http://dx.doi.org/10.12775/CLR.2020.003

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INDUCEMENT, ENCOURAGEMENT, OR ASSISTANCE TO SELF-MUTILATION IN BRAZILIAN CRIMINAL LAW. THE LIMITS BETWEEN THE BASIC OFFENCE AND THE RESULT-QUALIFIED OFFENCE FOR SIGNIFICANT AND SERIOUS BODILY INJURIES

Abstract

The Brazilian Congress recently enacted a profound modification to Article 122 of the Brazilian Criminal Code, through which it criminalised the conducts of inducement, encouragement, or assistance to self-mutilation. The justification for this was the need to prevent behaviour that encourages young people to practise self-mutilation, a phenomenon manifested worldwide in online social networking groups (so-called "challenges"). In addition to the basic offence contained in Article 122, two types of result-qualified offences were introduced, namely a result-qualified offence for significant and serious bodily injuries (para. 1) and a result-qualified offence for death (para. 2). However, there are no clear limits between the basic offence and the result-qualified offence for significant and serious bodily injuries. In this sense, in this paper I intend to analyse the problem of the scope and limits of the newly introduced basic offence and in its result-qualified offence of para. 1 of Article 122.

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Keywords

self-mutilation – result-qualified offence – inducement – encouragement and assistance – Brazilian Criminal Law – Brazilian Criminal Code

Introduction

Article 122 of the Brazilian Criminal Code ("BrazCC") was substantially modified by the recently enacted Law No. 13.968 of 26.12.2019. This law had its origin in a draft Bill proposed in the Brazilian Federal Senate (draft Bill No. 664/2015). This draft Bill, which was proposed on October 1, 2015, had the purpose of creating a legal norm to criminalise the behaviour of "inducement, encouragement, or assistance to self-mutilation of children or adolescents", by including Article 244-C into Law No. 8.069/1990 (also known as "Statute of the Child and Adolescent",[1] in Brazil).

The justifications presented in the draft Bill for the creation of this norm were, on the one hand, the observed increase in the practice of self-mutilation, which is characterised by the deliberate self-infliction of physical harm, *without the intention of committing suicide*, by adolescents.[2] And on the other hand, the discovery of groups in online social networks that *encourage* this practice among children and adolescents, in the form of so-called "challenges".[3]

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[1] In Brazil, a person under the age of 18 cannot be held criminally responsible for the commission of an alleged offence, pursuant to Article 27 of the BrazCC and Article 228 of the Federal Constitution. Law No. 8.069/1990 is the special legislation that regulates the full protection of children and adolescents in Brazil. According to this law, a person up to the age of 12 years is considered a "child", and a person between the ages of 12 and 18 is considered an "adolescent". Furthermore, this law creates specific norms that classify as crime certain conducts that are committed against children and adolescents, as well a specific system of legal consequences applicable to children and adolescents who eventually commit acts defined as crimes (so-called "infraction acts [*atos infracionais*]"). In Brazil there is no "Juvenile Criminal Law", as there is, for example, in Germany (*Jugendstrafrecht*).

[2] Federal Senate, *Federal Senate Diary*, 664, (2015), 19.

[3] The "challenges" that are mentioned here consist of the dangerous viral games that aim to encourage adolescents to commit acts of violence such as self-mutilation, self-injury, and even suicide, whose phenomenon is manifested worldwide in online social

The draft Bill was submitted to the Chamber of Deputies,[4] where it was processed under No. 8.833/2017. The Commission of Constitution, Justice, and Citizenship, of the Chamber of Deputies, voted for its approval with some modifications. However, during the Extraordinary Session at the Chamber of Deputies, the Science, Technology, Communication, and Informatics Commission presented Plenary Amendment No. 1/2019. Instead of including the prohibitive norm into the "Statute of the Child and Adolescent", the Plenary Amendment proposed its inclusion into the BrazCC, through the modification of its Article 122 (which only provided for the offence of "inducement, encouragement, or assistance to suicide"), in order to include the figure of "self-mutilation" and create other derived prohibitive norms. This amendment has been subsequently approved.

When it returned to the Federal Senate, the Bill was eventually approved under the terms of the Amendment. Thus, the Law that modified Article 122 of the BrazCC was finally published in the Brazilian Official Gazette on 27.12.2019, and came into force on the same date. With the new wording Article 122 BrazCC now establishes as follows:

> Inducement, encouragement, or assistance to suicide or self-mutilation
> Article 122. To induce or encourage someone to commit suicide or to practise self-mutilation or to provide material assistance to do so:

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networking groups. In Brazil, there have already been numerous cases of self-mutilation, which have resulted from the so-called challenges, for example, "cutting challenge", "salt and ice challenge", "fire fairy", "Momo challenge", and others. About this information see Estadão, *Cresce alerta para automutilação entre crianças e adolescentes no Brasil* [Alert for self-mutilation among children and adolescents in Brazil], 4.5.2019, available at https://saude.estadao.com.br/noticias/geral,cresce-alerta-para-automutilacao-entre-criancas-e-adolescentes-no-brasil,70002815855 [last accessed 18.1.2020].

[4] It is important to clarify that the Brazilian Legislative Branch is exercised by the National Congress, which is bicameral, i.e. constituted by the Chamber of Deputies and the Federal Senate (pursuant to Article 44 of the Federal Constitution), and that in each of these entities there are permanent, temporary or mixed Commissions; cf. G. Mendes, G. Coelho and P. G. Branco, *Curso de Direito Constitucional*, Saraiva, 2010, p. 981–982; for a detailed analysis of the structure and functioning of these entities, see J. A. Silva, *Processo Constitucional de formação das leis*, Malheiros, 2017, p. 45–49. For an overview of the Commissions that are part of the Brazilian Legislative and their attributions, in the Chamber of Deputies, Comissões available at https://www.camara.leg.br/comissoes/ [last accessed 18.1.2020]; see also Federal Senate, Comissões available at https://

Penalty – imprisonment, from 6 (six) months to 2 (two) years.
§ 1º If the self-mutilation or attempted suicide results in bodily injury of a significant or serious nature, under the terms of paragraphs 1 and 2 of Article 129 of this Code:
Penalty – imprisonment, from 1 (one) to 3 (three) years.
§ 2º If suicide is committed or if self-mutilation results in death:
Penalty – imprisonment, from 2 (two) to 6 (six) years.[5]

Before this change, the following behaviours were prohibited by Article 122, *caput*, of the BrazCC: "to induce or encourage someone to commit suicide or to assist him in doing so". The punishment for this offence varied according to the consequences, namely: "imprisonment, from two to six years, if the suicide is committed; or imprisonment, from one to three years, if the attempted suicide results in significant and serious bodily injury". Therefore, only inducement, encouragement, or assistance *of suicide* were encompassed by the criminal norm. With the changes, the current legal norm criminalises the conducts: "to induce or encourage someone to commit suicide or to practise self-mutilation, or to provide material assistance to do so". Moreover, the punishment became "imprisonment, from six months to two years". Consequently, the legal norm came to encompass inducement, encouragement, or assistance *not only* to suicide, *but also* to self-mutilation. Furthermore, the paragraphs of the new Article 122 of the BrazCC now establish types

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legis.senado.leg.br/comissoes/pesquisa_comissao?%200&tipo=prm,sub,cpi,tmp,mpv,vet&casa=sf,cn [last accessed 18.1.2020].

[5] Translated by the Author. The cited normative text was originally written in Portuguese, and reads as follows:

Induzimento, instigação ou auxílio a suicídio ou a automutilação

Art. 122. Induzir ou instigar alguém a suicidar-se ou a praticar automutilação ou prestar-lhe auxílio material para que o faça:

Pena – reclusão, de 6 (seis) meses a 2 (dois) anos.

§ 1º Se da automutilação ou da tentativa de suicídio resulta lesão corporal de natureza grave ou gravíssima, nos termos dos §§ 1º e 2º do art. 129 deste Código:

Pena – reclusão, de 1 (um) a 3 (três) anos.

§ 2º Se o suicídio se consuma ou se da automutilação resulta morte:

Pena – reclusão, de 2 (dois) a 6 (seis) anos.

of result-qualified offences (paragraphs 1 and 2),[6] grounds of increased punishment (paragraphs 3, 4 and 5), and, finally, subsidiary offences (paragraphs 6 and 7).

However, the forms of participation required in the former Article 122 *caput*, which included intellectual or moral participation ("inducement", "encouragement") and material participation ("assistance"), have been maintained. Despite this fact, the scope of the legal norm provided for in Article 122, paragraph 1 – that establishes a result-qualified offence – conflicts with the basic offence established in the *caput* of this same Article. This is because Article 122, paragraph 1, states that "if the self-mutilation […] results in significant and serious bodily injury, under the terms of paragraphs 1 and 2 of Article 129 of this Code", the punishment shall range from 1 (one) to 3 (three) years of imprisonment. The issue is that the concept of self-mutilation comprises most of the situations listed in Article 129, paragraphs 1 and 2, of the BrazCC as a significant and serious bodily injury.[7-8] Thus, the following problem arises: when does the basic offence of inducement, encouragement, or assistance to

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[6] This paper follows the English language terminology adopted by M. Bohlander. Thus, the distinctions between basic offence (*Grunddelikt*), result-based offences (*Erfolgsdelikte*), result-qualified offences (*erfolgsqualifizierte Delikte*) was chosen because the corresponding terminology is similar to that adopted in Brazilian criminal law. Specifically in relation to result-qualified offences it is appropriate to refer to Bohlander's explanation: "A more substantial problem, both dogmatically and from the point of view of criminal policy, is posed by the so-called *erfolgsqualifizierte Delikte*, offence combinations where a basic offence has a further, extended consequence that is not an element of that basic offence"; with more details see M. Bohlander, *Principles of German Criminal Law*, Hart Publishing, 2009, p. 31.

[7] The wording of Article 129 of the BrazCC states:
Simple bodily injury
Art. 129. To injure the physical integrity or health of another person:
Penalty – imprisonment, from three months to one year.
Significant bodily injury
§ 1º If it results in:
I – inability to perform usual occupations for more than thirty days;
II – risk of death;
III – permanent debility of limb, sense or function;
IV – acceleration of childbirth:
Penalty – imprisonment, from one to five years.
Serious bodily injury

self-mutilation occur, if most of the cases, in principle, actually configure a result-qualified offence for significant or serious injuries?

The answer to this question seems to depend on two factors. On the one hand, it depends on the delimitation of the concept of self-mutilation, on the systematic position of Article 122 in the BrazCC and on its relationship with other legal norms (which refers to the objective elements of the offence = *objektiver Tatbestand*). On the other hand, it depends on the subjective elements and the purpose of inducement, encouragement, and assistance to self-mutilation (which, in turn, refers to the subjective elements of the offence = *subjektiver Tatbestand*).[9]

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§ 2° If it results in:
I – permanent incapacity to work;
II – incurable disease;
III – loss or disablement of member, sense or function;
IV – permanent deformation;
V – abortion:
Penalty – imprisonment, two to eight years. (Translated by the author)

[8] 8 Translated by the Author. The cited normative text was originally written in Portuguese, as follows:

Lesão corporal
Art. 129. Ofender a integridade corporal ou a saúde de outrem:
Pena – detenção, de três meses a um ano.
Lesão corporal de natureza grave
§ 1º Se resulta:
I – Incapacidade para as ocupações habituais, por mais de trinta dias;
II – perigo de vida;
III – debilidade permanente de membro, sentido ou função;
IV – aceleração de parto:
Pena – reclusão, de um a cinco anos.
§ 2° Se resulta:
I – Incapacidade permanente para o trabalho;
II – enfermidade incurável;
III – perda ou inutilização do membro, sentido ou função;
IV – deformidade permanente;
V – aborto:
Pena – reclusão, de dois a oito anos.

[9] About this terminology see M. Bohlander, *supra* note 6, p. 6.

I. The Objective Elements of the Offence, Pursuant to Article 122, *Caput*, BrazCC

With respect to the role of the principle of legality in the constitutional State, it has been stated that the appropriate judicial treatment of the *quaestio iuris* needs an essential precedent, which is the exclusive responsibility of the legislative power.[10] The essence of this affirmation is that it would be difficult for a judge to comply with the constitutional imperative of strict legality if the legislative power had not previously duly enacted legislation whenever necessary and, above all, had not done so with technical precision when it comes to legal language.

The relevance of this technical precision in Criminal Law dates back to the Illuminism, when the principle of legality was first formulated.[11] This principle was consolidated in the Latin wording *nullum crimen, nulla poena sine lege*,[12] and one of its main corollaries is the *lex certa*, which is also known in Brazilian literature as the "taxativity" or the "certainty of the criminal law".[13] In Brazil it is provided in Article 1 of the BrazCC and

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[10] Cf. P. Andrés Ibañez, "Jurisdición, jurisprudencia y principio de legalidad en el Estado constitucional", C*uadernos penales José María Lidón*, 2015, Issue 11, p. 17 and 28.

[11] For a thorough examination of the historical development of the principle, see V. Krey, *Keine Strafe ohne Gesetz. Eine Einführung in die Dogmengeschichte des Satzes "nullum crimen, nulla poena sine lege"*, Walter de Gruyter, 2014, p. 12–57; for a short historical survey of the principle and, mainly, presenting different understandings in civil and common law jurisdictions, see K. Ambos, '*Nulla poena sine lege* in International Criminal Law', in R. Haveman, O. Olusanya (eds), *Sentencing and sanctioning in supranational criminal law*, Cambridge: Intersentia, 2006, p. 17–35; synthetically, see H.-H. Jescheck, *Lehrbuch des Strafrechts Allgemeiner Teil*, Duncker & Humblot, 1988, p. 117–119.

[12] Cf. P. J. A. Feuerbach, *Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts*, G. F. Heyer's, 1847, p. 41; for an exhaustive survey of the idea of legality in Feuerbach, see W. Naucke, "Die Zweckmäßige und die Kritische Strafgesetzlichkeit, dargestellt an den Lehren J.P.A. Feuerbachs", *Quaderni Fiorentini*, 2007, Issue 36, p. 321–345; for a thorough examination of the principle of legality in Feuerbach and the philosophy of Kant, see J. Hruschka, *Kant und der Rechtsstaat, und andere Essays zu Kants Rechtslehre und Ethik*, Alber, 2015, p. 89–91; synthetically, see P.-A. Albrecht, *Die vergessene Freiheit*, Berliner Wissenschaft, 2003, p. 54–55.

[13] See mainly H. C. Fragoso, *Lições de Direito Penal Parte Geral*, Forense, 2006, p. 107–109; furthermore, see F. A. Toledo, *Princípios básicos de Direito Penal*, Saraiva, 1994, p. 29–31; see also N. Hungria, H. C. Fragoso, *Comentários ao Código Penal*, Forense, 1977, vol. 1, 1,

Article 5, XXXIX, of the Federal Constitution.[14] Such a model of legality was directed at the control of the State's arbitrariness;[15] it was based on the simple idea that the greater precision of a legal norm the greater the possibility that the judge applies it in conformity with an objective rationality or a logical syllogism.[16] In current legislation, however, this seems to suggest a simplistic and unfeasible understanding of the principle of legality. It is enough to note that, in theory, the accuracy may be so high that the case described is not expected to occur.[17]

Criminal legal norms are not simply articulated constructions, which depend on the semantic or syntactic exhaustion of the terms that compose them; in fact, they are designed according to their hermeneutic function. It is enough to observe that, despite the "technical precision" – semantic – in the elaboration of certain legal norms, a judge, even when supported by doctrine and jurisprudence, is often not able to deduce, beyond a reasonable doubt, whether certain conduct fits into a legal norm, or whether there is another norm in which it fits better. This is because

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p. 21; in addition, see A. Bruno, *Direito Penal Parte Geral*, Forense, 1959, vol. 1, p. 12–13; see also R. A. Dotti, *Curso de Direito Penal Parte Geral*, Forense, 2004, p. 59; synthetically, see C. R. Bitencourt, *Tratado de Direito Penal Parte Geral*, Saraiva, 2011, vol. 1, p. 41; similarly, see J. Tavares, *Fundamentos de Teoria do Delito*, Tirant lo Blanch, 2018, p. 60–61. See also Ambos, *supra* note 11, p. 20, who says that "the great German legal theorist Rudolf von Jhering emphasised that the rule of law is founded upon the formal meaning of legal wording."

[14] Article 1 of the BrazCC reads as follows: "There is no crime without a previous law that defines it. There is no penalty without previous legal provision"; and Article 5, XXXIX, of the Federal Constitution reads as follows: "There is no crime without a previous law that defines it, and no penalty without a previous legal provision" (translated by the author).

[15] In this sense, see Ambos, *supra* note 11, p. 19, noting that Beccaria "made the case for legal certainty, security and foreseeability to be guaranteed by the strict letter of the law against the arbitrary and unlimited interpretation by the judges"; in the same sense, see W. Naucke, "*Die robuste Tradition des Sicherheitsstrafrechts*", KritV, 2010, Issue 93, p. 129–131; in addition, see directly C. Beccaria, *Dei Delitti e delle pene*, Chez Molini, 1766, p. 19. In a critical sense, see E. R. Zaffaroni, 'La influencia del pensamiento de Cesare Beccaria sobre la política criminal en el mundo', *ADPCP*, 1989, Issue 42, p. 521 (and p. 549), who claims that Beccaria's ideas arrived in Latin America only in a mediated way.

[16] This is typical of a positivist view that is unsustainable today, as demonstrated by A. Kaufmann, *Das Verfahren der Rechtsgewinnung*, Beck, 1999, p. 1 *et seq*.

[17] Cf. G. Jakobs, *Strafrecht Allgemeiner Teil*, Walter de Gruyter, 1991, p. 78: "*Die Genauigkeit kann dabei in der Theorie so hochgeschraubt werden, daß nicht mehr zu erwarten ist, der beschriebene Fall werde sich auch ereignen*".

a legal norm is always a benchmark for many possible cases; it never translates a reality, but only the possibility of Law.[18]

The content of the prohibition prescribed in a legal norm is obtained through an analogical process that develops between two poles, namely the real phenomena and the legal text.[19] There is no doubt that legislative work is of paramount importance, insofar as its product culminates in the second of these poles. But it is not enough. The interpretation of a norm and a decision about a fact do not occur through the subsumption to the legal text, but through the analogy resulting from the unfolding between the norm text and the fact, one in the other.[20]

Article 122, *caput* and paragraphs, of the BrazCC is a paradigmatic example in this sense, because it reflects the problem that underlies the analogical process of transposing the meaning and scope of the norm. It shows that in prescribing the prohibition of an action, the work of the legislative power is not to recognise and reproduce existing types of reality,[21] but this work is of a technical nature, guided by criminal law legal concepts. Furthermore, it also demonstrates that this technique can make the hermeneutic process difficult, especially when it suffers from a systemic interconnection deficit.[22]

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[18] Cf. A. Kaufmann, *Analogie und "Natur der Sache"*, Decker and Müller, 1982, p. 11: "Die Norm ist immer nur eine *Maßstab* für viele *mögliche* Fälle, eben darum aber niemals die *Entscheidung* eines *wirklichen* Falles, das Gesetz also nicht die Wirklichkeit, sondern nur die Möglichkeit von Recht – damit aus dem Gesetz Recht wird, bedarf es zusätzlicher Bausteine".

[19] See Kaufmann, *supra* note 18, p. 14–15.

[20] Cf. W. Hassemer, *Tatbestand und Typus: Untersuchungen zur strafrechtlichen Hermeneutik*, Heymanns, 1968, p. 160.

[21] In this sense, see Hassemer, *supra* note 20, p. 153: "*Es geht bei der Arbeit des Gesetzgebers also nicht darum, in der Wirklichkeit schon vorhandene Typen zu erkennen und abzubilden*".

[22] The expression "systemic interconnection" is used here in the sense of Jakobs, *supra* note 17, p. 85: "*Wenn die strafrechtlichen Normen nicht wilkürlich sein sollen, müssen sie miteinander verbunden sein und in diesem Sinn ein System bilden (einen nicht notwendig vollständingen, aber im vorhandenen Teil wiederspruchsfreien Zusammenhang). Das System besteht nicht nur aus ungleichen Bauelementen; vielmehr wiederholen sich zahlreiche Merkmalsbezeichnungen bei zahlreichen Normen…*" ("If we do not want criminal norms to be arbitrary, they must be interconnected and, in this sense, form a system [a connection not necessarily complete, but free of contradictions in the part in question]. The system does not consist only of unequal components; differently, several characteristic descriptions are repeated in a variety of legal norms…") (Translated by the Author).

1. Definition of Self-mutilation

The first factor related to this problem concerns the definition and scope of the concept of self-mutilation. The concept, in fact, depends on the definition of the concept of "mutilation". This concept is part of the so-called international humanitarian law. Concretely, the practice of mutilation is prohibited by Article 3 common to the Four Geneva Conventions (GC I–IV), Article 13(1) GC III and Article 32 GC IV. In addition, Article 8(2)(b)(x), Article 8(2)(c)(i) and Article 8(2)(e)(xi) of the Rome Statute of the International Criminal Court criminalise "physical mutilation" as war crimes (in international and non-international conflicts).[23] In these cases the prohibitive norms are restricted, because the concept of "mutilation", on the one hand, is applicable to the context of international and non-international armed conflicts, and, on the other hand, the characteristic harmful act of mutilation is practised against an already subjugated victim, either for being subject to the power of another by reason of a conflict, or for any other reason.

In Brazil, the conduct of "mutilation" was introduced through the implementation of the said international treaties.[24] Thus, the concept of "mutilation" is already part of the domestic law and for that reason its interpretation must follow the international parameters.

Mutilation, in the sense of the above-mentioned GC-provisions, exists particularly when the perpetrator causes lasting disfigurement in the victim or removes an organ or part of the body or renders it incapable of functioning.[25] The domestic law meaning does not differ, i.e., mutilation

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[23] About that, see K. Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2014, vol. 2, p. 166.

[24] Brazil ratified the Geneva Conventions of 12.8.1949 through Decree No. 42, 121 of 21.8.1957; and ratified the Rome Statute of International Criminal Court through Decree No. 4.388 of 25.10.2002.

[25] In this sense, see G. Werle, F. Jeßberger, *Völkerstrafrecht*, Mohr Siebeck, 2016, p. 565; similarly, see S. Sivakumaran, "Article 17 – Prescriptions regarding the dead. Graves Registration Service", in ICRC (eds), *Commentary on the First Geneva Convention*, Cambridge University Press, 2017, p. 602: "to 'injure or damage severely, typically so as to disfigure'"; although applied in the context of war crimes, *ICC*, Elements of Crimes of the Rome Statute of the International Criminal Court, Article 8 (2) (b) (x)-1, War crime of mutilation: "by

consists in the behaviour of harming, injuring a body through cutting, eliminating, or destroying parts.[26]

Self-mutilation consists in the mutilation of oneself and, therefore, must be understood as any intentional mechanical action that falls upon one's own body and leads to disfigurement through destruction, loss, or substantial harm to an organ, limb, or other part of the body. Of course, this definition is not sufficient to determine the technical meaning of the forms of participation of inducement, encouragement, or assistance to self-mutilation, provided in Article 122 of the BrazCC.

2. Systematic Position of Article 122 BrazCC

The legal norm that prescribes this offence has been inserted into Chapter I Title I of the Special Part of the BrazCC, dealing with "*Offences against life*". Considering the above-mentioned concept of self-mutilation, it appears as if the Brazilian Congress either intended to punish inducement of, encouragement of, or assistance in self-mutilation *with* the purpose of causing death of the victim, or, differently, inserted this offence incorrectly into Chapter I Title 1 of the BrazCC.

Naturally, self-injurious behaviour may have suicidal intent or non-suicidal intent;[27] similarly, behaviour of inducement, encouragement, or assistance to self-mutilation may have the purpose of causing death or not causing death. However, if the aim was to punish only inducement of, encouragement of, or assistance in self-mutilation with the purpose of causing death, there would be a conflict of difficulty in solution between this offence and the attempt at inducement, encouragement, or assistance

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permanently disfiguring the person or persons, or by permanently disabling or removing an organ or appendage".

[26] In this sense, see T. Fischer, *Strafgesetzbuch und Nebengesetze, Kommentar*, Beck, 2020, p. 916; see also K. Lackner, K. Kühl, *Strafgesetzbuch, Kommentar*, Beck, 2018, p. 676; similarly, see A. Schönke, H. Schröder, A. Eser, *Strafgesetzbuch, Kommentar*, Beck, 2019, p. 1424–1425. Brazilian jurisprudence corroborates this opinion, see STJ, *Agravo no Recurso Especial* n° 1526079, 11.10.2019.

[27] Cf. M. K. Nock, "Self-Injury", *Annual Review of Clinical Psychology*, 2010, Issue 6, p. 341.

to suicide – provided for in the same Article 122 BrazCC[28].[29] In other words, all consummated offences of inducement, encouragement, or assistance to self-mutilation with the purpose of causing death would be, concomitantly, an attempt of inducement, encouragement, or assistance to suicide.

The justifications presented in the draft Bill for the change of Article 122 BrazCC were – as already said –[30] the observed increase in the practice of self-mutilation, which is characterised by the deliberate self-infliction of physical harm, *without the intention of committing suicide*. Consequently, the form of inducement, encouragement, or assistance to self-mutilation *with* the purpose of causing death should not be covered by Article 122 BrazCC. The "inducement of, encouragement of, or assistance in self-mutilation" is not an offence against life, but an unjustified offence of bodily injury. For this reason, this offence should have been included in Chapter 2 Title 1 of the BrazCC, namely "*Bodily Injuries*". Consequently, the inclusion of this offence in Chapter 1 Title 1 of the BrazCC was a mistake. And this mistake leads to some practical consequences.

As a result so far, it can be said that self-mutilation is a highly normative concept since every "mutilation", in principle, implies an offence to physical integrity. However, due to its systematic position, it must be concluded that the aim of the norm is to prohibit the production of death; otherwise, the mere *incentive* for someone to make, for example, a "piercing" may configure the offence in either of its modalities. This cannot be done with a simple hermeneutic process, as an analogical interpretation with either a negative or excluding character is required. In this sense, it is necessary to analyse the other objective elements of the prohibitive norm, namely: the participatory forms of inducement, encouragement, or assistance.

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[28] See *supra* note 5 and the corresponding text.

[29] Before the change in Article 122 BrazCC, the predominant opinion in the literature was that the *attempt* to induce, encourage, or assist the commission of suicide was not admitted, pursuant to the wording of the legal norm itself, see N. Hungria, *Comentários ao Código Penal*, Forense, 1989, vol. 4, p. 98; see also A. Mayrink, *Direito Penal Parte Especial*, Forense, 2008, vol. 4, p. 238; contrary to this opinion, see C. R. Bitencourt, *Tratado de Direito Penal*, Saraiva, 2011, vol. 2, p. 133.

[30] See *supra* note 2 and the corresponding text.

3. The Participatory Forms of "Inducement, Encouragement, or Assistance"

The Brazilian Criminal Code of 1830 (the first Brazilian Criminal Code) made a rather simple and deficient differentiation between the forms of principal and accessory liability for the commission of any offences. This Code distinguished, in Articles 4 and 5, "the principal" and "the accessory" by using the expressions "author" (*autor*) and "accomplice" (*cúmplice*).[31] However, it did not distinguish between levels of accessory or secondary participation.[32]

The Criminal Code of 1890 maintained the differentiation between the forms of principal and accessory liability.[33] However, this Code distinguished two kinds of authorship and complicity, namely: on the one hand, intellectual and physical authorship; on the other hand,

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[31] Paradigmatic about this, see J. Vieira de Araujo, *Codigo Criminal Brasileiro: comentário philosophico-scientifico em relação com a jurisprudencia e a legislação comparada*, Jose Nogueira de Souza, 1889, p. 17: "Co-delinquency is usually divided into authorship and complicity. We don't have a sufficiently generic word that encompasses the general idea of co-authorship, and that excludes complicity, although the code uses the word *authors* to designate the *principal* criminal participation and the word accomplices to designate *secondary* or *accessory* participation." (Translated by the author) ("*A codelinquencia costuma ser dividida em autoria e complicidade. Nós não temos um vocabulo bastante generico que comprehenda a ideia geral de co-autoria, excluindo a complicidade, ainda que o codigo empregue a palavra autores como comprehensiva da participação criminosa principal e a palavra complices para designar a participação secundaria ou acessoria.*"); furthermore, with comments, see L. A. F. Tinôco, *Codigo Criminal do Imperio do Brazil anotado*, Imprensa Industrial, 1886, p. 19–20.; see also J. H. Pierangelli, *Código Penais do Brasil: evolução histórica*, Jalovi, 1980, p. 167.

[32] In this sense, see Vieira de Araujo, *supra* note 31, p. 17–18.

[33] Cf. A. J. Costa e Silva, *Codigo Penal dos Estados Unidos do Brasil comentado*, Companhia Editora Nacional, 1930, vol. 1, p. 83: "The agents of the crime are divided into two categories: perpetrators and accomplices. The basic criterion of bipartition is the primary or secondary nature of the acts performed. Regarding the merits of this criterion, much has been discussed and is still being discussed." (Translated by the Author) ("*Em duas categorias se acham divididos os agentes do crime: — autores e cumplices. Criterio basico da bipartição é a natureza principal ou secundaria dos actos praticados. Sobre o merecimento desse criterio muito se tem discutido e se discute ainda*"); see also G. Siqueira, *Direito Penal Brazileiro Parte Geral*, Jacyntho, 1932, vol. 1, p. 222.

intellectual and physical complicity.[34] "Intellectual author", pursuant to Article 18, paragraph 2, performs acts of "provocation" (*provocação*) or "determination" (*determinação*): the former would occur with the resolution and the stimulus to commit the offence; while the latter, with the decisive influence on the will of the executor.[35] According to its Article 21, intellectual complicity entails the provision of instructions for the commission of the offence, while physical complicity consists in performing preparatory acts.[36] This Code also provided for several norms that, however, punished as "principal" someone who performed conducts of "inducement" or "assistance", such as, for example, Article 299, which provided for the offence of "inducement or *aid* to suicide" (*induzimento ou ajuda ao suicídio*).[37]

Following a position completely opposite to that adopted in the former codes, the Brazilian Criminal Code of 1940 abolished, however, the system of accessory liability, and opted for a unitary system of authorship (Article 25). In that respect, the "Exposition of Reasons" (*Exposição de Motivos*) of this Code stated that: "The draft Bill abolished the distinction between perpetrators and accomplices; all those who take part in the offence are perpetrators. There will no longer be any difference between principal or accessory liability, between necessary or secondary assistance, between *societas criminis* or *societas in crimine*". (Translated by the Author).[38] The General Part of this Code was completely reformed in 1984 by Law

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[34] Cf. Siqueira, *supra* note 33, p. 222.

[35] Cf. Siqueira, *supra* note 33, p. 233–234.

[36] Cf. Siqueira, *supra* note 33, p. 248–249.

[37] Cf. Siqueira, *supra* note 33, p. 210.

[38] The cited excerpt is taken from Bento de Faria, *Código Penal Brasileiro Comentado*, Récord, 1961, p. 246: "O projeto aboliu a distinção entre autores e cúmplices; todos os que tomam parte no crime são autores. Já não haverá mais diferença entre participação principal e participação acessória, entre auxílio necessário e auxílio secundário, entre a *societas criminis* e a *societas in crimine*". In this regard, Hungria and Fragoso already stated that, although the Code adopts a unitary system, "the equal treatment of all participants does not entail ignoring the various forms of participation or impeding the diversity of criminal treatment" (Translated by the author) ("a equiparação de todos os partícipes não importa desconhecer as várias formas da participação ou impeder a diversidade de tratamento penal"), see N. Hungria, H. C. Fragoso, *Comentários ao Código Penal*, Forense, 1978, vol. 2, p. 411.

No. 7.209; however, with this Reform the Code established in Article 29[39] a "confused" unitary system of authorship, which was designated as a "tempered unitary system" (*sistema unitário temperado*).[40] First, it is a "tempered" system because it admits different punishments for those who take part in the crime; second, it is a "confused" system because it coexists with norms that provide for accessory liability (Articles 29 paragraph 1, 31 and 62 III).

Thus, the current BrazCC distinguishes between three forms of accessory liability, namely, "inducement", Article 62 II; "encouragement", Articles 31 and 62 III[41]; and "assistance", Article 31.[42] As the former, the current Code also provides several norms that punish as "principal" someone who performs "inducement" or "assistance" actions, such as, for example, in Article 122.

The prohibited conducts in Article 122 BrazCC are "inducement", "encouragement" or "assistance" to someone to commit mutilation against himself.[43] This is, as mentioned above, intellectual participation and material participation. In this case, therefore, the principal responsibility occurs with the modalities of secondary participation, which depend, in line with a system of accessory liability, on the commission of the main act (which, according to Article 122 BrazCC, consists of self-mutilation by the victim).

The intellectual participation takes place as inducement ("*induzimento*") or encouragement ("*instigação*"). Inducement is characterised by the

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[39] Article 29 of the BrazCC reads as follows: "Art. 29. Whoever contributes anyhow to the crime, incurs the penalties provided for it, in proportion to his guilt." (Translated by the Author)

[40] The designation "tempered unitary system" was originally used by: J. Mestieri, *Teoria elementar do direito criminal – Parte Geral,* Editora do Autor, 1991, p. 47.

[41] Article 62 II, III of the BrazCC reads as follows: "Art. 62. The penalty will also be increased in relation to the perpetrator who: (…) II - coerces or *induces* others to materially execute the crime; III – encourages or determines to perpetrate the crime someone subject to his authority or non-punishable by reason of personal condition or quality." (Translated by the Author)

[42] Article 31 of the BrazCC reads as follows: "Art. 31. Arrangement, determination or encouragement and *assistance*, unless expressly provided otherwise, are not punishable if the crime is not at least attempted." (Translated by the Author)

[43] See *supra* note 5 and the corresponding text.

determination that gives rise to the resolution of execution in a person (as in the case of a person who gives the idea to another that he uses a kitchen knife to cut off part of his finger); encouragement constitutes a stimulus to reactivate what has already been accepted by someone else, in other words, it is an incitement, an encouragement to the idea already internalised by the victim of committing self-mutilation.[44] These two forms of contributions must be direct and causally effective, so if the person to whom the inducement or encouragement is directed is already sufficiently determined to practise the result, there is no participation.[45]

Physical (or material) participation, in the sense proposed in Article 122 BrazCC, occurs in the form of "assistance". It occurs through acts of contribution, which cannot constitute executory acts (although they may be acts of direct support for executory acts),[46] but they should be effective for the achievement of the result, for example, to provide a blade to make a cut, or a sharp object to scratch, to provide a match or lighter to burn, or to light the water boiler to scald, etc. The acts in question must contribute directly and substantially to the commission of the offence. A *direct contribution* does not mean that the perpetrator must be present at the time the act is committed; and, besides, a *substantial contribution* constitutes not a simple cause-effect relationship.[47] These kinds of contributions are to be understood in a normative sense and can be most clearly explained through the theory of objective (fair) imputation (*die Lehre von der objektiven Zurechnung*). Accordingly, to incur criminal

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[44] Cf. Mayrink, *supra* note 29, p. 232; see also Bitencourt, *supra* note 29, p. 129; furthermore, see L. R. Prado, *Curso de Direito Penal brasileiro*, Revista dos Tribunais, 2010, vol. 2, p. 64.

[45] In this sense, see Hungria, Fragoso, *supra* note 38, p. 413; furthermore, see Bitencourt, *supra* note 29, p. 129; see also Mayrink, *supra* note 29, p. 227; further, see Prado, *supra* note 44, p. 63–64. In another sense, see A. Bruno, *Direito Penal, Parte Geral*, Forense, 1959, vol. 2, p. 272–273, who does not differentiate between the forms of inducement and encouragement.

[46] See P. R. Alflen, 'Teoria do domínio do fato na doutrina e jurisprudência brasileiras', *Universitas Jus* 2014, Issue 25, p. 20, available at «http://dx.doi.org/10.5102/unijus.v25i2.2826» (last accessed 18 January 2020); in the sense of the text, see Hungria, Fragoso, *supra* note 38, p. 412; see also Bitencourt, *supra* note 29, p. 129.

[47] See Mayrink, *supra* note 29, p. 227–230, with a broad examination regarding the physical (or material) participation.

responsibility the assistant must, through his/her contribution, create or *increase the risk* for an offence to be committed. In addition, the *risk must be realised* by committing the (main) offence or, in other words, the risk creation or increase must be causal in relation to the commission of this offence.[48] And finally, the risk, created or increased, must be legally disapproved, which means that it must be a *prohibited risk*.[49]

In this sense, acts such as induce, encourage, or assist someone to do a body piercing for the purpose of inserting, for example, a jewel (as body art), by a professional licensed to perform this procedure are excluded from the scope of the legal norm (because they configure *permitted risks*); in these cases there is just a recommendation, an incentive, or an aid to carry out an artistic procedure which is not punishable, as, for example, the perforation of the earlobe to insert an earring or piercing.

4. The Limits Between the Basic Offence and the Result-qualified Offence for Significant and Serious Bodily Injuries

The offence of inducement, encouragement, or assistance to self-mutilation is classified in either of its modalities as a *result-based offence* because physical harm is a necessary element. Therefore, the basic offence type, prescribed in Article 122, *caput*, is consummated with the effective injury to physical integrity through inducement, encouragement, or assistance, provided that none of the circumstances listed in paragraphs 1 and 2 of Article 129 BrazCC occurs in the concrete case.[50] At the same time, however, not every injury to physical integrity that can be characterised

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[48] In the sense, see K. Ambos, *Treatise on International Criminal Law*, Oxford University Press, 2013, vol. 1, p. 164–166.

[49] See about that C. Roxin, *Strafrecht, Allgemeiner Teil*, Beck, 2006, vol. 1, p. 218; see also Jakobs, *supra* note 17, p. 203. Particularly on the idea of assistance with regard to individual criminal responsibility in the Rome Statute of the ICC, see Ambos, *supra* note 48, p. 164–165; furthermore, for a brief historical approach to this theory, see K. Ambos, 'Toward a universal system of crime: comments on George Fletcher's Grammar of Criminal Law', *Cardozo Law Review*, 2007, 28, p. 2664–2667.

[50] Similarly, see Lackner, Kühl, *supra* note 26, p. 676, but in this case, concerning the offence of "Dismissal from military service trough mutilation" (*Wehrpflichtentziehung*

as an offence of minor bodily injury – pursuant to the *caput* of Article 129 BrazCC – matches the concept of self-mutilation.

Take the following situations: (1) A young adult criminally responsible, induced by another, consciously and voluntarily fulfils a challenge, which consists in cutting a part of his finger at the height of the distal phalanx, using a portable circular saw; (2) Induced by a third person, a 16-year-old consciously and voluntarily fulfils a challenge that consists in placing salt and ice over the interscapular region of his back, in the shape of a cross, keeping the mixture for about thirty minutes; because of the challenge, the teenager suffers a second-degree burn, which destroys the epidermis and reaches the dermis (layer below the epidermis, vascularized, and which contains nerves), resulting in deep scars; (3) Induced by a third person, an individual of age who had no *piercing* in their body fulfils a challenge that consists in perforating the left earlobe and using the cap of a beer bottle as an "ear expander".

In these three examples the injury practised against one's own physical integrity entails in case of number (1) the nature of a significant bodily injury, due to the resulting permanent impairment of the limb (pursuant to Article 129, paragraph 1, subparagraph III), and in the cases of numbers (2) and (3) assumes the nature of a serious bodily injury, due to the resulting permanent deformity (pursuant to Article 129, paragraph 2, subparagraph IV). Therefore, in all the cases mentioned, the inductor (precisely, the "challenger") is responsible for the result-qualified offence (pursuant to Article 122, paragraphs 1 and 2, of the BrazCC).

These examples, nevertheless, are sufficient to demonstrate the difficulty that will be encountered in judicial practice with regard to the application of the legal norm that prescribes the *basic offence* of inducement, encouragement, or assistance to self-mutilation, since self-mutilation requires the destruction, loss or substantial injury of an organ, limb or another part of the body, and therefore most of the hypotheses will almost automatically lead to the incidence of the result-qualified offence (pursuant to Article 122, paragraph 1 of the BrazCC) in relation to whoever induces, encourages, or assists the commission of self-mutilation.

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durch Verstümmelung): "*aber nicht notwendig (zB medizinische Behandlungen) in einer Körperverletzung besteht*".

From there, the following question arises: is the occurrence of the basic offence, provided for in Article 122, *caput,* of the BrazCC really possible? Despite the practical difficulty of delimiting the scope of the basic offence, it seems possible that it occurs when, through inducement, encouragement, or assistance, the injury practised by someone to their own physical integrity can be characterised *as a minor bodily injury* and it also implies disfigurement through cutting, elimination, destruction, or introduction of objects, as in the following examples: to pull out or set fire to the hair; to apply a chemical compound that causes instant hair loss, but without greater danger to the integrity of the victim; to pull out the nails; to pull out a tooth without impairing the masticatory organ; to glue an object on the skin with the use of a chemical substance such as cyanoacrylate, etc. In this sense, the scope of the legal norm is quite restrictive, insofar as it does not include conducts that cause, for example, erythema, ecchymosis, oedema, hyperaemia, bruising, torticollis (including traumatic), etc., because in these cases there is no disfigurement through cutting, elimination or destruction.

So, despite the tenuous limit between the basic offence of inducement, encouragement, or assistance to self-mutilation – provided for in Article 122, *caput* – and the result-qualified offence – provided for in Article 122, paragraph 1 –, the meticulous examination of the objective elements of the offence makes it possible to identify differences from a technical-scientific point of view that assist in the solution of cases that should be covered by the norm. In any case, the final conclusion on the application of one or other legal provision (Article 122, caput or art. 122 paragraphs 1 and 2 BrazCC) will always depend on the comparative examination with Article 129, paragraphs 1 and 2 BrazCC.

II. The Subjective Elements of the Offence, Pursuant to Article 122, *Caput*, BrazCC

With regard to the subjective element of the offence of inducement, encouragement, or assistance to self-mutilation, in the modality of basic offence, provided for in Article 122, *caput*, BrazCC, intent (*dolus, Vorsatz*) is required.

In this regard, it should be noted that Brazilian criminal law follows the rule that negligent offences are only punishable when the law expressly requires it. This is a consequence stemming from Article 18, single paragraph, BrazCC.[51] Thus, as there is no express provision to that effect regarding inducement, encouragement, and assistance to self-mutilation, its punishment is admissible only in the intentional form.

In addition, it should be noted that the BrazCC – despite the criticism of the current literature –[52] follows the finalistic school of thinking,[53] also called "the goal-directed theory of human action".[54]

Finalist thinking rests on or presupposes a human act requirement as the starting point for criminal responsibility.[55] However, this act is not only a mere causal naturalistic manifestation in the external world, but is determined by a certain purpose derived from the internal sphere of the agent, i.e., of the "final will" to realise the act.[56] Thus, the difference between bodily movements and human acts is that when someone is acting we can perceive a purpose in what he or she is doing.[57] From that comes the famous statement that the action is not blind, it is seeing.[58]

The "final will" encompasses the intent in the sense of *dolus* (*Vorsatz*), specifically, the desire to realise the objective elements of the legal norm. In

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[51] Article 18, single paragraph, BrazCC, states that: "*Salvo os casos expressos em lei, ninguém pode ser punido por fato previsto como crime, senão quando o pratica dolosamente*". Translated by the author: "With the exception of cases expressed in law, no one can be punished for an offence, save when it is committed intentionally".

[52] See mainly Tavares, *supra* note 13, p. 249; furthermore, see P. Costa, *Dolo Penal e sua prova*, Atlas, 2014, p. 19.

[53] In this sense, see L. Luisi, *O tipo penal, a teoria finalista e a nova legislação penal*, safE, 1987, p. 124; see also Dotti, *supra* note 13, p. 309; similarly J. C. Santos, *Direito Penal Parte Geral*, Lumen Juris/ICPC, 2007, p. 160; further, see Toledo, *supra* note 13, p. 160–161.

[54] Cf. G. Fletcher, *Rethinking Criminal Law*, Oxford University Press, 2000, p. 434.

[55] Cf. Ambos, 'Toward a universal system…', p. 2649.

[56] *Ibid.*; for more details, see H. Welzel, *Das neue Bild des Strafrecthssystems*, Otto Schwarz, 1961, p. 1–13; see also E. Schmidhäuser, 'Willkürlichkeit und Finalität', ZStW, 1954, Issue 66, p. 27–30; further, see Fletcher, *supra* note 54, p. 434; in addition G. Stratenwerth, L. Kuhlen, *Strafrecht. Allgemeiner Teil*, Heymanns, 2004, vol. 1, p. 65–66; with an overview, see Jescheck, *supra* note 11, p. 198.

[57] Cf. Fletcher, *supra* note 54, p. 434.

[58] Cf. H. Welzel, *Das Deutsche Strafrecht*, Walter de Gruyter, 1969, p. 3: "*Finalität ist darum —bildlich gesprochen— 'sehend', Kausalität 'blind'.*"; see also Welzel, *supra* note 56, p. 1.

this sense, the intent is understood as expressing a volitional (will, desire) and a cognitive (knowledge, awareness) element.[59] The consequence of this "subjectification" of the human act is that the legal elements of the offence in the sense of the Tatbestand cannot be fully understood or captured without taking into account the subjective, internal side of the conduct.[60]

Having clarified this, some considerations may be made in relation to the two elements cited, which constitute the concept of intention, but in the light of Article 122, *caput,* of the BrazCC.

As the self-mutilation requires that the victim is aware of the self-injurious content of her own conduct and accepts doing it anyway (either out of curiosity or with the aim of experiencing euphoric and fleeting sensations), the author, in turn, must be aware that the victim is aware of this and that the purpose of his conduct is the act of self-mutilation. As the self-mutilation requires that the victim is aware of the self-injurious content of her own conduct and agrees to do it anyway (either out of curiosity or with the aim of experiencing euphoric and fleeting sensations), the author, in turn, must be aware that the victim is aware of this and

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[59] In this sense, see Tavares, *supra* note 13, p. 249–250; about the finalistic concept of intention (*Vorsatz*), see Welzel, *supra* note 54, p. 64–65. On the current debate about the concept of intent (*Vorsatz*) in the German literature, see mainly: G. Jakobs, *Kritik des Vorsatzbegriffs*, Tübingen: Mohr Siebeck, 2020, p. 1–50; H. Frister, 'Vorsatzdogmatik in Deutschland', ZIS, 2019, Issues 7–8, p. 381–386; G. Jakobs, 'Altes und Neues zum strafrechtlichen Vorsatzbegriff', in M. Pawlik (eds), *Strafrechtliche Beiträge. Zu den Grundlagen des Strafrechts und zur Zurechnungslehre*, Tübingen: Mohr Siebeck, 2017, p. 606–626.; also K. Gaede, 'Auf dem Weg zum potentiellen Vorsatz?', ZStW, 2009, Issue 121, p. 239–280; further J. Bung, *Wissen und Wollen im Strafrecht*, Vittorio Klostermann, 2008, p. 136–160; C. Safferling, *Vorsatz und Schuld: subjektive Täterelemente im deutschen und englischen Strafrecht*, Mohr Siebeck, 2008, p. 67; C. Roxin, 'Zur Normativierung des dolus eventualis und zur Lehre von der Vorsatzgefahr' in K. Rogall, H. J. Rudolphi (eds), *Festschrift für Hans-Joachim Rudolphi*, Neuwied: Luchterhand, 2004, p. 243–258; G. Jakobs, 'Dolus malus' in K. Rogall, H. J. Rudolphi (eds), *Festschrift für Hans-Joachim Rudolphi*, Neuwied: Luchterhand, 2004, p. 107–122; R. Herzberg, 'Der Vorsatz als „Schuldform", als „aliud" zur Fahrlässigkeit und als „Wissen und Wollen"?' in C. W. Canaris *et al* (eds), *50 Jahre Bundesgerichtshof - Festgabe aus der Wissenschaft*, Munich: Beck, 2000, vol. 4, p. 51–82; W. Frisch, *Vorsatz und Risiko. Grundfragen des tatbestandsmässigen Verhaltens und des Vorsatzes*, Heymanns, 1983, p. 1–64.; W. Janzarik, 'Vorrechtliche Aspekte des Vorsatzes', ZStW, 1992, Issue 104, p. 65–81.

[60] cf. Ambos, 'Toward a universal system…', p. 2650.

that the purpose of his conduct is the act of self-mutilation, and that the result of death may occur from this act.

There are two obvious reasons for this: in the first place, if the victim is not aware that she is causing self-mutilation, because, for example, he/she has been misled about the effects of using a certain instrument, object or substance that will lead to his/her self-mutilation, Article 122, paragraph 6,[61] of the BrazCC (subsidiary figure) is applicable, because the victim "cannot offer resistance" in relation to the unknowingly harmful act. In this way, if death does not occur, the individual who induces, encourages, or assists the commission of the offence will be liable for serious bodily injury, provided for in Article 129, paragraph 2, and not for the offence provided for in Article 122, *caput*, of the BrazCC. However, if death occurs, he will be liable for the offence of murder, provided for in Article 121 of the BrazCC.

In the second place, the interpretation that must be given to the hypothesis should take into account the systematic position that the norm occupies in the Criminal Code. This offence has been inserted – as has been said before (*supra*, 2) – into Chapter I Title I of the Special Part of the BrazCC, which is called "*Offences against life*". Therefore, despite the legislator's mistake in inserting this modality of conduct in the criminal type of article 122 of the BrazCC, it should be interpreted, in relation to the subjective element, as an offence against life. Thus, the individual who induces, encourages, or assists the commission of the offence must be aware that the conduct incurred by the victim is intended to cause self-mutilation to the point of causing death itself.

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[61] Article 122, paragraph 6, states that: "If the offence referred to in paragraph 1 of this Article results in serious bodily injury and is committed against a minor under 14 (fourteen) years of age or against someone who, owing to disease or mental deficiency, does not have the necessary discernment to perform the act, or who, for any other cause, cannot offer resistance, the perpetrator is liable for the offence described in paragraph 2 of Article 129 of this Code" (Translated by the Author) ("*Se o crime de que trata o § 1º deste artigo resulta em lesão corporal de natureza gravíssima e é cometido contra menor de 14 (quatorze) anos ou contra quem, por enfermidade ou deficiência mental, não tem o necessário discernimento para a prática do ato, ou que, por qualquer outra causa, não pode oferecer resistência, responde o agente pelo crime descrito no § 2º do art. 129 deste Código*").

Conclusions

The proposal to criminalise inducement, encouragement or assistance to self-mutilation by amending Article 122 BrazCC (instead of including Article 244-C in the Statute of the Child and Adolescent) has led to a greater legislative effort regarding the formulation of the criminal norm. Thus, different modalities for this offence have been elaborated, such as basic or result-qualified offence, and increased punishment and subsidiary forms of commission. However, excessive "technical precision" has caused great difficulties regarding the distinction between the basic offence, provided for in Article 122, *caput*, and the result-qualified offence, provided for in Article 122, paragraph 1. Moreover, the Brazilian Congress incorrectly included this criminal conduct into the chapter of the BrazCC corresponding to offences against life. Nevertheless, examination of the objective and subjective elements of the offence has made it possible to identify doctrinal differences that will assist in the solution of concrete cases by identifying those that will be covered by the basic offence type or the result-qualified offence type. Finally, in Brazilian criminal law, self-injury is not punishable, thus, conducts of inducement, encouragement, or assistance to self-injury would not be achieved by article 129, which requires direct conduct against the victim ("mutilation", and, in fact, not "self-mutilation"). Therefore, despite the problems of legislative technique the criminalisation of the conducts was, in fact, necessary.