SOME NEW IDEAS IN DOCTRINE AND CRIMINAL LEGISLATION

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ABSTRACT

This article surveys some new ideas which were expressed in the doctrine and criminal legislation in the last years, ideas which deserve to be pondered upon.

Keywords: *new ideas, doctrine, legislation.*

1. In juridical publications (reviews, monographs) of the last few years, along with thorough comments related to criminal legislation in force analyzed also in the light of the contradictory solutions from the judicial practice and due to the concern to better clarify the content of criminal regulation, also appeared some studies promoting a new vision of the crime phenomenon, namely some attempts to surpass the incrimination rules' classical analysis .

2. So, for instance, in a valuable doctor's degree thesis[2] the author proposed to prove the internal link which exists between a high level of language self-containment and control over the external events.

Especially in terms of avoiding violence acts, this becomes possible, the author's opinion, the more the subject has a richer language, being able to find more numerous and more pertinent verbal methods to express a dissatisfaction than the violent acts against a person in relation with whom they would be in conflict and which he/she would like to admonish.

3. Author's thesis would be that a person who loves to read and ponders more on those read, continuously enriching his/her forms of expression, is able to have a better self control on the impetus to violence, gaining the possibility to free himself/herself from "*emotional illiteracy*" which characterizes and explains such acts.

To the author, when enforcing punishments for acts of aggression, if one would emphasize on the cultural level broadening and on the enrichment of the language of those being in this situation so that the convict could find, in future, in his language and way to communicate the possibility to express what he/she feels at a certain time in relation with an opponent, all this would prevent the violence acts recurrence.

4. Is interesting, on this aspect, a research conducted in a juvenile prison in Switzerland under the programme named "*1000 words*". During this investigation they proposed to a juvenile detainee, known as being the most recalcitrant to read the Dumas' novel "*The three*

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[2] Loïe Parein, La fixation de la peine, Ed. Helbing Lichetenhahn, Bâle, 2010, p. 2.

musketeers". At the same time, he was suggested to write down in a notebook the words he couldn't understand, to be subsequently clarified. After 6 months the minor has filled 2 notebooks with such words. As he continued reading, after a time, he became more active in classes, more communicative, he enriched his expression, and he made efforts to attract other detainees to participate in the programme, his willing and pleasure of reading the novel becoming more and more intense[3].

5. Of course, this link between the language of a person and violence acts can't be generalized (the thesis author himself doesn't reach such a conclusion) as there are also persons with a high level of language and culture who commit acts of violence.

In relation to these people, the lack of an appropriate language to directly express this dissatisfaction towards an opponent couldn't explain the acts of violence. Others are the causes leading to occurrence of such events even from people with a high degree of culture and are subject to criminological researches having other prerequisites than unsatisfactory language as starting point.

But it is no less true for acts of violence being much more rare and exceptions when referring to educated individuals (criminal statistics testify to this respect) in relation to the facts that happen with the poorly educated individuals (far more numerous than the others).

6. Thesis the Swiss jurist argues, even in these limits, is of great interest.

It would also be worth a research on this topic in the juvenile detention places from our country. In this respect, the influence the cultural level exercises on individuals' manifestations, on their capacity to self-inhibit some aggressive tendencies or to overlook even in other respects criminal law, would be verified. Such an influence would be liable to significantly contribute to reducing recidivism in what concerns the acts of violence and it would highlight the importance of education and cultural activity in juvenile detention establishments.

This leads to the obligation incumbent on the authorities carrying out punishments enforcement (for minors, and even for adults) to organize within the detention establishments as many and varied forms for increasing the detainees' cultural level as possible, as an efficient proceeding to prevent violence acts and to decrease the number of recidivists.

7. Another idea expressed in the quoted work is also interesting in the sense that we couldn't speak of determinism and free will as independent and well defined standings in relation to the requirements of material existence. The individual, author's opinion, doesn't take perfectly differentiated behaviors, neither as a robot under the influence of factors which determine his/her decision, nor like a free human who completely behaves beyond any determinisms, while having a full and permanent option over the convenient solutions.

Actually, the author affirms[4], there is a natural determinism (e.g., we can't choose the moment of our birth, our parents, the birth place, nor the material and spiritual conditions in which our existence is spreading up to an age when we can somewhat freely evaluate these conditions and we have possibility to choose, less determinate, one or another solution). There are however some occasional influences which are exercised upon us, urging us either towards beneficial, useful activities, either to illicit, damaging actions.

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[3] *Ibidem*, p. 2.
[4] *Ibidem*, p. 191-210.

Those negative influences, to the extent they become overwhelming, narrow very much the sphere of individual's free will. Under the influence of those negative factors, the individual can even commit misdemeanors.

Author's thesis is that the criminal sanction is meant for making the individual able to self-set free from multiple conditionings which led him/her to misdemeanor but, to do so, the sanction should be stricter or lower, depending on the nature and strength of influences exerted upon him/her. For an individual subjected to multiple and profound conditioning, the punishment will be more severe, to be more efficient in making him/her able to self-set free from conditionings, namely *"to get away"* from these influences.

The extent to which the individual succeeds in self-setting free from conditionings will justify his/her evaluation as a good or bad person, as an acceptable or unacceptable individual.

8. In such a vision the responsibility concept disappears. Likewise, we are not interested whether the individual is or not aware of the conditionings exercised upon him/her and which are relevant within the judicial process; therefore we can't speak about intention or guilt.

What is interesting would be only the convict's position related to the applied punishment.

If the infringement of the society behavior regulations , as a result of individual conditionings, is accepted by the individual as one of his/her particularities, the punishment will no longer have the role to set him/her free from these conditionings influence, because, in this case, the individual agrees to act this way; thus, as his/her behavior being only the expression of a difference in individual's opinions related with society's opinion, the punishment wouldn't tend to educate, but would only be a society's reaction against refractory opinions, opposite to social interests and opinions of the society members majority .

The judge, in such trial, expresses another opinion by a punishment, refusing to admit the offender's reasoning.

9. The author admits that, in case of factors compulsory determining the individual's conduct (like the need for air, water, food, or home), he/she can't set himself/herself free, "*get away*" from the influence of these conditionings, as this is not conditionings the individual agrees or does not agree with .

There is yet another type of conditionings from the influences of which most of the convicts wish to "*get away*", accepting the coercive measures required by society as ways to act upon the factors leading them to delict; coercive measures that, when reasonable applied, in proportion to the action and the offender's person, may be beneficial for the convict's gradual set free from such conditionings .

This need of the individual, namely to positively influence his/her conduct coincides with society's obligation to provide the convict with the minimal development conditions so that he/she is able to gradually cut loose from conditionings and, at the same time, to be provided with the protection of fundamental values. In such situations, the State appears like a device through which individual's internal disorder is influenced of (conditionings conflict) to make it easy for him /her, to facilitate his/her the effort to self-set free from conditionings which were exercised on him/her until that moment.

Delict, author's conception, is also an attempt on the security needs of the community, on the protection of and respect for legal asset.

When choosing the society's manner to react, emotion and reason interweave: emotion leads the reason towards choosing adequate sanctions to satisfy the needs of the society and so that sanctions to be always reasonable and adequate.

10. On this line of thought, the author suggests to abandon the idea of guilt[5], which could be replaced with the idea of danger for protected legal asset. The individual answers not because he/she is guilty, but because he/she is not able to set himself/herself free from conditionings endangering the protected legal asset and, at the same time, overwhelming him/her. As such, the sanction is neither revenge, nor redemption, nor the consequence of abstract violation of law. Sanction is a form of State coercion, as a result of the delict committed by an individual submitted to multiple conditionings. Even if there would be individuals with different opinion on their own behavior (thus, the idea of Kant according to whom those breaking the law create their own, generated and abstract law, would be verified), coercion must intervene to ensure public security: punishment gives expression to the need for security the society has, namely the need to respect fundamental norms. By sanction, the recurrence of the act is avoided at the same time (the preventive character of coercion).

11. In author's view, individuals can be easier freed, emancipated from conditioning provided they wish so and act themselves on their mental. The very gravity of the sanction involves the individuals' adhesion and cooperation degree within the trial of their penalty, as the conditioning type is taken into account when delivering the sanction.

By his reasoning, the author proposes that a determinations file should be drawn up during investigation; the same during the judgment, so that based on solid knowledge of the conditionings, the punishment can be set.

12. Imprisonment, in his opinion, is in fact a limitation of the right to move. Such measures are incorrectly called measures involving the deprivation of liberty. In fact, individuals, overwhelmed by conditionings, can't be deprived of liberty because they are not enjoying liberty.

As such, one must give up the idea that punishment is based on the individuals' responsibility; individuals overwhelm by conditionings are limited in terms of liberty because of themselves, namely because they failed to observe society's compulsory rules (as a football player is out of the game for not complying with the game rules). Liberty limitation can be achieved by different ways, not necessary through imprisonment, and the pecuniary sanction is nothing but the equivalent of expenses incurred with the protection of social values, or for building up preventive institutions.

At the end of his work, the author proposes to give up the idea from the Bible, namely, "understanding everything means forgiving everything".

On the contrary, punishment must be set subject to the conditionings degree, and these must be well and completely known by means of the judicial process. As such, sanctions must be preventive and not retributive.

13. As noted, the paper includes a new vision on the criminal responsibility. Individuals are held responsible, not because they are guilty (intention, negligence, praeter-intent) for the act committed, but because they were subject to conditionings, determinisms, which they couldn't dominate as they became aware of these conditionings, and couldn't change their conduct according to the social demands. The more numerous and deeper these

[5] *Ibidem*, p. 213-230.

conditionings are, the more severe the punishment must be for stimulating individuals to "*get away*" from these conditionings.

14. As shown, according to author, individuals who accept themselves as they are and don't want to change their conduct also exist in society. In relation to those persons, punishments seem to have retributive nature, as a justified reaction of the society, defending as such its own security and respect of the fundamental social values. Such individuals, who think it is "modernly" to oppose legal rules, are yet rare items. Majority is made of individuals who learn from applied punishment and make efforts to not repeat the actions.

Identifying the conditionings which led these individuals to delict pertains to the judicial process, and punishment individualization is to consider the nature and depth of the said conditionings.

15. We doubt the author's idea that both the necessity to determine guilt of those who have committed an unlawful act, and that one could give up the idea of criminal responsibility are disappearing.

Identifying the conditionings system that acted upon individuals couldn't be drawn by a judgment on the subjective position of those conditioned in relation to the influences they were subject to. People are not some robots that act automatically as a result of impetus, but any of their external moves, from the simple ones to the more complex ones, also involve the psyche of those performing the act. Certain private, value judgment on those manifestations precedes or is simultaneous with these acts no matter the individual, even those subjected to some external conditionings. On the other hand, it is an illusion to believe that in judicial process would be possible to identify absolutely all conditionings of some unlawful actions, as some of them remain unknown even for those who act. Therefore, in practical terms, in criminal trial the competent authorities are mainly in charge with objective setting of committed act and of the most obvious conditionings and, at the same time, they aim at identifying the subjective position of the author in relation to these acts and conditionings. Within the subjective position, the possible circumstances likely to eliminate the perpetrator's guilt are also identified, as well as those conditioning capable of influencing the seriousness of the action and the danger of the perpetrators.

16. Is known that, currently the in *vitro fertilization* issue*, i.e.* fecundation of a feminine gamete (egg) and a male gamete (spermatozoon) which is performed in laboratory, and the resulting embryo is then transferred in the uterus of a woman for later evolution into a fetus, no longer raise theoretical or practical problems, such acts happening frequently, especially when the couple didn't reach by other means to give birth to a child.

More delicate problems intervene when, during the fertilization process and development of the human embryo, the husband dies after sperm harvesting . Can the fertilization and insemination be continued given such conditions? But, should the fertilization process not start, and the husband died before that, would it be possible for the wife to request the launch, even in this situation, of the fertilization and insemination process[6]? German courts gave negative answer for both matters, arguing that is not possible for a child to be born if his father wasn't alive at the moment of conception.

Surprisingly, on May 7th, 2010 a High German court upheld the action of an applicant who required to be entrusted for insemination with the cells fertilized after husbands' death, cells which were preserved at a specialized bank, the Court arguing that the applicant

[6] Mathias Krüger, The prohibition of *post mortem* fertilization, legal situation

exercised her property right over those cells, right that is enshrined in para. 985 of the German Civil Code *(rei vindicatio)*. Applicant's claims were also admitted and the applicant, took cells possession as at October 1st, 2010, , further addressing to a polish clinics for implantation[7].

A similar case happened in France. A woman required the bank where the sperm cells coming from her husband were preserved at to give those sperm cells to her, even if the husband died in the meantime, as she was willing to proceed for fertilization based on those husband's cells. Bank has declined her request, and the applicant filed civil action against bank.

The first and the second Court dismissed the application on the grounds that the husband has deceased before the start of the *in vitro* fertilization, and the French law doesn't allow using the sperm preserved in a bank for fertilization *"if one of the spouses has deceased*[8]*"*. This resolution, although contrary to a previous one, 25 years ago, by the Court in Creteil as a superior court, , which at August 1st, , 1984 has decided that sperm being preserved *in vitro* might be returned to the widow after husband's death, resolution that was grounded on art. 1915 (French Civil Code) remained final, and the French civil law in force since 2004, rejected such resolution and explicitly prohibiting *post mortem* fertilization arguing that the contrary resolution wouldn't fit child's interest.

17. Specialized literature however argues that the prohibition of *post mortem* fertilization could be upheld if the fertilization process started during husband's life[9], meaning during those 9-12 months of fertilization. In this view, prohibition of *post mortem* fertilization would refer only to some cases when the husband's death occurred before the beginning of fertilization process, no matter if the eggs and sperm cells are found isolated, or if their union took place and the fertilization did not begin.

18. As seen, the matter in discussion is controversial. Currently, one can't see how criminal legislation, doctrine and case law will advance in this matter and, namely, if child's interests would be better protected while having a deceased dad before conception or, on the contrary, it would be more appropriately protected if *post mortem* fertilization would remain prohibited.

19. International debates which currently take place in relation to the human embryo researches (either on supernumerary human embryos, or human embryo cells[10]) are also tightly connected to the above matter.

Two doctrinaire solutions are facing in this matter, namely: the restrictive solution (based on the retributive theory on the criminal sanction theory) and mixed theory (based on the reductionist theory according to which the criminal sanction can be but a mere means of social control). The former normative solution was passed by German and Italian criminal legislation, and the latter was passed by the Canadian, French, North American, and Australian legislation.

According to the first legislative solution mentioned, researches on the human embryo are prohibited under criminal sanction (fine or imprisonment). As for the second theory, it is considered that such scientific research can't be prohibited just like that, but they should

[7] Mathias Krüger, *quot. work*, p. 43;
[8] *Ibidem*, p. 43.
[9] *Ibidem*, p. 44-62.
[10] Maria Kourelis, Rosario Isasi, Bartho M. Knoppers, La recherche sur les embryons et le droit pénal entre prohibition et permissivité, Revue internationale de droit pénal, no. 82, 2011, p. 65-82.

be subject of an appropriate regulation to stipulate the terms for such regulation is worth being kept and when it can be admitted, observing certain law provisions. This latter theory adopted different legislative solutions, some upholding the possibility to get new cells as source of embryos from supernumerary embryos (legislative solution upheld by the United States of America and Australia), and other legislative solutions by which this derivation by means of core transfer was prohibited ; this solution was adopted by Canada and Germany.

There is a common ban criminally sanctioned by all states, no matter of adopting a restrictive or mixt solution concerning the human embryos, namely, creating a human clone (namely, creating identical individuals from the same organism, identical cells coming from one initial cell). Canadian law stipulates imposing a 500,000 Canadian dollars fine and imprisonment up to 10 years for creating a human clone, arguing that law must protect individuality and the diversity of the human being, as well as the integrity of the human genome (that is of the hereditary particularities).

This was aimed at preventing the use of the human body for creating some identical individuals. For the same purposes, North American law provide a national human embryo-related research authorization and surveillance system. Violation of these provisions entails criminal sanction. A 2002 Australian law provides imprisonment up to 5 years for conducting researches on the human embryo whilst violating the conditions stipulated by law.

In the federal states Switzerland and Canada the problem that some regulations in the matter of human embryo should fall under the jurisdiction of federal bodies, instead of that of the Member States also arose.

In terms of these regulations' global perspective,, the doctrine expressed the need for a national and international related regulation harmonization, and, at the same time, the preparation of flexible norms, in condition to reply to rapid development requirements, which characterize human embryos research[11].

In such a vision, criminal law could be used not only for fighting regulation infringement, but also for stimulating science development in order to prevent any excess in human embryo research.

20. Recent criminal doctrine[12] also rose the issue of whether criminal law must change its preventive and repressive role as regards the great developments registered on biotechnology, , thus becoming a rather symbolical tool in what concerns certain infringements of rules in this matter.

For instance, specialized literature describes various genetic control ways, theoretically possible and in a hypothetically accomplishment perspective, even if, in present, there is no appropriate technique to make possible such control. Could the preventive role of criminal law be extended over such type of control, and as a consequence, could a group of indictments for future actions be made up?; this would mean an anticipation of violations which technically, at the time of law passing, could not be committed. In this case, a question would come up: how could the infringement of an activity, which is not susceptible of execution due to the lack of the necessary technique for making such infringements practically possible, be prevented? As we can see, in these situations we are facing facts not likely to be currently proved but, eventually, only in future.

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[11] Maria Kourelis and other authors, *quot. work*, p. 81.

[12] Carlos Maria Romeo Casabona, *Criminal policy and legislative technique in criminal law on biotechnology*, Revue internationale de droit pénal n° 82/1-2/2011, p. 83-108.

In such conditions, if one however should go for the indictment of some actions for which there is no certainty they will be proved or not, the preventive role of criminal law would be a more symbolic one, deprived of efficiency and, essentially, would lose its legitimacy.

Equally ineffective would be to approve such acts because, even if they would be committed, they could not be discovered, due to the lack of the necessary technique. Consequently, they could not be traced legally, staying hidden in secret laboratories.

In the quoted author's opinion, such a symbolism of criminal law (indictment of actions presenting an abstract danger) although inevitable, the extent to which such symbolism could be acceptable is the main problem. In this regard, the question on whether, in the biotechnology field, is possible for new acts to be indicted so that to meet the preventive role of the criminal law, without other interests to become prevalent, arises. Under the accelerated development of biomedicine, for instance, some authors focus on the tendency for hypothetical future's scenarios to become a simple future, and the future to become present, and should this progress be adequate, the problem is as follows: when would law intervention be justified as a repressive instrument? In other terms, how long can we afford to anticipate the danger of some actions, which can't be committed now because the material conditions for their commission to become possible in the biomedicine, genetics and biotechnology matter, were not created yet.

Some authors consider that, since in abstract terms (as a potential reality) there is the possibility for such acts to be committed, a minimum intervention of criminal law would appear justified, following that eventually, further, these provisions be better adapted to the danger such acts will bring in the distant future. Such a perspective involves a gradual development of scientific knowledge on this matter, namely regarding the material object of criminal repression. Today, some countries like Germany and France provided criminal provisions in this field; as well were provided some stipulations concerning genetics control in Spanish and Peruvian legislation, etc.

All these regulations, inevitably vague and extremely general, are in contradiction with the important role incumbent on the national legislator when precisely defining the acts subject to indictment, fundamental requirement of the indictment legality principle.

21. In this regard, of high importance are also the provisions contained in international documents addressing this issue, namely, criminal law interfering with scientific research on human evolution, biomedicine and biotechnology (for example, proposals made in 1988 by the Criminal Law International Association related to research on human genetic control). This impact of criminal international law tends to grow, particularly in terms of reproductive and irreproducible human cloning, as well as in terms of creating and using human embryos for purposes other than human reproduction. Presently, provisions of international documents are pretty vague in this field, both in terms of prohibited actions, and of restrictive terms of such actions.

In what concerns the use of human embryos to reach human cloning, is interesting to note that all involved parties, including the scientific community, have rejected reproductive cloning of human being.

One may quote, in this regard, the position adopted by UNESCO through the Universal Declaration on the Human Genome and Human Rights of 1986 (art. 11) and the Additional Protocol to the Convention on the Human Rights and Biomedicine, of the Europe Council dated1988. Also, European Constitution totally prohibited reproduction by means of human

cloning. As a result, many countries approved this position and incriminated the above-mentioned acts in the wording of their legislations.

When discussing the adoption, by the United Nations Organization, of a statement rejecting human reproductive cloning, the issue of whether this rejection refers to all cloning forms or should human cloning be possible for not-reproductive purposes (creation of identical individuals), but for this phenomenon research purposes. On this issue, at the General Assemble of United Nations Organization dated 5th of March 2005 many opinions were expressed, combating any scope-expansion of the mentioned Declaration. Finally, the declaration employed a compromise formula, namely that human reproductive cloning shall be prohibited, in all its forms, in so far as *("dans la mesure qu'il serait")* they would be incompatible with human dignity and with human life protection. Such a statement leaves open the abstract possibility for reproductive human cloning, which wouldn't be contrary to the above desiderata.

Unlike the United Nations Organization, European Council turned his attention especially on the *in vitro* human embryo protection establishing limits in this matter. The Convention proposed by the European Council argues that the idea of *in vitro* human embryo can't be rejected even if this could lead to reproductive human cloning, because *in vitro* embryo can be used for scientific researches, for knowing the biological processes related to the beginning of human life, or to the human genome, and some researches would be beneficial in terms of diseases treatment (it's about regenerative diseases which could be treated based on growing and development of human embryo cells).

Due to these great controversies, the Convention proposed wasn't accepted by some states (for instance, Germany and England did not ratify the Convention, and France, Spain, and Italy have expressed some reservations).

According to the Convention, the *in vitro* embryo research is admitted provided that embryo protection measures are to be taken. Article 18 of the Convention explicitly shows that creation of human embryos for any purpose other than scientific research is prohibited.

These Convention provisions, author's opinion of quoted study, do not solve certain ambiguities and uncertainties regarding the human embryo, especially if this way could lead to reproductive human cloning or not.

In discussing this matter, remarks have been made in relation to Convention's provisions of art. 18, in the sense of prohibiting any attempts to create human beings genetically identical to each other, whether the human being is alive or dead. Such a statement, quoted author's opinion, is unable to specify whether it refers to a born human (genetically identical with another), or to a human who was only conceived, but not born. Some authors define "human being" as a human being that is born. Whether or not prenatal life is an extremely controversial matter, opposed opinions were expressed even in European Union states. In relation to the answer given this will also affect the *in vitro* embryo issue and protection thereof.

22. To correctly fit unlawful acts in the biotechnology field is necessary to identify the social values that are to be protected, as well as the actions against these values. It's about to identify both the individual social values, and the superindividual, legally protected ones.

Establishing the incidental social values for the acts falling under this category is currently difficult due to multiple controversies. The same happens when defining the actions or omissions likely to prejudice these social values.

Legislation of some countries distinguishes between human embryos for non-reproductive purposes, action allowed as opposed to the creation of such embryos for obtaining human beings by way of cloning.

So, for example, the Spanish Criminal Code and the Mexican one provide that there is no misdemeanor if the female egg is fertilized for other purposes than human procreation (scientific research purposes, or industrial purposes).

Due to the difficulties involved when documenting the unlawful actions or omissions in this matter, the legislator used vague formulas and definitions, very general and undefined. So, for example, the Spanish Criminal Code, namely art. 159 para. 1, provides that the same punishment (imprisonment from 1 to 5 years) shall also be applied when creating identical individuals by means of cloning or other procedures. The same difficulty is found in the Mexican Criminal Code and in the Colombian one; wordings prove the legislator's lack of knowledge on cloning possibilities existing in the current level of the related-science and, implicitly, on the categorization as criminal or non-criminal in relation to various acts or omissions that are committed in this field, i.e. biotechnology (*in vitro* embryo research).

In the opinion of the author quoted in this matter, the legislator should clearly state the actions and omissions allowed for scientific purposes and also the terms in which such permission could be granted.

Such leniency would serve science development and avoidance of the current situation, namely where some countries obtain important data on the human embryo (due to their permissive legislation, while other countries are disadvantaged due to their restrictive legislation).

To the extent that the legislator incriminates reproductive cloning, it would be justified to set penalties proportional to the seriousness of the act; especially in terms of cloning human beings, acts considered of extreme seriousness (in France the penalty is from 20 to 30 years of imprisonment, in Italy from 10 to 20 years of imprisonment, plus a 500.000 to 1.000.000 pounds fine , as well as lifetime prohibition of practicing) .

Same provision is contained also in the Spanish Criminal Code, the Mexican one, and the Peruvian one, as well as in other countries, by passing special laws (Germany, England, Japan, Australia, and Canada).

23. There are interesting discussions in the criminal legislation and doctrine on every person's right to choose its own death. It's about the right of people suffering from serious illnesses to ask to be put to death to end their pain.

In a certain view, such a right couldn't be granted to the individual, because life as a transcendental reality wouldn't be susceptible to be left at the disposal of a person, even if it suffers from an incurable illness. In a different opinion, any human has the right to die with dignity, as the individual is the only one to have the right to judge its own life quality and the necessity to die with dignity.

In this clash of opinions, one must also mention the recommendation of the Parliaments Assembly of the Council of Europe, dated 1989, addressed to Member States, with a view to respect and protect the dignity of incurable patients, providing an absolute prohibition to deliberately put them to death.

Surprisingly, the European Court of Human Rights, jurisdictional body within the Council of Europe, has enshrined a contrary resolution, deeply debatable, in the sense of

granting any person the right to choose its own death as an expression of respect for person's private life[13].

Veritably, the European Court of Human Rights though it has proclaimed that the right to life is protected by law, referring to art. 2 of the European Convention of fundamental freedoms and human rights, and to art. 15 para. 2 of the same Convention, listing this right as unalterable, admits however, in exceptional cases, that death can be caused to some individuals in specific limited situations, namely those rigorously controlled by the European Court of Human Rights.

Thus, in the *Pretty v United Kingdom* case, an incurably ill person asked permission for her husband to provide her with assistance in suicide, the husband not being exposed to criminal liability for this act (assisting another to commit suicide).

Pursuant to Article 15 of the European Convention of fundamental freedoms and human rights, such a request was dismissed by the English courts, reasoning that State Members of the Council of Europe agreed on the absolute unalterable nature of the right to life, prohibiting Member States to intervene in any way in this matter that would authorize the causing of death, even of a incurably ill individual.

This principled stance wasn't held consistently by the Court of Strasbourg when assessing the said cause.

Invoking the provisions of art. 8 *(right to respect for private and family life)* of the European Convention of fundamental freedoms and human rights, the European Court of Human Rights decided that there would be a right to self-determination of the person, a right that would justify the contrary resolution to the one emerging from art. 15 of the mentioned Convention. European Court of Human Rights' opinion, every person would have the right to live as considers and sees fit, including the carrying out of actions which might prove prejudicial to themselves. In these terms, a possible restrictive State intervention would mean an assault to private life. As such, the European Court of Human Rights reasons that any obstruction of the applicant for choosing a solution that would end an embarrassing and unworthy life would represent an attack on the right of everyone to respect for private life.

This European Court of Human Rights resolution repeated in a case settled by the Swiss courts *(Hass v Switzerland case)*. It's about an incurably ill who asked psychiatrists to prescribe a substance to end his life.

Following the psychiatrists' refuse, he filed an application before the Swiss courts, which delivered the same resolution.

Desperate, the said addressed the European Court of Human Rights, which ruled that the applicant has the right to commit suicide to get rid of suffering with dignity; therefore, the State had the obligation to take necessary measures to allow such resolution.

As noted, the European Court of Human Rights' resolution is obviously adversarial. On the one hand, protection of person's life has priority as compared to the will and consent of the applicant to be put to death, and on the other hand, it admits, in the name of personal autonomy, the contrary.

Such a position of the European Court of Human Rights appears like a contradiction of principles. It is known that, in principle, the consent of the person is not relevant when it's

[13] Olivier Bachelet, *Le droit de choisir sa mort: les ambiguïtés de la Cour de Strasbourg,* Revue internationale de droit pénal, no. 82, 2011, p. 109-127.

about non tradable social values, like human life is. As such, the resolution of this court, which assigns the value of a criminal non-liability cause to the consent of an incurably ill, even when it's about an action susceptible to prejudice the applicant's life, appears profoundly questionable.

A similar resolution was also pronounced by the European Court of Human Rights in relation to sadomasochistic practices, reasoning that every person has the right to live by its own will, and every person can also allow self-experiencing certain dangerous or immoral practices.

According to the European Court of Human Right's view, criminal law couldn't intervene in consented sexual practices without prejudicing the free will of the individual and that there should be exceptional reasons concerning acts of extreme seriousness, to justify authority's intervention in sexuality.

In the case which occasioned such a reasoning, the European Court of Human Rights admitted, however, that there was infringement violation of the European Convention of fundamental freedoms and human rights, because the participant in a series of sadomasochistic practices once shouted "have mercy", thus underlining his refusal to continue such practices upon his body.

Only in such conditions, the European Court of Human Rights' opinion, sadomasochistic practices might be considered unjustified, being contrary to the will expressed by the victim.

This resolution, as the author of the mentioned study remarks, is in total contradiction with other resolutions of the European Court of Human Rights in sexual matters, where it has motivated the impossibility to take note of victim's consent when it comes to serious prejudices of victim's bodily integrity. Thus, in *Laskey Jaggard and Brown v England case,* the European Court of Human Rights reasoned that state intervention and enforcement of criminal law provisions are fully justified when it's about sexual practices likely to attract bodily harm upon the victim, even if the consent of the injured party existed, as the necessity of protecting health or life overrides. Such acts are also in contradiction with the provisions of art. 18 *(limitation on use of restrictions on rights)* of the European Convention of fundamental freedoms and human rights as such, homosexual practices couldn't be justified, because life and bodily integrity protection overrides.

Worthily, shows the quoted study, such resolutions justifying dangerous practices in sexual matters under the pretext that there is the victim's consent, might have harmful consequences, justifying the victim's torture acts and even its killing, if such a result would be considered by the perpetrator as likely to cause maximum sexual pleasure.

In another case, reasoning that is necessary to protect individual's private life, *(K.A. and A.D. v Belgium case)* the European Court of Human Rights has also held, the possibility to exercise dangerous sexual practices on the victim, if the latter has consented to such practices (in this case, the victim was in a precarious material situation, not having anything else to sell except for its consent and resigned itself to please the others by the sexual practices it was subjected to).

Rightfully, the quoted study's author criticizes this exacerbated liberalism, which is an attitude completely opposite to that adopted by the United Nations Human Rights Committee, which had decided that certain sexual practices must be prohibited, even if there is the victim's consent, so that to protect criminal order and for reasons of human dignity protection.

Likewise, the quoted study combats the idea that a right of "personal autonomy" could be invoked when it's about protecting fundamental individual rights.

The study correctly underlines the contradictory position of the European Court of Human Rights which, on one hand, orders some resolutions which prohibit individual's right to choose the moment of death moment, and on the other hand, grants the individual the right to personal autonomy, which also includes the right to choose the moment of death.

24. In spring 2008, by initiative of professor Helmuth Stazger, criminal European law professor at München University, was created an European criminal policy group, composed of representatives of 14 European universities (Sergiu Bogdan, associate professor at Babes Bolyai University Cluj represents our country); this group aims at stimulating cooperation in criminal matters based on repressive rules from European countries legislations and the European Court of Justice case law.

Creation of this think-tank envisaged the increasing number of European rules and the multitude of framework-decisions adopted by the European Union in criminal matters, activities which were amplified following the entry into force of the Lisbon Treaty, thus creating conditions for developing direct incriminations by way of Directives.

Incriminations under this category are those concerning very serious and *transboundary* deeds, incriminations named *Euro-crimes*. They include: terrorism, human trafficking, sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, counterfeiting of currency, corruption, computer crimes, organized crimes, recycling of money. Subsequently, the European Council will include other deeds in this category, with the consent of the European Parliament.

Another category of offenses that will be analyzed by the European think-tank will be that of those affecting European Union policy in the fields subject to harmonization measures, such as those related to the environment, transport, fishing, agriculture, immigration, competition, etc., in so far as harmonizing national provisions with the European ones is indispensable and necessary for ensuring an efficient criminal policy in these matters.

Provisions of art. 83, para. 1 of Treaty on the functioning of the European Union are also is noteworthy, as they stipulate for the possibility that European Union Directives could set minimal rules for defining offenses and imposing sanctions. Thus, transfer of criminal jurisdiction is achieved in favour of the European Union bodies which acquire the power to legislate on criminal matters. These new responsibilities of the European Union bodies are not contradictions free. Indeed, transfer of jurisdiction refers to drawing up minimal rules, which means that Member States will be able to adopt a more severe position, either by amplifying the scope of incriminations', or by setting higher limits for punishments. This will inevitably lead to criminal repressive overbid and possible differences in sanctioning identical deeds, which could result in the emergence of *"refuge"* national states for the offenders. In order to prevent this to happen, it is required to proceed at the drafting of one unitary repressive policy of the European Union.

But this massive increase of the scope of deeds susceptible to criminal sanctions raise serious problems also regarding criminal involvement of national states at the same time with that of the European Union. Will it be able to respect national sovereignty of Member States, meaning the right of each Member State to decide when laying down these incriminations, or should it be admitted as necessary a unitary position of the European

criminal policy by creating a *"repressive European space"*? This question has become extremely present in terms of increasing to worrying proportions of the criminal transnational phenomenon.

These realities have determined the emergence of the mentioned European initiative group, born due to the necessity to have an effective repressive policy in criminal matters. This group has also ordered the publication of a Communication titled *"Towards an European criminal policy",* in which content were presented main ideas guiding the group.

Essentially, the Communication mentions that criminal law is not a device similar to others used for combating phenomena which have been currently emphasized in criminal matters, appeal for criminal repression involving a value judgment and a social stigmatization susceptible to prejudice individual rights. As a result, the use of this device must prove it is necessary and proportional with the necessity asking for such instrument. Also, this device must be subsidiary, namely to be used when other remedies were proven ineffective and, therewith, to be used in compliance with the legality and guilt principle, expressing a certain vertical and horizontal coherence when used.

In the opinion of the Communication's author, this document couldn't be seen as an exhaustive presentation of currently required solutions to combat the criminality phenomenon in Europe, but more as an open discussion on how European authority must use this repressive device.

25. Extremely interesting, in terms of new ideas which appeared on the content of European criminal law, is also the article of professor Helmuth Satzger, founder of the European initiative group in criminal matters[14].

The author remarks from the beginning that the European Union criminal law exercises an incontestable influence over the Member States' criminal law, and this made necessary to harmonize the national criminal legislation with the European Union criminal law. A first step in this evolution was the Lisbon Treaty, which suppressed the previous structure of the European Union consisting of pillars (pilier) or basic pillars where the intergovernmental cooperation in criminal matters (Pillar III) was also located in and, as such, in the future is no longer necessary to have *unanimity* of votes in criminal matters, the principle of majority being applicable (any decision of the European Union on criminal matters could pass by majority vote, even if there would be a contrary position of a Member State).

Also, legislative initiative can be taken by at least one quarter of the Member States, and the European Parliament has acquired broad powers also in criminal matters, in the sense that, in the future, any criminal law shall be adopted only by the European Parliament.

26. Extremely interesting are also the reflections of the quoted study's author on two exceptionally important processes that are conducted in the European Union States, namely, the Europeanization of criminal law in the Member States and the Europeanization of criminal legislation of the Member States.

As regards the former process, the author reveals that in many cases, the judiciary, the Prosecution bodies, as well as lawyers, use European criminal law provisions when construing national criminal law, taking into consideration *"the European legal order"*. But it was noted, in the sense that, as there is a great mobility of European legislation, it would

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[14] *Quelques principes pour une politique criminelle européenne après le traité de Lisabonne,* Revue internationale de droit pénal, no. 82, 2011, p. 137-151.

be possible for a litigant to not be aware of the European requirements related to one or other misdemeanor. In these cases the issue of compliance with the incrimination and punishment legality principle arises, a person couldn't be convicted with respect to an interpretation of the text which would broaden the incrimination to deeds (according to EU criminal law), other than those which didn't previously involved sanctioning according to another text interpretation, the only one known by the person concerned.

Europeanization process of the criminal legislation is equally interesting; it followed the adoption of the Lisbon Treaty provisions and is also due to the increasing role of the European Parliament.

If until now the idea according to which European authorities don't have jurisdiction to create a supranational law was speculated, this situation is gradually changing.

Thus, for example, due to the necessity of effective fight against fraud related to European funds the creation of a specific deed incrimination as *"European fraud"* was admitted in a European regulation, applicable in all criminal courts of the Member States, with no transposition of these provisions into the domestic law. The Treaty on the functioning of the European Union has also other provisions which can be interpreted as laying the foundations of a supranational law, as are those on customs and human trafficking matters. (art. 33 and art. 79 para. 2 of the Treaty on the functioning of the European Union). Thus were laid the foundations of a veritable European criminal law, however subject to the observance of the subsidiarity and proportionality principles , namely, principles which limit the European bodies' jurisdiction.

27. Simultaneously with this process, the process of domestic criminal provisions harmonization with those of the European Union continues. As it is known, this process began with the Judgment of the Court of Justice of the European Communities dated 2nd September 1989, whose reasoning shows that Member States have obligation to sanction the breach of Community law under the same substantive and procedural terms as those applicable for deeds similar as importance and nature when violating domestic law , , with the obligation that in all cases these sanctions shall be effective, proportionate and dissuasive. The same idea of national legislation harmonization with the European one is also found in art. 29 and31 of the European Union Treaty which stipulates for the Member States' obligation to include in their criminal law minimal rules related to a misdemeanor's constituents also for the sanctions applicable in matters of organized crimes, terrorism, and drug trafficking. Such minimal rules were also subsequently extended to corruption, money recycling, human trafficking, child sexual exploitation, as well as cyber crime matters.

The Court of Justice of the European Union decided, also, on the possibility to carry out legally this harmonization, especially in matters relating to environmental protection legislation violations.

After the Treaty of Lisbon, the harmonization process has intensified and expanded, taking the form of directives as a legal instrument (the Framework Decision being suppressed) to solve harmonization, having art. 83 of the Treaty on the Functioning of the European Union (TFEU) as legal foundation. This text contains a list of fields subjected to harmonization, basically exhaustive, but which can be extended by a decision in unanimity adopted by the European Union competent bodies.

As noted, EU's criminal legislative jurisdiction is conceived only as regards deeds posing great seriousness and, therewith, a cross-border dimension. It stands to reason that, beside the features mentioned, criminal suppression of the above deeds must prove to be

necessary and to comply with the subsidiarity and proportionality principles. This means that criminal suppression on these matters at European level must be considered necessary only if the activity of the national Member States proves to be insufficient to realize an effective repression of these criminality forms.

Among the first proposals of directives submitted to the European Parliament and based on the provisions of art. 83 para. 2, are also those concerning human trafficking, exploitation and sexual abuse against children and pedo-pornography.

On the other hand, according to art. 83 para. 2, it is necessary to observe the competence principle, general accessories, in the sense that Member States criminal provisions' harmonization with those of the European Union must prove to be indispensable for ensuring completion of the European Union criminal policy.

In connection to this text, the authors of the Communication subject to our analysis, noted that European Union 's jurisdiction widens arguably , in contradiction with the powers which would have been received by the Member States in relation to criminal matters, although criminal legislation of the latter express the will of their citizens will. Hence, they proposed that such a provision on "accessory jurisdiction", to be restrictively interpreted and limited only to cases of strict necessity, in the sense that criminal provisions' harmonization would effectively prevail, with no alternative.

28. In the view of Communication's authors there is a series of issues unresolved by the European Union on European criminal policy. Thus, it is noted that neither art. 83 para. 1 and nor art. 83 para. 2 don't contain anything but the obligation to introduce minimal rules into the national criminal legislation, granting the Member States wide powers to incriminate other deeds or to stipulate for more severe punishments. This creates the possibility for differentiation in terms of the criminal treatment of identical deeds among European Union Member States. Also, for *cases of decriminalization*, no rules for legislation harmonization are provided. On the other hand, as minimal rules regarding general punishment limitations exist, harmonization appears to have more of a symbolic nature, if not concurrently referring also to punishments effectively applicable to concrete cases.

Also, the authors of the Communication reproach the current European Union criminal policy the lack of the minimal rules concerning sanctioning of the attempt, of complicity and instigation to misdemeanor, as there is great diversity of solutions in Member States' criminal legislations on those matters.

29. One should also observe the opinion of Communication's authors, in the sense that provision of art. 83 para. 3 of the Treaty on functioning of the European Union, granting Member States the right to refuse to comply with the harmonization rules to the extent to which those would prejudice the fundamental principles of domestic criminal legal system, granting the Member States the *right of veto*, the latter being able to oppose to the enforcement of compulsory directives on criminal matter. In these cases, the State which disagrees with other States might follow its own way, and the rules provided by directives should be observed only by the rest of the States. Such a different enforcement of harmonization rules creates the prerequisites for the emergence of a *"matrix"* regulation, and this would contravene European Union's objective, namely to have a single space for freedom, security and law.

In the opinion of the analyzed study's author, there is hope that such differentiation cases between the Member States will be rare, thus the harmonization of criminal

provisions will be carried out based on the familiar principles of proportionality, subsidiarity, legality and guilt and that any contradictions between national and European Union legislation will be avoided by means of a rational criminal policy, so that the single judicial European area to not be threatened.

30. During the debate less session of April 6th, 2009, Justice and Home Affairs Council (JHA Council) of the European Union decided to establish the European Police Office (Europol); this decision was published in the Official Journal no. 121 of May 15th, 2009. This way, Europol, which initially was an intergovernmental organization, becomes a European Union agency[15].

Decision to establish Europol in its new composition shows that the *objective* of this agency is that to support and strengthen the activity of Member States' competent authorities (police, customs, immigration bodies) and their mutual cooperation to prevent organized criminality, terrorism and other serious crime forms, which affect at least two member states, together with the fight against the said phenomena.

Furthermore, the decision to which we refer enlarged Europol's jurisdiction, putting organized crime and terrorism among the types of serious crime.

As for the functions exercised by Europol, the decision underlines the existence of an information exchange coordination function, Europol acting both as an information exchange coordination center and as an information collecting, management and analysis center. In relation to this function, the decision provides that Europol has to preserve information contained in Europol's files for a period of 3 years, enough time for Europol bodies to decide whether or not to maintain the data file for analysis.

The decision further refers to the Europol task to establish and maintain cooperation relations with other European Union institutions, bodies, offices and agencies, with the States, and with third organizations.

It is important that Europol's decision also admits the opportunity to capitalize the very personal data from private parties, or from individuals, to be used (collected data) by private companies for their needs to fight unlawful deeds.

Another important function assigned to Europol in its new formula is that of a quasi - operational organism. Even if Europol won't be able to perform specific police bodies operations (interpellations of individuals, house searches, etc.) Europol bodies will still have an important part in preparing, encouraging and coordinating investigations related actions carried out by the competent authorities of the Member States, being able to conduct different operations involving teams composed of Europol representatives, formed as a means to support operations of Member States.

Europol has an important role, namely as an expertise center on international organized crime matters, to the extent to which this phenomenon occurs within the European Union. As regards the management body of the Europol, this will be the Board of Directors, including State members' government representatives and the Vice-President and President of the Board, according to art. 37 para. 2 of the Decision, are appointed by a group composed of representatives of the three Member States, which have developed the Board's programme, , for a period of 18 months and the very same group exercises for 18 months the powers set in the Board's programme. Decisions shall be taken by a two-thirds majority

[15] Alexandra de Moor and Gert Vermeuler, Europol, *Quai de neuf? Une approche critique de la decision Europol,* Revue international de droit pénal no. 82, trimestre 1 et 2, 2011, p. 156-187.

of Board's members. There is also a Europol Director, whose decisions are subject to the Board of Directors. Decision provides for the establishment of a Europol internal control on the data available to this organization, in order to protect such data. Also, the European Parliament exercises a control over Europol's activity, together with the Parliaments of the Member States. As such, the Court of Justice of the European Union is competent to settle the main causes relating to Europol's functioning. There is also a public opinion control in the sense it has a wide access to Europol's documents. An administrative control is also exerted; it is a new form of control introduced by Europol's decision in view of a more efficient fight against frauds which may occur in European Union's activity.

By all these changes, Europol's decision places this agency of the European Union at par with the other European Union's bodies. This new organization shall be financed from the community budget, and staff shall have same statute as the European Union's staff. Litigations concerning budget execution and those regarding European Union's staff shall fall under the jurisdiction of the European Court of Justice, and the European Anti-Fraud Office shall be able to conduct administrative investigations within Europol.

31. Romanian Criminal Law includes, in its turn, some provisions concerning new unlawful deeds which occurred in legal life, either as immediate realities, or as prospective realities.

Thus, Law no. 17/2001ratified the European Convention for the protection of human rights and the dignity of the human being with regard to the application of biology and medicine.

The Additional Protocol to the Convention on the prohibition of cloning human beings (signed at Paris at January 12th, 1998) was also ratified.

Law no. 95/2006 on health care reform stipulated in Title VI the conditions in which collection and transplant of organs, tissues and cells of human origin for therapeutic purposes take place in. With regard to these operations, law provides for the issuance of methodological norms concerning the concrete conditions such operations are to take place in. These methodological norms were approved by Order no. 1290 dated 2007 of the Minister of Public Health, published in the Official Gazette of Romania no. 916 of November 10th, 2006.

These methodological norms provided (art. 6) that, notwithstanding the provisions of art. 158 para. 1 of Law no. 95/2006, public and private units authorized by the National Transplant Agency or by the Ministry of Public Health may register profits as a result of their activity developed in relation to collection and transplant of organs, tissues and cells of human origin for therapeutic purposes.

This provision was subsequently repealed by Order no. 1156/2009 of the Health Ministry.

Law no. 95/2006 stipulates several incriminations of deeds breaching the law. Thus, the following are sanctioned: the transplant of organs, tissues, or human cells without the consent of the person those organs, tissues, and cells are collected from (punishment is imprisonment from 5 to 7 years), and the deed of the donor who, , after obtaining material or other benefits for oneself or for another, consents to the above mentioned operations (punishment is imprisonment from 3 to 5 years); or organizing or carrying out the above-mentioned operations in order to obtain material profits either for the donor or the organizer (punishment is imprisonment from 3 to 10 years); or buying for resale purposes and making

profits as a result of those operations with organs, tissues or human origin cells (punishment is imprisonment from 3 to 10 years).

Law on medically assisted human reproduction regulates the legal regime of medically assisted human reproduction by means of artificial insemination and *in vitro* fertilization.

In our legislator's view, artificial insemination of a woman with the sperm of her deceased husband is prohibited (art. 11 of the law). Also, the abusive collection of embryos, the genetic engineering of embryos, trade of embryos, illicit embryos donation, and gametes trafficking are prohibited.

Law specifies both the medically assisted human reproduction techniques (artificial insemination, *in vitro* fertilization and embryo transfer) and the prohibited medically assisted human reproduction (*post mortem* artificial insemination, interventions in cases of infertility due to age, interventions for couples that can't prove to have a stable life as a couple).

The Methodological norms dated May 27th, 2011 regarding *in vitro* fertilization and embryo transfer stipulate the terms in which a couple can ask for *in vitro* fertilization.

These Methodological norms were approved by Order no. 765 of May 27th, 2011 of the Health Ministry.