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THE «DEPTH GRAMMAR» OF *CRIMINAL LAW*: THE CASE RULE AND THE DISTINCTION BETWEEN NORM AND ASCRIPTION

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1. Setting out a normological problem

According to a widespread opinion in the Criminal Law Science, the judicial statement saying that a behavior has disrespected a rule enchased in the legal description of a crime firstly and foremost means: the very same conduct is a *duty violation*[1]. In this sense, the judgment always depends on proofing some ascription coefficients related to the position of the suspected or accused person during the perpetration,

[1] Naturally, this does not apply from the perspective of those who simply deny the existence of any duty able to be deduced from the Criminal Law precepts. See Andreas Hoyer, *Strafrechtsdogmatik nach Armin Kaufmann. Lebendiges und Totes in Armin Kaufmanns Normentheorie*, Berlin: Duncker & Humblot, 1997, 40 f., 79 f.

such as their physical capacity to act and their knowledge about the factual circumstances[2].

Behind this idea is a well-known theoretical approach in the field of philosophy of action, the so-called *Ascriptivism*. In very simple and generic words, this account reads as follows: talking about an *action* implies using statements which not only describe something that has occurred in past, but *also and first of all* ascribe this event to someone else as an expression of their freedom[3] (we can say: as «opus sua»).

However, this general plea seems to involve a kind of category mistake[4]: if we look more closely, we can see that, in its ambition to universality, such a claim ends up disregarding the logical and

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[2] Recently, with quite emphatic terms: Georg Freund / Frauke Rostalski, «Normkonkretisierung und Normbefolgung. Zu den Entstehungsbedingungen context- und adressatenspezifischer Ver- und Gebote sowie von konkreten Sanktionsanordnungen», *Goltdammer's Archiv für Strafrecht* 165 (2018), 268 f. In the same line, before, although with some differences in details: Wolfgang Frisch, *Tatbestandsmäßiges Verhalten und Zurechnung des Erfolges*, Heidelberg: Müller, 1988, 33 f., 71 f.; Lothar Kuhlen, «Rezension zu Urs Kindhäuser, Gefährdung als Straftat», *Goltdammer's Archiv für Strafrecht* 137 (1990) 479 f.; Georg Freund, *Erfolgsdelikt und Unterlassen. Zu den Legitimationsbedingungen von Schuldspruch und Strafe*, Köln: Heymanns, 1992, 56, 122 f.; Joachim Renzikowski, *Restriktiver Täterbegriff und fahrlässige Beteiligung*, Tübingen: Mohr Siebeck, 1997, 256 f.; Volker Haas, *Kausalität und Rechtsverletzung. Ein Beitrag zu den Grundlagen strafrechtlicher Erfolgshaftung am Beispiel des Abbruchs rettender Kausalverläufe*, Berlin: Duncker & Humblot, 2002, 107 f.; Stephan Ast, *Normentheorie und Strafrechtsdogmatik. Eine Systematisierung von Normarten und deren Nutzen für Fragen der Erfolgszurechnung, insbesondere die Abgrenzung des Begehungs- vom Unterlassungsdelikt*, Berlin: Duncker & Humblot, 2010, 62 f. and 187; Frederico da Costa Pinto, *A categoria da punibilidade na teoria do crime*, Vol. ii, Coimbra: Almedina, 2013, 1041 f.; Javier Wilenmann, *Freiheitsdistribution und Verantwortungsbegriff. Die Dogmatik des Defensivnotstands im Strafrecht*, Tübingen: Mohr Siebeck, 2014, 265 f.; Rainer Zaczyk, «Kritische Bemerkungen zum Begriff der Verhaltensnorm», *Goltdammer's Archiv für Strafrecht* 161 (2014), 86 f.; Francisco Aguilar, *Dos comportamentos ditos neutros na cumplicidade*, Lisboa: aafdl, 2014, 739 f., 852 f.

[3] Thus H. L. A. Hart, «The Ascription of Responsibilities and Rights», *Proceedings of the Aristotelian Society* 49 (1948-49) 171 f.

[4] For the classical objections raised on this context see Peter Geach, «Ascriptivism», *The Philosophical Review* 69 (1960) 221 f.; George Pitcher, «Hart on action and responsibility», *The Philosophical Review* 69 (1960) 226 f.; Joel Feinberg, «Action and responsibility», Max Black, ed., *Philosophy in America*, Ithaca: Cornell University Press, 1965, 134 f. With discussion overviews: Urs Kindhäuser, *Intentionale Handlung. Sprachphilosophische Untersuchungen zum Verständnis von Handlung im Strafrecht*, Berlin: Duncker & Humblot, 1980, 164 f.; Heinz Koriath, *Grundlagen strafrechtlicher Zurechnung*, Berlin: Duncker & Humblot, 1994, 379 f.; Luís Duarte D'Almeida, «Description, Ascription, and Action in the Criminal Law», *Ratio Juris* 20 (2007) 170 f.

practical contrast between rules of behavior and rules of imputation. Taking this contrast seriously means to recognize that no behavior rule can bring on itself the criteria from which the judge will measure the connection degree between the norm addressee and its semantic content.

2. The Criminal Law folklore and the grammatical holism

Thus it is not by chance that the first and main sponsor for the Ascriptivism has explicitly abandoned his previous account[5]. This change is often associated to an increasingly positivist approach to juridical problems (the so-called *legal positivism*)[6], whose farthest theoretical foundations are linked to empiricism. Here I am not in a position to discuss such a link in details. My interest is humbler: I just intend to stress the *grammatical holism*[7] implicit in the understanding of Criminal Law rules (also) as linguistic rules.

In fact, the distinction between *descriptive* and *prescriptive* statements already belongs to the "Criminal Law folklore": however, the same can not be said about the contrast between prescriptive and *ascriptive* utterances[8]. In general, such an opposition is simply neglected. And even where the difference between prescription and ascription receives some theoretical recognition, often it is not consistently and convincingly developed in its more stringent and newsworthy consequences.

Once the rules for the law enforcement (application, realization)

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[5] H. L. A. Hart, *Punishment and responsibility. Essays in the Philosophy of Law*, Oxford: Oxford University Press, 2009 (reprinted), with this quotation in the preface: "I have not reprinted here, in spite of some requests, my earliest venture into this field: 'The Ascription of Responsability and Rights', published in the *Proceedings of the Aristotelian Society* (1948-9). My reason for excluding it is simply that its main contentions no longer seem to me defensible, and that the main criticisms of it made in recent years are justified".

[6] *Pars pro toto* see Paulo de Sousa Mendes, *Causalidade complexa e prova penal,* Coimbra: Almedina, 2018, 23 (note 9), although by choosing to rescue the adversarial, rhetorical and procedural dimension of the old tradition of the classic *imputationes* doctrine (59 f., 91 f.).

[7] For its outcomes in the specific field of the interpretation of incriminating precepts: José de Faria Costa / Bruno de Oliveira Moura, «L'interpretazione nel diritto penale: un multi verso», in Adelmo Manna, org., *Il problema dell'interpretazione nella giustizia penale*, Pisa: Pisa University Press, 2016, 221-222.

[8] Already pointing out this deficit: Joachim Hruschka, *Strafrecht nach logisch-analytischer Methode. Systematisch entwickelte Fälle mit Lösungen zum Allgemeinen Teil*, 2. Aufl., Berlin: Walter de Gruyter, 1988, 424-425.

are (also) rules of language[9], the concepts of prescription (norm) and ascription (attribution) constitute the "depth grammar" of Criminal Law[10]. Instead of "surface grammar", which is restricted to *syntax*, the "depth grammar" refers to the modes — identified by reference to language games — of *use* a particular linguistic expression or a sentence[11], and therefore invokes a dimension which can *not* be accessed by hearing[12].

Such a capture has its locus classicus in Wittgenstein's *Philosophical Investigations*[13] (§ 664):

> In the use of words one might distinguish 'surface grammar' from 'depth grammar'. What immediately impresses itself upon us about the use of a word is the way it is used in the construction of the sentence, the part of its use — one might say — that can be taken in by the ear. And now compare the depth grammar, say of the word 'to mean', with what its surface grammar would lead us to suspect. No wonder we find it difficult to know our way about.

From this account, considering the logical chance of asymmetry opened by this approach (below 6), to know if such an opposition should lead to a strictly objective concept (without any kind of ascriptive elements) of criminal wrongdoing — provisionally detached

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[9] Fritjof Haft, «Die „Regeln" der Rechtsanwendung», in Lothar Philipps / Heinrich Scholler, Hrsg., *Jenseits des Funktionalismus*, Heidelberg: Decker & Müller, 1989, 30.

[10] Juan Pablo Mañalich, *Nötigung und Verantwortung. Rechtstheoretische Untersuchungen zum präskriptiven und askriptiven Nötigungsbegriff im Strafrecht*, Baden-Baden: Nomos, 2009, 75 and 179; Bruno de Oliveira Moura, *Ilicitude penal e justificação. Reflexões a partir do ontologismo de Faria Costa*, Coimbra: Coimbra Editora, 2015, 126, 127 and 421.

[11] With emphasis on the fluctuations between the functional differents employments of linguistic expressions and sentences, although referring only to the *descriptive* and *normative* uses: Hans-Johann Glock, «Necessity and normativity», Hans Sluga / David G. Stern, ed., *The Cambridge Companion to Wittgenstein*, Cambridge: Cambridge University Press, 1996, 208 f. Also with respect to that pragmatic turn: Luís do Vale, «O realismo normativista de Enrico Pattaro (subsídios para uma análise), Jorge de Figueiredo Dias / Joaquim Gomes Canotilho / José de Faria Costa, org., *Estudos em homenagem ao Prof. Doutor António Castanheira Neves*, Vol. I, Coimbra: Coimbra Editora, 2008, 1243 f.

[12] Francesco Bellucci, «Wittgenstein's Grammar of Emotions», *Rivista Italiana di Filosofia del Linguaggio* 7 (2013) 5: "Surface grammar concerns the syntactic construction of a sentence and the syntactic role of a componente word therein. Its is, to use Wittgenstein's phrase, what ‹can be taken in by the ear›. Depth grammar, on the contrary, concerns the *use* of a sentence, that is, is the description and the clarification of the circumstances and the consequences of its use".

[13] Ludwig Wittgenstein, *Philosophical Investigations*, transl. G. E. M. Anscombe, 3rd ed., Oxford: Basil Blackwell, 1986.

from culpability[14] — is a question that still remains open. For this purpose it is convenient to distinguish between *condemnatory* and *non-condemnatory* verbs (infra 7).

3. Behavior rules and imputation rules

Since the end of the nineteenth century, the Criminal Law Theory constantly distinguishes between *norm* and *law*: the offender performs the conduct described by the legislator in the incriminating prescription and therefore violates the norm underlying the legal description. This idea finds expression in a famous conclusion: the offender actually does not infringe the incriminating law, but behaves accordingly to it[15].

This account usually appears in association with the analytical tendency to decompose the incriminating law into two pieces, each of them conceived from its different recipient. The *primary precepts* contains a *behavior (conduct) rule*: an order given to the citizens for the purpose of coordinating social interaction. Diversely, the *secondary precept* contains a *sanction (decision) rule*: an order given to the officials in charge of the criminal prosecution, namely the judge, concerning to what they must do to ensure the legal system efficiency. Despite terminological disagreements, the essence of such a matrix differentiation remains undisputed not only in the specific field of Criminal Law Theory, but also in the broader area of Legal Theory (General Jurisprudence; Science of Law)[16].

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[14] My reasoning assumes the definition of crime as an *(i)* unlawful *and (ii)* culpable event. On the difference between wrongdoing (the wrongfulness of the *act*) and culpability (the blameworthiness of the *actor*) as both elements os criminal liability: Heidi M. Hurd, «Justification and Excuse, Wrongdoing and Culpability», *Notre Dame Law Review* 74 (1999) 1551 f.; Jeroen Blomsma / David Roef, «Justifications and excuses», aa.vv., ed., *Comparative Concepts of Criminal Law*, 2nd ed., Cambridge: Intersentia, 2016, 157 f., 200 f. This analytical has become a victim of growing criticism. For some report: Bruno de Oliveira Moura, «Sobre o sentido da delimitação entre ilícito e culpa no Direito Penal», *Revista Brasileira de Ciências Criminais* 87 (2010) 7 f.

[15] Karl Binding, *Die Normen und ihre Übertretung*, Band i, 4. Aufl., 1922, 3 f. Also going on this line: Ioannis Giannidis, *Theorie der Rechtsnorm auf der Grundlage der Strafrechtsdogmatik*, Ebelsbach: Gremer, 1979, 18 f.; Karl Heinz Gössel, «Die normwidrige strafbare Unterlassung als ontischer Sachverhalt», Martin Heger / Brigitte Kelker / Edward Schramm, Hrsg., *Festschrift für Kristian Kühl*, München: Beck, 2014, 225 f.

[16] With historical references: Meir Dan-Cohen, «Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law», *Harvard Law Review* 97 (1983) 625

This aproach generally appears together with another distinction, which brings some influences from the *Jurisprudentia Universalis*, currently rediscovered by a particular segment of analytical philosophy. Indeed, an important sector of the general theory of norms has been doing a valuable effort to rehabilitate the traditional difference between *rules of behavior* and *rules of ascription*, which, in turn, is the deepest root of the distinction between *wrongdoing* (related to the *fact* itself) and *attribution* (related to its *offender*)[17].

Present in a more or less explicit way in authors like Samuel Pufendorf (1632-1694) and Joachim Georg Daries (1714-1791), such an scheme points out that, by definition, the rules which draws the universe of illicit conducts are different from the rules which draws the conditions by which a certain behavior can be ascribed to somebody else as something that expresses their freedom exercise[18].

Behavior rules (or simply «norms») work both in prospective and retrospective dimensions: (*i*) as standards which guide the citizens in their interaction in society, by indicating what they can (or can not) do in the future; (*ii*) as measurement parameters according to which the judge evaluates the social damage content associated with the perpetration, applying the norm to a specific act performed in a specific situation occurred in the past (*applicatio legis ad factum*). On the other hand, as a type of hypothetical imperative, ascription rules work only in retrospective and are addressed only to the judges[19].

It is interesting to underline that such a scheme evokes a *perspective matter*. The distinction is formulated in relation to the concerned person: the rules which are imputation rules from the point of view of *the person to whom the behavior was ascribed* (offender), are behavior

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f.; Joachim Renzikowski, «Normentheorie und Strafrechtsdogmatik», Robert Alexy, Hrsg., *Juristische Grundlagenforschung, ARSP* 104, Stuttgart: Franz Steiner Verlag, 2005, 115 f. For a more systematic concern: Bernhard Haffke, «Die Bedeutung der Differenz von Verhaltens- und Sanktionsnorm für die strafrechtliche Zurechnung», Bernd Schünemann / Jorge de Figueiredo Dias, Hrsg., *Bausteine des europäischen Strafrechts. Coimbra-Symposium für Claus Roxin*, Köln: Heymanns, 1995, 89 f.

[17] George Fletcher, *Basic Concepts of Criminal Law*, New York: Oxford University Press, 1998, 77 f.

[18] On the evolution of this frame: Joachim Hruschka, «Zurechnung seit Pufendorf. Insbesondere die Unterscheidungen des 18. Jahrhunderts», Matthias Kaufmann / Joachim Renzikowski, Hrsg., *Zurechnung als Operationalisierung von Verantwortung*, Frankfurt am Main: Peter Lang, 2004, 17 f.

[19] Jan C. Joerden, *Strukturen des strafrechtlichen Verantwortlichkeitsbegriffs. Relationen und ihre Verkettungen*, Berlin: Duncker & Humblot, 1988, 13 f.; Tobias Rudolph, *Das Korrespondenzprinzip im Strafrecht. Der Vorrang von ex-ante-Betrachtungen gegenüber ex-post-Betrachtungen bei der strafrechtlichen Zurechnung*, Berlin: Duncker & Humblot, 2006, 26-32.

rules from the point of view of *the person who ascribes* (judge), because they tell them if a concrete behavior should be assigned as an action or as individual culpability[20].

In this framework, imputation rules operate on two levels: (*i*) the *imputatio facti* checks the conditions to ascribe a behavior as *actio libera* (capacity to act otherwise); (*ii*) the *imputatio iuris* approaches the conditions to assigning a behavior already qualified as unlawful act to offender's demerit (capacity to priority motivation).

At first level the judge evaluates the agent's bodily and intellectual abilities regarding to some alternative behavior: here arises, for instance, the problem of physical (absolute) coercion and the mens rea (dolus) announcement. At second level the judge examines the agent's volitional abilities regarding to the possibility to prefer a particular intention at the expense of another competing (rival in those particular circumstances) intention. Here comes up, for example, the assessment of the knowledge about the wrongfulness of the act (the mistake of law) and the account of psychological (relative) coercion[21].

Because they are exclusively addressed to the judge, the imputation rules tend to occupy a prominent place in *Juristenrecht* topics, mainly in the discussion about *Richterrecht*[22]. Indeed, ascription rules easily become the flash point for those who, starting from the *ante casum* (at the moment of creation of the legal precept) norm, are engaged in defining the criteria which could guide the judicial task of searching for or building the so-called «case rule» not as a *post casum* (at the moment of the judicial decision about the fact) norm but rather as the norm *in tempore casus*, that is, as a criteria which would have been available for the judge at the moment of the behavior whose ascription is approached[23].

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[20] Joachim Hruschka, «Verhaltensregeln und Zurechnungsregeln», *Rechtstheorie* 22 (1991) 451 (note 7). In the same horizon, distinguishing the «ascribed subject» and the «ascribing subject»: Gunther Biewald, *Regelgemäßes Verhalten und Verantwortlichkeit. Eine Untersuchung der Retterfälle und verwandter Konstellationen*, Berlin: Duncker & Humblot, 2003, 32-34.

[21] See the references in the two previous notes.

[22] Both with their distinctive practical reasoning (*phonesis/prudentia*). On this aspect, inside the jurisprudentialism of the Coimbra legal philosophy scholars, see the conclusive remarks of Aroso Linhares, *Entre a reescrita pós-moderna da modernidade e o tratamento narrativo da diferença ou a prova como um exercício de ‹passagem› nos limites da juridicidade (imagens e reflexos pré-metodológicos deste percurso)*, Coimbra: Coimbra Editora, 2001, 858 f. Detailed about the analogical feature of the realization of law: Fernando Pinto Bronze, *Analogias*, Coimbra: Coimbra Editora, 2012, 20 f., 164 f.

[23] Apparently in this way: Francisco Aguilar, «A norma jurídica *in tempore casus*: o caso como fundamento dos (e limite aos) poderes legislativo e jurisdicional»,

4. The sequence issue

So far we have a provisional image of the different structure and content of the rules which take part in the elaboration of criminal responsibility. Now it is necessary to define how different normative species might be articulated in such a way as to provide not only an understandable final result (a correct decision of conviction or discharge), but also a consistent grounding in its presuppositions.

Here opinions fall into two streams. On the one side are those who propose a subjectivist norm conception, sustaining that *imputatio facti* always precedes *applicatio legis*, which is succeeded by *imputatio iuris*[24]. On the other side are those who support an objectivist norm conception, defending that *applicatio legis* is always the first moment of analysis, which is succeeded by *imputatio facti* and *imputatio iuris*[25]. From my standpoint, this question should be decided, for pragmatic reasons, in favor of that second option.

To achieve a minimal consistency in its operation, a Criminal Law really concerned with the protection of the most important individual and collective goods in face of the most serious forms of attack must give priority — as a starting line for its intervention, including the judicial action — for a type of reasoning which begins by analyzing the criminal event from the perspective of its outcome, with regard to its social devaluation.

However, the priority announcement does not prevent the transposition of something which has been recognized in the hermeneutic field, engraved in a famous image[26]: a kind of *go-and-come-back-in-the-point-of-view* among the relevant elements. But in this case is no longer a go-and-come-back between normative and factual circumstances reciprocally viewed in the light of a *tertium comparationis*, but rather a go-and-come-back between different judgments made on the basis of different types of rules[27].

Anyway, such an articulation scheme does not predetermine the

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O Direito 148 (2016) 825 f., proposing (883) a retrospective "reconstitution" or "mimicking" of "the norm in the case" by the "norm of the case".

[24] Vide again the mentions above, in notes 19 and 20.

[25] See the references in notes below, in note 38.

[26] Karl Engisch, *Logische Studien zur Gesetzesanwendung*, 3. Aufl., Heidelberg: Winter, 1963, 15. With some methodological details: Marijan Pavčnik, «Das „Hin- und Herwandern des Blickes". Zur Natur der Gesetzanwendung», *Rechtstheorie* 39 (2008) 557 f.

[27] Bruno de Oliveira Moura, *A não-punibilidade do excesso na legítima defesa*, Coimbra: Coimbra Editora, 2013, 112-119.

answer to the question about if the behavior unlawfulness presupposes — at least in the Criminal Law field — some ascription stage. Because, in principle, it is still possible to allocate that imputation moment only in the offender's culpability, *i. e.*, in their personal blameworthiness. I will return to this topic below.

5. Accordion effect: not only for actions but also for norms

In the field of philosophy of action — especially in the discussion on the criteria for identifying one singular action — the *accordion effect* is an expression used to represent metaphorically the language property that allows a given human action to be submit to different descriptions, some more complex, some simpler, but all equally valid[28].

In fact, within certain assumptions, we can inflate or deflate — freely and without loss of semantic content — the statements applied to describe the same behavior considered as a whole. It is always possible to stretch or contract the formulation to include or exclude therein some causal sequence of changes in a given state of affairs[29].

We might say: «Jones opened the door and thereby caused Smith to be startled, who therefore suffered a heart attack and died»; or we also could say, in a less expensive manner, that «Jones killed Smith». As well as the complex statement «Peter threw a stone and thereby shattered a glass window, whose fragments have reached Paul's body, who was sitting behind the destroyed object, and therefore has suffered some harms in his physical integrity» can be replaced by the simpler enunciation «Peter injured Paul». And vice versa.

In this context, the theoretical controversy is whether and in what extent the transition between those utterances — which at the same time implies the transition from an causality announcement to an authorship or agency announcement[30] — requires a specific causal

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[28] Joel Feinberg, «Action and responsibility», Max Black, ed., *Philosophy in America*, London: George Allen & Unwin Ltd., 1965, 146.

[29] Bruno de Oliveira Moura, «Tipos de tipos, estrutura do delito e nexo causal. Considerações sobre o pensamento classificatório no Direito Penal», *Revista Portuguesa de Ciência Criminal* 27 (2017) 484 f.

[30] Donald Davidson, *Essays on Actions and Events*, New York: Oxford University Press, 1980, 53: "A man moves his finger, let us say intentionally, thus flicking the switch, causing a light to come on, the room to be illuminated, and a prowler to be alerted. This statement has the following entailments: the man flicked the switch, turned on the light, illuminated the room, and alerted the prowler. Some of these things he did intentionally, some not; beyond the finger movement, intention is

verb (similar to «kill» or «injury») eventually available in the regional language or if such move could be warranted by a generic causal verb («to cause» something)[31].

Once the law creation (by legislator) and the norm application (by judge) are likewise actions in itself, seems natural to conclude that such juridical activities are also submitted to an accordion effect. So any prohibition object may be put under more or less extended prescriptive statements, as long as it could be interesting (hermeneutically useful) for understanding the rule's specific purpose.

For instance, the homicide prohibition admits several equally valid formulations, like these: (*i*) «do not kill somebody else!»; (*ii*) «do not perform any behavior capable of causing somebody else's death!»; (*iii*) «do not shoot a gun causing somebody else's death!»; (*iv*) «do not load a gun, aim it against a human being and pull the trigger causing their death!». The limits to this normative reformulation are given by textual frame mapped in the incriminating law, *i. e.*, in the borders of natural language outlined in the *ante casum* textual norm by the legislative power[32].

The next question is to know if the ascription conditions — mainly the capacity to act (physical ability to do so and knowledge about the factual circumstances) — might be inserted in the judicial

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irrelevant to the inferences, and even there it is required only in the sense that the movement must be intentional under some description. In brief, once he has done one thing (move a finger), each consequence present us with a deed; an agent causes what his action cause". In this analytical account, that piece of behavior which can no longer be formally decomposed (or whose decomposition, praxiologically, does not make much sense) — in the former example the act of moving a finger — is the so-called «basis-action». About that and on the relativity of intentional description of events: Urs Kindhäuser, «Zum strafrechtlichen Handlungsbegriff», Hans-Ullrich Paeffgen *el al.*, Hrsg., *Festschrift für Ingeborg Puppe*, Berlin: Duncker & Humblot, 2011, 44 f.

[31] For a picture of the whole discussion in this frame: Michael E. Bratman, «What is the Accordion Effect?», *The Journal of Ethics* 10 (2006) 5 f.

[32] Bruno de Oliveira Moura, «O lugar da analogia no Direito Penal», M. P. Queiroz Macêdo / Wagner Marteleto, org., *Temas avançados do Ministério Público*, Salvador: Juspodivm, 2015, 223 f. On the controversies about the existence of a previous literal enclosure made by the words used in the law: Mathias Klatt, *Theorie der Wortlautgrenze. Semantische Normativität in der juristischen Argumentation*, Baden-Baden: Nomos, 2004, 40 f.; Hans Kudlich / Ralph Christensen, «Wortlautgrenze: Spekulativ oder pragmatisch?», *Archiv für Rechts- und Sozialphilosophie* 93 (2007) 128 f. In the specific field of Criminal Law see A. Castanheira Neves, «O princípio da legalidade criminal: o seu problema jurídico e o seu critério dogmático», *Boletim da Faculdade de Direito de Coimbra*. *Número Especial. Estudos em homenagem ao Prof. Doutor Eduardo Correia*, Vol. I (1984) 307 f.

reworking of the norm *in tempore casus*, in a way to provide a kind of statement like this: «if you have the physical ability to do so and the knowledge about the factual circumstances, do not kill someone else!».

6. The private language argument and the potential asymmetry principle

In my opinion, the answer should be negative. By connecting the determination of the behavior rule content to the capabilities of their addressee, a subjectivist norm conception makes impossible, in general and abstract terms, to distinguish between right and wrong behavior. When the rule's meaning becomes to depend on the perspective of those to whom it is addressed, the normative utterance simply can not anymore defines or distinguish any form of behavior.

Both the judgment of agreement (conformity) and the judgment of contradiction (nonconformity) have no more sense when any type of behavior may be (subjectively) considered to be suitable or mismatched to the normative utterance. To talk about rules presupposes that the determination of its propositional content can not depends on the personal aptitudes (especially the perceptions) of their possible recipients. The norm only can be a criterion of legally (in)correct behavior if what it orders could be identified or recognized independently from the perspective of their addressee.

Behind this sentence[33] is the plea against the possibility of a private language[34]. In his *Philosophical Investigations*, Wittgenstein points out (§ 201):

> This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict here. It can be seen that there is a misunderstanding here from the mere fact that in the course of our argument we give one interpretation after another; as if each one contented us at least for a moment, until we thought of yet another standing behind it. What this shews is that there is a way of grasping a rule which is *not* an *interpretation*, but which is

[33] See Juan Pablo Mañalich, *Nötigung und Verantwortung*, 44 f.; Bruno de Oliveira Moura, *Ilicitude penal e justificação*, 127 f.

[34] On this argument: Walter Grasnick, *Über Schuld, Strafe und Sprache. Systematische Studien zu den Grundlagen der Punktstrafen- und Spielraumtheorie*, Tübingen: Mohr Siebeck, 1987, 90 f.; Manfred Herbert, *Rechtstheorie als Sprachkritik. Zum Einfluß Wittgensteins auf die Rechtstheorie*, Baden-Baden: Nomos, 1995, 79 f., 95 f., 158 f.

> exhibited in what we call 'obeying the rule' and 'going against it' in actual cases. Hence there is an inclination to say: every action according to the rule is an interpretation. But we ought to restrict the term 'interpretation' to the substitution of one expression of the rule for another.

So Wittgenstein concludes (§ 202):

> And hence also 'obeying a rule' is a practice. And to think one is obeying a rule is not to obey a rule. Hence it is not possible to obey a rule 'privately': otherwise thinking one was obeying a rule would be the same thing as obeying it.

Things get even clearer in Wittgenstein's final notebook, published posthumously as *On Certainty*[35]. With regard to his epistemological remark about mental states and its differentiation from another concepts as well as on the ability to offer compelling grounds (reasons, justifications and evidences) for some belief inside the language-game of making knowledge-claims, we can read that (§ 308):

> 'Knowledge' and 'certainty' belong to different *categories*. They are not two 'mental states' like, say, 'surmising' and 'being sure'. (…) What interests us now is not being sure but knowledge. That is, we are interested in the fact that about certain propositions no doubt can exist if making judgments is to be possible at all. Or again: I am inclined to believe that not everything that has the form of an empirical proposition *is* one.

Here appears the general parameter *rejoinder which does make no sense*: a proposition makes sense if and only if its negation (the doubt about the statement) makes sense[36]. In this account, to make sense,

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[35] Ludwig Wittgenstein, *On Certainty*, G. E. M. Anscombe / G. H. von Wright, ed., Oxford: Basil Blackwell, 1969.

[36] Stressing this aspect under the interpretation of that last quotation: Newton Garver, «Philosophy as grammar», Hans Sluga / David G. Stern, ed., *The Cambridge Companion to Wittgenstein*, Cambridge: Cambridge University Press, 1996, 140-150: "Being sure (elsewhere called 'subjective certainty') is a mental state in the sense that I can say when I am sure, and I can be sure quite apart from any objective certainty or from anyone else being sure. Thought it is a mental state rather than a sensation, being sure has all the apparent privacy of sensation. Certainty, on the other hand, seems presented in this passage as a transcendental requirement for the practice of making judgments. There are no *particular* propositions about which one must be certain, but some propositions must be certain. Since making judgments is a public practice (even though individual judgments are private), the certainty presupposed by it must be in a different category from 'mental states'. 'Certainty' and 'knowledge' are both social rather than private, but what is certain 'lies beyond being justified or unjustified' (OC 359), whereas a knowledge-claim is subject to doubt and confirmation. All three of these categories are identified by reference to language-games, and are distinguished by different discourse conditions (circumstances in which expressions of that category fit into the stream of life) and different discourse possibilities (appropriate discourse continuations). The catego-

a rule is only a rule for someone as long this person is not allowed to determine for themself what is ruled[37]. The norm propositional content must be available in our public language. Norms do not say — even because they are not able to do so — to what extent its addressee is tied to its command. They do not offer any information about the conditions which enable us to say that somebody else is responsible for failing to recognize the behavior standard in an effective way for action.

This question can only be decided in the light of another rule, which enunciates the liability criteria for the noncompliance (nonfulfillment) of the behavior rule, ascribing the nonconformity as a duty violation. The offender's capabilities are important to make de transition between norm and duty. That is why they must be considered for the judgment about if a behavior follows or not follows the norm. But those capacities are irrelevant to the judgment about the behavior suitability (conformity) to the normative statement.

Since the conditions of personal attachment to the prescriptive utterance can not be determined by behavior rule itself, the (intentional) avoidance capacity does not represent a moment of the behavior antinormativeness, but only a requirement for the subsequent ascription of the antinormative behavior as a duty violation. Not all behavior in conformity (adjustment) with the norm content can be assigned as a behavior which follows the norm. Conversely, not all misconduct (mismatch) with the norm implies the noncompliance (nonfulfillment or unfollow) of the norm.

Let's get a pretty simple picture of everyday life. Just like the behavior of who reads the newspaper while having breakfast can not be understood as a «following» (observance or obedience) of homicide prohibition, the behavior of who shoots at a big box without knowing or even without be able to know that there was a person in there can not be understood as a «unfollowing» (nonobservance or nonobedience) regarding this interdiction. Therefore, the denial of rule self-reference has a crucial heuristic-explanatory meaning: it opens space to recognize that contrariness to the norm and contrariness to the duty

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ries are therefore grammatical categories, though the grammar in question has to do with discourse and with *uses* of language rather than with word-forms or phrase structures. 'Right' and 'wrong' are descriptive in this context. They signify being in accord or not in accord with constitutive rather than regulative rules".

[37] Again with Ludwig Wittgenstein, *Philosophical Investigations*, p. 222: "I can know what someone else is thinking, not what I am thinking. It is correct to say 'I know what you are thinking', and wrong to say 'I know what I am thinking'. (A whole cloud of philosophy condensed into a drop of grammar.)".

are potentially divergent or asymmetric attributes[38].

Actually, this possibility of divergence is only a special form to express the general possibility of asymmetry between those two species of grammar: the «surface» and «depth» ones[39]. In this framework, a behavior can be antinormative without a breach of duty: for example, in the typical case of offensive performance without dolus (intention *lato sensu*). And in another hand, inversely, a behavior may violate a duty without being antinormative: for instance, in the typical case of the criminal attempt (inchoate offence).

To confirm this relation, we can mention the *subjective elements of the justification causes* (self-defence, necessity, etc.) and the so-called *inversion principle*: the perpetration of the wrong act under a mistake of factual circumstances (complete *actus reus* without intention) is the inverse hypothesis to the beginning of execution which is not consummated due to reasons beyond the agent's control (intention without complete *actus reus*)[40].

7. Final remarks

As far as I can see, in the above outlined framework the conclusion is always the same: the personal capabilities of rule's addressee do

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[38] Urs Kindhäuser, *Gefährdung als Straftat. Rechtstheoretische Untersuchungen zur Dogmatik der abstrakten und konkreten Gefährdungsdelikte*, Frankfurt am Main: Vittorio Klostermann, 1989, 18 f., 58 f.; Friedrich Toepel, *Kausalität und Pflichtwidrigkeitszusammenhang beim fahrlässigen Erfolgsdelikt*, Berlin: Duncker & Humblot, 1992, 16 f., 31 f.; Joachim Vogel, *Norm und Pflicht bei den unechten Unterlassungsdelikten*, Berlin: Duncker & Humblot, 1993, 41 f., 72 f.

[39] Pointing out this particular feature: Francesco Bellucci, "Wittgenstein's Grammar of Emotions", 5: "Two sentences may well 'sound alike' (pi: § 134) and may nonetheless differ markedly in the circumstances of their use. For instance, the surface grammar of 'Bachelors are unmarried men' is akin to that of 'Bachelors are unhappy men'; yet, they differ in depth grammar: the latter says something factual about bachelors, while the former teaches us how to use 'bachelor'. What appears alike in surface grammar might be not in depth grammar, and expressions collected with regard to their superficial similarity might result dissimilar in the way they are used. Surface grammar is deceptive, for it distorts our view und misleads us in conceptual analysis. What is needed is a method that might enable us to have an overview over the different uses an expression has in our language, over and above its surface syntax, and to tabulate these uses in *surveyable representation*".

[40] For this inversion, also considering that potential asymmetry: José de Faria Costa, *Direito Penal*, Lisboa: Imprensa Nacional, 2017, 517, 518 and 554. With some skepticism: Tonio Walter, *Der Kern des Strafrechts. Die allgemeine Lehre vom Verbrechen und die Lehre vom Irrtum*, Tübingen: Mohr Siebeck, 2006, 368 f.

not influence the determination of its proposional content. Whereas the contrariness to the norm constitutes the *object (substratum),* the offender's intentional aptitudes provides the *reason (criterion)* for imputation. That is why the so-called «personal wrongdoing theory» *(personale Unrechtslehre)* fails.

The criticism raised here could be faced with the plea arguing that the capabilities of the conduct rules addressees are also objectively defined by norms, according to standards of normal power or abilities of the average man, occasionally enriched by the specific social role which should be played by the agent (*v. g.* businessman). This is the proposal of the so-called «objective ascription» *(objektive Zurechnung)*[41]. *Brevitatis causa*, I just want to point out that this approach simply reinforces the mixture between the object and the criterion of imputation, this time by mixing the subject of ascription itself[42].

Only to summarize my account: we have seen that, at least in its generality or universality claim, the Ascriptivism raises serious doubts. But things change when we look to some excepcional cases where the action described by the incriminating law simply can not be understood without the specific grammar of ascription. For this effect, we could distinguish between condemnatory and non-condemnatory verbs[43].

So at least in crimes whose legal configuration uses a *non-condemnatory verb*, there is no compelling reason to restrict the *applicatio legis* to conducts ascribed at first level, *i. e.*, to a behavior performed in a situation in which another one was possible. Let's think about the homicide prohibition: who, under physical constraint or without knowledge about factual circumstances, shoots another person and thereby takes their life, does not «kill» less than who does

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[41] With a great influence in the development of this theory: Claus Roxin, "Gedanken zur Problematik der Zurechnung im Strafrecht", in Eberhard Barth, Hrsg., *Festschrift für Richard Honig*, Göttingen: Schwartz, 1970, 133 f. Recently, proposing a reinterpretation based on the normative setting (abstract standardization) of some competences or tasks which belongs to the concept of person: Michael Pawlik, *Das Unrecht des Bürgers. Grundlinien der Allgemeinen Verbrechenslehre*, Tübingen: Mohr Siebeck, 2012, 160 f., 295 f. Investing the same effort, before: Heiko Hartmut Lesch, *Der Verbrechensbegriff. Grundlinien einer funktionalen Revision*, Köln: Heymanns, 1999, 12 f., 210 f., 255 f.

[42] For a critical review with regard to the grounds of that doctrine: Volker Haas, "Die strafrechtliche Lehre von der objektiven Zurechnung. Eine Grundsatzkritik", Matthias Kaufmann / Joachim Renzikowski, Hrsg., *Zurechnung als Operationalisierung von Verantwortung*, Frankfurt am Main: Peter Lang, 2004, 202 f.

[43] So George Pitcher, "Hart on action and responsibility", 230 f.

it intentionally. In both cases the opposition against the norm will be the same.

However, this does not exclude that a different conclusion may arises in other criminality fields, especially where the prohibition object is described by a *condemnatory verb*. It is enough to remember that some legislations autonomises a description for the murder crime (usually under the form of malicious or premeditated homicide), where makes perfect sense to say that the antinormativeness judgment presupposes that the behavior — at least in some degree — must be ascribed at first level (*imputatio iuris*): there is no sense in talking about «murder» if the suspect has acted under physical duress or if he has acted without knowledge about the factual circumstances.

The same will happen in other types of crimes, as perjury, false statements, illegal appropriation, trust abuse, patrimonial reception and stellionate. But in all these cases imputation rules exceptionally plays an improper function: it works to define the ascription's *object*, the very specific behavior form which, by the nature of things (ontologically), can go against the norm. Anyway, incriminating precepts involving condemnatory verbs represent only a tiny sector of the whole legal system[44].

[44] On the issues rased here, although without invoking that verbal distinction, with some examples: Stephan Stübinger, "„Subjektiv-objektive" Tatbestandsmerkmale", Hans-Ullrich Paeffgen *et al.*, Hrsg., *Festschrift für Ingeborg Puppe*, Berlin: Duncker & Humblot, 2011, 270 f.