

LA CRITICA AL PATERNALISMO GIURIDICO-PENALE. UN LAVORO DI SISIFO?

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Abstract. The present contribution offers a critical analysis of both the “direct” and the “indirect” criminal legal paternalism. The work takes its point of departure in the historical-conceptual analysis of the paternalistic dogma established in pre-Enlightenment and straightly connected to the Christianity. In particular, the author provides account of the birth and the evolution of the theoretical criticism of the paternalistic paradigm which developed on the basis of various argumentative structures by authors such as Beccaria, Hommel, Kant, Feuerbach, Mill. Moreover, the work highlights the influence of anti-paternalistic theoretical perspective on German liberal legislation typical of the end of XIX’s.

Furthermore, the research proceeds to the analyses of legal types with reference to the currently in force German legislation in a such a way to recover both the paternalistic perspective and the subordination of the individual self-determination principle. As to this issue, the author arises criticism towards doctrinal arguments, and in particular the German Constitutional Jurisprudence, which aim at ensuring to such a types a constitutional guarantee by referring to supra-individual legal interests deemed worthy of legal protection. Finally, the author analyses the hypothesis of legitimacy of a limited paternalism as well as of penal types as crimes of abstract danger with reference to the legal protection of third parties interests.

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