Hobbes, *Philosophical Rudiments Concerning Government and Society* (The English works of Thomas Hobbes of Malmesbury / now first collected and edited by Sir William Molesworth, t. II), London, 1841, Chap. VIII, par. 1.

¹⁴ Hans Kelsen, *What is Justice? Justice, Law and Politics in the Mirror of Science*, University of California Press, Berkeley & Los Angeles, 1957, p. 231.

¹⁵ See Günther Jakobs, *Das Strafrecht zwischen Funktionalismus und "alteuropäischen" Prinzipienendenken*, Zeitschrift für die gesamte Strafrechtswissenschaft vol. 107 (1995), p. 843; Id., *Norm, Person, Gesellschaft*, 3rd edition, Duncker & Humblot, Berlin, 2008; Hanno Kaiser, *Widerspruch und harte Behandlung*, Duncker & Humblot, Berlin, 1998; Heiko Lesch, *Der Verbrechensbegriff: Grundlinien einer funktionalen Revision*, Carl Heymanns Verlag, Köln etc. 1999; Id., *Unrecht und Schuld im Strafrecht*, Juristische Arbeitsblätter 2002, p. 602; Michael Pawlik, *Person, Subjekt, Bürger: Zur Legitimation von Strafe*, Duncker & Humblot, Berlin 2004 reviewed by H. Kaiser, *The Three Dimensions of Freedom, Crime and Punishment*, Buffalo Law Review vol. 9 (2006), p. 691; Wolfgang Schild, *Die unterschiedliche Notwendigkeit des Strafens: Zur Geschichte der Philosophie von Hobbes bis Hegel*, in: Klaus-Maria Kodalle (ed.), *Strafe muss sein! Muss Strafe sein?*, Verlag Königshausen & Neumann, Würzburg 1998, p. 81.

¹⁶ Michael Köhler, *Le droit pénal entre public et privé*, Archives de la Philosophie du Droit vol. 41 (1997), p. 199, 202.

¹⁷ Kurt Seelmann, *Gaetano Filangieri e la proporzionalità fra reato e pena: Imputazione e prevenzione nella filosofia penale dell'Illuminismo*, Materiali per una storia della cultura giuridica vol. XXXI (2001), pp. 3 sq., 18; on Hobbes' penal theory see Dieter. Hüning, *Hobbes on the Right to Punish*, in: P. Springborg (ed.), *The Cambridge Companion to Hobbes*, Cambridge University Press, 2007, pp. 217 sq.; Thomas Schrock, *The Rights to Punish and Resist the Punishment in Hobbes Leviathan*, *The Western Political Quarterly* vol. 44 (1991), pp. 853 sq.; R. Spjut, *Hobbes Definition of Crime*, *Anglo-American Law Review* vol. 13 (1984), pp. 1 sq.

¹⁸ V. Dongoroz, *Drept penal*, Asociația Română de Stiințe Penale, 2nd reimpression, Bucuresti 2000, par. 209; Constantin Bulai, *Manual de drept penal Partea Generala*, Editura All, Bucuresti 1997, par. 340; Constantin Mitrache & Cristian Mitrache, *Drept penal român Partea generala*, Editura Universul Juridic, Bucuresti 2004, par. 262.

¹⁹ See Cristina Rotaru, *Fundamentul pedepsei*, Editura C. H. Beck, Bucuresti 2004, pp. 128 sq.; for critical analysis Ernst Amadeus Wolff, *Das neuere Verständnis von Generalprävention und seine Tauglichkeit für eine Antwort auf Kriminalität*, Zeitschrift für die gesamte Strafrechtswissenschaft vol. 97 (1985), pp. 786 sq.; Michael Pawlik, *Person, Subjekt, Bürger*, cit., pp. 35 sq.

²⁰ See also critically to the empirical approach of the positive general prevention and promoting a normative understanding of this doctrine Günther Jakobs, *Zur gegenwärtigen Strafrechtstheorie*, in: K. M. Kodalle (Hrsg.), *Strafe muss sein! Muss Strafe sein?*, Verlag Königshausen & Neumann, Würzburg, 1998, pp. 29 sq., 39 sq.

In any of these situations there is simply a defense against the unconscious damaging forces. We don't see why the conscious ones should be submitted to other laws"²¹. The outcome of this conception is obvious: „Whenever a man is seen as resembling to 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"²². But the same Romanian scholar makes also a statement, that (that leads us to an opposite direction): „the modern criminal law ... is requiring that the man as the subject of the offense, cannot be punish because the man acted unconscious, like the beast, or a constrained man, who is only an instrument. The modern criminal law requires a whole human being, that is: a free and conscious man, then otherwise the action does not belong to him anymore, being something *alienum*, which he cannot be responsible for"²³, in the words of the Romanian philosophers Constantin Radulescu Motru: the modern criminal law requires a man understood as „free personality, who is aware of his personhood”, because „only in this case he can be hold responsible for his deed”²⁴. There is accordingly a difference between the *cognitive order of nature* and the *normative order of freedom*, and the law belongs to the latter one: here, within the law, „the principle of *causality*, the only valid in the natural sciences, is replaced by the principle of *freedom*, without which we could not attribute to persons any rights or duties” and „the very concept of the person can be found only in the normative sciences”²⁵.

This is clearly an approach that can and must be traced back to Immanuel Kant. His difference between „the man in the system of the nature” and „man as person”, that is the man as subject to the laws of freedom which are in the same time also the laws of his duties as moral being²⁶ is till today definitory for the legal thinking of the Western world. „Our legal discourse is the discourse of rights, and Kant is the first – perhaps the greatest – modern expositor of the concept of right. In this sense, we are all Kant's children”²⁷. The same is assumed from German scholars of criminal law, as they state that «le point de départ de la pensée juridique allemande se trouve toujours dans l'œuvre d'Emmanuel Kant»²⁸ especially regarding the illegality (*Rechtswidrigkeit*) and the (normative) culpability (*Schuld*), therefore the concepts that the newer Romanian criminal law scholarships and legislation are trying now to establish in opposition to the older theory. During the first part of the 20th Century, Kant legal philosophy was intensively promoted in Romania and served to Mircea Djuvara (1886-1944), the most renowned Romanian legal philosopher, as basis for him expressing the difference between the natural determined *individuals* and freely acting *persons* which the *law* objectively regarded – as *social order of free persons* – at the same time constitutes and protect. The other scholar, which is widely seen as the (second) founding father of the Romanian criminal law science, Vintila Dongoroz (1893-1976), underlined permanently that „the criminal law science is by its very nature a juridical discipline and in opposition to the criminal science, which is a naturalistic discipline, having as subject matter the crime and the punishment as natural events”²⁹. But the words of one among his early followers indicate how this statement has to be understood: „the law, as so precisely stated by the great German contemporary jurist Kelsen, has to do with legal norms, that is: with what ought to be (*sollen*), meanwhile the natural laws belong to the

²¹ Ioan Tanoviceanu, *Tratat de drept penal si de procedura penala*, t. I, Editura Curierul Judiciar, Bucuresti 1924, par. 146.

²² Günther Küchenhoff, *The Problem of Guilt in the Philosophy of Law*, Law and State vol. 11 (1975), p. 67-68.

²³ Ioan Tanoviceanu, *Tratat I*, cit., par. 595.

²⁴ Constantin Rădulescu-Motru, *Responsabilitatea penala*, Revista de Drept Penal si Stiintă Penitenciara 3-4/1940, p. 5.

²⁵ Paul Georgescu, *Cercetari de filosofie juridica*, Bucuresti, 1942, p. 141/142.

²⁶ See at large Joachim Hruschka, *Die Würde des Menschen bei Kant*, Archiv für Rechts/ und Sozialphilosophie, vol. 88 (2002), p. 463 sq., especially 478 sq.

²⁷ Ernest J. Weinrib, *Law as a Kantian Idea of Reason*, Columbia Law Review vol. 87 (1987), p. 472.

²⁸ Hellmuth Mayer, *Les fondements du droit pénal allemand actuel*, Revue Internationale de Droit Penal vol. 1967, p. 62.

²⁹ Vintila Dongoroz, *Drept penal*, par. 7, 42.

realm of the *sein*, to what exists *per se*, without the intervention of the human will”³⁰. Consequently Dongoroz rejects explicitly the responsibility of the perpetrator as „person of criminal law” and relies entirely on the „psycho-physiological capacity of an individual to be aware of the nature, value and consequences of his acts” (alternatively: „the normality of all faculties that participate to the complex activities of cognition, understanding and volition”): „the criminal law does not need and does not rely on the arbitrary and equivocal idea of responsibility. When the commission of a criminal deed is constated, the penal laws are incident ... because the society considered its intervention useful and just, therefore because the incidence of the penal law is necessary”³¹.

The mention about justice in this context should not mislead: for the Romanian scholar, as for Thomas Hobbes too, what is just confounds itself with that, with what is useful. „Before the names of just and unjust can have place, there must be some coercive power to compel men equally to the performance of their covenants, by the terror of some punishment greater than the benefit they expect by the breach of their covenant ... so that the nature of justice consisted in keeping of valid covenants”³², and „therefore the law is only a system of rules imposed by the public power in order to maintain the social order”³³, or, expressed in the words of Hans Kelsen, law „as a specific social technique” is nothing more than „an organization of force”³⁴. Günther Jakobs has recently underlined the fundamental similarity between Hobbes and Kelsen regarding the negation of law as order of personal duties of the subjects of law³⁵: there is no obligation in the proper (that is: moral) sense of any subject to obey the law, but under circumstances only the prudential necessity to avoid *Leviathan*’s use of force as legally provided sanction of his orders that are also clothed in legal form. Hobbes speaks of „persons” meaning „individuals” and Kelsen speaks of „persons” meaning only abstract construction of reference points for rights and obligations by the law scholar, that is: the scholar who *will* interpret the sum of mandatory orders issued by the highest authority as a system of legal norms, that is: as a legal order and not as an order of force. Pretending to adopt the Kantian difference between *Sein* and *Sollen*, Kelsen reverts this difference by emptying the Kantian *Sollen* from its original moral significance: there is no place anymore for the Kantian „practical reason”, for the practical constitution of the human person through the *moral law* express by the categorical imperative as opposed to the *laws of nature* whose expression are the hypothetical imperatives, that is: those rules that the actions directed toward achieving an empirical goal must conform to, otherwise the goal being not achievable by the agent through rational planning of his activity. As Kelsen rejects the idea of any categorical imperative, the definition provided by Kant for obligation as „the necessity of a free action when viewed in relation to a Categorical Imperative of Reason” is not applicable to Kelsen’s own concept of obligation, neither for the quite similar manner in which Dongoroz uses the same concept. Kant states then unequivocally: ”A Person is a Subject who is capable of having his actions *imputed* to him. Moral Personality is, therefore, nothing but the Freedom of a rational Being under Moral Laws; and it is to be distinguished from psychological Freedom as the mere faculty by which we become conscious of ourselves in different states of the Identity of our existence. Hence it follows that a Person is properly subject to no other Laws than those he lays down for himself, either alone or in conjunction

³⁰ George Cristescu, *Introducere în știința dreptului penal*, p. 71.

³¹ Vintila Dongoroz, in: Ioan Tanoviceanu, *Tratat I*, cit., par. 594¹⁻².

³² Thomas Hobbes, *Leviathan* (1651) with selected variants from the Latin edition of 1668, edited by E. Curley, Hackett Publishing Company, Indianapolis/Cambridge, 1994, chap. XV, par. 3.

³³ Vintila Dongoroz, *Drept penal*, cit., par. 82.

³⁴ Hans Kelsen, *What is Justice?*, cit., p. 231, 237.

³⁵ See Günther Jakobs, *Imputation in Criminal Law and the Conditions for Norm Validity*, Buffalo Criminal Law Review vol. 7 (2004), pp. 491 sq., 492-493.

with others”³⁶. There is no place for such a concept of person, neither in Kelsen’s nor in Dongoroz’s conception.

The subject of criminal law is configured by Dongoroz as subject of an obligation to obey the laws, who becomes through the offense subject of the subsequent obligation to suffer the punishment provided by the law that was broken, except the situation when he „justifies himself”³⁷. Thirty years later he will restate the same alternative between justification and punishment in the context of his opposition to the difference between the ground of justification and grounds of excuse, that is the same difference which the new Romanian criminal code express in the context of the offense definition by „unjustified” and „imputable” deed: all these grounds (or „causes”) of excluding the criminal nature of the deed must be seen a justificatory grounds (or „causes of justification”)³⁸. Following also the Romanian version of Hugo Grotius’ work *De iure belli ac pacis* from 1625, that uses the same Romanian concept³⁹, we can restore the original Latin version: *causa iustificata*. In a further passage Grotius demonstrates. Grotius speaks of „necessitas si non defendit tamen excusat”, that is in the English translation of William Whewell from 1853, „necessity, which if do not justify, at least excuse”⁴⁰, and in the French translation of Jean Barbeyrac from 1724, “la Nécessité, qui fournit toujours, sinon de quoi se justifier entièrement, du moins de quoi s’excuser”⁴¹. If we understand this difference as a difference between *excluding* and *attenuating* criminal responsibility (and do Grotius understand the difference too), then it express plainly the scholar view of Dongoroz and of the traditional scholarship on Romanian criminal law: this is namely the distinction between “justified” and “excusable” exceeding the limits of the legitimate defense and of the necessity as regulated in art. 44, 45 and 73 of the penal code, in force since 1968. But if we understood the same distinction as expressing two different categories of excluding criminal responsibility by making a difference between absence of obligation in the concrete situation and exclusion of culpability for the breach of the existing obligation⁴², then Dongoroz allows no place for such distinction, which now is consecrated by the new Romanian penal code from 2009. For him, the absence of culpability means automatically “legitimacy” of the deed in virtue of the constraint exercised by the “laws of nature” that granted to the author a “right” to commit the deed⁴³, exactly as for Thomas Hobbes «if a man by the terror of present death, is compelled to do a fact against the Law, he is totally Excused; because no Law can oblige a man to abandon his own preservation»⁴⁴. Doing otherwise would mean, like Dongoroz said, is nothing less than reviving „the old fashioned doctrine of natural law”⁴⁵, which both Immanuel Kant and Kelsen expressed unequivocally this view – should belong to.

And there are other concepts too, that used by Dongoroz must find an explanation. So when he states that constating the reality of a criminal offense requires the correspondence between deed and description provided by a statutory provision, he adds that „the illegal result must have had as cause one or more voluntary acts-*causality-imputatio facti*” and „the voluntary act must be accompanied by intention or negligence-

³⁶ Immanuel Kant, *The Philosophy of Law*, cit., sect. IV.

³⁷ Vintila Dongoroz, *Drept penal*, cit., par. 12.

³⁸ Vintila Dongoroz, *Explicatii teoretice ale codului penal roman* vol. I (1969), 2nd edition by the Romanian Association of Penal Sciences, Editura Academiei Romane & Editura All Beck, Bucuresti, 2003, p. 312.

³⁹ Hugo Grotius, *Despre dreptul razboiului si al pacii*, trans. by G. Dumitriu, Editura Stiintifica, Bucuresti, 1968, Book II, Chap. I, par. 1.

⁴⁰ Hugonis Grotiis *De iure belli et pacis, Libri tres*, accompanied by an abridged translation by William Whewell, with the notes of the Author, Barbeyrac and others, vol. 3, John W. Parker, London, 1853, Book III, Chap. XI, Sec. IV, par. 7.

⁴¹ Jean Barbeyrac, cited after Joachim Hruschka, *Rechtfertigungs- und Entschuldigungsgründe: Das Brett des Karneades bei Gentz und bei Kant*, Goldammer’s Archiv für Strafrecht vol. 1991, pp. 1 sq., 4.

⁴² In this direction (but not pretending explicitly to express Grotius’ view) Joachim Hruschka, see the preceding note.

⁴³ Vintila Dongoroz, *Drept penal*, cit., par. 146, 168, 170; *Explicatii teoretice I*, cit., p. 330.

⁴⁴ Thomas Hobbes, *Leviathan* cit., Chap. XXVII, par. 25.

⁴⁵ Vintila Dongoroz, *Explicatii teoretice I*, cit., p. 312.

*culpability-imputatio iuris*⁴⁶. If we take as point of departure the famous definition that Immanuel Kant provides for imputation in his *Metaphysics of Morals* from 1797, then we will meet the first problem. “Imputation (*imputatio*), in the moral sense, is the *judgment* by which any one is declared to be the Author (*causa libera*) of an action which is then regarded as his moral fact or deed (*factum*), and is subjected to the Laws”, more precisely: to the “laws of freedom” which are for Kant categorically different from the “laws of nature”⁴⁷. The problem is that Dongoroz – and Kelsen too, for whom the “imputation” (of sanctions to delicts) is a fundamental concept⁴⁸ – do not recognize any laws of freedom in the moral sense, as Kant do. But, as the Latin terms suggest, neither the category of imputation nor the subsequent distinctions which configure till today the conceptual grammar of criminal law do originate in Kant’s (legal) philosophy.

II.

As the Kantian scholar Mircea Djuvara stated, Mircea Djuvara „the idea of person in law does not confound itself with that of man” but, nevertheless „all human beings are persons”, that’s why the personal freedom has to be „explained as fundamental principle of law” and “the foundation of law lays ... in the rational idea of obligation, which alone makes possible the idea of *imputatio*”⁴⁹. In the same time the author of „the central synthesis of the natural law doctrines”⁵⁰ of the Modern age and «la principale source du droit pénal moderne»⁵¹, the German philosopher Samuel Puffendorf (1632-1694) is the creator of the *imputatio* as category of the moral philosophy⁵², or, what in his time the same was, of the natural law. Promoting a natural law doctrine which can be regarded as a synthesis between the late scholastics of Hugo Grotius and the radical modern program of Thomas Hobbes, Puffendorf set at the basis of his construction the difference between so called physical entities (*entia physica*) and moral entities (*entia moralia*), the later ones being as such essentially related to the moral liberty of man and expressing herewith the *meanings*

⁴⁶ Vintila Dongoroz, în: I. Tanoviceanu, *Tratat I*, cit., par. 594¹⁻²; for the same meaning see Gustav Radbruch, see also more recently for this meaning of *imputatio facti* Costica Bulai, *Manual de drept penal, Partea Generala*, Editura All Beck, Bucuresti, 1997, par. 180

⁴⁷ Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right*, by Immanuel Kant, trans. W. Hastie, Clark, Edinburgh, 1887, sect. IV. This highly interpretive translation was lightly modified by myself according to the original text: Immanuel Kant, *Metaphysik der Sitten*, in Preussische Akademie der Wissenschaften (ed.), *Kants Gesammelte Schriften*, t. VI, p. 227: „Zurechnung (*imputatio*) in moralischer Hinsicht ist das Urteil, wodurch jemand als Urheber (*causa libera*) einer Handlung, die alsdann That (*factum*) heisst und unter Gesetzen steht, angesehen wird“.

⁴⁸ See Hans Kelsen, *Causality and Imputation*, *Ethics* vol. 61 (1950), pp. 1 sq.; see further on this subject Joachim Renzikowski, *Der Begriff der Zurechnung in der Reinen Rechtslehre Hans Kelsens*, in: R. Alexy et al. (eds.), *Neukantianismus und Rechtsphilosophie*, Nomos Verlag, Baden-Baden, 2002, pp. 253 sq.; Stanley F. Paulson, *Hans Kelsen's Doctrine of Imputation*, *Ratio Juris*, vol. 14 (2001), pp. 47 sq.

⁴⁹ Mircea Djuvara, *Teoria generala a dreptului* (1930), 2nd edition, Editura All, Bucuresti, 1995, p. 110, 136, 397, 400.

⁵⁰ John M. Schneewind, *The Invention of Autonomy: A history of modern moral philosophy*, Cambridge University Press, 1998 hereby cited after the Romanian edition: *Inventarea autonomiei: O istorie a filosofiei morale moderne*, Ed. Polirom, Iasi, 2003, p. 171; see further Vanda Fiorillo, *Von Grotius zu Puffendorf: Wissenschaftliche Revolution und theoretische Grundlagen des Rechts*, *Archiv für Rechts- und Sozialphilosophie* vol. 75 (1989), pp. 218 sq.; Horst Dreitzel, *The reception of Hobbes in the political philosophy of the early German Enlightenment*, *History of European Ideas*, vol. 29 (2003), pp. 255 sq.

⁵¹ Alessandro Giuliani, *Imputation et justification*, *Archives de la Philosophie du Droit* vol. 22 (1977), pp. 85 sq., 89.

⁵² The subject matter goes back to Aristoteles and interferes in a significant manner with the Protestant and Catholic doctrines of the justification see e.g. Richard McKeon, *Freedom and History and Other Essays*, University of Chicago Press 1989, pp. 66 sq; Paul Ricoeur, *Le Juste*, *Esprit*, Paris 1995, pp. 41 sq.; J. Hruschka, *Der Einfluss des Aristoteles und der Aristoteles-Rezeption auf Rechtsbegriffe*, in: H. de Wall / M. Germann (eds.), *Festschrift für C. Link*, Mohr Siebeck, Tübingen, 2003, pp. 687 sq.; Hans Welzel, *Die Naturrechtslehre Samuel Puffendorfs*, Walter de Gruyter, Berlin, 1958, p. 84-85; for the justification (as used today in criminal law theory) see also Joachim Hruschka, *Justification and Excuse: A Systematic Approach*, *Ohio State Journal of Criminal Law* vol. 2 (2004), 407 sq., 412-413: the difficulties merely shows us how unfortunate it was that Luis de Molina introduced the word *justificare* into *moral theory*”.

which this free and rational man imposes on the rest of the nature⁵³. Accordingly to this difference, their actions can be viewed as causal processes which are governed by the laws of nature or as moral actions, when the natural process is met in relation with the human freedom. Puffendorf views in every *moral action* (*actio moralis*) a *material element* and a *formal element*, calling this later one *imputativeness*: „The formality of a moral action consists in the imputativeness (*imputativitas*) of it ... by which the effect of a voluntary action may be imputed to the agent, or esteemed as something properly belonging to him, whether he himself physically produced that effect or whether he caused it to be produced by others”⁵⁴.

The influence of Puffendorf’s constructions on the future development of the criminal law science in Europe cannot be overestimated. His traces can be found easily in German⁵⁵, French⁵⁶ or Italian criminal law treatises. With reference to this place in Puffendorf’s work, Francesco Carrara (1805-1888), the founder of the modern science of criminal law in Italy⁵⁷, let the General Part of his famous *Programma del corso di diritto criminale* begin with the definition of *imputatio*: „Imputare significa – porre una qualche cosa al conto di alcuno”⁵⁸ and details after that the meaning of this judgement. „Il giudizio col quale il magistrato imputa ... ad un cittadino un’azione ... e il risultato di tre distinti giudizi. Il magistrato trova in quel individuo la causa *materiale* dell’atto: e gli dice – *tu facesti* – imputazione *fisica*. Trova che quell’individuo venne a quell’atto con volontà intelligente: e gli dice: *tu facesti volontariamente* – imputazione *morale*. Trova che quel fatto era proibito dalla legge della città: e gli dice: *tu facesti contro la legge*: imputazione *legale*. È solo dietro il risultato di queste tre proposizioni, che il magistrato può dire al cittadino: io ti imputo questo fatto *come delitto*”⁵⁹. The similarity with the already cited fragment of the Romanian author Dongoroz is quite frapping, but there is however an evident difference. Carrara uses here – we can translate the terms back into Latin – *imputatio physica*, *imputatio moralis* and *imputatio legalis* or, better, *imputatio legis*, and not *imputatio facti* and *imputatio iuris*. For Dongoroz, as for other scholars since that time⁶⁰ till today⁶¹, *imputatio facti* and *imputatio physica*, respectively *imputatio moralis* and *imputatio iuris* are treated as equivalent terms. This treatment camouflages till today the source of many misleading constructions and reciprocal misunderstandings between criminal law scholars and various schools of thinking criminal law at national level as well as in the province of the comparative criminal law.

⁵³ See at large Hans Welzel, *Die Naturrechtslehre Samuel Puffendorfs*, cit., pp. 24 sq.; Id., *Naturrecht und materiale Gerechtigkeit*, 4th Edition, Vanderhoeck & Ruprecht, Göttingen, 1962, pp. 130 sq.; Eberhard Schmidt, *Einführung in die Geschichte der deutschen Strafrechtspflege*, 3rd Edition, Vanderhoeck & Ruprecht, Göttingen, 1965, pp. 169 sq.

⁵⁴ Samuel Puffendorf, *Of the Law of Nature and Nations. Eight Books*, transl. Basil Kennett, 4th Edition, J. Walthoe, R. Wilkin, London, 1729, Book I, Chap. I & V, par. 2, 3.

⁵⁵ See Joachim Hruschka, *Ordentliche und außerordentliche Zurechnung bei Puffendorf*, *Zeitschrift für die gesamte Strafrechtswissenschaft* vol. 96 (1984), pp. 661 sq.; Id., *Imputation*, *Brigham Young University Law Review* 1986, pp. 669 sq.;

⁵⁶ See for further references Philippe Robert, *L’histoire des éléments de l’infraction*, *Revue de science criminelle et de droit pénal compare* vol. 1977, pp. 269 sq.; Kai Ambos, *Zur Entwicklung der französischen Strafrechtslehre: Bemerkungen aus deutscher Sicht*, *Zeitschrift für die gesamte Strafrechtswissenschaft* vol. 120 (2008), pp. 30 sq.

⁵⁷ Alessandro Baratta, *Philosophie und Strafrecht*, Carl Heymanns Verlag, Köln et al., 1985, p. 332.

⁵⁸ Francesco Carrara, *Programma del corso di diritto criminale*, tip. Canovetti, Lucca, 1867, par. 1; comp. also the French version: *Programme du cours de droit criminel, Partie générale*, traduction faite à Pise sous les yeux de l’auteur par Paul Baret, Marescq Ainé, Paris, 1876, par. 1: „Imputer signifie – mettre quelque chose sur le compte d’une personne”.

⁵⁹ Francesco Carrara, *Programma*, cit., par. 8.

⁶⁰ Richard Honig, *Kausalität und objektive Zurechnung*, in: A. Hegler (ed.), *Festgabe für Reinhard von Frank*, J.C. Mohr, Tübingen, 1930, pp. 174 sq., 175 with Footnote 2.

⁶¹ Kai Ambos, *Toward a Universal System of Crime*, *Cardozo Law Review* 28 (2007), pp. 2647 sq., 2664.

As the German scholar Joachim Hruschka has shown⁶², the origin of the *tripartition* used by Carrara were laid down from Pufendorf in a passage from his further work *The Whole Duty of Man According to the Law of Nature*: “Those Human Actions then which proceed from, and are directed by the *Understanding* and the *Will*, have particularly this natural Propriety, that they may be *imputed* to the Doer; that is, that a Man may justly be said to be the Author of them, and be obliged to render an *Account* of such his Doing; and the *Consequences* thereof, whether good or bad, are chargeable upon him”⁶³. Johann Jacob Lehmann (1683-1740) made the three *declarations* suggested by Pufendorf correspondent to an *imputatio prima, secunda* and *tertia*; later, other representative authors detailed these imputations as *imputatio facti, imputatio iuris* and *imputatio legis*. The move itself was however highly misfortunate. *Imputatio facti* and *imputatio iuris* are as such coined by Joachim Georg Daries (1714-1791), a disciple of Lehmann. *Imputatio physica* means nothing more than the causality, whereas *imputatio moralis* establishes the connection of the natural process into which a man is (as natural being) causally involved with the will of this man regarded as free rational person, that is: *imputatio facti*. Defined by Daries as “*declaratio, quod aliquis sit auctor facti*”, *imputati facti* represents therefore the sum of the first two *imputationes* settled out by Carrara, and explains in the same time the definition which Kant gave to the imputation in the fragment cited above. What Carrara – and also Kant, in some fragments not published by himself – meant under *imputatio legis* was shown by Daries as being not really an *imputatio*, but the *applicatio legis ad factum*, that is, the correspondence between the legal requirements and the real conduct of the agent which was imputed previously as his own deed. *Imputatio iuris*, the second genuine *imputatio*, was defined by Daries as “*iudicium de merito facti*”. This judgment takes place therefore after determining the relation between the imputed factum of the agent and the legal requirements and has as object the eventual praise or blame which is to be accounted to the agent for the exercise of his rational freedom under moral laws.

The construction of Daries was at the time when Carrara wrote his *Programma* largely neglected and much more in the époque of Dongoroz. As Joachim Hruschka showed, this construction suppose firstly the difference between two systems of rules – rules of conduct and rules of imputation – and explains secondly, on this ground, the difference between the grounds of justification and the grounds of excuse. Expressed, in the words of Daries, to the justification corresponds an exception from the law regulating conduct which is founded on a higher legal promoted reason and is therefore an *exceptio instituta secundum leges*, that is: conform to the entire system of laws, whereas to the excuse corresponds not an exception from the applicable law – the deed remains illegal and the *exceptio* is in this respect *instituta contra leges* – but only from the rules which govern the attribution of blame to the authors of illegal deeds and the legal consequences which are bound to this attribution. Kant writes in this respect about a material and a legal *effectus* of the illegal deed: „When any one does, in conformity with Duty, *more* than he can be compelled to do by the Law, it is said to be *meritorious (meritum)*. What is done only in exact conformity with the Law, is *what is due (debitum)*. And when *less* is done than can be demanded to be done by the Law, the result is moral *Demerit (demeritum)* or Culpability. The *juridical* Effect or Consequence of a culpable act of Demerit is Punishment (*poena*); that of a meritorious act is Reward (*præmium*) ... The degree of the *Imputability*

⁶² See Joachim 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 Verlag, Stuttgart 1998, pp. 163 sq.; Id., *Zurechnung seit Pufendorf: Insbesondere die Unterscheidungen des 18. Jahrhunderts*, in: M. Kaufmann / J. Renzikowski (eds.), *Zurechnung als Operationalisierung von Verantwortung*, Verlag Peter Lang, Frankfurt, 2004, pp. 17 sq.

⁶³ Samuel Pufendorf, *The Whole Duty of Man According to the Law of Nature. Two Books*, trans. Andrew Tooke, ed. Ian Hunter and David Saunders, with Two Discourses and a Commentary by Jean Barbeyrac, trans. David Saunders, Liberty Fund, Indianapolis, 2003, Book I, Chap. I, par. 17.

of Actions is to be reckoned according to the magnitude of the hindrances or obstacles which it has been necessary for them to overcome. The greater the natural hindrances in the sphere of sense, and the less the moral hindrance of Duty, so much the more is a good *Deed* imputed as meritorious. ... Conversely, the less the natural hindrance, and the greater the hindrance on the ground of Duty, so much the more is a Transgression imputable as culpable”⁶⁴.

III.

As stated by George P. Fletcher, «the question of wrongdoing is resolved under the set of primary legal norms, prohibiting or requiring particular acts, as supplemented by norms of justification, that provide a license to violate the primary norms. The question of attribution is resolved under an entirely distinct set of norms, which are directed not to the class of potential violators, but to the judges and jurors charged with the task of assessing whether the individuals are liable for their wrongful acts. .. The nature of a justification is that the claim is grounded in an implicit exception to the prohibitory norm. ... Excuses bear a totally different relationship to prohibitory norms. They do not constitute exceptions or modifications of the norm, but rather a judgment in the particular case that an individual cannot be fairly held accountable for violating the norm”⁶⁵. The difference between grounds of justification and grounds of excuse, which Fletcher himself establishes taking as point of departure of the particular developments of the German scholarship in the 20th century⁶⁶ and is regarded on the same basis also by the most German authors as a „legal-ethical postulate”⁶⁷. This must also be maintained, as long as we continue to make a difference between the normative order of a society and the limits within which the law blames the members of that society for deeds which contravene to this order⁶⁸. As Dongoroz rejected the difference between justification and excuse in the sense of Daries, this approach was consistent with his definite rejection of the difference between laws that govern the conduct and rules which also govern the attribution of blame and punishment. The same solution was also crucial for both Hobbes and Kelsen: “distributive and vindictive are not two several species of the laws, but two parts of the same law” because any prohibition would be „in vain” without „the fear of punishment”⁶⁹ and «if it is assumed

⁶⁴ Immanuel Kant, *The Philosophy of Law*, cit., sect. IV, see also Samuel Pufendorf, *Two Books of the Elements of Universal Jurisprudence*, translated by William Abbott Oldfather, 1931. Revised by Thomas Behme. Edited and with an Introduction by Thomas Behme, Liberty Fund, Indianapolis, 2009, Definition XIX, par. 2: „The material effect of a good action, profitable and not owed, is *merit*; of an evil, *demerit*. Of these the former is recompensed by a *reward* and a *premium*; the latter is followed by *punishment*”; for the correlation between Pufendorf and Kant as well as for the interpretation of Kant’s solution in the matter of necessity see Joachim Hruschka, *Pufendorfs Zurechnungs- und Notstandslehre*, in: M. Beetz / G. Cacciatori (eds.), *Die Hermeneutik im Zeitalter der Aufklärung*, Böhlau Verlag, Weimar et al., 2000, pp. 181 sq.

⁶⁵ George P. Fletcher, *Rethinking Criminal Law*, cit., p. 491-492, 810-811; see also Santiago Mir Puig, *Die Zurechnung im Strafrecht eines entwickelten sozialen und demokratischen Rechtsstaat*, Jahrbuch für Recht und Ethik vol. 2 (1994), pp. 225 sq., 229; Georges Mousorakis, *Distinguishing Between Justifications and Excuses in the Criminal Law*, Stellenbosch Law Review vol. 9 (1998), pp. 165 sq., 167: «Central to the theory of justification and excuse is the distinction between primary or prohibitory norms and norms of attribution»; Joachim Renzikowski, *Normentheorie als Brücke zwischen Strafrechtsdogmatik und Allgemeiner Rechtslehre*, Archiv für Rechts- und Sozialphilosophie, vol. 87 (2001), pp.110 sq.,116.

⁶⁶ George P. Fletcher, *Rethinking of Criminal Law*, cit., pp. 759 sq.; Id., *Basic Concepts of Criminal Law*, cit., pp. 81 sq.

⁶⁷ Albin Eser, *Die Unterscheidung von Rechtfertigung und Entschuldigung: Ein Schlüsselproblem des Verbrechensbegriffs*, in: R. Lahti / K. Nuotio (eds.), *Criminal Law Theory in Transition*, Helsinki 1992, pp. 302 sq., 303; see also Walter Perron, *Justificación y exclusión de la culpabilidad a la luz del derecho comparado – con especial consideración del Derecho penal español*, Anuario de Derecho Penal y Ciencias Penales t. XLI (1998), pp. 137 sq; Sharon Byrd, *Wrongdoing and Attribution: Implications Beyond the Justification-Excuse Distinction*, Wayne Law Review vol. 33 (1986-1987), pp. 1289 sq.;

⁶⁸ Winfried Hassemer, *Justification and Excuse in Criminal Law*, Brigham Young University Law Review 1986, pp. 573 sq., 595.

⁶⁹ Thomas Hobbes, *Philosophical Rudiments Concerning Government and Society*, cit., Chap. XIV, par. 7.

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»⁷⁰. This is so precisely because neither Hobbes nor Kelsen can configure the offense as breach of a moral obligation and the culpability as normatively attributed blame; the real perpetrator is always an exclusively natural rational being who determines its conduct according to the balance between the eventual pleasure which he expects from his conduct and the pain of the punishment which he also may expect as consequence of the same conduct. If we take into consideration, that rejecting the norm dichotomy is constitutive for the entire school of the legal formalism applied to criminal law⁷¹, than the solutions of Dongoroz in rejecting both the concept of a normative culpability and the difference between justification and excuse show themselves consistent within the chosen paradigm of legal philosophy due to the same reason why Hans Kelsen's approach can do nothing for the configuration of a criminal law theory, remaining on the abstract level of the purely normative legal forms⁷². In this respect, the newer Romanian scholarship, who promoted during the last decades the opposite solutions which find themselves in the new Romanian penal code without changing anything in Dongoroz' technical approach and even rejecting expressly the difference between laws of conduct and rules of imputation⁷³, edified the whole edifice on a theoretical inconsistency which affects dramatically all the detail elements of the criminal law system.

There are however another difficulties which have to be solved. The assumption widely made by Romanian scholars, the distinction between the two types of causes has to be connected with the German developments during the 20th century, especially with the standard German tripartite definition of the offense is insofar wrong, as those developments did only (partially) rediscover the ancient structures of the *Philosophia Practica Universalis*, which were subsequently also formulated with the aid of a particular terminology. When today the increasing number of the German authors who criticize this distinction taking these late developments as object of their critics is – as it should be – taken seriously⁷⁴, than replacing the ancient natural law constructions with the new German mainstream considered *de facto* as a neo-natural law⁷⁵ may hardly be seen as a felicitous step for the Romanian scholarship. On the other side, it must be also taken in consideration, that the ancient constructions belonged from the beginning on even to the *Philosophia Practica Universalis* and not specifically to a law theory and more specifically to a theory of criminal law. As the reader may have noticed, all the above cited fragments authored by Kant belong either to the works on moral philosophy, or to the General Introduction to the *Metaphysic of Morals* which deals with the exposition of the *general preliminary concepts defined and explained*, that is: with those concepts that are relevant for both the theory of law – including here also the theory of criminal law but not specific for this theory – and the theory of virtue. It is enough to mention that the “standard view” on Kant's doctrine of punishment in the criminal law of a *Rechtsstaat* remains till today the

⁷⁰ Hans Kelsen, *General Theory of Law and State*, New York 1945, p. 61 *apud* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Accoustic Separation in Criminal Law*, Harvard Law Review vol. 97 (1983-1984), pp. 625 sq., 627.

⁷¹ Massimo Donini, *Illecito e colpevolezza nell'imputazione del reato*, Giuffrè Editore, Milano, 1991, p. 142.

⁷² See at large Wolfgang Schild, *Reine Rechtslehre und Strafrechtswissenschaft* and Kurt Seelmann, *Kelsen und das Strafrecht*, in: A. Carrino/G. Winkler (eds.), *Rechtserfahrung und Reine Rechtslehre*, Springer Verlag, Wien / New York, 1995, pp. 59 sq., 83 sq.; Günther Jakobs, *Rainer Lippold, Reine Rechtslehre und Strafrechtswissenschaft*, Goldammer's Archiv für Strafrecht vol. 1991, pp. 555 sq.

⁷³ See e.g. Florin Streteanu, *Tratat de drept penal, Partea Generala* vol. I, Editura C.H. Beck, Bucuresti, 2008, par. 83.

⁷⁴ Urs Kindhäuser, *Zur Logik des Verbrechensaufbaus*, in: H. Koch (ed.), *Herausforderungen an das Recht: Alte Antworten auf neue Fragen?*, Athenaem Verlag, Berlin, 1998, p. 77; H. H. Lesch, *Unrecht und Schuld im Strafrecht*, Juristische Arbeitsblätter vol. 2002, pp. 602 sq.

⁷⁵ As in Italy, see Giorgio Licci, *Quelques remarques sur les racines allemandes du droit penal italien*, *Revue Internationale de Droit Comparé* vol. 2003, pp. 309 sq., 329.

ethical retributive⁷⁶, and that a conception of criminal law imputation specific to the (criminal) law must specify the general concepts related to the moral (as opposed to the nature) to the moral concepts related to the law (as opposed to those related to the virtue). Kant himself relates in what is legal (*licitum*) resp. illegal (*illicitum*) via “duty” and “obligation” to the *moral* law (which can proceed either from the external or from the internal legislation), while just (*iustum*) and unjust (*injustum*) refer explicitly to “whatever” is resp. is not “juridically in accordance with *external* laws”. After Kant, both terms change (again) their place – *illicitum* becomes a specific term of the juridical doctrine, while *justum* (re)gain the main relevance for the moral philosophy and the doctrine of natural law, the last one being also from now on increasingly treated separately from the positive law.

After the self-proclaimed Kantian and the real Hobbesian criminalist Anselm Feuerbach constructs a purely preventive doctrine of punishment and reverts accordingly the whole doctrine of *imputatio*⁷⁷, it was Georg Wilhelm Friedrich Hegel to restore and to develop the tradition of a freedom-based personal theory of law. He did it nevertheless in the context of a wholly new systematic construction which saw the legal order beside as objective structure of personal freedom configured not rationally *in abstracto*, but in the institutions of every real society. The abstract legal forms as well as abstract moral determinations are surpassed in the synthesis of an ethics (*Sittlichkeit*) conceived not as common roof (or basis) of two distinct rooms as in Kant’s view, but as dialectically bound one to another. The question whether the concept of imputation “disappears after Kant”⁷⁸ or the so-called Hegelian criminal law scholars after 1830-ies “wrote the same as Pufendorf but with the words of Hegel”⁷⁹ may not be solved here; in any case is certain that the victorious march of the empirical positivism into the criminal law science was responsible for both the fallen down of *imputatio*⁸⁰ and the consecration of exactly that definition of the offense that can be viewed as “the expression of misunderstanding the basic structures”⁸¹ – even if is less really and much more nominally – it is still seen as a major achievement of the German theory of criminal law and impressed if not Dongoroz, than many Romanian criminal law scholars of our days. Interestingly enough, the same definition did not make great impression on German scholars as Hans Welzel – “a compromise which historically has to be seen as a very randomized result” – who made the new criminal doctrine represented mainly by Franz von Liszt, Ernst Beling and Gustav Radbruch responsible for the “destruction of that concept in which for hundreds of years the criminal law scholarship since Pufendorf ... identified the center of the penal functions, namely the concept of the imputation and, together with it, the equivalent concept of action (*Handlung*)” which meant “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”⁸².

⁷⁶ Jane Johnson, *Revisiting Kantian Retributivism to Construct a Justification of Punishment*, Criminal Law and Philosophy vol. 2 (2008), pp. 297 sq., 298.

⁷⁷ See for the following drawings in detail Günther Jakobs, *Staatliche Strafe: Ihre Bedeutung und Zweck*, Ferdinand Schöningh, Paderborn, 2004, pp. 18 sq., 34 sq.; Id., *Strafrecht als wissenschaftliche Disziplin*, in: C. Engel / W. Schön (eds.), *Das Proprium der Rechtswissenschaften*, Mohr Siebeck, Tübingen, 2008, pp. 103 sq.

⁷⁸ Joachim Hruschka, *Strukturen der Zurechnung*, Walter de Gruyter, Berlin, 1976, p. 2-3; see e.g. Richard McKeon, *Freedom and History and Other Essays*, University of Chicago Press 1989, pp. 66 sq; Paul Ricoeur, *Le Juste*, pp. 41 sq.; J. Hruschka, *Der Einfluss des Aristoteles und der Aristoteles-Rezeption auf Rechtsbegriffe*, in: H. de Wall / M. Germann (eds.), *Festschrift für C. Link*, Mohr Siebeck, Tübingen, 2003, pp. 687 sq.

⁷⁹ Hans Welzel, *Das Deutsche Strafrecht*, cit., p.38-39; see also Eberhard Schmidt, *Einführung in die Geschichte der deutschen Strafrechtspflege*, cit., par. 267 sq.; Manfred Maiwald, *Zur allgemeinen Verbrechenslehre in der Strafrechtswissenschaft des 19. Jahrhunderts*, in: J. Hausmann / T. Krause (eds.), *Festschrift für W. Sellert*, Köln, 2000, pp. 427 sq, 431 sq.; Wolfgang Schild, *Verbrechen und Strafe in der Rechtsphilosophie Hegels und seiner «Schule» im 19. Jahrhundert*, *Zeitschrift für Rechtsphilosophie* vol. 1 (2002), pp. 30 sq.

⁸⁰ Werner Hardwig, *Die Zurechnung: Ein Zentralproblem des Strafrechts*, Cram, de Gruyter, Hamburg, 1957, p. 173.

⁸¹ Joachim Hruschka, *Verhaltensregeln und Zurechnungsregeln*, *Rechtstheorie* vol. 22 (1991), pp. 449 sq., 460.

⁸² Hans Welzel, *Abhandlungen zum Strafrecht und zur Rechtsphilosophie*, Walter de Gruyter, Berlin 1975, p. 364; Id., *Die deutsche strafrechtliche Dogmatik der letzten 100 Jahre und die finale Handlungslehre*, *Juristische Schulung* vol.

It is enough to see the way in which Radbruch, citing Beling, defines in 1904 “action”, “imputation facti” and “imputatio iuris” (exactly as the Romanian scholar Dongoroz will have done it exactly twenty years later in the fragment cited above)⁸³ in order to prove these sayings of Welzel. There is laid down the separation between external nature (acts and caused results) and internal nature (psychical processes), with no place at all for any moral evaluations⁸⁴. Only one year before Radbruch, it was Richard Loening to write a voluminous book on *The doctrine of imputation of Aristotle*, in whose preface he underlined the basic link between Aristotle and Pufendorf, crediting the later one with laying the ground for the substance of all modern criminal law scholarship. Loening was followed by the 1927 sustained and just 1958 (unmodified) published doctoral thesis of Welzel himself on *The Natural Law Doctrine of Samuel Pufendorf* which can be credited as the silent beginning of the conceptual revolution in the field of the criminal law theory under the flag of the so-called doctrine of the *Finalismus*. The action was not anymore conceived as natural process determined by an individual, but as “goal directed human activity” which cannot be understood without taking into consideration the subjectivity of the agent, moving itself so from meaningless nature to personal practice. The same fundamental movement away from nature to the person was in 1930 also effectuated by Richard Honig in his study on *Causality and objective imputation* taking as point of departure the research on *Hegel’s Doctrine of Imputation* published in 1927 by Karl Larenz, this time underlining the *objectivity* of the *imputatio (facti)* judgement – viewed therefore from the external side – and not, as Welzel, as the subjective direction to the goal pursued by the agent in forming the *actio moralis* from the internal side. After the war and in heavy conflicts with Welzel were developed under the same name another doctrines on the objective imputation, that revealed themselves especially during the last two decades as doctrines regarding the *applicatio legis ad factum*⁸⁵, precisely: as doctrines which tend to explicitate the legal forms according to the reality of the society⁸⁶. Similarly, the passage from the highly naturalistic view on culpability as mere psychical process to a normative conception, whose form – the imputation of blame due to the missing motivation to respect the law, therefore to the factually missing although legally required personality – was especially in Günther Jakobs’ work completed with the functional determination of the content⁸⁷: Any individual who has the natural requisites to behave himself as a legal person by respecting the law must always answer for the lack of the will to fulfill this basic legal obligation, and can be exonerated from responsibility, only when such exception do not periclitate the social order itself.

And what remains then from the definition of the offense, as stated 1923 by Traian Pop? „The society lives through the cooperation of its members” and „this cooperation is assured by certain norms”, „the social formation reestablish its violated order and protects it for the future”, more pregnantly: „the social formation need the punishment in order to

1966, pp. 421 sq., 422; on the correlation between the scientific and the legal positivism not only in Germany see also Helmut Coing, *The Original Unity of European Legal Science*, Law and State vol. 11 (1975), pp. 76 sq.; Franz Wieacker, *Foundations of European Legal Culture*, American Journal of Comparative Law vol. 38 (1990), pp. 1 sq.; G. Fletcher, *Criminal Theory in the Twentieth Century*, Theoretical Inquiries in Law vol. 2 (2001), pp. 265 sq.

⁸³ Gustav Radbruch, *Der Handlungsbegriff in seiner Bedeutung für das Strafrechtssystem*, J. Guttentag, Berlin, 1904, p. 129, 131.

⁸⁴ Bernd Schünemann, *Einführung in das strafrechtliche Systemdenken*, in: Id., (ed.), *Grundlagen des modernen Strafrechtssystems*, Walter de Gruyter, Berlin 1984, pp. 1 sq., 20; see also George P. Fletcher, *The Grammar of Criminal Law I*, cit., p. 55.

⁸⁵ So the interpretation of Pablo Sánchez-Ostiz, *Auswirkungen der Zurechnungslehre in den aktuellen Verbrechenlehren*, Jahrbuch für Recht und Ethik vol. 13 (2005), pp. 669 sq.

⁸⁶ Bernd Müssig, *Zurechnungsformen als gesellschaftliche Praxis*, in: M. Pawlik et al. (eds.), *Festschrift für G. Jakobs*, Carl Heymanns Verlag, Köln et al., 2007, pp. 405 sq.

⁸⁷ G. Jakobs, *Das Schuldprinzip*, Westdeutscher Verlag, Opladen, 1993.

conservation its established order"⁸⁸. The function of the punishment conceived as „social relation against anti-social deeds"⁸⁹ 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"⁹⁰, that is: of a socially dangerous deed, whose meaning is: not this society"⁹¹. 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 orders, 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"⁹²; „in respect to the non-culpable the punishment has no ground and makes no sense"⁹³. 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"⁹⁴, the culpability in the criminal law does not regard the factual will of an individual who seek the achievement of his natural goals, but the conduct of an individual – conceived as externalization of a „subjective will"⁹⁵ which reveals the missing objectively as obligation required will of social cooperation through the mere external conformity⁹⁶ to the laws of conduct – is attributed to the legal subject as criminal culpability. In other words stated: that member of the society which „commits a socially blamable deed" is „culpable" and „subject of blame, that is: called to answer"⁹⁷ because through his deed is seen as „refusing to the legal order and to the members of the lawful organized society the owed recognition"⁹⁸. 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 that regulate the way in which to an „individual" conceived as „member of the society" is imputed as *effectus* of criminal law that what he did in fact work – that is: the missing will have to comply with the legal order of that society (culpability), that is: the protest against that order (social danger), that is: an offense – are no other ones that those provided by the „constitutive act" of the criminal statute, conceived as „the totality of the conditions required for the existence of an offense", that is: for the imputation of a deed in the sense

⁸⁸ Traian Pop, *Drept penal comparat* III, Orastie 1926, p. 10/11, 21; Francesco Carrara, *Programma PG*, cit., par 615. – On Carrara's doctrine of the punishment and his fundamental agreement with ant and Hegel see at large Sergio Cotta, *Il pensiero di Francesco Carrara nell'incontro di filosofia e scienza*, Rivista italiana di diritto e procedura penale, vol. 1989, pp. 882 sq., 883; Mario A. Cattaneo, *Francesco Carrara e la filosofia del diritto penale*, Giapichelli Editore, Torino 1988, p. 136; 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 la imputación de Günther Jakobs*, in: G. Jakobs, Estudios de derecho penal, Madrid: civitas 1998, pp. 25 sq., 29.

⁸⁹ Traian Pop, *Drept penal comparat* III, cit., p. 19.

⁹⁰ Immanuel Kant, *Metaphysik der Sitten*, cit., p. 331.

⁹¹ Günther Jakobs, *Zur gegenwärtigen Straftheorie*, cit., pp. 29 sq., 34; Id., *Das Schuldprinzip*, cit., p. 29.

⁹² Traian Pop, *Drept penal comparat* III, cit., p. 25; Günther Küchenhoff, *The Problem of Guilt in the Philosophy of Law*, Law and State 11 (1975), pp. 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».

⁹³ Traian Pop, *Drept penal comparat* II, cit., p. 333/334.

⁹⁴ Mircea Djuvara, *Eseuri de filosofie a dreptului*, edited by N. Culic, Editura Trei, Bucuresti, 1997, p. 107, 110, 111, 222.

⁹⁵ Georg Wilhelm Friedrich Hegel, *Philosophy of Right*, cit., par. 113.

⁹⁶ Urs Kindhäuser, *Rechtstreue als Schuldkategorie*, ZStW 107 (1995), pp. 701 sq, 706/707.

⁹⁷ Traian Pop, *Drept penal comparat* II, p. 346; Hans Welzel, *Das Deutsche Strafrecht*, cit., p. 16.

⁹⁸ Wolfgang Frisch, *Schwächen und berechnete Aspekte der Theorie der positiven Generalprävention*, in: B. Schünemann et.al. (eds.), Positive Generalprävention, Verlag C.F.Müller, Heidelberg 1998, pp. 125 sq., 139/140; H. Kaiser, *The Three Dimensions of Freedom, Crime and Punishment*, Buffalo Criminal Law Review vol. 9 (2006), pp. 691 sq., 697: «transcendental free riding».

of the criminal law⁹⁹. The reader may now see in this nutshell the ancient legal definition of the offense as provided by the still vigent penal code in force since 1968: socially dangerous, culpable and statutory provided deed (art. 17). Whether legal or not, the criminal law theory that *this* definition expresses – if rightly interpreted – would deserve to be remembered and newly established, so as the new definition to be as soon as possibly forgotten.

⁹⁹ Traian Pop, *Drept penal comparat* II, p. 83; Günther Jakobs, *Der strafrechtliche Handlungsbegriff*, Verlag C.H. Beck, München, 1992, pp. 20 sq., 27 sq.