Criminal repression in the context of the economic crisis and the maximization of crime at European and global level

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Editors
C. Duvac, M. Tomita
Foreword

The Romanian National Group of the Romanian Association of Penal Sciences affiliated to the International Association of Penal Law, with the approval of the Scientific Commission and the Board of Directors of the International Association of Penal Law from 2nd of June 2012 and under its coordination organizes between 9 – 10 May 2013, the Regional Conference of the AIDP-IAPL in Bucharest entitled „CRIMINAL REPRESSION IN THE CONTEXT OF THE ECONOMIC CRISIS AND THE MAXIMIZATION OF CRIME AT EUROPEAN AND GLOBAL LEVEL”.

This scientific event is organized with the support and in partnership with the Chamber of Deputies - Legal, immunities and disciplinary Comission, the Romanian Academy – The Institute of Legal Research “Academician Andrei Radulescu”, Alexandru Ioan Cuza University in Iasi - Faculty of Law, Romanian-American University of Bucharest- Faculty of Law; League of the Romanian Students Abroad and Juridical Universe Publishing House, Bucharest.

The organizers and participants of this scientific event intend to examine the way in which the state and judiciary organisms in Romania or other countries reacted in the context of the global economic crisis and the increase of international crime for a more effective fight against crime and its results. Based on this assessment, theoreticians and practitioners attending this international conference propose to formulate some suggestions for improving the chosen solutions, as appropriate, by the legislative or the judicial bodies in this field.

A particular attention is given to analyzing the innovations introduced by the Romanian legislator when adopting the Criminal Code through Law no. 286/2009 and subsequently by Law no. 187/2012, or on the occasion of the adoption of the Criminal Procedure Code through Law no. 135/2010, in terms of their entry into force on the 1st of February 2014.

The order in which the papers were presented in the volume was driven by two areas of criminal law (the general part, special part) and of criminal procedure law ( the general part, the special part) and within them, after the speakers established by the Management Office of the Romanian Association of Penal Sciences, the other authors were positioned in alphabetical order.

The success of such an approach cannot be denied because of the valuable materials with which many criminal law specialists (academics and practitioners) have subscribed, based on analyzes they undertook by formulating several comments on the examined norms, as well as some suggestions for their improvement.

Through these contributions, and by interesting new analysis and deepening of the new criminal law and criminal procedure law which this volume includes, it represents an important achievement of the conference organizers and participants, a valuable contribution to the knowledge and deepening of the new criminal legislation.

In this way we express our conviction that the volume will enjoy a warm welcome from the Romanian and foreign criminal law specialists, as well as from the general public interested in knowing the issues raised by the new criminal and criminal procedure law.

Professor Ph.D. George Antoniu
Scientific Director of the Institute of Criminal Research „Acad. Andrei Rădulescu” of the Romanian Academy
President of the Romanian Association of Penal Sciences
President of the Romanian National Group

Associate Professor Ph.D. Constantin Duvac
Associate Researcher of the Institute of Criminal Research „Acad. Andrei Rădulescu” of the Romanian Academy
General Secretary of the Romanian Association of Penal Sciences
Vice-president of the Romanian National Group
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Section 1
Criminal Law
The concept of crime under general crisis and globalization

Antoniu G.

Law Research Institute „Acad. Andrei Rădulescu” of the Romanian Academy revdpenal@gmail.com

Abstract

The article addresses the issue of perception of the methods and techniques in criminal forensics. In this context, subjects are depicted on the incidence of criminal tactics and the tactical forms of interaction processes with forensic evidence. The author expresses views on the limits of interviewing persons in criminal proceedings with respect to the method of statement analysis and polygraph technique which is used to detect simulated behavior.

Keywords: criminal trial, forensic, tactical rules, hearing/interviewing persons, statement analysis, polygraph

Preliminary explanations

We know that worldwide humanity currently faces two social phenomena with broad implications, namely the general economic crisis and globalization.

The first phenomenon is characterized by the massive drop in household consumption possibilities due to an apparent increase in the volume of goods on the market.

Reducing consumption is the result of impoverishment of a large part of the population as a result of diminishing livelihoods, massive unemployment, and bankruptcy of numerous enterprises and lack of investment in all economic spheres.

The second phenomenon, globalization is characterized by intensified state cooperation at global level in order to create a single market, the abandonment of duties, increased movement of goods, identifying new sources of raw materials and sales opportunities for products.

Globalization stimulates the process of creating a union of states between which cooperation becomes more intense and finally reach a unitary state to continental and global level.

These two processes, the general crisis and globalization take place now, with the prospect for the first process to have a fixed period while the second process, globalization, to have the character of a process that will further enhance appropriate economic needs and culture that are in constant growth and complexity.

Incidence of forensic tactic

What concerns us at the moment is not the perspective of the processes mentioned but how these processes affect the present criminal law and more specifically the concept of crime and concrete aspects that express these influences.

As it is known the concept of crime, like any concept, is a generalization of specific features of multiple offenses under the Penal Code and special penal laws. As such, a certain influence of the concept would be possible only by influencing first of all the concrete manifestations that the concept generalizes and gives them an abstract form. This means that in order to influence the concept would be necessary to influence in a first step, a crime whose concrete features in an abstract form, are included in the concept of crime.

Further, it requires to consider whether the general economic crisis and globalization influencing concrete manifestations of crime will affect the very definition of this concept, in other words if they continue to subsist as the concept of criminal traits those traits currently established by doctrine namely to be a criminal offense under the criminal law committed with guilt and also concerned (positive trait) and unjustified (negative trait).
The limits in interviewing persons – forms of interaction between evidence processes with tactics forensic

So far the development of our criminal law definition of crime does not appear to change as a result of the general economic crisis and globalization, have not been introduced new facts as crimes that draw more often during an economic crisis (it is mainly aggression against property, whether these attacks are accompanied by violence against persons or are not accompanied by violence) have not been provided any exceptions to the requirement of guilt in the sense that some facts attract criminal liability objectively regardless of the perpetrator mental position.

Might be considered, at most, the new provisions of the new Code of Criminal Procedure which stipulates the possibility of a plea agreement (art.478-488) with the result of reduced penalty legal limits with the third party if prison and with a quarter in the case of the fine. Such provisions although somewhat simplifies the criminal responsibility of a person's minimizing legal bodies concern to establish defendant's guilt in some cases they admitted their guilt from the beginning, does not remove all this concern, some defendants may plead guilty to less serious offenses to hide other more serious offenses or for other reasons or for other purposes can watch reality distortion regarding guilt. Might be considered, at most, the new provisions of the new Code of Criminal Procedure which provides for the possibility of a plea agreement (art.478-488) with the result of reduced legal limits if a third party and prison a quarter in the case of the fine. Such provisions although somewhat simplifies the criminal responsibility of a person's concern minimizing legal bodies to establish defendant's guilt in some cases they admitted their guilt from the beginning, does not remove all this concern, some defendants may plead guilty to less serious offenses to hide other more serious offenses or for other reasons or for other purposes can watch reality distortion on guilt.

But even if we reduce this plea in its most favorable meaning for defendants since it does not have an influence on the concept of criminal culpability requirement implicitly as a feature of the concept. Just the opportunity for defendants to recognize the guilty is evidence that the courts can not proceed to prosecution of a person for an offense if it is not found guilty either as a result of the efforts of the investigation or as a result of pleading guilty to by defendants.

The necessity of finding guilt is also a proof of the impossibility of conceiving offense without the presence of this constituent element of the concept of crime. We do not see changes in the concept of offense, now, nor when those pentiti of Italian criminal law namely that of those defendants who admit and regret their deeds while denouncing the accomplices, instigators and other participants in the acts committed. Such an attitude on the part of defendants as collaboration and regret we do not think that affects the concept of crime as such, but only identification card existing features for the concept. The favor obtained for those who intend to work with the courts is one way to ease the identification of guilt for a participant in serious organized offenses but does not affect the basic requirements of the concept of crime. Furthermore we do not see any prospect of adding other reasons to actual cases that remove imputability or other reasons to add to the existing evidence, we believe that legislative changes would be likely to influence although the wording of the concept of offense is not foreseen as possible.

The same conclusion drawn from the fact that Romanian criminal law has acknowledged the possibility to apply criminal sanctions to legal persons given that many illegal acts especially those against property are committed by different legal entities. Criminal liability of legal entities taking place on the basis of the all known concept of offense to establish the current features of the concept is absolutely necessary in such cases.

It can be concluded the conclusion that Romanian criminal law managed to create largely a regulatory framework capable of ensuring adequate and appropriate suppression of unlawful acts committed under the influence of the general economic crisis.

To this framework should be able to add the provisions establishing the legality of criminal offenses and the legality of punishment (Article 1 and 2 of the new criminal code). These basic principles of criminal repression are also influenced by the general economic crisis, not conceivable an abusive, outlawed criminal liability, even in cases of serious offenses occasioned by the economic crisis, committed either by natural or legal person.

But if for all the assumptions discussed above could not be conceived a change under the influence of the general economic crisis, the definition of the offense for the reasons shown, it should be taken into consideration if the criminal law should not introduce a compulsory question of sentence discount (not from liability) the fact that the offender regrets the act committed denouncing those with whom he committed the crime (especially in cases of organized crime). Such courtesy shown to the defendants can stimulate not only a speedy rehabilitation of the criminal liability of those involved, but would facilitate the discovery of perpetrators and the accountability of participants.
Conclusions

Regarding the influence of globalization on the concept of offense, this process might be reflected in the unification of different concepts at European and global level defining the crime and criminal responsibility.

Currently, is known, that most criminal laws do not include a definition of the offense, considering that this is an issue that falls within the criminal law doctrine, hence the concern of criminal law courses and treaties to include definitions of the concept of crime.

A certain unification of these definitions imposed by globalization, if it could be done would be, in our opinion, in a future unified doctrine in formulating a simplified definition of the concept of crime, conceived as an act under criminal law committed with guilt, without reference to other features of the concept.

In our opinion and globalization may act by influencing the unifying nature of the supporting and non-attributable causes, unification that would require both the definition of these causes as well as their scope and consequences that would produce, in rem and in personam.

Globalization could not affect our opinion, the principle of legality of criminal offenses and penalties in terms of the formulation at most (could seem more appropriate a unitary form for the principle of legality of criminal offenses and punishment as provided in most criminal legislation and not a separate form of legality of criminal offenses and of the legality of the sentence as in the new Romanian criminal code, as Spanish model, Article 1 and 2).

Referring to both processes and their influences on the criminal law, we can not but notice that these influences will not have the same intensity in all general laws during the crisis nor the same duration.

For instance, the influence of the general crisis will be more intense if the laws of the less developed countries would also inevitably have a longer duration, can cause changes, even many of them for the criminal law as to combat such social and legal consequences of the general economic crisis.

Conversely, countries with an advanced economy, duration and intensity of the economic crisis will be less. In these cases, the influence on the criminal law of the economic crisis could be much reduced, almost invisible.

Likewise globalization will cause numerous changes in criminal law in countries with a less developed economy but likely to be unified than in economically more advanced countries, the latter serving as the former model.

References


Considerations on the legal sentencing regime of unreported employment in Romania

Aron I.M.

Romanian-German University Sibiu, Romania ioan_aron@yahoo.com

Abstract

The study presents a summary of rules on unreported employment in Romanian legislation and analyses the most important incriminating laws (Labour Code, Criminal Code etc.), decisions and opinions on this subject.

These phenomena have been exacerbated not only in our country but also at community and international level, amid the global economic crisis, which directly affects the workforce, namely the relationship between employee and employer.

Keywords: unreported employment, contributions, taxes, incrimination

Although it is not established as a legal notion, 'unreported employment' means working without making respecting legal forms, i.e. without closing an individual labour contract, and payment out of a payroll.

All the statistics in the field show that the State loses many billions of Euros annually due to 'black' or 'grey labour’. If in the case of 'black labour' it goes without saying that one does not pay the State any taxes and fees, in the case of 'grey labour' the work the amount of these fees is much reduced, using the method of employment with the national minimum wage, although in reality it is superior, the difference not being highlighted neither in the company’s activity nor in the employee's income, and being paid 'in hand'.

Unfortunately there are no statistical data on the situation of the rights which have not been/can be valorized by employees who have carried out “black labour”.

As methods (old and new) of circumvention the labour legislation [5], we can illustrate the following:

A. The employee agrees to be fired (though, in writing, termination of the contract is made without the consent of the parties). Thus, they are entitled to the unemployment allowance and the employer gives them, unofficially, the rest of the money until the completion of the initial salary.

B. The contract is concluded for a part-time job even if the employee works full-time. It is difficult to detect; in this situation, even though inspectors descend into different days, at different times, the employee is entitled to the seat and will claim that it is during the four hours of daily schedule.

C. The employee enters in sick leave, in which case the contributions payable by the employer are reduced to a minimum. It is an easily detected method, except in cases where the employee can work from home — basically, if you are at home, work inspectors cannot demonstrate the artifice.

D. The employee is paid the minimum wage on the employment record book, and they receive the rest in the envelope. It is the most ancient and widespread method grey labour, but also one of the most difficult to detect: even if they realize that some companies pay their employees the minimum wage, the inspectors do not have to prove that they receive additional sums 'behind the doors'. The solution in general is interviewing the employees individually.

E. The candidate is tricked to work 'for trial' for three to four months, often on a less than minimum wage and without any written agreement (by law, in their trial period, an employee has a status similar to his colleagues, a labour contract, their pay social contributions must be paid etc.) Predictably, at the end of the period, the employer announces them that they did not correspond to the requirements of the position and they are removed.

The State coercion by legal norms to regulate social relations, including by criminal rules, has become a necessity in contemporary society.

Labour legislation, of all branches of law, is currently the most dynamic.

If the old Labour Code – Law No.10/1972 [6], did not contain rules of criminal offence, and not even rules concerning contraventions, the market economy since 1990 has forced the legislator to adopt such amendments.

Also, if prior to 1990 there were 15 felonies in connection with labour relations stipulated in special laws, in 2008, for example, there were 26 such criminal offences incriminated – one under the Criminal Code, three in the Labour Code and in 22 in special laws [2]. It is observed that the new social realities have imposed significant increases in the number of criminal rules regulating potentially increased social facts committed in connection with the employment relationship.
At the same time, considering this criminal labour legislation as a whole, one can highlight the fact that the legislator has incriminated a number of actions which previously have been considered only as minor offences, or which were not sanctioned.

In the new Labour Code – Law No.53/2003 [7], the legislator also introduced criminal provisions. At the time of its publishing, in chapter IV of the Code, entitled 'Contravention Liability' art.276, par.1 letter (d), penalized with a fine receiving a person for work without closing an employment agreement (...).

Currently, art.260 par.1, letter (e), imposes a fine of 10,000 lei to 20,000 lei for each person identified 'having up to 5 people without the conclusion of an individual employment contract', in accordance with art.16 par.1' (Labour Code). In accordance with art.16 par.1, individual labour contract is concluded on the basis of consent of the parties, in written form, in the Romanian language. The employer has the obligation to conclude individual labour contract in written form. The written form is required for the valid conclusion of the contract'.

Thanks to Law No.40/2011 [8] the Labour Code underwent a number of changes, among which is making 'unreported employment' a criminal offence, introduced in art.264 par.3 (after being republished). Thus, 'it constitutes offence and is sanctioned by imprisonment from one to two years or by a fine hiring more than 5 people, regardless of their citizenship, without the conclusion of an individual employment contract.'

According to art.127 par.(2) and art.247 of Law No.187/2012 [9], with effect from February 1, 2014 (date of entry into force of Law No.286/2009 [10] concerning the Criminal Code), art.264 par.3 shall read as follows: 'constitutes an offence and sanctioned with imprisonment from 3 months to 2 years or a fine hiring more than 5 people, regardless of their citizenship, without the conclusion of an individual employment contract.'

The current provisions regarding unreported employment give rise not only to controversial comments from practitioners of law and literature, but also to numerous practical problems as regards finding, probation, time frame, etc.

The difference between contravention and offence is found in the objective side and consists of the number inferior or superior to 5 people hired without signing an individual employment contract.

The Labour Code does not specify the maximum period of time that one can examine whether there have been received at work up to 5 people without the conclusion of an individual employment contract. On the other hand, art.13 par.1 of Government Ordinance No.2 of 2001 concerning the legal regime of contraventions (provisions that corroborate to the specific provisions of the Labour Code) states that 'the application of the administrative fine penalty shall lapse within a period of 6 months from the date of commission of the offence', and enforcement of the administrative fine sanction lapses if the minutes of the contravention has not been communicated to the offender within one month from the date of the penalty (art.14 par.1).

It is worth mentioning the quality of 'accomplice' conferred by the legislator to the employee who accepts to work without the conclusion of an individual employment contract, activity considered to be a contravention by art.260, par.1 letter (f) of the Labour Code.

As for the unreported employment as an offence, in addition to the faulty drafting of the text in relation to the citizenship, we consider that the number of 5 persons hired without a written contract, constitutes an arbitrary element that should not differentiate the offence from the contravention and which violates the spirit of the law, to protect both the rights of the employee and general social services (complete collection of the taxes to state budgets). We have not encountered such an objective side of an offence in criminal law, except possibly as an aggravating circumstance. In our opinion, violation of the law is equally severe in the case of a single person, the criminal law having punishing institutions for a multitude of facts (continuous offence, multiple offences, aggravating circumstance, etc.).

The legislator may consider in the future, some changes in terms of incrimination or exoneration of certain acts, namely changing the elements that define the objective side of offences and irregularities in this area.

The 'ad probationem ' or 'ad validitatem' written form of the individual labour contract is of particular importance in this context.

Prior to Law No.40/2011, art.16 par.2 of the Labour Code stipulated that 'where the individual employment contract has not been concluded in writing, it shall be deemed to have been concluded for an indefinite period, and the parties may make proof of contractual provisions and benefits effected by any other means of proof'. Thus, the written form of the individual labour contract was imposed only 'ad probationem' in a possible dispute, being much easier for the parties, and especially for the employee, to prove the provisions of the contract and related benefits.

In accordance with art.16 par.1 of the Labour Code in its current wording – the vision the legislator being fundamentally different – the individual labour contract has become a contract that is closed in written form, 'ad validitatem', under penalty of contravention (art.260 letter e) or criminal liability (art.264 par.3) of the employer. And the one who agreed to work without having concluded in writing an individual employment contract is sanctioned with administrative offences (art.260 par.1 letter (f) [3].

By Decision No.383/2011 [12], the Constitutional Court has reasoned itself the current option. 'It is the exclusive right of the legislator to lay down the conditions required for the conclusion of a contract regardless of
its nature... 'the conclusion of the contract in a written form is justified by the fight against employers ' practices, who taking advantage of the fact that the written form ... it was just an instrumentum probationis, eluded payment of taxes and charges ... owed as the effect of closing the employment contract. Such conduct reflected negatively on the welfare plan of the employee that did not benefit either from the contribution periods or health or social insurance for the unreported period of time to the competent authorities '. [3]

Evoking a previous decision (no.418/2007) [13] which stated that 'the existence of the contract prevents the abusive behaviour of the employer, but also the attitude of the employee in performing the duties for which they were hired', the Constitutional Court stated '... the phrase employment only with legal forms is distinct from the situation where the employment is carried on in the counter or with violation of the law. Or, what is taking place against the law cannot be accepted either in the field of employment relationships where, in addition to the employee and employer, an important, but related role, is played by the State through the granting of future pension or other forms of social welfare and health care'. [13]

Noting this legislative evolution we can appreciate that the legislator has imposed it for the very reason of fighting against 'black' labour, being clear that currently 'the work carried out in the absence of the individual labour contract concluded in writing is no longer considered to be done in the context of legal relations, and so does not confer to the provider neither the capacity of employee nor the seniority at work [1], embodied in the old-age pension, etc. All the more the employee is deprived of protection in cases relating to accidents at work or occupational diseases.

The Constitutional Court has decided over time, through several decisions (Decision No.448/2005 [14], Decision No.655/2006 [15], Decision No 265/2007 [16], Decision No.418/2007 [17], Decision No.961/2008 [18], Decision No.1003/2009 [19], Decision No.1109/2009 [20] and Decision No.938/2010 [21]) about the fact that the texts of the Labour Code – which established written form contract – did not violate art.16 par.1 (equality before the law), art.41 (right to work) and art.45 (economic freedom) in the Constitution [3].

In a review of the doctrine [3] it has been shown that these solutions are the right ones even now, when the written form 'ad validitatem' of the individual labour contract has been regulated, for the following reasons:

- this contract is the most conclusive proof of what the parties agreed upon, on the basis of which it can be verified to what extent they have fulfilled these obligations, their responsibilities and rights that they can claim, being obvious the bilateral benefits of its conclusion in written form before the commencement of the employment relationship;
- employment only respecting the legal forms, on the basis of individual labour contracts, and knowledge and exercise of their legal obligations by those who use paid labour force;
- the existence of the contract prevents the abusive behaviour of the employer, but also the attitude of the employee in the correlative duties;
- the obligation of concluding a written individual labour contract, as well as sanctioning failure to comply with this legal obligation do not to hinder in any way the right to work and, especially, freedom of trade.

Whereas work can be done also out of the employer - employee employment relationship prescribed by the Labour Code, that is without the need for the conclusion of an individual employment contract (civil convention, joint venture contract, contract concerning voluntary work, copyright contract, contract concluded between a floater and a beneficiary, etc.), we appreciate that text of the contravention referred to in art.260 par.1 letter (e) or of the offence stipulated in art.264 par.3 is poor through the use of the expression 'to work ... without the conclusion of an individual employment contract.'

In another opinion, it was expressed the idea that 'sanctioning the black labour through various legal means is welcome for society in general, but the solution promoted by the extreme art.16 par.1 in the current wording, lacks the legal effect of a verbal employment contract and, in the future, of a job the employee concerned. ... we appreciate that a more severe sentencing regime of labour law with regard to the illegal conduct of the employer through determining contravention and criminal sanctions, but without civil sanctions – nullity of employment contract – is a desirable solution for a future regulation. [1]'

All opinions, both pro 'ad validitatem' and pro 'ad probationem' concerning the conclusion of the written form of the individual labour contract are valid. The key difference lies in the appreciation given by the legislator to the worker regarded as employee-accomplice or employee-victim. These views have led, in time, to the sentencing policy of the State towards unreported employment.

From another point of view, the unreported employment phenomenon affects not only the employee’s rights that are protected by labour legislation, but also directly the State budget. In the case of an individual employment contract, the employer is required to withhold and transfer the contributions to the State budget.

Because, in case of unreported employment, the employer does not enter into any contract of employment, they do not pay any contributions or taxes to the State.
In this case we deal with criminal liability of the employer for committing the crime of tax evasion under art.9 par.1 letter a) of Law No.241/2005 amended: 'Constitute crimes of tax evasion and are punishable the following acts ... perpetrated in order to circumvent tax obligations: ... hiding the goods or taxable source ... '. This situation also applies to 'grey labour' for the difference in salary hidden by the employer.

Only through a harmonized social policy with an appropriate fiscal policy, supplemented by a sustained campaign and a continuous work of educating the society to comply with the law, the State can solve the problem of maintaining 'black labor' within reasonable limits.

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Brief considerations about the correlation between the provisions concerning the protection of the environment through criminal law between domestic law and that of the European union

Badescu V.S.

Abstract

Criminal liability for infringements of the rules on the protection of the environment is part of the principles of criminal liability; employment is determined by the nature of the object protected by the law and of social relations in this area. The criminal's character is given by the degree of social danger raised the deed; it should portray a serious threat to the environment, the health and life of humans and other life forms.

Keywords: environmental protection, ecological damage, criminal code, criminal law, criminal liability, European Union

About criminal liability in the field of the environment

Criminal liability is next to other forms of legal liability for specific environmental law a repressive means important for environmental protection and development. Criminal liability arises as a last measure and aims at protecting the social relations of environment through the Suppression of crime.

Criminal liability for engaging in environmental law, ecological offense must have a high social risk and represent a serious threat to the overall interests of the people, plants and animals, of material goods. The crime is socially dangerous deed, perpetrated with guilt, which poses a threat to the interests of society in the field of the environment, and human health. The crime is that dangerous offence consisting of environmental pollution (natural or artificial), disruption of the work of prevention, reduction or elimination of pollution, liable to endanger the health of humans, animals or plants or to cause great damage to the national economy. The crime is a constituent part of the report of criminal liability in environmental law.

Criminal liability for infringements of the rules on the protection of the environment is part of the principles of criminal liability; employment is determined by the nature of the object protected by the law and of social relations in this area. The criminal's character is given by the degree of social danger raised the deed; it should portray a serious threat to the environment, the health and life of humans and other life forms. For hiring of criminal liability, the facts must be perpetrated crimes the suspect as with guilt by natural or legal persons, subjects of criminal liability. Therefore, the graduation of sentences should take into account both the gravity of the environmental damage caused, and the seriousness of the threat.

All these considerations have been taken into consideration and of the Romanian legislature, national legislation in this area, being furnished to European standards and international most advanced.

In the present study, editorial reasons, we try to an alyze the issue of the protection of the environment through criminal law solely from the perspective of, Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law and the law No. 101/2011 for the prevention and sanctioning of acts relating to environmental degradation, the law transposing into national law directive without scrutinizing the regulations established by the Romanian law framework of the protection of the environment, the new criminal code and special laws in this area extremely rich.

The directive 2008/99/ec of the european parliament and of the council of 19 november 2008 on the protection of the environment through criminal law

At EU level there are already a number of acts including norms of environmental protection laws, to which all Member States should introduce minimum standards at European level in terms of penalizing unlawful acts in the area, which already have been transposed into national law. Experience has shown, however, that the existing systems of sanctions have not been sufficient to ensure that the legislation on the protection of the environment. Such a statement must be strengthened through the provision of criminal sanctions, which is a
powerful tool, of a different nature compared to administrative sanctions or a compensation mechanism based on civil law.

The objective of Directive 2008/99/EC set out in art. 1 "lays down the criminal measures in order to ensure a more effective protection of the environment". More clearly, the purpose of this directive is the establishment of a minimum set of offences within the territory of the Member States to ensure protection of human health and the environment through criminal law. This directive provides sanction and legal persons who do crime. We also carry out a more effective protection of the environment, through the establishment of minimum standards in the Member States of the European Union regarding the sanctioning of illegal acts in this area.

In order to achieve this objective and to meet these needs, it oblige Member States to provide in their national legislation the criminal sanctions for serious breaches of the provisions of European Union law on the protection of the environment. Also, a unified vision at European Union level with regard to the criminalization of violations of rules of environmental protection is required in consideration of the fact that serious pollution laws often have cross-border dimension, both in terms of the method of committing, as well as in terms of the extent of the effects, so that you can effectively control their unit without a legal framework.

Directive 2008/99/EC in respect of facts which constitute the offence, although each Member State to determine the specific manner of sanctions, and this is intended as a response to a series of contemporary realities as well as increasing the number of offences against the environment with transfrontier effects; existing systems of sanctions have not been sufficient to ensure the respect of the laws on the protection of the environment; compliance with the legislation could be strengthened by the provision of criminal penalties, which demonstrate a social disapproval of a different nature, in terms of quality compared to administrative penalties and compensation mechanism based on civil law; the existence of common rules on criminal offences make it possible methods of investigation and effective assistance in the territory of the Member States and between them; environmental protection requires the introduction of dissuasive sanctions for activities that harm the environment, which causes or is likely to cause significant damage to the air, including the stratosphere, soil, water, animals, planes, including in relation to the conservation of species; 6. Failure to comply with a legal duty to act can have the same effect as active behavior and should therefore be considered a criminal offence and to be sanctioned as such.

Containing minimum standards, the directive does not prevent any other liability regimes (laid down in Community law or national environmental damage) and the application of more stringent protection measures the efficiency of the environment through criminal law.

Although article 1 of the Directive states that criminal action established the role "to ensure more effective protection of the environment," we cannot ask ourselves, in agreement with other authors, that this would result in more effective protection, whereas the Directive content I see summarizing that:

1) Lists a number of facts which it considers crimes (we don't know after criteria, as long as the list is susceptible to numerous additions);

2) Provides for the penalization of legal entity (which is not a novelty for a number of national legislations);

3) consider it necessary to require the Member States to penalize incitement and complicity in the acts perpetrated with intent (what they included in their legislation anyway).

At the same time, we would have expected not to General and imprecise assertions (such as: "Member States shall take the necessary measures to ensure the applicability of penal sanctions effective, proportionate and dissuasive") but to the clear and precise provisions that would constitute "an appropriate response to the increasing number of crimes against the environment” as stated in point 2 of the reasons.

Even taking into account the emphasis given in paragraph (12) of considerations – in the sense that the directive lays down minimum standards – we cannot see the lightness, flexibility in terms of crimes against animals.

Thus, the Directive refers only to protected species of fauna – which means that it is not intended and unprotected ones – and, on the other hand, requires exceptional situation “affecting a negligible quantity of such specimens, which has a negligible impact on the conservation status of the species.” Because the Directive 2008/99/EC does not specify what is meant by “a negligible damage and negligible impact on the conservation status of species and given the reality that most Member States do not comply with the minimum standards, not even imposed by the directive – rarely they adopting and complying with high standards – we can draw the conclusion that animal protection is and will remain long time merely a desideratum.

The following acts are considered crimes: a) the discharge, emission or introduction of a quantity of materials or ionizing radiation into air, soil or water, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water, animals or plants; b) the collection, transport, recovery or disposal of waste, including the supervision of such operations and maintenance of public spaces and removal actions taken by traders or intermediaries (waste management), which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of the
air, soil quality, water quality, or animal or plant; (c); d) operation Department at the danger or activity in which they are stored dangerous substances or preparations, and outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil or the quality of water or animals or plants; e) production, processing, handling, use, holding, storage, transport, import, export or disposal of nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or damage to air quality, the quality of soil or the quality of water or animals or plants; f) killing, destruction, possession or acquisition of specimens of species of wild fauna and flora protected, except where the Act affects a negligible quantity of such specimens and has a negligible impact on the conservation status of the species; g) trade in specimens of species of protected wild fauna or flora, or parts or derivatives thereof, except where the Act affects a negligible quantity of such specimens and has a negligible impact on the conservation status of the species; h) any act which causes significant deterioration of a habitat within a protected site; i) production, importation, exportation, placing on the market or use of substances which devalues the ozone layer.

Note that the crimes envisaged by the Directive relating to: a) waste (collection, transport, disposal, exploitation), b) materials or ionizing radiation (also known as discharged, released, introduced into the air, water, soil, which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, soil, water, animals or plants); (c) nuclear materials or substances) fallout (produced, processed, used, handled, stored, transported, imported, exported, deleted); d) specimens of species of protected wild fauna or flora (killing, destruction, possession or acquisition, trade); e) within a habitat protected site (any act which causes significant damage); f) substances which devalues the ozone layer (the production, importation, placing on the market or use). As a result, the Directive cannot be considered offences, such as illegal acts drawing of woodlands, water poisoning, burning of vegetation, lighting and the use of fire in protected natural areas and other wooded areas, zoophile, hunt for pleasure, arranging fights between animals, exploitation of wild animals in circuses or holding them in private collections, as pets.

A legal entity may be considered liable for the crimes specified in if: 1. these offences have been committed for the benefit of or any person who has a leading position within the legal person (who was acting either individually or as a member of an organ of the legal person, based on: a) an authority on behalf of the legal person; b) a powers to make decisions on behalf of the legal person; c) a supervisory powers in the legal entity), or 2. The lack of supervision or control by a person in position of leadership has made possible the Commission of such offences, to the benefit of that legal person by a person under its authority.

Liability of a legal person shall not exclude the criminal liability of the natural persons who, as perpetrators, instigators or accomplices, are involved in the crimes. Member States will have up to December 26, 2010-to take the necessary measures to ensure the applicability of the sanctions effective, proportionate and deterrent effect of legal persons considered-in accordance with article. 6 of Directive-responsible for a crime.

**About the law. 101/2011 for the prevention and sanctioning of some facts about environmental degradation**

Romania currently has under environmental legislation, including sanctions of a criminal disregard for the provisions of the legislation. The European Union felt the need to strengthen the sanctionatorie systems in the Member States by Directive 2008/99/EC, Member States are required to transpose it into national laws. A number of the provisions of this directive are to be found in national legislation, but most of these are not fully transposed, so that it was necessary to their implementation and adaptation of national legislation to Community requirements.

Law No. 101/2011 national legislation complements environmental protection, ensuring alignment to European standards on the matter and the fulfillment of Romania as a Member State of the European Union. To this end, provision has been made in the article. 15 of the draft law that the facts listed under "If you are not, under the law in force, more serious offences". Also, it should be noted that the incriminations contained in this enactment relates to non-compliance with certain provisions laid down by law governing the main aspects of the management of pollutants and protection of the environment in general, the provisions constituting the transposition of Community legislation, or even the regulations of the European Union. As is well known, these regulations, the date of Romania's accession to the European Union, are part of national legislation and are directly applicable, so that compliance with them is mandatory for every citizen of the country.

Therefore, for the purposes of this Act, the term "violation of legal provisions in this area" relates only to non-compliance with the legal provisions listed in annexes of the law. In particular, incriminations are meant to complement the existing legal framework. It is, for example, waste operations namely sanctioning conduct operations with waste, covered by article 1. 3 the text of the law. Currently, perform these operations without complying with legal provisions is indicted only in terms of hazardous waste, Directive 2008/99/EC obliges Member States to sanction non-compliance with certain rules on the conduct of these operations (rules contained in the documents listed in the annex to the draft law) and in the case of waste which do not fall within the
category of dangerous. This is the reason why this Bill comes up with a new offence in relation to the collection, transport, recovery or disposal of waste other than dangerous.

The criminalization of the art. 4, relating to the conduct of export activity in violation of the legal provisions in this area takes into account compliance with the obligation imposed on Member States, by means of the said directive, of punishing unlawful transfer operations, as defined in Regulation (EC) No. 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste. Currently the domestic law was imposed on the import, transit, introduction or removal from the territory of the country, with failure to comply with the legal provisions, but as such without sanction and export of waste.

With regard to the protection of natural habitats and of specimens of fauna and flora protected provisions affecting the area also can be found in the force (GEO 54/2006 on protected natural areas, conservation of natural habitats, wild flora and fauna as a criminal offence imposed on capturing, killing or injury of certain protected species), so it was necessary to take only certain provisions relating to the trade in protected species at European level and even international at that article. 6 links.

With regard to the crimes of nuclear materials or radioactive substances, the project comes to fill in the existing provisions under the penal code or special laws, such as law No. 111/1996 on conducting safe, regulating, licensing and control of nuclear activities, with certain ways of committing the offences included in current legislation and the directive embraces it as such.

The crimes contained in the text of this law join the already existing special rules, including by way of example: the law. 111/1996 on conducting safe, regulating, licensing and control of nuclear activities, GEO No. 78/2000 on waste, GEO No. 195/2005 on the protection of the environment, the GEO 58/2007 on protected natural areas, conservation of natural habitats, wild flora and fauna, law No. 107/1996-Water Law and the penal code.

The social impact will be positive by providing a stronger awareness of the society on the protection of the environment and social values extremely important that this law protects: the environment and human health, and the impact on the environment will be positive because it provides additional protection.

**Conclusions on the current system of criminal sanctions of ecological crimes**

Beyond the positive impact which we are all aware, no less important we find a critical examination of the present sanction system of ecological crimes, from the perspective of the many legal instruments with the purpose of regulating environmental protection through criminal law. More specifically, at this time, the incidents are no less than four legal acts, some of them with the same value; The penal code, the law on the protection of the environment, the EU directive and its transposition law in our country, as well as special legislation mentioned in the preceding.

Editorial reasons, easy to understand, we cannot make a comprehensive approach of Assembly rules, but we will focus only on one aspect, one regarding this regulatory inflation with negative effects on the consistency of the interpretation and application of the texts.

In this sense, therefore, that, in essence, that in matters of protection of the environment through criminal law exists, as we state, several parallel regulations with the same purpose. Are violated, in our opinion, technical legislative rules relating to the prohibition on parallelism, and the requirement of precision and clarity in the legal norm, set out in Law No 24/2000, concerning the rules of legislative technique to develop normative acts, deficiencies which have very serious consequences on the implementation of consistent and uniform legal standard incident and in force, and that affects Finally, the principle of Justice as the Supreme value of the Romanian State, but also of the European Union. At the same time, we consider that the statement in the explanatory memorandum to the law No. 101/2011, meaning that "already exists at Community level a number of acts including norms of environmental protection laws, to which all Member States should introduce minimum standards at European level in terms of penalizing unlawful acts in the area, which have been transposed in national law" is not well founded basis for lawn the sense required by art. 6. 1 of law No. 24/2000, and realizing a legislative chaos and larger proportions.

We believe that the identification of texts of law, incidents in a given area at a given time and cross-checking them according to rank normative act assessment of the legal norm of the incident, followed by their interpretation and application in specific cases, characterized by circumstances of fact, represents the operations jurisdiction of the judge of the quo. But, until the magistrate assessment there are so many other people with no legal training of this level that are required to comply with and enforce the law! Do they like doing?

And yet, something not always European regulations have been exempt from criticism, there are plenty of examples in which the texts of legal acts with binding force for the Member States, have been declared unconstitutional by the constitutional courts of national control. No man is not infallible, only God is without a mistake!
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Insurance fraud as a result of economic crisis

Bentia A.M.

aracsia_bentia@yahoo.com

Abstract

Insurance fraud increased significantly over the past year, indisputably as an impact of the down-turned economy. While there are several products of which exposure has been noted, the greatest measured impacts are as a result of vehicle insurance fraud, mortgage fraud, and workers’ compensation premium fraud [4].

Keywords: Insurance, fraud, economic crisis.

Insurance fraud and economic crisis

The world financial crisis started in 2007, was expected to have ended in 2009, and continues to the present. It opened the eyes of government leaders to how vulnerable nations are in times of crisis. When the economy began to decline in late 2007, early 2008, it was expected that insurance fraud would most likely increase. And, as the unemployment rate, the cost of gasoline and the foreclosure rates all increased, an increase in insurance fraud became a certainty [4].

Insurance fraud has existed ever since the beginning of insurance as a commercial enterprise [7]. According to the Coalition Against Insurance Fraud, the causes vary, but are usually centered on greed and holes in the fraud fight [14].

Drug dealers who have entered insurance fraud [6] think it’s safer and more profitable than working street corners.

The “chief motive in all insurance crimes is financial profit” [7]. Insurance contracts provide both the insured and the insurer with opportunities for exploitation.

Insurance fraud can be classified as either hard fraud or soft fraud [5].

Hard fraud occurs when someone deliberately plans or invents a loss, such as a collision, auto theft, or fire that is covered by their insurance policy in order to receive payment for damages. Criminal rings are sometimes involved in hard fraud schemes that can steal millions of dollars [3].

Soft fraud, which is far more common than hard fraud, is sometimes also referred to as opportunistic fraud. This type of fraud consists of policyholders exaggerating otherwise legitimate claims. For example, when involved in a collision an insured person might claim more damage than was really done to his or her car. Soft fraud can also occur when, while obtaining a new insurance policy, an individual misreports previous or existing conditions in order to obtain a lower premium on their insurance policy [5].

In Romania, in the first six months of the year 2012, non-life insurance market were underwritten total premiums amounting to approximately 3277 million lei, of which 2064 million were related to insurance policy CASCO and RCA (about 63% of total).

With regard to wages, the insurance companies have paid about 2074 million lei, of which about 1907 million were incurred in auto insurance policy (over 87% of total).

Although there are no statistics on the extent of the insurance fraud in Romania, it is noticed a slight increase in attempted fraud, as a result of the economic crisis.

In fact, the specialists had expected insurers in 2012 loss of approximately EUR 100 million as a result of fraudulent requests for damages.

According to a survey recently conducted by 1asig.ro., more than half of the respondents consider that fraud represents more than 20% of total compensation, other 33.3% assigning fraud between 10% and 20% of the value of claims paid by insurers [15].

In Bulgaria, this percentage is even higher, and in Poland, for example, 62% of all frauds uncovered general insurance market in 2007 were about auto insurance, registering an increase of up to 70% in 2008.

Romania enters the EU, representatives of CSA media declaring that fraud in the auto insurance reached 15% of the total number of cases.

According to preliminary statistics, in the first six months, the judicial police found approximately 500 specific insurance fraud offences, with an estimated damage of about 3.5 million lei (about 0.14% of total gross wages paid).
The issuance of electronic RCA packages solved the problem of previous dating, or of the management of intermediaries, but the difficult economic period, high number of cars bought in leasing system, as well as the introduction of its finding out are issues that can stimulate the continued phenomenon of fraud.

In terms of the percentage of insurance fraud, in Romania it exceeds 15%, given that the international system is accepted a rate of 5%, and I'm not referring here only to identified fraud after you apply constatului throughout. In fact, hull have been the engine of growth in auto insurance fraud, the fact that many businesses have been closed, increased unemployment and decreased salaries, many preferring to defrauding the insurer and provide” (Declared the President of B.A.A.R., Liviu STOICESCU.)

Thus, the increased lot number and total damage, too, have increased the car thefts. So, register an increase to more than 125% of the combined rate of damage on the CASCO.

Between the number of uninsured cars provided by CEDAM data F. P. V. S. where the number of accidents involving cars without insurance is valued at less than 1% of the total, there is a difference that can be explained in two versions: fold difference in uninsured motor vehicles do not move, so no accidents, often they become insured at the time of the accident, which is confirmed at a rate of 50% of the shoulders. This solely responsible are employees of their own companies and people who buy their RCA. We hope that this trend will be stopped issuing with electronics, when previous dating is no longer possible”. (Explained Albin BIRO, Member in CSA Counsil.)

Whether it's about light/opportunity fraud or serious crimes, such as simulated accidents, we must admit that we are dealing with a phenomenon that gained momentum, which in our country is still not punishable as it should. The most effective way to combat this problem is a tighter collaboration between insurance companies. „Who try to defraud a company today, you will definitely try another tomorrow”. (Declared Madalin ROSU, Avp Claims Management, GENERALI Insurance)

For example, the Member companies of GENERALI PPF Holding in most CEE and have created their own Fraud Prevention Departments of Insurance, which deals with all claims of damage suspect.

Claims of fraudulent claims rejected by GENERALI Asigurari in 2009 in Romania amounted to a value of 300.000 EUR, according to a study by GENERALI PPF Holding based on information regarding fraud detection, provided by each country member of the holding.

Simulation of car crashes, attempted termination of contracts of insurance or accident subsequently submitting fictitious invoices for maintenance of the car and application of damage with a value of greater than the compensation to which he is entitled the client represents the most common cases of fraud.

1.1 Cases of insurance fraud

Next, we present a series of cases of insurance fraud, identified and released by GENERALI PPF:

1.1.1 Don't drink and drive:

A driver in a Renault hit a tree in a secluded place in the Czech Republic. Although the accident was serious enough, the driver got out of the car without any lesion. A telephone and in a half hour damaged car was loaded onto a platform and transported quickly. The next day, the platform brought Renault-damaged along with his driver at the place where the accident occurred and the car next to downloaded. The driver gave a phone number, just as they had done the day before. After a while the police and another platform. What happened yet?

When the driver hit the tree, is under the influence of alcohol, and knew that his claim of damages would have been rejected and i never would have paid compensation based on insurance Casco. The next day there were no more alcohol into the bloodstream, therefore has not phoned his friend with the platform, but the cops. But he realized that there was a witness who watched him in two days and that his behavior seemed strange.

1.1.2 Life insurance policy:

After he ended a life insurance policy on a very large amount, a Lady of Hungary has submitted a claim for compensation, declaring that her husband died at sea, in a surfing accident in Greece.

The applicant remained open life insurance policies with coverage of deaths totaling about 100 million HUF (376.000 EUR) several insurance companies.

All insurance companies have refused to pay the compensation and have hired a private investigator who has determined that the person insured, which is claimed as the deceased, actually lived on a farm in Czech Republic.

Based on this information, police arrested both the person in question and its accomplices, who were then brought before a court in the Hungary. GENERALI would have been forced to pay about 20 million HUF.

1.1.3 Damages that were already paid by another insurance company:

In 2009, in Romania, an employee of the public authorities, the owner of a BMW brand cars, reported a loss of 8000 EUR to the GENERALI, and as a car brand Citroen hit him from behind and threw him into a fence, which resulted in damage to his BMW car the front and rear. All repairs had been made into an auto shop
that GENERALS no longer had never until then. After a careful research performed by the GENERALS it was discovered that the car belonged to even shop owner BMW brand vehicle, and the person who owns the vehicle, mark the part of Citroen, was one of its employees. Furthermore, the investigation revealed that the damage to the front of the car were one year old and that they were already paid by another insurance company. At the same time, it was discovered that the vehicle involved in the accident had been Fh bought a few days before and made sure all the GENERALI, while its owner was seeking payment for the damages.

1.2 Classification of insurance fraud

Insurance fraud can be perpetrated by any participating party to the transaction and any third-party with dishonest intentions.

The involvement of these parts can be classified as follows [9]:

- Client versus insurance company - Example: providing false information to obtain an insurance policy for a premium or issuance of a false claim
- Organized criminal groups versus insurance company - Example: staging road accidents to issue claims for fraudulent claims
- Insurance Agent/Broker versus client - Example: taking money for premium, but the failure of the insurance company
- Insurance Agent/Broker versus insurance company – Example the submission of false policies to get Commission
- Employee versus employer insurance (insurance company) - Example: taking money for premium, but the failure of the insurance company
- Undertaken in insurance versus client - Example: the provision of false figures set and keep surplus money
- Insurance company customer versus - Example: payment of premiums and their payment upon expiry of the contract
- Third party versus insurance company or client - Example: retrieving data on customer identification and withdrawal of its investment

Criminal code of Romania – insurance fraud

The new Criminal Code of Romania will specifically criminalize the deception regarding insurance. Unfortunately, although the statistics show that the most frequent fraud in this area is related to the amendment of data concerning the manner in which in fact, this accident way fraud will not have any in the new code the specific incriminations.

The penalties for the offence of misrepresentation, either the generic or specific markets will not exceed 5 years imprisonment and will not penalize more severely offence depending on the amount of damage caused.

However, the main change which will bring new criminal code will be the reconciliation of parties will remove criminal liability. This will encourage the injured parties of this offence, as he gained the interest of the perpetrators to try recovering from injury and reconciliation with the insurance company who hijacked.

However, it is easily deduced that the new penalties provided for, as well as the possibility of reconciliation which removes criminal liability irrespective of the procedural time comes will have as a result an increase in the phenomenon of crime.

Times, where, for example, auto insurance companies sometimes pay compensation higher than premiums, such trend is extremely damaging. To counteract the effect of fraud upon the financial results will be needed, this time by a reactive attitude. To counteract the effect of the phenomenon of fraud against the financial results will be needed, this time by a reactive attitude.

The economic environment in which the insurance undertaking of the desfășoară activity is responsible for committing the crime of insurance fraud. Factors such as: the economic crisis and rising unemployment are causes of insurance fraud.

Fraud concerning insurance in accordance with article 245 N.C.pen. the following content: "(1) the destruction, degradation, destruction hiding or alienation of property insured against destruction, degradation, wear and tear, loss or theft, in order to obtain, for himself or for another, sum insured, is punished with imprisonment from one to five years.

(2) the Act of the person who for the purpose stipulated in paragraph 1. (1), simulate, they cause or aggravate injury or bodily produced by an insured risk is punished with imprisonment from 6 months to 3 years or fine.

(3) Reconciliation removes criminal liability. "

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Similar incrimination are found in art. 642 C. on. Italian art. 219 C. pen. Portuguese. From observing the legal content of the offense, you may notice that it has two types of offence: a variant type, provided by paragraph 1. 1 of article. 245 N. (C). pen and an attenuated Variant (paragraphs 1 and 2. 2), while paragraph 1. 3 includes items that relate to the cause of the removal of criminal liability and that existed in the case between the parties involved.

By reference to the level established for the crime of deception abstract in form from the article 244 N.C.pen. notice that the off-the-shelf lies on the same plane. The legislature to create a distinct offence that relate to fraud in the insurance field was justified but the fact that the efficiency in terms of general prevention is increased to the extent that there is a dedicated regulatory.

The fact that you have created a rule of this kind does not equates the criminalization of acts for the first time that the legislature has set as material. All the acts that the article 245 N.C.pen. it establishes as offences can be framed as such and by reference to the provisions of article 215 C.pr. 1969 that may be factual variant ways of incrimination of quoted text.

The crime involves the existence of an insurance contract.

Considering how the two normative options are formulated, we believe that they follow the classical system of civil law, the insurances are classified according to the subject matter covered by insurance of goods and insurance of persons.

If the object is good insurance, insurance of goods; the compensation owed to a third person, to insurance against civil liability, some attributes of the person, life or inability to work, persons insurance, contract insurance is, in fact, the name given to the financial interest that a person has in connection with the subject to ensure [2].

The assurances have appeared and have been developed due to the need for protection of people and goods through the distribution and sharing of the risks in the context of raising awareness of the idea of solidarity in the face of risk [10].

Legal approach to life insurance is frequent and justified, whereas the provision in order to be able to be operated, should take legal form, and this form is the first discerned [1]. Her shape is the contract, which is " parties " law and the law itself, they complement each other. Thus, through the conclusion of contracts are born, are amended or terminated rights and obligations. Taking as a model the French civil code of 1804, which defined the notion of obligation, the civil code of 1865, as other European civil codes, like the one in 1811, the Austrian Swiss in 1907 or the Swiss federal Code of obligations in 1881 and then from 1911, have defined this legal institution[1].

In life assurance the offeror is deemed to be the client, the consumer [11], the insured. Offer or proposal to contract is not made by the insurer, it limited to trying to attract bids from consumers, insured, and through the activity of brokers [8].

Although we cannot make an accurate picture of the General problems of fraud, the best estimate is that ours in most European countries, fraud detected in the phase of demand for compensation shall amount to 5-10% of the annual compensation payments in the case of other insurance than life [13].

Conclusions

The insurance fraud has become a temptation increasingly higher from the beginning of the economic and financial crisis. If the phenomenon of insurance fraud was mostly met at auto zone it appears that in recent years this phenomenon has extended to other lines of insurance, including life insurance, property, travel or malpractice. Like all white collars, crime insurance fraud is perceived socially as a crime without victims, a crime in which no one has to suffer. Even more than that, according to some statistics, about 35% of the number of people who have an auto insurance policy have been involved, in one form or another, in an insurance fraud.

We must fight against insurance fraud, as follows:

Fraud-busting units. Most insurers have made fighting fraud a priority, more than tripling anti-fraud spending in recent years. Most insurers have created special fraud-busting units, often staffed by former detectives and police officers.

Educate consumers. Many insurers actively educate consumers how to detect and protect against fraud, and often sponsor active fraud hotlines so people can phone in tips.

Train employees. Most insurers train employees and alert insurance agents to spot fraud.

Track down cheaters. Insurers also sponsor the National Insurance Crime Bureau (NICB). The NICB is increasing the number of fraud convictions by gathering detailed data about suspected fraud crimes, and referring them for prosecution. The NICB also runs a national consumer fraud hotline.

More fraud bureaus. State insurance regulators have created 37 fraud bureaus in 45 states, whose job is to investigate and hunt down fraud.

Tougher fraud laws. We have to develop a tough model state fraud law. Among other provisions, this model:
- creates state fraud bureaus that help hunt down fraud artists and build strong cases against them. Many fraud bureaus even have power to subpoena and fine crooks.
- requires insurance companies to develop thorough plans for preventing and detecting fraud.
- requires insurance applications and claim forms to warn that fraud is a serious crime.
- provides immunity to insurers when sharing fraud information with other insurers, investigators and law enforcement [15].

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The need to perfect the fight against human trafficking by criminal means in the context of the current economic crisis. national and european perspectives

Bocaniala T.

Senior Lecturer, PhD, Danubius University of Galati (ROMANIA) tache.bocaniala@univ-danubius.ro

Abstract

The present paper is a brief analysis of the impact of the current financial and economic crisis on human trafficking phenomenon and also the level of response that the society is ready to give at national and European level, in particular through the regulatory framework made available to the specialized institutions for its criminal repression. The analysis concludes that Romania has now a modern legal and institutional system in the domain of preventing and combating human trafficking. However, the research highlights the need for legislative amendments that would determine more efficiency to the prevention and control measures, representing a milestone in approaching other related topics.

Keywords: human trafficking, organized crime, economic crisis, fight against.

General considerations

Human trafficking is a violation of human rights and an offense to human dignity and integrity. Trafficking in human beings is not a new problem in the crime scope, being present in human history for millennia. Thus, slavery, in the old and new forms, and slavery-like practices continue to exist in other states of the world, everything being conducted in the range of organized crime. In turn, the development of communications means and global economic imbalances have increased and internationalized the human trafficking. The vast majority of trafficking victims come from broken or dysfunctional families, and also from the marked by violence and abuse youth.

We notice lately a relatively high incidence of minors, their number exceeding a quarter of the total identified victims. Amid the economic crisis, which has brought large staff layoffs and declines of purchasing power of the population, important groups of cross-border international and local crime manage to secure higher earnings by recruiting new members, much easier in exchange for money, especially by recruiting much easier the victims, particularly minors, but also adults who are increasingly available to move to other areas obtaining gains that would insure a better living; this causes an increase in their vulnerability. The right of the European Union citizens to travel freely was and still is exploited by traffickers in the development of close relations between the organizers of human trafficking and “business partners” from the domains from where they are exploited such as agricultural predilection for labor exploitation or sexual tourism in various locations authorized to work legally in some countries such as Spain, Czech Republic, Germany, Austria, Switzerland.

Specialists’ estimates involved in the research of the organized crime phenomenon and especially in preventing and fighting against it, according to which the current economic and financial crisis will have a major impact on all forms of manifestation of this phenomenon, which will increase, become more and more real. Because of the underground nature of the phenomenon, the estimates of the number of trafficked persons vary, determining their exact number has become impossible. For example, the International Labor Organizations estimates on forced labor reported that nearly 21 million people are trafficked annually worldwide and about 880,000 in the EU states. In turn, the State Department of the United States of America, the Organization for Security and Cooperation in Europe, GRETA (Group of experts specialized in the fight against human trafficking; they are responsible for monitoring the implementation of Council of Europe Convention on the fight against trafficking in human beings.), the Europol regularly published the rather alarming estimates regarding the shapes, volume and the extent of trafficking in human beings.

The official statistics released by the Romanian authorities in 2011 [7], finds that it is kept the tendency registered in 2010, that is keeping the exploitation modes related to the number of criminal cases: the most common form of exploitation is the sexual one, being followed by the exploitation of labor obligation and
forcing to begging practice. Also there were found other cases that regarded other exploitation ways such as forcing to road or stores theft and child pornography, etc.

Considering the almost constant growth of the organized crime and implicitly the human trafficking in the perpetual transition, considered by the UNODC study on the countries of South Eastern Europe, as being a real problem of this geographic area, along with corruption, it corresponded, at European level constant concerns for improving the European regulatory framework so that there would be the necessary tools to achieve a firm and uniform retaliation from the Member States of the European Union. Thus it was adopted the Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings, and replacing the Council Framework Decision 2002/629/JHA. The reaction against trafficking in human beings phenomena requires a multidisciplinary and multi-institutional approach. Victims in trafficking and exploitation represent a type of illegal economic activity consisting of means of significant financial resources accumulating for organized crime groups. Given the serious violations of fundamental human rights, such acts represent an offense against human dignity, which no country can overlook and Romania makes no exception. Moreover, as illegal activity very often a cross-border one, the human trafficking is an element that can threaten the national and the Union security. Combat it, including by criminal means, is an important area of cooperation within the European Union and in partnership with all other states and international organizations.

Analysis of the legal framework

Human trafficking is expressly prohibited by the European Union Charter of Fundamental Rights which has turned combating this phenomenon in one of the priorities of the Stockholm Programme. The amplified dynamics of trafficking in persons, thus worsening and prolonging the economic crisis, has led to a dynamic on the measure of recent legislative regulations, at both national and union level.

The existing legal framework currently in force in Romania, and also the one provided by the New Criminal Code, adopted by Law no. 286/2009, which will become applicable in the near future, have been adapted to demands resulted from the practice on incriminating the human trafficking acts and the assimilated or related acts, as well as the procedural and criminal procedure deposition for combating the criminal phenomena. Thus, the present legal framework in the field, Law no. 678/2001 on preventing and combating human trafficking, according to the latest amendments, contains the rules of criminal indictment on human trafficking in connection with human trafficking, preventing crimes in human trafficking, domain, protecting and assisting the victims of human trafficking and elements necessary to the national agencies in order to apply the law in the area for the international cooperation on this level.

For achieving the alignment to the European standards for combating and preventing trafficking in human beings, the law clearly defined the crime of human trafficking, which placed it in accordance with the definitions contained in the international acts in this field, it also proceeded to incriminating the use of services of the trafficked persons and it included a definition of the notion of victim of human trafficking. Following the ratification by Romania of the Council of Europe Convention on Action against Trafficking in Human Beings (by Law no. 300/2006), the new incriminations were taken and in the new Criminal Code. For example, the New Criminal Code provides punishments for a person who is proved to have agreed to receive the transplant, one or more organs, knowing that its taking was made illegally by a victim of trafficking, or in the case of the one who is proved that accepted to use forced labor imposed on the victims of trafficking, as defined. Similarly the New Criminal Code analyses the person receiving the services of the forced victim in practicing prostitution, if it is established that the person knew that the person concerned was a victim of trafficking.

Regarding the New Criminal Code, it retains the content of the current legislation, bringing improvements and also making systematization and an alignment of its provisions at EU and international standards. Thus, in the special part of the New Criminal Code, under Chapter VII of Title I there were introduced offenses of trafficking and exploitation of vulnerable people, by taking the offenses provided currently in the Law no 678/2001, in the Government Emergency Ordinance no. 194/2002 and Emergency Ordinance no. 105/2001 on the state border of Romania. The legislator carried out a systematization of the incriminating texts of the facts of human trafficking, including the minors and migrants, for easier understanding and better correlation with other legal provisions, but without proceeding to substantial modifications. Starting from common situations encountered in the last year practice, the New Criminal Code renounces at the incrimination of begging acts in the form prescribed by the current Criminal Code, but it includes two new incriminations related to begging, designed to respond to the practice demands. Thus, it is incriminated the exploitation of begging practiced by a minor or a disabled person (consisting in determining practicing the begging or profiting from this activity) and the use of a minor, by the adult who has the ability to work in order to obtain such financial support from the public.

The legislation also includes a number of special procedure provisions necessary to ensure an effective fight against the trafficking in human beings, in accordance with Directive 2011/36 of the European Union.
Thus, regarding the prosecution of offenders, the Directive provides the possibility for Member States to prosecute its nationals for offenses committed in other EU Member States and to use the characteristic investigation means for the fight against organized crime. As a result, under the law, in the case where there are serious reasons for committing crimes of human trafficking there can be conducted interceptions or audio or video recordings by the prosecution in order to obtain evidences required in these cases, and there can also be used undercover investigators with statutory authority of the prosecutor or the court, as provided by the Code of Criminal Procedure.

Also in order to comply with the dignity and private life of the victim who agrees to participate as injured parties in the criminal trial, upon request, the court may declare the hearing secret. In the case where the victims of human trafficking offenses and child pornography are minors, notwithstanding the procedural rules, the hearings are not public, in order to guarantee the protection of minors. Also, in accordance with article 12 of Law no. 508/2004 on the establishment, organization and operation, within the Public Ministry of the Directorate for Investigating Organized Crime and Terrorism, the prosecution of human trafficking offenses is under the competence of the specialized directorate of the prosecutor’s office.

We should mention that in terms of implementing the Directive 2011/36/EU of the European Parliament and of the Council, the Member States are required to implement the laws, regulations and administrative provisions necessary to comply with it until April 6, 2013 and it is for the Commission to submit every two years, the measures taken by the EU state in the fight against trafficking in persons. The first Commission report on the issue is scheduled for 2014.

**Brief conclusions**

Trafficking in persons as a business generates huge profits. The assessments released by the International Labor Organization (ILO) estimated the gained amounts, from the proceeds of trafficking in human beings, only in the sexual or labor exploitation, of about 31.6 billion dollars a year, worldwide. Or, in the context of economic crisis and financial extension it is easy to estimate that the interest for achieving such fabulous illicit profits through human trafficking will remain at a high level.

Freedom of movement of EU citizen must be related to the differential response of various law enforcement agencies for applying the law in the fight against human trafficking cases although it is imperative that all union structures and member states to act together to eradicate this phenomenon both by repressive measures and by reducing and even annulling the possibility of the dealers to benefit from these crimes.

Romania still remains primarily a country of origin for human trafficking victims, under the conditions of amplifying the vulnerability of some segments of population in search for better living opportunities. As a corollary, the European countries continued to maintain their position as destination countries for people in our country in situations of trafficking and exploitation.

The economic crisis resulted in Romania, the financial limitations in all areas including in the domain of preventing victimization prevention, combating human trafficking and assisting victims of this scourge, caused an inappropriate number of trained personnel, thus reducing the capacity of law enforcement agencies.

A series of proposals for measures to coordinate the action against human trafficking, which aim at better protecting the victims and punishing offenders more effectively by all EU Member States were subject of the Commission, Council and European Parliament concerns for building a European Union Strategy for the period 2012-2016 to eradicate trafficking in persons, representing a set of concrete and practical measures to be implemented over the next five years. The measures included in the strategy are the result of extensive consultations with experts, governments, civil society, international organizations, social partners and academics.

Simultaneously, Romania has made efforts to draft its own national strategy against trafficking for the 2012-2016 period.

In addition to the economic measures, targeting the improvement of living standards, increasing the access to education and strengthening the legal protection, with direct effect in lowering the risk of victimization, there are needed further measures to improve the regulatory framework. Among other things, we think that it should be considered the best legal action to ensure the confiscation of illicit proceeds in all situations from human trafficking in all its forms, and any form of hiding them. It also requires traffic regulation on the streets at night of the unaccompanied children and children in the clubs or bars that should be better controlled, as provided in the law of other countries, by setting age and hours’ limits. There are also a range of opinions and standpoints that the legalization of prostitution could significantly reduce the number of victims of trafficking, including among minors. We do not agree with these opinions, moreover, we believe we can bring many arguments against it and it can be the subject to further study.

It can be appreciated that Romania has made significant progress in the recent years in preventing and combating human trafficking, the current economic and financial crisis found it with institutions and departments, specialized personnel trained to a higher level. Nowadays we may say that Romania, through the improved regulatory framework and the state’s institutions, has the task to solve many of the negative aspects of
this segment of organized crime reported in the past, being in a position to share expertise and best practices with other European partners.

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The new legal aspects regarding tapping a phone call from the European Court of Human Rights case law perspective

Boroi A.¹, Popa M.²

¹Professor, PhD, Danubius University of Galați, (ROMANIA)
²Phd, Titu Maiorescu University of Bucharest, (ROMANIA)
alexandruboroi@yahoo.com, popika_rapid@yahoo.com

Abstract

The objective of the present research consists of analyzing the requirements imposed by the jurisprudence of the European Court of Human Rights in order to establish the presence / absence of a match between the standards and regulations of the Romanian legislation in the field of audio or video interceptions and recordings. This paper joins the scientific efforts made by other authors in order to identify the existing problems in the internal law from the perspective of the Convention. The concrete results of the research focus on presenting the principles required by the European Court of Human Rights on the protection of privacy. The paper also examines the internal rules that violate the European standards in the field. The undertaken research may be useful to practitioners in the field, that will be guided to the correct application of community and national provisions, and to theorists and Romanian legislator. The research is a critical analysis of the national rules that does not meet the European Court of Human Rights standards and it reports negative effects that may occur, as a consequence of these provisions.

Keywords: interceptions; New Code of Criminal Procedure; the European Court of Human Rights

Audio and video interceptions and recordings according to the European Court of Human Rights jurisprudence

In order to comply with the privacy and correspondence right, the New Code of Criminal Procedure establishes procedural rules in the special techniques of surveillance and research matters to meet the accessibility, predictability and proportionality requirements.

There are classified and defined as special surveillance or research techniques the following:

- interception of conversations and communications;
- video, audio surveillance or by photographing in private areas;
- location or GPS tracking or by other surveillance technical means;
- obtaining the list of telephone conversations;
- retention, delivery or searches of postal correspondence;
- monitoring the financial transactions and the disclosure of financial data;
- use of undercover investigators;
- finding corruption offence, or the conclusion of an agreement;
- supervised delivery;
- identification of the subscriber, the owner or the user of a telecommunication system or an access point to a computer.

Also it is defined the notion of technical supervision regarding the use of one of the techniques referred to in letter a)-c) and f).

In all cases of authorization of such measures, the New Code of Criminal Procedure requires the need for a reasonable suspicion of committing a crime, the compliance of the subsidiarity principle - being revealed the exception character of interference with the right to privacy - and the principle of proportionality of the measure by restricting the right to privacy in relation to the particularity of the circumstances, the importance of information or evidence to be obtained or the seriousness of the offense.

Also in order to ensure the right set by article 8 of the European Convention on Human Rights and Fundamental Freedoms, the New Code of Criminal Procedure establishes, as a matter of principle, the obligation of the prosecutor that, after ceasing the technical supervision measure, he would inform in writing as soon as possible every subject of the warrant on the technical surveillance measure which has been taken in his case.
The way in which there were regulated in the Code of Criminal Procedure the interceptions and the audio or video recordings is part of the constitutional provisions (article 53 of the Romanian Constitution), especially because the restriction did not affect the existence of the right, being proportional to the situation that caused it. [10]

However, the new regulation does not solve the existing provisions of special laws. These provisions have been appreciated both in domestic law (Trial Bucharest, Section IV Civil Code civil sent. no. 709/2007, Bucharest Court of Appeal, Civil Section III, dec. no. 1/2009 cases S.R.I. vs Patriciu.) and the jurisprudence of the Court (Elena Pop Blaga v. Romania, the European Court of Human Rights, November 27, 2012.) as being contrary to the principles laid down in the Convention. In what follows, we provide an overview of the arguments underlying the proposal: the Law implementing the New Code of Criminal Procedure providing expressly that the provisions of special laws that undermine the right to privacy, to be repealed.

The free communication between two or more persons represents an integral part of the notion of “correspondence” and “privacy”. In the current context if society development, the communication between two or more persons may be held, in addition to the classical forms: discussions between the persons presented in the same place, letters, telegrams, telex or fax, through a variety of other ways: by mobile telephony [3] (that in addition to voice transmission, it can also provide data transmission as SMS (Short Message Service - Short Messages sent via mobile phones) or images), communications made by broadcasters of fixed or portable reception (e.g. “walkie-talkie” systems), transmission of electronic messages via pager or Internet communications (in all its forms: text messages, sounds, pictures). [12]

Restrictions on the inviolability of telephone conversations and communications, on respecting the private and family life, home and correspondence are required also by the European Convention on Human Rights and Fundamental Free European Human Rights ms (Romania ratified the EUROPEAN HUMAN RIGHTS Convention by Law no. 30/1994, published in Official Monitor no. 135 of 31 May 1994.)

Article 8 of the Convention on European Human Rights, entitled “the Right to respect the private and family life”, provides:

“Everyone has the right to respecting his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except to the extent where this mixture is required by law and if it represents a measure that, in a democratic society, it is necessary for national security, public safety or the economic well-being of the country, defense of order and preventing the criminal acts, protecting the health or morals, or the protection of rights and freedoms of others.”

The possibility for phone call interception by state authorities is provided virtually in all signatories States of the Convention on European Human Rights, being related generally to the fight against crime. The democratic societies are threatened by complex forms of espionage and terrorism and to effectively combat such threats it should allow states to monitor the subversive elements operating in their territory.

The European Court of Human Rights (following the European Human Rights Court) admitted that there are some legal provisions allowing the interception of mail under exceptional circumstances which are necessary in a society in order to ensure the national security, defending the public order and prevention of committing crimes. (European Human Rights Court, September 6, 1978, no. 5029/1971, Klass and others v. Germany, A no. 28.) On the other hand, any excess in carrying out some interceptions of telephone conversations involves not only the risk of harming the individual, but it can have negative consequences for the democratic society as a whole. That is why the guarantees against the abusive interceptions are indispensable. (Berger, 2005, p. 407)

In dealing with cases analyzed by the EUROPEAN HUMAN RIGHTS Court it followed a certain natural order in order to discover the incidence of the provisions of article 8 from the Convention:

a. The applicability of article 8 in the domain of telephone communications interceptions. The EUROPEAN HUMAN RIGHTS Court has stated that the guarantees of article 8 of the Convention must be respected under all circumstances, and only where the interference has as aim proving a crime. It is irrelevant in this regard the way of using the records (the immediate purpose of interception).

b. The conditions of applicability of article 8 paragraph 2:

- The existence of an interference (The European Human Rights Court, April 24, 1990, Kruslin v. France, Huvig v. France, A 176-A.);
- The interference is provided by law (besides the mere existence of the legal law it seeks the quality of the law, its affordability and predictability); (European Human Rights Court, 2 August 1984, no. 8691/1979, Malone v. UK, the European Human Rights Court, February 16, 2000, no. 27798/1995, Amann v. Switzerland published in RJD 2000-II; cause Prado Bugallo v. Spain, no. 58496/2000, European Human Rights Court judgment of 18 February 2003.) it is necessary for the rules to be known, under reasonable terms by the person to whom it is applied. Accessibility is assessed by

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reference to the possibility of a person to have information on the standards. The condition of accessibility of a legal rule is not met by internal unpublished regulations, instructions or directives or simply is not brought to the attention of interested persons, so it could not be invoked in order to justify the interference by the public authorities. (Judgments in the case of Rotaru v. Romania, published in the Official Monitor no. 19/11.01.2001, Case Petra v. Romania, published in the Official Monitor no. 637/27.12.1999, Case Cotlet v. Romania, published in the Official Monitor no. 422/19.05.2005 or case Sissantis v. Romania, judgment of 25 January 2007 in terms of analyzing the accessibility condition of the law. The main way to insure the publicity of legal acts is provided by the Autonomous Administration “The official Monitor”, according to article 5, Law no. 202/1998.)

The interference would pursue a legitimate aim; (European Human Rights Court, case Campbell Christie v. United Kingdom, application no. 21482/1993, inadmissibility decision of 27 June 1994, 78-A DR 119.) these aims are assessed according to the circumstances of each particular case. The commission recognized the flexibility in interception is required by the nature of the subject in question and that the concept of “predictability” does not require the definition of terms such as “national security” or “the economic well-being of the country” when they are used as prerequisites conditions in applying the measures.

- Interference represents a necessary measure in a democratic society. (European Human Rights Court, 24 August 1998, no. 23618/1994, Lambert v. France.) In adopting the measure which represent an interference in the exercise of rights protected by article 8, the states have provided a variable appreciation reserve, and by this condition it seeks to restrict the measures taken by the authorities to what it is “necessary in a democratic society”, obliging the states to ensure an “adequate and effective control” for verifying the legality of measures in relation to the specific situation of each case. The order of a magistrate for an interception does not involve regular records and compliance with article 8, so as to make unnecessary an appeal to those concerned (case Matheron v. France, judgment of 29 March 2005).

**National legislation on interceptions and audio or video recordings**

Previous to the legislation in the Code of Criminal Procedure of the potential interception and recording of telephone conversations, there were some provisions in Law no. 51/1991 on the national security (article 13), where it is regulated the procedure interception and recording telephone conversations and other communications in the case of preparation and perpetration of crimes that represent a threat to the national security.

Regulations on the procedure of recordings and audio or video interceptions are found in other normative acts as well. (Law no. 161/2003 on some measures to ensure transparency in the exercise of public dignities, public functions and business environment, the prevention and punishment of corruption contains provisions on the access to a computer system and interception and recording of communications conducted through computer systems (article 54-59 - authorizing the prosecutor, referring to the Code of Criminal Procedure). Law no. 78/2000 on preventing, discovering and sanctioning corruption; it also includes provisions on surveillance or tapped telephone lines or access to information systems (article 27 - authorization of the prosecutor). Law no. 143/2000 on combating illicit drug trafficking and consumption, it includes provisions on the access to telecommunications and information systems used by a person who prepares the commission of an offense under this law or has committed such an offense (article 23 - authorization of the prosecutor). Law no. 678/2001 on preventing and combating trafficking in persons, which provides in article 23 that when there is data or there are clues that a person who prepares the commission of an offense under this law or has committed such an offense uses telecommunications or computer system, the prosecution may, with the approval of the prosecutor, have access for a period of time, to these systems and to supervise. Law no. 39/2003 on preventing and combating organized crime which provides in article 15, line 1 letter c) that when there are clues on committing crimes for establishing a criminal organization, in order to gather evidence or identify the perpetrators, the prosecutor may order a maximum period of 30 days surveillance of the communications systems. Law no. 535/2004 on preventing and combating terrorism provided in articles 20-22, the authorization procedure and conducting intelligence activities, which also include the interception and recording of audio or video conversation.)

Looking at the provisions of the special laws by reporting to the current and future provisions of the Code of Criminal Procedure, we find that there are inconsistencies regarding the competent authority to authorize the audio or video recordings and interceptions.

Thus, in the regulations previously adopted of the Law no. 281/2003 amending and supplementing the Code of Criminal Procedure and the Law no 135 on the Code of Criminal Procedure (Published Official Monitor
no 486 of 15th July 2010.), it provides that the prosecutor shall be responsible authorized body to authorize the carrying out of the audio or video recordings and interceptions.

By adopting the two laws, the Code of Criminal Procedure provides for further regulation of interception and audio or video recordings, setting another application procedure and issuing such authorization (thus the court becomes the competent body for issuing the authorizations for interception and audio or video recordings) and other limits on its duration.

In this situation it raises a question: the provisions of special laws, in which it provides that the authorization for interception and recording of conversations is issued by the prosecutor, are they still applicable?

The Code of Criminal Procedure establishes the cases of interception and recording of conversations and communications, namely: there should be solid clues or data (According to article 143 paragraph 3 of the Code of Criminal Procedure, there solid clues when from the existing data it results the assumption that the person to whom it is applied the prosecuting action has committed the act.) has been committed or is preparing to commit a crime, for that crime the criminal prosecution is carried out automatically and the use of these procedures is necessary for finding the truth.

The interception and recording is required for finding the truth when establishing the facts or identifying the perpetrator cannot be made based on other evidences, which represents a consecration of the subsidiarity principle of this measure, and only in exceptional cases, in accordance with the requirements of the Convention.

(Case Klass v. Germany, previously cited)

The authorization is given by the president of the court to whom it would return the jurisdiction to hear the case at first trial, in closed session, which meets the requirements of the European Court of Human Rights. Criminal Procedure Code provides the limits of the duration of the executing measures, the need for extensions only if they are justified without exceeding the overall length of four months, motivating the decision-making measure (a motivated conclusion, which will include the concrete clues that has led to it, the person concerned, means of communication, or the place under surveillance, the period for which it was authorized, the issued revealed by the European Human Rights Court in cases Contreras v. Spain (European Human Rights Court, July 30, 1998, no. 27671/1995, Venezuela Contreras v. Spain RJD 1998-V, no. 83.) and Venezuela Bugallo Prado v. Spain, previously cited).

Provision of article 911 paragraph 8 Code of Criminal Procedure according to which the recordings can be achieved also at the request of the victim on what the addressed communications, with the authorization of the court, it represents an implementation of the provisions of the causes European Human Rights Court A. v. France (judgment of 5 March 1991) and MM v. Norway (judgment of 8 April 2003), but it is contradicted by article 916 paragraph 2 Code of Criminal Procedure, according to which the records referred to in this section, submitted by the parties, can serve as evidence if they are not prohibited by law, which may lead to situations such as those identified for the same reasons (obtaining the registration by the person involved in the conversation, but at the request and with the support of the police) and a violation of article 8. [12]

Regarding the predictability of the law, we believe in the existence of contradictory laws, that is the Code of Criminal Procedure and special laws listed above, providing still the possibility for making telephone intercepts only based on the prosecutor's authorization; it may result in the detention of a contradiction in Romanian state law in the event of a new case to the European Human Rights Court, as happened in the case Kopp v. Switzerland. (European Human Rights Court, March 25, 1998, no. 23224/1994, Kopp v. Switzerland.)

In the doctrine [5] it was considered that although the Law no. 281/2003 has made harder the process of obtaining the authorization for interception and recording, the competent public authorities in the national security domain would meet the legal regime provided for by article 911-915, the procedure in other way could lead to the inability of using the unlawfully obtained evidence in the criminal proceedings.

This view is supported also by the provisions of article X of Law. 281/2003, which states that “whenever other laws contain provisions regarding the disposition by the prosecutor of making, maintaining, revocation or termination of the detention under remand measure, the provisional release and the obligation of not leaving the city, the safety measures provided by article 113 and article 114 of the Criminal Code, the interception and recording of conversations, searches, arrest and surrender of correspondence and items sent by the defendant or submitted to it, shall apply accordingly, the provisions of article 1 of this law “(motivated authorization of the prosecutor).

The lack of this clear framework in this field has led to the formulation of different interpretations, both in theory and in practice. Thus, it is considered that the provisions of the special laws are applicable when there are conducted specific intelligence activities and those of the Code when the interceptions are available for criminal instruction. We believe that such an approach is unsustainable and it is only possible if the special laws regulations should include specific guarantees on the intrusion by the intelligence services in the privacy of a person. By invoking the national security reasons for ordering the interception under a procedure, other than that of the Code, it leads, in our opinion, to a breach of article 8 of the Convention on European Human Rights, even if they would not be then used as evidence in criminal trials. [12]
The above laws are special laws that fall under the report of sanctioned crimes under serious criminality, responding to the need of the state to ensure the national security, public safety or the economic well-being of the country, prevention of disorder or crime, but they are not predictable enough, they do not include procedural rules and guarantees required by paragraph 2 of article 8, complementing the provisions of the Code of Criminal Procedure. From this point of view, as long as they contain contradictory provisions, given the European Human Rights Court’s jurisprudence and the provisions of article 20 of the Romanian Constitution, it must be established by the Code of implied repeal of conflicting provisions of the law. (In the case law it was established that by the illegal character it was understood the lack of the necessary legal authorization and quality of the person who made the recordings of telephone conversations and discussions between people (I.CCJ, Criminal Section, Decision no. 2706 of 5 June 2003, www. scj.ro).

For this purpose the European Human Rights Court ruled the case of Dumitru Popescu v. Romania (no. 2) (European Human Rights Court, April 26, 2007, no. 71525/2001, Dumitru Popescu v. Romania), which found the respecting of the right to a fair trial (article 6), but violating the right to privacy guaranteed by article 8 of the Convention.

In fact, the applicant Dumitru Popescu was one of the 19 defendants prosecuted for offenses of smuggling and association to commit offenses, which were the object publicized as the “Cigarette II” case.

The applicant alleged, among others, the breach of article 8, where the right to privacy was violated because his phone interceptions.

With reference to article 8 of the Convention, the Strasbourg Court found that it had been violated because the Law no. 51/1991 on national security does not comply with the European Convention, as it does not provide a minimal protection degree against arbitrary, required by this Article of the Convention.

Thus, the Court noted the lack of independence of the competent authority (the prosecutor) for authorizing the recordings, the lack of time limits established by law, without any a priori or a posteriori control of the extent of listening to conversations by a judge. Thus the European Human Rights Court emphasized the fact that the internal law does not require to the intelligence services or the prosecutors to file the criminal file documentation that led to the request, or authorize interceptions, has observed and the inexistence of the guarantees for the protection of the intact and complete records and their destruction, pointing out that the law does not require the prosecutor to state the intercepted telephone number, and it did not provide the situation where the information obtained through interception of telephone conversations could be destroyed.

The Court also noted the lack of independence of the authority that would have been able to certify the reality and reliability of the records, since it was the Romanian Intelligence Service, the same authority which was responsible for intercepting the communications, the Court considered it necessary to have a public or private authority independent of the that made recordings.

The court welcomed the legislative changes outlined by the Government in its observations (on the fact that currently, the interception and recording are performed after obtaining a permit from the judge, and that, in matters of controlling the validity of the of the records, the competent authority is the National Expertise Criminology Institute, under the Ministry of Justice, where the experts have the quality of civil servants and they are independent of the competent authorities for intercepting or transcribing the heard conversations), but it also revealed that they were introduced after the time of the facts.

The court found that, despite the amendments to the Code of Criminal Procedure, and that currently the surveillance measures may be ordered by the prosecutor, according to the procedure laid down in article 13 of Law no. 51/1991, which has not yet been repealed, showed that in a recent decision C.C., Decision no. 766/2006 (Official monitor, No. 25 of 16 January 2007), the Constitutional Court ruled that this article is in line with the Constitution, invoking the special feature of the Law no 51/1991.

Regarding article 6 of the Convention, the European Human Rights Court found that it was not violated. Thus, the European Court held that the evidence on which the applicant states that it was obtained under the internal law and article 8 of the Convention were not the only ones at were considered by the courts, when they convicted the applicant and stated that the applicant himself does not dispute to the domestic courts or the European Human Rights Court the contents of recordings, but the law under which they were obtained.

Thus, the guarantees offered by article 8 of the Convention concern all possible situations, and not only the interceptions made within a criminal trial, and that obtained evidence by violating the article 8 does not automatically lead to the violation of article 6 on the right to a fair trial. Just so happens that the interferences are found mainly within the criminal proceedings and only to the extent where the evidence was so obtained should be filed. (The test consists in determining the existence of a “reasonable appearance” that the applicant had been subject to such measures or as part of a class of persons who are subject to interception, was used in the case of Hilton v. United Kingdom, the of decision inadmissibility on July 6, 1988, in Case Camenzind v. Switzerland, judgment of 27 February 1995 or case Halford v. United Kingdom, judgment of 25 June 1997.) Introduction of the legal provisions in the Chapter Evidences and means of evidence from the Code the Criminal Procedure cannot therefore be interpreted by state authorities as a condition only for “investing” the evidence of a legal feature. An example of misapplication could be interception of telephone communications under the...
authorization of the prosecutor under special laws or under secret normative acts (orders, instructions of Ministers, Regulations unpublished in Official Monitor) for monitoring a person's actions (interception of conversations according to article 13 paragraph 1 of Law no. 51/1991) and then obtaining legal authorization if it finds indications of committing some crimes.

In the practice of the Romanian judicial authorities and public authorities there can be generally found violations of the Convention on European Human Rights, that is there are specialized organizations that “masking” the interception under the form of records related to the location in space and time of the phone, call duration, telephone numbers between which there were calls, including the identity of the persons that use the telephone numbers and thus excluding an audio recording for the purposes of the Code of Criminal Procedure, acting outside the law and in violation of the requirements of the Convention. In the case of Malone v. United Kingdom, judgment of 2 August 1984, the Court dealt with the registration of telephone numbers through a system connected to a printer that also records the time and duration of the call (not the content of the conversation), there being no provision in English law allowing this practice to Post Office (telephone operator), that transmitted the information to the police, even without a warrant, being found as a violation of the Convention.

From the documents that are often submitted that prosecution files it results that receiving the notification of a judicial body (police, prosecution, etc., without the court’s authorization under the Code of Criminal Procedure) after the commission of an offense by a person the special interceptor units (the Special Intelligence Service or the Information Service of M.I.D) submit such information from the period previous to the notification, which is evidence in their existing database that exceed the legal framework or - at least – the proof of their free access to databases of mobile or fixed telephone Cooperation, issues that are likely to lead to a conviction of the Romanian State on the ground of the Convention on European Human Rights, even without recording the conversation.

Conclusions

The national law has evolved a lot in this area, the New Code of Criminal Procedure contains provisions that are consistent with the standards set by the Convention. The development of a normalcy was possible through the adoption of related special legislation (e.g. Law no. 298/2008 on the retention of data generated or processed by providers of communications-the current one), and also by the creation of effective means of control and liability (criminal, civil and disciplinary) of the magistrates that broke the legal rules in the field.

Therefore, we consider that the Romanian legislator must continue his efforts to adapt the national legislation to the requirements of community rules (it will be taken into account the community law incident in the field and the jurisprudence of the European Court of Human Rights.

An important role in compliance with article 8 of the Convention had the Romanian magistrates, in particular, and the institutions in the field, who understood the importance that a modern society must grant to the protection of the human right to privacy. In many cases judges have censured some actions that represented true interference it the privacy of a person, acting as the first judges of the Convention. At the same time it is necessary to highlight the fact that there were many situations where, rightly, they found that the interference by a public authority with the right to privacy was necessary to defend the rule of law.

It also should be noted that a misunderstanding of the requirements imposed by the EU or the European Court of Human Rights may give rise to serious consequences for the rule of law. Thus, incompetence or bad faith in this area could be detrimental to determine or adopt a law favorable to the crime environment or the manifestation by the magistrates of some reluctant attitudes regarding the disposal of the authorizations for audio and video interception and recording.

Reason for which we consider both the legislative and the judiciary power it should join efforts in achieving a framework of normality in this area, avoiding any imbalance.

Finally, we should highlight to the legislator the existence of some special rules that are not in line with the Convention standards in the field, being the risk of convicting Romania by the European Court of Human Rights and other causes as well. Therefore, we resume the proposal made in the first part of the article, which is to provide in the Law of applying the New Code of Legal Procedure the express abrogation of the contrary stipulations, which exists in the special laws.
References


Considerations regarding the offense regulated by article 140 of law no. 8/1996

Butculescu C.R.

„Acad. Andrei Rădulescu” Legal Research Institute of Romanian Academy (ROMANIA)
e_mail:butculescu@yahoo.com

Abstract

This article tackles the issue of copyright infringement in Romanian Law. Currently, the copyrighted works are protected through the enforcement of Law no. 8 / 1996, which contains provisions regarding offenses that breach copyrights. One of these offenses concerns the unlawful installation, storage, running or execution, display or transmission in a local network of computer programs.

Keywords: copyright law, offense, computer software

Introduction

Offenses related to copyright protection have a relatively new background, although the first regulations regarding copyright can be traced as far back as the XVIIth Century. They were enforced as a way to protect social relations regarding copyright, taking into account the quality and contribution of such works to the development of human society. Today, social life becomes more and more influenced by intellectual property law, as through this field, important cultural traits are developed[1].Copyright-related offenses are at least interesting in nature and we must consider them as having a mixed character. Usually, the crime is a result of the state's intention, as holder of the rule of law to protect society against civil unrest. Also, the state is the actor who enforces penal responsibility, as it was shown in doctrine[1]. Without analysing too profoundly on the origins of these theories, it should be noted that with the replacement of private justice, state retributive justice came into effect, for reasons of common and public interests - in a word – for the interests of public order. Offenses concerning copyright protection are specially legislated to protect particular interests of pecuniary matters. One can surely argue, that social and human development are protected by copyright laws, for which cultural works are of particular importance are relevant. It is also important to note that copyright infringement is causing serious harm to the authors of works, as they are not able to financially support themselves. It is also indicated as an argument the harm made to the state, given that for each work sold legally, taxes are paid. The mixed character derives primarily from the priority it has in these offenses,with regard to the civil argument concerning the merits. In other words, in some cases, the injured party may waive the issue, considering that the damage was covered. However, in most cases of this type of offense, the action moves ex officio. It is true that the Romanian Criminal Procedure governs a special procedure whereby injured parties may sue in cases of less serious offenses, law enforcement, by means of a prior complaint. The foregoing offenses do not include preliminary complaints. In relation to copyright, there are many conflicting theories and ideologies. I have tried in this paper to highlight those issues that have generated conflicting views in case law or doctrine, showing reasons which could be disseminated. Finally, it should be noted that although incorporeal in nature, copyrights are of particular importance in human society, so ignoring them is a fundamental error that no practitioner of the law should do.Copyright law entered into force in the year 1996, in Romanian Law. Certainly, far from being an offshoot of natural law, the incrimination of copyright offenses are more related to legal positivism or even legal utilitarism, and its tendency toward equilibrium[2]. Throughout the time, the law was extensively modified, supplemented and amended. Among the offenses incriminated, those regarding software piracy were given special regulations. As such, unlawful instalation, running, execution e.t.al., of computer software was incriminated under de penal law. To this end, art. 139° of Law no. 8/1996 states that : „Constitutes an offense and shall be punished with imprisonment for 1-4 years or a fine, the unauthorized reproduction of computer programs on computing systems in any of the following: installation, storage, running or execution, display or transmission in the domestic network[3]“. 
The text analysis

The generic juridical object is common to all offenses covered by Law no. 8/1996, and those social relations concerning the protection of intellectual property rights. Of course, all the traits of this offense are subordinated to the legality principle, as it is considered to be a fundamental principle of penal law[4]. The special legal object is comprised of social relations that are growing and are conducted in connection with copyright protection for software. Material object of the offense may be considered the pirated computer software which is reproduced, copied, executed et.al.. The term „software program” is defined by the law as „protection of software programs which includes any expression of a program, applications, operating systems, written in any language, whether source code or object cod, conceptual preparatory material, as well as manuals” [5]. The active subject is the individual who meets the legal requirements of criminal responsibility, as there are no special requirements regarding him. Possession of adequate knowledge in computer science is irrelevant, for the existence of the offense, because the ways of multiplying today's software are governed by the principles of accessibility and ease. Criminal participation is possible in all its forms: accomplice, aiding and abetting. The passive subject is the copyright owner. The premise situation is represented by the pre-existing software, which is in the period of legal protection. The objective element, that is, the incriminated action (actus reus) is the action of reproducing copyrighted software material without license. The key concepts are: a) unauthorized reproduction, which must be understood as copying, without the permission of the copyright holder, the computer programs or part; b) computer system, which is envisioned as a set of items of hardware (physical components) and software (virtual components) in order to constitute a system capable of interacting with a user; c) installation which means implementation of all stages of software integration of a computer system for use; d) display - presenting partial or full prohibited information; e) network, meaning a set of terminals (computers) connected to each other into a local network. As for the essential requirements, it is necessary that the incriminated conduct (actus reus) to be committed within the period of legal protection of software and also, the software must meet the requirement of originality. The immediate result is the unauthorized reproduction of protected software in ways sanctioned by the normative text. The causation results from the materiality of conduct. As for the subjective element (mens rea), this offense can be committed only with direct or indirect intent. For the existence of the crime, the purpose or motive that animated the author is irrelevant, although they may be useful for individualizing elements judicial treatment. The offense can be committed in imperfect form, but the law has chosen not to criminalize preparatory acts or attempted ones. The offense is considered committed when the external element is completed. Normative arrangements of these offenses include: a) Installation; b) Storage; c) Running or executing; d) Display or transmission to the external network. The offense can be committed in a variety of factual ways. Criminal proceedings shall be initiated ex officio and jurisdiction for the Court of First Instance. Penalties for committing this offense is a fine or imprisonment.

Comparative aspects

At an international level, the protection for copyrighted materials was brought into discussion at the 1928 Rome Conference [6]. Software piracy is seriously fought in almost all the countries in the world and is nowadays considered a global threat. To this point, these offenses range from small operations to large scale operations, some of them being closely connected with organised crime. It has also been observed that modern-day pirates have the „advantages of fax machines, computers, overnight mail, trucks, cellular phones, and e-mail.” [7] Nowadays, copyrights are protected at both national and international level. In the United Kingdom, copyright law goes all the way back to the XVIIIth century, as the concept of copyright was envisioned in the Statute of Anne (1711), later to be replaced by the 1842 Copyright Act, which was considered at the time an important improvement to copyright law[8]. Today, the copyright law of the United Kingdom is the Copyrights, Designs and Patents Act 1988, which in Section 107 regulates criminal offenses, which mostly carry penalties in fines and imprisonment. Among the criminal offenses, one may find: making copies for the purpose of selling, distributing large numbers of copies, publicly performing a work in knowledge that the performance is unauthorised. Also, the Copyright and Related Regulations 2003 transpose the EU Copyright Directive. In Germany, the copyright law, respectively the Duetsches Urheberrecht, which is included in the Gesetz über Urheberrecht und verwandte Schutzrechte and was based on the implementation of EU Copyright Directive 93/98/EEC, also carries similar provisions. In France, the copyrights are protected through the DADVSI (Loi sur le Droit d’Auteur et les Droits Voisins dans la Société de l’Information), which also criminalises the unlawful exchange of copyrighted works. Within EU, some states have indeed transposed the EU copyright directive, namely the Czech Republic, Finland, France, Greece, Denmark. In the United States, the copyrights are protected by the Digital Millennium Copyright Act (DMCA), which basically incriminates unlawful production and distribution of technology, software et.al, although some of the specialised literature did point out that the law was not always accepted peacefully[9]. Also, a central point within DMCA regulations is prohibition of
Criminal repression in the context of the economic crisis and the maximization of crime at European and global level (May 9-13, 2013, Bucharest, Romania)

circumvention of access technology[10]. Of course, most of the national regulations are based on WIPO Treaties. The last one was the Anti-Counterfeiting Trade Agreement, which targeted the copyright infringement on the internet. The Agreement regulated Civil and Criminal enforcement, to „permit effective action against an infringement of intelectual property rights” (art. 27), and criminal offenses should be punishable by monetary fines or imprisonment, which must be sufficiently high to discourage forbidden actions (Art. 24).

Conclusions

Given the importance of increasingly greater copyright protection, coupled with the extremely sharp dynamic development of the Internet, it becomes obvious that it becomes necessary the criminalization of acts or omissions that may cause social harm. In fact, in terms of the philosophy of criminal law, whether such offenses overlap the main structure and generic offense consists of three main features, we see that social harm is the most difficult to define. Firstly, the actions or inactions are punishable and strictly regulated by criminal law and committed with the degree of culpability required by the law. But these offenses pose a high social danger? Social impact of proliferation of piracy is obvious, as this phenomenon is causing losses of billions of euros and dollars globally. These losses are reflected on companies that manufacture or distribute such works, the taxes paid by them and therefore on government budgets. Therefore, the legislature has regulated certain exceptions to sanctions, such as the reproduction of works exclusively for the normal circle of a family, although the notion is not that clearly defined. In addition to the real world that is preconditioned by us, formulating and applying axioms as we know them, accounting only for the amount of our perceptions about external phenomena, another world is increasingly making itself known to exist - the virtual world. In this world there are no limits as those to which we are subject, in modern real life. Thus, managing to contradict the famous saying of Jean Jacques Rousseau, who shows the contradiction between freedom acquired by birth by human beings, who nevertheless are chained by the social norms. In virtual worlds, as they are only at beginning of their development, such restrictions often do not exist or are greatly diminished. What gives these spaces a reality appearance, however, is the large number of people, both physical and legal persons who have chosen to live there, even only partially, or to promote interests in this environment. Undoubtedly, challenges and new perspectives that open virtual spaces should be carefully analyzed and weighed, as they have the potential, both fascinating and dangerous, to be a refuge from the real world as we know it and we see it today.

References

[4] Romanian text, art. 139: Constituie infracțiune și se pedepsește cu pedeapsa de la 1 la 4 ani sau cu amendă reproducerea neautorizată pe sisteme de calcul a programelor pentru calculator în oricare dintre următoarele modalități: instalare, stocare, rulare sau executare, afișare ori transmitere in rețeaua internă;
[6] Romanian text, art. 72 : „protecția programelor pentru calculator include orice expresie a unui program, programele de aplicație și sistemele de operare, exprimate în orice fel de limbaj, fie în cod-sursă sau cod-obiect, materialul de concepție pregătitor, precum și manualele”
Analysis of tax evasion crimes implead on art.9 of the act. no.241/2005

Ciobanu P.

Bucharest University, (ROMANIA) office@petrutciobanu.ro

Abstract

The highlight, within accounting documents or other legal documents, of expenses not based on real operations or the highlight of other fictional operations, consists of the activity by which a series of notes are made within these financial-fiscal documents, which are not based on legal and valid explanatory documents, either integrally or partially [7].

Keywords: tax evasion, tax obligation, expenses, legal representatives

The generic legal object of these crimes consists of social relations which ensure integral determination and compliant to legal dispositions for taxes, fees and other subscriptions due to the state which are designated under the name of „tax obligations towards the state”, no matter if they are due to the state budget or to other budgets creating the general consolidated budget, from natural or legal persons contributors, either Romanian or foreign, as well as social relations regarding ensuring the fulfillment in due time of all fiscal obligations determined by the legislator [1].

All crimes have a material object which differs depending on each specificity, consisting on accounting evidence reports or tax evidence.

The active subject of these crimes is the contributor, natural or legal person, its legal representative or the person designated with economic-financial, financial-fiscal tasks.

Generally, the passive subject is the state, represented by the Ministry of Finance, which takes part in the criminal trial through ANAF.

At the objective side level, the provided crimes are commissive in their majority, however the law also executes certain omissions. One essential element for crimes regulated by this law is represented by the determination of the instant of committing the respective crimes, to that goal we may talk about an instant for the birth of tax receivable and correlative tax obligation right, spent through a settlement of the rating base which generates them, and for another distinctive moment - of filing erroneous financial – accounting evidences to the tax bodies, upon which the effective payment level of obligation is determined.

Crimes are as a result, being susceptible of committing in various types of criminal participation.

The guilt type these crimes are committed in, is always the intention, either direct or indirect.

In case of tax evasion crimes provided and executed by the art. 9 of the Act no. 241/2005 the notion of „hiding the good” stands for any activity through which the non-circumstantial active subject hides from the competent bodies, the good or the taxable or reckonable, as the case may be.

Hiding the taxable or reckonable material represents the action of hiding both the good and the taxable source, for the purpose of not being in any manner identified, by the competent bodies.

This activity may also be achieved my omission to declare an income or a good which has to be declared for taxation or rating.

As a practice [2], “failure to declare” has been decided to be deemed as a hiding compliant to art.9 line 1 let. a of the law, if for the respective income or good, there is only the declaration obligation.

If the income got around from tax or fee payment, has to be declared and highlighted, dispositions of art.9 line 1 let.b of the law are applicable, without any crime competition with the competition provided by the art.9 line1let. a of the law.

The omission, either integral or partial, of highlight in accounting documents or in other legal documents, of performed commercial operations or achieved income, represent the activity through which a contributor leaves out the highlight of both its performed commercial operations and achieved income.

We assess that this crime may be committed no matter if there is or not an accounting evidence, as the indictment rule refers to the highlight operation in accounting documents or in legal documents.
The omission deed, either integral or partial, or the highlight within accounting or in other legal documents, of performed commercial operations or achieved income, or the highlight within accounting or in other legal documents of expenses not based on real operations or the highlight of other fictional operations, represents the tax evasion’s complex operation provided by art.9 line1 let. b and c of the Act no.241/2005 [3]

The highlight, within accounting documents or other legal documents, of expenses not based on real operations or the highlight of other fictional operations, consists of the activity by which a series of notes are made within these financial-fiscal documents, which are not based on legal and valid explanatory documents, either integrally or partially [4].

Altering accounting documents, memory of the cash registering equipment or of the electronic tax marking equipment or of other data storage means, represent the activity of their change or forgery.

Their destruction stands for data or support, and accounting documents annulment, so that they can not be used by the competent bodies in order to perform the control.

Hiding represents any activity that hides before the competent bodies, the accounting documents, memories of of the cash registering equipment or of the electronic tax marking equipment or other data storage means.

We assess that if the constituting content of this crime is achieved, we can not take note of the existence of a crime competition with other criminal regulations (material forgery, destruction or theft). (For contrary meaning, see C.Balaban, cit. work, p.161.)

Drafting of double accounting evidence, by using documents or other data storage means represent the activity through which another accounting evidence is drafted, together with the apparent accounting evidence, a parallel one through which the contributor’s activity is totally or partially highlighted [5].

The doctrine expresses also contrary opinions, according to which there is no need for a whole double accounting evidence, opinions to which we do not adhere, as the text grammar interpretation of the legal text results in a necessity of double accounting evidence, which implies the existence of at least two accounting evidence, one apparent and one real [6].

The avoidance of financial check up, through failure to declare, fictional declaration or inaccurate declaration connected to the main or secondary offices belonging to the verified persons, involves the existence of three cumulative conditions:

a) avoidance of financial, tax or duane check up performance, shall be made through failure to declare, fictional declaration or inaccurate declaration regarding the main or secondary offices belonging to the verified persons;

b) the existence of a tax control already performed in this cause;

c) the avoidance has been achieved with the purpose not to be subject of the tac obligations.

Debtor’s or third parties substitution of goods under sequester compliant to provisions of the Fiscal Procedure Code and of the Criminal Procedure Code, represent the activity through which the good under sequester is replaced with another similar good, however having a lower patrimony value.

Degradation represents the bringing of the respective good into a out of use condition, totally or partially.

The estrangement of the good represent the operation through which the owner of the good’s property right is changed through a legal operation, most frequently occurent being the fictional sale of the respective good.

We believe that this crime may also be held as in competition to other crimes, respectively avoidance of the sequester, without the ability to remain in competition with the destruction crime.

If through the substitution activity, the legal seal applied has been destructed, there is a competition between crimes, concerning the current crime and the seal breaking crime. If the legally sequestered good is effectively destructed, we deem being in the presence of the destruction crime solely.

Pursuant to provisions of art. 10 line1 of the law, in case of committing a tax evasion crime, if during the criminal research or trial, until the first trial term, the indictee or the culprit integrally covers the generated prejudice, the limits of the law provided penalty for the committed deed, reduce to half.

If the generated and recovered prejudice within the same conditions, amounts 100.000 euro, in the equivalent of the national currency, the fine penalty can be applied.

If the generated and recovered prejudice within the same conditions, amounts 50.000 euro, in the equivalent of the national currency, an administrative sanction is applied then registered in the criminal region.

These dispositions are not applied if the malefactor had committed another crime provided by law within a 5 years interval from the occurrence of the deed for which he/she benefitted from the above-mentioned provisions.

We believe that in order to benefit from the penalty reduction cause, only the indictee or the culprit has to integrally cover the generated prejudice.
De lege ferenda, taking into account the major interest of the state to recover the prejudice created through tax evasion commission, we suggest the change of this legal text, meaning to give up to the limitation of persons that are able to pay the prejudice, as this can be paid up by any interested person, either natural or legal.

We believe that this legal text includes in the II thesis a possibility to replace the penalty, however not a reason for penalty reduction or absence of penalty.

We assess that the III thesis in the analyzed legal text, actually includes a cause for replacement of criminal responsibility however not an absence of penalty cause.

We believe that the prosecutor, during the criminal research stage, may apply an administrative sanction provided by the art.91 of the Crim. C.pen., if all legal conditions are fulfilled.

In order to apply the provisions of art.10 of the law, the following three conditions must be fulfilled:

To concern a tax evasion crime provided by art.9 of the law, so that the crimes in connection with the tax evasion crimes provided in art.3-8 of the law, are excluded;

The reasons for penalty exclusion or replacement, is not applied if the malefactor had committed another tax evasion crime provided by the Act no. 241/2005 within a 5 years period from the moment of committed the crime for which already benefitted of this cause;

The integral recovery of the prejudice no later than the first trial term.

In case of deeds committed under the Act no. 87/1994 and their trial after the Act no.241/2005 became effective, may benefit of the impunity or penalty reduction causes regulated through art. 10 from the latter law, only those on whose account, through the application of art.13 of the Criminal Code, the commission of a tax evasion crime has been brought, compliant to art. 9 of the Act no. 241/2005 [7].

If a crime provided by this law was committed, talking insurance measures is compulsory.

Persons convicted for crimes provided by this law can not be founder, administrators, managers or legal representatives of a trade company, however if they have been chosen as such, they shall be retrograded from these rights.

We believe that this inability operates only until the rehabilitation occurs, a moment when any degradation, interdiction or inability ends.

Bibliography

Imprisonment and taxes. is a custodial sentence an efficient instrument against tax evasion?

Ciopec F.¹, Roibu M.²

¹Senior Lecturer, PhD, Law Faculty West University Timișoara (ROMANIA)
²Lecturer, PhD, Law Faculty West University Timișoara (ROMANIA)
flaviu.ciopec@drept.uvt.ro, magda.roibu@drept.uvt.ro

Abstract

Even though tax evasion acts are utterly damaging for the normal course of a state’s economy, both in an ordinary social climate and, all the more, in times of economic crisis, the penal policy of a country should always adopt a reasonable approach to such circumstances. A reasonable approach implies that lawmakers should act cautiously and avoid a traditional tendency in Romanian legislation that consists in enacting harsher penalties for crimes. This is a perfect example of bad management penal policy.

As the experience of Western legal systems has shown, it is better to take a utilitarian stance to tax evasion offences. This means that criminal laws in the matter should also provide alternative, yet more efficient means to sanction tax evaders (e.g. substantial fines), rather than increase the limits of criminal penalties, with no practical results for the state budget.

Providing more severe penalties in the criminal law shall do nothing but fuel the tendency to commit tax evasion and other tax fraud offences, thus leading to an even stronger development of underground economy, which seems to be a serious complement to the official economy.

Romanian lawmakers should take into account revision of the recent act passed in 2013, to the extent in which the said act should be a truly effective remedy for tax evasion, and not a mere legal scarecrow. The Romanian legislation aiming at reducing tax evasion offences should rather orient itself towards civil (including administrative) remedies consisting in bitter pecuniary sanctions that are imposed very promptly, leaving tax evaders no room for other aside manoeuvres.

Keywords: tax evasion, custodial sentence, civil remedies, increased limits of penalties, collateral estoppel

Intriguing issues

The recent amendment of the Romanian Tax Evasion Act Tax (Evasion Act no. 241 of 15th of July 2005, published in the Romanian Official Gazette no. 672 of 27th July 2005.) has occasioned the present legal study. Thus, by Act no. 50 of the 14th of March 2013 (Published in the Romanian Official Gazette no. 416 of 19th March 2013.), several criminal provisions have been altered pursuant to the principles set out in Explanatory Note [9] of the proposed law. The idea developed by the authors of the said Act is that, given the level reached by the underground economy, estimated somewhere between 35 and 40 billion euro annually, and the responsibility to overcome economic crisis, the Romanian state should react firmly to that, by encouraging tax discipline and increase significantly the limits of imprisonment for tax evasion offences, in order to prevent their commission.

More notably, for the offence set out in art. 3 (failure to recompose the accounting trail that has been mismanaged), a penalty of imprisonment of 6 months to one year has been provided, while before the amendment, the same offence was punished by a fine; moreover, it has been criminalized the act committed by negligence, now punishable by the same penalty as the act committed with intent. For the offences set out in art. 4 (unjustified refusal to produce the legal records and assets, with an aim to prevent financial, tax and customs audit) and in art. 5 (preventing, by any means, competent authorities to lawfully enter the premises with an aim to make a financial, tax or customs audit), the limits of imprisonment have been doubled and the alternative fine penalty has been eliminated. At art. 6 (failure to deduct and pay, with intent, within 30 days from the maturity date, the amounts representing taxes or dues deductible at source) the maximum limits of imprisonment have been doubled and the alternative fine penalty has been displaced. Thus, the minimum limits of penalties have increased from 6 months to one year, the maximum limits from 3 years to 6 years and where the resulted damage
amounts to more than 100,000 euro, the limits of penalties are increased by 5 and respectively, 7 years, if the
damage exceeds 500,000 euro.

One cannot help noticing the sheer preference of Romanian lawmakers for sanctioning tax evasion
defences with penalties that consist mainly in deprivation of freedom, an option based on the deterrent role that
criminal law may have on those tempted to act in evasion of legal norms. Such absolute trust in the intimidating
function of penalties represents a penal policy choice that deserves to be analysed, all the more due to the fact
that it has triumphed as compared to other options, which have fallen into disfavour.

The doctrine support

The penal law doctrine has revealed two major perspectives when it comes to suppressing tax evasion
offences.

One utilitarian perspective [10] questions “why, as a general matter, any criminal tax enforcement is
appropriate. The focus here is on how best to achieve efficient deterrence. Tax noncompliance seems like the
kind of conduct that appropriately severe civil penalties generally can deter. Tax evaders should respond to the
prospect of harsh but purely financial penalties, because the point of tax noncompliance is financial gain, and
because tax evaders at some point must have had enough financial resources to incur a tax problem in the first
place. Tax evasion, moreover, is not the sort of impulsively sudden or passionate conduct that some sceptics
doubt can be deterred. Under these conditions, some utilitarians advise government enforcers to use civil
enforcement machinery, because the civil enforcement process and civil penalties both are cheaper to administer
than are their criminal counterparts. The main conclusion here is that financial penalties should be imposed to
the maximum extent feasible before turning to the criminal penalty of incarceration. This perspective is
controversial, politically and otherwise, in its possible implication that the justice system should be more willing
to imprison the poor than the wealthy”.

On the other hand, “retributivists begin with moral analysis rather than a utilitarian calculus, but here
again the tax context has notable features. Social norms in support of paying taxes are weaker than the norms
supporting many more traditional crimes. Tax sanctions compel nearly the entire adult population to undertake
affirmative conduct that often is annoying, expensive, and popularly reviled. [...] Criminalizing the failure to
pay taxes creates offenses that must get their moral core, not from the accepted badness of the failure itself, but
rather from a condemnation of deliberate cheating on rules that govern everyone. From this perspective, the
conventional wisdom about death and taxes reveals that most people accept taxes as something inevitable—
something that most people dislike, true, but something that most people plan to pay. Retributivists focus on this
mutual obligation and would tend to limit criminal prosecutions to cases where people shirk it with a
blameworthy sense of wrongdoing. As with any sort of cheating, cases of tax evasion that are flagrant and
outrageous provoke strong retributive reactions”.

The law-making lab

The backstage of debates on the legislative proposal have pointed out to a real legal clash between
different ideologies.

Thus, the Romanian Senate, acting as the first seized chamber to debate the law proposal, on September
18th, 2012, dismissed the legislative initiative with an overwhelming majority (57 votes against, 5 votes in favour
and 2 abstentions). Also, on October 9th 2012, the Commission for Budget, Finance and Banks in the Chamber of
Deputies, unanimously cast a negative vote on the legislative proposal.

The proposal was not supported by the Government either, being criticised instead for several reasons.
It was asserted [9] that the legislative initiative is contrary to the approach of the new Romanian Penal Code
which provides a decrease in the limits of penalties for almost all offences. In addition, an increase in penalties
as set out in art. 9 would lead to the sanctioning of tax evasion acts similarly to homicide acts, and the outcome
would be a considerable legislative disparity and a risk of confusion as to what the scope of protection under
criminal law really is. Apparently, the increase in the limits of penalties was not the demand of tax enforcement
authorities and it does not generate, by itself, an extra income to the state budget. In fact, the best instrument to
suppress efficiently unlawful acts is not the exaggerated increase in penalties, but a sanctioning system which is
proportionate to the severity of the acts committed, backed up by a prompt enforcement of such penalties by the
judicial authorities.

Nonetheless, the members of the Commission on Legal Matters, Discipline and Immunities in the
Chamber of Deputies unanimously voted the adoption of the proposed law, a vote strongly confirmed by a wide
majority (280 votes in favour, 42 votes against and 2 abstentions) in the final debates in the Chamber. This was a
decisive vote for the proposal to become statute law. It is nothing but another example of what has been
estimated to be a constant tendency of “excessively escalating penalties” [1], frequently occurring in Romania,
following the year 1990.
The Romanian paradox

The Romanian lawmaker, a fervent advocate of severity, has always shown a propensity for the penalty of imprisonment, deemed to originate in 1996, when Act no. 140/1996 (Published in the Romanian Official Gazette no. 289 of 14th November 1996.), amending the Penal Code, came into force.

The doctrine [1] criticised this approach of the penal policy, since the logic behind the escalating of penalties has proved to be a total failure. On the other hand, it has been demonstrated that no direct correlation can be established between the massive use of imprisonment and the decrease in criminal acts. Increasing the limits of penalties on a large scale should be justified according to certain principles, given that, in practice, judges did not even resort to formerly provided limits of penalties (not yet increased), for most of the offences. Many times, there were applied minimal penalties or penalties not exceeding by far the minimum penalty, because judges did not seem to be convinced that, considering the facts to be judged and the authors of the offence, harsher penalties would be appropriate.[2] Beccaria had warned in the past about the danger represented by the severity of penalties, stating that not the severity but the immediacy and certainty [3] of their application ensures their deterrent role. The danger consists in the trivialisation of penal repression, which thus leads to immunity to the idea of punishment.[1]

Analysing the relation between the softness and severity of penalties set out in the law and the deterrent effect the former entail, leads to a conclusion that has been valid for centuries: it is not the special quality of punishment that is relevant for its effects, but the conditions in which it is applied, regardless of its dimensions. The certainty of punishment has a greater intimidating value than severity. It has been indicated [4] that individuals seem more intimidated by a probability of 10% of incurring a penalty of one year of imprisonment, than by a probability of 5% of incurring a penalty of two years of imprisonment. At this elementary level, a penalty of half of the reference limits actually doubles its intimidating force, if applied regularly. A signal of prompt, quick and energetic functioning of the judicial system shall render the idea of unavoidable punishment much better than a criminal law provision setting out a severe punishment, which is however assorted with just the possibility to be applied. This theory has its limitations, since it is applicable only to custodial sentences, and not to pecuniary sanctions (fines), where fluctuations in the amounting quantity are more likely to strike a sensitive nerve than the probability of their effective enforcement.

Consequently, which has been the ratio legis, given the impressive amount of support in the legal doctrine, which gives reasons for the opposite choice? Is this obstinacy or ignorance? Why does the Romanian lawmaker remain stuck on an unfortunate option of penal policy, despite a national experience which recommends the alternative solution? The issue is utterly serious and, in our opinion, it needs to be placed in a larger framework, in order to check out what happens in other legal systems.

UK, Belgium, United States

Thus, in Great Britain, “The Crown Prosecution Service (CPS) intends to substantially increase the number of tax cases it takes on with a view to prosecution”, said Keir Starmer, the director of public prosecutions, because “tax evasion has to be dealt with robustly all the time. But in a recession, when ordinary law abiding taxpayers are suffering real hardship, the need to deter, detect and prosecute those who evade tax is greater than ever” [12]. He also dispelled the idea of tax evasion as a victimless crime, stating that tax “cheats” cost each household the equivalent of £530 a year. Figures from HM Revenue & Customs (HMRC) suggest that tax evaders, including those operating in the hidden economy and those who undertake organized criminal attacks on the tax system, deprive the public purse of around £14 billion.

HMRC investigates tax avoidance and evasion in the UK. Most cases are settled through negotiation with HMRC or pursued through the civil courts such as the Tax Tribunal, where taxpayers can be ordered to pay the unpaid tax with penalties and interest, but do not face criminal sanctions. In the most serious cases of tax evasion HMRC provides the evidence to the CPS to make a decision on criminal charges. It seems certain in the light of the CPS announcement that HMRC will revise its policy on prosecution and this will mean that anyone caught by HMRC will be more likely to be prosecuted than has been the case in the past. The CPS plans to increase the number of tax files it handles, to 1,500 a year by 2014-15. The CPS secured 200 convictions in tax cases in 2010-11 but this increased to more than 400 in 2011-2. It has a conviction rate of about 86%.

Cases where HMRC will currently consider criminal sanctions include those where the individual holds a position of trust or responsibility; where materially false statements are made or materially false documents are provided in the course of a civil investigation; or where deliberate concealment, deception, conspiracy or corruption is suspected.

It becomes certain the option made by Great Britain to intensify the suppression of tax evasion acts by using criminal law methods. However, the instrument is not a legislative one consisting in the increase in the limits of penalties, but an institutional and procedural one, namely the efficient reactions on the part of the authorities competent in suppressing tax evasion criminality.

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In Belgium, on 1 November 2012 the law introducing the “una via” principle in the prosecution of the violation of tax rules (Law of 20 September 2012, Belgian Official Gazette of 22 October 2012), chose for just one way proceedings: a case of tax fraud will be handled either as an administrative case or as a criminal case. At the same time, this law also significantly increased the amount of the already existing criminal tax fines. Where formerly the maximum fine amounts EUR 125,000, now it is about EUR 500,000.

Taking into consideration the doctrine [5]: “A violation of a tax rule could lead to both a criminal sanction (for example a prison sentence or a fine) as well as to an administrative sanction (for example a tax raise). A double punishment in tax fraud cases therefore is possible. This however conflicts with the “non bis in idem” principle, which is embedded in the European Convention on Human Rights. According to that principle, a person may not be prosecuted and penalized twice for the same offence. The law, which fits within the framework of the fight against tax fraud, aims to organize this fight in an efficient way and to avoid double use of government resources”.

In practice, in a tax fraud case a consultation on the approach of this specific file will take place between the tax administration and the Public Prosecutor’s office. Afterwards and in line with the “una via” principle, an administrative procedure or a criminal procedure will be initiated. Rather simple tax fraud files will be taken on by the tax administration and larger tax fraud files, wherein an appeal to the large judicial resources is necessary, will be left to the Public prosecutor.

In the United States, beginning with the utilitarian view, it is significant that criminal tax prosecutions were quite rare. Officials resort to criminal actions so rarely in part because they have a wide array of powerful civil enforcement remedies, including fines, interest, and property seizures. While most taxpayers convicted of criminal tax violations have, historically, received probationary sentences, the advent of the Federal Sentencing Guidelines (“Guidelines”) in 1987 has increased the likelihood of incarceration or some form of community confinement upon conviction of a tax crime.[6] While Congress has not statutorily increased the criminal sanctions for tax crimes, one effect of the Federal Sentencing Guidelines has been to substantially increase the severity of the criminal sanction.

The Internal Revenue Service (IRS) has the statutory authority to assess both civil and criminal fraud penalties against those who attempt to evade or actually do evade any tax due under the Internal Revenue Code. At present, it is conceivable that the IRS can invoke both sanctions in every case of tax evasion. The tax fraud investigation routinely begins as an audit to determine civil liability. The taxpayer may surprisingly learn, however, that the possibility for criminal prosecution has arisen. The policy behind the decision to prosecute for criminal fraud apparently varies from time to time.[15] The Service has a two-fold standard in deciding whether or not to recommend criminal prosecution: there must be sufficient evidence to establish guilt beyond a reasonable doubt, and there must be a reasonable probability of conviction. Due consideration is given to all the facts and circumstances in determining whether a case warrants a recommendation for prosecution or should be disposed of on the basis of the civil liability only. Imposition of the civil fraud penalty usually follows the prosecution for criminal fraud. The reverse situation—criminal prosecution following civil assessment—is unlikely under current IRS policy.

The possibility to impose both civil and criminal sanctions gives tax fraud investigation a dual nature, which has crucial significance with respect to the doctrine of collateral estoppels.[8] This doctrine is applicable “when an attempt is made to litigate a fact previously litigated in an earlier suit involving a different action. The doctrine may be invoked to estop a person from re-litigating a fact only if the following conditions are met. First, the fact at issue in the original suit must have been identical to the fact at issue in the second suit. Secondly, the same legal principles must apply in the second suit. Finally, both parties or persons in privity with them must have been participants in the earlier suit. […] The fact that the elements of sections 7201 (criminal) and 6653(b) (civil) have been deemed identical gives the doctrine great vitality in tax fraud cases”.

Despite this, the Supreme Court of the U.S. holds a decision in Helvering v. Mitchell ((303 U.S. 391 (1938)) that the imposition of the civil penalty for tax fraud was not barred by acquittal in the criminal fraud proceedings. Supreme Court rejected the taxpayer's arguments based upon res judicata and double jeopardy. While the elements of civil and criminal fraud are identical, there are some differences with respect to the two sanctions. The civil penalty, remedial in character, is intended as a safeguard for the protection of revenue. It is intended to defray the expenses incurred by the government in investigating deficiencies stemming from fraud. The criminal sanction, on the other hand, being primarily penal in nature, has deterrence as one of its primary objectives. It is designed to insure prompt compliance with the duties imposed by the Internal Revenue Code. Additionally, the burdens of proof on the government differ in civil and criminal fraud cases. In the former, the government must establish its case by “clear and convincing evidence.” In the criminal context, the “reasonable doubt” standard is applied.

The Court held that the res judicata doctrine was not applicable because of the differing burdens of proof involved in criminal and civil tax fraud proceedings. Further, the Court stated that double jeopardy cannot occur in the enforcement of a civil sanction and pointed out that Congress clearly intended the fifty percent
penalty for fraud to be remedial and civil in nature. Similarly, it has been held that a conviction does not bar imposition of the civil penalty.

Thus, in a sense, the collateral estoppels doctrine is a "one way street" in that it aids the government in tax fraud cases but is of no assistance whatsoever to the taxpayer. However, under current IRS policy, a decision to proceed first with the civil fraud sanction will not be followed with a criminal prosecution. Thus, the doctrine of collateral estoppel affects the relationship of civil and criminal tax fraud in a way totally beneficial to the government and totally detrimental to the taxpayer.

Conclusions

Conventional wisdom rates paying taxes with death. Even U.S. judges, the federal officials who ultimately enforce the tax code, sometimes disparage the moral basis for tax obligations. The revered Judge Learned Hand, for instance, wrote in Newman v. Commissioner of Internal Revenue ((331 U.S. 859 (1947)): "Over and over again courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant".

The Romanian lawmaker experience seems to be a variation on a theme, associating not death and taxes, but imprisonment and taxes. But, after all, the following question then arises: why prefer the imprisonment penalty if the state interest consists in regularly cashing the amounts which represent taxes and dues, as closely as possible to the maturity date, and not in leading as great a number as possible of criminal investigations on tax evasion acts? By doing this, the state incurs in fact greater costs (repressive justice is expensive), judicial authorities cannot guarantee that criminal prosecution shall automatically end in convictions and the discouraging effect of criminal penalties' latitude is ultimately diluted.

The aforementioned are but a few topics on which the Romanian law enforcement authorities need to reflect.

References

Concepts and definitions in delimiting the active subject of tax evasion offences

Costea I.M.

Law Faculty, Alexandru Ioan Cuza University, (ROMANIA) ioana.costea@uaic.ro

Abstract

Tax evasion offences have, traditionally, qualified subject, with a certain legal profile determined both by criminal and tax law. This personalized profile generates a series of legal definitions and factual transformations that inquire a thorough analysis. This study puts in balance the general need of an ample and encompassing legal formula to determine the subject of these offences and the specific method of criminal law.

Keywords: contributor, withholding taxpayer, payer, taxable person, criminal participation

Introduction

The last years’ evolution of public debt on the background of the international financial crisis faced the public power with an increased preoccupation in preventing and fighting against national and trans-border tax evasion. Through recent legal intervention by Law n. 50 from 14 mars 2013 [1], the national legislator modified Law n. 241/2005 and establish new and severe punishes from acts of tax evasion. This intervention reactivates doctrinal discussion on tax evasion and its role in defending public revenue [2].

A particular issue regarding tax evasion resides in the subject of these specific offences. The national legislation distinguishes between offences of tax evasion and assimilated offences with particular profile of the legal subject. Taking into account the incriminations in Law n. 241/2005 and the specific profile of the criminal rapports subjects’, there can be identified different categories of legal subject in the conformation or repression criminal rapport.

General concept regarding active subject in offences of tax evasion

The sphere of subject to tax evasion is limited to the persons for which special law stipulates a certain conduct (for the conformation criminal rapport) or to the persons, who have breached the tax rules committing an offence (for the conflict criminal rapport). From the analysis of Law n. 241/2005 and of the tax normative system we can identify several categories of active subject of tax evasion offences or assimilated offences. As to the determinants of tax evasion, the profile of the contributor and its dimensions generate several differences. For corporate tax, the tax evasion is related to the level of economic freedom, the level of importance of the equity market, the effectiveness of competition laws and high moral norms [3]. For income tax, the tax evasion is determined by the values, attitudes, norms, and conformity to laws that influence the taxpayers’ decision of the amount of income they want to conceal [4].

In order to establish the content of the active subject sphere in tax evasion offences, the basis of the analysis is given by the legal definitions with certain doctrinal and jurisprudential emphasis. A definition of the contributor is given by the special criminal law in article 2 (b) from Law n. 241/2005, as: any natural person or legal person or any other entity without legal personality who owe taxes, contributions and other amounts to the consolidated budget. The same definition is to be found in the tax law, namely the Tax Procedure Code article 17 § 2.

In a more comprehensive sense, the notion includes any person who owes an amount of tax to the general consolidated budget amounts due on its own or for a third, including withholding payers. By a teleological interpretation of the Law n. 241/2005, we can admit that subject of tax evasion offences is a contributor in the comprehensive sense of the notion, including the withholding payers as to the offence incriminated in article 6 [6].
These legal and doctrinal definitions permit a certain critique as they refer to a person owing sums as taxes to the general consolidated budget. In fact, a contributor can be subject to the tax and criminal law without owing sums, as he is in a state of fiscal loss or inactive contributor and has merely non-patrimonial obligations: obligation to fiscal registration (article 63 Tax Procedure Code), obligation to lead tax records (article 70 Tax Procedure Code), obligation to permit the access of tax control bodies (article 95 Tax Procedure Code). These obligations refer to specific non-patrimonial conducts and the tax law reports to these subjects as contributors contradicting the legal definition of the notion. The criminal Law n. 241/2005 also stipulates offences in relation to tax evasion that are committed in connection to auditing and legal documents (article 3, 4, 5), special fiscal forms (article 7) and even some of the actual tax evasion offences (article 9 § 1(c), (d), (f)) can be committed by a contributor in the large sense of the notion. For example, the definition of the assimilated tax offence in article 3 refers to the contributor’s failure to recover the destroyed accounting records and uses the notion in a comprehensive sense including the contributor with no sums dues from tax obligations for a certain tax period. So it is fair to admit that this usage of the notion, allows a proposal of changing the regulatory text by including alternative formula (owes or might owe) and extend the notion of contributor, beyond the direction of the two legal texts and include broader hypothesis of the person having any tax obligations even non-patrimonial.

At least at the level of doctrine, the notion of contributor should be defined: any natural or legal person or any other entity without legal personality, which under a tax law legal rapport holds for himself or for another person, tax obligations, patrimonial or non-patrimonial. We believe that this definition would ensure active subject and content for tax evasion offenses or similar offenses, in all cases indicated by special criminal law.

As to the nature of the sums owed to the general budget, these can come from taxes, contributions and even other sums, including for example Customs. The definition in Law n. 241/2005 of tax obligation sends to the provisions of the Tax Code and Tax Procedure Code; this last source establishes its sphere of application including a general formula and other sums consisting in revenues to the general consolidated budget. This reference allows an encompassing determination of the matter of tax evasion, wherever sums of fiscal nature are due to the general consolidated budget.

For these arguments, we can conclude that even if the Law n. 241/2005 gives a limited definition of the contributor in the general provisions, the specific offences have been formulated taking into account the comprehensive sense of the notion [6].

In a jurisprudential approach, courts refer to the provisions of the tax law, in delimiting the active subject of the tax offences; the notion of contributor is understood under the provisions of the tax law, in a general manner. For example, the court underlines: Provisions of article 9 § 1(b) of Law n. 241/2005 shall apply to any person who is required to follow a particular accounting treatment required by law. Related to this, the active subject of the crime is qualified, its required special quality is person liable to lead financial accounting records [7], Active subject of the offence of tax evasion regulated by article 9 § 1(c) of Law n. 241/2005 is qualified: the contributor as defined by tax law [8].

As to the nature of the contributor, it can be represented by a natural person, a legal person or any other entity without legal personality. The nature of the contributor determines the fiscal regime of its economic activity and the means of committing the tax offences. The simple natural persons have a more relaxed fiscal regime and they commit tax evasion offences in simpler manners, for example article 9 § 1(a) concealing taxable or chargeable goods or source. The professionals, in the sense of article 3 § 2 Civil Code all operating a business, are the favorite subject to tax evasion. These persons, regardless their nature: natural or legal persons or merely entities are subject to specific tax norms and obligations. They are submitted to tax registration, accounting obligation and tax auditing and therefore can be subject to all offences of tax evasion and assimilated offences. If a simpler regime of tax obligations is created by law (for example, exemption from accounting obligations applicable to natural persons establishing the tax revenue on flat income), then these persons are excluded as subjects to certain forms of tax evasion, for example, article 9 § 1(b) omission, in whole or in part, to set off, in the accounting or other legal documents, commercial operations performed or realized income and c) highlighting in the accounting or other legal documents of expenditures not based on actual operations or highlighting other fictional operations.

As to the legal persons, the criminal liability lays both to the entity as a tax and criminal law subject, but also to the natural person or persons that ensure its management. For example, the offence from article 9 § 1(b) Omission of revenues in accounting documents, is executed by the administrator of a company which will also be criminally liable; any other participant to the execution of the offence without having the legal or factual empowerment [10] to represent the legal person on tax matters is liable as an accomplice to the tax evasion offence [6]. Regarding the conditions of the manager’s liability for tax evasion, the doctrine and jurisprudence have establishes that he must be in function at the moment of the offence’s commission and must have directly participated to the fraudulent action or inaction [10]. A delegation of the management of the legal person (a company or even a non-profit association) will involve the criminal liability of a factual manager. Tax evasion offences are compatible with co-author commission only in relation to the tax obligation of legal persons; the tax
obligations are *intuitu personae* obligations therefore natural persons will commit tax offences in their person [6], but in legal persons some management structures confer decisions to a group and consequently the tax obligations’ execution is imputable to a plurality of subjects [6].

Some of the assimilated to tax evasion offences can be committed by any person acting in the interest of the contributor; for example, preventing, in any form, the competent bodies to enter headquarters, land or premises in order to perform financial, tax or customs verifications is a offence under article 5 and can be executed by a plain subject acting to protect the contributor (an associate, a guardian, an employee).

### Distinctive concepts regarding active subject in offences of tax evasion

As a measure of tax evasion prevention, the Fiscal Code establishes a specific manner of collecting tax obligations *the withholding* in several matters: corporate tax in certain cases of association, dividend tax, income tax and social contributions. The fiscal legal relation is traditionally, according to article 25 Tax Procedure Code established between a creditor (the public institution) and a debtor (the contributor). By the withholding method, a third party, as defined in article 26 Tax Procedure Code, is involved with obligation to manage the tax and to pay or withhold and pay taxes, contributions, fees and other budgetary revenues. The withholding taxpayer has accounting, declarative and payment obligation, by which he ensures the collection of the due sums. The contributor, the real debtor is exempted from any legal duties as to revealing and executing the tax obligation; he only ensures the payment by a diminution of its revenues [9].

Withholding method is an exemption within the declarative system, when stipulated by the law, meant to simply the identification and collection of taxes, especially when due by natural persons: tax income on wages and pensions, on investments, on prizes and gambling, on intellectual property rights. According to article 52 Tax Code a more general rule is provided in order to prevent omission of declaration from the natural persons; legal entities have a general obligation to withhold taxation when contracting with a natural person, which cannot prove its fiscal registration.

The withholding obligation can be split in two branches: the first operation is to withhold the sums representing tax obligation from the generated revenue. This obligation’s execution is ensured under contravention liability according to article 219 § 1(o) from Tax Procedure Code. The second operation is shedding the sums to the corresponding budget. This obligation’s execution is ensured both by contravention liability according to article 219 § 1(p) from Tax Procedure Code and by criminal liability according to article 6 from Law n. 241/2005. The criminal liability intervenes if the shedding isn’t executed within 30 days from the maturity of the obligation [6].

So, the criminal liability is bare by the withholding taxpayer, who according to the tax law has operated the withholding but has failed to shed the sums to the budget. As to the nature of this person, usually, the withholding taxpayer is a legal person, but there is no limitation by the law, and a natural person (for example an employer) can be subject to this offence. In this case, subject to the tax evasion offence is the natural or legal person [11] having the obligation to shed these sums; the actual contributor, when participating to the offence in the basis of a prior agreement, is an accomplice or might be an instigator. Criminal participation in this offence is not possible in the form of co-author as the offence is executed by an omission; if the tax obligations’ management is deferred to a plurality of subjects, as in a council of administration, each administrator will have engaged his criminal liability as an author [11].

The Tax Code uses the notion of payer in excise matter. The payer can be represented by the authorized warehouse operator, by the registered consignor, by any person who guaranteed the payment of excises or any other person detaining, producing or importing excise goods. So, tax evasion in excise matter can be executed by an authorized person, when the offences consist in fraudulent activity and fraudulent accounting evidence of the activity or by a non-authorized person acting on the excise good market, when the offences consist in hiding the specific activity and its’ taxable effects. The liability in this domain knows also special forms, as article 7 referring to *stamps, banners, printed forms* has an incidence in excise goods and as article 296°1 Tax Code stipulates a large number of special offences in this matter. Excise offences have similar content to the offences regulated by Law n. 241/2005; for example, opposition to control is regulated in article 296°1 § 1(i) Tax Code and also in article 5 from Law n. 241/2005. In this case, the provisions of Law n. 241/2005 have general character and are derogated by the offences established in the Tax Code. Through the special-general relation, we can affirm that in excise matter tax evasion offences are applicable only if there is no specific regulation in the section of the Tax Code.

In terms of value added tax, Tax Code does not use the term contributor, but the concept of taxable person. Taxable person is any person, group of persons, public institution, legal entity and any entity capable of carrying out an economic activity. A general definition enumerates subjects of economic activity: producers, traders or providers of services including mining and agricultural activities and professions, exploitation of tangible or intangible assets on a continuing basis. The value added tax has a specific regime; for the taxable person it is a “neutral tax”, as the tax does not affect her patrimony, being submitted to a deduction regime [12].
Tax evasion in this matter can occur particularly in relation to the deduction right, as the taxable person forces the limits of this legal right, by registering non-documented or fictive expenses, grounds for tax evasion offence as stipulated by article 9 § 1(c). Connective to the deduction right is also the offence regulated by article 8 of Law n. 241/2005, consisting in fraudulent value added tax reimbursement.

As value added tax is secondary to an economic activity, also relevant for other taxes, tax evasion in this matter can be committed in any form, cumulating a plurality of effects in several tax obligations; for example, income tax and value added tax. Although the Tax Code uses the concept of taxable person, taxable persons are assimilated as legal treatment to the general notion of contributor and follow the same regime of criminal liability for all offenses of tax evasion. The nature of taxable person is not a formal criterion, but a material one; so, a person acting as an economic agent, will verify this quality and the consequent liability regardless of the authorizations procedures [13].

As to the nature of the taxable person, it can be a natural, legal person or even an entity without legal personality. Article 127 § 4 Tax Code admits that under certain conditions a public institution can be treated as taxable persons [14]. However, their criminal liability is to be appreciated under the conditions of article 191 Criminal Code, as to the content of public authority and exclusivity of the activity [11]. As to the criminal participation in tax evasion offences related to value added tax, we can observe a similarity to other taxes. If the taxable person is represented by a natural person, then any participation to the execution of the offence will be qualified as an accomplice act, as the obligations are personal; if the taxable person is a legal person, co-author participation is possible when joint management of tax obligations.

In case of value added tax and in excise matter, a third person bears the patrimonial effect of the tax, named tax barer [6]. This person is the final consumer of the good, product or service that contains the tax in the price. This person has no direct tax obligation, therefore is never subject to tax evasion offences.

In certain cases, criminal liability for tax evasion can return to persons who do not have one of the above analyzed qualities, as they are third parties to the taxation rapport. In these cases, criminal liability is conditioned by the existence of certain obligation resulting from a tax procedure, as some legal obligation can be retained to other subjects.

For example, certain obligations to communicate with the tax authority are imposed by law to different persons than the contributor: business partners, associates, commercial banks. The persons are obligated to present documents or goods to the auditing authority and by not doing so, can be criminally liable under article 4 of Law n. 241/2005. In the forced execution procedure obligation can be imposed to other persons, which are criminally liable under article 9 § 1(g) for substituting, hiding or degrading goods (for example, a liable custodian). Thirdly, criminal liability may be incurred by independent third parties. Several offences of tax evasion are offenses with simple subject and can be committed by any persons, for example, in article 5 namely preventing access control bodies, article 7 § 1 and § 2 namely the circulation of the tax forms real or fake, article 9 § (g) namely replacement or degradation forfeitures.

Conclusions

Particularities of tax evasion offenses cause the specific features of their subjects. Conceptual delimitations are required in order to identify the subjects of these criminal norms. We can distinguish in relation to the criminal and tax norms a certain number of hypotheses. The plentiful notion is the contributor notion, applicable in a comprehensive sense, larger than the definition of Law n. 241/2005; this expansion has legal grounds in the regulation of the specific offences and in the whole taxation system. Although the criminal norm is interpretable under a limitative procedure, in this case the will of the legislator is visible through the incrimination technique and the delimitation of the matter. For this reason, a further legal intervention on tax evasion offences should rephrase the definition in article 2 (b) correlating it with the actual content of the offences.

Secondly, their can be identified several special subjects to tax evasion offences if we take into account their legal taxation regime. Different notions are uses by the tax norm, which produce limited effects in criminal matter. In these cases, the tax evasion offences have specific subject and content only if the taxation norm has particular content. In several cases, derogative regime is imposed by correlation to other criminal norms and to the taxation mechanism.

For these reason, an attentive approach will ensure the legal framing of facts in a practical interest and a correct content to the notions in a doctrinal interest.

In the general context of public financial crisis, tax evasion law is a significant instrument in consolidating public revenue. In this purpose, a thorough analysis of the content of these offences, focused on the subjects’ particularities is essential. Specific definitions and notions used by the criminal legislator show certain vulnerability when correlate with the general tax system. The recent legal intervention on the text on Law n. 241/2005 would have been an excellent opportunity to revise these definitions. Although stability of the legal norm is a must, in this case, we appreciate that further legal intervention should extend the definitions in Law n.
241/2005 at least for assuring correspondence between the general definitions and the content of specific offences.

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Deception offences in romanian and french criminal law.
Aspects of comparative law

Dobrila M.C.

Faculty of Law, „Alexandru Ioan Cuza” University Iași (ROMANIA) E-mail mirela.dobrila@uaic.ro

Abstract
Aside from capitalizing on the Romanian legal tradition in terms of criminal law, the Romanian Criminal Code must be aligned to the current trends of regulation in certain reference legal systems for European criminal law, as well as to other foreign legal systems, and analysing these can contribute to the development and improvement of our own regulations. Thus, we consider it necessary to analyse the way in which the deception offence is regulated in certain foreign legal systems, particularly in French criminal law, as well as the possible influences that can have a positive effect on regulating this offence in the Romanian Criminal Code.

Keywords: deception offences, Romanian and French Criminal Law, Comparative Law.

The necessity to analyse regulations of deception offences in foreign legal systems, in the context of certain Comparative Law aspects

In the elaboration of the New Romanian Criminal Code, enforced through Law no. 286 of 25 June 2009, published in the Official Journal no. 510 of 24 June 2009, the lawmakers aimed both at capitalizing on the Romanian legal tradition in terms of criminal law, as well as at drawing connections to the influence of current regulation trends in certain reference legal systems for European criminal law, by combining an analysis of the evolution of Romanian criminal law with the solutions embraced by other European systems, as is the case in France, Belgium, the Netherlands, or some of the Scandinavian countries.

Aside from outlining the regulations in other legal systems concerning deception offences, it is necessary to analyse these legal solutions that prove to be more comprehensive or more flexible in terms of what reality can offer, in order to ensure an optimal level for the protection of values through the incrimination of deception [1].

An interest in protecting social relations concerning property imposes a constant preoccupation with improving the means to counteract property offences, so that the criminal legal framework is able to correspond to the requirements of current criminal policies [2].

Deception offences in the French Criminal Code. Aspects of Comparative Law

Unlike the current Romanian Criminal Code, which contains under one heading all offences against patrimony, this solution is not promoted in other, foreign legal systems. The solution of classifying offences against patrimony in several categories is promoted in the Criminal Codes of certain EU countries, such as France, Italy, Germany, or Spain. In the current Romanian Criminal Code, property offences are regulated under Title III of the Special Part; in the New Criminal Code (Law 286/2009), these offences are regulated under Title II of the Special Part, with priority given to incriminations pertaining to individuals and property, as opposed to those concerning community at large, a solution adopted by some European Criminal Codes, such as the French and Spanish Criminal Codes. See [3].

In the French Criminal Code, in force beginning with 1 July 2006, offences against patrimony are regulated in Book III, “Felonies and Misdemeanours against Fraudulent Appropriations”, which contains two titles: title I, “Fraudulent Appropriations”, and title II, “Other Offences against Property” each of these structured into four chapters (Title I, Book III of the French Criminal Code contains the following offences: theft, extortion, fraudulent obtaining and similar offences, misappropriation (fraudulent breach of trust, misappropriation of property pledged or attached, and fraudulent organization of insolvency. See [3].) the deception offence (escroquerie) is regulated in chapter III (“Fraudulent obtaining and similar offences”), in the first section (“Fraudulent obtaining”, Art. 313-1 – Art. 312-2), aside from which there are distinct regulations for offences similar to fraudulent obtaining (Art. 312-5 – Art. 312-6-1). According to Art. 313-1 in the French Criminal Code, a deception offence (or fraudulent obtaining) is an act achieved through the use of a false name or a
fictitious capacity, or through the use of unlawful manoeuvres, in order to deceive a natural or legal person, thereby determining this person, to his or her prejudice or to the prejudice of a third party, to transfer funds, valuables or any property, to provide a service or to consent to an act incurring or discharging an obligation. This offence, as well as its attempt, is punished by five years of imprisonment and a fine of €375,000. The deception offence is considered aggravated (Art. 313-2 of the French Criminal Code) when it is committed by a person holding public authority or discharging a public service mission, in the exercise or at the occasion of the exercise of the functions or mission, by a person unlawfully assuming the capacity of a person holding a public office or vested with a public service mission, by a person making a public appeal with a view to issuing securities or raising funds for humanitarian or social assistance, as well as by a person committing it to the prejudice of a person whose particular vulnerability, due to age, sickness, infirmity, a physical or psychological disability or to pregnancy, is apparent or known to the perpetrator. In such cases, the offence is punished by seven years of imprisonment and a fine of €750,000, and where the fraud is committed by an organised group, ten years of imprisonment and a fine of €1,000,000.

Unlike the deception offence in Art. 313-1 of the French Criminal Code (which is described as being committed through the use of an untruthful name or capacity, the abuse of a real capacity, or the use of fraudulent means/ manoeuvres), the Romanian Criminal Code, in Art. 215 Par. 2, states that using untruthful names, capacities, or fraudulent means makes the offender responsible for the offence of deception in aggravated form, and the scenarios for aggravated deception offences in the French Criminal Code are not found in the Romanian Criminal Code.

Deception offences imply a positive action of the offender, and are usually committed through a misleading action, through presenting a false act as being true or a true fact as being false, but the offence can also be committed through inaction or omission in cases where the offender has a duty to make a statement or take an action, and he or she does not [4]–[6], a solution admitted in French criminal law as well [7], [8], even though there are other differing opinions, according to which deception mandatorily implies a positive action, and not an omission [9]–[14].

Even though, in Romanian law, consent is mainly protected by the regulations in civil law concerning vices of consent, should these legal provisions prove insufficient, the fraudulent alteration of the consent of one of the parties in the conclusion or execution of a contract can determine criminal liability for committing deception in conventions (Art. 215 Par. 3 of the Romanian Criminal Code), and the enforcement of criminal law is justified by a certain gravity of these actions [15], [16]. As in Romanian law, French law also considers the role of classic civil law to be diminished in the matter of vices of consent, while criminal law provides solutions that are more efficient, faster, more accessible [17], and stronger deterrents of such damaging behaviour.

The simple lie, that is a simple statement or simple omission, the simple fact of stating an untruthful fact or of denying a truthful one, is not sufficient for deception offences as described in the Romanian Criminal Code to exist, if it is not correlated with external elements or with circumstances that reveal an intention to deceive and that give the untruthful statement the semblance of truth; certain activities are needed to empower the lie [4].

French law also considers that a simple lie, even when recorded in writing, is not sufficient for a deception offence without an accompanying external or material act, or a third-party intervention meant to grant power and credibility to the untruthful statement [7]–[9], [11]–[13], [18]–[20] (In French criminal law, the existence of deception offences also applies to cases of lies supported by a mechanism meaning to mislead the victim on the real or unreal character of a situation, which can be accomplished in various ways, such as settings created by the offender that grant credibility to the lie (e.g. specially decorated offices, apparent staff members, etc.) [21], even though another interpretation claims that the simple lie or simple statement does not need to be accompanied by external elements that grant it the semblance of veracity [22]–[24]. Even though it would appear that deception offences can be committed through simple lies, in reality certain activities on the part of the offender are necessary to empower the lie, which is insufficient in itself. Still, the tendency of French jurisprudence is to appreciate the methods of misleading used in abstraxto, in the sense that they are able to mislead a diligent individual [12], [21].

Art. 215 of the Romanian Criminal Code expressly states the purpose of deception offences, which is obtaining unjust material benefit for oneself of for another, an explanation meant to describe the offender’s intention, unlike the solution in French criminal law, where the purpose of obtaining benefit is not required, as it is believed it would present difficulties in proving it [9]. Unlike Art. 405 of the previous French Criminal Code, which referenced three purposes, Art. 313-1 of the current French Criminal Code only refers to the act of deceiving, regardless of the method used by the offender, and considers any type of misleading as incriminating [22], still Art. 313-1 in the current French Criminal Code that incriminates deception in simple form no longer features the scenarios present in Art. 405 of the previous French Criminal Code, but it is because these are considered implied [25]. However, it is held that the misleading required by the law is insufficient, and that the methods must be used in order to obtain the transfer of property from the victim [13].

In Romanian criminal law, the existence of a deception offence requires that damage be caused [26], and the damage must be actual damage. Even though in French criminal law, based on the previous Art. 405 in

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the old French Criminal Code, there was a controversy concerning the requirement to have caused damage for
deception offences, solved by French jurisprudence in the sense that it is not necessary to cause damage for this
defence to exist, based on the logic that the transfer of property absorbs the idea of damage, this solution is not
confirmed in doctrine, where the purpose of incriminating deception is criticised, as the offence had not been
established to protect against vices of consent (an idea that could become real if the solution in jurisprudence
were accepted); thus, according to the current French Criminal Code, the requirement of caused damage is
expressly regulated in the incriminating norm for deception, its purpose being the protection of the deceived
person’s property [13] (An opposing viewpoint was that the economic damage is eliminated from the
requirements for existence of deception offences, as these have changed into offences that protect consent, i.e.
will, and operate a transfer of the criminal law result from property damage to consent damage, so that it
operates the transformation of deception offences from property offences into person offences [27]; in French
law, it can be noticed that on the basis of Art. 405 of the previous Criminal Code, for a deception offence to
exist, it was necessary for the victim to have been caused damage, which could be actual or eventual, being
generated by the transfer of the property that had not been made with consent; the current French Criminal Code
reconfirms the requirement for the existence of damage, but it is not apparent if the lawmaker also wanted to
consider eventual damage, or if they simply preferred the existence of actual damage [20].)

The classic comparison between theft, deception, and breach of trust offences in Romanian criminal law
is similarly formulated in French criminal law, and the delineation between deception and breach of trust must
be made keeping in mind that, in cases of breach of trust, the property transfer is made through consent, whereas
in deception situations, the transfer is determined through an act of misleading [28]. In French criminal law, the
difference between theft (committed through the appropriation of property belonging to another, without his or
her consent), deception (which implies acquiring property through an act of misleading), and breach of trust
(which implies that the owner of the property willingly transfers it to the offender) consists in the fact that the
property acquisition is a prerequisite for breach of trust, a constitutive element for deception, and an element that
excludes theft [21]. Unlike theft offences, in cases of deception offences the property is not appropriated, but
rather its transfer is done by the victim willingly, based on the methods used to mislead him or her [29], [20],
[30].

In Romanian criminal law, it is held that the simple presentation of a false act as true or false
advertising cannot be considered typical acts of deception [31]. However, we believe that protection against false
advertising is ensured, together with the sanctions regulated by the specific laws, also through the incorporation in
Art. 215 of the Criminal Code [32], but excessive, untruthful advertising does not constitute a deception
offence, unless these advertisements are accompanied by external elements that grant them credibility [4].

In what concerns deception through false advertising, French criminal law states that the lie itself, even
when recorded in writing, is insufficient for the existence of a deception offence, even though in practice it is
admitted as sufficient if it can lead to successful misleading [9] (French criminal law shows that false
advertising, of such nature that it has the ability to deceive, may even be considered a derivative of the deception
offence [13].), for instance in the case of false advertisement widely distributed through advertisements in the
media, as this type of excessive advertising can lead to the public being deceived [23], a case where it is allowed
to sanction false advertising as a deception offence, but only when the former is done repeatedly or with greater
intensity [17]. The means required by Art. 313-1 of the French Criminal Code concerning deception offences
may result from false advertising that in fact constitutes a simple lie, with the exception of cases of inexact
advertising, with the purpose of misleading, which is incriminated by Art. L 121-1 of the French Consumer
Protection Code; and false advertising can constitute an offence of deceit in cases where the advertisement is
supported by means capable of deceiving a prudent consumer [19] (In French legal literature it is shown that,
apparently, the incrimination of false advertising or of advertising meant to mislead does not come into conflict
with the deception offence, but this issue requires nuanced distinctions [34].)

A question arises on whether we should consider the change of vision in French criminal law in terms
of the deception offence applying in cases where an automated device is used to obtain goods and services in a
different way than the one designed for the normal use of the device. Even though, in previous French
jurisprudence, it has been stated that a device cannot be misled, an act of misleading being necessary, it is now
agreed that a device can be deceived, and that this thing sometimes occurs with greater ease than in the case of
people, as its abilities are much more limited in any attempt to identify attempts to mislead than a person can
[14] (An opposing viewpoint was that, in order for deception to exist, it is necessary that a person be misled, and
the state of being misled is a psychological state that a certain person can be in, and not a mechanical device or a
machine, but it is allowed that deception can exist also in the case of using a specially tuned device in order to
deceive the person who will use it (e.g. taxi metres) [35].) We posit that, in the case mentioned above, there can
be no deception offence, as the misleading of a passive subject is not possible, especially when considering the
fact that, unlike the regulations in Art. 215 of the Romanian Criminal Code, the Spanish and German Criminal
Codes have express dispositions pertaining to deception that cover all the above-mentioned hypotheses.
In Romanian law, the non-compliance with contractual obligations can be charged as an offence of deception in conventions only if there is proof that one of the parties uses deceptive means to induce or maintain the other party misled, in order to induce the other party to enter or to perform a contract that he or she might otherwise not have entered in or performed the convention, but for the fraudulent misrepresentations in their absence, the situation is a simple breach of an obligation arising from a civil contract, with no penal consequences and without criminal liability for deception [36].

French criminal law also considers that contract fraud supposes, generally, a non-compliance with the contractual obligations, which in principle attracts contractual liability, but the gravity of such frauds can attract the intervention of a penal sanction in order to ensure, when the case applies, a certain loyalty [37].

We consider criticisable the choice of Romanian lawmakers of the New Criminal Code to eliminate the incrimination of deception in conventions (Art. 215 Par. 3) and deception through cheque fraud (Art. 215 Par. 4), which exist in the current Criminal Code. We also cannot agree with the opinion that deception in conventions or deception with cheques are no longer incriminated (abolitio criminis) [38]. Through this option of the lawmaker, we must not understand that these special forms have lost any of their value or have become obsolete, but rather that they attract criminal liability under the regulations of Art. 244 of the New Criminal Code, as deception offences.

It is correctly considered that the purpose of this was only to simplify the incriminating norm for deception, but these will continue to constitute methods of committing deception offences based on Art. 244 Par. (1) or (2) of the New Criminal Code, so there is no actual removal from incrimination of these acts [39], [5].

Similarly, in French criminal law it is shown that the repeal of the provisions on cheque fraud (incriminated in French law through the Law of 2 August 1917 and repealed through Law 91-1382 of 30 December 1991) is not considered a decriminalization of these acts, as the conditions for the existence of deception offences can sometimes be met, in the same way some countries have it in their legal systems as a specific element [40]; additionally, it must be mentioned that the mere act of issuing a cheque for non-existent funds cannot constitute a deception offence, but rather it is necessary that an act of deceit also be present, a misleading on its solvency [41].

Conclusions

As a natural consequence of the importance social relations in terms of patrimony have for the development of society and for stimulating the individual’s interest to participate in society progress, all modern laws include ample regulations concerning property offences. By analysing these regulations on patrimony offences, and by analysing the regulations on deception offences in different reference legal systems for criminal law, we can ensure a correlation of the efforts made in capitalising on our criminal law tradition, aligning it to the current tendencies in European criminal law, factoring in the developments that have been made in these systems, with the purpose of contributing to adopting regulations concerning deception and, generally, in terms of property offences, that can support a unitary regulation framework, enable their implementation, and satisfy the requirements for harmonising the national legal framework with the systems of other states.

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Criminal repression in the context of the economic crisis and the maximization of crime at European and global level (May 9-13, 2013, Bucharest, Romania)

Criminal repression in the context of the economic crisis and the maximization of crime at European and global level (May 9-13, 2013, Bucharest, Romania)
Deception offences: distinctions from contractual liability for non-compliance with contractual obligations in the new civil code

Dobrila M.C.

Faculty of Law, „Alexandru Ioan Cuza” University Iaşi (ROMANIA) E-mail mirela.dobrila@uaic.ro

Abstract

Non-compliance with contractual obligations can be approached both from a civil law perspective (when the consequences of non-compliance with assumed contractual obligations are regulated by the Romanian Civil Code and they imply contractual civil liability), as well as from a criminal law perspective (as a constitutive element of deception offences, when the sanctions specific to civil law in the context of contractual obligations prove insufficient). In the case of the offence of deceit, we must analyse whether non-compliance with contractual obligations meets the requirements for criminal liability, in the sense that we must examine the way in which the lawmaker established, through Art. 215 of the Romanian Criminal Code, the limits within which non-compliance with contractual obligations is judged as a matter of criminal law.

Keywords: deception offences, non-compliance with contractual obligations, contractual liability, criminal liability, article 215 of the Romanian Criminal Code.

Introduction

Distinguishing between deception offences, which attract criminal liability, and contractual liability for non-compliance with contractual obligations consists in knowing in which specific situations the consequences of non-compliance with contractual obligations are regulated by the Civil Code (and thus imply civil contractual liability of the individual not executing the respective obligation, with the specific means of civil law, without implementing criminal law dispositions), and for which cases non-execution of contractual obligations has the character of an illicit action incriminated by Art. 215 of the Criminal Code, which enables the transition from the level of civil liability to that of criminal liability.

According to Art. 215 Par. 1 of the Criminal Code, a deception offence consists of an act of deceiving a person, by presenting a false fact as true, or a true act as false, with the purpose of deriving for oneself or for another an unjust material benefit, and if damage was caused. In Art. 215 Par. 3 of the Criminal Code, a special type of deception offences is introduced, known as deception in conventions, which consists of deceiving or maintaining the deceit of a person when concluding or executing a contract, if in the absence of this deceit, the deceived person would not have concluded or executed the contract in the conditions stipulated.

Distinguishing between deception offences and contractual liability for non-compliance with contractual obligations

Concluding contracts with unclear provisions and non-compliance with these in terms of the vision the parties have of them determines the occurrence of litigation in which interpreting the real will of the contracting parties is difficult, and thus numerous situations have been noted where criminal liability is desired, but there are only grounds for contractual civil liability [1].

Protecting patrimonial relations through criminal law is the most energetic and efficient form of defending patrimony, but it has a subsidiary character, as criminal law only acts when the other non-criminal law or extra-legal means prove insufficient or inefficient [2]; the intervention of criminal law is justified by serious breaches of social values, and by the fact that it becomes the sole efficient method of counteracting such offences.

In this sense, the sanctions specific to civil law in the context of contractual liability can prove insufficient, their nature being to impose, for actually protecting contracting parties, the intervention of criminal law sanctions [3].

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Breaching legal dispositions can be ascribed to different fields of law, and it is possible for some transgressions to pass from one field of law to another [4], according to the level of social danger that imposes the existence of concurrence between the character of liability, and the real character of the offence committed.

In analysing the boundaries between deception in conventions and non-compliance with contractual obligations, we have to start from the fact that, as it has been argued, the sphere of civil culpability is greater than that of criminal culpability, and the consequence of this difference is that the offender can be charged under civil law, even though he is innocent under criminal law, and civil culpability includes all cases of criminal culpability, if the respective offences have caused damage, but also includes other situations that are not covered by criminal culpability [5]. This aspect must be considered through the perspective of the modifications brought by the New Civil Code in the matter of civil culpability, which is defined through certain definitions taken over from criminal law, with the purpose to ensure terminological unity.

Unlike in the previous version, Art. 16 of the New Civil Code regulates civil culpability; the introduction of this text is considered to be in accordance with the advances in legal literature, where it has been noted that there is a lack of terminological unity concerning culpability under civil law [6], and thus civil culpability is defined based on the model in the Criminal Code.

A subjective distinction can be made between the area of criminal law and that of civil law, as the existence of a deception offence requires that the act be committed with intent, whereas unintentionally causing damage can attract consequences under civil law [7].

Criminal law, in order to guarantee the creation and normal functionality of patrimonial relations, endeavours to ensure a spirit of good faith and mutual trust, necessary in any patrimonial transaction [8]. Damages to patrimony within contractual relations, as a consequence of a person deceiving another person, sometimes prove (even though they are protected by contractual liability, meant to sanction such harmful behaviour) insufficient for counteracting these actions, or for ensuring the actual protection of the contracting parties' interests, which justifies the intervention of criminal law in this field, through the regulations in Art. 215 of the Criminal Code regarding deception offences, with a focus on deception in conventions (Art. 215, Par. 3), which ensures with greater force, through the risk of being subject to criminal law sanctions, the protection of a person from damage he or she may be caused as a consequence of being deceived by another person.

French criminal law also states that the general notion of contract fraud supposes a non-compliance with contractual obligations, which in principle triggers contractual liability, but the gravity of such acts of fraud can determine the intervention of criminal law sanctions in order to ensure, when the situation demands it, a certain loyalty [9].

In terms of contractual civil liability, according to Art. 1350 of the New Civil Code, any individual is required to comply with the obligations he or she contracted, and when, without justification, he or she fails to comply with these obligations, they become liable for the damage caused to the other party and are forced to make reparations for this damage, without the possibility of replacing the rules of contractual liability with more favourable rules.

In order to determine the intervention of contractual liability, it is necessary for a non-compliance with contractual obligations to exist, for material damage to be caused for the creditor, and for a causality relationship between the illicit act and the material damage; aside from these conditions, there is a matter of the necessity for culpability or fault [10], since according to Art. 1547 of the New Civil Code, the debtor is required to make reparations for the damage caused with intent or in negligence, even though according to Art. 1548 of the New Civil Code his fault is assumed through the simple act of non-compliance with the contractual obligation.

The criterion of causing material damage is insufficient for distinguishing between non-compliance with contractual obligations and deception offences, as in both cases damage is caused; either due to the non-execution of the contract, in the first case, or as a consequence of the deceiving act, in the second case. Two elements have to be verified: good faith in concluding and executing the contract, and the special purpose of obtaining unjust material benefit for oneself of for another. Good faith is assumed, and the litigation is solved, in principle, in a civil court of law, and only exceptionally sanctioned under criminal law [11]. In this sense, the inadequate execution of a contract does not constitute a deception offence, even if damage is caused through it [12].

As a new development from the previous edition, the New Civil Code introduces the principle of good faith (Art. 1170 and Art. 1183), which is required both in negotiating and concluding, and along the entire execution of the process.

With regard to good faith in contractual matters, the manifestation of one of the contracting parties' will is called upon to elicit full confidence for the other party, without harming the other party's interests and rights, and it implies the obligation of refraining for any fraud applied to both parties, meaning any act meant to deceive the other party; violating the obligation of good faith consists of an illicit act that involves the intention to harm, and can extend to deception on a criminal law level [13], [14]. Responsibility for contract fraud is analysed based on the gravity of the actions; sometimes, beyond civil liability, it is possible to apply criminal law sanctions in the context of the offence of deception in conventions, when all the conditions are met [15].
In the case of non-compliance with contractual obligations, the distinction between cases that fall under civil liability and those that pass under criminal liability for the deception offence is based on the degrees of implementation of fraudulent manoeuvres, the extent to which consent is altered and good faith is breached, which is the worst form of bad faith in terms of contractual matters, in the case of deception in conventions, when there is an intention to deceive the other party about the conditions of the contract.

In cases where bad faith exists, deception can be proved only if there is also evidence that the act was performed with the purpose of obtaining unjust material benefit for oneself or for another; in the absence of this special purpose, the litigation will also be solved within a civil law trial. If one of the parties is undergoing financial hardship and has not informed the other contracting party, not because he or she was trying to obtain unjust material gain for oneself or for another, but rather because he or she were trying to rehabilitate themselves financially, the special purpose required by the incriminating text is absent, and the non-compliance with contractual obligations does not constitute a deception offence [11].

Non-compliance with an obligation that is derived from the concluded convention does not constitute an offence of deception in conventions when the party, with the occasion of the agreed conclusion and execution, has not used fraudulent means of such nature as to deceive or maintain the deceit of the other party, and without which the other party would not have concluded or executed the convention [16]–[18]. Non-compliance with contractual obligations can become an offence of deception in conventions if these obligations have an essential role in concluding or executing the contract [19], when an act of deceiving or maintaining deceit is present.

If the offender has not used any manoeuvres to deceive the victim, as at that time the offender guaranteed the reimbursement of the borrowed sum with e.g. an apartment he or she owned, and after the loan return deadline expired, before paying the owed amount back, the offender has estranged the apartment, this constitutes an act of non-compliance with a contractual obligation, and is susceptible to being examined by a court of civil law [20], in order to establish whether the other party has breached the contractual clauses. This does not constitute the offence of deception in conventions as described in Art. 215 Par. 3 of the Criminal Code, as this represents non-compliance with contractual obligations, and there is no intention specific to deception at the time the loan is obtained.

In the context where Art. 1 of Additional Protocol 4 to the European Convention of Human Rights (ECHR), recognizing certain rights and liberties aside from those already settled in the Convention and the first Additional Protocol, states that „no individual can be deprived of their liberty for the sole reason that they are unable to execute a contractual obligation”, non-compliance with obligations that derive from a concluded contract does not constitute a deception offence, if it is not established that fraudulent manoeuvres were used against the creditor when the contract was concluded [21].

It is held that the simple non-compliance with an obligation assumed as part of a civil convention does not have criminal character, even if the accused has agreed to execute the obligation until a specific deadline, knowing that he or she would be unable to comply, as long as no deceitful means have been used to persuade the other party that the convention would be executed by that deadline [15], [16], [22]. The consequences of non-compliance with assumed contractual obligations are mainly regulated by the Civil Code, with the possibility to introduce clauses in the convention that enable an easier process of attracting civil liability for the person who does not comply with the obligations.

If it cannot be proved that, for concluding the convention with the damaged party, the accused has used any deceiving manoeuvres in the absence of which the agreement would not have been concluded, this constitutes a simple non-compliance with an obligation within a civil convention, even if at the time it was concluded the accused knew that he or she would not comply with it. It is believed that the passage from civil law to criminal law can only occur either when the convention is concluded, or along its execution process, the party that did not comply with the convention has used deceitful tactics to persuade the other party that the obligation would be complied with [23], [1]. Thus, the action of the owner of an apartment, who agrees with another person to sell the apartment to the person he received an advance payment from, and instead sells the apartment to another individual, does not constitute an offence of deceit in conventions as described in Art. 215 Par. 3 of the Criminal Code [24].

In cases of deception in conventions, the offender knows, even at the beginning of contractual negotiations, that he or she does not wish or is unable to execute the obligation assumed in the contract, and the deceiving offer is designed before or at the time of concluding the contract, and in the absence of this intention the act can represent non-compliance with the contract [25], in which case civil liability intervenes, and not criminal liability.

Executing activities that implicitly demonstrate the assumption of a determined obligation (e.g. consuming beverages of food products in a restaurant, fuelling a vehicle, using a taxi service) with the prior intention of not performing the service can be sanctioned as deception offences, and they are considered to be implicit deceptions, as the offenders imply that they intend to execute their own obligations, even though, in reality, they are aware that they will not do it [7]. In order for a deception offence to exist, it is required that the intention of the offender also exists, prior to the act being committed; if his or her intention to no not pay is
subsequent to committing the act (e.g. if he or she does not pay because they are out of money, or because they are unsatisfied with the received service), this will result in non-compliance with a contractual obligation, which is solved under civil law [7].

The influence of the criminal law judge is increased in matters of non-compliance with contractual obligations, which thus become susceptible of receiving criminal law sanctions, including the context of the offence of deception in conventions. In French doctrine, it is held that criminal law contributes to the development of contract law, and to finding a balance between the contracting parties [26].

Non-compliance with contractual obligations can determine the passage from contractual civil liability to criminal liability in the form of an offence of deception in conventions, only if the use of means to deceive or maintain the deceit on concluding or executing the contract, in the absence of which the convention would not have been concluded or executed. Otherwise, it is merely a matter of non-compliance with an obligation within a civil convention, which does not have criminal character as it does not in itself reflect the existence of fraudulent intention.

**Conclusions**

Liability for non-compliance with contractual obligations is analysed based on the gravity of the actions, and sometimes, beyond contractual civil liability, it is possible to apply criminal law sanctions based on the offence of deception in conventions when all the conditions required by law are met. Distinguishing between cases where the consequences of non-compliance with contractual obligations are regulated by the Civil Code and attract contractual civil liability, and cases that feature the offence of deception in conventions starts from the way in which Art. 215 of the Romanian Criminal Code establishes the limits within which non-compliance with contractual obligations determines the intervention of criminal law.

The passage from contractual civil liability for non-compliance with contractual obligations to criminal liability in the form of the offence of deception in conventions can only occur if it can be proved that certain means of deceiving or maintaining deceit on the conclusion or execution of a contract, in the absence of which the convention would not have been concluded or executed, as the simple non-compliance with an obligation within a civil convention does not in itself reflect the existence of fraudulent intention, and does not have criminal character.

Protection against patrimony damage within a contractual relationship, as a consequence of a person being deceived by another person is, first of all, protected through contractual liability; when these means prove insufficient or inefficient, in order to ensure actual protection of the contracting parties' interests, the intervention of criminal law is justified in these matters through Art. 215 of the Criminal Code on the deception offence, with a focus on deception in conventions as defined in Art. 215 Par. 3 of the Criminal Code, as this ensures a stronger level of protection of the individual against damage he or she may be caused as a consequence of their deceit by another person; the intervention of criminal law is justified by serious breaches of social values.

Criminal liability for the offence of deception in conventions in certain cases of non-compliance with contractual obligations completes the securities offered by contractual civil liability for non-compliance with contractual obligations, and endeavours to ensure protection both on an individual and a societal level.

**References**

Criminal repression in the matter of tax evasion. Realities and perspectives in the context of the economic crisis and the crime growth

Duvac C.

“Academician Andrei Rădulescu” Institute of Legal Researches within the Romanian Academy, Faculty of Law and Economics “AGORA” University of Oradea (ROMANIA)

Abstract

The author analyses concisely the regulation of tax evasion in the Romanian positive criminal law, in terms of the economic crisis and of the crime growth in this field.

In this context the author examines the way in which the two phenomena have influenced the Romanian legislator and the Romanian judicial authorities in adopting the most adequate means for fighting tax evasion, as well as the results obtained thereby.

In connection to this analysis, the author draws certain conclusions and puts forward de lege ferenda proposals, meant to facilitate that the persons who committed tax evasion offences are held criminally liable and also to enable the recovery of the damages produced to the consolidated general budget of the Romanian state.

Keywords: offence, penalty, taxpayer, tax obligations, consolidated general budget, tax evasion.

Legal basis

As it is widely known, both Law no. 15/1968 on the Criminal Code of Romania, recast [1], and Law no. 286/2009 on the Criminal Code [2], a unitary legislative work having a great historical importance for Romania, which, pursuant to art. 246 of Law no. 187/2012 for the implementation of Law no. 289/2009 on the Criminal Code [3], shall come into effect on 1 February 2014, date when the Criminal Code in force is to be repealed, do not cover the tax evasion offence.

Considering the dynamics of the social values and relations that are safeguarded through this criminalisation type and given the numerous amendments brought to the fiscal arrangements in Romania, the option of the Romanian legislator to refrain from codifying such offences that have no legislative stability is fully justified. Hence, tax evasion offences are criminalised under articles 3-9 of Law no. 241/2005 on preventing and fighting tax evasion [4]. This law repeals Law no. 87/1994 on fighting tax evasion, recast [5], the first legal instrument in this matter following the events of 1989.

Ordered Measures

After the economic crisis arose also in Romania, Romanian authorities have brought several legislative and administrative measures to diminish its effects on the consolidated general budget, by means of a firmer fight against tax evasion and of the increase in the collection of the outstanding amounts that are due to the state as tax obligations, on the basis of the activities carried out by taxpayers on the state territory.

First, considering among others, the need to urgently combat fiscal fraud in the field of value added tax, to diminish tax evasion in the field of value added tax and excise duties collection, the Government of Romania adopted Emergency Ordinance no. 54/2010 on certain measures to combat tax evasion [6] that amended, among others, Law no. 571/2003 on the Fiscal Code [7], Law nr. 241/2005 and Law no. 86/2006 on the Customs Code of Romania [8].

In the field covered by Law no. 241/2005, the following amendments and supplements were brought, as the case may be:

- criminal investigation bodies of the judicial police were included under the category of competent bodies (having responsibilities in conducting financial, fiscal or customs audits);
- from the scope of art. 4 [9] one dropped the requirement to notify three times the person who is subjected to financial, fiscal or customs audits to present the statutory documents and the goods from his/her property, and the condition “within 15 days of receiving the official request” was added;
- under the scope of art. 7, with respect to both criminalisation variants (typical and aggravated), a normative modality was added, namely “possessing” stamps, bands or standard forms, utilised in the fiscal field, having a special regime.

Second, when elaborating and adopting this legal instrument, the matter related to the fight against tax evasion and smuggling came on the agenda of the Supreme Council of National Defence that adopted Decision no. 69/28.06.2010 and the National Joint Action Plan of the agencies having responsibilities in fighting tax evasion and smuggling, meant to improve the efficiency of the collaboration between the Ministry of Internal Affairs, the Ministry of Public Finances and the Public Ministry. Under the scope of this Plan, nine priority intervention fields for competent bodies were set: energy products, tobacco products, agricultural and food products, alcohol and alcohol beverages, transport, tourism, construction and building materials. On the basis of this Plan, the inter-institutional working group for fighting tax evasion was set up at central level, whilst operational working groups made of specialist officers and experts appointed by mandated institutions were established at county level [10].

**Results obtained**

In the past years, crime rate in Romania is increasing, and this trend is also maintained in respect to tax evasion.

Hence, in 2009, prosecution offices had a case load of 1,356,939 cases to resolve, of which they solved 497,119. Indictments were issued in 38,109 criminal files and 49,743 defendants were brought to trial, as follows: 18,895 (38%) for offences provided under special laws (for tax evasion included); 17,245 (34.7%) for offences against property and 9,980 (20.1%) for offences against persons.

In 2010, the case load was of 1,513,272 cases to be solved (+11.5 as compared to 2009), 518,291 criminal files being resolved, of which 41,934 cases were resolved by indictment. 56,949 defendants were prosecuted, of which 22,001 (38.6%) for offences provided under special laws (for tax evasion included); 20,030 (35.2%) for offences against property and 10,624 (18.7%) for offences against persons.

In 2011, all the afore-mentioned indicators had the same ascending trend. As such, the case load was of 1,656,130 files to resolve (+9.4% as compared to 2010), whilst the number of the solved files was of 579,322 (+11.8%), of which 43,826 cases were resolved by indictments, 60,980 persons having been prosecuted (23,874 - 39.2% - for offences provided under special laws; 22,454 - 36.8% - for offences against property; 10,262 – 16.8% - for offences against persons.

In 2010, as a consequence of these measures and of the proper involvement of fiscal and judicial authorities in the fight against tax evasion, the imposed fines amounted to about 46 million euros, whilst the Ministry of Public Finances collected about 15 million euros stemming from fines. The specialised structures of the Ministry of Public Finances ordered 4,251 stays of activities and additional tax obligations amounting to more than 25 million euros were imposed, and fines amounting to a total of almost 14 million euros were collected, more than 1,500 stays of activities were ordered and additional tax obligations amounting to 863.5 million euros were imposed [12].

As of 25 June 2012, the Supreme Council of National Defence decided that the regular evaluation of the implementation of the measures established by the Joint Action Plan will come under the responsibility of the Government of Romania [13].

In 2010, at the level of the Romanian Police, 6,829 cases of tax evasion were solved (compared to 5,213 in 2009); in 2011, procedural solutions were proposed in 8,481 cases of tax evasion offences, and in 2012, their number was of 10,904[13].

In 2010, criminal prosecution bodies from the Public Ministry prosecuted 1,111 defendants for tax evasion offences (compared to 493 defendants in 2009, which is a 125.4% increase), whilst 1,385 defendants were prosecuted in 2011 (+24.8%).

At the same time, in 2012, the prosecutors brought charges against 1,722 natural persons and 51 legal persons for having perpetrated several tax evasion offences, having issued 1,303 indictments, the value of the damage established at this moment of the proceedings being set at 720,403,038 lei and 9,115,077 euros. In order to recover the damages, precautionary measures were instituted with respect to certain goods amounting to 601,880,699 lei and 11,350,613 euros. Following the application of the non-punishment clause set in art. 10 of Law no. 241/2005, in 7,917 criminal files 56,020,220 lei and 75,810 euros were collected to the state Budget [14].

Such efforts engendered a change in the fiscal behaviour of the taxpayers, and the following developments were found in terms of the collection to the state budget in 2012, as compared to 2011, as it follows from the statistical data of the Ministry of Public Finances:

- a 6.2% increase of the total revenues collection to the state budget, respectively 193,148.2 million lei;
a 8.9% increase of fiscal revenues to the state budget, respectively 114,044.6 million lei;
a 8.9% increase of fiscal revenues to the state budget obtained from the tax on profit, salaries, income and capital income, respectively 32,782.9 million lei;
a 5.4% increase of the revenues obtained from value added tax, respectively 50,516 million lei;
a 6% increase of the collected excises, respectively 20,260.4 million lei;
a 5% increase of the collected customs taxes, respectively 707.3 million lei.

Recent legislative amendments

Recently, the relevant legal framework has been improved again by Law no. 50/2013 to amend Law no. 241/2005 on preventing and fighting tax evasion [15]. For this purpose, the following amendments have been introduced:

- as for the offence set out under art. 3, the fine was replaced by the imprisonment penalty from 6 months to 5 years; the offence shall be also punished if perpetrated recklessly; from this viewpoint, the legislator’s option to establish the same penalty limits for an offence that is committed either intentionally, or recklessly, is an arguable one, even if the judge, when establishing the individual criminal repression, takes into account the mode of culpability of the offence perpetration; at the same time, the condition “although s/he could have done it” was removed from the content of the criminalisation text, being implicitly understood that competent bodies set, in their audit documents, a reasonable deadline for restoring the destroyed accounting documents, acknowledged and accepted by signature, when this act is presented, by the taxpayer; if it is impossible for the latter to restore the destroyed accounting records by the deadline required by the audit body as a consequence of a circumstance that could have not been foreseen, the provisions referring to unforeseeable circumstances shall apply;

- the special limits of the imprisonment penalty established for the offences criminalised by art. 4 and art. 5 doubled (imprisonment from one year to 6 years instead of imprisonment from 6 months to 3 years), whilst the fine as an alternative penalty was removed;

- at the same time, the special limits of the imprisonment penalty have been also increased for the offence set out in art. 6 (from one year to 3 years, to imprisonment from one year to 6 years), simultaneously with the removal of the fine as an alternative penal sanction;

- as for the aggravated variants, set out under art. 9 paras. (2) and (3), the limits of the penalty applicable to the typical offence (imprisonment from 2 to 8 years) increase by 5 years (as opposed to 2 years, as established in the law prior to these amendments) if the damage exceeds the equivalent in the national currency of 100,000 euros, whilst if the damage exceeds 500,000 euros, the penalty limits increase by 7 years (as compared to 3 years).

Conclusions

A first conclusion that can be drawn from this analysis refers to the option of the Romanian legislator regarding the penalty arrangements applicable to tax evasion offences and to certain related offences. For this purpose, we notice a certain inconsistency of the Romanian legislator that is likely to hinder the firm application of the legal provisions in this matter.

We notice that the legislator of 2010 (when adopting Government Emergency Ordinance no. 54/2010), as well as the legislator of 2013 (when adopting Law no. 50/2013), as opposed to the one of 2009 (in this respect, see the explanatory memorandum [16] of the draft Criminal Code [17]) or of 2012 (By art. 166 of Law no. 187/2012, as of 1 February 2014, the limits of the imprisonment penalty set under art. 7 shall be reduced from 2 to 7 years to one year to 7 years, for the basic variant, and from 3 to 12 years to 2 to 7 years, respectively, for the aggravated variant. At the same time, for this aggravated variant, a new normative modality is added, namely the “use”... of stamps, bands or standard forms, utilised in the fiscal field, having a special regime, falsified.), allowed for harsher penalties applicable to tax evasion offences and related offences, considering that this criminal phenomenon would be better combated in this way.

Additionally, the scope of certain texts has been expanded, both in terms of the modes of culpability when perpetrating those offences, as well as in terms of the new normative modalities for committing them.

This legal framework was doubled by several administrative measures taken at the highest level, namely the Supreme Council of National Defence, chaired by the president of Romania and the Government of Romania.

These efforts were complemented by those made by the fiscal and judicial bodies, with relevant outcomes.

The results that were obtained in the period under review are very good and unprecedented in Romania’s history after December 1989, whilst the most important thing is that although the country is still in crisis, the state budget collection rate significantly raised in 2012 as compared to 2011.
De lege ferenda proposals

De lege ferenda, until the entry into force of the new criminal legislation, namely 1 February 2014, the whole penalty regime established by the provisions of Law no. 241/2005 should be reviewed in order to bring it into line with the principles of the criminal policy that laid the foundations of the new Criminal Code of 2009 and with the penalty limits established therein with respect to certain equivalent criminalisations, in terms of the abstract social danger, as well as with the philosophy that was taken into consideration when adopting Law no. 187/2012. In this vein, certain excesses (unbalances) would be corrected, as it is not normal for a tax evasion offence, regardless of the damage resulted therefrom, to be punished more harshly (imprisonment from 9 to 15 years) than assaults or assaults causing death (imprisonment from 6 to 12 years) or than robbery (imprisonment from 2 to 7 years) or aggravated robbery (imprisonment from 5 to 12 years).

At the same time, the criminalisation of the act of the taxpayer to fail to restore the destroyed accounting records, within the deadline required by a tax audit report, when committed both intentionally and recklessly and its punishment within the same limits appears as an excess to us.

Furthermore, when the new Criminal Code of 2009 enters into force, art. 8 paras. (2) and (3) sentence II should to be repealed as well, as the hypothesis regulated by para. (2) is found in the criminalisation text of art. 367 of the new Criminal Code (setting up an organised criminal group [18], and the penalty of the attempted act for a preparatory act is also an excess and a singular situation in the Romanian criminal law. From this perspective, one should not ignore that the text of the afore-mentioned new Criminal Code mainly criminalises certain preparatory acts for the perpetration of certain offences, as a sui generis offence, which, on the basis of the lack of explicit will of the legislator, set out under art. 367 para. (3) of the new Criminal Code, would have been absorbed into the act it refers to.

References

Legal implications of using non-sufficient funds cheques in relation to the new criminal law

Duvac F.

National Bank of Romania-Supervision Department, (ROMANIA) duvacflorentina@yahoo.com

Abstract

The author examines the legal implications of using non-sufficient funds cheques in contractual relations with the consequence of producing damages to contractors relative to the new criminal law.

In this context, the Decision no. IX/2005 of the High Court of Cassation and Justice, United Section of admitting of an appeal on points of law, pursuant to art. 215 of the Criminal Code of 1969 is also analyzed.

Finally, some conclusions and proposals of ferenda law to improve the writing of art. 244 of the new Penal Code and therefore its application by the Romanian judicial authorities are presented.

Key words: offense, punishment, cheque, fraud, New Penal (Criminal) Code

Introductory Notes

A. According to art. 246 of Law no. 187/2012 for the implementation of Law no. 286/2009 on the Penal Code [1], the New Penal Code (hereinafter referred to as the Penal Code of 2009) [2] shall come into force on February 1, 2014, date to be repealed Law no. 15/1968 concerning the adoption of the Penal Code of Romania, republished [3] (hereinafter referred to as the Criminal Code of 1969 or previous Penal Code or previous penal law).

Law no. 286/2009 was adopted on June 24, 2009, pursuant to art. 114 para. 3 of the Romanian Constitution, republished, as a result of the Romanian Government commitment (decision adopted on June 10, 2009 [4]) in front of the Chamber of Deputies and the Senate.

B. The reasons that have led to the development of the new criminal code are shown in the explanatory memorandum [5] to the draft Penal Code [6] (hereinafter referred to as the Project), conducted in 2006-2008 by a panel of renowned penal law experts (theoreticians and practitioners) (the Commission for the elaboration of the draft penal code, established at the Ministry of Justice, according to the provisions of art. 26 of Law no. 24/2000 regarding to the rules of legislative technique for the elaboration of the normative acts, republished, with subsequent amendments and supplements, had the following members: prosecutor Katalin-Barbara Kibedi, adviser to the Minister of Justice, president of the commission; Professor doctor Valerian Cioclei, Law University from Bucharest; Professor doctor Ilie Pascu, Law and Administrative Sciences University „Andrei Șaguna” from Constanța; Associate Professor Ph.d. Florin Streteanu, Law University „Babeș-Bolyai” from Cluj-Napoca; judge Gabriel Ionescu, The High Court of Cassation and Justice; judge Ana Cristina Lăbuș, member of the Superior Council of Magistracy; judge Andreea Stoica, Bucharest Court of Appeal; judge Mihail Udroiu, Bucharest Second Court of Justice, seconded to the Ministry of Justice; legal adviser Elena Cismaru, head of the criminal and contravention legislation Department, The Legislative Council and lawyer Marian Nazat. Throughout the drafting process the Commission has worked and has been supported by the renowned penal law experts such as: Professor doctor Jean Pradel, Univesity from Poitiers, Professor doctor George Antoniu - Director of the Institute of Legal Research „Acad. Andrei Rădulescu” of the Romanian Academy, Professor doctor Costică Bulai și Professor doctor Valerian Cioclei, both of them from the Bucharest Law University,) and Government Ordinance no. 1183/2008 for the approval of the preliminary theses of the project of the Penal Code [7].

The New Penal Code in relation to the current penal law

Deception is criminalized in art. 244 of the New Penal Code (Art. 244 – Deception: “(1) Misleading a person by presenting as true a false or misleading fact or a true fact as being false, in order to gain for himself or another an unjust material benefit and if damage was caused, shall be punished with imprisonment from 6 months to 3 years), being included in the category of those crimes against the patrimony which is characterized by invading the confidence, foreseen in Chapter III of Title II of the Special Part. The text does not reproduce anymore para. 3, 4 and 5 of art. 215 of the previous Penal Code, thereby giving the appearance of
decriminalizing deception in conventions, with cheques or which produced particularly serious consequences. But the repeal of the incrimination rules laid down in art. 215 para. 3, 4 and 5 of the Penal Code of 1969 does not mean that this type of antisocial acts were decriminalized. (Art. 215 para. 4 of the Penal Code of 1969: “(4) The act of issuing a cheque with regard to a credit institution or a person, while being aware that the supply or cover necessary for its realisation does not exist, as well as the act of withdrawing the supply, wholly or in part, after the issuing, or of prohibiting the acceptor from paying before expiry of the presentation term, for the purpose in para. (1), if damage was caused against the owner of the cheque, shall be sanctioned by the penalty provided in para. (2) (imprisonment from 3 to 15 years - our bracket - Fl.D.) ”) These will constitute, in relation to art. 244, factual ways of committing simple or qualified offense of deception, as appropriate. In fact, the repeal is not a term synonymous with decriminalization, because the act repealed may continue to be criminalized in another legal text (in our case, in another paragraph) with the same nomen iuris (such as the crime of deception) or under a different name (for example, the offense of slanderous denunciation provided for in art. 259 of the Penal Code of 1969, will be prosecuted by the art. 268 of the New Penal Code named “Misleading the judicial bodies ”).

Perhaps the editors of the new penal law have not considered it necessary to take over these paragraphs, both from desire to simplify the text of art. 215 of the previous penal law and also because due to a significant reduction in the special limits of the punishment provided for deception, a legal diversification of them relative to several univocos aggravating circumstances would have been very difficult. Thus, the legislature has left to the judge that in the course of judicial individualization of punishment to take into account these circumstantial elements.

As far as we are concerned, in relation to offenses against the patrimony, including deception, it seems disputable to remove the aggravating circumstance when they mention extremely serious consequences that were produced, especially since their monetary threshold was increased from 200,000 to 2,000,000 lei. It should be noted that, in the view of the editors [9] of the first New Penal Code of 2004 [10], deception had a similar juridical content with art. 215 of the Penal Code of 1969, to which were added new normative modalities. Art. 260 — Deception: “(1) Misleading a person by presenting as true a false or misleading fact or a true fact as being false, in order to gain for himself or another an unjust material benefit and if damage was caused, shall be punished with imprisonment from 1 to 7 years. (2) Deception committed by using false names or qualities or other fraudulent means shall be punished with imprisonment from 3 to 10 years. (3) Inducing or maintaining of a person in error, during the conclusion or performance of a contract, committed so without this error the swindled person would not have completed or executed the contract in the stipulated conditions, shall be punished with the punishment provided in par. (1) or (2) as shown distinctions there. (4) Issuance of a check or other payment instrument on a credit institution or a person knowing that there are no supplies or coverage available for its exploitation or there will not be by the deadline agreed between the parties, and that to withdraw after issuance, the supply, in whole or in part, or to prohibit the drawee to pay before the end of the presentation, the purpose stated in para. (1) if the holder has caused a damage to the check owner or to other payment instrument shall be sanctioned by the penalty provided in para. (2). (5) Using fraudulent means to remove a person from public auction or tender or to limit the number of participants shall be punished with imprisonment from one year to five years. (6) With the penalty mentioned in para. (1) shall be punishable the exploitation of ignorance or inexperience of a minor or the state of weakness of vulnerable persons due to age, illness or pregnancy, to urge them to sign acts prejudicial to them. (7) inducing or maintaining in error regarding the living conditions in the country of emigration, committed under par. (1) in order to induce a person to emigrate, shall be punished according to par. (1). (8) deception that had serious consequences shall be punished by severe detention from 15 to 20 years and the prohibition of certain rights. (9) If the means used to commit fraudulent deception is in itself an offense, the rules on competition offenses ”.

In application of art. 215 of the previous penal law, the High Court of Cassation and Justice, upheld an appeal of law and through the Decision no. IX/2005 [11], set:

1. The act of emitting a cheque on a credit institution or on a person knowing that there is no supply or coverage required for its capitalization, as well as the act to withdraw, after issuance, the whole or a part of supply or to prohibit the drawee to pay before the end of the presentation term, in order to obtain for himself or for another an unfairly material benefit, if there was a damage to the cheque owner, constitutes the offense of deception referred to in art. 215 para. 4 of the Penal Code.

2. If the cheque beneficiary is aware, at the time of issue, that there is not enough funds to cover the entire cheque at drawee, the act constitutes the offense provided for in art.84 para.1 point 2 of Law no. 59/1934”.

Through art. 23 of Law no.187/2012, art. 84 para. 1 point 2 of Law no. 59/1934 has been restyled and has the following content: "issuing a check without sufficient available funds at withdrawal or disposing wholly or in part of the availability existent before crossing the deadlines fixed for submission", the penalty provided by law is imprisonment from 6 months to one year or a fine, if the act does not constitute a more serious offense.

In relation to these provisions and those of art. 244 of the New Penal Code, we believe that the mentioned decision will remain valid, except that the offense referred to in paragraph 1 of this shall be included in art. 244 para. (2) of the New Penal Code.
Conclusions and ferenda law proposals

The legal content of the offense of deception is greatly simplified by the new penal legislation, the removal of some normative modalities from its aggravated content being a matter of penal policy and legislative technique, without representing a decriminalization of such particular antisocial acts.

The repeal of para. (4) of Art. 215 of the Criminal Code of 1969 is likely to revive the controversy that in such a situation there are only retained the provisions of art. 244 of the New Penal Code or those of art. 311 of the New Penal Code, or concurrence of both of them.

It is a matter of reflection if so drastically reducing the special limits of punishment for the offense of deception will help reduce delinquency in the area. In our opinion, the answer can only be negative. The timeliness of penal repression, a reconfiguration of art. 74 [12], of the Penal Code (as a mitigating circumstance), in agreement with the objections raised by the Constitutional Court [12], and a firmer action on the causes of the offenses against the patrimony and, in particular, of deception, could contribute to the decrease in this category of inconvenient acts or, as appropriate to the removal of the damages caused by them.

*Of ferenda law,* we believe that it should be reintroduced, as circumstantial element of aggravation provision of par. (4) of Art. 215 of the previous penal law, same with the circumstance in which extremely serious consequences resulted from the offense of deception, as explained in art. 183 of the New Penal Code.

References

[8] Ghe. Ivan, Drept penal. Partea specială, second edition, Publishing House C. H. Beck, Bucharest, 2010, p. 314. Regarding to the deception in conventions and cheques, the author states that they are not criminalized, "though the factual reality does not claim such a decriminalization (abolitio criminis)".
The legal regime of the preparatory acts and of other criminal law institutions in the field of countering organised crime

Duvac C.

„Acad. Andrei Rădulescu” Institute of Legal Researches of the Romanian Academy, Faculty of Law and Economics “AGORA” University of Oradea, (ROMANIA)
cinduvac@yahoo.com

Abstract

The globalisation of crime in recent years has had consequences insofar as the Romanian criminal law is concerned. The Romanian legislator provided a quick response deviating from the theory of unity of offence in matters of combating organised crime and adhered sometimes to the theory of complicity as a distinct misdemeanour also by autonomously criminalising this secondary type of occasional participation with a penalty that differs, as a rule, from the one set out for the author of the offence the respective acts of participation refer to.

The same reasons to effectively combat this kind of criminal offence determined the legislator to introduce certain exceptions from the thesis of non-criminalisation of preparatory acts and to punish such conducts that are socially dangerous.

Accordingly, for a more effective fight against organized crime new procedural institutions were created, such as undercover investigators.

Key words: organised crime, preparatory acts, acts of participation, undercover investigators.


At the same time, insofar as the criminal rule applicable to participants (perpetrator, instigator, accomplice) is concerned, it established the system of legal parity of the penalty with the possibility to legally diversify it, subject to the contribution of each person to the offence and to the general individualisation criteria.

The evolution of crime in Romania and certain criminal policy rationales have determined the Romanian criminal legislator to deviate from the afore-mentioned rules and in matters of combating organised crime to adopt sometimes the theory of complicity as a distinct misdemeanour also by autonomously criminalising this secondary type of occasional participation with a penalty that differs, as a rule, from the one set out for the author of the offence the respective acts of participation refer to. The same applied as to instigation. By criminalising such “obstacle” offences one aimed at preventing, by criminal law means, the perpetration of the basic offence they refer to.

Hence, by Art. 10 of Law no. 143/2000 on preventing and combating illicit drug trafficking and use [1], as further amended and supplemented, organising, managing or financing the acts stipulated under Articles 2 - 9 shall be punishable by the penalty established by law for such acts, their maximum limits being increased by 3 years.

Mention must be made that, as opposed to other legislations (for instance, the Russian Criminal Code of 1997), Romanian criminal legislation does not provide for a forth category of participants, namely the one of the organiser. The organiser is punishable either as a perpetrator or as an instigator, subject to his concrete activity. Yet, financing is a mere type of assistance granted to the perpetrator of one or more offences of those laid down in Art. 2-9 of Law no. 143/2000, in other words, a previous complicity that is autonomously criminalised and sanctioned more harshly than the act of the perpetrator. This is an exception from the sanctioning regime introduced by Art. 27 of the Criminal Code and an enshrinement of the system of legal diversification of penalty that applies to the participants.

In this case, if the same person commits both acts of organisation, management or financing, as well as one or more of the acts set out under Art. 2-9 of Law no. 143/2000, he shall be punished for the perpetration of a real concurrence of offences.
Certain preparatory acts to the offences provided for under Art. 2-7, Art. 9 and Art. 10 of this law, such as producing or obtaining the means or instruments, as well as taking measures with a view to perpetrating these criminal offences are assimilated to the attempt and according to Art. 21 of the Criminal Code, it is punishable by a penalty ranging from the half of the minimum term and the half of the maximum term enshrined by the legislation for the accomplished offence, yet the minimum term may not be less than the general minimum term of the penalty (imprisonment of minimum 15 days).

A similar situation having the same consequences insofar as the criminal rule that applies to new criminal participation forms that are autonomously criminalised also exists in matters of terrorism. Our legislator has criminalised in a distinct way in the content of Law no. 535/2004 both the act of managing a terrorist entity [Art. 35 para. (1)], and certain support acts with a view to financing acts of terrorism [Art. 36 para. (1)] [2].

A certain anomaly in this respect is to be found in Art. 15 para. (2) of Law no. 678/2001 on preventing and combating trafficking in human beings [3], as further amended and supplemented, according to which organising the perpetration of the offences provided for under this law represents an offence and it is punishable as “organised crime”, although this is not defined in this legal instrument and no specific penalty is established for this type of offence. In the way it is drafted, the text under discussion is inapplicable, since its content includes neither the precept nor the criminal penalty applicable for its breach, whilst the legality of the criminalisation and of the penalty does not enable the extension of the criminal norm by means of interpretation or analogy.

Quite fairly, this provision is deemed superfluous, illogical and purposeless in doctrine [4].

2. By Law no. 278/2006 [5], criminal liability of legal person was introduced in the Romanian criminal law, in a unitary and general way (for any criminalisation that regards an offence of the natural person). According to article 19 (Conditions of the criminal liability of legal persons) of the Criminal Code, text that was introduced by this special law, legal persons, save the state, public authorities and public institutions that conduct an activity that may not represent a subject of private field, have a criminal liability as to the offences committed for the achievement of the object of activity or in the interest or on behalf of the legal person, in case the offence was perpetrated with the mode of culpability established by criminal legislation [6].

Criminal liability of the legal person does not exclude criminal liability of the natural person who has contributed, in any manner, to the perpetration of the same offence.

With respect to the offences set out in Law no. 678/2001 or in the Law on financing terrorism, the legal person, apart from the penalty by fine, shall be applied the complementary penalty of winding up the legal person or of staying its activity or one of its activities, as the case may be.

3. In this respect, one particularity of the Romanian criminal legislation is represented by the distinct punishment of the acts of instigation that were not followed by perpetration for criminal offences having a certain degree of danger. Hence, according to article 29 of the Criminal Code “the acts of instigation that were not followed by the perpetration of the offence, as well as the acts of instigation followed by the perpetrator’s act of desisting or by his act of hindering the result from being produced, shall be punishable by a penalty ranging from the special minimum term of the penalty for the offence to which the instigation applied and the general minimum term. When the penalty set out by the legislation is life imprisonment, a penalty by imprisonment from 2 to 10 years shall apply”.

Criminal law also establishes that these acts shall not be sanctioned when the penalty set out by the legislation for the offence to which the instigation had applied is 2 years or less, save the case when the acts accomplished by the perpetrator until the moment when he desisted represent another offence laid down by criminal law (aggravated acts of execution).

4. As is commonly known, according to art. 246 of Law no. 187/2012 for the implementation of Law no. 286/2009 on the Penal Code [7], the New Penal Code (hereinafter referred to as the Penal Code of 2009) [8] shall come into force on February 1, 2014, date to be repealed Law no. 15/1968 concerning the adoption of the Penal Code of Romania, republished [9] (hereinafter referred to as the Criminal Code of 1969 or previous Penal Code or previous penal law).

The new Criminal Code of 2009, as the previous criminal law, adopts dose not ind the preparatory acts. Exceptionally they are punishable either as stand-alone offense (eg, art. 314 of the new Criminal Code - possession of instruments for counterfeiting securities- Article 314 of the new Criminal Code - "(1) The manufacture, receipt, possession or transfer of tools and materials to be used to forge securities or securities referred to in art. 310 (forgery of coins), art. 311 para. (1) - forgery of debt securities or payment instruments - and art. 312 (forgery of stamps or postage) are punished with imprisonment of one to five years.) or by deeming attempt [art. 412 para. (2) of the new Criminal Code - that attempting (offenses against national security - our parenthesis). ( Article 412 para. (2) of the new Criminal Code - "It is considered tentative the production or acquisition of means or instruments and measures for offenses specified in Art. 395-397, art. 401-403, art. 408 and Art. 399 reported the crime of treason by helping the enemy ")."

Article 29 of the previous criminal law will be repealed by the new penal code, but some of the acts criminalized by this text will be found in art. 370 of the new penal law - an attempt to cause an offense. (Article
370 of the new Criminal Code - "Trying to determine a person by coercion or corruption, to commit an offense for which the law prescribes imprisonment for life or imprisonment exceeding 10 years shall be punished with imprisonment of one to five years or a fine."

The new Criminal Code in 2009 maintains the same system of criminal liability of legal persons who have committed crimes. It establishes criminal liability of legal entities Title VI of the general part (art. 135-151) giving the matter a superior regulatory and criminal legislation in line with other EU reference.

5. In terms of proceedings, new criminal proceeding institutions were created. Such institutions were not established initially in the Romanian Criminal Proceeding Code of 1968, which came into force on 1 January 1969.

Thus, when there are reasonable and concrete grounds that a civil servant has perpetrated or is under way of preparing a passive bribery, laid down in Art. 254 of the Criminal Code, of receiving undue benefits, laid down in Art. 256 of the Criminal Code or influence peddling, laid down in Art. 257 of the Criminal Code, the prosecutor may authorise the use of undercover agents or agents with real identity, in order to detect offences, identify perpetrators and obtain evidence. Undercover agents are operational members of the judiciary police, appointed for this purpose, under the conditions established by law. Agents with real identity are operational members of the judiciary police.

With a view to combating illicit drug trafficking and use, the Prosecutor’s Office attached to the High Court of Cassation and Justice may authorise, upon request of the legally mandated institutions or bodies, controlled deliveries, with or without total substitution of drugs or precursors. The prosecutor may authorise the use of undercover agents in order to detect offences, identify perpetrators and obtain evidence, when there are reasonable grounds that an offence established by this law has been perpetrated or its preparation is underway. The authorisation is provided in written for a duration not exceeding 60 days, which may be extended on thoroughly reasoned grounds, and each extension may not exceed 30 days.

The members of the special police units, who act as undercover agents, as well as their collaborators, may obtain drugs, chemical substances, essentials and precursors, upon prior authorisation of the prosecutor, with a view to detecting criminal activities and identifying the persons involved in such activities. The documents concluded by police and their collaborators may constitute evidence.

At the same time, with a view to collecting the necessary data for the initiation of the criminal action for the perpetration of human trafficking, undercover agents may be used, under the conditions established by law.

Pursuant to Art. 12 of Law no. 508/2004 [10], as further amended and supplemented, the Directorate for Investigating Organised Crime and Terrorism within the Prosecutor’s Office attached to the High Court of Cassation and Justice has the responsibility of criminal prosecution for the offences set out under Law no. 143/2000, Law no. 678/2001 and Law no. 39/2003.

Criminal offences laid down under Law no. 78/2000, perpetrated under certain conditions, shall be prosecuted compulsorily by the Anticorruption National Directorate pursuant to Art. 13 of the Emergency Ordinance of the Government no. 43/2002 [11], as further amended and supplemented.

Conclusions

Deviating from the rules established by the general criminal law, the Romanian legislator has widened the sphere of preparatory acts and punishable acts of participation, and even more, driven by the desire to prevent the commission of very serious offenses, he criminalised them separately, autonomous from the main aspect to which they are referring to.

At the same time, some criminal procedural law institutions were created designed to contribute significantly to combating organized crime.

References

Criminal repression in the context of the economic crisis and the maximization of crime at European and global level (May 9-13, 2013, Bucharest, Romania)

Combating organised crime by romanian criminal law means

Duvac C.

„Acad. Andrei Rădulescu” Institute of Legal Researches of the Romanian Academy, Faculty of Law and Economics “AGORA” University of Oradea, Romania ctinduvac@yahoo.com.

Abstract

Initially, when the Criminal Code of 1968 was adopted, and which entered into force on 1 January 1969, the Romanian legislator created two specific criminalisation provisions meant to repress the main forms of organised crime in Art. 167 (conspiracy) and in Art. 323 (association to commit offences).

The globalisation of crime in recent years has had consequences insofar as the Romanian criminal law is concerned. The Romanian legislator provided a quick response following the ratification of the main international conventions relative to this process (phenomenon), by establishing a criminal penalty for punishing the new activities that are dangerous to the society and its members, in particular as of 2000.

As such, the rise in the perpetration of offences, in conjunction with certain criminal policy rationales have made the Romanian criminal legislator enshrine new forms of constitutive plurality of offenders, circumstances in which criminal liability of the members of criminal associations or groups has become more severe.

Adopting the same line of thinking, the legislator deviated from the theory of unity of offence in matters of combating organised crime and adhered sometimes to the theory of complicity as a distinct misdemeanour also by autonomously criminalising this secondary type of occasional participation with a penalty that differs, as a rule, from the one set out for the author of the offence the respective acts of participation refer to.

The same reasons to effectively combat this kind of criminal offence determined the legislator to introduce certain exceptions from the thesis of non-criminalisation of preparatory acts and to punish such conducts that are socially dangerous.

By criminalising such “obstacle” offences, one aimed at preventing the perpetration of the basic offence to which they refer, by criminal law means.

Key words: organised crime, plot, association with a view to commit crimes, criminal organized group, corruption offences, drug trafficking, trafficking in human beings, terrorism.

1. The Romanian criminal legislator of 1968, when adopting the Criminal Code by Law no. 15/1968 [1], established two criminalisation norms, set out in Art. 167 (conspiracy- 1) The initiation or creation of an association or a group in order to commit any of the offences laid down in Art. 155-163, 165 and 1661, or adhesion to or any kind of support of such an association or a group, shall be punished by life imprisonment or imprisonment from 15 to 25 years and the interdiction of certain rights. (2) The penalty for conspiracy may exceed the penalty provided in the law for the most serious of the offences intended by the association or group. (3) If the acts in para. (1) were followed by the commission of an offence, the rules on concurrence of offences shall apply. (4) A person who, having committed the act provided in para. (1) or (3) denounces it before it is detected, shall not be punished.” For detailed explanations of this text, please see Constantin Duvac, Criminal Law. Special Part, vol. I, Bucharest: C. H. Beck, 2010, pp. 41-55.) and in Art. 323 (association to commit offences - “(1) The act of becoming associated or of initiating the creation of an association in order to commit one or more offences, others than those in Art. 167, or of adhering to or of supporting in any manner such an association, shall be punished by imprisonment from 3 to 15 years, while not exceeding the penalty provided in the law for the offence that was the purpose of the association.

(2) If the act of becoming associated was followed by the commission of an offence, the penalty for that offence shall apply to those who committed it, in concurrence with the penalty in para. (1).

(3) The persons in para. (1) shall not be punished if they denounce the association to the authorities before it is detected and before the commencement of commission of the offence that is the purpose of the association”.


The two texts provide similar criminalisation conditions, whilst the main distinctive element is the nature of the offences representing the purpose of the association.
In the first case, they may be represented only by one of the following offences against state security: treason, treason by aiding the enemy, treason by transmitting secrets, hostile actions against the state, espionage, attack jeopardising state security, attack against a community, undermining state power, acts of diversion, undermining national economy and actions against constitutional order.

As for the association to commit offences, they must be other than the offences against state security shown in Art. 167 of the Criminal Code or the offences set out in Art. 2 (b) of Law no. 39/2003 on preventing and combating organised crime [2], as further amended and supplemented (as an effect of the principle of specialisation as a principal way of resolving a concurrence of texts) [3].

The completion of the offence laid down under Art. 323 of the Criminal Code, just as in the case of conspiracy, is not conditioned by the attainment of the purpose for which the association has been set up, that is by the perpetration of the offence or offences coming under its programme. The perpetration of such offences, although arising as a consequence of the establishment of the association, has no other link with the offence of association, and therefore between this offence and the perpetrated offence(s) only a concurrence of related offences shall apply [4].

If, after the establishment of the association, it develops and acquires the feature of an organised crime group [4], the concrete offence shall be classified under the provisions of Art. 7 of Law no. 39/2003, provided at least one of the programme offences is the one mentioned in Art. 2 (b) of the same legal instrument.

The completion of the offence laid down under Art. 323 of the Criminal Code, just as in the case of conspiracy, is not conditioned by the attainment of the purpose for which the association has been set up, that is by the perpetration of the offence or offences coming under its programme. The perpetration of such offences, although arising as a consequence of the establishment of the association, has no other link with the offence of association, and therefore between this offence and the perpetrated offence(s) only a concurrence of related offences shall apply [5].

If, after setting up the association, one or more offences coming under its programme have been perpetrated, in accordance with the Romanian criminal law, the rules on real concurrence of offences shall apply in order to establish the penalty.

2. In Romanian doctrine [6] the main features (well defined organisational structure; division of labour; use of a large number of persons; attracting high profile persons from the political, legal, economic, social field; focusing on those activities that bring maximum profit in the shortest time; concealing income sources and recycling proceeds of crime; corruption of authorities; using coercion, violence in order to reach the purposes of the association and to ensure internal discipline) of the criminal activity entitled organised crime were highlighted in detail, irrespective of certain national particularities.

Since the two criminalisation norms set out in Art. 167 of the Criminal Code and Art. 323 of the Criminal Code meet only in part the requirements related to an effective fight against organised crime, one has proposed the creation of criminalisation texts that are distinct to the one enshrined in Art. 323 of the Criminal Code [7] or procedural institutions [8] (reversing the burden of proof handling, use of undercover agents etc.), and the legislator did it subsequently when drafting and adopting Law no. 39/2003.

Therefore, under the influence of the doctrine, the Romanian criminal legislator took, even if later, the necessary steps with a view to drafting and adopting specific criminalisations and an adequate sanctionatory system.

Faced with this phenomenon, criminal law had to cope with the need to criminalise and punish in a new way these complex criminal occurrences and to draft an effective legal instrument which, observing criminal law fundamental principles that are specific to the rule of law, to represent, at the same time, an effective weapon in the fight for preventing and combating such anti-social acts [9].

Crime globalisation phenomenon in recent years has its own consequences at the level of the Romanian criminal law. The Romanian legislator has rapidly responded after the ratification of the main international conventions relative to this process (phenomenon), by criminalising under criminal penalty new activities that are dangerous for the society and its members:( For instance: International Convention against cross-border crime of 2000 was ratified by Law no. 565/2002; International Convention for the suppression of the financing of terrorism, adopted by the UN General Assembly on 9 December 1999 was ratified by Law no. 623/2002; International Convention for the suppression of nuclear terrorism, signed at New-York on September 2005, was ratified by Law no. 269/2006; Council of Europe Convention on the prevention of terrorism, signed at on 16 May 2005, was ratified by Law no. 411/2006. Mention must be made that, according to Art. 11 para. (2) of the Constitution of Romania, adopted in 1991, as further amended and supplemented by Law no. 429/2003, published in the Official Gazette of Romania, Part I, no. 758 of 29 October 2003 “Treaties ratified by Parliament, according to the law, are part of national law.”)

Hence, organised crime appears in the Romanian criminal law as a challenge not only to the legislator, by making it identify new forms for combating such acts, by means of criminal legislation, but also to criminal doctrine, by determining scientists to think about the nature, severity and patterns of criminal activities perpetrated by criminal associations, in order to suggest new, specific and effective modalities for combating the afore-mentioned phenomenon by means of criminal legislation [10].
It is also a challenge for law enforcement agencies, considering that judiciary statistics confirm the rise of criminal activities in Romania, in particular organised crime, in recent years. For instance, the Directorate for Investigating Organised Crime and Terrorism within the Prosecutor’s Office attached to the High Court of Cassation and Justice, in 2010, at national level, gave indictments in 103 cases having as subject matter the offences laid down in Law no. 39/2003 (+37.33% compared to the year of 2009), and 760 defendants, of which 397 remanded in custody, were committed for trial (+22% compared to the year of 2009).

The identification of the most adequate repressive means also impacted on the activity of the International Association of Penal Law that addressed this issue on the occasion of the Congress of 1999 from Budapest, with the topic “Criminal Systems Facing Organised Crime” and the one of 2009 from Istanbul, with the topic “Main Challenges Posed by the Globalisation of Criminal Justice”.

3. Under such conditions, the Romanian criminal legislator, adopted after 2000, a series of special laws with criminal provisions meant to properly repress the main occurrences of organised crime.

Consequently, new criminalisations of certain forms of constitutive plurality of offenders were adopted or the criminal liability of the members of criminal organised groups was aggravated, subject to certain serious offences, as opposed to the one enshrined in the Criminal Code in Art. 167 and Art. 323.

First, by Art. 17 (b) of Law no. 78/2000 on preventing, detecting and sanctioning corruption acts [11], as further amended and supplemented, the association in order to commit corruption offences or an offence that is assimilated to corruption became an offence directly related to corruption offences and, at the same time, a special case of criminal liability aggravation, the maximum term of the penalty set out under Art. 323 of the Criminal Code being increased by 2 years.

The same applies to drug trafficking, trafficking in toxic substances, human trafficking, money laundering, smuggling and non-compliance with the legal treatment of weapons and ammunition, committed in connection with an assimilated offence or having a direct link with corruption offences.

According to Art. 9 of this legal instrument, if corruption offences are perpetrated in the interest of an organisation, association or criminal groups or one of its members, or in order to influence the negotiations of international trade transactions or international exchanges or investments, the maximum term of the penalty set out by the legislation for such offences increases by 5 years. As for the offences criminalised by Art. 12 and 13 of this legal instrument, where they are committed under the conditions laid down in Art. 9, the maximum term of the penalty provided for by the legislation increases by 3 years.

Likewise, the act of becoming associate or of initiating the creation of an association in order to perpetrate acts of terrorism or of adhering to or of supporting, in any manner, such an association was incriminated as such by means of Art. 35 para. (2) of Law no. 535/2004 on preventing and combating terrorism [11], as further amended and supplemented and is punished by imprisonment from 10 to 15 years, without exceeding the maximum term of the penalty enshrined by the legislation for the offence that comes under the purpose of the association, therefore derogating from provisions of Art. 323 of the Criminal Code as an effect of the principle of specialty (lex speciali derogat generali) as a main way to resolve the concurrence of criminal norms (concurrence of texts).

From the desire to combat as effectively as possible organised crime, Romanian Parliament adopted Law no. 39/2003 on preventing and combating organised crime, as further amended and supplemented. This law regulates specific measures for preventing and combating organised crime both at national and international level.

Several conceptual provisions needed for an understanding of the regulated phenomenon were introduced by law (for instance, those related to organised crime group, serious offence, cross-border offence - any offence that, as the case may be: 1. is perpetrated both on the territory of a state and beyond its territory; 2. is perpetrated on the territory of a state, yet the preparation, planning, its management or control takes place either fully or in part, on the territory of another state; 3. is perpetrated on the territory of a state by an organised crime group that conducts criminal activities in two or more states; 4. is perpetrated on the territory of a state, yet its result is produced on the territory of another state.).

As to the afore-mentioned conceptual provisions, mention must be made that, since they are contextual explicative norms (authentic legal interpretation), their meaning is compulsory for the judiciary bodies which may not give them another meaning that differs from the one that is explicitly laid down in Law no. 39/2003.

According to Art. 2 (a) of Law no. 39/2003, organised crime group means the structured group, made of three or more persons, which exists for a period of time and acts in a coordinated way in order to commit one or more serious offences, in order to obtain either directly or indirectly a financial benefit or another material benefit; a group that is established occasionally for the purpose of an immediate perpetration of one or more offences and that does not have a continuity or a determined structure or pre-established roles for it members within the group is not deemed an organised crime group.

The legislation presents in a limitative way the serious offences (murder, first degree murder, particularly serious murder, illegal deprivation of freedom, slavery, blackmail, offences against patrimony that produced particularly serious consequences, offences regarding the non-compliance with the treatment of
weapons and ammunition, explosives, nuclear materials or other radioactive materials, money forgery or forgery of other values, disclosure of economic secrecy, disloyal competition, non-compliance with the provisions regarding import or export operations, embezzlement, non-compliance with the provisions regarding the import of waste and residues, procuring, gambling offences, drug or precursor trafficking offences, human trafficking offences and related offences, trafficking in migrants, money laundering, corruption offences, offences assimilated to corruption offences, as well as offences directly related to corruption offences, smuggling, fraudulent bankruptcy, IT&C offences, trafficking in human tissues or organs, any other offence for which the legislation establishes the penalty by imprisonment, whose special minimum term is at least 5 years.) that may be a purpose of this type of criminal association in Art. 2 (b), by concluding with those for which the special minimum term is at least 5 years of imprisonment.

Additionally, by this law, new criminalisations have been included. For instance, in Art. 7, the initiation or constitution of an organized crime group, or adhering to or supporting in any manner such a group, is criminalised. These offences are punishable by imprisonment from 5 to 20 years and the interdiction of certain rights, the limits of penalties being longer than those set out under Art. 323 of Criminal Code. The penalty for these offences may not be more severe than the penalty laid down by law for the most serious offence that comes under the purpose of the organised crime group. The rules regarding the concurrence of offences apply in case such offences have been followed by the perpetration of a serious criminal offence.

4. Conclusions. The analysis conducted as to the efforts made by the Romanian criminal legislator to identify the most adequate methods for the criminal repression of the new forms of organised crime, by observing fundamental principles specific to the rule of law, highlights that its response and also the response of the law enforcement agencies having responsibilities in this field is and has been an effective one.

In principle, the solutions adopted by the Romanian legislator are in line with the recommendations formulated by the International Association of Penal Law by the Resolution adopted under Section I of the Congress from Istanbul of 2009. In this concept, one deems that the autonomous criminalisation and punishment of the acts of participation may be considered a legitimate one provided the following conditions are met jointly: to involve the prevention of the perpetration of very serious offences that breach very important social values; the law must define in a precise manner the criminalised acts of participation, avoiding the recourse to general terms; the criminalised acts to be likely to effectively facilitate, according to common experience, the perpetration of the basic offence; the penalty for the previous misdemeanour to be less than the one established for the perpetrator of the main offence.

In this regard new forms of constitutive plurality of offenders have been criminalised, and in certain situations this circumstance has become a special aggravating cause as to the provisions of Art. 323 of the Criminal Code.

The Romanian legislative solutions, enshrined both in the Criminal Code currently in force, and in the special legislation with criminalisations and penalties, meet the demands set out in the international documents adopted in this matter and ratified by Romania.

Moreover, it appears from the afore-mentioned that our country makes convincing efforts in its desire to harmonise its national criminal regulations with the normative demands of the European Union in the fight against the most serious types of criminality: terrorism, drug trafficking, human trafficking, corruption offences etc.

References

Criminal repression in the context of the economic crisis and the maximization of crime at European and global level (May 9-13, 2013, Bucharest, Romania)


Abstract

During the last few years, the development of new forms of very serious crime has gained ground through the exploitation of both the opportunities and the contradictions of today’s global society, emphasizing the need for more effective responses to face the organized and often transnational character of the phenomenon at state.

In most countries, acts immediately of “the offence” are considered characteristic elements of criminal attempts. They are strongly related to the offence due to the high probability that the criminal act he accomplished even without any further act by the perpetrator.

On the contrary, preparatory acts on those which do not concern the “actual realization” of a given crime, and which need additional acts by the perpetrator or third parties for the realization of criminal attempt, and a fortiori for crime consummation.

Thus, preparatory acts represent the threshold before constitutive elements of punishable attempt, only the first stage of action, which cannot yet be determined, as that in its future development; the notion can be more generally applied to a more serious offence, or to a set of non-precisely determined crimes, which one would like to prevent.

Keywords: preparatory act, serious crime, today’s “global society”, reform, offence

During the last years, new and serious forms of criminality have developed due to the exploitation of opportunities, and also of contradictions, offered by contemporary society at a global level, underlining the necessity in finding efficient answers and solutions meant to face this organized, and often transnational, phenomenon.

Economic development, the growth of exchanges, the free circulation of goods, of services and of capital beyond national borders, represent the basis of a global market, with new opportunities of action and dissemination of large criminal networks, exploiting the economic, social, political and legal conditions from different countries, in order to gain authority and to facilitate illegal traffic of drugs and weapons, up to women and children, culminating with human organs [1] necessary for transplants or experiments.

Moreover, profound inequalities among society and the direct contact of those impersonating these inequalities, from various territories - more or less developed, and also the cultural divergences generated by ideologies, traditions, religion, value systems and individual and collective lifestyles, represent the starting point of direct conflicts. Moreover, the linguistic differences have their own influence over the development of social inequalities. [2]

This fact is clearly demonstrated through the strong difficulties, and sometimes through the impossibility of social integration in case of large migration groups or human traffic, which can cause discrimination and intolerant behavior, often leading to violent outbreaks.

Consequently, new areas have become training and growth centers of complex terrorist networks, which require more efficient reactions in order to be destroyed, because they are transnational networks.

Eventually, special attention must be paid at a national level, [3] when each piece of legislation comes into force, as each state has its own jurisdiction in the effective substantial and procedural application of criminal law. Moreover, it is important to assert that penal law is predominantly affiliated with legal positivism, rather than natural law. [4]

Therefore, considering the possible achievements of some supranational norms [5], a profound analysis of the subject must be effectuated, starting from positive criminal law, presently functioning within each juridical system.

The concept of preliminary act is a relative notion which can be defined only reported to its reference object. In criminal law, this should be taken into consideration together with committing a legally determined crime. Because the definition of preliminary acts present them as the first step of action, and cannot be further applied in the case of a more serious criminal act, or in the case of crimes that must be prevented.

In most countries, preliminary acts are not punished, because they are regarded as rather “ambiguous”, and way too far from the effective committing of the crime, which would in fact generate punishment. [6]
Objectively speaking, like in the case of Italy, this is not considered a risk or a concrete threat to social interests and cannot cause damage, as it is also the case in Germany. This is consistent with the systemic approach regarding legal systems, as it was shown in newer papers. [7]

In history, we can find references to preliminary acts in the work of Vasile Lupu’s Pravila, from 1946; [8] in Stirbei’s Criminal Code from 1850, article 20; in Bucovina’s Criminal Code from 1852, article 8; in the Romanian Criminal Code from 1864, articles 38 and 39; [9] in the Transylvanian Criminal Code from 1878, article 65.

All these were referred to as “beginning of committing” or “the beginning of the execution”. [10]

In the Romanian doctrine, there were formulated several definitions of preliminary acts, among which the most relevant are those of Professor Tanoviceanu, who considered the preliminary act as an action with an ambiguous nature, which even if is deliberately committed by its author, it still does not harm anyone. Regarding the execution acts, Professor Tanoviceanu [11] mentioned that they have an antisocial nature, they affect society through the fear that they produce among people.

In later works [12], Professor Vintila Dongoroz offered a more complex definition of the preliminary act underlining that: a preliminary act is any manifestation which prepares the execution of an activity, which someone is determined to make.

Professor George Antoniu defined the preliminary acts [13], as being the first exterior manifestations oriented towards the commitment of a criminal act and they conclude with the beginning of the effective criminal acts, as they are described in incriminatory norms.

A similar opinion is shared by Professors Constantin Mitrache [14], Costica Bulai [15], Ion Oancea, Viorel Pasca [16] and Narcis Giurgiu.

In foreign literature, Garraud used to define preliminary acts as being [17]: those that represent the execution of the projected criminal act, but he ties this criminal act to an agent who contributes in this manner towards the execution.

The same coordinates can be found in the definitions offered by Angyal, Prince, Carmignani and Carrara, Pelegrini Rossi. [18]

In the Spanish Criminal Code, articles 17 and 18, offer the definitions of three forms of preliminary acts, which can be relevant from a criminal point of view, more exactly from the conspiracy point of view, which also includes the classification of the act.

In the Romanian Criminal Code some preliminary acts can be assimilated to criminal execution and are punished as specific criminal attempts.

The Hungarian Criminal Code separates the general conditions in which preliminary acts should be punished - art. 18, namely the fact that law imposes a sanction for preparing, and also for the situation in which the preliminary act is designed in order to contribute to a real criminal act.

In the Dutch Criminal Code in article 46 there is stipulated that preliminary acts meant to be punished are: the attainment, the import, the transportation and the export of objects, substances carrying information, the spaces or means of transportation which are meant to contribute to a criminal act.

In other countries, like Germany Italy and Hungary, the simple detention of some objects, such as pornographic images or infantile pornography, are considered criminal acts. These are punished through the application of some international conventions like: O.M.P.I. 2000 – The European Council’s Convention against informatic criminality, or the directives of the European Commission.

The Austrian Criminal Code considers the association crimes or the organized crime, which cannot simply be classified as preliminary acts, but cause prejudices, as conspirations, infractional associations and armed associations.

According to the actual legislation, preparatory acts are incriminated in the following cases[19]: for some crimes against state security [20], the crime of obstruction of preventing the normal exploitation of ships and the offenses of illegally deprived. [21] In Germany, Austria, Finland, Bosnia, Herzegovina, Croatia, Japan and Brazil, the national Penal Code and other special laws state situations where specific preparatory acts are themselves punitive, being regulated as distinct crimes or attempted crimes, an example to this end being the Article 16 of the Polish Penal Code.

Preparatory acts are those which do not relate to the actual implementation of a crime and who require additional actions by the author of third parties for carrying out criminal attempt, and moreover for committing the offense. By the way they manifest in terms of their content, preparatory acts are material and moral. Preparatory acts can be performed in a longer or shorter period of time. Between acts of preparation and execution can interleave also a period of time of variable length.

Regarding the criminalization of preparatory acts, the criminal doctrine and in modern criminal law present two main theses, the first being the non-criminalization of preparatory acts because they are most often equivocal and have the ability to provoke serious danger to the social value protected by the incriminating norm.

Also, its non-incrimination could provide an incentive for the offender to give up crime. This thesis was embraced in specialized literature and the legislative enshrined in it most legal systems. A second opinion,
contrary to the first, assumes that criminalizing promotes unlimited or limited incrimination of preparatory acts because they would create favorable conditions for committing the offense under the criminal law, presenting a threat to state social value against which was actually prepared to move. Incrimination and punishment of preparatory acts thesis, claimed by that those who promote this thesis, is considered necessary to prevent the perpetration and defend the threatened social value.

The Criminal Code in force adopted the stance of non-incrimination of preparatory acts. Lack of relevant provisions in our penal code, in this direction, explains the lack of a general rule in the penal code regarding these acts.

Although enshrined in the penal system as an unitary system of sanctions for acts of preparation by deeming judicial individualization of punishment, one must bear in mind that what has been done is an act of preparation, not a completed act or even an attempt, and as such will appreciate punishment, primarily based on this finding, among other circumstances which depend on a fair assessment of its individualization. In this way the criminalization and punishment of preparatory acts present some interesting results. First, if a person makes preparation acts punishable by law and then reaching beyond this stage the offense, although preparatory acts have their own criminal significance, they cannot be accepted and treated by cumulation with the offense consumed, because the latter absorbs relevant previous offense. So, the entire activity will be considered as having unity. Secondly, preparatory acts may be treated as tentative, subject to the divestment and their regulation and prevention of the result.

Considering preparatory material acts of a criminal offense, the judicial practice exemplifies the most commonly used methods: production or acquisition of means; production or acquisition of means or instruments or adapting them, providing transportation, removal of obstacles, attracting victims in certain places, experience implementing solutions, providing aid, enforcement of diversions, providing places of refuge or conditions of merchandising illegal products and so on, as all these methods are targeting two distinct sides: one corresponding to procurement and the other specific to the creation of favorable conditions for success, the actual execution of the offense and the offender goals pursued by committing the offense.

References

The influence of the global economic crisis in re-shaping abortion policies. A point of view.

Frant A.E.

Faculty of Law, “Alexandru Ioan Cuza” University, Iași (Romania) anca_frantz@yahoo.com

Abstract

In this paper we analyse the ways in which various states faced the abortion problem through the economic crisis. Our main observation is that, apparently, faced with a crisis, people tend to focus on the ideology level, rather than finding real solutions. This can only bring a delay in finding a solution for solving the crisis. This tendency is easily found as we follow the states’ attitude towards abortion during the economic crisis. In some states with a long tradition of liberalizing abortion, such as The United States of America, recently new legislative acts have come into force, dramatically restraining access to abortion. Also, Ireland strikes us with its constant anti-abortion attitude, even though this brings financial difficulties to its citizens. In Hungary, another country with a relatively long tradition in liberalizing abortion, a new Constitution provides that the foetus is a human being from the moment of conception. Romania, although it has a very permissive legislation on abortion, has proved its tendency to recognize a greater value to the unborn children. We express our hope that such attitudes don’t affect the logical reasoning which must be at the basis of every legal provision.

Keywords: abortion, right to life, right to choose, religion, economic crisis, radical ideologies.

Defining the issue

A crisis should, in the first place, put people in the position to redefine their attitude towards life. An economical crisis, by its nature, affects the quality of life, involving the very basic human needs. This includes food, access to medical care and access to education. In a logical succession, it follows that an economic crisis is not the best moment for a person to choose for having children. Even nature shows us that, in harsh times, such as a drought, animals are not so eager to have offspring, because they would have little opportunity to develop. And plant seeds don’t even take roots in inappropriate conditions, sometimes waiting several years for the right moment to come. Thus, it seems perfectly justified that, in hard times, people postpone breading children for better times. This could also lead to a more relaxed view on abortion. People, including the legislator, should be more tolerant on this issue. At least this is what we believe to be the most appropriate attitude.

1.1 The gap between theory and practice on the abortion problem

It was a surprise for us to find out that reality clashes what we believed to be the logical conclusion. After all, it is not the first time when people defy logic and act according to other rules. Moral believes or strong preconceived ideas have often taken the lead. Sometimes, the result has been a serious infringement of some essential human values. In order to sustain our claim, it is enough to mention that people who believed that the earth was moving around the sun have been long time considered as heretics in medieval Europe, despite scientific evidence. In this paper, we will analyse some legal changes in the status of abortion which occurred in some countries affected by the economic crisis. From the beginning we point out that these changes have not been dramatic. These were rather subtle variations. But we wonder whether these variations are not the expression of the desire to make a more important shift in the legal position of abortion. Also, apparently, the changes are not directly connected to the crisis. Still, we think that these changes show us, once more, that people faced with a crisis tend to embrace radical ideologies. And we think this is a strange and dangerous behaviour. Further on, we will try to capture the attitude towards abortion of some legislations which seem to go against the rational thinking. First, we will focus on foreign legislations, and then we analyse the way abortion is seen today at the official level in Romania.

1.1.1 Subtle changes in the abortion status in the United States of America

We start our study with a view on the status of abortion in the United States of America (U.S.A.). Our approach is not random. We choose to speak first about this country, because U.S.A. has been a pioneer in the
liberalization of abortion in western societies. The landmark decision ruled in 1973 in the case Roe vs. Wade by the Supreme Court established that abortion is available by simple request, until the foetus becomes viable [1]. Despite the clarity of the official status of abortion in the U.S.A., the access to abortion in this country is much more difficult than it seems. This is because the legal abortion procedure is often expensive, while the health insurance system usually doesn’t cover the costs of an abortion [2]. This leads to discrimination between women who belong to different social classes, based on financial reasons. For rich women, having an abortion is a real possibility, whereas for poor women legal abortion becomes a remote option. This situation persisted even through the economic crisis, creating a more sharp difference between people, based on financial power. In this context, in March 2013, the state of North Dakota introduced some legal provisions which dramatically restrain access to abortion. Thus, the new laws allow abortion only until the foetal heartbeat can be detected. This occurs early in the pregnancy, around six weeks. It follows that the abortion is actually forbidden after six weeks of pregnancy. The most intriguing aspect is that the law doesn’t provide any exceptions in case the pregnancy is the result of a sexual offence or in case the pregnancy puts the health of the mother in danger [3]. We may think this is an isolated situation and that, sooner or later, such a legal provision will be declared unconstitutional by the Supreme Court of the U.S.A. But we also may think that this could be the beginning for a major shift on the abortion status in the U.S.A. It is surprising to realize that an idea which seemed well established, like the liberalization of abortion in the U.S.A., can actually change. In our opinion, a radical change of the abortion status in the U.S.A. would demolish a symbol which, at least in the last decades of the XX century, had a major role in the liberalization of abortion in the entire world. If such a legal change takes place, it will push us back in a world in which even the worst prejudices would have a chance to become true. We can only hope that logical reasoning will overcome religious fanaticism and time-serving politics.

1.1.2 The constant position of Ireland in the abortion issue

A striking situation takes place in Ireland. Here, the Constitution states that abortion is prohibited, as the foetus has a right to life from its conception. At the same time, the Constitution provides that a pregnant woman whose life is endangered by the pregnancy has the right to travel to another country in order to undergo an abortion procedure [4]. This means that the Irish state chooses to give maximum importance to an idea, ignoring the real-life problems. Or, this is exactly an attitude which a state must never adopt. A state must follow its principles, but never turn away from the actual needs of its citizens. In our opinion, in the abortion issue, Ireland actually abandons its citizens. The acknowledged possibility for a pregnant woman to travel abroad in order to have an abortion doesn’t mean the recognition of a right. It is merely the emphasis of the lack of rights regarding abortion. It is a way in which the state admits that it fails in taking good care of its female citizens, when their life happens to be threatened by a pregnancy. Of course, comparing Ireland with other states, which don’t even admit that an abortion may be allowed when the life of the pregnant woman is endangered, we think that, speaking in practical terms, the situation in Ireland is preferable. But still, at the ideology level, Ireland shows an inconstancy. While the states pointed out before have the justification of totally following an ideology, the Irish position shows a breach. While admitting that an abortion is sometimes necessary to save the life of the pregnant woman, why not allowing the performance of an abortion in such a situation on the state’s territory? After all, once the necessity of an abortion is accepted, it doesn’t matter anymore where the abortion is performed. We can try to find some logical arguments for such an attitude. Some may say that, due to the lack of experience in performing abortions, the doctors in Ireland aren’t the most suitable for this procedure. But we find it hard to believe that a well-trained obstetrician can’t successfully perform an abortion, when necessary. And, furthermore, the Irish state could finance the medical training of a number of doctors who would be able to perform an abortion when the life of a pregnant woman is in danger. The effects of such a legal vision on abortion are certainly negative. We only want to mention the fact that women who want to have an abortion, whether their life is in danger or not, are forced to travel abroad in order to have the abortion. This implies costs which are often high. Seen in the context of the economic crisis, the Irish legislation on abortion seems to put an unnecessary pressure on the citizen’s finances. In essence, here, we don’t critic the anti-abortion attitude; it is certainly perfectly justified and useful to value the life of the foetus. But we don’t understand why some states choose to ignore that the abortion problem has some real-life implications which must be solved. As for Ireland, we think that its attitude shows duplicity. Despite its constant official position inpressing abortion, overall, Ireland proves to be inconsistent, with the price of putting its citizens to unjustified expenses.

1.1.3 Recent changes in the Hungarian Constitution. Possible effects on the abortion status.

Another country which has drawn our attention is Hungary. In 2012 a new Constitution came into force in this country. On the abortion issue, this Constitution brings a surprising change: it provides that the foetus’s life is protected from the moment of its conception [5]. It is noticeable that such a powerful affirmation of the foetus’s rights doesn’t have a practical effect. In Hungary, the laws on abortion continue to remain very permissive, as abortion is allowed by request in the first twelve weeks of pregnancy. Still, it is important to try to understand the reasons behind such a strong affirmation of the rights of the unborn children. One reason could be
that the entire New Hungarian Constitution lies on a religious background. The preamble states that the Hungarian Nation recognise the role of the Christianity in preserving nationhood and that it values the religious traditions of Hungary [5]. Because Catholicism, the dominant religion in Hungary, sees foetus as a person from the moment of conception, we may conclude that the constitutional provision referring to the foetus follows the same line of valuing religion. But we notice that, in full economic crisis, a state found out that it was necessary to expressly affirm the importance of religion and of its implications. As we pointed out before, it seems that, faced with a crisis, some people may tend to adopt radical ideas. Of course, affirming one’s religion and even a state’s religion is not a radical behaviour. But history showed us that it would have been better if we hadn’t created the conditions for radical attitudes to occur. And, unfortunately, religion has often been the leading point for violent conflicts. This is why we think that, in the official statements of a country, religion should play only a subtle role. As regards the Hungarian Constitution, even if the affirmation of foetus’s rights is only a reflection of religious opinions, or precisely because of this, it doesn’t mean it will remain without effects in the future. The door has been opened and only time will show us whether the liberalization of abortion remains in force in Hungary.

1.1.4 Changes in the form of criminalizing abortion in the New Romanian Penal Code.

Other legal approaches on abortion in Romania. Significance.

Romania makes no exception from the tendency to recognize the rights of the foetus from the moment of conception. This becomes obvious as we analyse the New Romanian Penal Code. In the first place, we discover that the New Penal Code includes an entire chapter dedicated to the foetus, which is entitled Aggressions against the foetus [6]. This chapter include two offences: The voluntary interruption of pregnancy and Foetal injury. The existence of a whole chapter dedicated to the foetus proves the legislator’s desire to establish the idea that a foetus must be protected, although its protection must be a special one, somehow different from the protection offered to a person. In other words, the Romanian legislator proves the will to offer a maximum protection to the foetus, but, at the same time, it is aware that such a protection can only have a special form. This comes from the biological state of the foetus, which depends on the pregnant woman, while the pregnant woman, at least in the first fourteen weeks of pregnancy, has the right to choose whether to keep the child or to have an abortion. Thus, although bearing the consciousness of their limits, the New Penal Code’s provisions on abortion emphasize an increased interest in protecting the foetus. This attitude of the Romanian legislator is more obviously shown in a draft legislation from 2012 which referred to compulsory counselling of the pregnant women before having an abortion [7]. This draft legislation provides expressly that the foetus is a person from the moment of conception and that an abortion means killing a human being. This proves that some people involved in the legislative process are interested in offering a maximum of rights to the foetus. Beyond the question of the foetus’s rights, which certainly is one of the essential issues of the abortion problem, we noticed some financial aspects, necessarily implied by the procedure provided by the draft legislation mentioned above. Thus, the costs of the counselling procedure should be paid by someone. When the hospitals or other health institutions which are allowed to perform abortions include counselling offices, the costs of the counselling should have the same regime as the abortion procedure; this means that the costs can be supported by the health insurance system. But when the health institution doesn’t have such offices and the counselling is offered by a private office, the draft legislation doesn’t stipulate who should support the costs of the counselling. This could lead to discrimination between women on financial basis. We find it strange that, in full economic crisis, the creators of this draft legislation have shown such little interest in the economic implications of the pre-abortion counselling. Once more, faced with a crisis, people show their tendency to focus on setting general principles, rather than finding real solutions.

Conclusions

The examples shown above illustrate our observation that, in a strange way, a crisis seems to push people to a radical way of thinking. As we have seen above, even in an economic crisis, sometimes people prove to ignore financial aspects, for the sake of their principles. We think this is a dangerous attitude, because it may draw away attention from seeking the right solutions for overcoming the crisis. This is why we believe that people must not let any situation affect their judgement. Especially at the legislative level, all the decisions must be funded on rational thinking. Only acting in this manner the solutions will be effective.
References


The smuggling of migrants for the purpose of their exploitation

Gament N. ¹, Stoica A.²

¹ Associate researcher, Institute of Legal Research „Academician Andrei Rădulescu” of the Romanian Academy; assist., PhD stud., the Romanian-American University, Faculty of Law, advocate – Bucharest Bar, (ROMANIA)
² Police officer, PhD, specialized officer of the Frauds Bureau of Investigation - District Police of Călărași, (ROMANIA)
nicu.gament@yahoo.com, stoica.anghel@yahoo.com.

Abstract

In the present international context, Romania – a Southeast Europe country, situated at the confluence of the roads that link the East to the West of the continent, and the Asian South to the North and European West – is included on the “Balcanic Route” of illegal migration, fact that influences all main domains of the society, including the state security and the one of its own citizens.

Keywords: fraudulent trespassing of the state boundary, migration, criminal organization

1. The organized crime is one of the most serious phenomena that the international community struggles with, as this involves criminal actions much more dangerous than usually expected, based on the recruitment of persons specialized in different domains of activity, on use of modern technology, based on a certain continuity in the operating systems, strategies on international level, perpetration of deeds likely to endanger the life and physical integrity of persons, but also the stability of nations themselves [1].

The modern organized crime is present all over the globe, under various forms, depending on traditions, specific economic and political conditions and the type of activity and business involved, engaging on all types of deals or smuggling, be it legal or illegal, inasmuch as they are profitable and allow the investment of money obtained on illicit ways. Illegal migration, human trafficking, weapons traffic, drugs smuggling, corruption are phenomena to become generalized and a feature of the present legal and social life.

Globalization and the internationalization of markets determine new migration behaviors, an increased fluidity of territorial movements, the temporary migration phenomena bringing forth a peculiar signification. [2]

In terms of means to complete it, migration can happen both legally or illegally, but not a few times just on the boundary between legal and illegal, the migrants using different methods and means to leave their native countries, to transit other states and finally to reach and settle the destination countries.

2. Under these conditions, the regulation of migration is situated on the confluence between the domestic laws of the states involved in tackling the phenomenon of migration and the provisions of the international law in this respect.

The basic reason, that justifies the harmonization and intertwining of these two categories of internal and international norms, consists of the permanent need of protection of the people’s legitimate rights and interests, independently of their living place or their status as citizen, stateless, or refugee.

The provisions of the EU criminal law that are relevant in the matter of foreigners are important regulations which must be taken into account for a correct interpretation and application of this law, according to the other internal legal provisions, and to international provisions.

Romania, as EU member state, has passed the EU legislation in this matter, thus it is permanently developing common politics with other states in the matters of asylum and migration, doubled by a constant concern for the management of external boundaries and by efforts to fight illegal migration and the related border criminality [3]

3. Being one of the forms of migration, the illegal one generates a series of dangers for EU member states, through the disturbing effects over the principal areas of society: the demographic area, the labor market, strengthening of underground economy, proliferation of criminality and even infiltration of persons engaged in terrorist actions or recruitment of migrants (due to their critical financial situation).

The clandestine migration is a phenomenon much too extended to escape the attention and control of criminal organizations, starting with the recruitment of candidates, the preparation of routes and means of transport. Illegal migration usually goes together with human trafficking. The magnitude of human trafficking with the purpose of gaining large profits is also a legal question that has been constantly concerning the international organizations.
In terms of causes, the phenomenon of migration is supported by economic factors, the significant differences of development between states, various demographic factors (developed states record low child birth rates, while underdeveloped states have high child birth rates), the armed interethnic conflicts, natural disasters, earthquakes, flooding, extended droughts, and also a series of conditions, both objective and subjective: dramatic violations of human rights, perpetrations of migrant smugglers, etc.

4. The illegal migration for the purpose of people exploitation is one of the most dynamic components of the organized crime.

The migrants, due to their situation in their native countries, the desperate need of survival, often use the services of several networks of migrant smugglers, this time migration becoming illegal. The criminal gangs have taken control over this phenomenon, exploiting only for their benefit the despair of the persons who are willing to migrate to find a better life [4].

Most times, the migrants trespassing state borders are identified, the criminal case file is settled ut singuli, without any further investigations, except for those regarding the migrant's deed. Thus, the sanctions applied are milder only for the person who committed the trespassing and who, being afraid, does not testify against their traffickers.

5. The rulings issued by the courts of justice in cases regarding illegal trespassing of state borders, deed provided in art 70 paragraph 1 of the Government Emergency Ordinance (GEO) no. 105 from 2001, June 27th on the Romanian border, were most times discontinuations of prosecution, enforcing art 18 [4] of the Romanian Penal Code. The costs and research-related expenses could not be recovered given the migrant’s legal and material conditions.

A very serious social danger is the recruitment, guidance or aiding of one or several persons for the purpose of trespassing the state borders, and also the organization of such activities, sometimes likely to endanger the life and physical integrity of migrants or the migrants by subjecting them to inhuman or degrading treatment, with the assumption stipulated by art. 71 paragraph 3 from GEO no. 105/2001, for such deed to result into the death or suicide of the victim [5].

We should notice that when the lawmaker includes the possibility of death or suicide, the term used is not that of the migrant, but that of the victim.

Art. 70, paragraph (4) of the same law provides the exemption of criminal liability in the case of the deed of trespassing the state boundary for a certain category of persons, namely the victims of human trafficking.

6. The migrants, that don’t have the sum of money claimed by the criminal gang specialized in the trespassing of state borders, are bound to pay in the destination state. Thus, when they arrive in their destination country, the migrants are subjected to forced labor, to forms of sexual exploitation, committing of crimes etc., the values obtained being given to the members of the criminal gang.

In order to identify such criminal acts it is necessary to use the work of specialized investigators, with information on the constraints employed by traffickers to break a person’s will. Such constraint degrees differ from case to case; some victims are subjected to physical constraint, others are practically subjected to forced labor and only later they realize that somebody benefits of their status as migrants in order to be subordinates of various criminal organizations.

The forms of exploitation from which criminal organizations obtain large profits are various, from sexual exploitation to forced labor, domestic slavery, committing of crimes by constraint, organ donations, arranged marriages etc.

Meanwhile, the victims of trafficking are subjected to complete dependence towards the traffickers, who use every means, even violent, to determine the migrants into total obedience [6].

7. It can be claimed that the persons who, due to some unhappy circumstances, become illegal migrants, they also become victims of human trafficking, as consequence of the decision made by traffickers to exploit those persons, on the course of development of the stages of criminal activity until its completion by any means. Meanwhile, the traffickers take advantage of the state of necessity in which the exploited person is from the departure of their native country, of famine, of poverty, of unemployment, which determine them to trespass state borders.

Thus, the intent of the trafficker to exploit such person cannot be but direct, because the actions composing the material element of objective side for the crime of trespassing state borders, by guiding or transporting the migrant, don't have other end but the exploitation of the person in question.

It could be taken into account even the migrant’s state of necessity, for a suitable legal treatment, which might convince them to help proving the illegal activities of the criminal gangs specialized in illegal migration and to dismantle the network of migrants trafficking and also to hold them accountable according to the law.

8. The ascertainment of the state of necessity, implicitly of the necessity of protection of a person trespassing state borders, can be done by hearing the migrant by a state authority representative, if the migrant trusts in the representative’s power to protect them and to eliminate all fear inoculated by the members of the criminal group, who use such threats if the authorities are informed about the deeds related to the transfer of the migrant from their native country to the destination state.
The trust of migrant is extremely important for finding the truth, when he/she is heard, the statements given corroborated with other proofs obtained during investigations could lead to the prosecution of the members of such criminal organizations.

The statements of the illegal migrant, to be deemed solid, must be coherent and plausible and to not contradict the information from the native countries [7].

Even if the illegal migrant couldn’t prove entirely his/her ignorance, he/she could still enjoy the benefit of the doubt.

This benefit can be granted only after the obtaining and reviewing of all evidence available. It’s also required that the statements of migrant to be coherent and plausible and to not contradict well known facts. If the trespassing of state borders is proven to have been made with the support organized crime networks, by persons placed in special, vulnerable situations, such as unaccompanied minors, single women, victims of torture, elderly persons, the capacity of victim of traffickers becomes convincing.

Finally, "the well founded fear" because of which the migrant left his/her country, "the evaluation of credibility", "the benefit of doubt" and the humanitarian aspect may constitute basis for granting a form of protection. Afterwards, it is extremely important to identify and prosecute the members of organized crime networks, specialized in actions of illegal migration and human trafficking, whose criminal activity represents a high social danger and who take advantage of the state of necessity of the persons who leave their native country, who submit themselves to the exploitation by certain criminal networks to which they paid or had to pay important sums of money, once arrived in the destination country.

9. There are situations where the victims of human trafficking need international protection, because they fear persecutions if they return to their native country. Such request of international protection for the victim or potential victim of human trafficking can arise from various personal cases. For example, the victims trafficked abroad and who somehow manage to escape the trafficker may request the protection of the state where they are. Equally, when the victim could be trafficked on national territory, but, afterwards, manages to escape abroad could request protection. It is also possible that a person who hasn’t been trafficked yet, but simply fearing that they could be trafficked, could also request such protection.

Such fear could occur after a personal experience or after he/she has acknowledged what happened to friends or relatives or to other members of the same racial or social group. In such situation, the fear to become a victim of persecution, earlier or later, appears to be well substantiated.

10. In order to solve all these situations, the legislation and the criminal law would require some improvements to provide efficient means to fight human trafficking, and also means of social reintegration of victims. One solution could be that supplementing art 262 of the new Romanian Penal Code, whose contents incriminate the deeds of trespassing state borders.

In this respect, we could suggest that, for the crime of trespassing state borders not only the victim of human trafficking or of minors trafficking to be considered exempted of punishment, but also the potential victim, the person who leaves his/her native country because of a situation of real danger for human being: famine, poverty, unemployment, armed intercourse conflicts, natural disasters, earthquakes, flooding, droughts, dramatics violations of human rights etc., and who is expected to pay services for the benefit of a group specialized in smuggling of migrants in the destination state. These potential victims, detected of having committed deeds of trespassing state borders, should enjoy legal protection because they could support the investigators in the course of investigations regarding organized crime, in so far the deeds of such migrants could not be considered crime.

Thus, valuable time, energy, funds could be spared etc. and instead, by focused effort and highly qualitative work, the members of criminals organizations, who exploit people by luring them to migrate and to become subordinates of these organizations, could be identified and subjected to criminal liability.

References:

The economic crisis – effects over the romanian penal legislation

Gorunescu M.

“Nicolae Titulescu” University, Bucharest, Romania E-mail: mire_gor@yahoo.com

Abstract

This study deals with the issue of the impact of the economic crisis over the Romanian penal legislation - both substantial criminal law and procedural criminal law. The perspective is different from the criminological approach and has the aim to identify some of the modifications made in the Criminal Law field during the economic crisis from the last years. We do not intend to point all these legislative effects, but to demonstrate that the penal legislation cannot stay out of the effects of the economic needs of the society.

Keywords: economic crisis, criminal law, common interest protection, individual right protection.

Introduction

Economists show that the economic crisis concept has not a generally accepted definition, but “a common view is that disruptions in financial markets rise to the level of a crisis when the flow of credit to households and businesses is constrained and the real economy of goods and services is adversely affected”[4]. It is obvious that in this economic context the authorities have to identify the most efficient mechanisms to bring all the financial resources they can in order to support the general consolidated budget, and also to protect the individuals’ propriety interest. These mechanisms have the aim to assure the equilibrium of social life which can be very diverse, and can have different natures. Sometimes, it is admitted that the economic crisis serves as an opportunity to reform the criminal law [1].

It is beyond of any doubt that the legislative measures have an important role in regulating the social relations according to the society current needs. As in an economic crisis the society needs to gain more resources and to diminish the expenses, the legislative authorities tend to create new legal rules which aim to fulfill these two necessities. The difficult problem in this context is to keep the correct balance between the common interest and the rights of each individual member of society. That is because there is an important risk to neglect the generally accepted standards in the human rights fields due to the preoccupation to get more resources. This risk is even bigger in the Criminal law field, because it gives to the authorities very powerful instruments which can create serious individuals’ rights violations. Moreover, the individuals themselves have an increased interest in protecting their goods and in conserving their financial security. That is why the public authorities have a huge responsibility to offer enough strong guarantees for these private interests.

Statistics show that during the economic crisis, and because of it, criminality has an ascendant trend, especially criminality against property. This state of facts cannot remain without a consistent influence over the penal law domain and the law itself has suffered several modifications in order to serve in a better way this aim.

Legislative effects of the economic crisis

A society facing economic crisis needs resources and it also needs to limit the expenses, and that is why the legislative instruments serve to support these objectives. An important role is played in this complex process by criminal law mechanisms, because they cannot fail to ensure common interest protection. Both substantive criminal law and procedural criminal law have suffered consistent modifications and have been partially transformed in real recuperation instruments.

We will reveal some of these legislative adjustments, without the aim to offer a comprehensive perspective.

1.1 Legislative consequences over the Romanian Penal Code

Firstly, we analyse Article 74 of the Romanian Penal Code [5]. According to this legal text, “If the defendant who committed an offense as fraudulent management, fraud, embezzlement, abuse of office against
the interests of people, abuse of office against the public interest, abuse of office qualified form and negligence, or any economic crimes defined in special laws, which has caused a damage and, during the prosecution or in front of the first instance, before having a solution, fully cover this damage, benefits halving of punishment. If the damage caused and recovered under the same conditions is up to 100,000 Euro in the national currency equivalent, sanction may be the fine. If the damage caused and recovered under the same conditions is up to 50,000 euro in national currency equivalent, it will get an administrative penalty, which is registered in the criminal record.

The provisions of par. 1 and 2 are not applicable if the offender has committed a similar offense within a previous 5 years term and he or she benefited of the same favorable treatment.”

By this legal text, the legislator chooses to create a better penal treatment for the author of any crime from the indicated list when he or she manages to cover the prejudice created by the offence. The legislator revealed in this way its’ will – the penal law has as priority to recover the material losses and, as important as the first one, to diminish the judicial costs. So, it appears to be more important for the common interest to recover the financial consequence than to engage the penal responsibility of the person who committed it or to apply a penal sanction according to the special limits provided by the legal text.

Unfortunately, it appears that the preoccupation to protect the need for material resources was so stringent that determined the legislator to make regrettable mistakes when formulated this text. First, it was criticized because [6] it was considered that its provisions infringe the constitutional prescription of article 16 paragraph (1) on the equality of citizens before the law, without any privilege or discrimination, the provisions of article 21 paragraph (3) on the right to a fair trial and the right to resolve cases within a reasonable term, as well as the provisions of article. 124 paragraph (2) on the uniqueness, fairness and equal justice. That is because this favorable rule benefits only to a particular class of defendants arbitrarily determined by the legislator – those who are involved in a trial and do not have yet a solution before the first instance. Thus, citizens in other procedural stages are discriminated because they are exempted from the benefit of reducing the penalty, although this different stage is not imputable to them and may depend, for instance, on the way the judicial authorities organize their activity.

The Constitutional Court stated that the criticized legal provision breaks indeed the fundamental principles stipulated by the Romanian Constitution, but also by the European Convention of Human Rights. The court indicated that, generally, such indulgence measure does not contravene constitutional provisions because the criminal trial does not only have the aim to find out the truth ant to punish the offender, but also has to contribute to defend the legality and the rights of individuals. Among these rights, we can mention the one to recover the prejudice created by the offence. But in this context, the criticized provision is in contradiction with the Principle of equality before law. That is because the rule creates different situations for people who have committed the same offence, have similar situations and behaviors, depending on the objective elements which do not depend on them. Sometimes, the Court indicates, these elements are influenced only by way that the judicial activity is managed by the authorities. In the same way, the European Court of Human Rights has shown that, based on Article 14 of the Convention, a distinction is discriminatory if it "has no objective and reasonable justification" (see in particular the judgment of 13 June 1979 in Case Marckx v. Belgium [7], judgment of 11 June 2002 in Case Willis against United Kingdom of Great Britain [8] and judgment of 22 February 2011 in Case Sun against Romania).

The Romanian Constitutional Court stated that the criticized legal provision also breaks the national and the conventional norms which guarantee the right to a fair trial because it lacks clarity and predictability. For instance, it is stated that, in this regard, the European Court noted that it could not be considered "law" but the norm formulated with sufficient precision to enable the citizens to control their conduct. Each citizen, with an expert advice, must be able to foresee, to a reasonable extent, the consequences which may result from a specific action [8].

As regards the article 74 from the Romanian Penal Code, its provisions do not meet these requirements, because they limit in an unjustified way the offences regarded by this favorable penal treatment. As well, the indicated legal text does not fulfill the clarity standards imposed in this domain. It refers to "other economic crimes, defined by special laws" without mentioning the precise legislative framework. Due to this inappropriate legislative technique, in the opinion of the national Constitutional Court, the criticized text affects the constitutional guarantees on the right to a fair trial. That is because the right to a fair trial is complex, has several components and broad sense which includes also the right to an effective defense. This cannot be achieved if there is uncertainty regarding the applicability in one or another case of benefit of halving the sentence. The judge himself is in difficulty, being forced to choose between several hypotheses, without a clear understanding of applicable sanctioning regime.

For these reasons, and some others (For instance, the court criticized the fact that the text does not indicate the nature of the institution created by the article 74 from the Romanian Penal Code and creates the possibility to get different penal values and to influence the way the participation to an offence is punished.), the Constitutional Court stated that the article under analysis is in an evident contradiction with the principles
defined by the fundamental law. Because the legal text was not correlated with the constitutional and conventional provisions within of 45 days! The term is calculated since the day the decision of the Constitutional Court is published in the Official Gazette of Romania. During this period the unconstitutional provision is suspended.) indicated by the article 147 par. 1 from the Romanian Constitution, it does not produce any legal consequences now. Moreover, in the new Romanian Penal Code from 2009 we cannot find a similar text [3]. So, we can observe that a legal text create to serve the common and the individual interest to get resources is inefficient and cannot accomplish its mission because a serious negligence of the legislator who did not respect the legislative technic standard and generated a dangerous situations for the accepted standards in the human rights domain.

1.2 Legislative consequences over the penal special legislation

Another legal text is, in our opinion, in the same situation, although it has resisted till now to the constitutionality controls. It is about article 10 from the Law no. 241/2005 on preventing and combating tax evasion. The provision served as an inspiration source for the article 741 from the Penal Code and that is why its content has the same specific as the text already analyzed. The special legal provision creates a favorable penal treatment for the person who committed an illegally tax evasion (a tax fraud) and does special efforts to cover the prejudice created for the general consolidated public budget. In this case the protected interest for resources is the public one. The text of article 10 concerns all the offences defined by article 9 from the same law, although some of them have only a virtual consequence. For instance, the offence defined by article 9 par. 1 lit. b from Law 241/2005 has the aptitude to put into danger the general interest to diminish the tax collection activity and consists in the omission, in whole or in part, to highlight in the accounting record or in other legal documents, commercial operations or revenues in order to avoid the tax obligations. So, in order to serve the common interest to increase the collection level in the taxation field, the penal legislator created a more favorable regime for the person who has the obligation to financially contribute to the budget, who omitted to register some operations in the official record and created only the premises for tax avoidance. Moreover, the text has been indicated as being in contradiction with the Romanian Constitution several times. The main critic regards the fact that the indicated provisions create the possibility to avoid the punishment or to reduce penalties only for those who pay the full damage caused by the offence till the first hearing in front of a court (and not for those who pay the damage pending a final judgment of conviction) and, in this way, violates the principle of non-discrimination enshrined of art. 16 para. (1) of the Constitution. On the occasion of constitutional review exercised, the Court held [10] that criticized the legal text is constitutional, and does not have a discriminatory character because the benefit is applicable to all the active subjects of the offense, who till the first hearing will cover the prejudice and the text must be interpreted as the first hearing is the next immediately following the entry into force date of Law no. 241/2005, regardless of the phase of the penal trial. So, we observe an evident inconsequence of the constitutional control court, because the same situation has different interpretations.

1.3 Legislative effects over the Romanian Penal Procedural Code

Also, due to the economic crisis, the Romanian penal legislator had to serve the general interest to diminish the judicial public expenses. That is why in the Romanian Penal Procedural Code was introduced the article 320. According to this text, “until the start of the court inquiry, the defendant may declare personal or by an authentic declaration that he/she admits committing the facts described in the indictment and accept to be judged on the basis of the evidence administrated during the prosecution”. The main aims of this legal text are to give expression to the right to a fair trial and to a reasonable duration of the proceedings. In this way the penal trial gains more celerity because its duration is shortening considerable, moreover, it is obtained a considerable reduction of the costs of these judicial activities. In order to become efficient in a concrete case, this institution needs to have as a starting point a fully and complete recognition of the facts described in the indictment. The only proves which can be administrated are the circumstantial documents, the rest of elements being revealed by the ones administrated during the prosecution. The intention of the legislator was noble in this case too, but once again it was proved that because of the hurry to identify rapid solutions, some regrettable mistakes in formulating article 320 from the Romanian Penal Procedural Code have been made. That is why it was necessary to have two decisions of the Constitutional Court that indicated indispensable corrections to be done over the legal text, in order to correlate it with a fundamental rule in the criminal law – the mitior lex rule [11]. These corrections have been already operated [12] and the text is successfully used in the practical activity of the courts.
Other effects of the economic crisis in the criminal law domain

Those which preceded were some examples on the modifications penal law has suffered during the economic crisis, but we could indicate some more, as it is the creation of the extended confiscation institution, or the aggravation of the special punishment limits for the tax fraud offences.

At the same time, some particular aspects occurred in the practical field. That is because the circumstantial elements are consistent influenced in cases of the offences committed in order to get a minimum resource of living for the defendant and his family. Moreover, the courts examine more carefully the requests of the individuals to recover the judicial expenses or to get moral reparation and often censure them.

Sometimes, the courts have the tendency to exaggerate the way they interpret the particularities of the civil part of the penal trial. For instance, in some particular cases which involve offence of smuggling, some courts dictate the confiscation of the goods illegally introduced in the country and also impose to the defendant to pay the custom taxes for the confiscated goods. In this way, the law application is pushed to the limit of a *bis in idem*, an unacceptable situation in criminal law domain.

Conclusions

In our research we pointed some of the direct or indirect effects of the economic crisis over the criminal law field. The criminal law has the most powerful instruments and it is obvious that it could not stay apart of the general needs of the society and of the interest to protect each citizen’s rights. But it is extremely important to maintain a correct balance between the protection of the common interest and the duty to protect each member of the society against the other’s illicit behaviors but also against the abusive acts of the authorities themselves. It is not an easy process and that is way, at an ideal level, it is important to avoid the inconsistencies and the repeated interventions over the law. Unfortunately, this is not the case of the Romanian penal legislation because, as we indicated in our paper, usually it confront with situations which request immediate intervention in order to respect the human right protection standards.

References


Consideration on the concepts of judicial co-operation and police co-operation

Grigore-Radulescu M.I.

ROMANIA -- radulescuirinaro@yahoo.com

Abstract
Judicial cooperation and police cooperation represent two concepts whose determination is necessary on reason of their frequent utilization both in the domestic laws of the states and in the regional and international regulations.

Keywords: co-operation, judicial co-operation, police co-operation.

Introduction
The concept of co-operation (According to Dicţionarul explicativ ilustrat al limbii române (the illustrated explanatory dictionary of the romanian language), Editura Arc and Editura Gunivas, Bucharest, 2007, p. 441, cooperation is understood as „the (systematic) collaboration of certain persons, economic facilities, countries etc. in the manufacture and marketing of certain products, scientific and technical research etc.; work in common; work together”), known and applied even from ancient times, developed gradually along with the common interests of the states. The concept of international co-operation can consequently be defined as a means of mutual assistance between various states of the world, in various fields established concretely by international legal documents whose purpose is that of promoting and protecting the national, regional or world interests, at the same time observing the independence and sovereignty of each contracting party [2].

Conceptual delimitations
From the aforesaid perspective, in the specialized [2] literature it is deemed that the institution of international judicial cooperation may be defined both in a broad meaning and in a strict meaning.

Lato sensu, international judicial cooperation in criminal matters represents “that form of cooperation which refers to complex activities whereby the governments worldwide, in order to reduce criminality and increase the safety of their own citizens, act together, lending mutual support in the achievement of certain specific activities, such as: extradition, delivery based on a European arrest warrant, transfer of procedures in criminal matters, recognition and enforcement of orders, transfer of convicts, legal assistance in criminal matters and other such forms or rules established by the laws, treaties, agreements, conventions or by reciprocity” [2].

Stricto sensu, international judicial cooperation in criminal matters represents “a specific manner of action whereby the governments worldwide act to lend mutual assistance in forms established by the laws, treaties, agreements, conventions, in order to get, prove the criminal activity and punish the perpetrator of a criminal act and implicitly to reduce criminality [2].

We deem that both definition s, namely the one in the broad sense and the one in the strict sense, refer to the concept of international judicial cooperation in criminal matters, as, in terms of typology, international judicial cooperation may also be achieved in civil, commercial, family and police matters. We consequently deem that a distinction needs to be made both in terms of terminology and in terms of the contents, between the types of international cooperation and the forms (manners) of international cooperation that each of such types of cooperation may take, aiming at the avoidance of any confusion and starting from a thorough specializations of such fields.

In order to reveal the importance of this distinction, we shall proceed to an examination of the juridical doctrine, of the jurisprudence and of the incidental legal provisions in this matter.

The older legal literature analyzed the “forms of international legal assistance” [3], classified in “forms of an informative character” [2] and “forms of a procedural character” [2]. The category of forms with an informative character included the “delivery of copies and extracts from court orders in criminal matters, delivery of criminal history sheets and finally the international exchange of information regarding a series of issues of interest to the states in their common fight against criminality” [3], while the latter category, that of the
forms of a procedural character, included the cooperation of the judicial police authorities, sending of letters rogatory, service of summons or other legal calls, delivery of detainees for the purpose of hearings or confrontations, conveyance of judicial pieces, extradition, recognition of foreign court orders [3]. Later on, as the types of cooperation between countries specialized, the judicial doctrine referred to specific forms for each type of cooperation, without making however a clear-cut express verbis delimitation.

Thus, the international judicial cooperation in criminal matters was intensely theoretized and enjoyed the widest doctrine development in terms of concept definition (as shown above), of identification of specific forms and of establishing of the general principles governing it, along with the evolution and improvement of the legislative framework.


- extradition;
- delivery based on a European arrest warrant;
- transfer of procedures in criminal matters;
- recognition and enforcement of orders;
- transfer of convicts;
- legal assistance in criminal matters, while leaving an open end for other forms of judicial cooperation in criminal matters.

The law also regulates the general [2] principles applicable to judicial cooperation in criminal matters, namely:

- the principle of pre-eminence of international law;
- the principle of observance of the fundamental interests of Romania;
- the principle of reciprocity and international courtesy;
- the principle or mutual recognition and trust;
- the principle of legality;
- the principle of non ibis in idem;
- the principle of confidentiality;
- the principle of humanism;
- the principle of jurisdiction immunity.

In terms of the interest justified by this analysis, we specify that according to art. 1(2) of Law 302/2004, republished, it does not apply to the specific methods of international police cooperation if, according to the law, such methods are not under judicial control. Per a contrario, Law 302/2004 is also applicable to international police cooperation, but only when the specific forms of this juridical institution are conducted under judicial control (in the meaning of the Code of Criminal Procedure, after the institution of criminal proceedings [5]). We deem that this is the sense to interpret the above opinion according to which the cooperation of the judicial police authorities is placed in the framework of the “forms of international judicial assistance with a procedural character” and the “judicial assistance” phrase must be understood in the meaning of judicial cooperation [4].


The said ordinance is applicable to the specific activities of international police cooperation and assistance, according to out national law, to the international agreements, conventions and treaties to which Romania is a signatory party and to the relevant legal instruments of the European Union, in observance of the principles [2] governing international police cooperation, provided in art. 3 of the Emergency Ordinance of the Government 103/2006, namely:
- the principle of reciprocity (It consists of the exchange of data and information of an operative nature, to be conducted in terms of reciprocity.);

- the principle of legality (It consists of the exchange of data and information of an operative nature, to be conducted at the request of the competent authorities, in accordance with the legal provisions.);

- the principle of prevalence of judicial cooperation (It supposes that the legal provisions on international judicial cooperation in criminal matters prevail against the provisions of the Emergency Ordinancy of the Government 103/2006 in case of activities of police cooperation conducted during the criminal suit);

- the principle of confidentiality (It supposes that the competent Romanian authorities have the obligation to ensure, as far as possible, at the request of the applicant authority, the confidentiality of the applications for assistance made in the fields regulated by the Emergency Ordinancy of the Government 103/2006 and of the documents enclosed. In case that confidentiality cannot be assured, the competent Romanian authority notifies the applicant authority, who makes a decision with reference to the conveyance of the application.);

- the principle of speciality (It supposes that the competent Romanian authorities shall use the data and information received from the applicant authorities only in the fulfilment of the object of the application.).

The regulation of the principle of prevalence of judicial cooperation in the domestic laws, the institution in the Lisbon Treaty of Chapter 5 entitled “Police Cooperation” and the establishment of the concrete forms (The forms of police cooperation specified in Chapter 1 – Cooperation of the police services in Title V of the Convention for application of the Schengen Agreement are: mutual assistance, cross-border pursuit, public order and safety, exchange of information for efficient performance of external border control and supervision, appointment of connection officers, intensification of police cooperation in the border regions by bilateral agreements and creation and maintenance of a common information system, SIS.) of such cooperation in Chapter I to Title V of the Convention for the application of the Schengen Agreement represent a series of arguments to support the existence of international police cooperation as an independent juridical institution having its own legal and institutional framework. (the distinction between the two international cooperation institutions was also pronounced by the Court of Justice of the European Communities by two of its orders, namely Order no. C-354/04 of 27 February 2007. Appeal. EU. Police cooperation and judicial cooperation in criminal matters. Common positions 2001/931/PESC, 2002/340/PESC, 2002/462/PESC. Measures regarding the persons, groups and entities involved in acts of terrorism. Suits for damages. Competence of the Court of Justice and Order C-303/05 of 3 May 2007. Police cooperation and judicial cooperation in criminal matters. Art. 6(2) and 34(2)(b). Frame Decision 2002/584/JAI. European arrest warrant and delivery procedures between member states. Harmonization of national laws. Elimination of double incrimination checking. Validity.)

Conclusions

We deem that the examination of the doctrine and law show the importance and necessity of making a distinction between the types of cooperation and their specific forms in general and between the judicial cooperation in criminal matters and the international police cooperation in particular.

References

Critical aspects regarding the interpretation of criminal law

Guiu M.K.

„Al. I. Cuza” Police Academy Bucharest, (ROMANIA) mioarakettygatu@yahoo.com

Abstract

This paper is a concise presentation of the problems raised by the juridical interpretation, stressing the debatable or confusing aspects, which, in their majority, relate to criminal law.

Keywords: method, knowledge, juridical realities.

The phrase “juridical interpretation”

Although common, the phrase "juridical interpretation" is confusing and inadequate, unable to render the exact topic of the discussion. It means, of course, an effort of knowledge, an attempt to go beyond appearances and reach the truth of law. The issue is that the term "interpretation" refers to a personal way of judging and feeling, It involves subjective knowledge, which is not necessarily shared and which can be accepted in art, but not in science. Science seeks to reach the truth - understood as objective knowledge with logic value - and, for this, organized and methodical research is needed, respecting certain rules. In short, the way of science is not interpretation, but the method - which means "the set of rules, to which the thought must comply with in its processes of knowledge" [1]. Moreover, precisely because lawyers speak of interpretation, not method, there is a quite widespread opinion that the law would be a pseudoscience where everything is debatable or interpretable. Thus, it is understood that in order to combat this opinion, legal science should give up on "juridical interpretation and its rules" and replace it with the theme of "method and rules of juridical knowledge" or, in other words, with the means or procedures of checking the reasonable value of legal statements.

Such a change of theme and terminology would underline an aspect already indicated by many authors, namely the theory in the field is incomplete. The so called juridical interpretation rules ensure, exhaustively, the knowledge of the positive law, of norms or legal imperatives in force – which leaves aside the fact that law is an applied science, a science regarding human coexistence and its knowledge cannot be limited only to texts and abstract realities. Anyway, the positive law is not the only juridical reality. The enactment (developing and adopting rules) and the practice of law (mainly jurisprudence) are also juridical realities, even more, they are objective realities which give life to positive law. Thus, it should be necessary that their study (knowledge) be ensured with priority. Thus, we should believe that the theory in the field has to comprise not only rules to know the positive law but also the rules that have to be followed by the juridical thinking in the process prior to enactment, as the rules that have to be followed by the juridical thinking in the afterwards process, of enforcing the rules.

Logical rules of enactment

In their majority the logical rules of enactment were formulated and recognized from a legislative point of view. For more than a decade in Romania there has been a normative act that establishes the “general principles of enactment for the Romanian system”, namely Act no. 24/2000 on the rules of legislative technique, republished by Article II from the Act no. 60/2010.

But, unfortunately, these rules often go unnoticed for the law maker. As it has been noticed, we are witnessing an unprecedented "legislative inflation" [2] which is especially obvious in criminal law. Basically, no law is entirely valid; each suffered multiple corrections, changes, interpretations, repeals etc., making impossible a complete and correct knowledge of laws in general, and the provisions on incrimination, in particular. In short, in most cases, these changes are made hastily and carelessly - which explains why judicial practice has become deeply contradictory and often unconnected with the law.

This totally unacceptable situation has several explanations but, apparently, the first explanation is that the enactment theme is not included in the university curricula; it is not included, as would be required in the topic of "juridical interpretation" nor is it treated separately, but, at most, it enjoys a tangential approach, when dealing with the topic regarding the sources of law. (Another explanation, in our opinion, would be that the aviso
of the Legislative Council is not always motivated and it brings no sanction if the project does not respect the general principles of enactment.)

We do not want to analyze here the issue of enactment but only to draw attention on some of the enactment principles in criminal law, which are not stipulated by the law or, when stipulated they are continually ignored by the legislative body.

Firstly, we noted that Act no. 24/2000 does not stipulate as it would be required, the principle that incrimination disposal has an exceptional and subsidiary character. Although the thesis that punishment is a "ultima ratio" has been made since the nineteenth century, however, for the legislator, this thesis seems to have remained completely unknown. It is because only at that moment, can one explain why, the legislator continues to extend the criminal illicit sphere, rather than reduce it. As one can see, it is not only maintained the incrimination of questionable attitudes or mentalities (e.g. according to art.236 par.2 from the Penal Code, any "manifestation expressing contempt for logos used by authorities" continues to be a crime). In addition, there are drawn into the criminal illicit area more facts of questionable gravity (e.g., the new Penal Code incriminates "disclosure … of information that is not public by the one who is aware of them"- art.304 par.2). It is therefore useful, perhaps, to remember what Professor Ioan Tanoviceanu wrote in his treaty from 1912: "So, logic tells us that if we wish to preserve a right, we use a less serious sanction - the extra-penal one - if this is sufficient, and we will resort to criminal sanction only as extrema ratio, when the other sanctions are insufficient. This logic priority indicates the complementary nature of criminal law." [3] In particular, we would like to recall that, under the subsidiarity principle of criminal law, it becomes necessary for the existence of any provision of incrimination to be fully reasoned, explicitly showing both its purpose of protection, which is the right or interest protected and arguments upon which it was considered that another legal sanction would be ineffective.

Secondly, we would like to underline that, although art. 16 from the Act no. 24/2000 prohibits parallel regulations, the law maker continues to incriminate the same act in different texts, using different sanctions and procedures. This is mainly the case of economic crimes – for example, the crime of unfair competition is stipulated in 3 different texts (art. 301 Penal Code, art. 5 from the Act no. 11/1991 annotated by Act no. 298/2001 and art. 63 from the Act no. 21/1996) and the special limits of the sanction differ from one text to the other. In some cases the consequences of this parallelism of legal disposals becomes more serious because the same act may be a crime according to one text or a contravention (minor offence), according to another text. For example, prostitution and procurement are crimes, according to the provisions of art. 328-329 from the Penal Code and contravention (minor offence), according to art. 3 par. 6-7 from the Act no. 61/1991 (republished in 2011).

**Logical rules of jurisprudence**

Any judicial decision is the conclusion of a syllogism, where the major premise includes the applicable law, and the minor premise contains the facts subjected to judgment.

Therefore, any judicial decision involves double knowledge: knowledge of the law (this knowledge is used to formulate the major premise), and knowledge of evidence (this knowledge is used to formulate the minor premise).

However, in formulating the two premises, the juridical practice has always had a creative character, more or less pronounced.

In formulating the major premise, the civil judge has maximum creative freedom, while the criminal judge enjoys minimal creative freedom. In civil law, there is no principle that forces a judge to start from the law. Therefore, if the applicable provision in this case does not fully meet the requirements of justice, the civil court is free to reformulate or even to ignore it and to base its syllogism on "the sentences of juridical logic and on those principles which dominate the laws themselves." [4] Criminal law, in turn, is governed by the principle of legality, which requires a judge to start from the law - which means that the judge cannot consider criminal offence an act that the law does not so qualify, or do not fully meet the requirements of justice; as it cannot apply another penalty than the one prescribed by law for that offence. This is, in fact, the meaning of the rule that criminal law needs to be strictly enforced.

In formulating the minor premise, the civil judge enjoys minimum creative freedom, while the criminal judge has a maximum creative freedom. As it is already known, in civil law, there is a hierarchy of evidence which strictly limits the creative freedom of the judge. In criminal law, the evidence does not have a pre-established value anymore and the judge is free to formulate the minor premise according to its own beliefs and opinions.

Still when it comes to the rules that have to be considered in taking judicial decisions in criminal matters there are a series of controversies and unclear aspects.

First, we noticed that an important part of the doctrine contests the validity of the rule that criminal law must be applied restrictively. As shown in the online encyclopedia Wikipedia [5], this rule was the main reason why Montesquieu and his followers insisted that the principle of legality be recognized as a fundamental human
Criminal repression in the context of the economic crisis and the maximization of crime at European and global level (May 9-13, 2013, Bucharest, Romania)

right. Enshrining the principle of legality in 1789 ended the arbitrary power of judges, which was regarded with hostility by the people. It forced judges to limit themselves to establish the facts and their legal qualifications and, where appropriate, the applicable penalty provided by law. However, judicial authorities felt threatened and reacted, saying that such a conception promotes a “légicentriste” approach, unrealistic which refuses the criminal judge any initiative and creative freedom, without considering that in fact he can be arbitrary, since in many cases, several legal qualifications of the facts are possible. Unfortunately, instead of clarifying things, part of the doctrine agreed with the demonstrators and began an offensive against the so-called “literal method of interpreting the law”, thus deepening the general state of confusion.

In order to clarify the fact that these protests are not justified we shall start by saying that the opposition against the so-called “literal method” has no sense, because such a method does not exist. Anyway, the statement that the principle of legality limits the judge to proceed to the textual (word for word) enforcement of the law is not true.

This becomes evident if we see that any other text, the text of the law is made of sentences, and the sense of a sentence does not depend only on the meaning of each word, but also on the whole context and the perspective used to analyze its meaning. Far from having a unique and steady meaning, any legal disposal, including criminal ones are polysemantic which means that they have an indefinite number of uses – which leaves the judge enough freedom to be creative.

When it comes to the principle of legality, the criminal judge is obliged to build his syllogism starting from an incrimination disposal, which is completely correct because recognizing that the judge should establish the facts means to go back to the totalitarian state and to abandon the fundamental principle of a rule of law, that all individuals are equal in front of the law and nobody is above it.

On the other hand, we must stress that the principle of legality does not exclude, but only limits the creative freedom of the penal judge - namely it prohibits the penal judge to invoke the analogy (the a pari argument) to expand an incrimination disposal in a case unforeseen, neither expressly nor implicitly.

Then we noticed that there is a contradictory practice in the assessment of evidence and formulating a minor premise – for example, some believe that in order to justify a conviction decision, it would be enough to have one or two forms of evidence, while others believe that, in such a case one cannot establish the truth and must make an application of the rule in dubio pro reo (from doubt benefits the offender). The first position is specific to the juridical systems prevailing the view that probation would provide direct knowledge of the facts. The second position, which we support, is specific to the juridical systems in which it was noted that probation provides indirect knowledge of the facts. In the latter approach, the evidence means deduction - but not from the universal to the particular, but from a fact to another - being defined as an “inference from a current and certain fact to another fact which is uncertain and has to be proved” [4]. But, as we noticed [4], this deduction lacks the fact that “it cannot generate a logical certainty but only a probability” (viewed isolated, no probatory deduction is true, only probable) – which means that, the judge cannot define the minor premise starting from a simple probatory deduction, even if it is repeated (for example, it is the case when witnesses agreed). Under these circumstances, in order to determine the minor premise, the multiple probatory deductions should be consistent, different in origin and independent.

That is why, in our opinion, procedural laws should provide the minimum number for independent probatory deductions which has to be the foundation for every conviction decision (in our opinion three different in origin and independent probatory deductions would be enough).

References
Criminal repression in the context of the economic crisis and the maximization of crime at European and global level (May 9-13, 2013, Bucharest, Romania)
The unprescriptibility of criminal liability and sentencing for intentional crimes against life and those resulting in the death of the victim

Iacob A.

Police Academy „Alexandru Ioan Cuza”, (ROMANIA) adi_iakob28@yahoo.com

Abstract

This project treats an actual subject widely debated in the romanian society, namely the unprescriptibility of criminal liability and sentencing for intentional crimes against life and those resulting in death of the victim and necessity of issuing the law no. 27/2012. We are trying to analyze the opinions related to those problems, specially because of the importance given by the society in our times.

Key words: unprescriptibility, intentional crimes, victim.

Prescription

„The concept of prescription of the criminal liability designates that cause of extinction of the offender’s obligations to abide the criminal consequences of his actions, as a result of the passage of a certain period clearly determined through legal dispositions.”[3]

One of the essential characteristics of the criminal law is the time that is granted a great importance, in the application of its dispositions, the legislator considering that through its lapse, in certain conditions, a cause of removing criminal liability is constituted.

The argument, according to which in case the criminal liability is not accomplished in good time, the action can be erased from the social group’s memory in which it was produced, is based on this ground.

Another argument in favor of the prescription is that the application of the punishment does not fit the social and criminal requirements any more and the removal of the punishment is the objective solution, because the late engaging of criminal liability becomes totally impopertune, its contribution to the achievement of the criminal law’s purposes being worthless.

We mention the fact that the criminal law has a repressive purpose, the purpose of showing that the action comes in conflict with the norms of social cohabitation, and through its elaboration the legislator wants to create safety climate favourable to the society’s norms.

In our law system, criminal liability is governed, amongst other principles, by the principle of prescriptibility that represents a cause for removing criminal liability.

It is regulated by the Criminal Code and it consists in the extinction of the legal relationship of conflict, created by the commission of offenses and by the failure of engaging criminal liability in a certain term established by the law.

From another point of view we can say that the fulfilment of the criminal liability term is a case in which the criminal proceedings cannot be initiated and when it has been accomplished it cannot be exerted anymore.

In other words, in order to accomplish the finality of removing the criminal liability the course of the prescription must be complete and continuous.

Prescription terms of criminal liability and execution of the punishment

The criminal liability is governed, amongst other principles, by the principle of prescriptibility. The prescription is a cause that removes criminal liability, consisting in the extinction of the legal relationship of conflict, created by the commission of offenses and by the failure of engaging criminal liability in a certain term established by the law.

The prescription term represents the period of time that starts to pass from the date the offence was committed, including the day the offence was committed, in the case of continued criminal offences, this term is calculated from the moment the action or inaction stops, the moment the offence is exhausted, and continuing until the prescription period is fulfilled.
In case of complicity, the prescription terms start to pass for all participants from the date the offence was committed by the author.

These prescription terms are determined based on the nature and the length of the punishment established by the law for the action that is prescribed, taking into consideration the special maximum of the punishment:

- years when the law establishes for the committed offence the punishment of imprisonment that does not exceed 1 year or a fine
- years when the law establishes for the committed offence the punishment of imprisonment that exceeds 1 years but does not exceed 5 years
- 8 years when the law establishes for the committed offence the punishment of imprisonment that exceeds 5 years but does not exceed 10 years
- 10 years when the law establishes for the committed offence the punishment of imprisonment that exceeds 10 years but does not exceed 15 years
- 15 years when the law establishes for the committed offence the punishment of life imprisonment or the punishment of imprisonment that exceeds 15 years

The term of criminal prescription for the legal person is:

- 10 years, when the law establishes for the offence committed by an individual the punishment of life imprisonment or the punishment of imprisonment that exceeds 10 years
- 5 years, when the law establishes for the offence committed by an individual the punishment of imprisonment that does not exceed 10 years or a fine

Also, the prescription of the execution of the punishment is determined based on the nature of the punishment whose execution is prescribed:

- years if the offence is punished with a fine
- years plus ½ of the punishment if it is a punishment that does not exceed 15 years
- 20 years if it is a punishment that exceeds 15 years or life imprisonment

### The range of offences for which the prescription operates

The range of offences for which the prescription operates is quite various in the Romanian criminal law. Thereby, all offences, besides simple or aggravated intentional homicides crimes resulting in the death of the victim, are under the incidence of the prescription of criminal liability and execution of punishments. Also war crimes and crimes against humanity cannot be prescriptible.

### The concept of unprescriptibility

“To be unprescriptible” means to always remain valid! This results in the unprescriptibility of criminal liability and execution of punishments in the case of crimes that can never be conceived as pardonable, crimes that leave deep marks in the destinies of our peers and that can even mutilate the entire society.

The unprescriptibility came as a necessity for the proper development of the society. Because of the prescription, both regarding the criminal liability and the execution of the punishment, after the lapse of a certain period of time from the moment the crime was committed, the crime cannot be investigated because the offender’s criminal liability disappears. There is also the possibility that a court order is definite, but if it is not executed it will be prescribed.

This is why, for certain crimes, the legislator decided that the prescription must not operate in order to rise the population’s degree of confidence in justice.

### The unprescriptibility of criminal liability and sentencing for intentional crimes against life and those resulting in the death of the victim

In the Romanian criminal system almost all crimes are prescriptible except the ones that violate fundamental values.

So, according to Law no.27/2012 (published in Romania’s Official Gazette, Part I, no.9 from 20.03.2012) regarding the modification and completion of the Romanian Criminal Code and Law no.286/2009 regarding the Criminal Code, the following crimes become unprescriptible:

- art. 121, paragraph 2 Criminal Code /crimes against peace and humanity
- art.174 Criminal Code/ murder
- art.175 Criminal Code/ degree murder
- art. 176 Criminal Code/ extremely serious murder
- art. 183 Criminal Code/ injuries causing death
Criminal repression in the context of the economic crisis and the maximization of crime at European and global level (May 9-13, 2013, Bucharest, Romania)

- art. 197 paragraph 3, Criminal Code/ rape resulting in the victim’s death
- art. 211 paragraph 3, Criminal Code /robbery resulting in the victim’s death

The unprescribility of criminal liability and execution of punishments in the case of intentional crimes and those resulting in the death of the victim defends the most important value, the human life and strengthens the person’s safety.

The person that commits a murder can always be sentenced no matter how much time has passed since the date he committed the crime.

The preventive character of the criminal law is very efficient, that is why the deletion of a single person is comparable and must be punished as drastically as the crime against humanity.

Murder is unprescribable in many European states such as: Holland, Italy, Estonia, The Czech Republic, Great Britain, Finland, Denmark, Austria, Malta, Cyprus and Germany.

We consider that before Law no. 27/2012 was promulgated, the legislator had to request the execution of a thorough study through which the necessity of this law’s promulgation was inquired because the possibility that it did not correspond with the social necessity imposed by the current climate existed.

From our point of view, this study should have pointed out the number of the crimes that have become unprescribable along with the coming into force of the current law, crimes whose authors are not subjected to criminal liability for their actions.

We think that this law of unprescribility was based on the example given by many European countries in which it exists. We do not know exactly if in the middle of all this was the desire to align our legislation to theirs or the necessity to promulgate the law.

We leave it to you to decide this matter.

References
The penal policy and the penal law in the context of the economic crisis

Ifrim O.R.

Spiru Haret University of Bucharest, Faculty of Law (ROMANIA)

Abstract

The penal policy is the totality of proceedings susceptible to be proposed to the lawmaker or that are already effectively used at a certain moment, in a certain country, to fight against the criminal phenomena or the totality of the measures and means of prevention and of fight against the criminal phenomena, as well as of the principles of elaboration and application of these means and measures, which express a certain conception regarding these phenomena and that aim at a certain goal.

Keywords: the penal policy, criminal phenomena, fundamental principles

Introduction

1. In the literature [1] the penal policy is defined as the totality of proceedings susceptible to be proposed to the lawmaker or that are already effectively used at a certain moment, in a certain country, to fight against the criminal phenomena or the totality of the measures and means of prevention and of fight against the criminal phenomena, as well as of the principles of elaboration and application of these means and measures, which express a certain conception regarding these phenomena and that aim at a certain goal [2]. According to another opinion [3], the penal policy is at the same time a science and an art, consisting of finding and using the best possible solutions for the various problems of content and form of the criminal phenomena. The penal policy is a component part, a smaller field of the general policy of building the state. Between the aims, fundamental principles, methods and means of the general policy of the state, on the one hand, and those of its penal policy, on the other hand, there is a tight connection.

The penal policy and the penal law in the context of the economic crisis

1. The penal policy aims at the defence against the crimes against the social relations and against the social values around which and because of which those relations were formed [4], at providing the security climate necessary for the action of creating the new society and of continuous improvement of the social relations, at the reeducation of the antisocial elements in the view of their transformation in an aware member of the society, at the elimination of the social and individual causes of the crimes and at the gradual eradication of the criminal phenomena from the social life.

2. These goals of the penal policy are in perfect harmony with the fundamental purpose of the general policy of development of the society in the view of providing the maximum of possibilities for ensuring the progress of the individual and of the society. The penal policy contributes thus, through achieving its specific goals, to the fulfillment of the purpose of the general policy.

3. In the penal doctrine there are unanimously acknowledged as fundamental principles of the penal policy the humanism, the democratism and the legality [5]. These principles are at the same time fundamental principles of the general policy of our state, which find their natural application in the field of the penal policy whose elaboration has them as starting point. According to these principles, the penal policy in Romania is oriented in two main directions: the prevention of the commitment of the penal offences and the fight against the antisocial actions with penal character that were committed in reality [6].

4. Both the preventive action and the repressive reaction, as sides of the penal policy, are carried out within and through the penal law.

5. In the theory of the current penal law [7] it is generally acknowledged that the penal law has a preventive function and a repressive function. As regards the preventive function, this has a double aspect: a function of general prevention and a function of special prevention [8]. The function of general prevention refers to its preventive influence against the commitment of the crimes, which is exercised on the members of the society. This function is accomplished through the fact that the...
penal law forbids, under the sanction of the punishment, certain types of behavior and through the fact, by the coercion force of the state, the punishments established by the trial courts will be applied.

The function of special prevention consists of the influence exercised on the criminal through the measures of penal counter-reaction, meant to determine the author to refrain from committing a new crime.

As regards the repressive function in the penal doctrine [9], it is considered that the punishment represents the main mean for achieving the goal of the penal law. The penal law is unconceivable without punishment which, besides the crime and the penal responsibility, represents the fundamental institutions, without which a system of penal law, no matter which, cannot exist. As a sanction specific to the penal law, the punishment represents a constraint measure in which is concretized the reaction of the state, in the name of the society, against the person who committed a crime. The punishment represents the privation of the criminal, either of freedom, or certain goods or patrimonial or civil rights, or even of the right to life in certain penal legislations [10].

6. The penal law appears thus, as an instrument of the penal policy, i.e. its main instrument, because it gives legal expression to the penal policy, through all of its norms and institutions. The indissoluble connection between the penal policy and the penal law is present in the determinant role of the penal policy in establishing the social and political content of the penal law [11].

7. The penal law can have as content only the penal policy, and this unity of content is expressed in the full concordance between the penal policy and the penal law as regards aims, fundamental principles, methods and means of accomplishment, in the sense that the penal law must follow the fulfillment of the goals or desiderates established by the penal law, with the compliance if the fundamental principles of the penal policy, in the way and with the means accepted by it. Only complying with the penal policy can the penal law attain its social mission that consists of the contribution brought to the consolidation of the basis of the society, the policy and the law being both the expression of the citizens’ will and interests to ensure the progress of the society and of each individual.

8. Therefore, the penal law as instrument of the penal policy cannot have a goal different from the latter’s goal [12].

9. From the provision in art. 2 of the Penal Code “The law stipulates which offences represent crimes, the punishments for the criminal and the measures that can be applied when such offences are committed” results that these means consist, on the one hand, of forbidding the offences that represent crimes, and on the other hand of applying punishments and taking safety measures and educative measures for those who commit such offences. Both the incrimination of the dangerous offences for the society and the stipulation of the measures that are to be applied in the case of the commitment of these offences reveal the content of the penal policy at a certain moment in a society, the incrimination, the application of sanction becoming instruments, means of achieving the purpose of the law and of the penal law.

10. In applying its purpose the penal law is required to fulfill certain tasks and functions in its capacity of instrument of penal policy. Mainly these tasks are:

a) ensuring the crime prevention. The penal law has to fulfill, among others, a double function of prevention and this is the general prevention, (the penal law exercises through the content of its regulations, an action of prevention of the socially dangerous deeds of the member of the society [13].

For the efficiency of the general prevention is necessary that the offences forbidden through the penal norms should be well and completely characterized, so that the addressee of the penal law should understand what behavior is required and which are the social consequences derived from violating the interdiction to commit the incriminated offence. Also, it is necessary that all the members of the society should know the content of the penal law.

The special prevention consists of the prevention of a new commitment of a crime by the person to who was applied the punishment stipulated by law. This preventive action is exercised thus not in general, but only towards the person who committed a crime and to who was applied the punishment as a consequence of the resolution of the penal judicial relation of conflict.

For the efficiency of the special prevention it is necessary that the stipulated punishment should be able, through the nature, the amount and the possibilities of adaptation stipulated in the law to determine the criminal not to commit another crime [13].

b) ensuring legality. The penal law has to ensure the legal framework for the exercise of the function of social defense by the state. In this regard it should establish with maximum clarity the behavior that the state has the right to claim from each of the addressee of the penal law, in the view of protecting the values and the social relations; implicitly, it has to stipulate with the same clarity the deed contrary to this commandment and the conditions in which it represents a crime and in which it gives the right to the competent state authorities to hold the criminal responsible and to apply for him the sanction that is stipulated by that norm of incrimination.

c) ensuring the development of the new values and social relations. The penal law has an active role in the defense of the new values and relations emerged after our country adhered to the European Union. For example, the genetic manipulation, the computer systems, the financial interest etc.
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The importance of the penal protection of the family life in the context of the economic crisis

Ifrim I.

Institute of Legal Research „Academician Andrei Rădulescu” of the Romanian Academy (ROMANIA)
ionut_ifrim24@yahoo.com

Abstract

The penal protection of the family is an important problem of the penal law, with wide theoretical and practical implications, belonging to the larger framework of the constant concerns of the legal doctrine and practice of protection of the individuals, of their freedom and rights – social values protected both by the internal law and by the international treaties and conventions to which Romania also participates.

Keywords: notion of family, extrajudicial means, judicial means, judicial and penal protection means

1. One of the most important and interesting problems regarding family protection is the way the concept of family [1] was defined.

According to some authors the notion of family refers to “a group of people united through marriage, affiliation or who descend from a mutual author” [2]. There are also authors for whom the family would represent both a biological [3] reality, because it emerges from the union of man and woman in the view of the process of procreation, and a social [4] one, in the sense of creating a life communion between husband and wife, between parents and children, between relatives. Also, the family would represent a judicial reality through the regulation of this institution by the legal norms in a certain society [5].

Summing up these opinions, it can be claimed that, through family we understand a group, a form of organization and life of some people connected through marriage or kinship, between whom there are relations of mutual moral and material help and who lead their life in compliance with the laws and the requirements emerged from the rules of social cohabitation.

As can be seen, the concept of family can be used in a restricted or larger sense.

In a restricted sense, the family is reduced to the married couple and their minor children. This notion is used with this meaning, usually in the Civil Code and in the legal literature [6].

In a large sense, to the family belong the married couple and the persons that descend one from another or from a mutual author, between whom there is a blood kinship [7].

2. The family represented from the oldest times the main cell of the society development, its permanent factor. It was rightfully said that the family life constituted and still represents a component part of the society [8]. As it was emphasized in the literature, the family cannot be reduced only to the biological framework of the child birth, but it should be perceived in a larger sense, representing the most adequate environment for the multilateral and healthy development of children, for their education and physical and intellectual preparation in order to be useful for the society, for themselves and for the whole family. Only inside a family a permanent and careful surveillance of the child exists, the parents and the other members of the family being able to intervene as soon as a negative manifestation occurs, in order to apply the right measures for correcting it. The care for the child education represents a natural manifestation of the feelings of parental love, of concern for their faith and for their development, in order to become useful members of the society. The family life, the tight connections between its members and the example offered by them, exercise a considerable influence in the child formation and development.

3. The individual and social importance of the family explains why the care for the formation, consolidation and development of the family relations represented and still represents a state concern, being consecrated first of all in the Constitution of Romania. According to art. 48, para. (1) of the Constitution of Romania, the family is based on marriage in free consent between the married couples, on their equality and on the right and obligation of the parents to ensure the child growth, education and instruction. As regards the protection of the children and youth, art. 49 in the Constitution of Romania, in para. (1), refers to the special regime of protection of children and youth in providing their rights. In para. (2) it is stipulated that the state grants allocation for children and financial help for the care of the sick child or of the child with disabilities.

4. The legal doctrine [9] shows that the family fulfills the following functions: the reproductive function of the population and the species perpetuation; the economic function, because it finds justification in the
existence of the community of goods and in the help granted to the members in need; the educative function, which has as aim the formation of a person with multilateral and harmonious development. Thus, the parents have the duty to raise the children taking care of his health and physical development, of their education, study and professional training, according to their skills, in order to render them useful for the community. Also, the parents have the right to provide, according to their own beliefs, the education of the minor children whose responsibility they have. Consequently, the family life represents the natural and fundamental element of a proper development of children, this objective being followed also by the rules of social protection, by customs, traditions etc., and by the legal rules adopted by the society [10].

5. The ways to protect the family are thus, multiple and varied, existing both under the form of the extrajudicial means, and of the legal ones, mutually combined and harmonized.

As it is known, the order within any social group was provided over the time through extrajudicial means, such as the customs, religious and moral ones, and only later, once with the state formation and through legal means of protection – at the beginning were used non-penal judicial means (outside the sphere of the penal law, for example civil, administrative etc.), and after that judicial and penal protection means were used.

The penal code is and must be, the last mean (ultima ratio, extrema ratio) used in the concern for the family protection. The penal repression will aim only at the most serious deeds that can be committed against the family. Such deeds being an exception in the life of our society, the intervention of the penal law in the matter of the family relations [11] can have only an exception character.

In these limits, the penal law represents an important and efficient instrument for the family protection, as with their specific help it contributes to fighting against those serious offences that harm the family relations.

The Penal Code in force contains more types of incrimination that protect the family. Thus, in Title IX from the special Part of the Penal Code [12], Chapter I, are incriminated under the name of “Crimes against the family”: a) the crime of bigamy. The incrimination of this offence protects the fundament of the monogamy of the family [13].

This offence is incriminated in the Penal Code in force in art. 303, and in the new Penal Code, the same offence is incriminated in art. 376; b the crime of family abandonment. The commitment of this offence causes damage to the social value represented by preservation of the good relations of social cohabitation [14]. Hence, the Penal Code in force incriminates this offence in art. 305, and the new Penal Code incriminates this offence in art. 378; c) the crime of maltreatment of the minor. It is stipulated in art. 306 as an offence that also causes damage to the relations regarding the family protection. In compliance with the penal law in force, the offences of maltreatment seriously endanger the relations of social cohabitation regarding the family, relations whose formation and development depend on a good, human behaviour, full of solicitude towards the minors from the part of the parents or of the persons in charge with raising and educating the minors. By incriminating and sanctioning the offence of maltreatment of the minor, the law defend the family relations and the institution of the family as a special social value and, through this it protects the social relations whose development and execution depend on the good behaviour towards the minors who make up the future human capital necessary for the perpetuation of the social relations.

This offence is also incriminated in art. 197 of the new Penal Code, which places through the crimes against the person also the crime of maltreatment of the minor; d) the non-compliance with the measures regarding the entrusting of the minor. This incrimination (art. 307) penalizes the offences that cause damage to the obligation of growing and educating the minor, obligation that belongs to the person to whom the minor was entrusted. At the same time, it is violated the provision of the authority who entrusted the minor to a certain person. Also, are incriminated the offences of repeated prevention of the parents from getting in touch with the minor under the conditions fixed by the parties or by the responsible authorities. The new Penal Code also includes among the crimes against the family the offence of non-compliance with the measures regarding the custody of the minor (art. 379 of the new Penal Code); these offences are considered in the older literature as being part of those that endanger the growth and education of the minor [15].

Moreover, in comparison with the Penal Code in force, the lawmaker of the new Penal Code stipulates also among the crimes against the family the following: e) the crime of incest [16] (art. 377); f) the crime of preventing the access to the compulsory general education (art. 380).

Besides the above-mentioned provisions that protect the family directly, by the means of the penal law, the penal law also includes other provisions meant to provide indirectly the family protection either through special penal laws or through special laws with penal provisions (the extraordinary relevant provisions of the penal norms).

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Reflection of the principle of equality in the special part of the new criminal code - expression of globalization

Iftimiei A.

Law Faculty of Alexandru Ioan Cuza University of Iași, co-supervision with AICU of Iași and Montesquieu Bordeaux IV University. AIDP member andra.iftimiei@uaic.ro

Abstract

The principle of equality is ubiquitous in the new criminal code and its guarantee is structured on two directions. The first consists of sanctioning the criminalization of acts which create a situation of inferiority (e.g.: malversation or abetment to discrimination). The second direction involves remedying de facto inequalities materialized into existing offences against vulnerable passive subjects (e.g.: trafficking in vulnerable human beings). The unification of criminal law by recoding it in terms of the broad scope of the principle of equality guarantees a means of constitutionalization of criminal law.

Key words: principle of equality, new Criminal Code, special part of criminal law.

Art. 16 of the Constitution, which describes the general framework establishing the principle of equality, provides that “all people are equal before the law and public authorities, without privileges and discriminations. No man is above the law”. Therefore, the equal rights of people represent the constitutional principle according to which Romanian citizens, regardless of their race, nationality, ethnic origin, language, religion, sex, opinion or political views, fortune or social origin, may equally use all their rights provided for in the Constitution and laws, may equally get involved in the political, economic, social and cultural life, without privileges and discriminations, receive fair and equal treatment both from public authorities and from the other citizens [1]

The principle of equality consists of adapting criminal law rules to a wide range of situations arising from criminal relationships. The inclusion of the principle of equality in the criminal law materializes in two directions. On the one hand, the principle may be stated in fundamental texts, documents that also refer to other positive law provisions related to criminal matters (principle of legality, presumption of innocence, etc.). On the other hand, the codes (criminal law is intended here in the narrowest sense of the term) are supposed to allow the establishment of equality in distinct hypotheses that may cause a pathological behavior in the equality of litigants.

The purpose of criminal codes is, among others, to ensure an equalitarian action, which takes two forms: the legislator did not hesitate to include in the codification provisions that seriously punish discriminations, and, at the same time, the legislator remedies certain de facto inequalities.

In the current Criminal Code, the criminal legislator devoted few texts to incriminating discriminatory deeds, namely art. 166 of the Criminal Code – propaganda for a totalitarian regime, art. 247 of the Criminal Code – official misconduct by obstructing certain rights and art. 317 – abetment to discrimination. As the text of the criminal law is complemented by offences provided for in special laws, other incriminations are stipulated by the Law 78/2000 regarding the prevention, discovery and punishment of cases of corruption, in art. 132 and 17, as well as in the GO 137/2000 regarding the prevention and punishment of all forms of discrimination.

In the new Criminal Code, the principle of equality in reflected in offences such as official misconduct, art. 297 or abetment to hatred or discrimination, art. 369. The legislator’s unification efforts of 2009 focus on regulating in a single article all the three forms of the offence of official misconduct, discussed in the Criminal Code currently in effect. Yet, it does not include the provisions of the special laws enumerated above.

Official misconduct – art. 297 of the Criminal Code

Par. (2) of art. 297 in the special part of the new Criminal Code, according to which “the same punishment [2] applies to the deed of a public official who, while exercising their office duties, obstructs the exercise of a right by a person or creates a situation of inferiority for this person on grounds of race, nationality, ethnic origin, language, religion, sex, sexual orientation, political views, fortune, age, disability, non-contagious chronic disease or HIV infection/ SIDA”, is relevant for our research on the reflection of the principle of equality.

In our opinion, this par. (2) refers to the essential elements of a distinct offense and not to an aggravated form of the basic content of par. (1) of art. 297 of the Criminal Code. The analysis of offence in the new Criminal Code tackles the following issues: legal object, material object, active subject and criminal involvement, passive subject, objective side, subjective side, attempted and committed offence, punishment.

The legal object takes the form of both a main legal object and a secondary legal object. The main legal object consists of the social relations regarding the proper fulfillment of one’s job duties. In our opinion, the secondary legal object consists of the social relations regarding the proffering of equal and fair treatment to
everybody. As concerns the *material object*, the offence described here does not have such an object, as there is no material entity which the offender’s action is directly directed to.

Under par. (2), the official misconduct offense involves a skilled *active subject*, namely the civil servant. Unlike the code currently in effect, the new Criminal Code no longer includes the notion of official [3] as the special part only incriminates deeds that involve the civil servant, or a foreign official at the most, as a skilled active subject. According to art. 175 of the new Criminal Code, a civil servant "is a person who, either permanently or temporarily, with or without remuneration: a) carries out duties and activities set under the law, in order to fulfill the prerogatives of the legislative, executive or judiciary powers; b) holds a position involving public office or civil service of any nature; c) carries out, alone or with other persons, within a public corporation, another business entity or a fully or mostly public corporate body, of a corporate body supplying public services, duties related to the fulfillment of that entity’s business object". In our effort to keep within the limits of our research, we simply wish to point out that the new Criminal Code clarifies the meaning of the term civil servant, and at the same time creates an enlarged area of understanding of the term. If we relate to the general rules of criminal law, we believe that *criminal involvement* is possible under all forms, both proper and improper. We should however note, as regards accomplice ship, this is possible only if all the offenders have the capacity of civil servant and if the offence is not committed by word of mouth.

The *objective side* of any offence is made up of the fact of the case, direct consequence and causal link. The fact of the case of the offence provided for in art. 297 par. (2) of the new Criminal Code consists of two alternative actions: obstruction of the exercise of a right by a person and creation a situation of inferiority for this person on grounds enumerated by the legislator in the incrimination text. The obstruction of the exercise of the right of a person has the same meaning as in the current code, i.e. hindering or preventing [4] a person from making use of a right. The difference with the code currently in force consists of giving up the redundant expression “obstruction of the use or exercise of the rights of a person”; in this context, use and exercise have an identical connotation, and therefore one of the two terms was superfluous and was given up, and the legislator fortunately kept “exercise”, which qualifies the fact of the case better. The alternative action within the fact of the case consists of the creation of a situation of inferiority in grounds of race, nationality, ethnic origin, language, religion, sex, sexual orientation, political views, fortune, age, disability, non-contagious chronic disease or HIV infection/AIDS. The situation of inferiority is the creation of an environment of inequality and discriminatory among people, on one of the grounds expressly, alternatively and restrictively enumerated by the legislator. Unlike the current Criminal Code, the legislator of the new code gives up some of the discrimination grounds, namely gender, opinion, convictions, social origin, or uses other terms, such as ethnic origin instead of ethnic group. The ethnic group is a group of people who share the same origin, language and cultural traditions, and therefore replacing this term by the phrase “ethnic origin” underlines a restriction of the possibilities for discrimination on grounds of origin alone. Also, the legislator of the new code gives the following grounds for discrimination: gender – thus excluding the incrimination of discrimination based on the inclusion in a particular group of human beings characterized by a common feature; opinion, defined as belief or judgment, probably counting on the fact that a situation of inferiority based on opinion leads to the violation of the freedom of speech; in the criminal law in force, convictions are a stronger variant from the viewpoint of legal effect, of opinion, consisting of a firm belief related to a thing and being closely related to its expression, and social origin refers to a person’s family or walk of life. We think that the legislator of the new Criminal Code intended to join together the provisions regulating discrimination, and by the corroboration with the provisions of the GO 137/2000 gave up the grounds that represented similar motives of creation of situations of inequality. We also noticed an agreement between the grounds for discrimination stated by the two regulations. The only motive that no longer appears in the new Criminal Code, yet it is still included in the ordinance, is that related to convictions.

The *direct consequence* consists of the state of danger created, in our case the violation of a right of a person, and the *causal link* should exist and it should materialize in the following assumption: if the civil servant had not restricted the exercise of the right of persons or if he/she had not created a situation of inferiority on one of the grounds enumerated above, he/she would have not trenched upon any right of the person.

*Attempted and committed offence.* An attempted offence of official misconduct is possible and it is not punished. Nevertheless, this is not possible if the offense is committed by word of mouth. The commission of the offense occurs when the right of the person is restricted or when the situation of inferiority is created.

The legislator of the new code increased the *punishment* from 6 months-5 years to 2-7 years of imprisonment, and the suppression of the right to hold public office. When the law, as is the case now, also provides this type of complimentary punishment, the provisions of art. 66 par. (1) let. a) and b) of the new Criminal Code also apply. Thus, any such civil servant will be deprived of the right to be elected in public authorities or to hold any other public office, as well as of the right to hold a position involving the exercise of the State’s authority. Art. 309 of the new Criminal Code – Deeds that had extremely serious consequences – applies in direct connection with the imprisonment time. According to this article, if the deeds provided for in (…), art. 297, (…) had extremely serious consequences, the special limits of the punishment provided by law are reduced by half. According to art. 183 of the new Criminal Code, extremely serious consequences involve...
damages the value of which exceeds 2,000,000 lei. We noted that the amount of the damage is considerably higher in the new Criminal Code and the legislator no longer included in this category serious differences with the activity of a public authority or of any of the entities referred to by art. 145, or of any other corporate body or natural person.

**Abetment to hatred or discrimination – art. 369 of the Criminal Code**

The new marginal name of the offense is terminologically based on the use of synonyms, as the term instigation is replaced by abetment. From the viewpoint of criminal law, the meaning is the same, that of instigation, incitation. The content of art. 369 of the Criminal Code is simplified as compared to the regulation in force and reads “the abetment of the public, by any means, to hatred or discrimination against a particular category of persons”. The legal object of the analyzed offence refers to the social relations regarding the keeping of public order and peace, and the description of the deed reveals no material object. Any person may be the active subject of the offence, and, by corroborating this with art. 135 of the new Criminal Code, that person may even be a corporate body. Criminal involvement is possible under all its forms, except for accompliceship, if the abetment is done by word of mouth. As concerns the objective side, we want to emphasize that the fact of the case may be an action, the abetment to hatred or discrimination, and, unlike the regulation in effect, this abetment may be done by any means, as the types of incrimination is not longer restricted. The number of acts of abetment is not important, as one is sufficient for the offence to take the committed form. Although the legislator fails to specify this explicitly, we believe that in order for the deed to take the form of an offence it should be done in public. The direct consequence consists of a state that threatens public order and peace, and a causal link should exist. The subjective side involves intention, which may be direct or indirect. The offence is committed with direct intention when the purpose is the creation of a situation of inferiority for the damaged person, and with indirect intention when, although the purpose is not the creation of a situation of inferiority, its creation is accepted. An attempted offence of abetment to hatred or discrimination is possible, yet it is not punished, and the commission of the offence occurs on the occurrence of the first act of abetment.

The second direction guaranteeing the constitutional principle of equality consists of remedying de facto inequalities. A de facto inequality involves the existence of several categories of people subject to a risk of unfair treatment – vulnerable people. A person’s vulnerability is related to the quality of the victim, a concept that has been increasingly employed, considering scientific development called victimology. A vulnerable person is a person that is unable to exercise the attributes of his/her legal personality or is unable to accurately exercise his/her rights and liberties [5]. Therefore, the state of vulnerability is defined by examples (age, disease, disability, physical or mental deficiency, pregnancy – apparent or known to the offender), and the legislator wanted to provide better protection to these categories of people, when they are the passive subjects of offences. The offender’s resolution to commit the offence also relies on the intention to exploit the victim’s vulnerability, as the former is aware of the unequal balance of power between them.

A first example of de facto inequality reduction in the new Criminal Code is given by a newly incriminated deed, aggression against the fetus. The regulation of this new offence establishes the equality between the fetus during his/her intrauterine life and the child during his/her extrauterine life. Article 202 of the new regulation is welcome, as it confers criminal protection to the fetus for a period that is not covered by the Criminal Code in force, namely the time elapsed between procreation and birth. This element of novelty turns our attention to constitutional law, which takes a step towards the current called the constitutionalization of criminal law. Criminal law currently refers to two theories on the moment when life begins [6], and implicitly on the moment when criminal protection begins. According to the first theory, life begins at the time of birth, when the fetus leaves the mother’s uterus, even if his/her leaving the uterus is not complete. The second theory, also preferred by the Romanian criminal law, argues that the moment of a person’s entering this world if the moment of the fetus’ complete separation from his/her mother’s umbilical cord, i.e. the moment when the production of conception is no longer a fetus but a baby and he/she starts to have an independent life from his/her mother, in the sense of the onset of the baby’s pulmonary breathing. We noticed that Romanian criminal law specialists have started to prefer the first theory precisely by incriminating this deed.

The new Criminal Code even employs in its text the term vulnerable persons and concentrates several offences in a single distinct chapter – Trafficking and exploitation of vulnerable people. The legislator of 2009 considers offences with passive vulnerable subject the following: slavery (art. 209), human trafficking (art. 210), trafficking of minors (art. 211), submittal to forced or compulsory labor (art. 212), pandering (art. 213), begging exploitation (art. 214), using a minor for begging activities (art. 215) or using the services of an exploited person (art. 216).

As a general remark, we may say that this new chapter observes the requirements of unification of similar provisions in this field, as it includes incriminations provided for in the Law 678/2001 or GO 194/2002. The offence of begging is no longer regulated by the new code, although it was included in the former one, yet two new deeds directly connected to it are incriminated – begging exploitation or using a minor for begging activities, as experience has shown that most of the times the people who beg are nothing but the interfaces of
actual organized crime networks. Further to the ratification by our country of the Council of Europe Convention on Action against Trafficking in Human Beings [7], the legislator of the new Criminal Code includes the offence of using the services of an exploited person.

From the viewpoint of the topic we wanted to analyze, the new Criminal Code is characterized by a bigger preoccupation to guarantee the principle of equality, as compared to the code in effect. Although this principle is not explicitly defined in the code, it is however ubiquitous, and the idea of recodification of the criminal law provisions are in line with the contemporary phenomenon called constitutionalization of criminal law. We support this statement by arguing that a fundamental principle such as the principle of equality knows many applications in the special part of criminal law alone, without considering the general part, which materialize in the legislator’s preoccupation to avoid the construction of situations of inequality, as well as the punishment of deviant behaviors leading to the creation of a situation of inferiority.

References

[2] The punishment provided by the legislator for the deed under par. (1) is 2 to 7 years of imprisonment and the suppression of the right to hold public office.
[3] Nonetheless, a distinct category is created in addition to civil servant, i.e. natural person practicing a profession involving public interest.
[7] The convention was ratified by the Law no. 300/2006.
The response of the new romanian criminal code to crisis, europeanization and globalization in the matter of territorial enforcement of the criminal law

Lascu L.A.

Faculty of Law, University “AGORA”, Oradea (Romania) liviulascu@yahoo.com

Abstract

The article aims to analyze some changes introduced by the new Romanian Criminal Code in the matter of territorial enforcement of the criminal law. The legislator has taken in account the challenges of the current social and political conditions of Romania. From this perspective, we may see in this new code, the matter of territoriality is supplemented with some additional provisions for defining the notions of crime and territory, the principles of personality and reality have undergone some adjustments in order to be more effective and the principle of universality has been reformulated for the purposes of being applied in only those cases in which, Romania has assumed some obligations to international level. Some new elements like “surrender the persons” to another EU Member State or to an international criminal court have been also introduced as legal instruments in the matter of international cooperation. These changes appear to be justified in the light of the obligations Romania has assumed.

Keywords: territoriality, personality, reality, universality, surrender, extradition.

Introduction

The current social and political realities of the Romanian society have entailed the provisions of the new Romanian Criminal Code relating to the principles of territorial enforcement of the Romanian Criminal Law to be significantly different than those currently into force, regulating the same matter. The fact Romania is nowadays a Member State of the European Union and also a signatory State of the European Convention on Human Rights, as well as a party of the Treaty of Rome establishing the International Criminal Court, are key issues that led to some important changes in what regarding these principles. Not only the requirements related to the rule of law in a democratic State had influenced the shape of the new Criminal Code but also some de facto aspects like: a significant emigration of the Romanian citizens to other E.U. countries for getting better jobs or because of the effects of the economic crisis; the increasing ratio of the external crimes involving Romanian citizens; the fact Romania is a part of the itinerary for the cross-border crimes like drugs or human being traffic, illegal immigration, terrorism, e.t.c.

The principle of “territoriality”

According to the principle of “territoriality”, the Romanian criminal law can be applied throughout all the Romanian territory, in what concerning all kind of crimes, undiscriminating the perpetrators according to their citizenship, namely, Romanian citizens, foreign citizens or persons without citizenship. The enforcement of the Romanian Criminal Law in what concern the crimes committed in the area on which the Romanian state exercises its sovereign prerogatives represents an exclusive and unconditional attribute of the Romanian authorities.

Regulating the principle of territoriality, the new Criminal Code shows novelty not only by rearranging the structure of the current text but also by bringing the articles describing the concepts of “territory” and “crime committed in Romania” from the final title dedicated to “the meaning of the words or the phrases of the Criminal Code” to the section dedicated to this principle. There are also some changes aiming to supplement the current provisions and to clarify the meaning of some concepts. The paragraph (3) stating what means “a crime committed on the Romanian territory” remains basically the same, in the sense, a crime shall be deemed as fallen under the Romanian authorities’ jurisdiction, ratione loci, if it has been committed on the territory of Romania, on a Romanian ship or aircraft. However it is to mention that the new Criminal Code specifies in addition that the vessel must be under the Romanian flag and the aircraft must be registered in Romania. This
provision is very useful because it removes the gaps as well as the uneven or speculative interpretations of these concepts. The law does not distinguish if the Romanian vessels or aircrafts are situated in the moment of the crime commission on the territory of Romania, on a territory of a foreign State or a territory which is not under the jurisdiction of a State. The distinction wouldn’t be meaningless because, if the crime has been committed in Romania or in an area not subject to the jurisdiction of a State, no doubts, the Romanian criminal law is going to be fully applicable ratione loci but, if the crime has been committed in the territorial sea, in some mooring or landing places of a foreign State, then the criminal law of that State is going to be applied. The Romanian criminal law might be applicable, in certain circumstances, but only under the principle of “reality” or “personality” of the Romanian Criminal Law.

There is no indication regarding the crimes committed outside of the ships or aircraft, but in their proximity. According to the international customary law, the applicable law depends on what kind of ship or aircraft is under discussion: if a military or governmental one, the so called “law of the flag” is applicable, that is, the jurisdiction ratione loci belongs to the State owning that ship or aircraft; if having a commercial, civil or any other else statute, the applicable law is that of the State on which territory the crime has been committed. In other words, the principle of “territoriality” is justified by the nature of the vessel or aircraft, but unfortunately, the new criminal law does not distinguish it. It is quite possible to be an intentioned gap of the legislation because there are a lot of international customary laws and agreements relating to such incidents.

In the other hand, we observe some criminal doctrines which expand the scope of the principle of “territoriality” even to more other situations. The French Criminal Code, for example, states that its provisions are applicable to the crimes which have been committed against the French military ships or aircrafts, wherever they would be situated in the moments of commission and in certain circumstances, even to the crimes committed aboard the ships or aircrafts not registered in France. So being, we conclude, the scope of the concept of “territoriality” in the legal sense, is not yet uniformly defined in the criminal doctrines of the States.

There is also some criticism of the new Criminal Code because the Article 8 paragraph (3) does not include into the definition of “territory” the entities like offshore platforms, artificial islands and installations belonging to the Romanian State but outside of its geographical area.

Within the paragraph (4) of the Article 8, the new Criminal Code defines the principle of ubiquity, according to which, a crime shall be deemed as committed entirely within the territory of a certain state, only if at least one element of the actus reus of that crime has been done on the territory of this state. In addition to the current provisions stating an act of execution or the result of the crime, the mentioned above paragraph of the new Criminal Code introduces some novelty items, namely, the incitement, the complicity and the partial result of the offense. These changes seem to be justified if taking in account the definition of the crime commission. Both in the current and in the new Criminal Code, the incitement and the complicity belong to the concept of crime commission, in its broader sense, together whit the notions of perpetration (co-perpetration) and attempt. In what regarding the added provision “part of the result of the crime”, we also consider it welcomed as long as the judicial practice gives us countless examples of crimes whose results are materialized in more than one place. Had we refer, for example, to the so called continued crimes or custom crimes, there is a major likelihood that only certain acts or part of the results of those crime to occur within the territory of one country. Not including the provision “part of the result of the crime” among the elements which allow the enforcement of the principle of ubiquity would increase the chances of the criminals to evade the criminal law enforcement.

In the literature, there is also some criticism regarding the application of the ubiquity principle where the crimes have been committed by omission in the sense, the legislator should add a mention about the place where the perpetrator had to do an act as well as in the case of an attempt, should specify the place where the result of the crime was expected to take place, according to the perpetrator’s decision. However, we cannot say, the absence of the last mentioned provisions would affect in a way the principle of ubiquity.

The principle of “personality”

Enshrined in the most of European doctrines, known, also, like the “active nationality principle”, this principle is deemed as being complementary to the principle of “territoriality”. It ensures the efficiency of the
Romanian criminal law by enlarging its enforcement to the situations where the Romanian citizens, being outside of the country, have committed crimes.

Within the provisions of the Article 4, in the current Criminal Code we don’t identify any limitation of the principle of personality. Unlike, the legislator has found that some limitations in the new Criminal Code, as stated in Article 9 (1)-(3), must be introduced. Thus, the unconditional application of the principle, according to the provisions of paragraph (1) shall be made only if the crime committed abroad is punishable with life imprisonment or imprisonment for more than 10 years or, under paragraph (2), last sentence, for crimes committed on a territory which is not the subject of a state’s jurisdiction. For the small and medium gravity crimes, such as those punishable with imprisonment up to 10 years, the paragraph (2) of the same article requires the condition of double incrimination, that is, the fact committed by the Romanian citizen to be considered also a crime in the light of the criminal law of the state where it was committed. According to the opinion of many specialists, this change of the legislation was required since long time ago because it is a model supported by the most of the European doctrines.

Another amendment, justified by practical reasons, in order to avoid unnecessary loading of the Romanian judicial authorities is the preliminary authorization of the General Prosecutor of the Prosecutor's Office attached to that Court of Appeal which was first notified with the case, or, according to case, the preliminary authorization of the General Prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice.

We can mention, also, two changes introduced by the new Criminal Code, related to what kind of subjects should be applied the provisions regarding the principle of personality. Firstly, we observe that a new kind of subjects, namely the “Romanian legal persons” appears into the text of the law and secondly, another kind of subjects, “stateless persons residing in Romania” has been removed. The first amendment appears to be justified because once the legal persons are subjects of criminal responsibility under the Romanian criminal law, they, obviously, have to bear the consequences of the principle of personality. In contrast, the second amendment is challenged by many authors as being contrary to the principle of personality, because the stateless persons residing in the country are treated like the Romanian citizens, they enjoy almost the same rights and consequently, it would be natural to withstand the rigors of the Romanian criminal law, even for crimes committed outside of the country. There is still no explanation coming from the authors of the new Criminal Code regarding this removal but, regulating in this manner, an old tradition which dates back from the adoption in 1936 of the Criminal Code of the king Charles the Second, has been broken.

A final remark regarding the principle of personality of the criminal law is related to the transition period when the problem is to decide what criminal law will be the most favorable. From this perspective, the provisions of the new Criminal Code are more favorable in two situations: if the penalty provided for the crime committed abroad, is a fine or imprisonment up to 10 years and the act is not incriminated by the criminal law of the state; if there is no a preliminary authorization of the General Prosecutor as it is provided in the Article 9 (3) of the new Criminal Code. As these conditions imposed by the new law, by their nature, restrict the area of the personality principle’s application or impose some additional procedural requirements than those of the old law, they are obviously more beneficial and will be applied retroactively.

The principle of “reality”

Another principle designed to achieve the purpose of Romanian criminal law is the principle of reality known also as the “passive nationality principle”. It means, if a foreign person commits a crime outside of Romania, and the passive subject is the Romanian State or a Romanian citizen, that foreign person is going to bear criminal responsibility according to the Romanian criminal law. The regulation of the current Criminal Code states that the Romanian criminal law enforcement is limited to the situations where the crimes committed by the foreign citizens have affected the “Romanian State security”, created “serious bodily injury” or affected the “health” of a Romanian citizen. As the nowadays jurisprudence shows countless other kinds of crimes, not stipulating them among those the reality principle has incidence on, would be likely to create a major sense of injustice. This is the reason why the Article 10 of the new Criminal Code expands the area of applicability of the reality principle to all crimes committed abroad against the Romanian state, the Romanian citizens and legal entities. The legislative took in account, in particular, the crimes belonging to the so called “organized criminality” which are committed abroad against Romanian state or citizens and whose consequences can be very bad, even if they don’t affect the life, the physical integrity of the citizens or the national security. For the same reasons like in the case of the principle of personality, in such cases, the prosecution remains a subject to the preliminary authorization of the General Prosecutor.

It is also to mention, the new Criminal Code imposes an additional condition for applying the principle of reality, namely the crime committed by the foreign citizen “do not be the subject to judicial proceedings in

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situation, we consider there are no many favorable in this sense. Firstly, it should be noted that the Romanian legal person has been introduced as a passive subject and the stateless person living in Romania has been removed from the content of the article. As the situation is the same, these changes do not require additional comments to those made in the previous chapter.

In what regarding the transitional situations when into question is the principle of “the most favorable criminal law”, we can see the following situations: when the provisions of the Article 10 paragraph (1) of the new Criminal Code are applicable, “the most favorable criminal law” will be the current Criminal Code because it limits the applicability of the principle; when it comes to applying the provisions of the Article 10 paragraph (2), “the most favorable criminal law” is the new law because it provides an additional condition, that is, the criminal act not be a subject to the judicial proceedings in the State on which territory, the crime has been committed.

The principle of “universality”

In what regarding this principle, we can say that it has been adopted as a tool of last resort, in order to convict the criminal acts of extreme gravity, affecting the universal values which are recognized and protected by the whole international community and which, for some reason had not been prosecuted by the states having a direct concern in these cases. The current regulation applies to the offenses committed by foreign citizens or stateless persons, outside of Romania, other than those covered by the reality principle, with two conditions: the double incrimination of the crime; the perpetrator to be willingly in a place considered as being a Romanian territory.

The text of the new law, regulating the matter, namely the Article 11 of the new Criminal Code, was completely reformulated. The new wording of the principle of universality has exactly circumscribed the area of the applicability of this principle, limiting actually the enforcement of the Romanian criminal law in only two situations: when, according to Article 11, paragraph (1), letter a) it is about a crime, the Romanian state did a commitment to suppress it according to an international convention; when, as provided in Article 11 paragraph (1) letter b), the Romanian state has refused the extradition of a person, thus, following the principle “aut dedere aut judicare” it is called to prosecute and try this person.

We observe that some provisions of the current law, concerning the exceptions of the application of the universality principle and the application of the principle “ne bis in idem” have not been modified.

A foresight of the application of this principle in future is difficult to make now, but given the current situation, we consider there are no many favorable in this sense. Firstly, it should be noted that the principle of universality arouses controversy in the bilateral relations between some states and is still not recognized by the criminal doctrines of the other states. On the other hand, this principle is related to some extremely grave crimes, which are subjects of the jurisdiction of the International Criminal Court, and therefore is more likely the remedy to be found at this level than to the level of a State which, in principle, has no direct involvement in the case.

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1 The fact a Court of Belgium accepted, based on the principle of universality of the criminal law, to commence a criminal trial, on 18 June 2001, after a complaint of some survivors and relatives of the Palestinians victims killed by the Lebanese Phalangists Christian Militia, supported by the Israeli troops in the camps of Sabra and Shatila in 1982, where the main accused was the Israeli Prime Minister, Ariel Sharon, was likely to swell in such a way the relations between these two countries, that Israel has threatened to break diplomatic relations with Belgium. See, Kattan, V, From Beirut to Brussels: Universal Jurisdiction, Statelessness and the Sabra and Chatila Massacres in “Yearbook of Islamic and Middle Eastern Law”, vol. 11, University of London, 2004-2005, pp. 32-82.

2 The Common Law States, in general, do accept the application of the principle of universality of the criminal law only where the offenses to be applied, have violated the universal values, belonging to the so called “jus cogens”. See, Malanczuk, P, Modern Introduction to International Law, Routledge Publisher, Seventh edition, London, 2004, p 112.
Other legal provisions concerning the territorial enforcement of the Romanian criminal law

The enforcement of the above mentioned principles has also some exceptions. In the latest articles of the chapter regulating the territorial enforcement of the criminal law, there are some legal provisions establishing the following: the legal provisions of the international treaties to which Romania is a Member State, prevail over the Romanian criminal law; the diplomatic representatives of the foreign states enjoy immunity from the Romanian criminal jurisdiction according the international standards and customary laws; in some conditions previewed by the law, Romania accepts the extradition of the persons to other states.

From this point of view, the new Criminal Code does not modify the essence of the provisions currently into force. The only issue with novelty is the introduction of the expression “surrender a person”. It is commonly used in relation with another Member State of the European Union and also with an international criminal court. When talking about the transfer of a person to another EU country, it must be specified that the goal set up by the most recent E.U. treaties to create a European area of freedom, security and justice\(^9\) has required the replacement of the system of multilateral extradition built upon the European Convention on Extradition of 13 December 1957. The last mentioned system involved a rather complicated mechanism of bureaucratic procedure, implicitly time duration of legal proceedings and was made exclusively by the Member States acting unilaterally. It is why the E.U. Member States have unanimously decided in the European Council that this policy is easier to be achieved, under “the principle of subsidiarity”\(^10\) to the E.U. level. Thus, the Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant has created a simplified system of surrender of the sentenced or suspected persons between the Member States which eliminates the previous complex procedure.

In what concerning this procedure in relation with an international criminal court, as we can see, it differs fundamentally from the extradition as the surrender of a person is not granted following a request of another sovereign state, but at the request of an international tribunal, that is, a supranational organization with jurisdiction in criminal matters. Romania through the Law no. 111/2002; ratified the Rome Statute of the International Criminal Court.

The essential achievement of these above mentioned procedures of surrender is the fact they have established a system of free movement of the judicial decisions in criminal matters. In other words, they have removed the political decision of the Member States from the field of cooperation in criminal matters, which is a real achievement because in the past time, in many occasions, the extradition proceedings resulted in delayed or impaired performance of justice.

A final observation about the procedures introduced by the Framework Decision 2002/584/JHA is that, given the increased possibilities of the national judicial authorities to bring the perpetrators before the courts, no matter where they are located in EU, inevitably, it will significantly reduce the applicability area of the personality and reality principles of the Romanian criminal law. Actually, we believe their application will occur especially in the situations where the crimes have been committed on a territory outside of the E.U.

Conclusions

The changes introduced by the new Criminal Code relating to the territorial enforcement of the Romanian criminal law have been expected since long time ago, either because the current Criminal Code had been adopted under a different political regime and many of its provisions are not harmonized with the current realities and the spirit of Romanian Constitution, or because of the international commitments Romania has undertaken. If this new code has succeed or failed to create a modern and efficient legal framework in the criminal matter to which we refer, it is too early to say today. Even if the most of the innovatory provisions introduced by the new Criminal Code appears to be justified, there are some changes that are not supported by a reasonable explanation. We can mention here the provision according to which, the stateless persons residing in Romania have been removed from the subjects who bear the application of the principles of personality and

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\(^9\) See the provisions of Article 61 of the Treaty on European Communities, reiterated by the current Article 67 of the Treaty of the European Union, according to the numbering introduced by the Lisbon Treaty, in force since 1 December 2009, which states that the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and for different legal systems and legal traditions of the Member States.

\(^10\) Known also under the slogan “as close to the people as possible”; the principle of subsidiarity as set out in Article 5 paragraph (3) of the Treaty of the European Union states that “Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action can not be sufficiently achieved by the Member States either at central level or at regional and local level, but the scale and effects of the proposed action, be better achieved at Union level”. 

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reality. These amendments not only contravene to the criminal law tradition in Romania but also exclude the application of its provisions to a kind of people widely spread in the EU landscape. The resident person without citizenship, that is, the person who legally resides into a country but who is not a national of another country, enjoy almost the same rights like the citizens of that country, excepts, as a general rule, the right to vote and to be elected. If we refer only to the European Union, even these restrictions has been significantly reduced as the resident persons are allowed nowadays to vote or to be elected into municipal and European elections. If these attributes which until recently have been seen as the purest expression of the notion of citizenship underwent adjustments in the sense of being extended to the resident persons, it is hard to understand why, the punitive or protective effect of the Romanian criminal law, according to the case, should not be applied to these kind of people outside of the country, especially where not other else legal remedies exist.

Finally, perhaps after the entry into force of the new Criminal Code, in conjunction with the new Code of Criminal Procedure, some of its provisions will prove to be inadequate or inapplicable. However, they won’t be absolute impediments as long as their change is also possible. As a final remark, we think that in any case, not the theoretical commentaries but the concrete application in the practice is the true test for the new Criminal Code. We only hope the fate of the new Romanian Criminal Code to be a different one than of that adopted in 2004 and not entered ever into force. We also expect that its provisions widely acclaimed as beneficial to be as soon as possible applicable.

References

[2] The French Criminal Code which provides that French criminal law applies to crimes committed on board or against aircraft not registered in France if the following conditions exist: the perpetrators or the victims are French citizens, the aircraft landed in France after the crime has been committed; the aircraft was rent, without a crew, to a person who has his/her seat or residence in France.
[4] The fact a Court of Belgium accepted, based on the principle of universality of the criminal law, to commence a criminal trial, on 18 June 2001, after a complaint of some survivors and relatives of the Palestinians victims killed by the Lebanese Phalangists Christian Militia, supported by the Israeli troops in the camps of Sabra and Shatila in 1982, where the main accused was the Israeli Prime Minister, Ariel Sharon, was likely to swell in such a way the relations between these two countries, that Israel has threatened to break diplomatic relations with Belgium. See, Kattan, V, From Beirut to Brussels: Universal Jurisdiction, Statelessness and the Sabra and Chatila Massacres in “Yearbook of Islamic and Middle Eastern Law”, vol. 11, University of London, 2004-2005, pp. 32-82.
[5] In another case, the fact that the Government of Chile vehemently protested against the decision of a court in London, in January 2000, to extradite the former Chilean president, gen. Augusto Pinochet on charges of murder and torture of thousands of Chilenas, by an Appeals court in Spain, after the request of Judge Baltasar Garzon, the Supreme Court of U.K., namely, The House of Lords, rejects, finally, with a very tightly vote, the request for extradition, more for political than legal considerations. See, Sugarman, D, From unimaginable to possible: Spain, Pinochet and the judicialization of power in “Journal of Spanish Cultural Studies”, Volume 3, Number 1, Routledge Publisher, 1 March 2002 , pp. 107-124
[6] The Common Law States, in general, do accept the application of the principle of universality of the criminal law only where the offenses to be applied, have violated the universal values, belonging to the so called “jus cogens”. See, Malanczuk, P, Modern Introduction to International Law, Routledge Publisher, Seventh edition, London, 2004, p 112.
[7] See the provisions of Article 61 of the Treaty on European Communities, reiterated by the current Article 67 of the Treaty of the European Union, according to the numbering introduced by the Lisbon Treaty, in force since 1 December 2009, which states that the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and for different legal systems and legal traditions of the Member States.
[8] Known also under the slogan “as close to the people as possible”, the principle of subsidiarity as set out in Article 5 paragraph (3) of the Treaty of the European Union states that “Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action can not be sufficiently achieved by the Member States either at central level or at regional and local level, but the scale and effects of the proposed action, be better achieved at Union level “.
The criminal immunity from jurisdiction of the diplomatic agent. Theoretical and legal fundamentals

Maftei J.

Associate Professor, PhD, Danubius University of Galati, (Romania) janamaftei@univ-danubius.ro

Abstract

In this study we aimed at analysing the theories underlying the diplomatic immunities and their regulation by the framework convention of decoding the diplomatic relations, in relation to state sovereignty, focusing on the criminal immunity from jurisdiction of a diplomatic agent. The issue of criminal immunity from jurisdiction of the diplomat has an important place in the practice of interstate relations, but also in the concerns of researchers. Based on doctrinal views found in the specialized literature, there were highlighted elements that define the criminal immunity from jurisdiction of diplomatic agent and its complete and absolute feature. In order to achieve the proposed objectives we used as research methods the analysis of doctrinal views expressed in the specialized literature, research documentation, interpretative and comparative method.

Keywords: criminal jurisdiction, diplomatic agent, diplomatic immunity, international law, jus cogens, state sovereignty, Vienna Convention on Diplomatic Relations of 1961

Introductive Considerations

Globalizing the international relations, the interdependence became more pronounced between states determining them to acquire a considerable permanency in the attention of researchers, with issues such as preserving and enhancing international solidarity and the coexistence of states in the international community, which cannot be achieved without the compliance of certain “essential rules of law and morality”, of certain “rules of dignity and mutual respect” [5]. In all these rules, the principle of sovereignty, as a fundamental principle of international law, applicable to the relations between states, acquires complex valences of cooperation between states more today than in the past. The requirements solving problems arising from the principle of sovereignty in relation to other fundamental principles of the international law, as they were formulated by the consensus between the states, developed also on the diplomatic relations [9].

Vienna Convention on Diplomatic Relations of 1961 established by its regulations a specific legal status both to the diplomatic mission and the mission staff, resulted in the granted immunities, privileges and facilities. Within them, the diplomatic immunities represent a separate category that is reflected in the special treatment that the receiving state is granting to the diplomatic missions and their personnel, expressed by exempting them from the criminal and civil jurisdiction of that State. In his work, Guide to Diplomatic Practice, Satow appreciated that the distinction between immunity and privileges is not an easy thing to do, that “the terms are often used interchangeably, but in general a privilege denotes some substantive exemption from laws and regulations such as those relating to taxation or social security, whereas an immunity does not imply any exemption from substantive law but confers a procedural protection from the enforcement process in the receiving States”. [10].

The diplomatic immunity is a principle of international law and it represents an exception to the general principle, according to which any person is subject to the national jurisdiction of a State, under sovereignty. The national sovereignty and its recognition and compliance by the subjects of the relationships covered by the international law are the foundation of the international system and the fundamental principle of conducting the interstate relations, as the diplomatic immunity is a prerequisite in the relations between states and any analysis of diplomatic relations between states must cover this subject as well. One may think that immunity from jurisdiction contradicts the idea of sovereignty, because in the essence it involves a limitation of territorial jurisdiction. Boutros Ghali, former UN Secretary-General stated that “no state sovereignty, the true instruments of international cooperation can be destroyed, and the international cooperation itself could become impossible”. [5] But the international law establishes immunity from jurisdiction as an exception which should be interpreted and applied restrictively and it has been established as international rule by the agreement between sovereign states. In the Dictionary of diplomatic law it was stated in this regard that the immunity from jurisdiction “is
granted on a reciprocal basis, through bilateral agreements, for the sovereign equality of states, in order to ensure the best possible performance in terms of the functions of diplomatic missions.” [1]

Immunity from jurisdiction arises from the relationship between subjects of international law, states involved in diplomatic relations. The state granting the diplomatic status is a receiving State and the sending State is the owner of the subjective right of the jurisdiction immunity. According to article 32 of the Vienna Convention of 1961, only the sending State may renounce at the immunity from jurisdiction of diplomatic agents and of the persons enjoying immunity; this renunciation must always be expressed. As a result, the diplomatic agents of the sending State are the only beneficiaries of this legal status that includes jurisdiction immunity, imposed by rules belonging to the international law. Under these rules of international feature, the receiving state shall establish in the national law a set of rules that will govern the immunity from jurisdiction of which the diplomatic agents of the sending State benefit.

Vienna Convention of 1961 and bilateral agreements regulating the diplomatic relations establish expressly also the categories of persons enjoying jurisdiction immunity. In accordance with article 17 of the Vienna Convention, these immunities are recognized to diplomats (Head of Mission and other members of diplomatic staff: counsellors, secretaries, attachés), and their families, members of the administrative and technical staff and service personnel. Vienna Convention of 1961 establishes in article 1 the exact meaning of each of these expressions which refer to categories of the persons listed above [10]. The extension of immunity jurisdiction, however, differs according to the category to which these people belong. Thus, if the immunity jurisdiction in terms of the acts that they perform in their official quality is destined to all members of the diplomatic mission, regardless of the category to which they belong, the immunity from jurisdiction for acts that is not related to their official quality will not have the same extent in the sphere of people who benefit from this status, the limits being established by article 37 and 38 of the Vienna Convention of 1961. These immunities are acknowledged by the members of diplomatic missions in order to enable them to exercise their functions so that the local authorities would not bring them restrictions.

**Theories that are the Basis of Immunity Jurisdiction**

As many of the institutions of international law the diplomatic immunity also has its origins in antiquity. It exists for millennia and it was born out of the need to protect the resident emissaries abroad during the international conflicts, the messengers’ person being inviolable. Historians have shown that in ancient Greece, in India, China, Rome it was practiced the diplomatic immunity. The concept of diplomatic immunity has grown continuously and it is justified by the doctrine by three theories: the theory of extraterritoriality, representation theory and functional theory (ne impeditatur officium principle) [7:484]. The theory of extraterritoriality, the oldest of these doctrines, made by Hugo Grotius, is an exception to the rule of territorial supremacy. According to this principle, the legal norm acts in space and on people acting within the state territory, delimited by frontiers. Extraterritoriality theory creates the fiction [13] that those responsible for these functions, diplomatic mission headquarters, as well as residence of the diplomatic envoy would reside on the territory of the sending State, although actually it is located in the receiving State. Although it was initially supported by most of the doctrinaires and it survived for three centuries, today it is rejected because of the deficiencies that it could create, the dangerous and impractical nature of it is highlighted by the situation in which, for example, the diplomatic mission headquarters would cover a large part of the city, which would make this whole area to be excluded from the law of the residence State. [12]

According to the representation theory, supported by Burlamaqui and Montesquieu [8], the diplomats act on behalf of a sovereign state and they embody the ruler of that state. It may be considered that the diplomatic envoy is an alter ego of the sovereign. Therefore, the representative of a sovereign state replaces the sending State. As a result the impairment to the diplomat would be an offense against the sovereign and even of the foreign state that it represents [2]. This theory involves, however, several drawbacks. On the one hand, it can never be on the same level the immunity of the foreign representative and the immunity of the sending State. This situation considers the diplomat person above the law of the receiving State, the diplomatic envoy can never be submitted to the legislation of the residence state, due to the fact that a State may not be submitted to the laws of another state. On the other hand, the theory has been affected by the evolution of the state as a political and legal entity and the decay of the monarchical absolutism, which led to a confusion regarding the diplomatic representation. The modern era has brought changes in this respect, in the sense that diplomats no longer represent the head of the state, but the state itself. The theory was supported in part by the Vienna Convention of 1961 on Diplomatic Relations, which recognized that the diplomatic mission represents the state in article 3 letter a, stating that one of the functions of the diplomatic mission is to represent the sending State in the receiving State. Finally, reliance on this theory would extend the diplomatic immunity also on the private actions of diplomats, creating a statute broader than necessary for carrying out the diplomatic functions. The functional immunity doctrine accepted today in scientific studies, and also in the jurisprudence and practice, was stated by Vattel and it fundaments the diplomatic immunity based on functional need. According to this theory, the
dipломat should be exempted from the jurisdiction of the courts of the Residence State from the need to carry out effectively and unhindered its functions. Coding Convention of diplomatic relations included to this theory in the Preamble as follows: “the purpose of such privileges and immunities is not to create advantages to individuals, but to ensure the efficient performance of the functions of diplomatic missions as representing States bodies.” Viewed from this angle, sovereign immunity appears as a way of ensuring the freedom and the independence of the diplomatic agent in exerting the functions which were entrusted. However, and this theory may also be criticized: the strictly functional immunity from jurisdiction would exclude the unofficial acts that the diplomat achieves. The general rule concerns the immunity of a diplomatic agent, that is it enjoys immunity for all acts committed on the territory of the receiving State (article 31 of the Vienna Convention of 1961).

Criminal Immunity from jurisdiction of the Diplomatic Agent

According to article 31 of Vienna Convention of 1961, the diplomatic agent shall enjoy criminal civil and administrative immunity from jurisdiction of the receiving State [4:76]. According to the formulated terms of the Convention, the criminal immunity from jurisdiction is not defined. The criminal immunity from jurisdiction is an exception to the principles underlying the regulations relating to the application of the criminal law. A diplomatic agent shall enjoy criminal immunity from jurisdiction of a foreign state, but this benefit does not preclude the criminal character of the act, but it is built on a procedural exception [3:146]. As a result, the beneficiary diplomatic agent of immunity from jurisdiction could not be prosecuted and tried, it would not be brought any form of constraint from the local police and judicial authorities. It persists, however, on the obligation of obeying the local law. A diplomatic agent shall comply with the legislation of the country where it is approved. If a diplomatic agent commits, however a crime, according to the practice of states, to the rules of international law, and to the doctrinal views, it cannot in any case be prosecuted, tried or punished by the authorities of the receiving State. Therefore, although the diplomat is subject to local law, it cannot be taken any legal action against it for violating the law. This inability to act exists even if the diplomatic agent is guilty of an offense against the State to which he is accredited. The receiving State can only, in such situation, declare the diplomat as persona non grata, to require to the sending State its recall, its trial and condemnation by the authorities of the origin country. [14]

The benefit of criminal immunity from jurisdiction ceases to act on the diplomat if he is guilty of crimes against peace, humanity and war crimes. These crimes are international by their intrinsic nature, “their incrimination and repression is a direct consequence of the international legal norms.” [11] It is about the incrimination of acts affecting the fundamental values of the international society of jus cogens “as an expression of an imperative right with universal vocation”. [11]

In comparison with the other two mentioned forms of immunity, the criminal immunity from jurisdiction is complete and absolute. It will be applied to acts achieved in the exercise of diplomatic attributions and for the private acts of the diplomat. Unlike the criminal immunity from jurisdiction form, the civil and administrative immunity from jurisdiction presents exemptions, according to the Vienna Convention of 1961, if it is about:

a) a real action on a particular property situated in the territory of the receiving State, unless the diplomatic agent does not possess it on behalf of the sending State in order to achieve the purposes of the mission;

b) by an action relating to succession in which the diplomatic agent is involved as testamentary executor, administrator, heir or legatee, not on behalf of the sending State, but as an individual;

c) an action relating to any professional or commercial activity, whichever, it may be exercised by the diplomatic agent in the receiving State outside his official functions.

The jurisdiction of the receiving State becomes in effect in cases where the immunity of criminal jurisdiction is raised or renounced at the benefit of immunity. The diplomat cannot renounce at the criminal jurisdiction immunity. The sending State is entitled to the criminal jurisdiction immunity. This type of immunity is granted to the person entitled to such protection, the diplomatic agent, in the interest of his Government. Therefore it can only be withdrawn by its government. Only he can decide on the renunciation to the immunity. Also the sending State may decide the withdrawal of criminal immunity from jurisdiction of the diplomat. Article 32 of the Vienna Convention of 1961 provides for the renunciation of immunity from jurisdiction as a possibility of action that the sending State has. He may renounce to the immunity from jurisdiction of diplomatic agents. But it must always be an express renunciation.

Conclusions

The compliance of the privileged position of the diplomat is, as stated by R.G. Feltham, traditional. According to him, the representatives of a State may carry on diplomatic activity only “if they are protected from the legal, physical and moral pressure of the state in which they operate, which may be exerted upon them”. [6].
The criminal immunity from jurisdiction of a diplomatic agent shall be placed in relation to all the immunities, privileges and facilities that create the diplomatic status, on a central, very important position. It is meant to protect the diplomat from any prejudice that may be brought to the freedom of action in exercising the diplomatic functions and it appears as a necessary rule. The criminal immunity from jurisdiction of the receiving State shall bear the responsibility to retain in undertaking, through its authorities, actions or enforcement measures against a diplomatic agent. Meanwhile, the members of diplomatic missions have a duty to respect the law of the receiving State and not to interfere in its internal affairs. Even if to the diplomatic agent it is unenforceable the criminal law of the state of residence, he must comply with the legal regulations of the receiving State. People who enjoy criminal immunity from jurisdiction can only answer for their actions in the courts of the sending State.

References
Irregular migration in Europe for crime

Magherescu D.

Gorj Bar Association (ROMANIA) delia_magherescu@yahoo.com

Abstract

In the beginning of the 21st century in Romania, as in whole Europe, an evident and massive movement of the population from the East and Southeast Europe was produced to the West part of the continent. The phenomenon has had several causes from social to economic one. In spite of the general background, each of these was developed in the context of the economic crisis. At the same time, most of the people have chosen not to penetrate the Western countries for a legal purpose, but they arrived in these states in order for them to commit crimes. In this paper, I would like to analyze the most important features of the irregular migration in Europe for a criminal purpose. The main aim of the current topic is to identify the elements of irregular migration as well as the consequences they produce for society.

Keywords: Migration, irregular migration, migration for crime, economic crisis.

Introduction

In the last period of time, we all were witnesses of a new movement of the population from countries situated in the East and Southeast of Europe to the Western part of the continent. This irregular situation was possible on the background of the European Union’s enlargement that refers to the countries which adhered to the European Union in 2004 and then to Romania and Bulgaria that joined the European Union on the 1st of January 2007.

Speaking about the main causes that have produced the migration in Europe for a criminal purpose, it is very important to define the particular feature of the phenomenon being part of the general “picture” having essential elements, both at national and European level – the economic crisis.

In the current paper, I will highlight the connection between the criminal organized groups with the officials and also how the European Union legislation came to “rescue” Western societies from the uncivilized invasion of the East Europeans. A new legal framework was adopted by the European Union authorities, which has to be implemented by Member States in several domains in criminal matters, such as: the framework decision on counterfeiting (Council Framework Decision on combating fraud and counterfeiting of non-cash means of payment (2001/413/JHA) adopted on 29 May 2000 has had as main scope supplementing the measures, which have been taken by Council in order to control and combat the fraud involving particular kind of means of payment.), the framework decision on money laundering (Council Framework Decision on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (2001/500/JHA), adopted on 26 June 2001, increases the effectiveness of cooperation between the Member States on identifying, tracing, freezing, and confiscating the proceeds from crime in purpose to combat the organized crime.) and the framework decision on trafficking in human beings (Council Framework Decision on combating trafficking in human beings (2002/629/JHA), adopted on 19 July 2002, has had as main aim the approximation of laws and regulations of the European Union Member States in the area of judicial cooperation in criminal matters in the field of the fight against trafficking in human beings). Usually, doctrine speaks about the trend of up-criminalisation as being a result of the European Union legislation adopted in criminal matters. [1] It is explained how much the European Union framework decisions have resulted in criminalisation of more acts in some countries. [1]

It is well-known the fact that, despite the other motives, personal ones, which have been taken into consideration by people who decided to leave the home country and move themselves to another one, a particular framework played a leading part in that “game”. It is an illegal one, unfortunately, which has produced consequences as well, as I will state below.

Both political and geographical situation created in the East and Southeast countries in Europe shows us how much such people depend on the legislation adopted at national level, on the one hand, and on the strategies implemented by the home authorities which have to develop programmes in order to create a better life for nationals, on the other hand. In these circumstances, the irregular migration would really be diminished and, even stopped as much as possible for the future.
Opportunities and drawbacks for irregular migration in Europe

On the background of irregular migration of the Eastern people to the West part of the continent, an important place in this respect occurs the fundamental liberties provided by the Lisbon Treaty and the other European Union legislation, which refer to the free movement of the citizens within the European Union area. It also connects other similar rights for Europeans, such as: the rights of finding a job, right of residence, family right. [2]

When speaking about the main causes which create the migration phenomenon, in particular the irregular one, I have to point out the home causes, which exist in the countries situated geographically at the East and Southeast Europe.

One of the well-known drawbacks, which could be taken into consideration while discussing about the irregular migration in Europe, is the issue of corruption. Hardly developed within the East and Southeast European societies, the phenomenon of corruption tends to affect all of the public sectors of activities, such as the education, the medical services, public administration and so on. As it is appreciated, the transition period from totalitarianism to democracy is a serious process, a perpetual one that await for finding solutions in order to diminish it or, better for society, to remove it totally. The corruption situation degenerates many other roads and creates no perspective for people who, working legally in their home countries, would have wanted to live a better life, but not travel abroad and work in another country. Thus, it is unanimous agreed that the home causes are the main reason for the people’s leaving from their countries and going to another one in the West of Europe. For several ones, illegal activities or criminal behaviour is an incomprehensible option they resort to.

It is recognised the phenomenon of corruption as occurring in all of the state’s institutions and public structure of the administration, both at local level and nationally too. Specialists speak about the connection between the corruption and organized crime as being the result of the “state capture by the criminal organizations, in which the main scope is influencing decisions in their own advantage as well as making sure of impunity in front of the justice” as stated by Professor N. Nita.[3] Even if, the law enforcement agencies have made huge efforts in purpose to achieve the main goal of its controlling, there are still many ways to be explored. The strategies and also the measures taken in this respect have been carried out as a consequence of the European officials’ request for the European Union Member States and also of the Council of Europe for the other states non-European Union ones, states situated in the East and Southeast Europe to prevent the phenomenon as much as possible.

Looking for a particular model of behaviour of the migrants’ style of approaching problem, I am looking for an explanation for the ubiquity of that model at the institutional level of the past European Union countries’ societies. In the matter of fact, the doctrine makes a remark upon the absentee of the home countries’ strategies, the state separated from society and also responsible for its serious problems, such as criminality and its high level of development, which occurs in everyday life and which does not have something in common with citizens or their habitual life. Actually, missing home strategies of a stabile economy and social securities for their citizens is the main drawback of the Eastern European states. Although Eastern European Union Member States have made huge efforts in order to harmonize the home legislation to the community acquis, there are still a lot of problems to which the national authorities are awaiting for finding real solutions. Because of the fact that, at the moment, the general economic crises still occurs in the most of these countries’ economy, it produces consequences for all of the European countries, both at the East of Europe and the West part of the continent as well. Actually, the phenomenon could be viewed as a macro-problem for whole Europe, due to the fact that any national problem is a European one. For this motive, speaking about the European Union citizens’ irregular migration within the European Union area, a serious issue is arisen over the European law enforcement level, and which can be solved through strengthening powers and finding solutions together.

Trends of irregular migration in Europe

Approaching the issue of irregular migration in Europe and the consequences it produces in the field of criminality, I would like to provide with the real behaviour people adopt by themselves in order to live in countries at the West of Europe. This concept leads with the abolition of criminalisation, called also “de-criminalisation”.[1]

One of the most negative experiences they spend in these countries is the criminal behaviour. From pretty offences, committed usually in street to serious crimes committed even in a transnational manner, all these criminal activities are committed due to the fact that most of the migrants prefer not to work legally in another country, but being engaged in an illegal activity whose profit is high with a minimum of effort.

Criminal behaviour has risen in the criminologists’ attention, while the criminal organized groups extended their activities and occupied the most sensitive areas of both public and private activities. On the other hand, spending a lot of time in committing serious crime, the criminals adopted not only real strategies, but their own rules too, whose respecting are to be taken into account by all other members. It is called working rules in
crime. [4] In spite of the rules respected by members of the criminal group, another way arose in accordance with their criminal activity. It is about the connection they carry out with the officials, in a country for committing crimes. This relation comes as a relative issue to corruption, due to the fact that, in most of the cases, the civil servants help members of the criminal groups in their criminal conduct, also opined by Mr. N. Nita. [3]

From the point of view of the perspective of irregular migration phenomenon, the home authorities of the Eastern and Southeast European countries have taken any kind of hope among their citizens, which has consequences for the everyday life.

Unfortunately, at the moment, it is expected not to exclude this perspective, but to have an analysis of the current situation of the migrant people in Europe that creates the phenomenon of irregular migration as much as it can be observed outside their home countries. I refer to this special element because of its institutional approach, which marks out lines between the methodology of researching the phenomenon and other institutional approaches that arise an interest for scientists, in researching the phenomenon of irregular migration of people within the European area. Moreover, the Eastern doctrine has been involved in finding more efficient theories and practical solutions or sides for labelling phenomenon of irregular migration.

Making an intrinsic link between state and civil society, assumption of responsibility by the law enforcement in the matter of stopping phenomenon is required.

Routes of irregular migration in Europe

First of all, the unprecedented development of the criminality in Europe as well as the various forms of criminality committed in the contemporary society, even in a transnational feature, make me reflect on this topic, examine the causes and formulate some conclusions, which hope to contribute to the improvement of the existing explosive situation in these countries.

Moreover, without stigmatising the role and the place of the judicial authorities confronting with this kind of danger and the threats all of us feel every day, but analysing and appreciating their contribution to diminishing this phenomenon, it is necessary to visualise the forms of criminality that are currently met in the European society. [5] In this respect, I would like to emphasize the nexus East - West criminality in Europe as well as the consequences it produces at macro-level too. [5] The instruments of fighting criminality used by the law enforcement agencies both at European and national level and also the judicial instruments of cooperation in criminal matters, which produce consequences in diminishing this kind of phenomenon have to be taken into account in distinguishing the current forms of criminality in Europe.

Referring to the routes of criminality in Europe both at the East and Southeast of Europe and also at the West part of the continent, as well as to the way in which the law enforcement agencies manage the situation in order to combat it, I have to highlight the routes’ dimension of criminality in both parts of the continent even some differences between them already exist. I appreciate it due to the fact that, it is frequently observed the forms of criminality committed at the East and the West of the continent are usually the same from an organizational point of view. It is a resemblance, which was the basis of starting and strengthening cooperation in criminal matters between the European Union Member States, which I will point out below.

Nevertheless, discussing about various forms of criminality committed in the Western Europe, I have to keep in mind the degree of development of the phenomenon in this part of the continent, because, as I noted above, the most serious forms of transnational criminality committed in West require the involvement of the organised criminal groups came from the East of the continent or they are collaborating with similar groups from the West, whose result is obviously.

On the other hand, the social values damaged as a result of the development of the contemporary criminality phenomenon, it could be noticed an increase in the number of cyber-crimes, which have achieved an alarming level at present. The attacks on the holders’ bank accounts and their credit cards have become so common, that are a real security threat against the banking systems in these countries. However, having into consideration an analysis of the perpetrators of this kind of offences and their modus operandi, it might provide the fact that they come from countries situated geographically in the Eastern Europe, from the former communist coalition countries, poor ones, which still pass the transition period, an important legal notion, which produces consequences in this way. And, if I discuss about the configuration profile of criminality of the source countries, I would remark the nexus between these features and the global economic crisis the European societies still pass.

A particular point of view states that the activities of the criminal groups in the East over the Western democratic values are developed at the moment more than ever. The phenomenon is seen as attacking poverty against wealth because of the fact that, among others, the most affected countries are Germany, the United Kingdom, France and the Netherlands. It depends on the capacity of the authorities in above mentioned states in defending themselves against the criminal activity affecting the human security or other values of the rule of law. States situated at the East of Europe, including Romania, also are confronted with this kind of phenomenon in which citizens have felt a high level of human insecurity, as Professor N. Nita pointed out. [6] At the same time, it is frequently appreciated that for a lasting development of the democracy as well as for a maximum parameters
permanent function in every situation the states’ institutions must be reformed but not politicized in order for them to be independent from politics and also strengthened. [7]

Basically, there are three main routes in this kind of phenomenon. One of these comes from Asia via Turkey – Bulgaria – Romania on the one hand, and then via Serbia – Western Balkans area on the other hand, to the Western European countries. The second route of the irregular migration concerns the phenomenon from the Mid East via Romania – Bulgaria – Hungary to Italy, Spain, France and other European countries. And finally, the third route of the phenomenon, which regards the irregular migration comes from the former Soviet Republics via R. of Moldova – Ukraine – Romania to Poland, The United Kingdom, The Netherland.

These routes offer more information on the contemporary forms of criminality in Europe and its antagonistic features. Human traffic in Europe is committed in the countries situated at the East of Europe to the West of the continent and it aims mainly at the exploitation of forced labour and prostitution or other sexual services. The victims of this type of crime are both men and women, but certainly, the huge profit and frauds obtained in this kind of offence is alarmingly increased, a fact which is proved by the increasing number of this type of causes discovered in the last 10 year period of time. Another contemporary form of criminality is, and remains, one referring to prostitution as a consequence of the trafficking in human beings. Minors also become victims of the traffickers on the same route, from East to West and for the same purposes – sexual services or forced labour. As a rule, children, usually very young, are trained to commit street offences. At the first sight, these facts seem rather minor but, if everyday human insecurity is measured, the social danger is higher having consequences in a negative manner upon the whole society. [8] And, if I think of the possibility of its spreading in the future, the danger is alarmingly too.

Moreover, it has been shown that, the most recent form of criminality, a “modern” one, committed in the United Kingdom is one referring to the benefit frauds. In these cases, children are involved in this type of offences, most of the time with their parents’ agreement. [2]

On the other hand, discussing the way in which the Western countries are prepared to face imminent dangers I am finding appropriate that it is very important to analyze the dimensions of the contemporary society penetrated by crimes when it faces the various forms of criminality. [5]

It is obviously the impact of crimes upon the population seen as a receiver of criminality and as a reality of everyday life looks quite numerous in the countries of the West of Europe and, on the one hand, the moment in which offences meet the law enforcement agencies and the legislation into force with the legal mechanisms and instruments implemented in this field, on the other hand. It is true that the differences between them are relevant and it is highlighted in both structural and institutional elements differentiating them.

Nevertheless, the way in which the Eastern population understands to move themselves to the states in the West of Europe comes across various forms of criminality. However, discussing in this respect, there should be another aspect to be taken into consideration. I have to distinguish between the minor offences, also called “petty offences” and serious crimes, having a transnational feature, or organised ones. In other words, both categories of crimes, having a low level of social danger or crimes having a high level of social danger must be taken into account when the impact of these categories with the social environment is analyzed. They are obviously considered more carefully and the legislator has regulated a particular incrimination, those in another category, in spite of the fact that ones included in the first category are not to be ignored. A better protection of the individual and its rights against the “petty offences” is considered while the serious crimes are a huge attack against the major values of democracy and the rule of law due to their increased danger. [9] And I can add that the danger is higher when this kind of offence is committed in an organised manner. [3] However, beyond all these specific features, the person and the human security are notions that would be considered in analyzing the concept of human rights itself. [10]

Conclusions

Irregular migration is not a newer phenomenon in Europe. It only has been accelerated in the last period of time, since the enlargement of the European Union to the Eastern European countries, which opened the roads as an alternative for Eastern European Union citizens to the Western countries due to the principle of free movement of population within the European Union area.

During the last decade, people from the Eastern European countries have preferred to go abroad, in another Western European Union Member States, in order for them to work legally and live. However, despite the large number of cases of migrants who chose working legally in these countries, another part of Eastern migrants decided to leave their home countries in purpose to commit crime abroad. In the matter of fact, it is recognised that several cases of serious crimes are committed abroad by Eastern European Union migrants. Statistically speaking, there are still a lot of people who have been engaged in transnational organized crimes and, working together with other similar groups from the West of Europe, have activated in a country, for example, but the consequences are produced in another one. In this kind of transnational organized crime the
Criminal repression in the context of the economic crisis and the maximization of crime at European and global level (May 9-13, 2013, Bucharest, Romania)

joint investigation team, organized at European level, collaborate together in order to investigate serious crime, likely to involve investigation in another Member State and control the situation.

However, it is obviously that even if all these actors have made huge efforts in order to control and combat the phenomenon of organized crime highly developed at European Union level, there are still several problems involving the results in the matters. A strengthened cooperation between the law enforcement does not solve at all the criminal repression, as it is viewed in practice. In other words, it does not mean an increased repression for the crime. [1]

It is explained how specialists in the issue of criminality in Europe believed in an increased repression for some Western European countries, for example, as a consequence of the cooperation in criminal matters. It seems to be more an ideal than a reality due to the fact that the analysis reveals provisions of criminal law that concern practitioners and influence the national law.

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The new sanctioning regime of the crimes of corruption

Magureanu A.F.
Spiru Haret University, Faculty of Juridical and Administrative Sciences, Brasov, Romania
magureanu_alexandru_1982@yahoo.com

Abstract

The New Criminal Code brings a series of changes to the sanctioning regime of the crimes of corruption. While some of the proposed changes are commendable and long waited, as the majoritarian doctrine suggested long ago, other changes raise some debates.

Keywords: corruption, New Criminal Code, bribe, public officials

General aspects

The crimes of corruption are some of the most serious crimes, as they can affect the entire economic, social and political system of a country, by generating a phenomenon of political instability at every level of the Romanian society. Crimes of corruption don’t affect only one area of the economic and social life, as one might believe, but the entire society, as the lump sums offered as bribe are, in one way or another, a result of the resources of the national economy, and by the crimes committed as a result of corrupting officials, the entire economic and social life of Romania is affected and not just the one of some persons. Why is this? Because these crimes are being committed by a public official, in the exercise of the attributions of his office, therefore harming all the citizens and because the worst crimes of corruption are being committed against the national wealth, and the sums of money or other benefits that the bribed person receives are not becoming State income.

The New Criminal Code (NCC) incriminates corruption at Title V, “Crimes of corruption and occupation related crimes”.

Perhaps this name is not the most appropriate one, as the title makes us think that the crimes of corruption have nothing in common with the occupation of the persons that commit them. Therefore the title should be renamed in “occupation-related crimes”. The name of the first chapter would be “crimes of corruption” as it is, and the name of the second chapter “other occupation-related crimes”.

NCC incriminates 6 crimes of corruption as follows:
1. bribe-taking
2. bribe-giving
3. the traffic of influence
4. the purchase of influence
5. crimes committed by members of the arbitration courts or in relation with those
6. crimes committed by foreign officials or in relation with those.

The “classic” crimes of corruption from the Criminal Code that is now into force (CC) are: bribe-taking; bribe-giving; influence traffic; receiving undue benefits. The regulations from special laws also includes other crimes of corruption, associated or in relation with the ones we mentioned.

We will use “CC” when we will refer to the Criminal Code which is now into force (since first of January 1969) and “NCC”, when referring to the New Criminal Code, adopted in 2009, but which did not enter into force until present day.

Crime of bribe-taking

a) The new regulation states the quality of the active subject of the crime, meaning that of a public official. The old regulation is only implying that the active subject is a public official. It is true however, that in the CC, the crime is stipulated at art. 254, Title VI, entitled “Crimes that affect some activities of public interest or other activities regulated by the law”, Chapter I, entitled “occupation crimes or occupation-related crimes”. We consider, however, that the new regulation is somewhat clearer, regarding the quality of the active subject, that of public official.

It is commendable that the NCC refers also to “other persons” besides public officials, as possible active subjects of the crime, these being:
- the person that has an occupation of public interest, for which was invested by the public authorities or which is submitted to the control or supervision of those authorities, regarding the fulfilment of that specific public interest;
- the person that exercises, temporary or permanently, with or without a remuneration, a task of any nature, in the service of a physical person from the category mentioned by art. 175, paragraph (2), or in the service of any juridical person. In this case, the special limits of the punishment are being reduced by a third.

b) The NCC specifies the type of complementary punishment that will necessarily be applied by the court.

c) The NCC states a less harsh punishment.

d) The NCC no longer stipulates an aggravated form for the crime that is committed by a public official that has controlling attributions.

A lesser punishment and the lack of a supplementary sanction, for the official that should control others and he, himself commits the crime of bribery, is not, in our opinion, likely to discourage the phenomenon of corruption that seems to be continuously on the rise since 1990 until present day.

The crime of bribe-giving

The new regulation is somewhat similar with the one that is now into force, with the exception of the quantum of the punishment, considerably larger in the NCC, similar with the one for the crime of bribe-taking. As the active subject for this crime can be any person that has criminal liability, and in the crime of bribe-taking he can be only a public official, we consider that there must be a much more severe punishment for the crime of bribe-taking. Also, by regulating identical punishment for different crimes would make useless the distinction that Romanian criminal law has made, traditionally, between bribe-taking and bribe-giving, as distinct crimes.

The traffic of influence

In the new regulation, the material element of the objective side of the crime is better presented, meaning the action of promising to determine the public official to perform, or not to perform, to speed up or to delay the fulfilment of an act that is part of his official duty. As the perpetrator suggests that he has a certain influence, in many cases the judges consider that the crime is not the one of receiving undue benefits, but the crime of deception.

Although the new regulation, were the perpetrator promises that he will exercise his influence is more clear, the controversies regarding the nature of the crime of “deception” or “receiving undue benefits” will probably not stop. The decisive element of differentiation between these two crimes is, in fact, the possibility or the impossibility to establish if the perpetrator did or did not have influence over the public official. If he did not have, the crime will certainly be that of “deception”.

The difference between the two regulations consists also in the quantum of the punishment, which is larger, by its special maximum, in the present regulation (10 years compared to 7 years in the NCC).

We can observe the tendency of the new regulation to reduce the quantum of the prison sentences. The question that arises is if this won’t actually encourage the perpetration of these crimes. It is however commendable that, by this system, the anomaly from the Romanian criminal legislation, of settling by law, a far to great difference between the special minimum and the special maximum, is partially corrected.

The crime of purchasing influence

There have been numerous solicitations, from the criminal doctrine, to incriminate such an action, which does not exist in the present Criminal Code. If the person that gives bribe is punished, it is only natural to also punish the one that receives undue benefits as a result of buying the influence that any person has over a public official. The law does not differentiate whether the benefits are large or small.

The crime [2] consists in promising, offering, or giving money or other benefits, directly or indirectly, to a person that has influence, or suggests that he has influence, over a public official, in order to make him to fulfil, not to fulfil, to urgent or to delay an act which is part of his service duties, or to fulfil an act contrary to these duties, is punishable with prison from 2 to 7 years, and with the prohibition of some rights.

The active subject of the crime can be any person that is criminally liable, even the husband or close relatives of the person that is trafficking his influence.

The incrimination will not be punishable, when the person denounces the crime, prior to the notification of the criminal investigation authority regarding the crime.

Paragraph (3) stipulates a strange disposition, as it refers to the fact that the money, the values or other gods that are given in order to purchase the influence, are being returned to the person that gave them, if they were given after the denunciation was made to the criminal investigation authority. This could be interpreted in
the way that the law will not punish a person for giving more money or for providing other benefits after he denounced the crime. Furthermore, by the restitution of the goods, the legislator encourages continuing these type of activities, by the person that buys influence. Therefore we propose for this paragraph to be changed, by removing the specification: “if it were given after the denunciation stipulated by paragraph (2)”.

**Crimes committed by members of the arbitration courts or in relation with those**

The incrimination, which does not have a correspondent in the present legislation, states that the stipulations of the articles that refer to the crimes of bribe-taking and bribe-giving, apply accordingly to the persons that, based on an arbitration agreement, are called to pronounce a decision regarding a litigation which is given to them for solving, by the parties to the agreement, regardless if the arbitral procedure takes place according to Romanian law or foreign law.

The active subject of this crime is the person that, based on an arbitration agreement, is called to decide regarding a litigation that is given to him in the search for a solution, by the parties to the agreement, if he, directly or indirectly, for himself or for another, asks or receives money or other undue benefits or accepts the promise of such benefits in order to:
- pronounce a decision regarding a litigation brought to him by the parties to the agreement;
- refuse to pronounce a decision regarding a litigation brought to him by the parties of the agreement;
- delay the pronouncement of a decision regarding a litigation brought to him by the parties of the agreement;
- pronounce a decision regarding a litigation brought to him by the parties to the agreement, which is contrary to his service duties.

It is not relevant if the arbitral procedure takes place based on Romanian or on foreign law, nor is it relevant the value of the litigation, the nature of the litigated goods, the quantum of the sum of money or the nature of the benefit that is asked, received or accepted by the person that must pronounce the ruling.

The person that gives the money or that offers other benefits in the purposes we mentioned above, is also punishable.

**The crimes committed by foreign officials or in relation with those**

Recent legislative changes, in criminal law and criminal procedure law, are aiming to harmonize our legislation with the community acquis.[1]

This crime does not have a correspondent in the present legislation. The incrimination norm states which categories of persons may have the quality of active subject for all the crimes of corruption, as follows:
- public officials or persons that operate under an employment contract, or other persons that have similar responsibilities in an international public organization that Romania is part of;
- members of a parliamentary gathering;
- officials of the European Union;
- the persons that are exercising judicial functions at the international instances whose competence is being accepted by Romania, as well as the officials associated with these instances;
- officials of a foreign state;
- members of the parliamentary or administrative gatherings of a foreign state.

In conclusion, the New Criminal Code has widened the sphere of economic and social relations that are protected against the crimes of corruption and has increased the number of the categories of persons that can be active subjects of these crimes. It was natural for the law to also mention foreign officials that are operating in Romania.

As the new regulation does not refer to the politicians, the stipulations of the special laws will remain applicable, in their case, if these laws will not be repealed by the implementing law of the New Criminal Code.

We consider however that the approach of the NCC on crimes of corruption should be tougher. It is not necessary to have many laws to fight corruption; few will suffice, as long as they are efficient. According to Tacitus, “The more corrupt the state, the more numerous the laws”.

At this point, corruption can only be reduced by applying more severe punishments, for example sentences to life imprisonment for the crimes that are connected to the political area or which produced very serious damage.
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Aspects regarding the principle of equality in criminal law. Exceptions and possible threats

Magureanu A.F.

Spiru Haret University, Faculty of Juridical and Administrative Sciences, Brasov, (ROMANIA)
magureanu_alexandru_1982@yahoo.com

Abstract

Equality has been recognized as a general principle of law. Even if the criminal law doesn’t explicitly recognize the principle, it is, without a doubt, a general principle for this branch of law as well. There are some exceptions from the principle of equality, most of them stipulated at a constitutional level. Some of these exceptions, such as presidential immunity for example, have made the subject of many controversies.

Keywords: equality, criminal law, exceptions, immunity

The principle of equality in criminal law

The social values that become protected by criminal law are specific to certain communities [1], or to what we can call different “legal cultures”. However there are certain minimal criteria that can be found in any state governed by the rule of law.

The general principles can be identified in all the institutions specific to criminal law: crime, criminal liability and criminal sanctions. Criminal law is governed by a series of principles that coexist, interfering their action, influencing both the autonomy and the specificity of criminal law, as a public law. Thus, there are considered as principles of criminal law the following: legality, humanism, equality, criminal liability is personal, the individualization of criminal sanctions, crime is the only basis for criminal liability.

Equality in front of the law is stipulated in all the constitutions of the member states of the EU, and has been recognized by the European Court of Justice as a fundamental principal for communitarian law. Legal equality may be defined as the recognition and guaranteeing of the equality of rights (in both achieving and restricting them) and obligations, in identical and comparable situations, for all the members of a society.

According to the principle of equality, all privileges enacted for certain groups of persons must be equal, in identical and comparable situations, for each member of that group or social category, and it must cease, when the reasons that justified them can no longer be invoked. Also, guaranteeing equality necessarily implies eliminating all forms of discrimination.

According to article 1 of The Universal Declaration on Human Rights, “All human beings are born free and equal in dignity and rights”. The Romanian Constitution consecrates equality at art. 16, paragraph (1): “All citizens are equal in front of the law and public authorities, without privileges and discrimination”.

The Criminal Code (CC) does not expressly recognize the principle of equality, nor does the New Criminal Code (NCC), adopted in 2009 and which will entry into force in 2014. Such a recognition is required, that is why the NCC should stipulate equality expressly, even if this principle is a general law principle, therefore implicitly specific to criminal law as well. The first chapter of the NCC is entitled “general principles”, however it only refers to the principle of legality. In this regard we consider that there is a considerable difference between the CC and the NCC, as the new regulation no longer states the values that are protected by legal norms of criminal law (such as: sovereignty, independence, unity and indivisibility of the state, the person, its rights and freedoms, property, as well as the entire law order [2]), which is regrettable.

The principle of equality does not imply only the recognition of the fundamental right to equal treatment, but also a positive side, meaning that the state has the obligation to guarantee equality and not only the obligation of not infringing it.

Although The European Convention on Human Rights does not expressly recognize the principle of equality, states, at art. 14 that: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

Equality can be inferred from other dispositions of the CC, for example art. 3 according to which, “criminal law applies to crime committed on the Romanian territory”. The article mentioned, as well as the other
stipulations of the Code does not state any inequality between citizens, with some exceptions that we will mention below.

Exceptions from the principle of equality in criminal law

1.1 Parliamentary immunity

Parliamentary immunity is stated by art. 72 of the Constitution which states that senators and deputies cannot be held legally responsible for the votes or the opinions that they express while exercising their mandate. The same article states that Parliament members can be prosecuted for actions that are unrelated with the votes or their politic opinions, but they cannot be searched, detained or arrested without the approval of the Chamber that they are part of, after they are heard. There is an exception, according to paragraph (3), in the case of flagrant offenses, when members of the Parliament can be searched or detained.

While is only natural that members of the Parliament cannot be held legally responsible for the votes or the opinions that they express while exercising their mandate, not allowing the search or the detention of the senators and deputies is a grossly breach of the principle of equality. Members of the Parliament, elected by the citizens, are, of course, entitled to their own political opinions, which is only natural in a democracy. However, the fact that they cannot be searched, detained or arrested without the approval of the Chamber that they are part of, is a violation of the stipulations, of the same Constitution, which proclaim the equality of all citizens before the law.

Some authors argue that the members of the Parliament do not benefit from immunity of jurisdiction. Nothing can be farther from the truth. By not allowing them to be searched, detained, or arrested, according to law, without the approval of the Chamber that they are part of; the Constitution establishes a disguised immunity. These rules do not apply to other categories of public officials, which demonstrate that, the members of the parliament that commit crimes benefit from a privileged regime. It is well known that the search is the main way of gathering clear evidences that the criminals cannot challenge easily. By the notification of the Chamber, after hearing them about the alleged crime, by letting the member of the Parliament know that his domicile will be submitted to a search, it is certain that he will have the possibility to take all measures in order to dispose of any incriminating evidence. Considering this, what would be the use of that search and how can we say that the member of the Parliament does not have a privileged regime?

We also have to note that, according to art. 72, paragraph (3) of the Constitution, in the situation that the Chamber that is notified regarding the criminal prosecution establishes that there is no ground for detention, it will immediately rule on the dismissal of this measure. This is in fact, a serious interference of the legislative power in the act of justice, privilege that is not enjoyed by all the public officials. Also, is not appropriate that a politician should be able to revoke the decision of a judge.

The opinion that, the possibility of the Chamber to revoke arrest warrants, has the role of protecting members of the Parliament, against abusive detention, arrest or search cannot be seriously taken into consideration.

1.2 Presidential immunity

According to the Romanian Constitution, art. 84, paragraph (2), the President has immunity. According to the same paragraph, the stipulations of art. 72, paragraph (2) are applicable. The article was interpreted in the sense that the President benefits of full immunity, not only of the stipulations of art. 72, paragraph (2). If this immunity is a general one, why would the constitution refer to art. 72? In the situation that the interpretation we refer to earlier, and if the President is immune, why should this immunity apply to crimes committed prior to his mandate? We can see that art. 84 of the Constitution is not without ambiguities.

However, art. 96 of the Constitution states that the two Chambers of the Parliament, in joint session, with the vote of at least two thirds of the number of parliamentarians, can decide to impeach the President for the crime of “high treason”, crime that is not incriminated, at present, in the CC or in special laws. Considering that there can be no crime without a prior law that incriminates the deed (according to the principle of legality), the President cannot be held criminally liable.

1.3 Immunity of the members of the Government

The law on the Ministerial liability [5] states (art. 6) which persons are considered members of the Government: the Prime Minister, the ministers and other members established through organic law, appointed by the President, based on the vote of confidence given by the Parliament. Art. 7 states that the Law we mentioned above can be applied for the acts which, according to law, are considered crimes, committed by the members of
the Government in the exercise of their office. Crimes committed outside the exercise of their function are punishable according to ordinary law.

Art. 8, of the Law we mentioned above, describes the crimes that may be considered committed during the exercise of the Government members:

a) obstruction, by use of threat, violence or other illegal means, of the exercise, in good faith, of human rights and freedoms;

b) presenting, with harm intent, inexact dates to the Parliament or to the President, regarding the activity of the Government of a ministry, in order to conceal deeds that can harm the general interests of the state;

c) unjustifiable refuse to present to the Parliament or to the permanent parliamentary commissions, inside the term set by art. 3, paragraph (2), the information and the documents required by these, according to art. 111, paragraph (1) of the Romanian Constitution;

d) emitting regulations or instructions with a discriminatory character, on grounds of race, nationality, ethnicity, language, religion, social category, beliefs, age, sex or sexual orientation, political appurtenance, wealth or social origin, that can harm human rights.

Tentative to a) and b) is punishable. Also, the law states that in the case when a member of the Government commits a crime, in the exercise of their mandate, besides the main punishment, additional penalty will apply of banning the access to a public dignity or position of leadership for a period between 3 and 10 years.

The “immunity” that the members of the Government have is rather a procedural one. Thus, for the categories of crimes stipulated by this law, there was provided a special set of procedural norms, regarding the criminal prosecution and the trial, according to art. 12, which states that: “Only the Deputies Chamber, the Senate and the Romanian President are entitled to ask the prosecution of the members of the Government, for crimes committed in the exercise of their function”. Such a legal stipulation seems unnatural, as long as the Constitution clearly states that no one is above the law. The question that arises is if the members of the Government have the obligation to answer to the questions and interpellations made by deputies or senators, according to art. 3, paragraph (3) and they refuse to do so, or with harm intent they present inexact data, why can’t they be prosecuted by the competent law enforcement officials *ex officio*, or at the request of the parliamentary that received an inexact answer or no answer at all? What will the solution be, for a situation like this, in the case when the Government is formed by the political entities that have the majority in the two chambers? The member of the Parliament that did not receive an answer, or that is not satisfied with the answer, will not have any legal mean at his disposal to hold accountable the member of the Government for his actions or inactions. Any legal stipulation should imply the possibility of being applicable, in a non-biased manner.

Even if the law, as some authors have shown already [2], does not present a definition for criminal liability, the framework for establishing the forms and the length of criminal liability must be established. In the case of the Law nr. 115/1999, the solution would be, for the members of the Government to be prosecuted according to general rules of criminal procedure.

In conclusion, it is definitely to revisit the immunities granted to public officials, and even if removing them entirely would prove impossible (although we see no real difficulties in removing the immunities for the state officials, excepting the cases of impunity regulated for the political opinions and political statements). This would certainly help ensuring a strict separation of the state powers, their impartiality and to firmly state that in the state of law no one is considered above the law.

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Considerations concerning the forgery of the cultural goods.

Matei G.
Faculty of Law and Public Administration, Ecological University of Bucharest (ROMANIA)
gabrieladrd@yahoo.com

Abstract
This paper is aiming to analyze the cultural goods’ forgery and to present a point of view concerning the definition of forgery in the field of art. In author’s opinion such a definition is necessary in order to make a proper judicial framing of the forgery offence.

Keywords: forgery, engravings, art artefacts, copyright.

Introduction
In order to properly apply the general legislation to the cultural heritage is necessary to complete the special norms making an express specification of some terms. We have to assume that these terms could have one meaning in the judicial language and another one in the cultural language. It is more than obvious that a misunderstanding of the terms could lead to misperceptions and a wrong framing of the offences.

To identify the forgeries and the forgers belonging to the specific field of the so called „cultural goods” represents one of the most important judicial activities with intimate consequences for the moral, cultural, social, economic, financial and even political life of the contemporary society.


- Law no. 182 of 25/10/2000, concerning the protection of the National movable Heritage;
- Law no. 422 of 18/07/2001, concerning the protection of the historical monuments;
- Ordinance no. 43 of 30/01/2000, concerning the protection of the archaeological Heritage,

and the declaration of some archaeological sites as areas of national interest.

According to the Law no. 182 (r1) of 25/10/2000, concerning the protection of the National movable Heritage, republished based on Law no. 488 of 28/12/2006, the goods belonging to the national movable heritage, according to their importance, signification (the signification of a cultural artifact can be of historical, archaeological, ethnographical, artistic, scientific, technical, literal, cinematographically, numismatic, philatelic, heraldic, cartographic, epigraphic etc.), age, uniqueness or rarity, are part of:

a) The treasure of the cultural movable national Heritage, made of cultural goods of exceptional value for humanity;

b) The fund of the cultural national movable Heritage made of cultural goods with exceptional value for Romania.

The starting of the procedures of classification for the cultural movable goods is made automatically – in those situations stipulated by law – or following the demand presented by the owners of the goods, individuals and private legal persons.

As an effect of the classification, the cultural goods are registered in the inventories of the national cultural heritage, in one of the above mentioned categories: treasure or fund. [1]
The criminal liability in Law no.182/2000

The execution of forgeries having as subject classified movable goods, with commercial purpose or with any other purposes, is preview by the article no. 84 of Law no.182/2000 as an offence and is to be punished with prison from 1 to 5 years.

The legal text does not comprise a reason, a purpose of the action of forgery, or a judicial consequence of that.

The judicial responsibility is different according to the degree of social danger of the crime. Also, the social danger of the crime is different in concordance with the forged artifact, the modality of forgery and, last but not least, in concordance with the legal consequences the forgery produced.

As a term of comparison, the Penal Code contains a special chapter concerning the forgery of documents, which presents a multitude of forgery methods. The official documents, in the sense of penal law, are the original documents and the duplicates, triplicates, as well as the legal copies or the certificates. The penal law incriminates both the actions of forgery for documents and „using of such a forged document or its custody to be used with the purpose of producing legal consequences” [4]

The text of the art. 288 of Penal Code, concerning the material forgery in official documents, stipulates unequivocal the fact that the action of forgery can be produce by faking the writing or under-writing of an official document or by altering it in any way.

This forgery action has to comply with two essential demands:
1. The document has to be part of the official documents’ category;
2. The forged document has to be susceptible of producing legal consequences.

That for, the immediate consequence of the forgery action - followed by creation of a document which apparently presents all the characteristics of an official and original document - consists in coming out of a dangerous status for the social value defended by law.

In the special cases concerning the cultural heritage, it is very important to have a clear piece of legislation with an unequivocal text which has to name all the conditions for an action could be defined as offence.

If we take into account the article 26 of Law no. 182/2005 (Art. 26. - (1) „The copies, casts, posthumous editions and facsimile made on classified movable goods have to be early marked in order to avoid confusions with the original; they are to bear the mention copy, facsimile, posthumous edition, the name of the author and the year when they were produced, as well as the mention about the collection where the original belongs.”), it might be deduced the fact that the forgery can be produced by making copies, casts, posthumous editions and facsimiles after the original and classified cultural movable goods and the offence can be committed as many times as the named goods were not early marked in order to avoid confusions with the original and are not bearing one of the inscriptions: “copy”, “facsimile”, “posthumous editions”, together with the name of the author and the year when they have been produced, as well as the mention about the collection where the original belongs.

That for, a precise definition of the artifacts’ nature - especially in the cases when their authenticity is questionable – can clarify the future approach of this subject [4]. In the community of the museums and collections the terms used to designate re-produced artifacts are naming the following categories of objects (We are presenting here the definitions which can be found in a short form on internet: The Internet Public Library, Egyptian Forgeries Exhibition: Definitions, 1996, (http://ipl.sils.umich.edu/exhibit/kelsey/definitions.html):

A. Reproduce object designates replicas or facsimiles of the original object. Often, the reproductions are directly realized after the original, representing genuine duplicates of it. Usually, these duplicates are marked with the following text: „copy after the original”. Many re-productions are meet in the museums’ shops where are sold as souvenirs for the tourists or even as collectibles for the people who can not afford in there collections the original.

From the legal point of view, the re-productions can be lawful reproductions and illicit reproductions.

The lawful reproductions of an object with a certain heritage value are realized with the purpose of replacing the original artifact in certain circumstances:
- Are replacing the original artifact for protecting it if this is permanently exhibited in the museum, or if is part of a temporary and itinerant exhibition;
- For temporary replacement of the original if this is subject of a conservation/restoration process;
- For permanent replacement of the original artifact if this was irretrievably damaged, affected, destroyed or lost.

The illicit reproductions, or unauthorized reproductions, are realized without the owner’s permission, with commercial purposes, for being exhibited, or detained with any title. These objects are placed in the category of forgeries.

Even the author is usually producing, for his own use and pleasure, replicas after his masterpieces. If these replicas could not be considered as “versions” of the main work of art, there is a good suspicion that the
author produced replicas of the same artifact with commercial purposes, in order to present the replicas as "the unique and the original work of art". These replicas are not respecting the character of a "unique work of art", the uniqueness being the main condition for an original work of art to be presented as "unique" and to be valued accordingly. That for these artifacts can be also considered as belonging to the category of forgeries.

Some works of art belongs to that category which does exist through reproduction in more than one exemplar (engravings, woodcuts, linocuts, lithography...). (The all three artistic produces are realized by some drawings printing which were made on metal, wood, or stone. The materials used for printing were paper, textile or leather.) In this situation, the artist has the possibility to multiply his work of art in a determined number of copies, each one receiving a serial number. He also has the possibility to add a small number of copies (usually between five to ten percent of all printings), marked as "author's proof". This practice has specific and well determined purposes of limiting the number of copies of the same work of art, establishing a collection value and a trade value for each artifact: more copies, less value, even if the author is a world wide acclaimed one. The serial number marked on each copy, together with the total number of copies, is also giving the possibility to have a more or less control of the edition and to avoid the temptation of the authors, editors or some other people to "enlarge" the edition and to commit that way an offence, a forgery. Usually, the artists with self respect and the notable printers are destroying the plates after printing the agreed number of copies, cutting it in two, marking the plate with a capital X or performing some holes in the plate.

The great artist is printing their masterpieces with recognized publishers or even in the most notable printing houses of the state. This is giving more value to the works of art and is certifying the authenticity of the artifact because the notable printers and printing houses are using special stamps of identification, special paper with filigree, special ink and colors, and even personalized filigree in the mass of paper bearing the name of the author.

Even when the printing is made by the author, he/she is obliged to comply to the obligations a printing house have: to print or write by hand the serial number of each copy and to specify the total number of printings together with the serial number of each copy.

In modern times – when the works of art gained the status of prestige goods and their value increased and become a form of investment, when the market of art reach a hyper specialized status – there are three ways to avoid suspicions of fake for a multiplied artifact of art as those mentioned above are:

- Marking the original plate (made of metal, wood, stone, linoleum or other material) with an inscription to attest that the plate was already used to imprint the agreed number of copies;
- Cutting, performing holes or scratching on the plate, in a manner able to prove that the plate was already used and to avoid the re-use for obtaining copies similar with the original ones. This method is attesting that any other copy - produced after the damage of the plate occurs - is not part of the agreed number of copies and has no value.
- Completely destroying the original plate (this method is a radical one and is less used by the printers or engravers who prefer to have the original plate marked as “used” in order to exhibit it along with the paper works of art).

In spite of that, some greedy engravers, even giants of the modern art (Salvador Dali is well known for this practice. Sometimes he used to sign unprinted papers letting the editors to make some extra money which then after were shared with the artist himself.) are risking their reputation for money and are producing an indefinite number of copies after one plate. Even if they are making more money in their life time, they are reducing the value of their own works of art and are creating a suspicion for every museums and art gallery which might want to exhibit their works. This way they are breaking the law producing illegal copies, forgeries, and are mocking the buyers of good faith who are paying an unrealistic price for their acquisitions. This sort of action is a fraudulent one and represents a serious offence.

Even if some states adopted norms which are stipulating a clear methodology to be followed by the artists, printers and art traders for the works of art, especially for graphic works of art, in Romania does not exist such rules and regulations. In consequence, the Romanian artists are doing things according to their self respect and conscience, or following their pecuniary interests and the art market.

In Great Britain, for example, Engraving Copyright Act, also known as Engravers' Copyright Act, was passed in 1735 by the British Parliament, being - at our knowledge - the first European piece of legislation which stipulates the rights and obligations of the engravers and printers. The Act aimed to protect the engravers against the fraud and it is also known as “Hogarth's Act”, being named so after William Hogarth, a well known engraver of that time. Referring to this act, the historian Mark Rose mentioned that it "protected only those engravings that involved original designs and thus, implicitly, made a distinction between artists and mere craftsmen. Soon, however, Parliament was persuaded to extend protection to all engravings." [6]

B. The copies are replicas produced following an original, but respecting the details or the dimensions of the original artifact. Due to that, the copies are usually less accurate than reproductions. In order to avoid any confusion between a copy and an original, the lawful copies are specially marked (inscribed) with mention "copy". Also, the materials used to realize copies, even if they are similar to the original materials, are not
identical from the point of view of their composition. These differences are intentionally done because there is the preoccupation to avoid the confusion between the copy and original. The copies could not be presented as originals in any circumstances. The copies created to appear as versions of an original artifact, are traded in the market in a fraudulent way and can be placed in the category of forgeries.

C. The fake represents an artifact fraudulently produced which is to be presented as a work of art belonging to a certain artist, in reality the copy belonging to some other person. A fake is not a duplicate of a specific object; by itself it is an original work of art made to be attributed, due to the notoriety and market’s price, to a certain artist. The fake is copying a style and has certain similitude with some other works of art created by the artist to whom is attributed.

A fake is completed with the signature of the forged artist as well as with writings about the “new discovered” masterpiece.

The existence of certain situations at the border between fake and authentic [3] is asking a more complex analyze in order to emphasize:

- An original work of art modified in the style of a later period of time;
- An original work of art modified in the process of restoration by replacing parts or by cutting off parts;
- The engraving printed today after an original plate, with an old press, using the paper and the colors used by the author;
- The coin made in the original mold after the quantity of coins has been produced, of an identical alloy or even better than the original.

D. The imitation of a certain original object represents another type of fake also done with the unequivocal intention to commit a fraud.

The Internet is offering today a multitude of opportunities for transactions with cultural goods. The amounts of money used in art transactions are huge and are circulating very fast. Unfortunately, almost all these transactions are off control. There are no rules to set a special frame for the transactions with art, but it does exist an unlimited lack of interest for checking the authenticity of the art works in circulation. Many of the cultural goods are stolen or forged. The tragic consequences for the honest art dealers, art lovers, museums, collections, and last but not least, for the artists, are incalculable. The worst of all is the fact that at least a part of the money are reentering in the circuit of the organized crime or are used for terrorist activities.

LIABILITY IN OTHER ENACTMENTS

We must also bear in mind the provisions of art. 21 al. 3 of Law no. 8 of 14.03.1996, concerning the copyright and the related rights, according to which "copies of the original works of art or photography made in a very limited number by their author himself or with his consent, shall be considered as original works of art."

The Directive no. 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, is precise in Article 2, “(1). For the purposes of this Directive, "original work of art" means works of graphic or plastic art such as pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs, provided they are made by the artist himself or are copies considered to be original works of art. (2). Copies of works of art covered by this Directive, which have been made in limited numbers by the artist himself or under his authority, shall be considered to be original works of art for the purposes of this Directive. Such copies will normally have been numbered, signed or otherwise duly authorized by the artist.”

The Law no. 311 (r1) of 08/07/2003 of the museums and public collections, republished under Law no. 12 of 11/01/2006, stipulates in the article 36 al.2, a warning rule: "the execution of fakes as cultural goods, for marketing purposes or any other purpose, is an offense and shall be punished in accordance with the legal provisions relating to the cultural objects classified as national cultural heritage."

The Law no. 301 of 28/06/2004, concerning the Penal Code, repealed by the Penal Code of 17/07/2009 to 28/07/2009, included a special title, the Title IX - offenses against cultural values and against intellectual property, in which the Chapter I - Crimes against movable national cultural heritage and against the national archives patrimony. In the art. 417 al. 3 was reproduced art. 84 of Law nr.182/2000, mentioning the strict imprisonment penalty.

The Law no. 286 of 17/07/2009, concerning the Penal Code, retains the concept of the Penal Code in force today, since it devotes a special chapter to the cultural heritage offenses, and therefore does not incriminate the cultural property forgeries.

The Law no. 187 of 24/10/2012, with entry into force on 01.02.2014, in fact a law for implementing the Law no. 286/2009 concerning the Penal Code, sets rules for conflict of laws resulting from the entry into force of the Penal Code. Therein, the Law nr.182/2000 brings a number of changes and additions, including the content of art. 84, whereby it excluded the phrase "any other purpose" as punishable offense only if committed “for commercial or were exposed in public”. The offense is punishable by imprisonment from 6 months to 3 years or a fine.
None of the papers mentioned above, does not provide real protection of cultural goods classified, or unclassified.

References


[7] The Short Titles Act 1896, section 2(1) and Schedule 2


The administrator of a company’s cumulative criminal liability with civil liability

Mihaila S.

Police Academy “Alexandru Ioan Cuza” (ROMANIA) stefan.mihaila@academiadepolitie.ro

Abstract

The administrator of a company is through the nature of the things is the one that initiates the company’s activity. When exercising his position it is possible that he may commit crimes. In case of intentional crimes that cause damages we are in the presence of a combination between criminal and civil liability.

Key words: administrators, criminal liability, damage, cumulative

General considerations

The doctrine [1] considers that the administrator is the main operative organ of the companies, which according to the law, is capable of fulfilling all the needed operation that are asked for accomplishing the company’s objective, with the exception of the restrictions imposed by law or the constitutional act.

Because of such things, some authors stated that „the administrator has a dangerous position for himself, for the society but also, for the others”[4]. Through their management instruments that are fair and dynamic, the administrators can bring prosperity and immense profits to the society, but at the same time they are proper to bring prejudice and even ruin the companies.

The business activity practice, showed, almost with no exception that the loss of good repute of the administrator through criminal sanctions, may lead directly or indirectly to the loss of repute, reliability and credibility of the company in the market. [4]

The psychological impact of the prosecution or conviction of some directors is particularly strong on business partners and especially on the creditors of the company and it can have as an end even the bankrupt of the company whose administrators lost repute.

The administrators’ repute and credibility does not only contribute to the extent of the business relations, but also in some situations, they are designed to help the companies overcome some difficult financial and economical situations or to avoid bankruptcy.

Having as basis the law’s general theory, the criminal liability is the sanction of the criminal law, the consequences of not respecting the legal rules, when committing a crime, and the civil liability is mainly a contractual liability, because at the bottom of the relationships between the administrators and the company is the warrant, but also a tort if the administrator has committed a civil tort.

Specific aspects regarding the cumulative of the criminal liability and the civil liability of the administrator

In case of crimes committed by administrators that produce damages, we are in the presence of a plurality of civil liability and criminal liability. This cumulative liability has some features in the case of administrators, and the causes that remove or exclude the criminal liability, do not remove the civil one, that makes them pay the prejudice.

Criminal liability and civil liability[3] are not alike firstly, and essentially because of their ending. While criminal liability has a punitive nature, following to apply some sanctions, punishments (lato sensu) to the person that was found guilty of a crime, the civil liability has a repairing character, following the recovery of the prejudice that was cause to a person.

The cumulative of the criminal liability and civil liability problem interferes only when the criminal deed causes prejudices towards the company and the others. Thus, criminal liability can be combined with the civil one, each of these two forms keeping its individuality and own legal system. In the case of some crimes of danger or in those cases in which attempt is punished we are not in the presence of the liabilities’ cumulative.

The Commercial Law’s doctrine[4] has in view some of the consequences of combining the criminal liability of the administrator with the civil one:
In the case of the prejudice caused by the criminal deed, and the victim is a third, he has four possibilities of option to recover the prejudice, because the civil action unlike the criminal proceedings, is available, therefore the third has the option to act civilly only the administrator, only the company, the manager and the company jointly or he may give up to the civil action. In either situation, if the company has indemnified the prejudice’s victim, it has recourse against the administrator, only that it will bear the risk of insolvency. These solutions are possible because besides the liability of the administrator that has caused a prejudice a warranty liability of the company as responsible civil party for it administrators or representatives is added.

- If the prejudice caused by the criminal deed of the administrator was reflected directly on the company amounts there rise some theoretical and practical problems that come from the dual nature of tort, contract or tort manager. In this situation combining the criminal and civil liabilities cannot be asked by the damaged company to obtain two different compensations. The combination Is not possible not even in the cases when they want to benefit of both advantages offered. [3]

Some problems and opposite points of view have risen in some cases in which the failure of the administrator’s warrant contract, is at the same time a crime: as fraud in the execution of the contract (art.215 paragraph 3 of the Criminal Code) breach of trust (Art.213 of the Criminal Code), fraudulent management (Article 214 of the Criminal Code) and others.

In these situations, the damaged company has the possibility to choose between an action based on the liability of the contract or an action based on a delictual liability of the shareholder.

The two actions can be introduced in a civil trial, separate from the criminal trial (these options are rare due to the legal expenses in the civil trial and also due to the fact that the criminal trial suspends the civil trial) or by introducing a civil action in the criminal trial (very frequent situation).

Regarding the exertion of the civil action in the criminal trial, the romanian jurisprudence decided that the civil delictual liability rules must be applied [7]. The same point of view is shared by a big part of the civil law doctrine [6] [5].

Some authors [4] have stated recently that they do not share the legal practice’s solution, that is to say since there is a contract, which, through its clauses, regulated the relationships between the parts, including the matter of civil liability, it follows that to apply the common law rules of the delictual civil liability where there is a special regulation, means to violate the principle specialia generalibus derogant (only where and when a special regulation does not exist the common law will be applied in subsidiary or in completion).

The consequences of the causes that remove or exclude criminal liability and their consequences for the civil liability

In the comercial [1] and criminal [2] law doctrine, some circumstances or clauses that exclude the criminal character of the action or remove the criminal character of the liability regulated by the Criminal Code are included in this category: the state of emergency, self-defence, the major force, the fortuitous case, irresponsibility actually invokes the lack of real social danger.

If the administrator, author of a criminal action is in a situation like this he will be exempted from the liability. Removing the sanctionable characteristic of the criminal liability does not automatically leads to the disappearance of the restoring effect of the civil liability.

According to art.346 of the Criminal Code regarding the solving of the civil action within the criminal trial, in case of convicting, acquitting or suspending the criminal trial, the court decides through the same sentence also in the case of the civil action. When the acquitting has been pronounced for the case in which the deed does not meet the social danger of a crime or because the court observed the existence of a cause that removes the criminal characteristic of the deed or because one of the constitutive elements of the crime is missing, the instance can impose the repairing of the damage according to the civil law.

The granting of civil compensations cannot be done in cases in which the culprit’s acquitting was pronounced because the deed din not exist or it was not committed by him.

Also, the criminal instance does not solve the civil action when it pronounces the culprit’s acquitting because the deed is not stated by the criminal law or when the criminal trial’s suspension is pronounced for lack of the victim’s preliminary complaint, of the authorization, of the intimation of the competent authority or of any other necessary condition for initiating criminal procedures as well as when res judicata exists.

In all the cases presented above or when the criminal instance omitted to pronounce over the civil compensations, the victim, company or thirds, has the possibility to recover the damages from the administrators that are guilty of producing them through a civil action exerted outside the criminal trial.
References


Special limitation of the criminal liability. The valences of the practical application of art. 124 of the penal code

Mihalache C.M.

"Ion Ionescu de la Brad" University of Agricultural Sciences and Veterinary Medicine Iași (ROMANIA) E-mails: av_carmen_diaconu@yahoo.com

Abstract

"All beings, writes Paul Fauconnet, are virtually able to become responsible. Responsibility of a subject does not follow from properties that would be inherent to it, but from the situation he is in" and the exercise of freedom in a state subject to the rule of law, can exist only in the context of its restriction based on the compliance of the conformity report by the individual who is respected the procedural rights and freedoms within a fair trial marked by the purpose of his holding of liability if he is proved to be guilty of the criminal offence for which he was tried, otherwise not being justified the initiation of the criminal proceedings which marks the beginning of the constraint report between the state and the individual as a result of the breach of the rule of law. [1]

Keywords: procedural rights, criminal proceedings, special limitation, etc.

Introduction

The criminal liability, as a judicial institution, is the finality of the criminal proceedings, marked by the delivering by means of a final decision that establishes that the defendant committed the crime for which he was indicted, as it was described in the indictment in fact and in law, with the form of guilt required by the lawmaker, affecting the protected social value, accusing of crime the fact by the Penal Code or a special criminal law. [2]

In the light of the definition given above, in our opinion, the special limitation intervenes if no document of notification was made to the defendant on the criminal case or were made notifications to the last legal residence or domicile declared, but he is actually not living anymore at these addresses and consequently he is not aware of the criminal case underway, as provided by the provisions of Article 123 of the Penal Code.

We also consider that in relation to Article 121 and Article 122 of the Penal Code we can talk about the special limitation and in relation to the situation in which the criminal case ended, the defendant was duly summoned, benefitted of the right to defense by appointing a public lawyer, but it was not enforced the conviction sentence warrant decided by final criminal decision within the term of fulfilment of the limitation depending of the amount of the legal punishment provided by the lawmaker for the respective criminal offense.

In this case we cannot say that the person in question is not guilty of the criminal offense which led to the initiation of the criminal action by the Public Ministry by the prosecutor, but that it was prescribed the right of the state as the actor of the legal compulsion report to oblige the defendant to serve the punishment to which he was sentenced.

We hereby consider that in light of the laws analyzed respectively art.124, art.122, art. 123 of the Penal Code the fact that these are the assumptions considered by the lawmaker where is operating the special limitation as a cause by which the finality envisaged by the criminal case regarding its criminal side do not operate anymore.

Methodology

Given the nature of the legal work we studied the specialised applicable legal texts namely art. 122 of the Penal Code, art.123 and art. 124 of the Romanian Penal Code and the judicial practice in the field that gives the applicative valence to the method of application of these legal texts as a cause for termination of the criminal case.
Results and Conclusion

The text of the law governing the special limitation, namely art.124 of the Penal Code takes into account a special term, namely since the date the imprisonment conviction was delivered by a final decision passed 2/3 of the general limitation period considered by art. 122 of the Penal Code and it becomes operational even if during this period of 2/3, decisions of the authority intervened and discontinued the limitation (For example in the assumption art.122 of the Penal Code, letter a, two-thirds of the limitation term mean 10 full years since the date of the final decision, even if within this period there were also issued warrants of conviction but they could not be met, being impossible to find the person convicted for whom the warrant of conviction was issue). [3]

Although the legal practice [4], [5]. supports a totally different perspective, we consider as illegal the application of this text of law that regulates the special limitation namely art.124 of the Penal Code if the defendant was duly summoned, benefitted of the chosen defender, declared in front of the Court, and by the decision delivered, the Court considers the guilt and implicitly its criminal liability but the intervention as well of the special limitation due to the length of the trial.

We cannot agree with this point of view, in our opinion is a circumvention of the aim of the lawmaker. By no means was the generic legal assumption the one described above.

In our opinion, the lawmaker considered only two situations: either the accused does not know about the trial, as he does not live anymore at the last legal domicile which is registered in the database of the Persons Record, even though he was duly summoned and benefitted of the right to defense by the public appointment of a lawyer or he even attended the criminal case, but in the period of the general or special limitation, which is 2/3 of the length of any term referred to by art. 122 of the Penal Code, it could not be implemented the conviction sentence warrant.

We consider a situation where the defendant was present or not, benefitted of a chosen defender, who stated the domicile of the defendant and the Court considers that intervened the special limitation period regulated by art. 122 colf the Penal Code represents a circumvention of the purpose of the criminal case, of the constitutional provisions enacted by art. 124 of the Constitution, namely to make responsible the persons who are guilty of committing crimes and prejudice the rule of law and thus to the protected social values, Justice must be done in the name of law, uniquely, impartially and equal for all participants to the justice act.

There is no text of law that charts the length of the criminal case, the only regulated term being the one concerning the period of 180 days of remand custody, the maximum duration under article 23 (5) of the Romanian Constitution. Iterating the idea of the lack of provision on a duration regarding the length of the criminal case, we refer to the constitutional texts, namely art. 21 (3) that regulate "the parties have the right to a fair case and to the settlement of the cases in a reasonable time".

The Constitutional Court in its practice of settlement of the unconstitutionality exception of art. 124 of the Penal Code and which discussed the application on the calculation of the special limitation and of the penal law more favourable, it concludes that the special limitation of the criminal liability is a cause of removal of the criminal liability and consequently of failure to apply the punishment, with the derived effect of termination of the criminal case. [6].

In this context even more is not justified the application of art. 124 of the Penal Code in case is pending, the defendant present or absent, in the latter he benefits of the right to legal counselling or legal representation, in the sense of establishing the occurrence of the special limitation of the criminal liability due to the long duration of the process.

It already occurs a situation of unfairness for the person who was tried in a reasonable time without being able to rely on the effects of the special limitation or for the people who were kept in a preventive custody, were tried in a period when they could not rely on the application of art.124 of the Penal Code and from the actual serving period, they are deducted only the detention period and not the entire duration of the trial.

Therefore we argue that the correct application of art. 124 of the Penal Code is presumed applicable in two situations in our opinion: either the accused does not know about the trial, as he does not live anymore at the last legal domicile which is registered in the database of the Persons Record, even though he was duly summoned and benefitted of the right to defense by the public appointment of a lawyer or he even attended the criminal case, but in the period of the general or special limitation, which is 2/3 of the length of any term referred to by art. 122 of the Penal Code, it could not be implemented the conviction sentence warrant.

For the judicial practice to be correct as how it applies the limitation of the special liability it would require the enactment of the maximum duration of the criminal case as well as the impossibility of granting terms which are not justified by taking evidence to solve the case.

We hereby consider that the finality of the criminal case becomes irrelevant being characterized by the coercivity principle of the criminal liability which marks the transformation of the conformity report between the state and the legal entity who violated the criminal law in one of coercion of the individual freedom.

How justifies in this case the Public Ministry by the Court meeting prosecutors, which symbolize the state and its legal order and who seek to restore this order, just the criminal liability of the persons guilty of
violations of the social values protected by the Constitution, the Romanian Penal Code and the special criminal laws, the lack of finality of the criminal case, by means of this procedural incident, namely art.124 of the Romanian Penal Code which reflects de facto the fact that during the criminal case, regardless of its procedural phase, criminal prosecution or inquiry, it exceeds the reasonable period taken into account by the constitutional lawmaker and that overlaps with that of the special limitation.

References

Prescription of criminal liability and imprescriptibility of certain infractions in the comparative criminal law

Mirisan L.V.

University of Oradea, Faculty of Law, (ROMANIA) ligiamirisan@yahoo.com

Abstract

‘There are situations when criminal repression no longer fits certain requirements imposed by social reality and criminal policy, when the crime wasn’t discovered in time and the perpetrators weren’t caught or even identified or the case was not solved within the lawful term.

Due to these reasons, criminal liability is removed with the help of prescription. As a consequence, criminal liability prescription is a cause that eliminates the obligation of the perpetrator to bear the consequences of committing an act, after the completion of a lawfully provisioned term.’ [12]

Keywords: criminal prescription, imprescriptibility, comparative law, infraction, criminal liability

General Considerations Related to Prescription

Prescription is a cause that eliminates both criminal liability and the execution of punishment because passing of time, under certain conditions, makes the criminal law inapplicable or the applied sanction no longer executable.

Prescription has a general character as it refers to any crime or criminal, except for crimes against peace and humanity. It operates ex officio, meaning that it doesn’t need to be requested by the interested party, being in full right from the moment of its fulfilment.

Criminal prescription steps in always and only when passing of time could produce consequences opposed to the purpose of criminal sanction. For criminal policy reasons, prescription appears as a general application character institution, always operating obligatorily, pending to be invoked and applied ex officio” [1]

Short History of Imprescriptibility

The term imprescriptibility appeared in an international historical context crushed by the atrocities, which appalled the world, after the end of the First World War. It was thus necessary to bring to criminal account those responsible for such crimes. Events like the large-scale extermination of a Ruanda ethnical group or the discovery on the territory of former Yugoslavia of common burial pits convinced the international community that it was high time for establishing some international criminal courts to try such reprehensible acts like war crimes, crimes against humanity, aggression crimes and genocide.

The judicial system from Argentina came forward with a very interesting proposition, underlining in 1989 that the origin of imprescriptibility, as a principle or as convention, came from the ideas of Hugo Grotius. Anyways, the International Law Commission in 1996 denied the fact that such rule already existed in those times. Imprescriptibility of international crimes, for this is the starting point for all the contemporary criminal law regulations concerning the imprescriptibility of homicides and premeditated crimes resulting in the victim’s death, as principle, is applied to each of the three main international crimes (genocide, the crimes against humanity and war crimes) or to only some of them? In addition, it doesn’t extend over other international infractions like acts of torture, forced disappearance of persons, or violations of human rights?” [11] The majority of world juridical systems show that the national provisions stipulating these imprescriptibility related aspects are divergent enough. For instance, the Albanian legal system and the Estonian one contain dispositions provisioning the imprescriptibility of “war crimes and crimes against humanity, but excluding genocide” [18].The Armenian and Chile provisions in the matter are limited to genocide and war crimes, excepting the crimes against humanity. [5] At the opposite point, “the legal systems from Burkina Faso and Cambodia contain one provision about the imprescriptibility of crimes against humanity and of genocide, thus excluding the war crimes. Nevertheless, Cuba limits the material field of applying imprescriptibility to crimes against humanity.” [11]

An interesting question was raised in the doctrine, namely if a national norm in force, a general principle or an unwritten law rule referring to the imprescriptibility of certain crimes, would apply immediately
Criminal repression in the context of the economic crisis and the maximization of crime at European and global level (May 9-13, 2013, Bucharest, Romania)

or retroactively. For example, the retroactive application of the United Nations Convention from 1968 has proven to be one of the major obstacles for a series of Western states to ratify this international document. (See the European Convention on the imprescriptibility of crimes against humanity and war crimes, adopted at Strasbourg, in 25th of January 1974.) In return, these states went for national norms or for application of international law. The first doctrinal attempts and institutional projects for their materialization, to create criminal liability concepts at international level appeared after the ending of the First World War, but the political events from the international arena were to impede these plans both during the interwar period and during the development of the Second World War, as well as after its ending, during the so-called Cold War, marked by political and ideological confrontations between the world’s great powers.

The year 1993 brings on the establishment through the U.N.O. Security Council’s Resolution no. 827/1993 of the International Law Court for criminal prosecution of persons responsible for serious violations of the International Humanitarian Right on the territory of the former Federative Republic of Yugoslavia starting with 1991, also known as the International Criminal Tribunal for the former Yugoslavia (I.C.T.F.Y.). Expressly established through the articles of incorporation, the competences of this tribunal were limited to acts committed on the former Yugoslavian territory, to persons holding the citizenships of the states involved in the civil war and a temporary existence, respectively until the end of the trials judging the crimes done during this civil war. These aspects render CTFY the quality of an ad-hoc tribunal.

The same applies to the establishment through the U.N.O. Security Council’s Resolution no. 955/1994 of the second ad-hoc tribunal, the International Law Court for criminal prosecution of persons responsible for serious violations of the International Humanitarian Right on the territory of Ruanda, between January 1994 and December 1994, also known as The International Criminal Tribunal for Ruanda (I.C.T.R.) or the second ad-hoc tribunal.

With 114 signatory states from several continents, the International Criminal Court (I.C.C.) [20], as a permanent character court, was born through the Rome Treaty of 17th of July 1997, taking over in its statutes a generous part of the ad-hoc tribunals’ experience. The U.S.A., Russia and China didn’t ratify the Treaty of Rome, which implicitly means that they don’t recognize its authority in judging their own citizens.

The Juridical Nature of the Criminal Liability Prescription

The prescription of criminal liability is considered a cause for extinguishing criminal responsibility (extinctive), determined by the influence the passing of time exercises on the necessity to apply to criminal constraint. [9]

One may observe that the report of conflict criminal law, generated by committing an infraction, is erased because it wasn’t realized within a lawful period. However, through prescription the criminal character of the act is not removed. Surely, there are exceptions to the rule, like the offences considered imprescriptibly, which we address here in this paper.

Criminal liability prescription is a juridical institution with effects in the material criminal law, in the sense that it is a condition of punishability within a certain term provisioned by law, but also in the matter of criminal proceedings law because it is a condition of procedibility under the hypothesis of the conclusion of the prescription term that impedes the exercising of criminal action.

Prescription eliminates criminal liability through the simple fact of ending of the period since the committing of the act (passive condition) without claiming the fulfilment of certain active conditions such as: a good conduct, remedy of damage, etc.

The Juridical Nature of Imprescriptibility

If the criminal law prescription institution is a cause for extinguishing the criminal action, as the case may be, the question is if imprescriptibility does constitute a cause leading to non-extinguishing the criminal law report or is it a reason for not extinguishing the criminal action.

Reviewing the institution through the prism of legal provisions in the comparative criminal law matter, I consider that the juridical nature of imprescriptibility must be looked at from the same angle as the juridical nature of the criminal liability prescription. Of course, it is at the opposed pole, in the sense that we find ourselves in front of a cause that doesn’t extinguish the criminal law report or, as the case, the criminal action by the simple passing of time.

By fact and by law, we would be faced with an exception derogated from the basic rule of prescriptibility of criminal liability for the infractions we already referred to in this paper (genocide, premeditated crimes followed by victim’s death).
Comparative Law References

The French Criminal Procedure Code regulates the prescription of public action under art. 7-10, considering it a criminal proceedings law institution. Therefore, prescription is not a material criminal law institution (substantial), but of formal, proceeding law, referring to public action.

In the French doctrine prescription is considered a mixed institution from the manner it addresses the prescription of punishment execution or the prescription of public action. In the first case, it would be a criminal law institution and in the second case, it would be a formal law institution. [19]

The French criminal laws make a distinction between the prescription of public action in case a crime was committed and the prescription in case of a misdemeanour, provisioning shorter terms of prescription of public action than the Romanian criminal laws.

The Italian Criminal Code handles prescription as a substantial criminal law institution. According to art. 157 from the Italian Criminal Code, prescription is considered a crime extinguishing cause.

The Italian criminal law provides a different duration for the prescription of the attempt as opposed to the consumed infraction. In exchange, the Romanian criminal law assimilates attempt to the consumed infraction under the aspect of the prescription duration.

According to the Spanish criminal law, prescription extinguishes criminal liability for the committed crime, fact that makes us think we are before a substantial, material, criminal law institution. In the Spanish Criminal Code, it is expressly if genocide crimes are imprescriptible.

The German criminal law provides that prescription remove criminal prosecution in order to sanction the act and take safety measures.

In the German legislation, genocide and aggravated first-degree murder are imprescriptible. We observe that the German criminal law extends imprescriptibility also to the aggravated first-degree murder, punished with life imprisonment.

Not far back, the Romanian criminal law also declared imprescriptible only crimes against peace and humanity. As shown earlier, the latest amendments of the Romanian Criminal Code in force and of the future criminal code show that homicides and the premeditated crimes resulting in the victim’s death are also imprescriptible.

The German Criminal law provides that prescription eliminate criminal prosecution in order to sanction the act and take safety measures.

The same document regulates in its special part, infractions against life, from among which the aggravated first-degree murder is imprescriptible and then genocide is also considered imprescriptible. We learn that the German criminal law extends imprescriptibility also to the aggravated first-degree murder, punished with life imprisonment.

From the very beginning, this criminal code presents a slightly different wording as the criminal codes from Europe’s national states, strongly underlining imprescriptibility, as if it would present, in fact, a rearranging of the sanctioning treatment within normal limits. In this sense, the last decade practice demonstrated that the exaggerated extension of the punishment limits is not the efficient solution for fighting crime.

As shown in the recitals of the Kosovo Province Criminal Code, “in a constitutional state, the extent and intensity of criminal repression should remain within determined limits, firstly by considering the importance of the affected social value for those beating for the first time the criminal law, following to grow increasingly for those committing more crimes before getting convicted and much more for those in recurrent state.” [7]

Still, in this case also, only genocide crimes and war crimes are imprescriptible. Being about an emerging Criminal Code, the perspective of regulating the imprescriptibility of homicides infractions and those followed by the victim’s death seems realistic enough.

The regulation from the Finnish Criminal Code belongs among those provisioning the imprescriptibility of the infractions for which the harshest punishment provided is life imprisonment. Here we are in the presence of a modern criminal Code with a pretty indulging punitive system, and the stipulation according to which there are no prescription terms for the crimes for which the harshest punishment is life imprisonment, although apparently, indicates a larger spectrum of imprescriptible infractions than in the case of other countries previously discussed, in fact, the life imprisonment punishment is to be found in numerically limited situations.

Besides the classical example of genocide incrimination (see the Finnish Criminal Code, Section 6 – Genocide 578/1995), the Finnish Criminal Code also offers other examples of sanctioning certain crimes with life imprisonment, like those of high treason and terrorism.

Although it is situated among those juridical instruments that served as a model for several states for the draw up or alteration of their criminal legislations, the Spanish Criminal Code circumscribes to the idea of imprescriptibility of only those crimes which harm humanity, genocides and acts against protected persons and goods in case of armed conflicts.
Criminal repression in the context of the economic crisis and the maximization of crime at European and global level (May 9-13, 2013, Bucharest, Romania)

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The imprescriptibility of some crimes according to the criminal code in force, to the new criminal code and to law no. 27/2012

Mirsan V.

University of Oradea, Faculty of Law, (ROMANIA) valentinmirisan@yahoo.com

Abstract

Law no. 27/2012 for the alteration and supplementation of the Penal Code and of the new Penal Code stipulates elimination of the criminal liability and punishment execution prescription in cases of homicides and intended infraction which led to the victim’s death.

The mentioned Law aimed at correlating the Romanian criminal law with the norms and solutions from other European states (Germany, Great Britain, Austria, Denmark, Holland, Finland, Italy, Czech Republic, Ireland, Estonia, Malta and Cyprus). Acts of homicide are not prescribed either in the USA, Canada or Japan.

Moreover, the normative act is compliance with the decision of the European Court on Human Rights, with the European Convention on Human Rights, with the European Convention on imprescriptibility of war crimes and crimes against humanity, as well as with the UNO Convention on the imprescriptibility of war crimes and crimes against humanity, we referred to in this paper.

Keywords: imprescriptibility, homicide, ECHR.

General Dispositions

Prescription is a cause that eliminates both criminal liability and execution of punishment because passing of time, under certain circumstances, makes the criminal law not to be applied anymore or the applied sanction not to be executed.

Prescription has a general character as it refers to any offence and offender except crimes against peace and mankind.

It operates ex-officio, meaning that it mustn’t be requested by the rightful and interested party from the moment of its fulfilment.

There are situations when the criminal repression could not correspond anymore to some necessities imposed by the social reality and criminal policy, when the crime wasn’t discovered in time, the perpetrators caught or identified or the case couldn’t be settled during the lawful term. Due to these reasons, criminal liability is barred with the help of prescription. Consequently, the prescription of criminal liability is a cause that removes the obligation of the offender to support the consequences of committing the crime, after passing a time interval provisioned by the law.

Starting from these generalities about prescription, we find out that in the Romanian criminal law all infractions were prescriptible, except for those against peace and humanity.

The New Penal Code took over under the same terms the regulations, considering that imprescriptible are only the infractions of genocide, those against humanity and of war.

Thus, pursuant to art. 121, par. 2 and art. 125 par. 2 from the Penal Code in effect, imprescriptible are only the crimes against peace and humanity. This provision is taken over also by the new Penal Code, through art. 153 par. 2 and art. 161 par. 2 saying that prescription does not eliminate criminal liability or the execution of punishment except for the infractions of genocide, against humanity and of war.

Elimination of prescription in cases of homicides and of premeditated crimes which led to the victim’s death. Short comments on the modifying texts

Law no. 27/2012 for the alteration and supplementation of the Penal Code and of the new Penal Code shows the elimination of the criminal liability and the punishment execution prescription in cases of homicides and of intended crimes which led to the victim’s death [7].

a. The texts from the Penal Code in force will have the following content:
Thus, 121 par. 2 is altered and will have the following content:
“Prescription will not remove criminal liability in cases of:
   a) infractions against peace and humanity, irrespective of the date they were committed on
   b) infractions provisioned under art. 174-176 and of intended crimes which led to the victim’s death.”

The rule established by the criminal law in force is that prescription eliminates criminal liability. By exception, the two categories of crimes are presented, for which prescription doesn’t eliminate criminal liability, for reasons which will be explained here.

Under article 121, after paragraph 2 there is a new paragraph introduced, paragraph 3, with the following content:
“Prescription will not remove criminal liability in cases of:
   a) infractions against peace and humanity, irrespective of the date they were committed on
   b) infractions provisioned under art. 174-176 and of intended crimes which led to the victim’s death.”

This text refers to the acts of homicide and of intended acts which led to the victim’s death, for which the prescription term, general or special, is not fulfilled by the date of enactment of this law.

Article 125, paragraph 2 is altered and will have the following content:
“Prescription will not eliminate the execution of main punishments in the case of:
   a) acts against peace and humanity, irrespective of the date the conviction decision was rendered final and binding;
   b) acts stipulated under art. 174-176 and of the intended acts which lead to the victim’s death.”

At article 125, after paragraph 2 a new paragraph is introduced, paragraph 3, with the following content:
“Prescription doesn’t eliminate the execution of main punishments either in the case of offences provisioned under par. 2 let. b), for which, by the date this disposition was enacted, the prescription term of the execution was not fulfilled.”

These texts refer to the main punishments applied for the same categories of crimes for which prescription doesn’t eliminate their execution. So, for infractions against peace and humanity, prescription doesn’t eliminate the execution of punishments, irrespective of the date on which the conviction decision was rendered final and binding. Moreover, for homicide acts and for the intended acts which led to the victim’s death, prescription doesn’t remove the execution of main punishments for which, by the date of enacting this law, the term of execution prescription was not fulfilled.

b. Law no. 286/2009 (art. II), concerning the new Penal Code, is altered and supplemented as follows:
At article 153, paragraph (2) is altered and will have the following content:
“(2) Prescription doesn’t eliminate criminal liability in cases of:
   a) crimes of genocide, against humanity and of war, irrespective of the date they were committed on;
   b) crimes provided under art. 188 and 189 and of intended crimes which led to the victim’s death.”

The rule consecrated by the new Penal Code is that prescription eliminates criminal liability. By exception, the two categories of crimes are presented, for which prescription doesn’t eliminate criminal liability, for reasons which will be explained here.

At article 153, after paragraph (2) a new paragraph is introduced, paragraph (3), with the following content:
“(3) Prescription doesn’t eliminate criminal liability either in case of infractions provisioned under par. (2) let. b) for which the prescription term, general or special, is not fulfilled by the time this disposition came into force.”

This text refers to the acts of homicide and to the intended acts which led to the victim’s death, for which the prescription term, general or special, is not fulfilled by the time this law came into force.

At article 61, paragraph (2) is altered and will have the following content:
“(2) Prescription doesn’t eliminate the execution of main punishments in case of:
   a) crimes of genocide, against humanity and of war, irrespective of the date on which they were committed;
   b) the crimes stipulated under art. 188 and 189 and of intended acts which led to the victim’s death.”

At article 161, after paragraph (2) a new paragraph is introduced, paragraph (3), with the following content:
“(3) Prescription doesn’t eliminate the execution of main punishments either in cases of crimes provisioned under par. (2) let. b) for which, at the date of enacting this disposition, the term of execution prescription was not fulfilled.”

These texts refer to the main punishments applied for the same categories of crimes for which prescription doesn’t eliminate their execution. So, for infractions of genocide, against humanity and of war, prescription doesn’t eliminate the execution of punishments, irrespective of the date on which they were committed. Moreover, for homicide acts and for the intended acts which led to the victim’s death, prescription doesn’t remove the execution of main punishments for which, by the date of enacting this law, the term of execution prescription was not fulfilled.
We learn that imprescriptibility is provisioned also for homicides and for intended crimes which led to the victim’s death for which the prescription term is not fulfilled by the time this law enters into force.

This provision makes room to interpretation concerning law retroactivity and a more favourable criminal law applicability for the transitory situations the text refers to[1].

Thus, one may argue that the new modifications of the Penal Code, under the aspect of imprescriptibility of homicides acts and of those leading to the victim’s death are not to be applied retroactively. In backing up this point of view, the provisions of art. 15 par. 2 of the Romanian Constitution are invoked, according to which, the law stipulates only for the future, except for a more favourable criminal or contraventional law. So, in these situations will be applied obligatorily the more favourable criminal law.

The provisions of art. 13 from the Penal Code are in consensus with the constitutional norms. The text provides that in case since the committing of the infraction until the final trial of the case one or more criminal laws appeared, the most favourable of them will be applied. Or, the prescription of the criminal liability and execution of punishment are institutions of substantial criminal law, which means that the dispositions concerning the application of the criminal law in time, including the most favourable criminal law are applicable to them. In favour of this point of view are also the dispositions of art. 20 from the Romanian Constitution, which refer to the human rights related international treaties.

According to this text, “the constitutional dispositions concerning the rights and liberties of citizens will be construed and applied in compliance with the Universal Declaration on Human Rights, with the pacts and other treaties Romania is part of. Should there be inconsistencies between the pacts and treaties concerning the fundamental rights of humans, in which Romania is part of, and the internal laws, prevalent will be the international regulations except for the case when the Constitution or the internal laws contain more favourable dispositions.”

This problem was solved differently by the European Court of Human Rights in concordance with the European Convention on Human Rights which decided that the principle of non-retroactivity is not breached by extending or eliminating prescription. In the coming section we would like to present its manner of settlement.

The manner in which the problem was settled by the European Court on Human Rights, in accordance with the European Convention on Human Rights

The problem is settled by the European Court on Human Rights which decided that the principle of non-retroactivity is not breached by extending or eliminating prescription.

The court considered that imprescriptibility is not a case of retroactivity.

In essence the Court considered that retroactivity is forbidden under two aspects:

a) not to punish today someone for an act which was not an infraction and punishable at the time it was committed;

b) not to apply one person a greater punishment than the one provided by the law at the time the crime was committed.

In consequence, the present law doesn’t introduce now the infraction of homicide and neither does it increase or aggravate the punishment for the infraction of homicide. The result is that the extension or elimination of the prescription terms is possible and based on the legal obligation of the perpetrator to answer, at all times, for the consequences of their act, as long as the prescription terms are not yet fulfilled.

Thus, Law no. 27/2012 considers it is about an act of “activity” of the criminal law, in the sense that the new law is applied also to the juridical consequences of a past act, if those consequences didn’t wear out completely and they are still in effect, ongoing by the date of its entering into force.

Or, in the case of homicides or intentional acts leading to the victim’s death, even if the act was committed prior to the new law, the juridical consequences of this act are produced and exist for the entire duration of the existent prescription term. These consequences wear out, fully consumed only when the prescription term is fulfilled because at any time, during the prescription term, the author of the homicide may be put under criminal liability.

In consequence, if the prescription term is not fulfilled at the date the new law is enacted, this new law may regulate the still existent consequences of the former deed. So the law will regulate the regime of ongoing prescriptions as an active not retroactive law.

The conclusion of the European Court on Human Rights, in accordance with the European Convention on Human Rights was that the non-retroactivity principle is not violated by extending or eliminating prescription. So the modifying law of the Penal Code in force as well as of the future Penal Code is in consensus with the court’s decision which we referred to [2] and in compliance with the European Convention on Human Rights.

The principle we referred to is also to be found in the European Convention concerning the imprescriptibility of war crimes and crimes against humanity which stipulates the following: “the convention
also applies to the acts committed before its entering into force, in case the term of prescription didn’t expire by that time”. [3]

The law refers also to the elimination of prescription for the execution of punishments in cases of homicides or of intended acts which led to the victim’s death. The simple conviction of the author of such infraction, if not followed also by the execution of the applied punishment through a sentence of conviction, would only represent an illusory measure for protecting the social values, respectively the human life, the idea of justice and faith in justice.

The law also targets the supplementation of the texts stipulating the imprescriptibility of the acts of genocide, against humanity and war, through the introduction of the phrase “irrespective of the date they were committed on”. This way, the texts from the law have been aligned with art. 1 from the UNO Convention on the imprescriptibility of war crimes and of crimes against humanity. [4]

In this sense, art.1 from the UNO Convention stipulates that “whatever the date on which they were committed, the crimes below will be imprescriptible:

a) crimes of war, as defined in the Statute of the International Military Tribunal from Nuremberg…;

b) crimes against humanity, no matter if committed during war or in times of peace, as defined in the Statute of the International Military Tribunal from Nuremberg…;

The UNO Convention started from an illustrious historic precedent, respectively that of the International Military Tribunal Charter from Nuremberg whose principles of international law have been subsequently recognized through the UNO Resolutions [5].

This Convention had as finality the establishment of a derogating juridical regime for a number of infractions. Thus, they were declared imprescriptible irrespective of the moment they were committed at, and no matter if, at the moment they were committed, they were considered violations of the national criminal law in the countries they were committed in. To be noted that these provisions have been applied for acts done prior to their adaptation, like the crimes of genocide, against humanity and of war during the Second World War [6].

Conclusions

The mentioned Law aimed at correlating the Romanian criminal law with the norms and solutions from other European states (Germany, Great Britain, Austria, Denmark, Holland, Finland, Italy, Czech Republic, Ireland, Estonia, Malta and Cyprus). Acts of homicide are not prescribed either in the USA, Canada or Japan. This solution was adopted also in Sweden in 2010.

Moreover, the normative act is compliance with the decision of the European Court on Human Rights, with the European Convention on Human Rights, with the European Convention on imprescriptibility of war crimes and crimes against humanity, as well as with the UNO Convention on the imprescriptibility of war crimes and crimes against humanity, we referred to in this paper.

Elimination of prescription for the criminal liability in cases of homicides and of intended infractions which led to the victim’s death is a way to cherish the right to live – the most profound and stable foundation of the civilized society. In this way, if these infractions become imprescriptible, the preventive function of the criminal norms in the matter will be more efficient.

In consequence, the legislative solution protects the right to live through means of criminal law – the first right from the list of fundamental human rights. Or, the infractions in discussion affect the right to live.

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[4] Convenția ONU asupra imprescriptibilității crimelor de război și a crimilor împotriva umanității, adoptată și deschisă spre semnare de Adunarea Generală a Națiunilor Unite prin Rezoluția 2391 (XXIII) din 26.11.1968, ratificată de România prin Decretul nr. 547/29 iulie 1969./The UNO Convention on imprescriptibility of war crimes and crimes against humanity, adopted and opened for execution by the UN General Assembly through Resolution 2391 (XXIII) of 26.11.1968, ratified by Romania through the Decree no. 547/29 July 1969
Criminal repression in the context of the economic crisis and the maximization of crime at European and global level (May 9-13, 2013, Bucharest, Romania)
Transnational organized crime - insecurity factor for nation

Modiga G.¹, Pocora M.²

¹"Danubius" University of Galati (ROMANIA)
²"Danubius" University of Galati (ROMANIA)
georgeta.modiga @ yahoo.com / monicapocara@univ-danubius.ro

Abstract

Evolution of contemporary society shows that although intensified intervention measures and the specialized agencies of social control against acts of organized crime in many countries there is a duplication of resurgence, being a social problem whose solution interests means of expression and as control factors in the field, such as the police, judiciary and administration, and public opinion.

Threats those decades ago were considered almost unanimously, speculation moved or analytical assumptions unlikely to materialize now become reality. Although the causes resurgence of organized crime are difficult to identify and explain the existence of sensitive differences in terms of scale and intensity from country to country, most scholars and researchers consider that the source of this phenomenon is the continuation of the political, economic and regulatory deficient in maintenance and increased social and economic disparities between individuals, groups and communities and increasing social and ethnic conflicts and tensions.

Proliferation "rational violence" specific organized crime and criminal organizations professional is now enhanced terrorist acts committed in order to inspire fear, dread and terror among the public, but a number of offences and crimes which violate individual rights and freedoms (murders, murders, rapes, robberies, physical assaults).

Keywords: criminal organizations, international terrorism, security policy

In the context of major contemporary social and political changes, the international imbalances and tensions caused by these processes, new forms of crime have increased especially in underdeveloped countries or those in transition to a market economy. A criminal gang, the way it is structured, flexibility and great penetration capacity in core areas of politics and economics, through its global scope quickly through unconditional appeal to violence, corruption and blackmail, is a direct and urgent threat, a challenge to global society.

In the classic version of a criminal organization can be a number of specific features such as structure, hermetic and conspiracy, flexibility, speed and capacity of infiltration, the transnational character of criminal organizations, profit orientation and use of force. Thus, criminal organizations have come to coordinate most of the world traffic in drugs, weapons, ammunition, strategic, human trafficking and stolen luxury cars to be owners of banks and holding companies to own hotels, casinos and oilfields, to engage in modern methods of crime such as money laundering and cyber crime.

Wide open borders, developing a highly permissive legislation external factor, poor economic development, political instability and corruption in poor countries have created exceptional opportunities and gaps for expansion and globalization of criminal organizations.

Currently transnational crime is a complex phenomenon of extreme gravity, the material value of the damage they cause society as a whole and the force that is able to penetrate and alter the economic, social and even political can affect not only the rule of law, but in extremis, even national security.

Also highlights the trend of diversification criminal globalization and expansion of illegal activities unhindered movement of people, goods and information, the rapid liberalization of financial markets, removing trade barriers. This, together with the globalization of currency markets, massive exodus of immigrants and immediate worsening trend of achieving prosperity, were the opportunities that crime has exploited rapidly.

Thus, the international community was faced with an economy "underground" large scale, which would discourage any attempt to control state and creates the conditions for marking money from illegal businesses like drug trafficking, arms, human beings, cars etc. stolen luxury. What is worrying is that this "virus" has reached the maximum in the world and in our country until recently considered a "pioneer" in terms of organized crime.

We are dealing with manifestations we mostly international crime and violence. Traditional crimes become a new challenge by changing operating modes. The production potential and imminent threat of damage these crimes can be seen as attacks on European civil society. This assessment fits broadly and international
terrorism. The purpose recognized the bombers in London and Madrid was to induce a state of fear and terror by killing a large number of people.

Efforts also organized crime groups use for their parts of the economic circuit for criminal so you can thus control can be seen as an attack on our society. If these groups would be successful, an essential foundation of our political systems in Europe - economic freedom - would be jeopardized. At the same time an expression of lack of concurrency is the commission said steadily, in parallel, from criminals or criminal groups in the states of crimes leading to the disadvantage of other countries and less developed societies. Sexual abuse of children in less developed countries, corruption and environmental crimes and illegal waste removal are just a few examples.

The biggest challenge in recent years is the international terrorism and forms of crime which derives from here. Terrorism is not really a recent phenomenon. But in the hands of religiously motivated offenders, he acquires a new dimension of danger that exceeds all expectations and imaginings so far.

As a special problem looming in the future relations international terrorism organized crime. Could not find until now a national symbiosis. But in some countries structural relationship between terrorism and organized crime. Thus, Taliban fighters in Afghanistan are financed by drug trafficking, like the FARC in Colombia. Therefore, it requires attention in these areas where structures are combined so-called "Warlord" with organized crime. Both share an interest in democratic structures as weak and limited control possibilities of prosecuting authorities.

Terrorism and illicit affairs with men and weapons found in these regions ideal land with favourable logistics and financial support. Research shows that the phenomenon should be initiated against terrorism and organized crime. Thus, Taliban fighters in Afghanistan are financed by drug trafficking, like the FARC in Colombia. Therefore, it requires attention in these areas where structures are combined so-called "Warlord" with organized crime. Both share an interest in democratic structures as weak and limited control possibilities of prosecuting authorities.

One of the most virulent threat of transnational organized crime. It is more and more public attention, national governments and international organizations. Representing undoubtedly an unprecedented challenge in the beginning of the millennium and the first era of globalization and technological advance, there is a growing tendency to regard this phenomenon as a threat to the security and general order, nationally and internationally. Under these conditions, more and more countries and international organizations publish their willingness efficient management of international cooperation to combat this type of threat.

The events of the last nine years have shown extraordinary strength of insurgent movements in the theatres of operations in Afghanistan and Iraq. "War on Terror" was launched in 2001 with the invasion of Afghanistan. Since then and until now have spent astronomical amounts to arming and maintaining military presence in these areas. These costs are added to the programs of reconstruction and recovery of equipment and training the local forces so.

The results of these campaigns were mainly: the elimination of Al-Qaeda training camps just after the invasion of Iraq Al-Qaeda forces to rebuild and become even stronger, destabilizing the region and Iran's acquisition of title "local power" , causing millions of civilian casualties, increasing the risk of radicalization moderate population, as well as other economic and other outcomes that we will not but regard. The most important is that after 10 years, Islamic fundamentalist-inspired terrorism not only still exists, but it seems that it has developed, expanding arsenal of tactics and recruits and the worst, gaining legitimacy among some circles Shiite and Sunni religious.

Maybe some voices would argue that to achieve objectives in 2001 it would take more time but in the interest of prudence, the best solution would be to find new solutions and implement them in parallel with existing ones, if not entirely replace the old ones.

In this sense, terrorism and transnational organized crime have a strong transnational transformed into completely non-state entities as both have demonstrated in the past decade. At least in the case of fundamentalist-inspired terrorism, the phenomenon manifests itself in different areas, some controlled environments rule of law while others are still dominated by chaos as theatres of operations in Afghanistan.

In this case counteract this phenomenon can only take one form or the military operations in theatres of operations or anti-terrorist operations in the controlled environment of states as they occur terror effects. The best solution seems to be the combination of these two types of doctrine and formation of a new measurement...
system that takes advantage of key features of the phenomenon that we combat that dynamism, adaptability and reliability.

Challenges of terrorism and cross-border crime in the context of globalization and the dynamics of the XXI century and the experience of the last 10 years to combat terrorism suggests a change in doctrine and focus more on internal than on the external environment. However, there are significant challenges in achieving this objective to be achieved without prejudice to the democratic values of rule of law. What can not be achieved in a way must be obtained in other ways, and this collaboration between partner countries, stimulating, coordinating and harmonizing policies adjustment process seems to be the obvious solution.

As a successful future counter-terrorism strategy and the one against cross-border crime will most likely depend on a doctrine based on the following priority cooperation and common interests rather than the individual. Unfortunately, at least in terms of legislation, the absence of a supranational sovereign system poses some problems to be overcome.

Dynamics of transnational criminal phenomena calls for a feedback however, to keep up with them and be at least as adaptive. In the context of terrorist cells communicate via computer games, the European Union has a strategy to combat these types of phenomena asymmetric adaptability to meet the requirements of the measure imposed by the international dynamics, the latter strategy against terrorism dating from 2005 which do was without any gaps at the time.

The current international system, at least at EU level is somewhat unprepared for a change in policies to combat terrorism and optimization policies to combat organized crime, although there is an infrastructure of cooperation between Member States, but it does not take optimal recovery force multipliers confers flexibility, adaptability and synchronization in the context of the decision-making process still occurs multiple.

However, from a more positive perspective, we look at efforts to strengthen and optimize EU bodies as a promoter of these changes that ultimately give us an international security as adaptive and dynamic as the threats against which trying to protect us.

Considering the fact that organized crime (including trafficking in human beings, drugs and weapons) and economic crime (especially smuggling, tax evasion and non-payment of customs duties) is, along with the corruption that is in the forefront ill order criminal, the most destructive criminal phenomena, it can be stated that preventing and combating transnational and cross-border crime is a priority of the national criminology. A national criminological policy is missing, which makes the actions of law enforcement to be dispersed and therefore ineffective. Instead, there is a clearly defined strategy and official corruption. Therefore could be developed and implemented a strategy to prevent and tackle cross-border and transnational crime, which would include, naturally, actions against two other major criminal threats in society: economic and organized crime.

To predict possible changes of border and transnational crime indicated systematic performance prediction of evolution phenomena. Centre for Combating Economic Crimes and Corruption established such work, the first results obtained. Follows as other institutions entitled to initiate forecasting activities.

Specificity of cross-border and transnational crime dictates the need to develop appropriate research tools such criminal acts, those used in operative investigations and prosecution. Operative investigation methods are established expressly by law, their application procedures are, however, must be developed so as to enhance the ability to detect and expose cross-border and transnational crimes.

Given the nature of the events that make cross-border and transnational crime, counter their successful implementation will also involve an exemplary collaboration internally between different public institutions such as the Centre for Combating Economic Crimes and Corruption, Ministry of Interior, Prosecutor's Office, Customs Service, Border Guard Service, Security Intelligence Service and others.

Changes likely to generate new types of crime require a corresponding change in the actions of those called to counteract them. And because optimal shape human behaviour modification consists in training, is to take a series of steps in this direction. On one hand, you have to include these topics in the curricula of specialized educational institutions, and on the other hand, will be organized training activities of practitioners in law enforcement. A very effective way is to organize joint training activities of law enforcement. They will contribute significantly to the standardization activities and interpretation rules at strengthening ties and coordinated problem solving.

Yet our society is not threatened by the scourge of terrorism that becomes increasingly transnational and cross-border dimensions. However, participation in international counterterrorism efforts is appropriate. It will allow for faster international arena and attract affirmation of assistance for domestic needs.

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Criminal punishment, economic crisis and criminality - interferences

Necula M.I.

The permanent reassessment of penal institutions is a necessity determined by the constant evolution of society. World states are entitled and at the same time obliged to permanently examine social realities and, whenever any social dysfunctions are noticed, must intervene to guide the destiny of their citizens towards a normality which entails a minimum level of satisfaction for all their members. Under this impulse, the legal systems of each state and the specific areas of law may undergo important changes and additions under pressure from socio-economic, cultural, religious and political realities. Consequently, each legal norm is distilled and shaped both in terms of its hypothesis and in terms of the disposition and sanction.

One may note that compliance with the disposition of a legal norm is supported by the sanction. Among statutory sanctions, criminal punishment occupies a special place. It is the means deemed appropriate by the legislating body to sanction violations of values protected by the criminal law. In this sense, criminal doctrine aims to incorporate in the norm pertaining to a particular offense both the notion of protection and that of repression. Accordingly, it has been argued that “in drawing up sanctioning dispositions, the focus is always on the interest that is protected and on the evil against which the protection is instituted; the sanctioning norm is underpinned by these two notions. As such, in each sanctioning disposition we may distinguish a mix of the two concepts, which encapsulates the idea of justice.” [2] Yet to what extent the two terms of the concept of offence can be reconciled in order to offer satisfaction to the injured party and ensure that the sentence of the offender is proportionate.

Key words: criminal punishment, economic crisis, criminality, decision-making process.

Introduction

When discussing criminal punishment it is absolutely necessary to assess, among other aspects, the norms governing the criminalizing of a criminal nature, the values that such norms protect, the penalties prescribed for criminal acts and any increase or decrease of the length of sentences. A criminal policy that implements more limited and alternative sentences stands in opposition to that which advocates longer sentencing terms.

The periods of economic crisis and the rising crime at European and global level are social phenomena that have been observed by the bodies charged with managing global economic matters and by the bodies vested with the power to enforce criminal law. The findings of the two categories of public officials must be adopted by the legislative power of states in order to adapt legislation to the current realities.

Aspects regarding the economic crisis

The crisis is a form of social degeneration that must be healed through a restoration of the normal state understood as the overall health and prosperity of the social body. In an attempt to define the current crisis of the modern world, through the prism of both its essence and of its causes and consequences, René Guénon stated that: “when it is said that the modern world is in the throes of a crisis, this is usually taken to mean that it has reached a critical phase, or that a more or less complete transformation is imminent, and that a change of direction must soon ensue – whether voluntarily or no, whether suddenly or gradually, whether catastrophic or otherwise.” [21]

The concern regarding the issue of the economic crisis is not a new one in the history of mankind, as it resurfaces regularly whenever the social body faces distress. The crisis of capitalism in the 17th century was illustrated by the words “The 17th century is the age of a crisis that affected man totally, impacting all his economic, social, political, religious, scientific, artistic pursuits and his whole being, to the deepest level of his vital powers, his feelings and his will. One could argue that the crisis was continuous, yet with violent oscillations.” [20] The reflection of the crisis in the fourth decade of the 20th century is found in the remarks of Fr. C. Dron who declared, at a conference of the General Association of Economists in 1937: “A violent economic crisis is nowadays haunting the world. It has brought on the agenda a multitude of issues in the community and individual life. The question is this: can the crisis be averted by violently changing laws and institutions that we are subject to, or is there a need for a new spirit that would blast powerfully and across the land, shaking the foundations of civilization and establishing a new world, with another mentality, with other...
powers and another will? A new world that would create a new environment, that is, new economic, political and social conditions?" [9]

The social crisis which began at global level in 2008 has its origins in the economic and financial crisis. The latter has manifested as private individuals, businesses and even states defaulting due to insufficient financial liquidity. This fact is blamed on the crisis of the variable-rate mortgage market in the U.S. in July 2007. It caused a decline in lending, the reduction of capital expenditures, a decrease in consumption, sales, production and services, rising unemployment and diminishing incomes. These changes are causing the social unrest and political rearrangements. The causes of the economic crisis are identified as being related to the excessive interdependence of world economies, excess production compared to demand, the tendency to maximize profit at the expense of nature and man, etc. The spiritual causes include: excessive or conspicuous consumption, fueled by credit at the expense of consumption based on necessity, the lack of minimum morals in the business environment, etc.

Regarding the economic crisis in recent years, analysts have emphasized that it is due to the management of the globalization program and consider that austerity and the change in economic policies, alongside social and environmental ones, as the way out of the ongoing global crisis. In this respect, it has been argued that decision-makers must implement “the concept of triple efficiency, which demands that the economic and social life of every country must simultaneously achieve the three main targets of efficiency (economic, social and environmental), and thereby, a certain correlation of these.” [15]

The implementation of this principle requires that the decision-making process engages all the stakeholders who, by their activity, determine directors of thought and action in society.

In addition to the above-stated principle, through the IMF program that policymakers have undertaken, steps have been taken to pull the economy out of the deadlock, by boosting public investment.

The solutions for emerging from the crisis must be discovered in determining and capitalizing on the particular identity of each social group, nation, etc. Thus, were we to refer to Europe and its spiritual origins, we ought to turn to the ancient Greek nation of the 8th and 7th centuries BC which gave rise to “a new kind of attitude of individuals toward their environing world. Consequent upon this emerges a completely new type of spiritual structure, rapidly growing into a systematically rounded (geschlossen) cultural form.” [10]

Last but not least, the economic crisis can be mitigated by overcoming the moral and spiritual crisis that various companies and contemporary business environment are now experiencing. Those who have examined the crisis phenomenon have noticed that “The monetary crisis can ultimately be seen also as a result of the crisis of values, a crisis that can be seen with the naked eye considering how authentic values are perceived in a society. People’s predominant focus on material values (money, house, car, excessive comfort, etc.) to the detriment of spiritual values (kindness, compassion, beauty, etc.) and social ones (solidarity, freedom, cooperation, understanding, help, tolerance and so on), has estranged them from the defining coordinates of the human essence.” [20]

Aspects regarding criminality

Worldwide, in recent decades, there has been an increase in criminality understood a special form of social deviance that includes "all antisocial behaviors, illegal and immoral, with a high degree of social severity that transgresses and violates the most important values and social relationships protected by criminal norms (life and integrity of the person, liberty, property, health, family, the state and its security, etc" [17] The Marxist-Leninist conception of the phenomenon of criminality is the result of "the irreconcilable class contradictions at the core of the structure of the capitalist society, a society full of criminogenic factors, which favor the generation and continuous expansion of criminality on an ever-increasing scale" [6] From this claim, we may bear in mind that the increase in crime can also be determined by how society is structured, which also involves the way the criminal justice system is designed and implemented. This establishes a criminal order that is respected or violated by those who are targeted by it.

The key to deciphering the increase or decrease in criminality as the sum of offenses perpetrated over a particular reporting period, lies in the concept of criminogenesis. This is the subject of legal psychology and is a psychological process of the human person who, under the influence of certain subjective factors, develops a particular type of conscience which, in some cases, determines criminal resolutions.

Among these factors can certainly be found those determined by the economic crisis, such as: extreme poverty and unemployment. Under these circumstances, the degree of social stability decreases and world states are required to pay greater attention to the protection of the right to life, of physical and mental integrity, of the property rights of citizens, and of any other values that become more vulnerable, including securing the stability of the state. Also, in crisis periods, corruption and organized crime escalate.

In this context, the penal legislator has the duty to use all means to reduce crime. One of these means is refers to criminal punishment. Over time, one can notice that sentences for the same offenses laid down in the criminal law were different due to the fact they were the means to defend the values protected by the norms of
criminal law. The doctrine stated that "the reaction against proven crime must be undertaken in such a way that the repressive measures (i.e. the punishments) constitute a proper blend of the idea of retribution with the idea of utility, while the preventive (safety) measures should serve to deliver, in complementary or alternative manner, that which could not be achieved by the punishment". [18]

In the statement of motives accompanying the draft of the new Criminal Code it is specified that "In regulating the sentencing system, the main focus was to create a mechanism which, through flexibility and diversity, should allow the selection and application of the most appropriate measures in order to serve both as a constraint, which is proportionate to the gravity of the offense perpetrated and to the danger posed by the offender, and as an efficient means of social rehabilitation of the offender.

Such an approach is supported, on the one hand, by similar stipulations in the majority of European criminal codes (see the ninth general section of the Swiss Criminal Code, in force since 1 January 2007, the Spanish Criminal Code, the French Criminal Code), which, in the last decade, have demonstrated a constant concern in this regard, and by the realities of legal practice which has not relied on a sentencing regime adapted to the developments in the period after the December 1989, marked by increasingly varied criminality, in terms of the methods used to commit offenses, and the purposes or aims thereof. [22]

Another method of reducing criminality is linked to the delivery of justice. Thus, in the judicial process, criminal enforcement bodies may use aggravating circumstances to substantiate decisions aimed at deterring the perpetration of certain types of offenses.

Conclusions and proposals

The economic crisis determines reassessments in all sections of human society in order to identify methods and means to restore the social balance. This effort engages both policy makers, specialists in various social fields as well as the citizens of the states. In times of crisis, certain values become more vulnerable to the phenomenon of criminality due to the fact that there is additional pressure on certain social categories. The reduction of criminality can also be determined by criminal policy which includes provisions aimed at protecting more vulnerable values by increasing the length of sentences and by more severe, concrete punishment for acts that violate these values.

In this respect, I propose the analysis of acts that may require prosecution as criminal offenses due to the fact that they trigger or fuel the economic crisis and of those offenses for which the minimum and maximum special sentence must be increased.

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Peculiarities of criminal liability in the environmental protection domain

Negrut V.

Danubius University of Galati (ROMANIA) vasilcanegrut@univ-danubius.ro

Abstract

The growth of crime phenomena by diversifying the ecological offense led the responsible factors to identify solutions that would incriminate the environmental pollution actions. The specificity of engaging in criminal liability for infringements of rules related to environmental protection is determined by the nature of the object protected by the law, whose breach is brought by an act committed at fault. Although they have imposed with difficulty, the use of criminal law means to protect the environment have multiplied and diversified, so that now they have an effective role which regards in the end ensuring the health insurance of the present and future generations. With this study we aim at highlighting, based on analysis, observation and a descriptive documentary research, certain features of criminal liability in environmental protection domain, both at European and national level; we also aim at clarifying the issues of transposing the European legislation from the environmental law. In conclusion, beyond the deficiencies determined by the many normative documents containing provisions on criminal liability in the environmental domain, in order to avoid parallelisms, contradictions and inconsistencies, it is necessary to review the entire environmental criminal legislation.

Keywords: environment, criminal liability, protection, environmental offenses

Introductory Aspects

The society is becoming more concerned with environmental preservation. “The environment represents a value whose defense produces in the public awareness, including at the level of public authorities, a constant and supported interest. The economic imperatives and even some fundamental rights should not be in a position to give precedence over the considerations related to environmental protection, especially when the state has legislated in the matter.”[1]

As stated in the specialized literature [2], the lack of reaction of the civil society towards environmental issues is an aspect that should be taken into account, whereas major events, such as the Copenhagen Conference on climate change, for example, go by unnoticed by the Romanian society.

The environmental damage can affect the individual welfare, bringing serious damage to the private and family life. [3] It requires the need for a balance between individual and community interests, but the economic wellbeing of the country may not be sufficient to disregard the individual rights. [4]

The content of the fundamental right to a healthy environment is determined by article 35 of the Romanian Constitution and to defend this right, article 5 letter d) from the Emergency Ordinance no. 195/2005 guarantees to physical and legal entities “the right to apply directly or through associations” to the administrative or judicial authorities, in order to prevent situations that might violate the right to a healthy environment or producing a direct or indirect prejudice. [2:47]

At the level of the fundamental values assumed in the new stage of the European construction [5:36], there is an increasing concern regarding the environment, by multiplying the references in this field. Thus, the Lisbon Treaty underlines that the EU policy contributes to the achievement of the following objectives: to preserve, protect and improve the environment quality; protecting the human health; the prudent and rational use of natural resources; promoting at international level some measures destined to counteract the environmental problems at regional or global scale, particularly in the fight against climate changes.

Moreover, all these aspects regarding the improvement of environmental quality are appreciated by specialists as a continuation of “greening” the fundamental values of the European Union. [5:36]

The European Union concerns about the “development of international measures to preserve and improve the environment quality and sustainable management of global natural resources, in order to ensure the sustainable development” (article 21 TEU), are found in the recent documents on the seventh action program for the environment of the EU.
In the fundamenting Note of the EU Council of 11 June 2012 it states that “the Seventh EAP should be a general strategic framework for the environment, which imposes the direction for transforming into reality the ambitious and mobilizing vision for 2050, that of a green Europe, including an European economy favourable to the competitive and ecological inclusion, that would protect the environment and health of the present and future generations” and the EU should become a green economy, competitive and efficient in terms of resource use and a society that respects the constraints in terms of resources and planetary limitations that make efforts to fully decouple the economic growth from environmental degradation.

However, the Commission Communication entitled “Optimizing the benefits derived from the EU environmental measures: increasing the confidence by improving knowledge and responsiveness capacity (COM (2012) 95)” establishes the priorities and measures to help the Member States to implement a systematic approach for collecting and disseminating knowledge, including ways to encourage a greater responsiveness to environmental issues.

In the Action Programme, the Commission identifies nine priority objectives, including: protection of nature; stimulating sustainable growth, efficient in terms of resource use and lower emissions of carbon dioxide; effectively combating the environmental threats to health, etc.

The program also establishes a framework for achieving these objectives: a better implementation of EU environmental legislation, leading science, provide investments needed to support the policy on environmental and climate change, improving the way in which the concerns and requirements of environment are reflected in other policies.

Section

A healthy environment and a high level of protection are essential conditions in order to ensure the quality of life and preserving the stability of ecosystems.

If the environmental action programs have targeted the development of EU environmental policy after 1970, currently it is imposed the adoption of an effective EU legislation in the environment domain, leading to a better quality of life, particularly through preserving the ecosystems by stopping the decrease of biodiversity, providing a lower pollution noise level, and by creating jobs and economic growth prerequisites conditions of the wellbeing of future generations.

This legislation, in our view, should shape effectively and balanced the framework generated by the criminal liability in the domain of the environment, not only at European but especially at the national level.

Considered as being the “living institution” that formed and evolved with the society [6], the legal liability of the environmental law is now an institution which is being applied more and more, following the ecological risks diversification, due to the concerning growth of the damages brought to the environment, amid deepening the ecological crisis. [6]

However, in its traditional forms (civil, administrative, criminal) to which there are added the penalties plus specific to the environmental law, the legal liability still has an important role in achieving the prescriptions of legal regulations in the field. [7]

In the specialized literature it is stated that liability has undergone under a substantial effort to adapt to the peculiarities of environmental protection action by developing some specific side (civil liability for environmental damage, contraventions and offenses to the environment protection regime) and by gradually building a form specific to liability for the prejudices brought to the environment. [2:115]

At the same time, in the current doctrine it refers to “environmental criminal law”, understood as “the gendarme of other rights” as the environmental protection presupposes repression measures. [2:194]

Through its repressive, protective, expressive functions, the environmental criminal law is attached to the classical principle of legality of the criminal offenses and penalties under any criminal code. [5:272 and the next]

The specificity of environmental criminal liability is determined by the nature of the object protected by law, and the characteristics of the social relations in this area.

Ever since 1998, the Europe Council adopted on 4 November, the Convention for the protection of the environment through criminal law. In the preamble of this document it states that legal entities are criminally responsible, which will determine their responsibility in prevention actions. It provides for the measures that need to be taken at national level and it sets the content of the offenses committed intentionally or negligently.

On the same subject, the Council adopted other two Framework decisions concerning the protection of the environment through criminal law. So by the Framework Decision no. 2003/80 it has been established a number of offenses against the environment and the Member States were invited to provide for criminal penalties in their national legislation.

Through the Framework-Decision no. 2005/667, the Council has considered building a tool that would ensure the approximation of the member states’ legislation in criminal matters. [2:197].

Through this normative act the EU has recognized “the vitality and importance of the environment” and that its protection by means of criminal law needs visibility, which would justify the official recognition of environmental criminal law.

As it results from the preamble of the Directive, the Member States are required to provide in their national legislation criminal sanctions for serious violations of the deposition of the European law on protecting the environment.

However, it is noted that the Directive provides for minimum standards, and the Member States may adopt or maintain more stringent measures of effective protection of the environment through criminal law, but these measures must be compatible with the Treaty’s depositions.

According to article 5 of the Directive, the offenses provided for committing ecological offenses must be “effective, proportionate and dissuasive”.

In order to accomplish the requirements of article 5, the sanctions, according to the specialized literature, in addition to the concern of being applied by the judge, they must be set by the legislator, taking into account: the intentional feature or not of the pollution behaviour; the damage bought to the environment; the seriousness of the damage brought to the environment. [5]

The Directive also contains provisions on the conditions of applying the principles of subsidiarity and proportionality.


Based on the method of transposition in our legislation of Directive 2008/99/EC, the current doctrine emphasizes that it was desirable that it should be transposed through the Criminal Code, as it would have had as primary effect a “visible phenomenon of “autonomy” relative to environmental criminal law, by defining the specifics and in a clearer structure of the prosecution, by the appropriate correlation of the danger offenses and those resulted in a conception of a minimalistic and essential criminal intervention.” [5:283]

As it can be seen, the Directive was transposed by a special law, which has led the experts to say that in this situation, the special law, namely Law no. 101/2011 is a benchmark of the legislator and not of the court, a “model law” and not a “common law” as any applicable national legislation. [5:285]

It should be pointed out also that in the Romanian criminal law the offenses on the environment protection regime are specified in innumerable normative acts: the Criminal Code, in non-criminal laws with criminal provisions and in the framework-regulation in the domain (It is about the sectoral environmental regulations, their number is increasing.) Emergency Ordinance no. 195/2005.

The current Criminal Code includes several ecological offenses, such as: infection by any means of sources of water or water networks, whether it is harmful to human or plant health (article 311); production, possession or other operation regarding the circulation of products or narcotic or toxic substances, cultivation for processing plants containing such substances or products and toxic substances experiments, all without having legal sustainment (article 312), etc.

In turn, the Government Emergency Ordinance no. 195/2005 establishes several categories of offenses, such as: offenses which result in environmental degradation or destruction; offenses which consider the ways of conducting the activities involving environmental risk; offenses which endanger life or human health, flora and fauna etc.

In conclusion, beyond the many deficiencies determined by the numerous normative documents containing provisions on criminal liability in the environment domain, which in our view can be corrected in time, we believe that the current legislation contains “effective, proportionate and dissuasive” penalties, so that the environmental offenders do not escape proper prosecution and punishment.

However, in order to avoid parallelisms, contradictions and inconsistencies, it is necessary to review the entire environmental criminal law.

References


Judicial aspects of not respecting legal constraints of the right to strike – internal country regulations compared –

Niculae A.

România auralungu_alex@yahoo.com

Abstract

This paper presents some considerations regarding legal liability in case of breach of legal conditions concerning a strike. Throughout this paper we discussed several issues on non legal conditions regarding strike in several countries, such as for example Bulgaria, Poland, Germany, Italy, and Sweden. Structurally, this paper debates work aspects and the time of onset of the strike and its regulation by law, the right to strike, with all the forms that can be triggered, such as the categories of staff that can not go on strike. There will also be detailed elements regarding how a strike should take place and the cases in which the strike ends. The paper ends with some conclusions and suggestions in order to help alleviate the uncertainty that can be found in legal texts which provide legal liability in case of breach of statutory conditions on strike.

Keywords: strike, employer, employee, conflict, work, social dialogue

Strike concept

A strike represents a willing collective cease of work activities as a means of pressure towards the employer with the end goal of getting the employer to agree to the employee’s demands. [1] A strike is the notion that covers the full or partial cease of work activities by the employees with the purpose of obtaining economical and work conditions improvements, salary increasment and social security benefits. [2] Thus, as stated in art. 234, paragraph (1) of the Work Code, “a strike represents the willing, collective stoppage of work activities by the employees”. Similarly, article 181 of Law number 62/2011 for social dialogue states that “a strike is any type of cease of work activities, done willingly and collectively”.

Legal liability in case of breach of legal conditions concerning strike.

In subtitle VIII of the Law for Social Dialogue, with the title of „Legal regulations for solving work conflicts”, is Chapter V called „The strike” (art. 181 - 207). Article 195, paragraph 5 states that: „The refusal of the strike organizers to fulfill the legal requirement makes them liable for damages caused to the employer”. According to Article 235 of the Work Code ,taking part in a strike as well as organizing one in accordance to the legal requirements does not infringe on the employee’s obligations”. Article 196, paragraph 1 of the Law for Social Dialogue states the same. Organizing a strike without complying with the legal requirements or taking part in such a strike is an infringement of the employees obligations. The illegal stoppage of work activities means that work duties are not being carried out and this will lead to the responsible persons being held legally accountable. The accountability for such acts is based on the severity of the actions undertaken and can be: disciplinary action, civil lawsuit, contraventional liability and penal action.

1.1 Disciplinary action

Organizing or taking part in an illegal strike means committing a work related infraction that may be punishable by disciplinary action. Illegal, one-sided stoppage of work activities may also be punishable by disciplinary action.

If an employee takes part in an illegal strike, the employer is entitled to take disciplinary action that can even lead to a cease of the work contract on disciplinary grounds.
Case study also supports disciplinary action, initiating or taking part in a strike that does not adhere to the legal requirements is considered to be a severe disciplinary offense that may entitle an employer to fire the employees involved. [8]

If the protest is caused by a labor union demanding salary increases, and some employees are fired while others are not without a court ruling, maximum disciplinary action is not justified. [8]

If a strike organized by a labor union leader is declared unlawful by court ruling, and the strike resulted in severe material damage, the act of firing that employee is a legal one.

1.2 Civil lawsuit

The consequences of a strike are direct damages to the employer by means of production shortages, delivery delays and service outages. The employer may also be subjected to indirect damages as a result of not fulfilling the agreed terms of contract with partners.

In the case of a legal strike, the attendants are not liable for the damages incurred. Failing to meet the legitimate legal demands of the employees is considered to be the employers fault.

Legal liability concerning damages falls onto the employees only if the strike is illegal. Article 201 paragraph 2 of the Law for Social Dialogue no.62/2011 states “if a strike is ruled as illegal by a court, the interested parties are entitled to reparatory damages”.

The strike organizers have a civil liability for the acts they commit, since there is no contractual relationship between themselves and the employer. This liability is determined exclusively by not adhering to article 181 from law 62/2011[8]

Establishing the amount of damage to the employer is done by a court according to article 201, paragraph 2 of Law 62/2011. The split of damages between those organizing the illegal strike and those participating is done by using the criteria defined in article 1383 of the Civil Code [8].

Liability for damages can also be present in case of a legal strike if:

- Strike organizers don’t respect their obligation to protect company assets and ensure there is no risk affecting people’s life or safety (article 193);
- The strike organizers don’t fulfill their obligation to continue negotiations in order to solve the issues that led to the collective stoppage of work (article 197, paragraph 5)

1.3 Contraventional liability

The Law for Social Dialogue states that there are two types of contraventions for not respecting the regulations defined by it:

- Preventing the continuation of work by the employees not taking part in the strike (article 217, paragraph 1, e);
- Preventing, by any means, access of a work inspector to the strike (article 217, paragraph 1, f) (See Chapter XX „Contraventional liability” §19.)

1.4 Criminal liability

Criminal liability occurs when one of the infractions defined in article 218 of the Law for Social Dialogue is undertaken:

- Preventing an employee or group of employees from attending a strike or from working during a strike Same action, according to art. 260 p. (1) letter. c) of the Work code, is a contraventioned sanctioned with 1500 lei to 3000 lei. There is a technical legislative issue as an action cannot be an infraction and a contravention at the same time. See Chapter XX „Contraventional liability” §2, pt. 5.
- Preventing labor union leaders from fulfilling their duties by means of pressure and constraints.
- Declaring a strike while breaching the rights of participation (article 191) as well as the restrictions defined in (article 202 - 205). See Chapter XXI, „Penal liability” §6.

Judicial aspects of not respecting legal constraints of the right to strike – internal country regulations compared

1.5 The following important judicial aspects for not respecting the legal constraints are very important when comparing different internal country
regulations. The focus will be on Bulgarian, Polish, German, Italian and Swedish law.

We hope to improve our own laws by comparing the regulations of different countries as well as by improving work relations through stronger discipline and responsibility of social partners for protecting the rights of the employees and those undertaking the act of labor.

1.6 Judicial liability in Bulgaria

The Bulgarian work code contains two types of liability for participating in a illegal strike: disciplinary accountability and financial accountability, without the mention of explicit sanctions.

Strikes are considered to be unlawful only if the competent court has proclaimed them as such. According to article 17 of SCLDA the employer, as well as the workers who are not striking, can put up a claim for the establishment of the unlawful character of a declared, proceeding strike, or strike that has already ended.

The claim has to be put up at the district court of the habitual residence or headquarters of the employer. The case shall be heard within seven days in an open session, by the order of the Civil Procedures Code, with the participation of a prosecutor. The Court is due to enact its decision within three days from hearing the case. The Court decision is final and it must be announced to the parties immediately.

1.7 Judicial liability in France

In accordance with case law and judiciary doctrine a strike is defined as a concerted work stoppage in support of backing employment-related demands. It is the expression of a collective work conflict.

The right to strike in France is a fundamental right, meaning that it is a right proclaimed and guaranteed by the Constitution (formally, it is dedicated, in the same terms as in the Italian Constitution, by the Preamble of 1946 Constitution, which the Preamble of the 1958 Constitution refers to).

This dedication and guarantee have two different effects. On one side, only legislation can regulate the right to strike. The right to strike is not a possible subject to collective bargaining, except when legislation, precisely, gives a real responsibility to collective bargaining.

This responsibility, nevertheless, can only be limited. On the other side, it is of the responsibility of the Constitutional Court, in it’s control procedures of legislations constitutionality, to ensure compliance, by the legislation and jurisprudence, of the right to strike.

It is still possible that a strike first lawful becomes an abusive strike. Abusive strike, in French law, is a strike which leads not only to disruption of production but a “disruption of the business”, that is to say that it endangers the survival of the company. The criteria for abuse are therefore in the effects of a strike.

The notion of abusive strike, identified by law cases, has for function to justify the employer’s initiatives, such as the closure of the company and therefore the suspension of the wages of non-strikers. Itself, the closure does not justify the loss of the striker’s guarantees, unless it is proved that the striker had taken an active part in generating the abusive activities.

1.8 Judicial liability in Poland

There is a resemblance between the regulations of this country and Bulgaria’s. In Poland there is the Trade Union Act of May 23rd 1991 regulating work related conflicts and civil liability both for labor unions and for employees taking part in illegal industrial action.[5]

The organizers of an illegal strike or alternative means of protest may be sanctioned by the administrative and judicial authorities by fines or by imprisonment.

The Polish work code also states that people participating in an illegal strike may be fired on disciplinary grounds.

1.9 Judicial liability in Germany

The trade unions as legal persons cannot be subject to criminal sanctions. They can however be subject to civil claims brought to court by the employers suffering from illegal strikes endorsed by trade unions. These claims can in the first place aim to stop the strike for example by a preliminary injunction. Preliminary injunctions end a strike instantaneously and are only issued by the Labor Courts under certain conditions. The employer has to argue plausibly that the strike is manifestly illegal and causing severe disadvantages for the employer.

If a strike is unlawful the employer’s side can in the first place demand any trade union which is organizing unlawful strike to stop that activity. Secondly, the employer can demand compensation for his losses suffered during the strike and for damages to his property.
Unions can exonerate themselves if there is a precedent and they are not accountable for initiating the strike.

No strike clauses exist, but are not commonly content of collective agreements. If they are included they are deemed valid and any strike contrary to a no-strike clause is illegal. Additionally collective agreements create a peace obligation. Any collective action such as strike is prohibited as long as a collective agreement is in force. Only after a collective agreement expires and negotiations for a new one commence collective action can legally be taken. [5]

The state and its authorities have an obligation to stay neutral and not to involve themselves in industrial conflicts. This is why the German authorities are generally reluctant to intervene. However they do so in certain cases. Felonies for example committed during strikes will be punished according to the criminal law. The police can stop a strike if it’s grossly illegal and/or violent or if the companies’ machinery poses danger to third parties or the environment because it is no maintained.

The Labor Courts can interdict any strike for example if the strike does not comply with the principle of proportionality. In this case the employer can demand the Labor Court to issue a preliminary injunction in order to stop the strike instantaneously. [5]

### 1.10 Judicial liability in Italy

In the Italian Common Law, strike illegitimacy can only come from the eventual aim of subverting the constitutional order, or from a specific mode of operation that causes damage to people or to company equipment.

In the sector of essential public services, Law No. 146/1990 establishes specific civil penalties or administrative fines for unions that do not comply with the procedures. Law No.146/1990 provides for disciplinary sanctions proportionate to the seriousness of the offense (with the exception of measures to settle the relationship) to the workers who refrain from work without complying with the terms contained therein.

In general, civil and/or criminal liability for trade unions as well as individual participants can result in cases of illegal strikes. [5]

### 1.11 Judicial liability in Sweden

The right to take industrial action is protected in the constitutional act, The Instrument of Government (1974:152), in article 2:17, which states that “a trade union or an employer or employers’ association shall be entitled to take industrial action unless otherwise provided in an act of law or under an agreement”. Consequently, the right to take industrial action is limited to the social partners (not the individual employee) an can also be limited by legislation or collective agreement. [5]

Individual employees cannot take industrial action unless it can be deemed for a collective purpose, for example, establishing a trade union.

In the event of an unlawful industrial action as called by the social partners, the side in error is to pay the other side damages. Individual employees can be held liable for unlawful industrial actions only up to a limited amount, today approximately 200 Euros.

An employer can fire under some particular circumstances an employee that took part in an illegal strike. According to legal regulations these circumstances may include ones in which an individual has instigated others or took part himself in an illegal, major strike. [5]

In conclusion, there is an institution and a legal act at a European level that regulates strike for all member countries

### Conclusion

The Fundamental Rights European Charter regulates strike law for the European Union, while the European Court of Justice handles cases as the highest echelon.

The main amendments we would like to see adopted in regards to Romanian law cover the strike and the sanctions applied to illegal strikes as well as to any breaking of current regulations by parties involved in the work conflict.

In regards to illegal strike categories, they are not clearly defined and there is room left for interpretation by all parties involved including employees, employers, justice courts.

My proposal in regards to this amendment is to better define the legal liability for those that do not comply with the legal requirements for a strike.

As a conclusion, Romanian law tries to cover all aspects of legal liability and sanctions for work conflicts and strikes, but, in my opinion, there is a lot of room left for interpretation by all parties involved directly or indirectly in such a conflict.
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The main political and legal premises of Romania’s success in the suppression of the serious crime

Nita N.

George Bacovia University, Bacau, (ROMANIA) nita_nelu@yahoo.com

Abstract

In a world in full process of globalisation, as life and everyday reality develop, risks and vulnerabilities related to the serious crime are becoming more numerous. As a consequence, all states have organised various institutions and structures, as a protection system against society’s destructive phenomena, in order to ensure an appropriate climate of order, social stability and citizens’ safety. In this paper, by analysing the main factors of the criminality in Romania, I intend to highlight my concept about the main political and legal premises, which should provide the basis for authorities’ success in the suppression of serious crime.

Keywords: globalisation, serious crime, corruption, suppression of crime, consolidation of political responsibility, reform of the legal system, elite promotion, new attitudes and values.

Introduction

The theme I intend to examine, although very briefly, is based on the analysis of serious problems with regard to Romania’s capacity to successfully cope with the responsibilities as a European Union Member State in the context of an increasing globalisation. In this regard, I refer to the consequences of the fighting, manipulating and deep political instability which are likely to seriously affect the activity of the state institutions, including the balance of state powers, the consequences of many justice drawbacks due to the widespread problem of corruption and ineffective counteracting measures, the consequences of bureaucracy and chronic deficiencies which are highlighted, due to certain unjust attitudes and behaviours etc., all of them being, at the same time, real barriers against the progress towards a sustainable success in fighting serious crime.

Furthermore, I also consider the necessity of eliminating the reputation at the European level, according to which “Romania produces documents that sounds nice, but that remain only on paper” [1], so that one never questions the willingness of the Romanian authorities towards new constructive and effective approaches in the prevention and control of serious crime and organised crime.

Globalisation and related risks

The phenomenon of globalisation is seen by experts as a very complex phenomenon which, in my opinion, should not be reduced solely to its economic dimension, just because it would obviously have the greatest importance, as it is one of the most important causes and driving forces of the globalisation process of the other areas. Along with the economic dimension of globalisation, I believe that a highly important role is held by the political, cultural, social and environmental dimension. Therefore, according to David Held “globalisation is essentially defined by the connections between the different regions of the world – cultural or criminal, financial or environmental connections – and the ways in which these connections change and amplify in time” [2]. At the same time, it is increasingly evident that the evolution of national societies, including the Romanian society, in the present context of globalisation, revolves around two main coordinates, namely: “the foundation of the rule of law in relation to other European countries and the increase of the safety and national security” [3]. As far as we are concerned, this situation highlights the indissoluble relationship between the concepts of the rule of law and the national security, respectively the order and public safety in Romania. The importance of national safety and security was also referred to, many years ago, by PhD. Eugen Bianu, who stated in the preface of his work: “where there is not peace and order, the evolution of civilization stops, the social and national progress is hindered” [4]. Also, as stated by other well-known authors, as Ph.D. Ion Suceavă, Ph.D. Gheorghe Popa and others, I consider that for the Romanian society, ensuring a climate of civic normality, of order and public safety is a priority, since, only in such a framework, life can follow a natural course, and all social and economic activities can take place safely.
By developing the concept of “global risk society”, the well-known sociologist Ulrich Beck [5] considers that by past and contemporary decisions, unpredictable and uncontrollable consequences occur, being so dangerous that even life on earth is compromised, which is perfectly true in the globalised society of nowadays interdependencies.

According to specialists, there are multiple layers of risk in globalised society, such as the crisis in the global economy and finance, ecological crises, terrorism, including the serious crime, highlighted by Mrs. Rodica Stănoiu, with whom I totally agree [6].

Being aware of the fact that industrial societies are the ones that have generated uncontrollable risks, in Ulrich Beck’s opinion, with whom I agree, globalization risks also involve risks “a modern approach on the prevention and control of the human actions’ future consequences” [5], including, in my vision, with regard to the efficient prevention and suppression of the serious crime at national, European and global level, at the same time.

As regards Romania, agreeing with Delia Magherescu, according to whom although “the Romanian authorities were involved in the reduction and control of various forms of serious crimes, including organised crime and corruption, there are still unexplored areas” [7], I consider that the effectiveness of the actions taken by authorities is still uncertain. In this regard, I take into consideration the experts’ views on the growth of serious crime in Romania and the less convincing results of the fight against it, as well as the conclusions of the Report of the Mechanism of Cooperation and Control, of January 2013, on Romania’s progress [8], by means of which there are asked important questions related to the observance of the rule of law and the independence of the legal system in Romania.

Analysing the main factors of the serious crime in Romania, I will highlight my concept on the main political and legal premises, which should provide the basis for authorities’ success in its suppression.

Considerations on the main factors underlying the crime in Romania

1.1 The political factor

- is a prime factor with a major role in the manifestations of the evolutionary trend of the serious crime in Romania, so far being mostly a factor of failure in the fight against it. In this regard, I also take into consideration that, in the last twenty years, there have been emphasised in Romania numerous aspects of deliberate and badly-intended delays, of appropriately solving the various political, legal, economic and social problems, where an important role was held by the political factor. Within this framework, there have been committed various acts of abuse and violation of human rights and freedoms, especially endemic corruption at a high level, which have led to a high growth of the lack of responsibility at all levels, of the various state structures with deep political roots. In this all reflect, in my opinion, obvious tendencies of protecting the various obtained privileges, of substituting legality and professionalism with “political opportunism”, for “successful” careers, wealth, power and influence among many of the employees of the public institutions at a central and local level. It is recognized by the specialists that political solidarity has led to the emergence of a certain cynicism, specific to the political class, by promoting statements that “corruption is a symptom of democracy”, “corruption exists in all countries, including the developed ones”, “there is too much noise on the topic of corruption in Romania”, etc. The situation in Romania demonstrates, however, that this kind of cynicism is promoted by people actively involved in acts of corruption that, sooner or later, end up being investigated by the competent institutions of the State. However, the problem is that such situations are destroying the confidence in people and in the democratic institutions of the State, are destroying the confidence that there can still be achieved sustainable success in the suppression of the serious crime in Romania. Furthermore, at the level of the European Union institutions, there are serious concerns related to the political system overly polarized in Romania, where distrust and allegations are a common practice. In this context, the various actions of the Romanian authorities, resulting in conditions of this political polarization, also raise serious doubts regarding the fulfilment of the commitment to observe the rule of law, but what is even more serious, doubts about how the principles of the rule of law are understood in a pluralist democratic system. Of the same importance are also the European Union’s concerns about the information on the manipulation and pressure affecting the institutions and members of the legal system that, ultimately, have only have a serious negative impact on the entire society.

1.2 The delays in the completion of the legal system reform

- is another extremely important factor that fosters and encourages the serious crime through the failure to fully and sustainably solve the observed shortcomings, including problems of integrity within this system. From this point of view, although there are many indications that Romanian magistrates have gained more professional confidence, as a result of cases of good practice, yet there are many concerns with respect to the compliance with the principles relating to the independence of the legal systems and the separation of State
powers. Such concerns are due to the unacceptable interventions of the government institutions and of some high rank politicians in certain independent judicial institutions, as well as the various political appeals of verdicts handed down by courts, in some emblematic cases of corruption and crime at a high level. Also, the way in which some promotions and appointments are made, the inconsistent case-law, the difficulties in ensuring compliance with the law, unreasonable delays of trials, acts of ineffective justice, the way in which the legal system has responded to the challenges of responsibility and integrity, the lack of dynamism in addressing the problems with real impact on the capacity of the legal system to quickly and consistently make justice, etc., are still widespread problems that make it almost impossible to restore confidence in justice, due to the consolidation of a generalized perception that the legal system in Romania, for objective reasons, but especially for subjective ones, has a limited capacity in the fight against the serious crime.

1.3 The lack of integrity and the endemic corruption at a high level, in the legal system and in the public sector

- is the third factor of failure in the fight against serious crime, which also endangers the existence of the rule of law in Romania. According to a special Euro barometer survey from February 2012, 96% of Romanians, a slightly higher percent than in 2007, corruption is considered to be a major problem. (Special Euro barometer available on: http://ec.europa.eu/public_opinion/index_en.htm). Since 2007, Romania has lost six places in the ranking realised on the corruption perception index of Transparency International, with a decline in the quoting of corruption perception. According to the same survey, 67% of Romanian's consider that the level of corruption has increased in the last three years. In this perspective, I share Delia Magherescu’ opinions, according to whom “one of the major drawbacks of the judicial system in Romania is still corruption”, as “in this field, the Romanian authorities develop a defective policy, unfavourable for citizens” [7]. Furthermore, I consider that this policy is favourable to the consolidation of criminal organisations and serious crime, as a whole. It is considered that, generally, in Romania, well-known lawyers, accused of corruption, have succeeded, many times to postpone procedures or to unproved accusations, on the basis of irregularities in procedure, due to complicated procedures and frequently changed laws. Thus, it is considered that for a skilful and astute lawyer, it is not at all difficult to identify procedural cracks. In these circumstances, it is worth mentioning that in the Interim Report, entitled: “Interim Report on Progress in Romania with Judiciary Reform and the Fight against Corruption”, presented in Brussels, in February 2008, concerning the legal system in Romania, the European Commission noted, appalled, that “in the last six months, the cases in which they were involved former Ministers or Ministers still in function were sent back to prosecutors due to procedural flaws.” Also, in the same report it is stated that “the very Government action plan against corruption contradicts the current legislation, indicating that the plan has been drawn up in a shallow manner”. Among the main causes of endemic corruption in all institutions in Romania, I consider the following: the shortcomings concerning the political will and responsibility to fight corruption in the public institutions, political solidarity with the people and their relatives accused of offences of corruption, the inefficiency of the public institutions to reduce incompatibilities and conflict of interests, the existence of analogies and major confusion at the level of the authorities’ attributions in combating corruption, ineffective and inefficient actions of corruption deterrence, the promotion of faulty policies on human resources based on cronyism, nepotism, careerism and professional incompetence, the various errors and omissions committed in the pursuit of justice, the existence of complicated procedures and the frequent change of laws, minor punishments given by the Court, punishments that were not likely to discourage the corruption phenomenon, and the provision of specialized institutions with the necessary technical means, the existence and maintenance of a collective traditional mentality, prone to tolerate acts of corruption in various forms, etc.

The main premises of success in the suppression of crime in Romania

According to the aspects analysed above, the main premises that have to be accomplished, in order to obtain constant and sustainable success in the suppression of crime in Romania are the following:

a. the consolidation of political responsibility, together with the prevention and combat of corruption at a high level. In this regard, success is determined in the highest degree, by the actual and effective involvement of all State powers, as well as by a new paradigm in terms of the direction in which it must take place, i.e. from top to bottom, so as to cover the entire Romanian society as a whole. An essential point of departure for this purpose is the maintenance of a balance of powers, and, in particular, the capacity of the legal system and the administration of Romania to respect and apply consistent principles of the rule of law;

b. the reform of the legal system, together with the prevention and combat of any manifestations of corruption in the system. The implementation in Romania of a functioning, independent, unbiased, comprehensive, credible and effective legal system is an objective necessity in order to ensure the supremacy of law and the observance of the rule of law principles. The measures to strengthen the independence of the legal
system must lead not only to the principle of separation of powers in the State, but also to its effective and consistent application in practice. The reform of the legal system in Romania must be carried out on the basis of understanding and applying ethical principles, which should ensure the functioning of a modern legal system, independent from the control of the executive power and not manipulated by political parties. A legal system should not represent “transmission belt” of formal or informal decisions, of the political power in the State. This means, first, the establishment and strengthening of the independent and invulnerable institutions of justice, which should be conducted in a professional manner and should resist the interference of political factors, without having to suffer because of dismissals or in any other way, ensuring that they are a staunch defender of the citizens’ interests. The reform of the legal system, thus, involves institutional restructuring, the reform of mentalities that underlie the functioning of the current system, and financial efforts to be undertaken;

c. the promotion of elites and the removing of bureaucracy, as the elites have the main responsibility of carrying out any type of reform. Under these conditions, the combat of “opportunism and careerism”, without any concessions, especially “the professional competence and integrity”, should be the most obvious priority in the promotion of elites, for removing bureaucracy and improving the chances of increasing the performances in the suppression of crime. With regard to the promotion of elites, through its reports, the European Union has made permanent pressure on the Romanian authorities, to draw up open and transparent selection procedures, by means of which, including the case of prosecutors and judges, candidates for promotion, performances are publicly assessed. It is proposed, therefore, that there should be eliminated the quick promotions of unexperienced persons from relatively unimportant positions to far superior ones. The elites promoted as a result of passing through other appropriate professional ways, I believe that they should represent true patterns of attitude and behaviour, a real personal example for all observers, more or less initiated, thus strengthening the confidence in the ability of the rule of law democratic institutions;

d. the awareness and strengthening of new attitudes and values. In this regard, I take into consideration the consolidation of an independent attitude toward political powers, of a civic consciousness about: patriotism, the membership to a free and democratic society, to truth, justice and social equity. For this, it is necessary to completely remove the unofficial and non-transparent selection and promotion practices in order to reach a deeper engagement in the activities and tasks, including the investigation of cases of law violation, even though it is often difficult and risky, especially when the investigated persons are influential both politically and financially;

Conclusions

In the above mentioned context, I consider that the ceaseless development of crime in the everyday Romania is driven by the weakening of some of the attributes and components of the rule of law, by the inadequate and ineffective use of the potential means offered by a genuine democratic state, to strengthen the respect for law and legal order. And, in this case, a role of utmost importance is justice, which must constitute a genuine factor of progress and civilization, and not a risk factor, with numerous vulnerabilities. On the success in repressing crime in Romania depends the evolution of citizens’ and European Union’s confidence, in the sense of eliminating the greatest fears of the increase of crime in all the states of the united Europe. Taking into consideration the grave consequences of the serious crime, which affect the very existence of the rule of law, I believe that it is really necessary to make a rigorous assessment of this phenomenon in Romania, in order to keep it under control. At the same time, it is necessary to analyse the possibilities of the beginning and improving actions, institutions and specialized agencies, in the fight of prevention and combating the threat of organized crime globalization. To all this I must add the context of our country’s aim of accession to the Schengen area, as well as the guarantees that it must provide for all European Union citizens, in terms of the unique space of freedom, security and justice. Taking into account the fact that “the organized criminal groups fight with more tenacity to create better opportunities” especially [9] “in order to be one step behind the legality” [9], I believe that it is imperative that the Romanian authorities must ensure the most effective and new standards, in order to combat and control the phenomenon of crime in Romania. In these circumstances, in order to obtain a sustainable success in repressing crime, with strict observance of the mentioned political and legal premises, it takes a firm strategy for reforms to achieve effectively and efficiently their potential to spur change in practice. For this reason, it is necessary, however, for the Government and politicians to provide a concrete example and take into account the fact that any pressure exerted on judicial system generates distrust between the powers in the State, which can only lead to regrettable failures in prevention and combat of the serious crime in Romania.
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Right to reproduce a work of art and the defense of such right by means of criminal law

Olariu M.

Romanian American University, Faculty of Law Juridical Sciences Department (ROMANIA)
avmihaiolariu@yahoo.com

Abstract

The reproduction of works of art represented, ever since old times, the core of copyright and remains, knowadays, a fundamental right of the author. This paper studies the content of the reproduction right and the way that this exclusive right is defended by the means of criminal law.

Keywords : copyright, art, work of art, reproduction

The reproduction of works of art represented, ever since old times, the core of copyright. The first regulation in the matter of protection of works of art, Engraving Copyright Act, adopted in 1735, established, to the benefit of authors of engravings, paintings and drawings, an exclusive right of printing and reproduction of their works, over a period of 14 years from the first publication. French law of July 1793 provided mainly this manner of capitalization of a work.[1] The Berne Convention of 1886 also includes reproduction among the most important property rights, as it provides, in art. 9, that "authors of literary and artistic works, protected by this Convention, shall enjoy the exclusive right of authorizing the reproduction of such works, in any manner and in any form whatsoever." The Romanian Law of 1923 on Literary and Artistic Property mentioned, in art. 24, that "The right of artistic ownership over works of art: painting, drawing, lithography, engraving, medals, sculpture etc. [...] includes the exclusive right to their author to publish, sell or display the work in question, to authorize its reproduction by any plastic, mechanical or chemical means and to assign or put up for sale such reproductions ".

Today, the right to reproduce the work remains a fundamental and exclusive right of the author, its "success" being determined by its exceptional ability to adapt. [2] Definitions of the activity of reproduction aimed at the very preservation of this versatile character.

Law no. 8/1996 on copyright and related rights, republished, defines the reproduction in a general way, in art. 14, as "full or partial creation of one or several copies of a work, directly or indirectly, temporarily or permanently, by any means and in any form, including the making of sound or audiovisual recordings of a work, as well as its permanent or temporary storage by electronic means."

Reproduction, as a general concept, implies, therefore, either the previous fixation of the work on a media - as making a copy would not be possible without it - or the fixation made by the very act of reproduction, this conclusion being drawn from the expression employed in Article 14 of Law no. 8/1996 on copyright and related rights, republished, namely: “including the making of sound or audiovisual recordings of a work.” (Sound or audiovisual recordings have been traditionally qualified as acts of reproduction. According to art. 9 para. 3 of the Berne Convention, "any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.")

However, the reproduction can be also achieved through "permanent or temporary storage of the work by electronic means", the solution being consistent with the definition of fixation given by the Romanian lawmaker in art. 98 para. 2, that "fixing is the embodiment of sounds, images or sounds and images or digital representation thereof on a support enabling the perception, reproduction or public communication thereof, through a device."

Although the lawmaker also includes in the general concept of reproduction the acts of fixation of a work, followed by multiplication, in our opinion, in the case of works of fine art, graphics and photography, the object of reproduction is only the work which, at the time of making the copies and multiplication, was already fixed by the author or by others under his authority. The solution results from the specifics of this
type of works, a necessary condition for the protection of works of fine art, graphics or photography being the materialization of the work.

The ways of reproduction of works of fine art, graphics or photography are diverse. Depending on what kind of work is subject to reproduction, the ways of reproduction can range from painting, printing, engraving, drawing, molding, to photocopying, photographing or any other means of obtaining one or several copies.[2]

It should be noted that, in order for an act of reproduction to exist, it is not necessary that the method of making the copy is identical to the method of execution of the object subject to reproduction. In other words, a painting can be reproduced in another painting, but also in a photograph, drawing or engraving. Architectural works may be reproduced by photographing, a drawing may be reproduced in three-dimensional form etc. Regardless of the manner in which the reproduction is made in relation to the original, the copying and multiplication of the latter shall be authorized by the original author.

Moreover, the resulting copy of the act of reproduction can have a different support than the one of the object subject to reproduction. Thus, a tapestry may reproduce a drawing made on a canvas or cardboard, and a photograph may be reproduced by painting a picture. [2] The material fixation characteristic to the act of reproduction may even result in the change of the type of work, however without resulting in the legitimacy of copying, to the extent to which it had not been authorized by the author. [3] The solution resides in the very legal definition of "reproduction" as the creation of one or several copies of a work, "by any means and in any form whatsoever".

Exhaustion of the right of reproduction. Unlike other author's rights, such as the right of disclosure, which is exhausted after the first use, this property right gives the author the power to authorize the reproduction of his work every time a different means of making copies is employed. The exception to this rule is the situation in which the author has assigned the right of reproduction in full.

Romanian law does not contain express provisions relating to the non-exhaustion of the right of reproduction, but the solution results from the use of logical interpretation, the per a contrario argument, in the context of express provisions on the exhaustion of the right of distribution of the work contained in article 14 paragraph 2 of Law no. 8/1996 on copyright and related rights, republished. [6]

The solution is also emphasized in the French literature on this matter, according to which the "permission to reproduce the work in a certain way does not constitute the permission to reproduce it in other forms and by different means, as well as the recording of a performance or execution does not constitute permission to reproduce"[3]

In France, the Intellectual Property Code provides in art. L. 122-7, paragraph 4, that when the contents of a contract specifies the full assignment of the right of reproduction or representation, its performance will be limited to the uses specified in the contract, and in art. L. 131-6 it shows that a clause in an assignment agreement which seeks to confer the right to use the work in a way that is not predictable or established on the date of conclusion of the contract, must be expressly provided, with adequate participation in the gain obtained from such use.

The Romanian law provides the exclusive nature of the right to reproduce the work, its holder being the only entitled to authorize the making of copies, regardless of the process used and the profit or non-profit purpose aimed[5]. But the lawmaker also established several exceptions to the rule, outlined either around the notion of private copy or around the so-called "license included".

The Romanian law incriminates the violation of the right to reproduce the work in article 139 and article 139. According to article 139, paragraph (l), shall be punished with imprisonment from two years to five years or with a fine from 2,500 lei (RON) to 25,000 lei (RON) such deeds which consist in: a, the creation, by any means or in any manner, of counterfeit goods [7], for the purpose of distribution, whether a material advantage was envisaged or not by such distribution. In this case, we see that the lawmaker punishes, quite severely, meaning that it incriminates as an offense, with the consequences that such incrimination involves, even the mere fact of creating counterfeit goods. The term counterfeit goods is defined by the provisions of Article 136 paragraph (8) of Law no. 8/1996 on copyright and related rights, republished, as follows: for the purposes of this law, counterfeit goods are: all copies, regardless of their support, including covers, made without the consent of the right holder or of the person duly authorized by the latter and which are made directly or indirectly, in whole or in part, after a product subject to copyright or related rights or after their packaging or artwork.) It doesn’t matter, therefore, whether the offense was committed in order to obtain material advantages, which is why we consider that such action is consumed at the very moment it has been committed, i.e. at the time of manufacturing of counterfeit goods. However, in order to be incriminated, the lawmaker establishes that such act needs to be committed for the purpose of distribution. In practice, it is difficult to prove the achievement of such a goal, namely that the possession of small quantities of counterfeit goods, while the perpetrator has not been caught attempting to distribute them, would remove criminal liability. Or given the prejudice created to the true author, it would be necessary, de lege ferenda, that the mere possession of counterfeit goods be subject to criminal penalties, all the more that the extent of the phenomenon of counterfeiting is well known these days,
also fueled by technical means of increased performance, which allow easy and low cost manufacturing of counterfeit goods; b. the placement of counterfeit goods under definitive import or export customs regime, under a suspensive customs regime or in a free zone. In this case the lawmaker establishes several conditions relating, on the one hand, also taking into account the provisions of Article 1 of the Law no. 344 of 29 November 2005 on certain measures for ensuring the observance of intellectual property rights in the course of customs operations, to the regime under which counterfeit goods circulate (are declared to the customs authority for placement under a customs procedure for import or export, either definitive or suspensive) and, on the other hand, to the place they are located, i.e. the free zones. If there is no request for intervention, the customs authority, under Article 4 of Law no. 344/2005, may suspend the customs operation and/or retain for a period of 3 business days such goods, if there is a suspicion that such goods infringe intellectual property rights, while having a duty to notify this measure both to the right holder and to the declarant/owner, consignee of the goods. The 3-day period begins to run from the date on which notification is received by the right holder (Article 4, paragraph 3 of Law no. 344/2005). Where the right holder fails to submit a request for intervention within this deadline, the customs authority shall suspend the measure of retaining the counterfeit goods and/or shall grant the customs clearance, when all other legal conditions are met. But if the right holder submits a request for intervention and it is accepted by the Customs Authority, an intervention period is also being set, which should not exceed one year, but which may be extended in accordance with Art. 7 paragraph (2) (Article 7 para. (2) of Law no. 344/2005 provides: Upon expiry of this period (of maximum one year, set provided that the request for intervention submitted by the rights holder has been accepted - our note) and subject to payment by the rights holder of all costs under this law, upon his written request, the National Customs Authority may extend the intervention period by no more than one additional year.) of Law no. 344/2005 by no more than one additional year. The retained goods or the goods for which the customs clearance operation was suspended as a result of an accepted request for intervention, can be destroyed as provided by law. (These conditions are set out in art. 11, letters a) and b) of Law no. 344/2005, which provides: a) the holder of the right informs the customs authority in writing, within 10 business days of receipt of the notification referred to in Article 9 (referring to the retention of counterfeit goods as a result of a request of intervention made by the holder of the right - our note), that the retained goods infringe an intellectual property right; b) the holder of the right submits to the customs authority, within the deadline provided under letter a), the written consent of the declarant/holder/consignee of the goods that such goods are abandoned for destruction; this agreement may be submitted to the customs authority directly by the declarant/holder/consignee of the goods.) However, when the right holder initiatives a civil action in court or files a criminal complaint, the customs authority shall retain the counterfeit goods until the judgment becomes final and irrevocable (Art. 11 para. (4) of Law no. 344/2005; c. any other way to introduce counterfeit goods on the domestic market. The text, as worded, allows the punishment of the introduction of counterfeit goods in the country, regardless of how this was done, either by declaring them in the customs or by attempting to enter the country illegally, covering, at least hypothetically, all cases possible.

According to article 1396, paragraph (2), shall be punished with imprisonment from one year to five years or with a fine from 2,000 lei (RON) to 20,000 lei (RON) such deeds which consist in: the offering, distribution, possession or storage or transport, for distribution purposes, of counterfeit goods and their possession for use by way of public communication in the premises of legal entities;

According to article 1396 paragraphs (3) and (4) shall be punished with imprisonment from three years to 12 years: a. any of the acts referred to in para. (1) and (2) if committed for commercial purposes.( According to art. 1396 para. (9), commercial purpose means the aim to obtain, directly or indirectly, an economic or material advantage, and according to para. (10), the commercial purpose is presumed when the counterfeit goods are identified at the premises, secondary offices, in adjacent buildings or means of transport employed by the operators who operate in the field of reproduction, distribution, rental, storage or transport of products bearing copyright or related rights.) By this rule, the lawmaker establishes in fact an aggravating circumstance to the typical offense regulated by article 1396, paragraph (1) and (2) and b. the rental or offering for rent of counterfeit goods.

According to article 1396, paragraph (5), shall be punished with imprisonment from six months to three years or with a fine from 2,000 lei (RON) to 20,000 lei (RON) the promotion of counterfeit goods by any means and in any manner, including: a. by use of public announcements; b. by use of electronic means of communication; c. by exposing or presenting to the public the lists or catalogs of products.

We see therefore that the offense is committed by actions related to advertising of counterfeit goods, in which case the lawmaker intervenes by punishing them severely enough given that the punishment may include the deprivation of liberty. The rationale for which the lawmaker incriminates such acts is that, on the one hand, the advertising ensures the first step in obtaining profits from the exploitation of counterfeit goods and, on the other hand, the fact that there is a persistence in criminal activity that is not limited to the manufacturing of counterfeit goods, but, even worse, it is continued through the advertising for the obviously illegal purpose to obtain undue profits.
According to article 139⁶, paragraph (6), an aggravating circumstance is represented by the deeds committed as provided in paras. (l) - (4) which caused severe consequences, in which case the penalty imposed is imprisonment from 5 years to 15 years. In assessing the severity of the consequences, the computation of material damages is performed according to the final sentence of the text under review, namely depending on the counterfeit goods identified as provided in paras. (l) - (4) and on the unit price of the genuine products, added to the illegal proceeds of the offender. In the interpretation of the text under review, we need to refer to the provisions of the Criminal Code defining “severe consequences” (Thus, according to art. 146 of the Criminal Code, severe consequences are represented by a material prejudice in excess of lei 200,000 or a particularly serious disruption of business caused to a public authority or to any of the units referred to in article 145 (defining the term "public" as anything related to public authorities, public institutions and other legal entities of public interest, management, use or exploitation of public property, public services and goods of any nature which, according to the law, are of public interest - our note) or to other legal entities or individuals.)

Under the provisions of art. 139⁶ para. (7), when the facts set out in para. (l)-(5) are committed by an organized criminal group, the punishment imposed shall be imprisonment from 5 years to 15 years. In this latter case, the lawmaker shall establish an aggravating circumstance, establishing a more severe punishment, the lawmaker’s position being justified by the high level of social danger posed by the act committed in such circumstances;

The penalty for a person who refuses to declare the origin of counterfeit goods or of pirate devices for access control, used for conditional access services programs, is, according to article 139⁷, imprisonment from 3 months to 2 years or a fine. The vision of the Romanian lawmaker also extends, by the incrimination of such acts, on the user/beneficiary/consumer of counterfeit goods or of pirate devices for access control, who refuse to disclose their origin.

According to article 139, shall be punished with imprisonment from one year to four years or with fine, the deed consisting in making available to the public, including via the Internet or other computer networks, without the consent of the holders of rights, of works or products subject to related rights or sui generis rights of manufacturers of databases or their children, regardless of medium, so that the public may access them at any time individually.

The digitization of works of fine art, graphics or photography. If the reproduction of a painting, for example, through a photograph does not pose any qualification issues, in general, the question of “digitization” of a work raised some problems in practice. The “digitization” is a technique that consists in translating the analog signal that the work represents in a numerical or binary way that will represent the information in a symbol with two values, 0 and 1, whose unit is the "bit". In a case where the original art work was digitized and made available online without the authorization of the rights holder, the French court ruled that digitization is a reproduction of the work, and that, regardless of the fact that a copy was downloaded from the website or not by third parties, the act represents counterfeiting. [8]

More so, the solution is applicable under the Romanian law, which expressly provides, in art. 14, that the reproduction means making copies of an original work, including by "permanent or temporary storage of such work by electronic means." We would like to emphasize that the wording of the Romanian law was adapted to the more recent workings of European Union Directives in this matter. Thus, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, in art. 2, called “Reproduction right”, provides, to the benefit of manufacturers of databases or their children, regardless of medium, so that the public may access them at any time individually.

Expressly mentioning the irrelevance of the permanence of the copies made by reproduction, the law also includes within the scope of reproduction the activities ensuring the temporary fixation of works, such as those made by Internet users who practice "navigation" ("browsing") or temporary storage of digitized works of art ("caching"). [1] In this regard Directive no. 2001/29/EC of the European Parliament and of the Council of 22 May 2001 establishes certain exceptions, taken by the Romanian lawmaker in art. 33 para. 3 of Law no. 8/1996 on copyright and related rights, republished.

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[7] Law no. 344 of 29 November 2005 on certain measures to ensure the observance of intellectual property rights in customs operations, as published in the Official Journal of 5 December 2005

The Involvement of Criminal Liability for Smuggling in the Romanian Legislation

Pamfil M.L.

Petre Andrei University from Iasi; Prosecutor, Prosecution's Office near Iasi Courthouse, (ROMANIA)
michaela_laura@yahoo.com

Abstract

Criminal liability of those involved in smuggling activities is carried out in Romania as provided by Law no. 86/2006 on the Customs Code, as amended and supplemented. In the matter that is the subject of this paper, the most important changes were made between 2009 and 2010 and pursued to broaden the area of the acts regarded as criminal offenses in an attempt to limit the growth of criminal phenomenon covering smuggled goods, especially cigarettes.

The purpose of this paper is to analyze the dispositions that have received different interpretations in the practice of department of public prosecution units and to demonstrate the author's opinion regarding the way in which these legal texts should be interpreted. The paper also includes some proposals for the improvement of legislation.

Keywords: cigarette-smuggling, circumvention of customs control, criminal liability, Customs Code.

Legal framework

The loss of jobs due to the economic crisis experienced by Europe in recent years, the significant price difference between cigarettes sold in the EU Member States and other European countries, as well as the perspective of easy financial gains led to a significant increase in the traffic with alcohol products and tobacco. Basically, the small border traffic, always known and accepted as such by the authorities reached a macro level. In some houses of locals from areas bordering non-EU countries, namely Serbia, Moldova and Ukraine, real storages of cigarettes coming from outside EU, illegally introduced in the country, which supplied the black market from several counties were established. The losses suffered by the Romanian state due to non-payment of customs duties, of excise due on those products, of the value added tax, of the taxes on the money resulting from the trade with these products resulted in the change of the applicable law in an attempt to discourage the entry, possession and trade in Romania of excisable products under conditions other than legal ones.

In its original form, Law no. 86/2006 on the Customs Code stipulated a single way of committing the crime of cigarette-smuggling. According to art.270, the entry into the country or release out of the country, by any means, of goods or merchandise through places other than those established for customs control, is considered a crime of smuggling and is punishable by imprisonment from 2 to 7 years and by interdiction of certain rights.

By G.E.O. no. 33/2009, a paragraph was inserted in art.270 according to which the entry into the country or release out of the country, through the places established for customs control, by circumvention of control, of goods or merchandise which must be placed under a customs procedure, if the customs value of goods is greater than 20,000 lei, is considered a crime of smuggling. The law approving the above mentioned ordinance, namely Law no. 291/2009 brought changes in paragraph 2, which was adopted as follows: the entry into the country or release out of the country, through the places established for customs control, by circumvention of control, of goods or merchandise which must be placed under a customs procedure, if the customs value of goods and merchandise is greater than 20,000 lei for products subject to excise duty and greater than 40,000 lei for other goods or merchandise is considered a crime of smuggling and is punishable under article 1.

In 2010, by Law no. 202 on certain measures destined to accelerate the processes settlement, known as the Small Reform Law, the crime of smuggling under paragraph 2 was again amended, a third way being introduced. Thus, according to art.270 paragraph 2 the following are considered crimes of smuggling and are punishable under paragraph 1 a) the entry into the country or release out of the country, through the places established for customs control, by circumvention of control, of goods or merchandise which must be placed under a customs procedure, if the customs value of goods and merchandise is greater than 20,000 lei for products...
subject to excise duty and greater than 40,000 lei for other goods or merchandise, b) the entry into the country or release out of the country, twice in one year, through the places established for customs control, by circumvention of control, of goods or merchandise which must be placed under a customs procedure, if the customs value of goods and merchandise is smaller than 20,000 lei for products subject to excise duty and smaller than 40,000 lei for other goods or merchandise, c) alienation under any form of goods undergoing customs transit. According to art.270 paragraph 3, the collection, possession, manufacture, transportation, acquisition, storage, delivery, marketing and sale of goods or merchandise which must be placed under a customs procedure, knowing that they come from smuggling or intended to commit it are assimilated to smuggling and punished according to paragraph 1.

The smuggling offense has an aggravated form governed by art.274, which provides limits of substantially higher sentences if the offense was committed by two or more persons together or if the offense was committed by one or more persons together. According to art.275, the attempt to commit any of the ways of the smuggling crime is punishable.

Debates and proposals concerning the smuggling offense

The law in effect nowadays includes therefore three distinct ways of achieving the alcohol or cigarette smuggling crime, their punishment being determined on the one hand by the dynamics of crime, and on the other hand by the EU criticism on the non-sanctioning prosecution of smuggling committed in places where customs control takes place.

As can be seen from comparing the first two paragraphs of art.270, the material element of the crime in the two ways is identical, the main differentiating factor being the place where the offense is committed. Thus, while in case of the way provided by paragraph 1 the goods or merchandise must be brought into or out of the country through places other than those entry or release is performed through the places established for customs control. The material element is in both cases an action of bringing in and out of the country of certain goods or merchandise. The notion of "country" can only be interpreted as referring to the customs territory of Romania which according to art.3 of Law no. 86/2006 includes the territory of the Romanian state, delimited by the Romanian state border. Therefore, the crime of smuggling provided by the first two paragraphs of art.270 of the Customs Code is consumed when the author went beyond the state borders, whether through the special places or not. For example, when the author comes at the customs office at the point of crossing the border from another state into Romania, the goods he/she has are already entered in the country and we cannot talk about an attempt to enter it, as it was sometimes considered by the legal practice, but of a consumed act of entry. The situation is similar to that in which the person is caught soon after crossing the border through a place other than the one specially established, with goods coming from the neighboring state, so that he/she cannot receive different legal treatment. This conclusion is drawn, otherwise, from the provisions of art. 4 point 5 of the Customs Code that defines the customs office of entry as "the customs office designated by the customs authority under the customs rules to which the goods entered (not to be entered) into the customs territory of Romania shall be conducted without delay and where they are subject to appropriate entrance controls for risk analysis."

For the entry into or release out of the country of goods or merchandise through the established customs control areas to be covered by criminal law - art. 270 paragraph 2 - several conditions must be met. When referring to cigarettes smuggling firstly these goods should be removed from customs clearance, then either the customs value of the products should be more than 20,000 lei, given that cigarettes are excisable goods or the author should commit more acts of circumvention.

Circumvention of customs control is achieved when the person coming at the customs office of entry into the customs territory of the Community does not fulfill the obligation to declare the goods he/she carries in order for the customs authorities to place the goods under a customs regime (art. 43-61, Community Customs Code), but rather notifies the customs authorities that he/she has nothing to declare. The customs control, as defined in art.4 point 18 of Law no. 86/2006 does not include obligatorily, but may include the control of the means of transport, the control of luggage and of other goods carried or owned by individuals. From the examination of these laws, it follows therefore that customs authorities shall carry out the physical inspection of the vehicle or of the person only when there is suspicion that the person’s statement is dishonest, otherwise customs control shall consist only in asking the person if he/she had anything to declare. Provided that the person does not declare the products which must be placed under a customs procedure, the circumvention of control action was consumed (actually occurred), having no importance whether the release from customs was granted or not.

Discussion arose in legal practice on the interpretation of the provisions of art.270 paragraph 2 letter b) which incriminates the entry into or release out of the country twice a year, through the places established for customs control by circumvention from customs control of the goods or merchandise which must be placed under a customs procedure, where the customs value of goods or merchandise is smaller than 20,000 lei for
products subject to excise duty and smaller than 40,000 lei for other goods or merchandise. In practice, some of the prosecution authorities considered that for this crime to exist the person should have been previously sanctioned at least twice in the same year for committing the crime provided by art. 653 letter a) G.O. no. 707/2006 approving the Regulation implementing the Customs Code. Such a view with which we cannot agree, ignores both the way of establishment of art. 270 on the whole, and the principle ne bis in idem requirements which do not allow a person to be punished twice for the same crime, even if the two sanctions have different natures (criminal and contraventional in the present situation). The analysis of the content of crime provided by art.270 paragraph 2 letter b) cannot be made, in our opinion, by ignoring the provisions of letter a) of the same article, especially since most of the elements of the two crimes are common.

In fact, there is only one single element that differentiates the two offenses: the customs value of goods brought into the country by evading controls. In the situation envisaged by letter a) the crime does not have a criminal character unless the customs value of goods brought into the country exceeds a certain amount of money (20,000 lei for products subject to excise duty and 40,000 lei for other goods). However, if within one year, the person repeats the activity of bringing into the country under conditions other than those provided by law goods which must be placed under a customs procedure, then his/her deed will be regarded as a crime, even if the customs value of the respective goods is below the limits provided by letter a). We emphasize that in our opinion the crime provided by art.270 paragraph 2 letter b) of Law no. 86/2006 is not a continuing crime that includes two material acts committed within one year, but a simple crime - a simple crime unit - which includes only a single physical act which acquires, by the will of the law, a criminal character because the person reiterated the illicit activity of entry into the country of goods by evading customs control. Based on this reasoning, regardless of any other entries of excisable goods in the country made by that person within a year, each one will be subject to the constitutive content of the crime provided by art. 270 paragraph 2 letter b), except the case when in any of these cases the customs value of the goods exceeds the limit of 20,000 lei or 40,000 lei.

Regarding the form assimilated to smuggling as provided in paragraph 3, the legislature no longer talks about the entry into the country or release from the country of products which must undergo a customs procedure, or about the place established for customs control, but sanctions other material acts, namely the collection, possession, manufacture, transportation, acquisition, storage, delivery, marketing and sale of goods or merchandise that must be placed under a customs procedure. What is specific to this method of smuggling is the subjective condition imposed by the legislature, asking the perpetrator to know that the goods are coming from smuggling or are destined for committing the act of smuggling.

The way in which the legislature has inserted this subjective condition gave rise to controversy in the legal environment, as factual situations similar or even identical were interpreted differently. The main source of differences is the use of the concept of smuggling, given that in the previous paragraphs the crime of smuggling is defined. Thus, some legal practitioners considered it necessary for the perpetrator to know the exact way in which the goods have been brought into the country and that the respective way constitutes a crime. As far as we are concerned, we believe that the legislature did not refer to the crime of smuggling, but to the act of smuggling, following by means of the criminalization of the offense assimilated to smuggling to prevent the sending on the black market of cigarettes, alcohol or other products entered under conditions other than the legal ones. Therefore, we consider that the term of smuggling should be understood lato sensu, as the illegal act of clandestine transport across borders of goods, values or items prohibited or exempted from customs duties and not as referring only to the crime of smuggling. Imagine a situation where a number of people bring into the country through the place established for customs control but by circumvention from control cigarettes with a value smaller than 20,000 lei which they store at the home of a person who subsequently sells it to another person who will in turn sell it. The deed of those who brought into the country cigarettes is not a crime as long as the requirement of the value of 20,000 lei or greater required by art.270 paragraph 2 letter a) or of the reiteration of criminal behavior imposed by art.270 paragraph 2 letter b) is not met. Therefore, these cigarettes do not come from the crime of smuggling, which is why neither the one who stored it and sold it nor the one who bought it for resale is criminally liable. But let’s imagine that the people who bring the cigarettes into the country do this several times and store cigarettes at a person’s house who subsequently sells it. In this case, cigarettes would come from the crime of smuggling under art.270 paragraph 2 letter b), and the situation would change radically both for the one who stored and sold it and for the one who bought them for resale. How can one justify this different treatment as long as the deeds committed by the two were identical, their subjective position was the same and the purpose followed by committing the deed the same? In addition, how can one prove that the one who bought cigarettes from the one who stored it knew the repeated character of the entry of cigarettes in the country, given that it is well-known that the sale of goods prohibited by law is performed without questions and explanations? Using this reasoning one would reach the absurd situation in which the offender might avoid criminal liability by citing his/her own lack of interest in the origin of goods. As far as we are concerned, we consider that what must be proved for the crime to exist is not the way in which that cigarettes were introduced in Romania (through an act which constitutes a crime, misdemeanor or none of them), but the author's subjective position in relation to his/her deed and the respective cigarettes or goods. The way in which the cigarettes were
purchased (at night, in secret, without the invoice or other documents) the small price with which they are sold (much lower than the prices of authorized dealers), the way in which they are stored or transported (hidden in car doors, in specially designated places in the engine compartment, in the trunk, under the car banquettes, in bumpers, hidden in cellars, attics, in the stables of animals, hidden in bags, travel bags, under blankets, carpets, furniture), the lack of inscriptions in Romanian and the lack of Romanian tax stamps on cigarette packets given that it is commonly known that cigarettes marketed in Romania bear stamps and inscriptions in Romanian, serve to determine the representation performed by the author at the time of committing a crime regarded as smuggling, prove that the author had the representation of the fact that those goods were goods that came from breaking the law and that those acts which he/she committed (holding, transportation, acquisition, selling) violated the law. Therefore, we suggest as lex ferenda the amendment of the text of art.270 paragraph 3 either by replacing the notion of smuggling with that of illicit trafficking, in the phrase "knowing that these come from smuggling" as well as in the phrase "intended to smuggling" or by reformulating the subjective condition as "knowing the illicit nature of the acts committed".

We also criticize the use of the conjunction and in the enumeration of actions (material acts) by means of which the crime assimilated to smuggling can be performed, which can lead to the idea that the author must commit not only an action from those stipulated in order that his deed is regarded as a crime but all of them, cumulatively. Such an interpretation results in the impossibility to enforce the legal text, being virtually impossible for one person to commit all the actions listed. Therefore, we think the conjunction and should be replaced with conjunction and / or so that the alternative nature of actions that may constitute the material element of the offense is obvious and beyond doubt.

Conclusions

Although imperfect, the legislation adopted by Romania in the matter of the crime of smuggling is able to bring about to the achievement of the goal for which it was established, respectively to hold criminally liable those involved in any way in smuggling activities. It is however necessary that those involved in law enforcement interpret its spirit, seeking to understand and implement the will of the legislature, and not cling to the strict interpretation of terms, depriving some statutory provisions of judicial efficiency. In turn the legislature is obliged to intervene and clarify the legal texts that have generated discussion and controversy, so that those guilty of violating the law are subject to criminal liability, and illicit trafficking of cigarettes limited to the minimum.

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Economic and financial crime in the romanian health system – a threat to national security

Pantea M.

Police Faculty – „Alexandru Ioan Cuza” Police Academy, Bucharest (ROMANIA)
marius.pantea@academiadepolitie.ro

Abstract

Business criminality appeared in Romania in 1989, after the accession to the EU. The modus operandi for these crimes has diversified. One of the fields this crime produces important damage for more than 20 years to the state budget and the health insurance budget is health care fraud. This article aims at drawing attention on this type of fraud, presenting a series of illegalities, the modus operandi and the factors that allow these acts to happen. We are addressing to the judicial competent authorities and the persons responsible for the national health care system.

Keywords: fraud, economic-financial crime, corruption, health care, pharmacy, doctors.

Introduction

While having a walk in the centre of large Romanian cities, one may notice a bank, a gaming room and a pharmacy along the central boulevards. Banks’ presence is somehow justified, taking into consideration the enormous profits made by them in times of crisis, the gambling rooms or agencies are also easily motivated by the hope to win easy money, tendency which is also fueled by the global crisis. In this context one may barely understand the reason for such a large number of pharmacies. Probably, the Romanian people is very ill, and these institutions are clearly useful and necessary at every step, or maybe the pharmacies owned by large chains which hardly manage to survive the troubled times that we all face, are to ensure health to this people. If one has a look through the latest statements made by the board of the institution managing the money of the Romanian taxpayer, or analyses the national health care system, he/she finds that “pharmaceutical market in Romania is about 5 billion euros and fraud is estimated at 200-300 million euros”.[1]

The aforementioned figure is also confirmed by the institution appointed by the EU - OLAF, which acknowledges that “Romania has a fraud rate of about 300 million euros” in the healthcare field. Given the fact that between 3 - 3.5 million prescriptions are nationally issued per month, then perhaps the big number of pharmacies is easily understandable. [2].

Types of frauds in the pharmaceutical industry

In Romania there are 3 types of pharmaceutical care which can function legally, namely community pharmacies, closed circuit pharmacies and drug stores. This aspect is regulated by the Pharmacy Law, which establishes that a community pharmacy operates under “Operating Permit” issued by the Ministry of Health and that community pharmacies are authorized in two ways, namely: Community pharmacy established on demographic criteria and community pharmacy established notwithstanding the demographic criteria

Please note that the establishment of community pharmacies is limited to the demographic criterion, namely: in Bucharest one can open a pharmacy for every 3,000 inhabitants, in county towns for 3,500 people and in other cities for 4,000 inhabitants. As an exception to the demographic criterion, pharmacies could be established only in stations, and wide areas shopping centers.

The first problem we wish to point out is that, according to the lists posted on the Ministry of Health’s site, in December 2011, in our country there were 7259 community pharmacies and through a simple click, we were amazed to find out that in Bucharest there is a pharmacy for about 1,900 inhabitants (calculation: 1,677,985 people/885 pharmacies = 1 pharmacy for 1,896 pharmacy inhabitants). The explanation for the obvious violation of the mandatory regulations imposed by the Pharmacy law is only one, corruption. What is the real situation? It is quite simple to observe that, at the corner of the block, at the ground floor, there are 2-3 corner shops, one of them being taken over (rented or purchased) by a chain of pharmacies and other pharmaceutical companies. By means of a "sop", they obtained from the townhall a document which shows that at that address, there is a "big
operating license for the future pharmacy situated in “the newly created shopping center”. The people responsible for these serious irregularities are both local authority representatives and the representatives of the ministry, the substantial amounts of money or gifts received on this occasion which fuelled the gray national economy. This way of opening community pharmacies as an exception to the demographic criterion, was possible until December 2010, when this article of the law was expressly repealed.

As far as the licensing and operation of community pharmacies are concerned it is clearly stipulated that “they function only if there is at least one pharmacist who personally exercises his profession, and who can not be replaced by someone having another profession”. Moreover, the sites of the Ministry and of the Pharmacists’ College provide the total number of pharmacists in Romania as being 14,000 pharmacists working effectively in pharmaceutical units, which is twice the number provided by the registered community pharmacies - around 7000, which means that the pharmacist is not present in the unit during the whole working activity, which leads us to one conclusion, that the imperative provisions of the law are not respected. Romanian pharmacies usually operate in two shifts (min. 12 hours / day including weekends). There must be at least two pharmacists, not to mention that there are non-stop pharmacies, which can legally operate with at least three pharmacists. How is this possible? The answer is only one, corruption.

Reality shows us examples of chain pharmacies that have employed pensioners as pharmacists (who are old, homebound, even seriously ill) or other persons with this qualification, being employees of the business only in papers, because the existence of at least one pharmacist is absolutely mandatory in order to get the certificate from the ministry. By means of money or substantial gifts transferred by large firms, the employees from the ministry of health do not identify any problems that the chief pharmacist is almost 100 years old or that this one suffers from illnesses that do not allow him to move, let alone managing work in a pharmacy. Authorizing the Community Pharmacy, Ministry of Health does not require a document showing the pharmacy opening hours, escape the legal rules, which permit authorization while the documents are presented only for the chief pharmacist. When providing the good standing certificate to the community pharmacy, the Ministry of Health does not require a document showing the pharmacy opening hours, a breaking of the legal rules in force, which permits the good standing certification while presenting documents only for the chief pharmacist. To note that County Health houses call upon the opening hours and the number of pharmacists employed when entering into drug supply contracts. Thus, one may prove that the same pharmacist appears to be hired by more pharmaceutical units and as far as the pharmacies belonging to „chains” are concerned, false statements were used and extraworkload contracts– which have nothing to do with reality (a pharmacist whose quota is 8 hours in a pharmacy needs to perform other 4 in another pharmaceutical unit.).

The shortage of pharmacists is a “danger” for citizens who need expert advice when purchasing medical treatments, because in chain pharmacies they often will be helped by pharmacy assistants (that wear only a badge with the name and surname - without specifying whether he is a pharmacist or assistant) who attended the courses of a post-secondary school and unfortunately does not have all the knowledge that a pharmacist who graduated from institutions of higher education has (5 years plus additional three years of residency, followed by a final examination). We consider that this is a threat to public health, a particularly serious offense under the criminal law in our country, but unfortunately I have not seen until now an administrator of a chain of pharmacies to be held criminally liable for this.

**Doctors’ involvement in the health system criminality**

Another problem that we submit to your attention to is that doctors receive significant sponsorship from drug manufacturers to aggressively promote a product made by a certain manufacturer. Romanian doctors are mostly "poor", but participate with money aid by big medical companies to congresses and symposiums held in exotic places, with transportation, meals, accommodation and pocket money supported by multinational companies that make impressive profits in our country. This negatively influences the professional ethics of the medical profession and is not a crime as long as medical prescriptions do not mislead or affect the patient’ health.

The most used methods for committing fraud in the Romanian health care system are:

- Introduction of expensive drugs compensated or free on fake recipes or for fictitious patients, which are then submitted to county insurance houses to be settled (there have been identified in the system settled recipes for deceased persons or who have not been to the doctor for long periods of time, but who have noticed with amazement that they are on expensive treatments for chronic diseases).

- Introduction of drugs on prescriptions after being released by the doctor (the doctor completes a recipe with 3-4 compensated medicines, which are taken by the patient from the pharmacy, and then it is further "completed" with 1 - 3 medicines for which they receive money from CNAS).

The practice in hospitals to charge patients medication records and medical examinations that were not performed.

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The medical analysis laboratories make arrangements with physicians or family practitioners that a patient is actually carried out a small number of laboratory investigations but money is paid for much more investigation. Thus, the above mentioned doctors increased their income by amounts received as commission from medical analysis laboratories.

Providers of home health care or palliative treatments are in contract with the County Health Insurance Houses and request reimbursement of more service than actually have been carried out, taking advantage of how the patient completes the form he sign.

Public acquisition of medicines and medical instruments, in which large deposits of drugs take part, by already known arrangements (agreements between suppliers of goods or services on prices or products, the involvement of intermediary companies that actually belong to the same owner, deals with hospital managers - who receive commissions in money or other benefits, trips, gifts, jewelry etc.).

Unacceptably high costs for rehabilitation of sanitary facilities or to acquire Integrated Information System (SIUI) of the National Health Insurance House (according to the Court of Accounts Report for 2010, SIUI was poorly designed and executed and that is why the institution's budget was damaged by over 1.4 million euros). [3].

Forgery of documents relating to medical products and medical instruments used in hospital units (initially cheap generic drugs were purchased and then sent for settlement as the original drug but more expensive).

Tax evasion committed by many operators in the health care market (most commodity stocks are kept in the accounting records by their value and quantity).

Medical instruments and counterfeit medicines, which manage to penetrate the legal healthcare system by low prices and the unconscionability of decision makers that allow this type of "business" (warehouses, pharmacies, hospitals who agree to purchase medical products very cheap and of poor quality, accompanied by forged documents and personal benefits for those involved).

In the IT system managed by the Ministry of Health, there is a greater number of insured than the number of payers, which allows loss of large sums of money (in fact there are many people who do not pay health insurance for various reasons, either they left the country for a longer period, or are deceased, etc.).

Granting of sick leave for incentives given to the doctors (the bigger the number of days for sick leave the bigger the increase in health budget holes, if we consider that the first part of a sick leave is paid by the employer and the difference is paid from health insurance fund).

The old issue of retired people due to health problems, has produced and is currently still producing serious damage to health insurance budget (some of them are healthy patients, that helped by the doctors in claiming the existence of a mental illness, followed by fictitious admissions to psychiatric hospitals or neurology, resulted in their retirement). This involves spending money from the state health insurance budget for hospitalization and medication and payments charged to county health insurance houses for medication related to mental illness. In this latter situation, in practice the situation is like this: annually the early retired persons due to illness are presented to a committee before which they must prove a treatment, which means that monthly, the doctor issues a compensated recipe with appropriate medication for the psychiatric disease. These prescriptions, in most cases are delivered directly to pharmacies, which never releases the medication prescribed but require and receive their value from their health insurance houses, and the money resulted from these ”maneuvers” were divided between doctors, owners of pharmacies and drug deposits.

In oncology, medication is given by the physician, the patient does not have access to the prescription, then these prescriptions “well loaded with very expensive drugs”, go through representatives of warehouses to pharmacies and then to settlement at the county health houses (this is possible in practice because at national level there is no strict evidence of oncology patients – as there is the national diabetes register).

Release of prostheses or pacemakers (for heart patients) in double copies (even if their release is based on a file, there have been identified situations where instead of a hip prosthesis there have been issued, in documents, two such prosthesis, or instead of a pacemaker to be issued two or more).

**Evidence in support of the issues presented**

To demonstrate the above mentioned in this article we draw your attention at one last example. Thus, the drug "NEBIDO", is compensated at a rate of 90% and is used to treat hypogonadism in males , so it is a medicine for men only, but used "successfully by women", according to a material broadcast by Antena 1 in June 2012 . In fact, in the last three years, some pharmacies in Bucharest, have settled in CASMB (House of Health of Bucharest), about 9 million dollars for medicine "NEBIDO", which was passed on recipes including for women. The drug in question was never taken from pharmacy by many patients who were identified by the TV reporters, moreover doctors have prescribed the recipes for this type of product, which means that on two copies of the recipe this drug was not written, and on the third copy it was inserted with a price of 450 lei. Thus those pharmacies have sold 748 boxes of this product annually; when at all pharmacies in the capital there was...
sent a total of approximately 1,500 boxes of NEBIDO. Following the complaints, CASMB started the verification and control of pharmacies and doctors involved, who prescribed the drug in question, their results are expected to be communicated.

County Health Insurance House (CIAS) from Bacău discovered in 2011, recipes worth 88,000 lei, issued between 2008-2010 for deceased patients with wrong personal identification numbers. Following the checks it was discovered that doctors can be liable, in some cases, for errors in filling personal identification numbers or in the case of cancer patients, the issue of prescriptions for patients who died, but only because they were handed to carers of persons in the terminal phase. It is possible that patients could have died and carers came to the pharmacy with the prescription and take the drugs in order to sell them. [4]

Without claiming to have discussed about all means of fraud in health, we must also mention briefly that at national level the "tax on vice" paid by manufacturers of cigarettes and alcohol, for the health system and collected by the Ministry of Finance, has a constant value, which was noted by the current health minister who rhetorically declared "I do not know how is it that every month, Romanians smoke and drink exactly in the same amount". [5]

In March this year these doctors and the employees of some laboratories were suspected of fraudulently settling prescriptions and medical tests that have never been performed. The prejudice to the budget of the National Medical Insurance House is about 500,000 Euro. The officials declared that 14,000 prescriptions were written and not given to patients. The relation with the House is not a direct one, but through a medical network that has a contract with the House. The 42 persons are accused of serious fraud, bribery and forgery. The doctors wrote fictitious prescriptions, the laboratories took them and the Medical House settled them. Large amounts of money remained with the laboratories and the doctors received a commission of 10%. According to the prosecutors, this network falsified 14,000 medical prescriptions.

The most interesting aspect is the fact that the family doctor or the specialist fictively sent their own patients to tests. The laboratories issued false tests bulletins and settled these tests. In this period also some of the tests were lost and the laboratory issued false documents, which is a threat to national security.

In 2013 2 doctors and a farmacist – the owner of a chain of pharmacies, were sent to court for having caused a prejudice of 2 million lei between 01.09.2008 - 31.08.2009. the 2 doctors are responsible for writing over 700 compensated prescriptions using data from patients they never treated or were dead, one of the doctors faces charges of forgery (430 documents), accomplice to forgery and fraud and the owner of the pharmacy chain also faces charges of forgery (1373 documents), and fraud.

Conclusions

"Romania lost about 1.6 billion Euros annually because of fraud in the existing medical system in the form of informal payments made to medical personnel or recording of treatments that have not been made", according to data presented by Paul Vinck, president of the European Network fighting corruption and fraud abroad (Belgium), in the second day of the conference Financing Sustainable Health Systems, organized by the Tarus Media. In 2004, the Romanian health system provided services to 27 million insured persons, out of which only 19 million have been identified. The costs of childbirth in Romania reached even up to 3,000 euros in informal payments to medical staff, to which we add a thousand euros if caesarean section was needed", said Paul Vinck who tried to develop a collaboration with the Romanian authorities since 2004, but that did not materialize into a concrete project related to combating fraud in the health system.

According to the existing studies worldwide, the waste of health resources is due to fraud and corruption (up to 19-20%), administrative inefficiency (17%), errors and inefficiency of health care providers (12%), health services that can be avoided (40%), lack of coordination between institutions in the system (6%) and medical care that could be prevented (6%).[6]

The attitude of health professionals that minimize the existence of fraud, the pharmaceutical industry companies using false licenses or promote overconsumption of antibiotics (for example) and do not publish the exact results of clinical trials and lack of legal definitions of fraud and corruption are in the opinion of Paul Vinck as many elements that keep the system losses. "Before investing in the system you should resolve the consequences of these problems that produce a flow of funding. In addition, these losses should be measured, such as costs and service quality should be measured. Once known, the losses can be treated as an element of business and the right solutions can be applied to recover them," said Vinck.

On the other hand, the national health officials say that "the fraud in the Romanian system of health cannot be assessed sooner than a year since the introduction of the electronic prescription. Currently, it is estimated that fraud in the health system is about 10-20% of total revenues, and the new system - the electronic recipe - would reduce bureaucracy and enable health control prescriptions and transparent use of money".[7] We believe that the introduction of "electronic record for patients" projected to be achieved by 2013 will be another way to reduce healthcare fraud.
In the late 2010, when the data basis from the counties were centralized the total amount exceeded the total population - there were about 27 million people listed, as some appeared in two cities. Subsequently their number decreased to 19.584 million, which includes all foreign nationals staying in Romania, but also part of the Romanians who work abroad but who come from time to time and pay their insurance or go to the doctor (especially dentists). [8]

Along with economic and financial crimes specific to the business law, in medicine in our country tax fraud is closely linked to smuggling and counterfeiting of products and medical instruments, and above all is corruption which facilitates the "arrangements" in the public acquisition field and allows to drain significant amounts of money from the state budget for maintenance of a sanitary system with sicker patients every day.

References
Criminal repression in the matter of crimes against property. Realities and prospects in the light of the economic crisis and the increasing of the crime phenomenon at the European and global level

Pascu I., Sima C.

Abstract

The author examines the solutions chosen by the Romanian legislature in the matter of criminal offenses against property under increased crime in the area and the economic crisis.

In this context, are presented, in addition to legal practice developments, the innovations introduced in relation to criminal offenses against property by Law no. 286/2009 on the Criminal Code that will come into force on 1 February 2012.

Keywords: crime, punishment, wealth, crime, economic crisis

The efficiency of the suppression of criminal offenses against property can be assessed by reference to the legal and social reality. This requires that criminal law must be updated in order to provide solutions to any challenge that society will face. Also, it requires the fact that institutions responsible for preventing and combating crime in this area should adapt to the social requirements, and the population to understand the danger of these criminal acts, learn to defend themselves against them and deter potential offenders.

The protection of property relations, the defense of public and private property from acts of theft, fraud and arbitrariness is one of the constants of criminal law, being present in ancient times as a permanent form of reaction of human society as one of the conditions of existence of any organized society.

The specific regulation of crimes against property belongs to both variables of law, because criminal protection of social values must adapt to the different stages of social development, as conditioned by nature and legal system (liberal-individualist-collectivist totalitarian) and social development, economic, technological society over time [1].

The Romanian Criminal Code in force, special part, adopted in 1968 in the context of socio-legal regime of that time, in its original form, criminalizes acts against property, in distinct titles, like, Title III, named "Offences against personal wealth or particular" and Title IV "Crimes against public property." The existence of two distinct titles on property crime was motivated by reasons of socio-political and legal regulations but two titles were essentially identical, which differed only by the general legal object and the sanctioning limits [2].

The need for such sharing crimes against property has not been felt in the next period of development of Romania (switching to other forms of society based on socialist ownership of property only).

The Romanian Constitution adopted on 21 November 1991, revised in 2003 stipulates in Article 136 that "property can be public and private " and formulated the criteria for determining the extent of public and private property. It also establishes the rule that the property is equally guaranteed and protected by law, regardless of its ownership.

According to these provisions, in all cases where they commit acts against property, these acts will be assigned to texts criminalization of Title III of the Criminal Code in force, the special part, whether the material object of these facts would be part of the private assets field or of public wealth. In this way we move from a differentiated protection of public property to its defense unit in a much attenuated form, given, on the one hand, sentence limits much lower regarding prison sentence, and on the other hand that the aggravated versions of some of the offenses against public property, determined by the extent of the consequences of this, there are no longer incidents.

All these legislative realities and other factors, particularly those relating to safeguarding, supervision or integrity of goods from the authorities or the owner of the property, on such property, regardless of its ownership, increased the frequency of offenses against property, within 5 years of the adoption of the Constitution.
Prominent in this respect are the existing data from the Public Ministry regarding the crime discovered during 1991-1996. During this period, offenses against property have a share in percentage of total crimes committed between 56.7% and 62.4% compared to 1989 when this figure stood at 46.1%.

Faced with these realities, the Romanian Parliament by Law no.140 of 1996 [3], made changes and additions to content incrimination rules laid down in Title III of the Criminal Code in force, the special limits by raising imprisonment and criminalization of new ways of committing some of the acts against property. For the offenses with the highest frequency of the offense against property such as burglary, aggravated burglary, robbery and deceit, the imprisonment special limits have been increased from 3 months to 3 years to 1 year and 12 years in theft qualified from 1 year to 5 years, 3 years and 15 years in robbery from 2 years to 7 years to 3 years and 18 years and for robbery that resulted in the victim's death set a prison sentence between the same special limits as to aggravated murder, deceit, variant type, from 3 months to 2 years 6 months to 12 years, etc.. We have introduced new circumstances that give character to theft or armed robbery, and new variants to the offense of cheating. The special crime of embezzlement of Title IV, which has been repealed, was brought under Title III of the Criminal Code in force.

Following these legislative changes, crime statistics revealed that crimes against property decreased with a lower weight in the overall total of offenses detected than in previous years (from 59.6% in 1997 and 34.7 in 2009). The new penal policy guidance was confirmed as in order to increase firmness of the facts against property as an effective way to reduce crime phenomenon in this area.

We might say that firmness in the punishment of this category of offenses annihilated, at least in part, the economic crisis which, as you know, affects mainly offenses against property, whereas lowering the living standards means that many people have to procure the necessary living through illicit means.

5. In 2009, the Romanian Parliament adopted a new penal code which is due to come into force on 1 February 2014. Regarding the criminalization of acts against property, the new criminal law, would seem to be more in line with actual conditions, the Romanian society development stage, and need to transpose into national law EU regulations to harmonize criminal policy in this area of the EU Member States.

A first difference between the new Criminal Code and the applicable law refers to systematic rules for the criminalizing acts against property. If the Criminal Code in force these rules are contained in a single title without any legal classification in the new Criminal Code were systematized in Title II of Part Special on 5 chapters, given the fact that situations can find goods as economic entities and the character or nature of illicit activities that may change this situation [4].

In addition to this systematic procedure of acts against property, the legislator introduces a new group of crimes against property and other criminalization of acts that does not match the existing Criminal Code. Moreover, the new code changes the contents of certain incrimination acts in this category.

Although the new Criminal Code is influenced by current conditions of economic crisis, the new legislature adopted a new orientation of criminal policy towards reducing to some extent the limits of punishments for crimes against property in relation to those set out in the Criminal Code in force.

6. The economic crisis, as it is known, began in Romania in 2009, being characterized by sociologists as an "economic crisis in the first place, but also a political crisis, moral crisis, a crisis at the individual level, at the level of social institutions, and not only as a mere economic depreciation " [5].

Investigating how crime affects economic crisis in Romania is a concern for the institutions that ensure the safety of citizens and society as a whole. As for the latter effect, experts agree that at least theoretically, would be denied the link between crisis and rising crime, particularly crime caused by poverty.

It is recognized that an important category of disadvantaged population at risk of poverty, with low chances of living or future, may be involved in delinquent activities, especially against property, a kind of crime type utility.

The areas most affected by the economic crisis is seen as banking and financial services, real estate, building materials, construction, transport means, transport (road traffic reduction, bankruptcy of carriers), automotive industry, services consulting, sales activity, chemical industry.

Note that an effect of the economic crisis was manifested by the restructuring from the private and public sector which generated an increase in the number of unemployed in Romania.

Also, there is a clear decrease in the level of living standards and purchasing power, receiving loans is very difficult, the increased poverty of respective categories of population becomes more visible, the inflation, the reduction or the block of their salaries lead to the situation that as individual level, some people are forced to resort to desperate acts, unlawful acts default property.

The weakening of state authority on the grounds of budget deficit, given the problems that need to be coped with, lead to diminishing public confidence in the police or prosecutor’s ability to manage the crisis.

In the context of the economic crisis, crimes against property has increased. Thus, in the statistics reported in 2012 Progress Report of the Prosecutor's Office attached to the High Court of Cassation and Justice, it is shown that in 2009, 17,245 criminals were put on trial for crimes against property which is 34.7% of the total prosecuted, in 2010, were put on trial for crimes against property, 20,030 offenders who are 35, 2% of those ...
indicted, in 2011 the number of people prosecuted amounted to 22,454 people representing 36.8% of all people to judgment, and in 2012 the number of people prosecuted amounted to 22,157, representing 37.1% of those prosecuted.

As can be seen in all 4 years of the economic crisis in Romania, the number of crimes against property increased.

The increased crime against property is manifested mainly for offenses of theft (+6.8%). Theft offenses remains the highest frequency accounting for 35.3% of notified offenses. We recorded growth mainly to the facts of theft from companies (+8.3%) and housing (9%)[6].

Robbery during the economic crisis has known an increased frequency, accounting for 12.1% of all crime and is due to the material seized and produced by plucking items (cell phones, purses, jewelry, and so on).

Deception is another crime against property which significantly increased during the crisis, representing 19.8% of all crimes for which the perpetrators were brought to justice.

We recorded a significant growth in the facts of embezzlement representing 8.7% of total offenses detected.

On the offenses against property committed in the period to which we refer, we identify the operating modes that were previously very rare, such as crimes committed with great violence in the street by criminals acting in groups in public places etc., premeditated crimes, crimes order, crime, especially robbery, using a firearm by masked criminals, crimes committed by immobilizing or removing guards, through the use of tools, instruments, equipment used by criminals; surveillance systems installed by criminals in the banks to collect information which are subsequently used in robberies.

It was also found out that offenders with the opportunity to purchase or buy almost anything, have advanced by using technical means (especially IT equipment), they have knowledge in several fields acquired through the internet.

In the point of view of the police, crime against property is particularly common in urban areas, because in this area there are values (money exchange houses, pawn shops, people known to be wealthy) and protection systems and their security are often poor.

In rural areas, it was registered a higher growth, especially in burglary, theft of birds, animals, food and wood.

7. The socio-economic changes produced in Europe in the last decade, the action of bringing new countries into the European Union, globalization and economic crisis led to an alarming increase in crime with serious consequences.

In this context, both import and export of crime as a whole was developed, an important role is held by offenses against property, especially offenses of theft, robbery and fraud.

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[3] Published in M.Of.nr.289 of November 14, 1996


The europeanization of the criminal law

Pavaleanu V.

Mihail Kogălniceanu University (ROMANIA) pavaleanuvasile@yahoo.com

Abstract

The institution of the Public Ministry is found in many countries, but the Prosecutor’s status is different. There are states where there is a single body of magistrates including judges and prosecutors, as part of the judiciary. In other countries the public ministry is organized under the authority of the Minister of Justice without prosecutors being part of the executive. Finally, there are countries where the public ministry is part of the executive. Today there is a tendency to harmonize the status of the prosecutor to that of a judge, with specific responsibilities in the administration of justice.

Keywords: public ministry, flooring, prosecutor, judicial authority, judge, independence, tenure, European Public Prosecutor.

Preliminary Explanations

Lately we are witnessing an unprecedented proliferation of crime phenomenon, which had surpassed long time ago national borders. In these circumstances, crime already transnational, with negative consequences for national and European social values, justifies a criminal law action at European level and the inclusion of this issue in the center of the leveling of judicial systems process.

Since criminal law rules are national and the European Union has no competence in criminal law matters, an European criminal law, that would contribute effectively in combating transnational crime does not outline yet, but legal literature have expressed views on the need of this approach [1].

In these circumstances it’s known that the European Union has conducted extensive work to harmonize the criminal laws of the Member States, devoting to judicial cooperation Chapter 4 of the Lisbon Treaty on the Functioning of the European Union [2].

According to article 82 of this Treaty, judicial cooperation in criminal matters within the European Union is founded on the principle of mutual recognition of judgments and judicial decisions and shall include the leveling of laws, regulations and administrative provisions of the Member States in certain areas.

For this purpose, the European Parliament and the Council adopts measures concerning:
- the establishment of rules and procedures for ensuring the recognition throughout the Union of all forms of judgments and judicial decisions;
- the conflict prevention and resolving in the competence of the Member States;
- Supporting the training of the judiciary and judicial staff;
- to facilitate cooperation between judicial authorities of the Member States relating to the prosecution and enforcement of decisions.

To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and cross-border police cooperation, the European Parliament and the Council may establish minimum standards which take into account the differences between legal traditions and systems of the Member States and covers:
- Mutual admissibility of evidence between Member States;
- Rights of the person in the criminal procedure;
- The rights of the crime victims;
- Other elements of the criminal proceedings.

The adoption of these minimum rules shall not prevent Member States from maintaining or introducing a higher level of protection for individuals, but cannot ignore the levels established at Community level.

The European Parliament and the Council may establish, under the Treaty, minimum rules concerning the definition of criminal offenses and sanctions in the areas of serious crime with the cross-border dimension resulting from the nature or impact of such offenses or from the special need to combat them from a common base.

These crime areas are the following: terrorism, trafficking and sexual exploitation of women and children, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime.
Depending on developments in crime, the Council may adopt a decision identifying other areas of crime. If the leveling of the legislation within Member States in criminal matters is indispensable to ensure the effective implementation of a Union policy in an area which has been subject to harmonization measures, directives may establish minimum rules on the definition of criminal offenses and sanctions in the area concerned.

For the functioning of the European judicial area several EU bodies such as Eurojust, Europol, the European Judicial Network, etc. were established.

According to article 85 of the Lisbon Treaty, Eurojust’s mission is to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases by operations undertaken by the Member States and Europol and information provided by them.

In this context, the European Parliament and the Council determines the structure, operation, field of action and tasks of Eurojust.

These tasks may include:
- Initiation of criminal investigations, as well as the request to initiate criminal prosecution conducted by competent national authorities, particularly those relating to offenses against the Union’s financial interests;
- Coordination of the investigations and prosecutions referred to;
- Strengthening of judicial cooperation, including by resolution of jurisdiction conflicts and by close cooperation with the European Judicial Network.

Eurojust was established by Council Decision 2002/187/JHA [3] as an instrument of the European Union, with legal personality, to promote and improve coordination and cooperation between the judicial authorities of the Member States.

Following the evaluation of Eurojust’s experience it was considered necessary to further improve its operational efficiency, starting precisely from experience. Thus, on the 16th of December 2008 the Council adopted Decision 2009/426/JHA on the strengthening of Eurojust and amending Decision 2002/187/JHA for establishing Eurojust, with a view to reinforce the fight against serious crime[4].

The new Decision does not affect how Member States organize their judicial system and administrative procedures for appointing internal organization and national offices to Eurojust. But in order to ensure continuous and effective contribution of Member States to achieving Eurojust’s objectives it was established the national offices to have his normal work place at Eurojust.

To ensure availability of Eurojust at any time and to allow it to intervene in urgent cases it was established within this unit the permanent coordination (OCC) in order to receive and process all applications at any time referred to it, the structure can be contacted 24 hours on 24 and 7 days out of 7, with a unique contact point within Eurojust.

OCC shall consist of one representative of each Member State, which may be the national member, deputy or an assistant that can be contacted at all times.

According to article 12 of the new decision, each Member State shall, until the 4th of June 2011, a Eurojust national coordination system to ensure the coordination of efforts: Eurojust national correspondents on issues related to terrorism, national correspondent for the European Judicial Network and up to three contact points of this network, as well as representatives of the network on joint investigation teams, war crimes, recovery of debts and corruption.

Eurojust national coordination system facilitates in the Member State the carrying out of Eurojust’s functions, in particular by: ensuring that case management system receives information regarding the concerned Member State in an efficient and safe way; assist in deciding whether a case should be treated with the support of Eurojust or the European Judicial Network; offering assistance to the national member in identifying the authority responsible for the execution of requests for judicial cooperation and decisions on judicial cooperation, including those regarding the instruments for giving effect to the principle of mutual recognition; to maintain close relations with Europol National Unit.

If two or more national members cannot agree on solving a case of jurisdiction conflict regarding the investigation or prosecution the Eurojust College will be requested to issue a written non-binding opinion on the case, if the case couldn’t have been settled by mutual agreement between the competent national authorities. The opinion of the College shall be transmitted immediately to the concerned Member States, without prejudice to the provision that one of them may be better placed to undertake an investigation or prosecution of specific acts.

Eurojust maintains contacts regarding the European Judicial Network based on consultation and complementarity, especially between the national member, the contact points of the same Member State and its national correspondents for Eurojust and the EJN.

The European Judicial Network was established by Joint Action 98/128/JAI[5], which has demonstrated its usefulness in facilitating judicial cooperation in criminal matters. EU enlargement in 2004 and 2007 led to increased judicial cooperation, leading to the necessity to strengthen the European Judicial Network. This
Criminal repression in the context of the economic crisis and the maximization of crime at European and global level (May 9-13, 2013, Bucharest, Romania)

Objective was achieved by Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network [6], repealing the Common Action 98/428/JHA. European Judicial Network is made, taking into account the constitutional rules, legal traditions and internal structure of each Member State, from central authorities responsible for international judicial cooperation and the judicial authorities or other competent authorities with specific responsibilities in the context of international cooperation.

It is established one or more contact points in each Member State in accordance with its internal rules and internal division of competence, ensuring the effective coverage of the entire territory of the Member State.

Each Member State shall appoint a national correspondent of the European Judicial Network contact points and a technical national correspondent.

To ensure efficient cooperation European Judicial Network provides centralized information on Eurojust contact points in each Member State, concise information on the legal and judicial systems and procedural practice in the Member States and secure telecommunications connection for the operational work of EJN contact points.

For the same purpose the Eurojust national members inform the contact points of the European Judicial Network on a case by case basis, on all cases where they consider that the network is in a better position to treat them.

Provide that it is relevant for carrying out its functions, Eurojust may establish and maintain cooperative relations with Europol, OLAF, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) and the European Judicial Training Network.

In order to facilitate judicial cooperation with third countries, where Eurojust provides assistance under the new decision (art. 27a), the College may deploy liaison magistrates in a third country, subject to an agreement with the third country. Liaison magistrates should have some experience of working with Eurojust and adequate knowledge of judicial cooperation and to know the functioning of Eurojust. Posting liaison magistrate on behalf of Eurojust is subject to prior consent of the magistrate and his Member State.

Eurojust and the European Judicial Network periodically perform assessments on activities, drafting proposals to improve judicial cooperation in criminal matters.

It can be said that the future architecture of European judicial cooperation, as shown in the 2 Decisions adopted on 16th of December 2008 is welcomed and shows a clear willingness to move forward and showcase all forces that must act on this line.

In order to combat crimes affecting the financial interests of the Union, the Lisbon Treaty stipulates in art. 86 the establishment of a European Public Prosecutor’s Office, based on Eurojust.

The idea of establishing a European Public Prosecutor is older, respectively since 1995, when the European judicial area was launched, which was entrusted to a group of experts who drafted the Corpus Juris, consisting of 35 articles grouped in two parts, one devoted to criminal law and the other to criminal proceedings.

The first eight articles proposed the criminalization of acts such as the Community budget fraud and corruption, abuse of office, money laundering and association to commit crimes.

Most EU member states have rejected this project, out of which only the second part remained, devoted to the European Public Prosecutor, an institution which was later renamed the European Public Prosecutor.

According to article 86 of the Lisbon Treaty, the European Public Prosecutor has jurisdiction for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offenses against the Union’s financial interests, in accordance with the rules laid down in founding Regulation. The European Public Prosecutor holds public action in relation to such offenses in the competent courts of the Member States.

The regulations determine the statute of the European Public Prosecutor, the general conditions for the exercise of its functions, the rules of procedure applicable to its activities and the rules governing the admissibility of evidence and the rules applicable to the judicial review of procedural measures taken in the exercise of its duties.

Conclusions

The European Council may extend the powers of the European Public Prosecutor’s Office by including combating cross-border serious crime and amending provisions relating to authors and accomplices in serious crimes affecting several Member States.

Based on these provisions, the legal literature have expressed an opinion favorable to creating a genuine European Public Prosecutor to strengthen the fight against Community fraud, organized crime and terrorism, but unfortunately the rules for the organization and operation of this unit were not drafted.

We believe that the European Prosecutor should be established as soon as possible to ensure the conditions necessary to firmly combat cross-border crime in the European Union.
References


Legal and criminal aspects of the phenomenon of pornography on the internet

Pocora M.1, Pocora M.S. 2, Modiga G. 3

1 Senior Lecturer, Danubius University of Galati (ROMANIA)
2 PhD in Progress, Assistant Professor, Tomis University of Constanta (ROMANIA)
3 Senior Lecturer, Danubius University of Galati (ROMANIA)
monicapocora@univ-danubius.ro, silviupocora@yahoo.com, georgeta.modiga@univ-danubius.ro

Abstract

The proliferation of the internet services with pornographic character no longer surprises anyone nowadays, if we consider the expansion of this type of expression in classic mass-media. Analyzing the phenomenology of virtual pornography we can clearly identify, apart from the proliferation of contents of this type, the high degree of accessibility enjoyed by users. The easy identification of these pages by means of search engines and introducing keywords suggestion is outstanding. The need to incriminate the acts of production, possession and dissemination of child pornography through computer systems is undeniable. The extremely aggressive campaign addressed against this scourge has led to the perception of an attack against free speech in cyberspace.

Keywords: cyberspace, cybercrime, international networks, child abuse

Introduction

The existence in cyberspace of child pornography materials generated international concern, with a view to punish and deter especially the production and dissemination of such materials. The political pressure that has developed in recent years on the issue, gradually led to the foundation of principles of action, as well as legal rules with extraterritorial application, meant to set more accurately the facts subject to criminal sanction and facilitate international cooperation aimed at fighting against the phenomenon of child pornography.

This type of pornography was known and criminally sanctioned even before the breakthrough of the Internet. But the development of new technologies triggered the revival of discussions on this phenomenon, given that the Internet services have a tremendous capacity to disseminate child pornography, to reproduce such materials and make it publicly accessible including to minors and even facilitate in various ways its justification by different interested groups.

Various communities attached to the idea of free expression across the Internet noted, behind the natural concern raised above, a pretext to establish some form of control of the global network of computers and intrusion into the private scope of the participants in the electronic transfer of information. In general, the international organizations involved welcomed these concerns by stating that: "internet child protection is not an issue of censorship. Creating an online environment for children, featuring safety must preserve and develop fundamental freedoms, such as freedom of expression, right to information, while protecting children against harmful and illegal content. Actions against illegal content require the cooperation of the Internet industry, combining forms of self-regulatory mechanisms with those of the criminal law enforcement by public authorities, in order to ensure children’s protection."

Judicial practice

Distinct from this, in judicial practice in recent years there was prompted a lively debate around the question of whether the classification of electronic child pornography should also include those images where an adult is presented as a minor, displaying an explicit sexual behaviour, or images presenting not a real person, but credibly simulating a minor with an explicit sexual behaviour. Also in this category it is included the discussion on modelling websites where girls that are minor are presented and even if they are not engaged in sexually explicit conduct, their images, including as video tapes are offered to users for a fee.
These aspects related to the issue of pornography per se launch a new dispute between constitutional values implied, namely freedom of expression on the internet versus protecting minors against all forms of exploitation electronically.

The phenomenology of child pornography in cyberspace has a number of significant features for the proper understanding of criminal repression approach in this field. Undoubtedly the most serious aspect is the organized and sustained effort into the production and dissemination of such materials worldwide. Countless resources indicate the existence of international networks in recent years which could be largely wiped out due to some form of cooperation between countries and international organizations. The force to deter such actions is not always very deep, so that new networks of production and dissemination arise relatively constant (Pocora Mihail Silviu, Pocora Monica, Savenco Iulian 2010).

In addition to production with minors of closed-circuit magazines, published in the '70s, electronically scanned and transmitted via Internet services, the years that followed marked the massive exploitation of children in order to obtain such materials. For this reason combating cyber child pornography is linked with broader efforts undertaken worldwide to reduce the risks of exploitation and victimization of minors.

Minors who are victims of these operations unfortunately belong to the entire scale of age groups ranging up to 18. Unlike the access to adult pornography the degree of accessibility to child pornography material via the internet is more reduced. Indeed search engines provide links to web pages whose title suggests pornography, but their content is rarely of the kind incriminated by law. In these situations it is more about diversion actions of traffic users to confront the latter with existing ads on these sites and accumulate a large number of hits for the benefit of the website owner.

The richest and most likely searched resources in these contents are the well-known conversation rooms (Chat Rooms), where users need to be familiar with the specific technology of Internet Relay Chat (IRC) protocol. This is also where the success rate of repressive criminal actions registers the highest rates. The peculiarity of chat rooms is their locked character, access being allowed only by a password. Perhaps this particular form of isolating a community of Internet users tends to wrongly assert freedom of expression. It is obvious that the interest of protecting minors is in this case predominant over the protection of the right to free expression. However, the strict rules of chat rooms and their deliberate isolation encourage the promotion of external forms of paedophilia and child pornography.

Often users searching for adult pornography contents are surprised to find that behind holders of the resources they access, which otherwise do not suggest child pornography, are exactly materials with minors. This is a method intensely used by holders of such resources in order to divert electronic traffic to their sites by arousing users’ curiosity. In this way there is a bizarre overlap between elements of child pornography and adult one, which becomes intolerable even for representatives of the latter (Bocaniala Tache, Rusu Ion, Coman Varvara, Pocora Monica, Savenco Iulian 2011).

Similar boundaries sometimes occur within system of BBS (Bulletin Board Systems) where there are trafficked erotic images with minors, located in a "gray" area and where the administrators explicitly deny pornography, thus defeating attempts to disregard the ban.

**Legislative elements**

In the legislative, it is essential the role of the Council of Europe Convention on cybercrime, signed in Budapest on 23 November 2001. Being focussed on a joint initiative of several countries to implement in their national laws ways to combat cybercrime, the convention provides in Article 9 an important space for governing child pornography, regulating important facts which the signatory states are to incriminate in their domestic criminal law.

In Romania, there was adopted Law nr.161 in March 2003, on measures to ensure transparency in exercising public functions and business environment, the prevention and punishment of corruption and in Title III regulates the prevention and combating of cybercrime. The regulation of provisions of Article 35 paragraph 1 letter i and paragraph 2 (namely the definition of terms such as: "pornographic materials with minors" and "unrightful"), as well as those of Article 51 which incriminates child pornography by computer systems, represents a first step of the Romanian criminal law towards combating this new type of crime concerning child exploitation.

On the Council of Europe Convention there also appeared an Explanatory Report of the same assembly which states among other things that the Internet freedom of speech must be subjected to extreme discipline because cyberspace is a place that offers wide possibilities for paedophiles to exchange ideas, fantasies and tips, designed to encourage and facilitate the sexual exploitation of children. Therefore such contents include not only images, but also genuine "debate", especially in chat rooms between promoters of such practices against minors.

However, Art. 9 of the Convention refers to "image" and "visual appearance". It is not clear to what extent it tends not to incriminate also the internet sources where under various forms it is spoken in favourable terms about the sexual exploitation of children or where there are short stories reproduced with paedophile
content. The Convention qualifies in the criminal illicit category "the offering" or "making available" materials with child pornography by computer systems. It is envisaged here the creation of web pages and links to such sites.

Lately there is talk even if names such as "Lolita" or "Teens", usable for Internet resources should be suspected in the sense of suggesting pornography. Without denying such a possibility, we cannot help noting the course at least curious taken by the debates related to this issue, in the context of the problem of limiting freedom of expression on the Internet. Therefore we should avoid using words with suggestive meanings.

The Convention aims to go beyond the prohibition of images representing a minor engaged in sexually explicit conduct, but to extend the scope of protection of minors even in those situations where they are not actually used in the creation of production pornography. The purpose of this step is to stop the formation of a subculture among users of Internet services that would otherwise contribute to increase spread of child abuse.

Halfway through last year, the FBI, in collaboration with other institutions, released a warning against Internet users about the increased risk of being deceived electronically, an initiative triggered by complaints of remote fraud, from Romania, Russia and Great Britain. The Romanian police warned about the development of electronic crime, such acts being committed especially by youth groups (Ybarra, M.L; Mitchell, K. 2005).

The bigger is the extension of a network, the more numerous are the sites of sex in general and especially those for paedophiles. The number of child pornography websites doubled in recent years, says the annual report released by service cybercrime in the UK. The growth rate is of 64%, most locations are "hosted" in the United States and, more recently, in Russia, which recorded a spectacular growth in the field. The explosion of the Internet, Reuters believes led to the growth of this type of sites hosted in a given country and administered in another, which further complicates the detection of offenders, mostly men, and victims.

"One of the consequences of the Internet is the internationalization of the child pornography market," said Reuters’ service spokesman. However, British police registered a success in October 2009, when a sports teacher was sentenced to 18 months in prison for attempting to purchase via Internet the sexual services of a Lithuanian child of nine years.

But paedophiles use methods that are becoming more and more sophisticated in order to escape the police. "Evading the law is the main concern of paedophile networks, which discuss openly how to escape the police pursuit," says a police report. For example if a network member is likely to expose others, his computer will be the target of an attack aimed at destroying the database. Although most networks are still formed informally of individuals, the report shows that groups linked with organized crime are interested in profit.

This "weakness" can however be easily speculated by the police. Thus, one of the most extensive and aggressive operations against paedophile networks operating on the Internet led to hundreds of arrests in Britain, after the United States sent a list of 7,000 people suspected to have used their credit card to access websites containing illegal images (Pocora Mihail-Silviu, Pocora Monica 2010).

The Romanian Law 161/2003 states the obligation of the Ministry of Justice, Ministry of Interior and the Ministry of Communications and Information Technology (MCIT) to establish a database on Cybercrime. Also it sets the obligation of owners or managers of information systems, to which access of certain categories of users is prohibited or restricted, to warn the latter about the legal conditions for access and the legal consequences in case of unlawful access of the respective computer systems. Failure to do so is punishable by a fine of 500 to 5,000 lei. (Law no. 161 of 19 April 2003 regarding some measures to ensure transparency in exercising public function and businesses, preventing and sanctioning corruption, published in „The Official Gazette of Romania”, Part I, no. 279 of 21 April 2003)

Cybercrimes were grouped according to the same criteria as those laid down in the European Convention. The first category is that of offenses against the confidentiality and integrity of data and systems. Access without right to a computer system shall be punished with imprisonment from 6 months to 5 years, and if the offense is committed in violation of security measures, the punishment is imprisonment from 3 to 12 years.

The interception without right, of a data that is not public information and is intended for a computer system or comes out within it, and the unlawful interception of an electromagnetic emission from a computer system that contains data that are not public constitute offenses and are punishable with imprisonment for 1-7 years. The modification, deletion or damage to computer data or unlawful restriction of access to them, are punishable with imprisonment for 1-7 years. The unauthorized transfer of data from a computer system shall be punished with imprisonment from 3 to 12 years.

The act to seriously disrupt, without right, the functioning of a computer system by inputting, transmitting, modifying or damaging the data or by restricting access to them is punished with imprisonment from 3 to 15 years. It is an offense and shall be punished with imprisonment from 6 months to 5 years, the production, sale, import, distribution or making available in any other form, without right, of a device, software, password, code or other computer data to favour the committing of one of the offenses mentioned above.

The second category of computer crime includes the deeds to introduce, modify or delete, without right, computer data or to restrict access to them, if it results in obtaining inaccurate data that will be used so as to
produce legal consequences. The offense is punished with imprisonment from 2 to 7 years. This category also includes the act of causing a material damage to a person injured by inserting, modifying or deleting computer data, by restricting or preventing access to them in any way, or by preventing the operation of a computer system in order to obtain a benefit for oneself or for another, offense punishable by imprisonment from 3 to 12 years.

The law regulates international cooperation, which covers international judicial assistance in criminal matters, extradition, identification, freezing, seizing and confiscation of the proceeds and instruments of crime, technical assistance and other to gather information, as well as training of specialized personnel (Mitchell, K., Finkelhor, D., Wolak, J 2003).

The articles of law on preventing and combating cybercrime will supplement the provisions of the Criminal Code and the Law on electronic commerce, which refers only to the forgery of electronic payment instruments and performing financial operations fraudulently. The Anti-fraud General Directorate on Information Technology has responsibilities via the MCIT, in terms of monitoring cases of fraud and piracy and cooperate with similar departments in other institutions, namely the Ministry of Interior, the Public Ministry, the Romanian Intelligence Service, the Service for Special Telecommunications, and also the private sector (professional organizations, service providers, university).

In the end, we can say that until the new Criminal Code comes into force, Romania is still lacking in the legislation chapter specific to the phenomenon called generally in Anglo-Saxon literature "cybercrime". For example in the United States there were bills proposed on computing criminality ever since 1977, when Senator Ribikoff first proposed regulations in this regard.

In Europe the first official stand on this phenomenon took place in 1983, during the OECD conference in Paris. On this occasion, there were some recommendations made for adapting the legislation of member states and even completing the criminal codes of these states. Countries like Germany, Poland, Turkey, Hungary, Norway, introduced new chapters in the Criminal Code, which refer distinctly to cybercrimes, model followed also by Romania through Law no. 286/2009. UK adopted ever since 1990 the "Computer Misuse Act", which refers thoroughly to such offenses. Even Malta adopted in 1991 the "Electronic Commerce Act".

Conclusions

Therefore, in order for our country to be able to participate along other states to the economic, social and scientific development of the world, and also benefit from this growth, it is necessary to enter into force a new legislative framework that might allow us access to the world of developed countries. The provisions on cybercrime prevention regard the cooperation between public authorities and agencies with relevant expertise in the matter and service providers, NGOs and other civil society representatives in drafting policy, practices, procedures and security standards of information systems, as well as organizing awareness campaigns concerning cybercrime and the risks users of computer systems are exposed to.

References

The offence of contraband and other offences stated by the romanian customs code. Theoretical and practical aspects

Ristea I.

"Acad. Andrei Radulescu" Legal Research Institute of Romanian Academy (ROMANIA), University of Pitesti, Faculty of Law and Administrative Sciences (ROMANIA), Pitesti Court of Appeal (ROMANIA); ristea_m_ion@yahoo.com

Abstract

Contraband represents a serious violation of the law, because it endangers and injures social values very important for the state of law.

Romania, as a European Union Member State, by signing different international conventions has assumed a series of responsibilities regarding the repression or control of trafficking in certain goods, being held directly responsible in the prevention, discovery and sanction offences to customs regime, often connected to money laundering, financing acts of terrorism and organized crime.

Therefore, incriminating contraband, in its simple or serious form, as of other offences on the customs regime is an “absolute imperative” in establishing order in this area and in adjusting national legislation to the European one.

Keywords: customs authority, customs control, simple contraband, serious contraband, falsified documents.

Introduction

Contraband consists in smuggling across the border of goods prohibited or exempted from customs taxes, and is one of the main forms of fraud in Romania and in the EU. In order to avoid customs taxes due to the goods’ entrance on the Romanian and European territory, those persons either do contraband or circumvent the customs transit procedures.

In this context, Romania, as an EU Member State, by signing different conventions has assumed a series of obligations on the repression or control of trafficking in certain goods, is held directly responsible on the prevention, discovery and sanction offences to customs regime, often connected to money laundering, financing acts of terrorism and organized crime [1]

Thus, contraband is an intended violation of the law with the purpose of circumventing customs taxes for moving goods across borders, prohibitions and commercial cotes of import-export; we note that its existence assumes as a premise a judicial customs procedure. The inexistence of such a procedure would make useless any debate on contraband. Without establishing rules of moving goods across borders, contraband, as an action of breaking the law would never exist [2].

The judicial customs procedure is the ensemble of the provisions stated by the Customs Code, by the Rules of application of the Customs Code, as well as in other national and international laws ratified by our state regarding the customs regime. These provisions refer to the customs control of goods and means of transportation, applying the customs tariff and other specific customs operations.

Content of the paper

As already shown, the essence of the notion of contraband is the purloining and circumvention of customs taxes. Searching to establish such offences harming the economic interests of the state, the legislator extended the incrimination for all actions that could represent this offence [3]. But, the conditions which influence the creation of the laws change from a stage to another, determining changes in the statements of incrimination.

It was enough for today that Art 270 and 271 of the Law No 86/2006 [4] on the Romanian Customs Code incriminate contraband as an offence, and the other violations of customs regime (the use of documents regarding other goods, falsified documents, exempt from paying custom taxes etc.) to be incriminated as different offences in Art 272 and 273, or even as contraventions.
Thus, Art 270 Para 1 defines simple contraband as being “the unlawful introduction or removal from the country, by any means possible, of goods and assets, through other places than the ones established for customs control, the offence being punishable with imprisonment from 2 to 7 years and banning some rights”.

According to Art 270 Para 2 of the Code, also is contraband:

The unlawful introduction or removal from the country through established places for customs control, in order to exempt from customs control, of goods or assets which must be placed under a certain customs regime if their value exceeds 20.000RON for goods subjected to excise duties and exceeds 40.000RON for other goods or assets;

The unlawful introduction or removal from the country twice in a year, through established places for customs control of goods which must be placed under a certain customs regime, if their value exceeds 20.000RON for goods subjected to excise duties and exceeds 40.000RON for other goods and assets;

Alienation of goods in customs transit;

According to Para 3 (Art 270) are assimilated to contraband and punished according to Art 1, the collection, possession, producing, transportation, taking over, storage, handing over, unpacking and selling goods which must be placed under a certain customs regime, knowing that are originated from contraband or are its purpose.

From the text analysis (Art 270 of the Law 86/2006) it is noticed that the material element of the objective side of contraband is the unlawful introduction or removal from the country, by any means possible, of goods through other places than those established for customs control.

The essential requirement of the material element of contraband regards the place of committing, an inner condition being the fact that the introduction or removal from the country of goods be must be made in other places than those established for customs control, and the moment of the offence is the moment when all requirements are met [5].

The author of contraband is the person who commits the offence incriminated by the penal law as stated by Art 270 of the Customs Code, and the person who takes over the goods from where they were stored, based on a prior understanding, is accomplice to contraband; the this High Court of Cassation and Justice also stated in this regard (Decision No 2743/2008, Decision No 2785/2008, Decision No 3238/2008 and Decision No 7017/2005).

In Art 271 of the Law No 86/2006 defines the offence of serious contraband as consisting in “the unlawful introduction or removal from the country of firearms, ammunitions, explosives, drugs, precursors, nuclear materials or other radioactive substances, toxic substances, wastes, residues or other dangerous chemical materials, punishable with imprisonment from 3 to 12 years and prohibition of certain rights, if the penal law does not state a bigger penalty”.

Romanian courts faced this type of offence issuing definitive sentences for conviction. For instance, the High Court of Cassation and Justice in Decision No 677/2006 found the defendant guilty, which was surprised by Customs Office of Giurgiu, entering the Romanian territory from Bulgaria having in its bus 3000 GenoFix detonating primers for the implantation bolt gun (ammunition according to the penal law), without having authorization and without declaring it to the authorities. Similar cases were solved by the High Court by its Decisions No 1008/2006, 952/2009, 1601/2009 and 1715/2005 [6].

In practice was also established that serious contraband (Art 271 of the Law No 86/2006) can be mentioned with the offence of non-compliance with the legal treatment of weapons and ammunition (Art 279 Para 1 of the Penal Code), because for the second offence, which consists in possessing, carrying, manufacturing, transporting as well as any operation concerning the circulation of weapons and ammunition, it is not relevant the period or distance for which the goods were held and transported. The two offences with different means of the material element can coexist, having an independent existence, without a plurality of offences (Decision No 952/2009 and 1715/2005).

Unlike contraband, Art 272 of the Law No 86/2006 states the use of fake documents, consisting in the use of transportation or commercial documents regarding goods or other quantities of goods than the ones declared and is punished with imprisonment from 2 to 7 years and the prohibition of certain rights. Also, Art 273 of the Law No 86/2006 incriminates the use of false documents, consisting in the use of falsified transportation or commercial documents, punishable with imprisonment from 3 to 10 years and the prohibition of certain rights.

In practice, in the solution of a case regarding the offence stated by Art 273 of the Law No 86/2006 was raised the unconstitutionality, considering that the legal text does not meet all requirements for constitutionality and conventionality of credibility and precision, because it does not distinguish between goods from the communitarian or extra-communitarian space. Moreover, the principle of legal incrimination is violated if the material element of the offence, the immediate effect and passive subject are ambiguously and vaguely stated.

Decision No 729/2009 of the Constitutional Court (published in the Official Gazette of Romania No 401/12 June 2009) considered this exception ungrounded. The decision was motivated by the fact that the use of
falsified transportation or commercial documents was incriminated by a special law, the text meeting all requirements of predictability, clarity and precision. Constantly, the European Court of Human Rights stated that the law is predictable only when is stated with sufficient precision in order to allow interested persons to foresee, in a reasonable measure, depending on the circumstances, the consequences of a certain action.

The Constitutional Court stated that Art 273 clearly defines the material element (the use of falsified transportation or commercial documents), as well as the essential requirements connected to it (the use in customs procedures); stating an act of danger, the criticized text does not state a material prejudice. Also, in order to determine the passive subject of the offence shall be taken into consideration the owner of the protected social value, endangered by the offence committed [7].

Regarding the critics to the fact that the text does not distinguish between communitarian and extra-communitarian goods, it was established that is not unconstitutional, but more likely refers to the interpretation and application of the incriminatory text.

According to Art 274 of the Law 86/2006, when the offences stated by Art 270-273 are committed by one or more persons armed or by two or more persons together, the penalty shall be imprisonment from 5 to 15 years and prohibition of certain rights, the offences having a higher degree of social danger. On the other side, we are dealing with aggravating circumstances of simple or serious contraband, the use of fake or false documents.

If it is found that there is an organized criminal group whose initiation or formation is stated by Art 7 Para 1 of the Law 39/2006 [8], and the defendants acted coordinated, each of them having his well determined role in contraband, for a financial or a material benefit, it shall be noted the offence stated by Art 7 Para 1 of the Law 39/2003 and the offence of contraband (High Court of Cassation and Justice Decision No 3238/2008 and 2743/2008).

In accordance with Art 275 of the Law No 86/2006 the attempt to the offences stated by Art 270-274 of the same law, it shall be punished.

If the offences stated by Art 270-274 are committed by employees or representatives of legal persons who performing import-export activities, it is possible the prohibition of certain rights according to Art 64 Point c) of the Criminal Code.

When the goods which were the object of the offence are no longer found, the offender is responsible to pay for them. This provision was borrowed from the previous Customs Code, namely Art 183 of the Law No 141/1997 [9].

Conclusions

Contraband is a fraud seriously affecting social relations in the area of customs regime or in an area regarding this regime. It is a *mala fide* and misleading action against customs authorities regarding the situation of certain goods, generating uncertainty and disorder in the area of moving goods across borders, with an obvious social danger.

References

[9] Law No 141/1997, Published in the Official Gazette of Romania, No 180/1 August 1997.
The analysis of the offences stipulated in the art. 143 of the law no. 8/1996 on copyright and related rights

Romitan C.R.

Bucharest Bar, The Romanian Magazine on Intellectual Property Rights, (ROMANIA)
ciprian.romitan@asdpi.ro

Abstract

Technical protection measures were consecrated in the Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society. In this respect, art. 6 of the Directive, provides that Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective. Also, Member States shall provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provisions of services.

Following these provisions, the Law no. 8/1996 on copyright and related rights recognized for the first time in the Romanian legislation, the right of the author of a work, performer, and producer of phonograms or of audiovisual recordings, radio or television broadcasting organization or the maker of database to institute technological measures of protection of the rights. Also, the copyright and related rights owners have the right to institute in electronic format, associated to a work or any subject-matter of protection, or in the context of their communication to the public, rights-management information.

Keywords: copyright, related rights, technical protection measures, neutralization, commercial scope, without the authorization.

The legal content of the offences

According to art. 143 (1) on the Law no. 8/1996 on copyright and related rights, with subsequent amendments and completions [1], it shall be an offense and punishable with imprisonment for 6 months to 3 years or with a fine “the deed of a person that, unlawfully, produces, imports, distributes or rents, offers, in any way, for sale or rent, or possesses for commercial purposes, devices or components that allow the neutralization of the technological measures of protection or performs services which lead to the neutralization of some technological measures for protection, including in the digital environment”.

Also, according to art. 143 (2) on the Law no. 8/1996, it shall be an offence and punishable with imprisonment for 6 months to 3 years or with a fine, “the deed of a person who, without having the consent of the owners of rights and knowingly of having to know that this way permits, facilitates, causes or hides an infringement of a right provided for by the present law:

a) removes, for commercial purposes, from the works or other protected products or modifies on them, any information under electronic form, on the applicable regime of copyright or of neighboring rights;

b) distributes, imports for distribution, radio broadcasts or communicates to the public or makes available to the public, so that anybody can access them in any place and at any time individually chosen by them, without having the right to do so, by means of digital technology, works or other protected products for which the information existing under electronic form on the regime of copyright or of neighboring rights have been removed or modified without authorization”.

Analyzing these provisions and as it was underlined by the specialized legal literature [2], the legal provisions of the art. 143 (2) is extremely confused, because the text contains some of the modalities and versions of the art. 142, which it was abrogated [3], combined with new modalities and versions, “follow a mammoth text, which is very difficult to decipher by theoretical point of view, and, also to apply it to the classical analysis scheme, consecrated and accepted by the majority of authors, and more over it becomes very difficult to apply by practical point of view”.

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Analysis of the common elements of the offences

Because art. 143 incriminate two offences, for the begging, we will analyze the common elements of the offences.

The special legal object of these offences constitute the social relations that result, evolve and are carried on in the respect of technical protection measures and rights-management information.

The material object of the offence provided in art. 143 (1) consist in the devices or components that allow the neutralization of the technological protection measures. The material object of the offence provided in art. 143 (2) consist in the works or other protected products. In the specialized legal literature [4], “the devices” are defined as “the ensemble of pieces connected in a specific way that fulfill a well determined function in a technical system”, and “the components” are defined as “the entity that complies as a part in a full system”.

The active subject of the two offences can be any natural or legal person that fulfill the conditions established by the law in order to be penal responsible. We consider that the active subject of the offences provided for the import activities, can be only a natural person that have trader quality [5], because only the traders have the right to make import operations or a legal person that can perform these operations by its object of activity. Even that the active subject is not circumstantiating by legal provisions, we consider that the active subject of the offence provide by art. 143 (1), regarding the provisions of services that neutralized the technical protection measures, can be only a natural person that have a certain knowledge in the IT field and that it knows the way in which the technical protection measures can be neutralized [6].

The criminal participation is possible in all the forms: co-authors, instigation or complicity. Regarding the co-authors is necessary that all the participants to have a trader quality, when the offences are done by import activities.

The passive subject of the offences is the copyright or related rights owner.

The premises situation is generated by the existence of some works or other protected products. Analyzing the legal text, we consider that the offence provided in art. 143 (2) a), represents the premises situation for the offence provided in art. 143 (2) b), meaning the works or other protected products from which the rights management information, under electronic form, had been removed or modified.

The immediate consequence represents the modification of the prior existence situation and the fulfilling of actions results (producing, importing, distributing, renting, offering for sale or rent, possessing, selling, broadcasting, public communication or making available). In this way results a danger situation for the copyright or related rights owner. The immediate consequence resulting from the offence provided in art. 143 (1), done by “producing” activities, consists also in the devices and the components that are used to neutralized the technical protection measures.

Between the incriminated offence and the immediate consequence must exist a causality connection which results from the materiality of the offence.

The offence provided in art. 143 (1), from subjective point of view, is done with direct or indirect intention, with the exception of the case when the offence is done by possessing activities. In this case, the offence is done with direct intention qualified by object, meaning that the possessing action is done with the object of the commercialization. In the case when the offence provided in art. 143 (1) a) is done by removing activities, the form of guilt is the direct intention qualified by objective, meaning with commercial purposes, and when is done by modifying activities, the form of guilt is the direct or indirect intention.

By rule, the offence provided in art. 143 (2) b) is done with direct or indirect intention, with the exception of the case when is done by importing activities, that are fulfilled by direct intention qualified by objective, meaning that the import activity is done with the distribution scope.

The prior acts and the endeavor are not incriminated by the legal texts.

The consumption of the offences it takes place at the time when is done any of the incriminated activities, followed by the immediate consequence.

The analyzed offences can be done in the ways stipulated in the legal norms, which may correspond to different facts.

Analyze of the distinctive elements of the offences stipulated in art. 143

1.1 Analyze of the offence stipulated in art. 143 (1)

The offence stipulated in art. 143 (1) can be done by two distinctive deeds:
- unlawfully, producing, importing, distributing or renting, offering, in any way, for sale or rent, or possessing for commercial purposes, devices or components that allow the neutralization of the technological protection measures;
- unlawfully, performing services which lead to the neutralization of some technological measures for protection, including in the digital environment.
The material element of the first deed consists in the alternative actions of producing, importing, distributing or renting, offering, in any way, for sale or rent, or possessing for commercial purposes, devices or components that allow the neutralization of the technological protection measures.

For the purpose of protecting the rights recognized by the law, the author of a work, the performer, and producer of phonograms or of audiovisual recordings, the radio or television broadcasting organization or the maker of database [7] can institute technological protection measures of the rights [8].

For the purposes of the Law no. 8/1996, technical measures means the use of any technology, of a device or component that, in the normal course of its normal operation, is destined to prevent or restrict the acts, which are not authorized by the owner of the rights acknowledged by the law [9].

Technological protection measures shall be deemed effective where the use of a protected work or other subject-matter of protection is controlled by the owner of rights through application of an access control or protection process, such as encryption, coding, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.

In order that these actions to complete the objective side of the offence is necessary to fulfill an essential condition, meaning that the facts of producing, importing, distributing or renting, offering, in any way, for sale or rent, to be done „without authorization”, and that the fact of possessing, to be done also „without authorization”, with the objective to commercialize the devices and the components that permit the neutralization of the technical protection measures.

According to art. 138° (4) – Law no. 8/1996, owners of rights that have instituted technical protection measures must make available to the beneficiaries of the exceptions provided for in Article 33 paragraph (1) letters a), e) and e), Art. 33 paragraph (2) letters d) and e) and Art. 38 necessary means for the legal access to the work or any other object of protection [10]. They have also the right to limit the number of copies made under the aforementioned conditions.

These provisions are not applied to the protected works made available to the public, according to the contractual clauses agreed between the parties, so that the members of the public to be permitted to have access to them in any place and at any time chosen, individually.

The material element of the second deed consists in performing services which lead to the neutralization of some technological measures for protection, including in the digital environment.

In this context, “performing services” mean the action to carry out and its result. Thus, are carried out some operations (manufacture, maintenance etc.) in order to make inoffensive the technical protection measures [11]. “Neutralization” means to make inoffensive, to remove, and to make inefficient the technical protection measures [12].

The Romanian legislative bodies have incriminated both the performing services which lead to the neutralization of the technical protection measures, meaning the prior activities which have as a final result the neutralization of the technical protection measures, and the proper neutralization of the respective technical protection measures. The prior activities can be done by the same person that fulfilled the neutralization measures or by other person that have limited only to the necessary activities in order to do the neutralization without fulfilling the result, namely the neutralization itself.

1.2 Analyze of the offence stipulated in art. 143 (2)

The offence stipulated in art. 143 (2) can be done by two alternative distinctive deeds [13]:

- removing, for commercial purposes, from the works or other protected products or modifying on them, any information under electronic form, on the applicable regime of copyright or of neighboring rights;
- distributing, importing for distribution, broadcasting or communicating to the public or making available to the public, so that anybody can access them in any place and at any time individually chosen by them, without having the right to do so, by means of digital technology, works or other protected products for which the information existing under electronic form on the regime of copyright or of neighboring rights have been removed or modified without authorization.

In order that the two alternative deeds to complete the objective side of the offence, the fulfilling of two essential conditions is necessary: the first one is that the deeds to be done without the authorization of the rights owners [14], and the second one consists in that the person to know or had to know that in this way permits, facilitates, provoke or hides any infringement of the rights provided by law. If any of these conditions is not fulfilled, there is no criminal offence.

The material element of the first deed consists in the alternative actions of removing, for commercial purposes, from the works or other protected products or modifying on them, any information under electronic form, on the applicable regime of copyright or of neighboring rights.

For the purposes of the law, rights-management information, means any information provided by the owners of rights which identifies the work or other subject-matter of protection by the present law, of the author or of other owner of rights, as well as the conditions and terms of use of the work or of any other subject-matter of protection, as well as any number or code representing such information [15].
In order that the removing action to complete the objective side of the offence, is necessary to fulfill an essential condition, namely the action to be done with the commercial purpose. Art. 139 (9) – Law no. 8/1996 defines the “commercial purpose” as “aiming at the obtaining, directly or indirectly, of an economic or material benefit”.

The material element of the second deed consists in the alternative actions of distributing, importing for distribution, broadcasting or communicating to the public or making available to the public, so that anybody can access them in any place and at any time individually chosen by them, without having the right to do so, by means of digital technology, works or other protected products for which the information existing under electronic form on the regime of copyright or of neighboring rights have been removed or modified without authorization.

It is necessary that the actions of distributing, importing for distribution, broadcasting or communicating to the public or making available to the public, to be done “without authorization” and to make possible to access them in any place and at any time individually chosen by them, by means of digital technology, of works or other protected products for which the information existing under electronic form on the regime of copyright or of neighboring rights have been removed or modified without authorization. Also, the importing actions have to be done with the distribution mean.

Commissioning the criminal actions and the competence to judge

Commissioning the criminal actions against the analyzed offences is done ex officio. The competence to judge the analyzed offences is incumbent to the first court of law [16].

References


[7] Art. 1221 (2) – Law no. 8/1996 defines the “data base” as a collection of works, data or of other independent elements, protected or not by copyright or neighboring right, arranged systematically or individually accessible by electronic means or in any other way.


[10] According to these articles, the following categories of persons, natural and legal, must benefit by necessary means for the legal access to the works or other protected materials: the reproduction of a work in connection with judicial or administrative proceedings, to the extent justified by the purpose thereof; the use of isolated articles or brief excerpts from works in publications, television or radio broadcasts or sound or audiovisual recordings exclusively intended for teaching purposes and also the reproduction for teaching purposes, within the framework of public education or social welfare institutions, of isolated articles or brief extracts from works, to the extent justified by the intended purpose; specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage; of works, for the sole purpose of illustration for teaching or scientific research; of works, for the benefit of people with disabilities, which are directly related to that disability and to the extent required by the specific disability; the assignment of the broadcasting right of a work to a radio or television broadcasting organization shall entitle it to record the work for the needs of its own broadcasts with a view to a single
authorized broadcast to the public; the case of ephemeral recording of particular works made by means of their own facilities by the radio or television broadcasting organizations for their own broadcasts.


[13] Dungan, P., Considerations regarding the offences provided in the Law no. 8/1996 on copyright and related rights (II), The Romanian Magazine on Intellectual Property Rights no. 4/2011, pp. 35. The author reflects that, even that the art. 143 (2) can create the impression that exists many offences, in fact “exist only one offence stipulated in two versions which in turn present several normative ways: for the letter a) there are two normative ways, meaning the activities of removing and modifying, and for the letter b) there 5 normative ways, meaning the action of distributing, importing, communicating and making available to the public of works or other protected materials, for which the management rights information, including the digital form, had been removed or modified without the authorization”.

[14] Art. 1386 (1) – Law no. 8/1996: “The owners of the rights recognized by the present law may provide, in electronic format, associated to a work or any subject-matter of protection, or in the context of their communication to the public, rights-management information”.


[16] Art. 145 (3) – Law no. 8/1996, referring to the competence of the tribunal for these offences, was modified by art. XXI – Law no. 202/2010 on some measures for the acceleration of the court trials, published in the Official Gazette of Romania no. 714/26.10.2010.
Criminal liability of legal entities in case of human trafficking offenses in the EU. Comparative review. Critical remarks

Rusu I.

“Danubius” University, Galati, Romania, Vrancea Bar, (ROMANIA) ionrusu.adjud@yahoo.com

Abstract

The purpose and the objectives of the research aims the European regulatory framework document examination in terms of harmonizing the national laws of the Member States in preventing and combating human trafficking offenses in the European Union and the formulation of critical comments and proposals for law ferenda.

The paper can be useful to academics, to Romanian and European legislator and to the practitioners in the field.

The essential contribution of this work consists in the examination of the general criminal liability of legal persons, the comparative examination, the critical remarks, and the proposal for law ferenda, which regards the incrimination in the offense of trafficking in juvenile text and of some actions of adoption performed in some concrete ways.

Keywords: purpose, exploitation of a person, subjective side.

Introduction

The extension of the European Union territory by the accession of new states at the beginning of the century, in addition to undeniable economic advantages enjoyed by all the Member States, also caused some difficulties in the complex activity of preventing and combating the cross-border crime.

Preventing and combating crime of all kinds at EU level is a complex judicial and extrajudicial activity to which have to make a major contribution all the Member States, starting from the intensification of cooperation in criminal matters between the judicial authorities of the Member States.

One of the most serious crimes is considered to be the trafficking in human beings given that most of the time it is committed in the context of cross-border organized crime, act expressly prohibited by the Charter of fundamental rights of the European Union.

Taking into account the gravity, resulting in serious violation of fundamental human rights, preventing and combating more effectively this type of crime is a priority of both the Union and of each Member State.

In this very complex context, the EU adopted the following two instruments, as follows, The Council Framework Decision 2002/629/JHA of 19 July 2002 on combating human trafficking [5]. and The EU Plan, on the best practices, standards and procedures for combating and preventing the trafficking in human beings [6]. In addition to the two European instruments which refer directly to the prevention and combating of human trafficking offenses, The Stockholm Program - An open and secure Europe serving and protecting the citizens, adopted by the European Council also gives priority to combating and prevention of trafficking in human beings.

On the background of increasing crime of this kind within the European Union a new regulation was adopted, The Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in persons and protecting its victims, as well as replacing the Council Framework Decision 2002/629/JHA [7] [1].

This new law is intended to provide an approximation of the national laws of Member States and the respectively intensifying concrete cooperation activities between the judicial authorities competent in such matters. Also, the legislative act in question establishes the necessity to complete the national laws of the Member States, with a series of facts as well as to establish the criminal liability of legal persons. In this paper we will examine a number of provisions involving the conditions of criminal liability of legal entities, the penalties applicable, a comparative examination and some critical remarks.

The criminal liability of legal persons in the European Union
Given the extremely serious consequences borne by the victims, the high degree of social danger, the European normative act stipulates the need to establish the criminal liability of legal entities, for human trafficking offenses cited in articles 2 and 3 of the European legal instrument mentioned above.

According to article 2 paragraph (1) of The Directive 2011/35/UE, the Member States shall adopt specific legal rules in which will be incriminated as human trafficking offenses the following intentional acts: recruitment, transportation, transfer, harboring or receipt of persons, including the exchange or transfer of control over the persons concerned of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or taking advantage of the vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the exploitation.

In article 3 is provided that the instigation, complicity and attempting to commit a crime of those mentioned in article 2 will be criminally punished.

To avoid some unilateral interpretations of the judicial authorities of the Member States which are not in accordance with the intention of the European legislator, within the same article, paragraph (2) - (4) was made a legal interpretation of some legal terms or phrases that are found in the legal content of the offense, namely:

State of vulnerability - means a situation in which the person can only submit to the abuse involved, having no real and acceptable alternative;

Exploitation - includes at least the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, including begging, slavery or practices similar to slavery, servitude,exploitation of criminal activities or the removal of organs;

The consent of a victim of trafficking in human beings for exploitation, whether intended or actual - is irrelevant where any of the means set was used in paragraph (1).

In the sense of the European legislator, the child benefits from a special status in the sense that, when the facts mentioned in paragraph (1) are directed against a child, they constitute the offense of human trafficking, although was not used any of the means referred to in paragraph (1). The child is a person under the age of 18.

Given the seriousness and consequences of this crime, the European legislator urges the Member States to take concrete measures for criminal liability of the legal entities for an offense of trafficking in persons.

Under the provisions of the European normative act, for this offense to be detained in a legal entity, it is necessary that the act is committed by any person for its benefit, acting on their own or as member of a body of the legal person, who has a leading position within the legal person, based on:

- a power of representation of the legal person;
- an authority to take decisions on behalf of the legal person, or
- an authority to exercise control within the legal person [1].

From the examination of the text of article 5, paragraph (1) rendered above shows that the existence of human trafficking offense committed by a legal person, it is necessary for the active subject individual to fulfill certain conditions, namely:

- to have a leading position within the legal person;
- the action through which the material element of the actus reus to aim making profit for the legal entity;
- the active subject to receive an authorization from the legal person, an authority to take decisions on behalf of the legal person or an authority to exercise control within the legal person.

Also, according to article 5, paragraph (2) of the Act, the active subject of this offense may be another person under the legal authority of the legal entity, acting on the lack of supervision or control of an individual with leading position in the legal entity, provided that the person (individual active subject) acts for the benefit of that legal person.

Like the laws of Member States, the criminal liability of the legal entity does not exclude criminal proceedings against individuals who are authors instigators or accessories in the offenses referred to in the articles 2 and 3 [1].

In accordance with Article 5, paragraph (4) of the European normative act, the term "legal entity" means any entity having legal personality under the applicable law, except for States or public agencies in the exercise of public authority and international public Organizations.

Regarding the criminal penalties applicable, the European legislative act provides in addition to criminal fines also the possibility of establishing others, namely:

- the exclusion from the right to receive public benefits or aid;
- temporary or permanent disqualification from engaging in commercial activities;
- placing under judicial supervision;
- judicial liquidation;
- temporary or permanent closure of establishments used for committing the offense [1].
The criminal liability of the legal entity in the Romanian law

In the Romanian law, the criminal liability of the legal entity was introduced by the Law 278/2006 published in the Official Gazette of Romania, Part I, no. 601 of 12 July 2006., being expressly stated in the content of the article. 19¹ of the Criminal Code.

Without proceed to the examination of the institution from the Romanian law, because it is under study, we just mention that although the domestic regulation is similar to the European normative act examined, however, it appears to be more complete.

Regarding the trafficking in human beings offense provided for in the Law no. 678/2001 on preventing and combating trafficking in persons (published in the Official Gazette of Romania, Part I, no. 783 of 11 December 2001.), where are separately incriminated the offenses of trafficking in persons which victims were juvenile.

The internal normative act does not provide for the criminal sanctions different for legal entities; however any legal entity can be an active subject of the crime under the provisions of the Romanian Criminal Code.

Comparative review

Given the proliferation of crime in the area, we cannot discuss about offense of trafficking in persons but in the context of the intensified activity of the organized crime.

It is known that with the expansion of the European Union, taking advantage of incoherent legislative framework and of a judicial cooperation in criminal matters with many gaps, the criminal organizations have developed the actions in an accentuated rhythm [2].

In this context, the harmonization of legislation in the Member States was a imperative priority, which can be the basis for improving the complex activities of judicial cooperation in criminal matters.

Also, taking into account the provisions of the Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organized crime, the harmonization of national legislation of the Member States must be done with ensuring the freedom of Member States to classify other groups of people as a criminal organizations well as the interpretation of the term "criminal activity" in the sense that it involves the development of material acts circumscribed to organized crime [2].

The examination of the provisions in the European legislative act and those in the Romanian law allows us a comparative examination.

A first observation concerns the Romanian legislator for preventing and combating trafficking in human beings, in particular juvenile, in the context of the unprecedented increase in of criminality in this field.

So unlike the European normative act, the Romanian legislator has provided a number of offenses for trafficking juvenile, offenses expressly mentioned in article 13 of legislative act mentioned.

Also, Romanian special law adopted in 2001, provides all the actions incriminated by the European legislative act, even with some new elements.

An important difference concerns the way in which the criminal liability of legal entities is established. In the European legislative act are mentioned express provisions concerning criminal liability of the legal entity for an offense of trafficking in persons. The Romanian special law does not provide such provisions, but according to Romanian rules of criminal law, the legal entity may be held criminally responsible for committing of such an offense as determined by law. Moreover, the Romanian law allows criminal punishment of any legal entity for any offense possible, regardless of its nature and its severity.

Another difference is the fact that while the Romanian special law defines exploitation of a person, the European legislative act does not provide this.

Critical remarks

From the examination of the two texts (Romanian and European) we find that both have in view, in terms of the subjective side, the commission of the human trafficking offense with the intent to exploit the person concerned.

In other words, all the actions incriminated by the European law, namely, the recruitment, transportation, transfer, harboring or receipt of persons, including the exchange or transfer of control over the persons concerned, conducted by methods shown in the text, namely, threat, use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or taking advantage of the vulnerability or of the giving or receiving of payments or other benefits in order to achieve the consent of a person having control over another person, shall be only performed in the purpose of exploitation of the victim.

In the same context the Romanian law provides several actions that fall within the content of the objective side respectively, the recruitment, transportation, transfer, harboring or receipt of persons, actions can...
be achieved by: threats, violence or other forms of coercion, of abduction, fraud or deception, abuse of power or advantage of that person's inability of submitting his defense or to express the will or the offering, giving or receiving of payments or benefits to achieve the consent of a person having control over another person in the purpose of exploitation of the person concerned.

We note that the legal content of both incriminations enter the purpose, which is the exploitation of the person, which, involves the direct intention of the individual or entity as an active subject of crime to exploit the victim. It is understood that the absence of the purpose of exploiting the victim, even whether the other constituent elements of the offense, it cannot exist.

As a legislative proposal we suggest the incrimination in the content of the offense of trafficking in juvenile also of other actions that are executed but not in the purpose of exploitation but of an adoption of the person, in case of juvenile victims of this crime.

Conclusions

The increasing the efficiency of the judicial authorities of each Member State in preventing and combating the juvenile trafficking crimes is determined by several factors among which the adoption of a legal framework and ensuring the efficient logistics to the institutions empowered by law with specific responsibilities in preventing and combat this phenomenon [3].

Therefore harmonizing the legal framework in the EU is a key that will enable the punishment of the legal entity as an active subject of the crime of trafficking in persons (adult as well as juvenile).

From the examination present it can be concluded that the adoption of the European law is an important moment in the fight against criminal organizations that commit crimes of human trafficking, individuals or legal entities can be held criminally liable to the same extent.

Combating and preventing criminality in the area of human trafficking in the European Union require joint action by the judicial authorities of the Member States, based on harmonizing their national legislation by which to ensure the criminal liability of the legal entity and of the individuals responsible.

References


Some considerations on sanctioning crime according to criminal law in the period of economic crisis

Rusu M.I.

„Simion Bărnuțiu” Faculty of Law, Sibiu, (ROMANIA)

Abstract

Adapting the law is a slow process that takes place in time based on the impact studies. The Membership of the European Union but also the need to meet the requirements of MCV and its ceasing, required the renunciation to the undertaking from 2004, and the initiation of a new project of the Criminal Code, particularly that the European Community also provided support.

Keywords: crime, accessory penalty, complementary punishments, criminal policy

A picture of international crime

To get a more complete picture of reality regarding crime, it is appropriate to consider figures, statistical data provided by institutions specialized in this field.

The evolution of international crime is revealed by the graphs drawn based on figures provided by these institutions.

The upward evolution of the values of criminality determined the states to manifest their will, on declarative level, to repress this phenomenon by developing national but also international fight strategies against it.

Another fight instrument would be the legal regulation in each field of activity, as it was ascertained that the lack of such regulation is effective in new and vast areas. Any ambiguity or lack of regulation opens doors to the manifestation of this phenomenon which is particularly harmful to society.

Economic plunder prejudices human dignity, besides the economic and social consequences of the states, especially of the underprivileged ones.

Methods to calculate the patrimonial consequences of crime are not characterized by precision in evaluation. This state of affairs is generated on one side, by the multitude of indicators that are taken into account, over 140, and on the other hand, by the multitude of organizations that make such assessments. Among these, KKZ World Bank Institute, the agency Transparency International, founded in 1961 (covers over 150 states), GRECO (Group of States against corruption) etc., can be listed.

Legal studies made on crime phenomenon, as well as the difficulties in holding liable the perpetrators trigger the idea of pessimism generated by the magnitude of this phenomenon.

Great crime has acquired a transnational character affecting all sectors of society.

In order to fight effectively against this phenomenon, it is necessary that the measures conceived on a global level are taken and applied locally.

A picture of crime in Romania during the 2008-2012 period

Certainly the assessments on the state of crime in Romania during the same period are based on statistical summaries on the evolution of national crime rate. (the number of persons sentenced per 100,000 inhabitants). After 1990, the crime rate has increased for seven years, and in 1997 the rate became 3 times higher than in 1990, that meaning a maximum of 496 convicts per 100,000 inhabitants. The evolution of crime then decreased in the next three years, namely until 2000, only to increase again in 2002. Since 2003, the crime rate steadily increased, in 2008 reaching approximately the rate of the year 1990 [1].

These data are not always able to provide a true picture of crime in a given country in comparison to other countries, as this index of crime is influenced by several factors. Among these we could mention, the criminal policy undertaken by each government, when in government, then the notion of crime that attracts a sentence which is different from one legal system to another, duration of settlement in a case based on committing a crime that involves both criminal prosecution, resolution of the criminal trial and final conviction. Another factor considered to influence crime rates according to statistical data, is the economic factor. The
economic crisis has left its mark on the evolution of crime rate in the sense of generating a permanent upward trend with the increase of the economic crisis. In other words, the greater the percentage by which the population pauperizes, the higher the crime rate. The everyday needs of people, the high unemployment rate, the shortages of every individual, the temptations of a richer life, lead to the commission of acts which are punishable, increasing the potentiality of criminal liability.

Another factor is the degree of instruction and education of the population. The education process regressed in the same period with the emergence of the economic crisis, making young people prone to temptations of an easier and full of "thrills" life.

Another factor is the media, especially the television which, by its program grid, does not prevent, doing the opposite in exchange.

Prof. G Anthony stated that "In times of crisis, when the organization of state and society in their structure are questioned and in danger, then the punishment returns to its primitive, intimidating and severe forms. If the state is strong, it prescribes gentle punishments for criminals, if the state is disorganized; it tries to remove lack of order, to improve and to invigorate its weakness by severe [2] punishments. The realities of the past years (2007-2012) confirm enough and to spare the above findings.

In the criminal doctrine, there have been voices that, some time ago, launched the idea of necessary change in the essence of criminal law. After the year 1990, the same Criminal code adopted in 1968 applied, so that the development and adoption of a new criminal law, after the events of 1989 has emerged as a stringent necessity in relation to the profound changes occurring in our country on political, social, and economic level.

[3]

The need for a legislation adapted to the realities of Romania

The need to develop a new criminal law resulted from the fact that Romania's international obligations to generally adapt and harmonize the legislation with the European Community legislation, as long as in 2007 it bound and is now a member state of this union. Numerous convictions of our state at ECHR for legislation inaccuracies compared to Community legislation, certain specific provisions of a legislation of a totalitarian regime that ignores human rights in sufficient cases, stand as a very strong argument, as long as these sentences were and are equivalent to the payment of money by our state to the prejudiced ones, in view of changing the essence of legislation, including also the criminal one.

Numerous changes made to the Criminal code from 1989 until now, more than 20 amendments have done nothing but give the image of a bag several times patched, which, of course, is not a strong and durable legislative edifice.

A first attempt to renew the regulation was achieved through the adoption of Law no. 301/2004, which was talking about a split of illicit deeds representing social peril and a certain severity, in offenses and crimes. This discrimination in offenses and crimes had consequences also in terms of criminal liability, especially in the individualization of criminal penalties. The statement of reasons showed at that time, that the law considered the international conventions to which Romania took part, the European Convention on Human Rights and Fundamental Freedoms, the European Criminal Convention on Corruption or the United Nations Convention against Transnational Organized Crime and its Additional Protocols, the Convention on Cybercrime, the International Convention for the Suppression of the Financing of Terrorism, the Recommendations of the Council of Europe, such as the Committee of Ministers Recommendation of the Council of Europe R 92/16 on the European Rules regarding the community sanctions and measures applied or the R Recommendation 2001/16 on the protection of children against sexual exploitation and the provisions of the European Council Framework Decision and the Framework Decision on combating the sexual exploitation of children and child pornography or the Framework Decision on combating the trafficking in human beings.

This penal code was prorogued for implementation until 2009 when the law no. 286/2009 repealed it, following the adoption of the New Criminal Code. Certainly the construction of a penal code is not an easy task both for theorists and practitioners. This legislative work should reflect the changes in economic and social level, in terms of criminal doctrine, last but not least in the national jurisprudence. In this sense, criminal law enrolls in planning strategies for the fight against the crime phenomenon, including transnational crime, by responding to new imperatives specific to the current stage of development of our state, and by taking into account the new manifestations of the crime phenomenon.

Adapting the law is a slow process that takes place in time based on the impact studies. The Membership of the European Union but also the need to meet the requirements of MCV and its ceasing, required the renunciation to the undertaking from 2004, and the initiation of a new project of the Criminal Code, particularly that the European Community [4] also provided support.

Economic globalization and the transnational nature of crime should lead to convergent solutions, at European and then at global level in repressing this phenomenon. Of course all the weapons that will be used
should aim at pursuing criminal prosecution of all perpetrators, by observance of human rights. Financial scams not only challenge the rule of law, but also the rights and dignity of the person.

**The punishment of defendants according to the New Criminal Code**

In relation to the criteria: persons sentenced by courts, persons sentenced according to the type of penalty, persons sentenced according to the type of offence, sentenced persons, persons in prisons and rehabilitation centers, an upward oscillating dynamics stands out. See tables in Appendix.

The picture is clearer in the case of Sibiu courts which are presented in the Appendix comprising the number of defendants sentenced by Sibiu Court of Law, the number of defendants convicted in 2012 by Sibiu courts, in the way that a permanent increase in number stands out.

In this situation, the natural tendency would be for the legislator to take measures to strengthen the sanctioning regime. This can be done in three ways: by increasing the general limits of penalties, by increasing the special limits for certain offenses and by incriminating several forms, aggravating or qualified versions of offense whose incidence is found to be deeper.

The doctrine [5] criticized the increasing of penalties, both the incriminated, but also the enforced ones. In fact, in the first place, it was found that generally the courts mostly turn to the special minimum, or in seldom cases to the average of the special minimum and maximum. Additionally, in financial terms, there are significant expenditures from the state budget for the upkeep of those convicts. The higher the penalties are, the greater the amount of these expenses, this representing a major pecuniary charge for the state. It is worthy of remark, especially that lucrative activities performed during the execution of custodial sentences in prisons were not, and are not able to support the financial costs incurred in the execution of the sentence in prison (personnel costs, maintenance costs, food, lodging costs, etc.).

Therefore, all the more so, for these reasons, the edification of a new Criminal Code has not been and will not be an easy task.

Thus, not only the restoration of penalty, of penalty limitations, of certain crimes within limits to reflect the importance of protected social values, but also the reduction for certain crimes of penalty limitations, while for others, the increase of these limitations.

A distinctive problem represents the way of punishing plurality of crimes, by regulating a harsher sanctioning regime than the currently existing one. In case of recurrence, the partial arithmetic sum was adopted as sanctioning system in the case of post-sentencing recurrence, namely an increased penalty by one half for post-incarceration recurrence.

In the case where the second term of recurrence is composed of a series of offenses, the rules of the offenses shall apply first and the rules of recurrence after. From this perspective, the New Criminal code appears more favorable than the current Criminal code, in case the rules of recurrence are applied first and the rules of multiple offenses are applied after.

The regulation of the punishment system brings forth a more flexible and diverse penalty system, allowing the selection and application of the most appropriate measures to ensure coercion equal to the gravity of the offense, and also to the person accused, aiming to set up ways for the social rehabilitation of the perpetrator.

The justification for this approach is provided by existing regulations in other legislation of other European countries, but also takes into account the realities of legal practice, which will now have at hand a sanctioning system adapted to the new economic realities.

The new Criminal code contains regulations on penalties in Chapter II of Title III of the General part, being divided into 3 sections, each section corresponding to a main penalty.

General limitations for imprisonment were established between 15 days and 30 years (art. 60), and the punishment will be executed according to the law on the execution of penalties.

The legislator understood in relation to life imprisonment to raise the maximum age limit for applying this penalty, to the age of 65, higher than the one of the Criminal code in force, which is set to the age of 60 (Art. 57 Criminal Code). Also in relation to this penalty, the mandatory remission of life sentence with imprisonment for 25 years (30 years) was dropped for persons who have reached the age of 60 (of 65). This provision allows the judge to make an individualization of criminal sanction in practical terms.

Several new elements are identified in the main penalty fine. First of all, one should notice that the method of calculating fines is based on a process relying on day-fine system.

This system uses two essential elements in establishing this amount: the value of a day-fine fixed by taking into account the financial situation of the convict, the legal obligations towards the people under his care, and the number of days-fine set based on the general criteria of individualization of penalty. The number of these fine days actually reflects the gravity of the offense committed and the degree to which the offender is dangerous.
The legislator in art. 61 of the Criminal Code provides the procedure for establishing the fine, given that the corresponding amount of a day-fine is between 10 lei and 500 lei, this is multiplied by the number of fine days, which is between 30 days and 400 days.

Another new element in the case of fine represents the possibility to increase with one third the special limits of this offense, in case the defendant committed the offense in view of obtaining pecuniary gain. With the individualization of criminal penalty, in this case, the judge has the legal possibility to apply cumulatively both imprisonment and the pecuniary penalty of fine. This regulation provides a legal instrument to compel more efficiently the person who entered the criminal field. The idea emerging from legal regulation is to expand the legal framework in order to prevent new crimes from happening.

The new regulation for applying complementary penalty in order to deny certain rights becomes more flexible, without any interest in the gravity of the main penalty, but with interest in the nature and gravity of the offense instead, in the circumstances of the case and offender. It also shows an extended domain of main penalties where this regulation could apply, in the sense that it could apply both to the main penalty of deprivation of liberty, which is imprisonment, as well as to fine penalty. Regarding accessory and complementary penalties, it appears that the New Criminal code extends the freedom of the judge in choosing these penalties and widens the range of rights whose exercising may be prohibited by accessory or complementary penalty.

**Accessory penalty** is regulated according to the Criminal Code in force, being mandatorily applied in pronouncing a sentence of life imprisonment or imprisonment. It includes the denial of 6 rights expressly provided by the legislator: the right to be elected into public authorities or to any public office, the right to hold an office involving the exercise of State authority, the right of the foreigner to stay in Romania; the right to vote; parental rights, the right to be a guardian or a curator.

Mandatory accessory penalty implies the denial of rights to be elected to public authorities or any other public office or to hold an office involving the exercise of State authority.

Optional accessory penalty consists of those rights that the judge considers to deny to the defendant as complementary penalty. The following are exempted from enforcement: the denial of the rights to be elected into public authorities or any other public office or to hold an office involving the exercise of State authority, the right of foreigners to stay in Romania.

In the field of complementary punishments, the novelty consists firstly in reducing the maximum penalty applied from 10 years to 5 years and secondly in increasing the number of rights included in this penalty. Thus, the new Criminal code introduced in the content of complementary penalties also a part of the sanctions that is at present in the safety measures, that is prohibition of being in certain localities, the expulsion of foreigners, the prohibition of returning to the family home for a determined period of time. The recitals to the new Criminal code justify the inclusion of these measures in complementary penalties, as they pursue to restrict the freedom of movement. Another new element in the Code is in relation to the starting moment of complementary penalty execution. If the current regulation states that complementary penalty is executed after the main penalty was carried out, the new Criminal code stipulates that, in the case of fine punishment or suspension of the imprisonment sentence under supervision, the execution of complementary penalty of prohibition of certain rights starts from final decision of imprisonment.

The new Criminal code provides the judge a number of seven criteria of individualization (Article 74), giving up those general criteria mentioned in the current regulation on the general part and special limitations of the penalty in the special part. The need to give up mitigating and aggravating circumstances stood out, due to the vague character of the regulation in force. In fact within individualization of criminal sanction, the judge is subject only to the law and own conscience, it may consider a wide range of situations, facts that may lead to a reduction or increase of penalty within legal limits.

Changes have been made also in relation to mitigating circumstances, namely it was removed the circumstance regarding the good conduct of the defendant before having committed the offense. In relation to their effects, the regulation was amended under the aspect of the extent and determination modality of these effects. The effect of finding these circumstances entails a reduction of 1/3 of the maximum and minimum special limit of the penalty provided by law. The legislator considered that this change gives the judge a greater freedom of consideration in establishing the concrete penalty, through the fact that it is no longer bound to enforce a penalty under the special minimum of the penalty, but it maintains this possibility to the extent the judge finds it appropriate.

The legislator modified and reevaluated the circumstances that determined the tightening of the sanctioning regime. In this respect, it is inappropriate to preserve as an aggravating circumstance, the committing of an offense due to "despicable reasons" as long as all offenses are based on immoral grounds. In exchange, it was introduced a new aggravating circumstance consisting in committing the offense by taking advantage of the evident vulnerability state of the injured person due to age, health, infirmity or other causes.

If there are one or more aggravating circumstances, it can be added, in the cases of the imprisonment, an addition of up to 2 years instead of up to 5 years as it is in the Criminal code in force.
The reduction of the special limits of the penalty, or by case, the increasing of the special limits of the penalty can be applied once, regardless of the number of mitigating circumstances, or, by case, the number of withheld aggravating circumstances.

In transitional situations, the two regulations, the criminal code in force, which becomes the previous criminal code and the new Criminal code which becomes the code in force, the more favorable criminal law shall be the previous Criminal code: regarding the age for the enforcement of life imprisonment and the suspension of life imprisonment, of fine, accessory penalty, and mitigating circumstances.

The new Criminal becomes the more favorable criminal law: in the case of complementary penalty enforcement, this is for a maximum period of 5 years also in the case of aggravating circumstances.

In the event of both mitigating circumstances and aggravating circumstances, of cases implying reduction of penalty, continuing offense, concurrence or recurrence, the more favorable criminal law shall be applied in each case, by taking into account the particularities of the case.

With respect to plurality of offenses in transitional situations, it appears that the more favorable criminal law for concurrence of offenses is the previous criminal code as the new criminal code stipulates a more severe sanctioning regime, thus being mandatory the application of that fraction of one third of the total penalties enforced. In the case of recurrence, the new Criminal code is more favorable, and in relation to the second term of recurrence, the more favorable criminal law is the previous Criminal code. Regarding the criminal treatment of recurrence, the more severe sanctioning treatment is the new Criminal code.

Also in relation to the method of incriminating deeds under criminal illegality, the effort of the Romanian legislator should be noticed in achieving an exhaustive regulation of offenses enforced by special criminal laws, within the framework of general and organic law, namely the Criminal code. By unifying the majority of deeds priorly enforced by special laws in a single normative act, the practitioners are provided with an unique legal working instrument, based on the same principles of incrimination and sanction. Proof of this unification is the inclusion in the Criminal code, in the special part: of offenses against the person (trafficking and exploitation of vulnerable persons), offenses against patrimony (frauds committed via information systems and means of electronic payment), non-observance of the regime of arms, ammunition, nuclear and explosive materials, election offenses.

Actually this is a common general feature of law in Romania, as a similar approach was made in relation to Law 95/2006 on the reform of public health, Law 1/2011 on education, etc. which observe the E.U. Regulations, renouncing in each domain, as we pointed out before, to certain “patches.”

With regard to safety measures, it was aimed to bring forward their predominantly preventive nature, being applicable only if a criminal deed has been committed, that is not justified and represents a social threat. Certainly if we refer to the definition of offense, it is observed that the deed should be unjustified, but not necessarily imputable, as measures may apply also in the case of non-imputability (irresponsibility). Some of the safety measures in the actual Criminal code were placed in the group of complementary penalties (prohibition of being in a locality for certain periods of time, prohibition to be at the family home, expulsion), being introduced as safety measure the extended confiscation. This safety measure actually represents the introduction of a Community provision stipulated in Article 3 of the Framework Decision no. 2005/212/JHA of 24 February 2005 of the Council on confiscation of products, instruments and goods that are part of offense, published in the Official Journal of the European Union L 68 of 15 March 2005. Actually the modified regulation corresponds to the provisions of UN Convention against Corruption, 2004.

Changes have occurred also in relation to criminal penalties that can be taken against offending minors who are criminally liable and who committed offenses under the criminal law. The dispositions in the title "Minority" are in accordance with the dispositions of UNO Convention on the Rights of the Child, 1989, with UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); with United Nations Rules for the Protection of Juveniles Deprived of their Liberty (The Havana rule),1990; with UN Guidelines for the Prevention of Juvenile Justice (The Riyadh Guide Lines),1990; with the Council of Europe Recommendation 2003/20E on juvenile delinquency and juvenile justice; with the Council of Europe Recommendation 2008/11 on the European rules for juvenile offenders. Against minors may be applied only non-custodial educational measures and educational measures involving deprivation of liberty [6], unlike the actual Criminal code which regulates also main penalties that can be applied to minors.

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Constitutionalization of regulations in criminal matter

Safta M.

The Academy of Economic Studies - Bucharest, The Constitutional Court of Romania
marietasafta@yahoo.com

Abstract

In light of increasing crime rate, States must take adequate measures and must coordinate criminal policies in order to achieve a regulatory framework that ensures both prevention of this phenomenon and the effective punishment of crime. Adoption of regulations reflecting these measures is, however, a complex process aimed at different levels of regulation, both in terms of plurality of legal systems - national, supranational and international and hierarchy of sources of law, as well as in terms of constant reference to pertinent constitutional standards and international law. In this context, an important role lies with the constitutional courts and with the supranational and international courts entrusted with the protection of human rights and fundamental freedoms, which sanction through their powers-related mechanisms the regulations that violate the standards required in the areas shown. This study illustrated the fulfilment of this role by the Constitutional Court of Romania.

Keywords: accessibility and foreseeability of law, constitutional review, the Constitutional Court, the presumption of lawful acquisition of property, data retention, the National Integrity Agency, appeals, more favourable criminal law, legislative technique

Introduction

The increased regional and global crime requires adoption of appropriate measures by the States and coordination of criminal policies to achieve a regulatory framework that would ensure both prevention of this phenomenon and the effective punishment of crime and the restoring of the legal order infringed upon.

Adoption of regulations reflecting these measures is, however, a complex process aimed at different levels of regulation, both in terms of plurality of legal systems - national, supranational and international and hierarchy of sources of law. Compliance with the hierarchy of normative acts, with the relations between national and international regulations, the substantial and formal requirements of law-making, as well as fundamental rights and freedoms, may constitute a real challenge, in terms of avoiding that the measure, regulated as such, results, as the European Court of Human Rights stated in one of its cases, in "destroying democracy on the pretext of defending the rights" (judgement of Klass and Others v. Germany, 1978).

In this context, an important role lies with the constitutional courts and the supranational and international courts entrusted with the protection of human rights and fundamental freedoms. They sanction by their powers-related mechanisms those regulations that violate the standards required in the areas mentioned herein, contributing, including through their dialogue on issues relating to such measures in relation to national or international reference standards, to achieving a universal language of human rights, and to the orientation and coordination in this regard of criminal policy measures.

This study will illustrate this role, revealing a number of situations where the Constitutional Court of Romania found unconstitutional regulations by which the legislature has ignored, upon adoption of measures deemed as necessary to combat crime, the provisions of the Basic Law. The purpose of the research is, on the one hand, to underline the obligation to respect the Constitution, regardless of the purpose of the regulation and the importance of the purpose of regulation and, on the other hand, to present the role and contribution of the Constitutional Court of Romania within the process of constitutionalization of criminally relevant legislation.

Revision of the Constitution. Unconstitutionality determined by the removal of a constitutional guarantee of a fundamental right

Each of the initiatives for revision of the Constitution, parliamentary or presidential (three so far), included an attempt to remove the presumption of lawful acquisition of property, in order to facilitate the confiscation of illicitly acquired assets, respectively, the last of these initiatives was aimed to implement the extended confiscation in relation to the provisions of Framework Decision 2005/212/JHA of 24 February 2005
Transposition of European directives into national law. The unconstitutionality caused by imprecise regulation and by violation of the right to privacy, secrecy of correspondence and freedom of expression

As a result of globalization of serious criminal activity, especially terrorism, States’ legislation was adapted in relation to this phenomenon, which led, especially after 11 September 2001, to a reconsideration of priorities in national security and in combating crime, with the consequent adoption of regulations that have established State interference in the exercise of certain fundamental rights of citizens. This tendency is also reflected in the European Union, the terrorist attacks of 11 September 2001 in New York (USA), 11 March 2004 in Madrid (Spain) and 7 July 2005 in London (United Kingdom) determining certain actions and the adoption of specific regulations in Europe. A priority at EU level in the fight against terrorism is the development of the capacity to collect information. In this context, it was adopted Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (Official Journal of the European Union L/105 of 13 April 2006). The declared purpose of the directive is “to harmonise the obligations of the providers with respect to the retention of certain data and to ensure that the data are available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law”.

The normative act that initially transposed the respective directive was Law no.298/2008 on the retention of data generated or processed by providers of publicly available electronic communications services or of public communications networks and amending Law no.506/2004 on processing of personal data and protection of privacy in the electronic communications sector. Subject to criticism, this law was challenged by means of an exception of unconstitutionality. Through Decision no.1258/2009, published in the Official Gazette of Romania, Part I, no.798 of 23 November 2009, the Constitutional Court allowed the exception raised and found that the law was unconstitutional.

The Court found, in essence, the lack of precision of the rules, and the violation, by the transposition law, of the right to privacy, of the secrecy of correspondence and of the freedom of expression. Likewise, it was
underlined that compliance with the rules of legislative technique, within the law-making set of rules, represents a key factor in transposing the will of the legislator [1]. Therefore, the transposition of EU law, even if the object in question is one of great importance, such as combating terrorism, cannot be done in violation of principles governing the legal order both in European Union and in Romania. Obviously, fundamental rights such as the right to remain silent, the right to private and family life, the secrecy of correspondence are not absolute rights, and they may be restricted in terms of their exercise, but subject to the law. And the law must continue to ensure, even in relation to the current realities as set forth above, an adequate protection of fundamental rights and freedoms. The European Parliament has emphasized this idea in its documents (Resolution of 12 December 2007 on the fight against terrorism), pointing out that “the Union is committed to the fight against terrorism in all its dimensions, whether its origin lies or its activities occur inside or beyond its borders, while acting within the limits defined by the rule of law and respect for fundamental rights; […] There must be no areas in which fundamental rights are not respected. Any limitation on fundamental rights and freedoms in the fight against terrorism must be limited in time and scope, prescribed by law, subject to full democratic and judicial scrutiny, and be necessary and proportionate in a democratic society.”

Establishing institutions with specific responsibilities in preventing and combating corruption. Unconstitutionality relating to setting certain competences, rules of organisation and operation contrary to the constitutional framework on administration of justice.

Given the need and appropriateness to regulate by means of a genuine code of integrity the 3 administrative instruments for prevention and fight against institutional corruption, namely the control of wealth declaration, declaration and verification of interests and incompatibilities in exercising public office, it was enacted Law no. 144/2007, republished in the Official Gazette of Romania, Part I, no.535 of 3 August 2009, governing the organisation and functioning of an autonomous and unique administrative authority, with legal personality and permanent activity, i.e. the National Integrity Agency. Through Decision no.415/2010, published in the Official Gazette of Romania, Part I, no. 294 of 5 May 2010, the Constitutional Court declared unconstitutional the provisions of Chapter I „General provisions” (Articles 1 to 9), Article 11 e), f) and g), Article 12 (2), Article 13, Article 14 c), d), e) and f), Article 17, Article 38 (2) f), g) and h), Article 42 (2), (3) and (4), Chapter VI - "Verification of assets, conflicts of interest and incompatibilities" (Articles 45 to 50) and Article 57 on the establishment, organisation and functioning of the National Integrity Agency.

In addition to considerations relating to violations of the requirements of legislative technique in drafting laws, i.e. accessibility and foreseeability of legal rules, as well as of certain fundamental rights (the right to property and the right to personal, family and private life), the Court also declared as infringed upon the constitutional provisions on justice and administration thereof. The Court noted that certain activities carried out by National Integrity Agency inspectors are of judicial nature. Thus, pursuant to Article 46 of Law no. 144/2007 and given the activities of research and verification, as there is confusion between the function of inquiry and that of trial, the National Integrity Agency inspector - based on his own appraisal in the taking of evidence, by a procedure that does not respect the contradictorility - decides that part of the wealth is unjustified and, consequently, gives a verdict, "declares the law" (iuris dictio), an activity permitted only to the courts, pursuant to Article 126 (1) of the Basic Law, which states that "Justice shall be meted out by the High Court of Cassation and Justice, and by the other courts set up under the law". The bodies exercising these activities are not courts and do not obey the rules of organisation and functioning set forth under Chapter VI "Judicial authority" of Title III "Public authorities" of the Constitution, so that the office of inspector of the National Integrity Agency is a public office with special status.

Regulation of criminal law concepts. Unconstitutionality of interpretations contrary to constitutional rights and principles

It is generally accepted that setting by law certain requirements, such as setting time limits or procedural requirements against the exercise by the holder of his subjective right has indisputable justification in terms of the objective pursued, consisting of temporally limiting the state of uncertainty in the legal relations and restricting the possibilities of abusive exercise of the respective right. These are aimed at ensuring the legal order, which is essential for the exercise of own rights with respect to both the general interests and the legitimate rights and interests of other holders, whom the State must equally protect. Having constitutional dispensation to proceed as such, the legislator must see that the requirements thus established are sufficiently reasonable as not to lead to an excessive restriction on the exercise of a right, likely to call into question its very existence. (see Decision no. 766/2011, published in the Official Gazette of Romania, Part I, no. 549 of 3 August 2011)
Starting from these considerations of principle, the Court proceeded to the "clearing" of the legislation subjected to its review and affecting fundamental rights and freedoms, including to the interpretation of criminal law in order to eliminate those interpretations contrary to constitutional principles and fundamental rights and freedoms. So it decided, for example, when referred to by the Advocate of the People on the unconstitutionality of Article 124 of the Criminal Code concerning special limitation periods, stating that, irrespective of the number of interruptions, if the general prescription period set forth in Article 122 of the Criminal Code is doubly exceeded, the criminal liability is removed.

In this sense, through Decision no.1092/2012, published in the Official Gazette of Romania, Part I, no. 67 of 31 January 2013, finding that, in conformity with Article 13 (1) of the Criminal Code, if from the perpetration of the crime until the final settlement of the case, one or several criminal laws have been enacted, the most favourable law shall be deemed applicable, including the more favourable law as concerns the limitation periods, and one of the criteria taken into account upon actually establishing the applicable criminal law in case of enactment of different laws in the respective time interval is that of periods of limitation of criminal liability, in which case it will be considered as more favourable the criminal law that has a more reduced special limitation period, and the Court found that impugned statutory provision is constitutional insofar it does not apply to cases commenced under the old regulation, otherwise resulting in the violation of the Basic Law.

Similarly, adjudicating on the provisions of Article 320 of the Code of Criminal Procedure relating to the settlement of the case when the defendant pleads guilty, the Court, through Decision no.1.483/2011, published in the Official Gazette of Romania, Part I, no. 853 of 2 December 2011, held that a criminal provision is unconstitutional to the extent that it does not allow the application of the more favourable criminal law to all legal cases which were initiated under the old law and continue to be tried under the new law until a final conviction. The Court upheld the exception of unconstitutionality and found that the provisions of Article 320(1) of the Code of Criminal Procedure are unconstitutional insofar as they remove the application of the more favourable criminal law.

Conclusions

The few examples selected from the extensive case-law of the Constitutional Court in criminal matters lead to the following conclusions: the regulations in this matter must concomitantly comply with the constitutional principles, the fundamental rights and freedoms, the requirements of legislative technique, they must be adapted to national specificity and identity as reflected also in the "core content" of the Constitution, i.e. those provisions that are not subject to revision, the relationship between national law and international law in matter of human rights, as well as between national law and EU law in implementing the commitments made by Romania through the accession to the EU. The requirement to ensure the repression of crime is subsumed to the obligation to respect the Basic Law. The decisions of the Constitutional Court, by their binding nature, represent a guarantee of compliance by the legislator with this obligation.

References

Labour criminal law – institution, subsection of labour law, of criminal law or separate branch of law?

Seceleanu L.

Universitatea Hyperion

Abstract

The author examines the possibility of establishing the labor criminal law as a separate branch of the criminal law presenting pros and cons of supporting this idea.

Keywords: labour law, criminal law, Criminal liability

Labour criminal law appeared and developed in those states where there was a traditional sensitivity regarding health and security in labour issues (France, Italy, Belgium) due to the development and accentuation of the importance of social and human relations affecting the labour system [4].

The relative inefficiency of labour law rules led, in time, gradually to appeal to criminal sanction. This relative inefficiency of civil and disciplinary sanctions was noticed, over time, when the legal norms of labour law multiplied and became more ample, hence the need to take control of an essential law branch, the legislator resorting more often to criminal sanctions. In order to correctly analyze the implications of criminal sanctions, the doctrine took into account the possibility of recognizing the existence of a labour criminal law. [1]

Labour law is in its essence the labour agreement law, and the labour cannot take place without observing the contractual clauses and the labour protection norms.

The liability, generally, has a substantial leading role in the just performance of this process with a quite sensitive importance in the smooth running of society itself. We deem realistic the legal opinions substantially attenuating the intuitum personem character of the labour agreement in favour of accentuating the importance of performing the labour process. Its performance cannot be conceived outside liability. The most severe form of liability, the criminal one, has its profound justification and a positive role in social evolution.

The correlation of labour law and criminal law

The correlation of labour law with the criminal law is revealed by the existence of legal liability specific to labour law – disciplinary liability. This form of liability is closely related to criminal liability, first of all, due to their common elements, as they represent species, categories or forms of legal liability. This connection is materialized in the influence one of the forms of legal liability has over the other. Thus, criminal liability in case of an employee influences his disciplinary liability, either through the suspensive effect of criminal investigation on the disciplinary procedure, or through the determinant character which, in some situations, the criminal order has on a disciplinary sanctions (for example, the disciplinary development of labour agreement).

The disciplinary and the patrimonial liabilities, forms of legal liability in labour law, are closely connected to the criminal liability.

Thus, we can say the following:

• Criminal liability, once triggered, entails a cessation of disciplinary procedure. The accumulation of liabilities, criminal and disciplinary, is possible as a result of their independence (spheres specific to protected social relations), but only in a subsequent report, from criminal to disciplinary. Therefore, in case the employee committed a criminal offence in the process of criminal investigation or in front of a judge, the criminal keeps the disciplinary in place. [5]

• The criminal order, in some cases, entails the termination of the individual labour agreement [art. 56 letter g) and letter i) of Labour Code].

• Important correlation refers to the implementation and enforcement of sentence in the workplace.

In this case, the labour agreement of the concerned person terminates when the sentence is executed in the same workplace and when the sentence is executed in another unit. In both cases, the convicted person, based on the document for executing the sentence, is obliged to fulfil all tasks in the workplace.
Labour law contributes, in some cases, to the correct application of criminal norms. It especially comes to setting, within the type of work, the work attributions, premises for defining certain criminal acts as work crimes or crimes related to work.

Series of normative acts regulating the work reports (as Law no. 319/2006 regarding security and health in labour or Law no. 168/1999 regarding work conflicts, etc.) provide and punish criminal character acts.

In the labour legislation, we already notice a tendency to extend certain criminal acts committed within or on the occasion of work reports. Therefore, we notice the legislator’s tendency to incriminate, in nowadays economic – social context, a series of acts that in the previous legislation only represented contraventions or were not sanctioned at all.

In 1990 the following 15 crimes regarding work reports were regulated:

1. not taking any of the measures provided by the dispositions related to labour protection, by the person who has the duty to take these measures in the workplace if an imminent danger of producing a work accident or professional sickness is created through this (art. 21 of Law no. 5/1965);
2. not taking any of the measures provided by the dispositions related to labour protection, by the person who has the duty to take these measures in the workplace, presenting a special danger, if the possibility of producing a labour accident or professional sickness is created through this (art. 22 of Law no. 5/1965);
3. the inobservance by any person of the measures set regarding labour protection, if an imminent danger of producing a labour accident or professional sickness is created through this (art. 23 of Law no. 5/1965);
4. the inobservance by any person of the measures set regarding labour protection, in workplaces with a special danger, if the possibility of producing a labour accident or professional sickness is created through this (art. 24 of Law no. 5/1965, modified by Decree no. 48 of 29th of January 1969);
5. creating pluses in management by fraudulent means is punishable by imprisonment for 6 months up to 3 years. If the fraudulent mean is in itself a crime, the rules of series of crimes are applied (art. 35 of Law no. 22/1969);
6. not stating, in writing, within the term provided by the legal dispositions, by the administrator, of pluses in his management of whose quantity or value he is aware, derived from any mean but the one shown in article 35, is punishable by imprisonment for 1 month up to 1 year. If the act had severe consequences, the punishment is imprisonment for 6 months up to 3 years (art. 36 of Law no. 22/1969);
7. the alienation of movable property representing a guarantee according to article 10, without the previous notification of the economic agent, authority or public institution, is punishable by imprisonment for 6 months up to 1 year (art. 37 of Law no. 22/1969);
8. forging the workbook by counterfeiting writing or subscription or its alteration in any way, by the holder or any other person [art. 22 paragraph (1) of Decree no. 92/1976 regarding the workbook];
9. writing in the workbook information regarding the attestation of acts that do not correspond to reality [art. 22 par. (2) of Decree no. 92/1976];
10. leaving unattended the installation on which the hired personnel is working directly on installations with continuous functioning regime [art. 18 thesis 1 letter a) of Decree no. 400/1981]; [3]
11. leaving the workplace during working hours without the approval of the foreman (art. 18 thesis 1 letter b) of Decree no. 400/1981);
12. suspension of activity before delivering the installation, to the worker in the next shift (art. 18 thesis 1 letter c) of Decree no. 400/1981);
13. not insuring at the end of the working hours of the installation with high degree in exploitation in which case the delivery to another shift is not provided [art. 18 thesis 1 letter o) of Decree no. 400/1981];
14. smoking or introducing cigarettes, lighters, materials or products which could provoke fires or explosions in the workplaces where smoking is forbidden (art. 18 thesis 2 letter a) of Decree no. 400/1981);
15. introducing or consuming alcoholic beverages in the unit or appearing in the unit under the influence of alcoholic beverages [art. 18 thesis 2 letter b) of Decree no. 400/1981].

To these incriminated crimes after 1990 were added the following important crimes which are still in force, introduced by Law no. 319/2006 regarding security and health in labour, such as:

1. not taking any of the measures provided by the dispositions related to security and health in labour by the person who had the duty to take these measures in the workplace, if a severe and imminent danger of producing a labour accident or professional sickness is created through this (art. 37 of Law no. 319/2006 regarding the security and health in labour);
2. not taking any of the measures provided by the dispositions related to security and health in labour by the person who had the duty to take these measures in the workplace, if special consequences are produced through this [art. 37 par. (2) of Law no. 319/2006 regarding security and health in labour];
3. knowingly not taking any of the measures provided by the dispositions related to security and health in labour, by the person who had the duty to take these measures, in the workplace if a severe and imminent danger of producing a labour accident or professional sickness is created through this [art. 37 par. (3) of Law no. 319/2006 regarding security and health in labour];
4. knowingly not taking any of the measures provided by the dispositions related to security and health in labour, by the person who had the duty to take these measures, in the workplace if special consequences are produced through this [art. 37 par. (3) of Law no. 319/2006 regarding security and health in labour];
5. not observing by any person of the obligations and measures set regarding security and health in labour, if a severe and imminent danger of producing a labour accident or professional sickness is created through this [art. 38 par. (1) of Law no. 319/2006 regarding security and health in labour];
6. not observing by any person of the obligations and measures set regarding security and health in labour, if special consequences were produced through this [art. 38 par. (2) of Law no. 319/2006 regarding security and health in labour];
7. restarting the installations, machines and devices previous to eliminating all deficiencies for which their stoppage was disposed [art. 38 par. (3) of Law no. 319/2006 regarding security and health in labour];
8. knowingly not observing by any person of the obligations and measures set regarding security and health in labour, if a severe and imminent danger of producing a labour accident or professional sickness is created through this [art. 38 par. (4) of Law no. 319/2006 regarding security and health in labour];
9. not observing by any person of the obligations and measures set regarding security and health in labour, if special consequences were produced through this [art. 38 par. (4) of Law no. 319/2006 regarding security and health in labour];
10. restarting the installations, machines and devices, due to guilt, previous to eliminating all deficiencies for which their stoppage was disposed [art. 38 par. (4) of Law no. 319/2006 regarding security and health in labour];
11. withholding and not transferring, with intention, within maximum 30 days since the due term, of the amounts representing taxes and contributions retained at source (art. 1 of Law no. 241/2005 for preventing and fighting fiscal evasion);[2]
12. preventing the exercising of the right to free organization or syndicate association for the legal purpose and limits [art. 53 letter a) of Law no. 54/2003 regarding syndicates];
13. conditioning or constraining in any way, for the purpose of limiting the exertion of attributions of the function of members chosen in the syndicates’ management entities [art. 53 letter b) of Law no. 54/2003];
14. supplying inaccurate information on obtaining the legal personality of the syndicate organization, as well as during its incorporation [art. 53 letter c) of Law no. 54/2003];
15. not executing a final court of law order regarding the payment of wages within 15 days since the date of execution addressed to the unit by the concerned party (art. 277 of the Labour Code);
16. not executing a final court of law order regarding the reintegration into labour of an employee (art. 278 of the Labour Code);
17. employing minors without observing the conditions related to age or their use for performing activities breaching the provisions related to the minors’ labour regime (art. 280’ of the Family Code).
In the context of switching to market economy, the previously known means, for sanctioning, proper to labour law became insufficient. The main appeared modifications:
1. replacing the material liability of employees with a variety of contractual civil liability, having certain particularities in which the employee is integrally liable (and not only for the effective prejudice);
2. the number of contraventions substantially increased regarding labour reports (practically tripled in comparison to 1990);
3. fact which previously represented contraventions were regulated as crimes (in comparison to 15 crimes regulated until 1990, there are currently 26 criminal acts incriminated in the criminal legislation of labour 1 in the Criminal Code, three in Labour Code and other 22 in special laws).

The objective existence in the Romanian legislation of labour of regulating certain crimes which have as common premises a legal labour report and presume a qualified subject in the person of the employee (clerk) led to the expression in the legal literature of the opinion – which we share – according to which a labour criminal law is contoured in Romania as well, without considering it represents an independent law branch.

In the papers of labour law there is no definite opinion in the meaning of the existence of a law branch – labour criminal law – and in the papers of criminal law this issue is only approached incidentally, the issue of qualifying this new normative reality remains opened.

In current conditions, of existence of certain regulations correlated from labour law and criminal law, regarding criminal acts, breaching labour reports, we can speak of a labour criminal law in Romania.

Conclusion
Labour criminal law must be remembered as a new legal reality. Being a doctrine concept having as objective support the fact that certain crimes regulated in the Labour Code, in the Criminal Code and Labour Legislation – have the same purpose – the good development of labour reports, strengthening the labour discipline, giving expression to the natural correlation between the two branches – labour law and criminal law – and, therefore, is characterized by certain specific features. In our opinion, we can speak of a sub-branch of law, labour criminal law belonging – as business criminal law, environmental criminal law – to labour law.

Through its sensitive importance for the labour process, we consider this matter has a pragmatic importance reported to the labour law. This is not “breaking” the labour criminal law from the special criminal law, but studying it next to labour law has the role to account the labour process indubitably necessary to society in its ensemble.

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[3] Decree no. 400/1981 for instituting certain rules regarding the exploitation and maintenance of installations, devices and machines, strengthening the labour order and discipline in the units with continuous fire or having installations with high degree of danger in exploitation was abolished by Law no. 319/2006 of security and health in labour (Official Journal no. 646 of 26th of July 2006)
Illegal creation of human embryos and cloning

Tudurachi E.

1 “Al.I.Cuza” University of Iasi, Faculty of Law,(ROMANIA) elena.tudurachi@gmail.com

Abstract
Cloning is a much-discussed issue and its ethical, legal, and social implications have not been fully grasped yet. There are several ways of cloning, but the most developed one is to transplant the nucleus from an adult cell, reason for which multiple clones of an adult may be created. This technique does function, but it is completely forbidden for humans. If there has been the possibility of cloning plants and animals, this does not mean that it should also be applied to humans (this process was possible by cloning a viable human embryo whose evolution was stopped at the stage of gastrula). Cloning can reduce the genetic variability; the production of clones may increase the risk of creating a population to a large extent identical. This population would be prone to the same diseases and contracting such a disease would mean the destruction of most of the population. This theory is less likely to happen, but many issues may arise, with the same devastating effects caused by the lack of genetic diversity.

I believe that, in the contemporary period, all States have to regulate the potential confusions related to the social and legal tasks of the responsibilities resulted from cloning. An article of the “Washington Post” examined the fears that the development of the technologies related to “genetic improvement” would create a “market of preferred physical features”.

Keywords: cloning, human embryo, offence, regulation.

Introduction
The Parliament Assemble of the Council of Europe has already issued a statement on the relation between genetic engineering and the human rights. On one hand, it is stated that the rights to life and to human dignity protected by Articles 2 and 3 of the European Convention on Human Rights imply the right to inherit a genetic pattern which has not been artificially changed. On the other hand, there is a statement on the fact that the explicit recognition of this right must not impede the development of the therapeutic applications of genetic engineering, which holds great promise for the treatment and eradication of certain diseases which are genetically transmitted. This is why gene therapy must only be used with the free and informed consent of the person concerned. The boundaries of legitimate, therapeutic application of genetic engineering techniques must be determined by independent specialized commissions, before being effectively operative, and they are subjected to practical re-appraisal. Besides the invitation addressed to the Member States to set a regulatory framework that observes the ethical criteria set, there are also recommendations for the Committee of Ministers to draw up a European Agreement on what constitutes legitimate application to human beings (including future generations) of the techniques of genetic engineering, mainly for the respect of human rights. Furthermore, this agreement also has to comprise the genetic engineering measures, to ensure that the human being will not be influenced (directly or indirectly), even accidentally.

The Universal Declaration on the Human Genome defines it as the heritage of humanity through the UNESCO Declaration of 1997, which 186 States attended. The declaration set the limits of the interventions on the genetic heritage of the person, forced the international community to protect the genome, to respect the dignity of the individuals regardless of their genetic characteristics, and to reject any genetic determinism. Art. 1 of the Universal Declaration on the Human Genome highlights the fundamental unity of all members of the human family in the recognition of their dignity and diversity, by declaring the human genome as the heritage of humanity, which means that the research on human genome involves the responsibility of the entire humanity. This dignity (art. 2) makes it imperative not to reduce the individual to his genetic characteristic and to respect his uniqueness and diversity. Hence, genetic determinism is rejected, and the knowledge on the human genome will not be interpreted against the dignity of the individual as free and responsible being, regardless of the natural and social environment concerning the development of the individual’s genetic potential. Art. 4 states that the human genome in its natural state shall not give rise to financial gains.

1 Published in November 2001.
2 See the Recommendation of the Council of Europe no. 934/1982.
research in the field must be grounded on the Universal Declaration of Human Rights, meaning on the right to individual freedom (which leads to the free consent), on the right to respect for the private life (which leads to the imperative of confidentiality), on the principles of interhuman and interstate solidarity (which leads to the right of all individuals to benefit from the scientific progress in the field). Hence, the research on human genome is admitted only if it brings a direct benefit for the health of the individual, as the respect for human (individual) rights prevails over the research needs. In this sense, the declaration states again that the practices which are contrary to human dignity, such as reproductive cloning of human beings, shall not be permitted; under these circumstances, the freedom of research, though part of the freedom of thought, will only seek to improve the health of individuals and of humankind, implicitly. A multidisciplinary ethics committee of the State will encourage the research focused on identifying, treating, and preventing genetic diseases and it will foster the dissemination of knowledge as an element of the general-humanitarian culture. The implications of the research on human genome are of interest for human society, reason for which the application of this declaration will be fostered. In the same sense, the International Bioethics Committee of UNESCO will contribute to the dissemination of these principles, and this declaration of ethical principles can represent the grounds for a treaty of imperative legal principles in the field.

The above-outlined aspects are only some of the arguments that prove – beyond any doubt – the direct relation between human rights and genetic engineering, a relation which should always be underlined and studied.

**Illegal creation of human embryos and cloning**

In regard to the **offence**, it was stated in art. 195 par. 1 of the Law no. 301/2004 (Criminal Code) and it concerned **the creation of human embryos in other purposes than procreation**.

According to the provisions of par. 2 of art. 195 in the New Criminal Code, it constitutes an **offence the creation of a human being genetically identical to another human being either living or dead, by cloning**.

The special legal object would have been represented by the social relations whose existence and normal progress regard the protection of the human being, both as individual and as pertaining to the human species, against the acts which could endanger his dignity through a misuse of biology and medicine. The material object is represented by the human genetic material taken from the source organism.

The active subject may be any physical or legal person who meets the general conditions of criminal responsibility. Criminal participation is possible under all its forms (co-authorship, instigation, and complicity), as the passive subject is the human collective, threatened by the creation of human embryos in other purposes than procreation, or by the creation of a human being genetically identical to another human being either living or dead, by cloning.

**1.1 Constitutive content.**

**1.1.1 Objective side.**

The material element, in case of paragraph 1, is represented by the action of creating human embryos in other purposes than procreation, while in paragraph 2 by the action of creating a human being genetically identical to another human being either living or dead, by cloning. The human embryo is the product of conception aged through the eighth week of development. Procreation represents the sexual activity of conception and gestation. Human cloning concerns reproductive cloning and therapeutic cloning. According to the definitions used in genetics, reproductive cloning is the process of taking genetic material from the nucleus of an egg cell from the surrogate mother and replacing it with the DNA taken and isolated from a body cell of the individual to be cloned. Therapeutic cloning is related to the production on undifferentiated stem cells, which have the ability to differentiate along multiple pathways, which include tissue and organ cells. Therapeutic cloning refers to the use of those cells in therapeutic purposes. Thus, the difference between the two types of cloning is made by the destination of the cloned embryos. (Decision no. 3/2005 on adopting the Status and Code of Medical Deontology of the College of Physicians in Romania, Annex no. 2 (Code of Medical Deontology), (Of.G. no. 418 of 18 May 2005). Though the New Criminal Code does not make the difference between reproductive and therapeutic cloning, the formulation of the text does indicate that only reproductive cloning is considered an offence.

The immediate consequence is the creation of a human being genetically identical to another human being either living or dead, by cloning.

There is a causality relation between the action of the wrongdoer and the immediate consequence.
1.1.2 The subjective side.

The blame corresponding to this offence is direct intention.

FORMS, WAYS, SANCTIONS.

Forms.

Preparation acts, though possible, are not sanctioned. The attempt is sanctioned (art. 196 Crim. code). The offence takes place when the immediate consequence occurs.

Ways.

The offence includes two normative ways: the illegal creation of human embryos and the creation of a human being genetically identical to another human being either living or dead, by cloning. There are various ways of committing the offence which correspond to these normative ways.

Sanctions.

The punishment for this offence is strict imprisonment, from 3 to 10 years, and the prohibition of certain rights. The legal person is sanctioned with a fee from 10 million to 5 billion lei.

These offences should also be incriminated by the Romanian Criminal Code as, presently, only the Code of Medical Deontology states, in art. 112, “Human cloning experiments are prohibited”. The prohibition of human cloning and of other dangerous offences in the field of genetic engineering also represents an obligation of Romania, in conformity with the Convention of Oviedo, in 1997, on human rights and biomedicine, as well as the Additional Protocol regarding the Prohibition of Human Cloning, in 1998, ratified through the Law no. 17/2001. (Adopted at Oviedo on 4 April 1997, it came into effect on 1st December 1999, being signed and ratified by 19 States. Romania signed the Convention on 4 April 1997 and ratified it through the Law no. 17/2001 published in the “Official Gazette of Romania” no. 103 of 28 February 2001.

The first Additional Protocol to the Convention for the protection of human rights and dignity of the human being with regard to the application of biology and medicine, on the prohibition of cloning human beings was adopted on 12 January 1998. It came into effect on 1st March 2001, so far ratified by 15 States, among which Romania. The second Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin was signed on 24 January 2002, to enter into effect on 1st May 2006, was ratified by 5 States. The third Additional Protocol on Biomedical Research was signed on 25 January 2005. The Romanian Constitution of 1991, revised in 2003, mentions only a general right to life and physical and mental integrity, without giving any details on the specifics of bioethics principles.

In regard to the human embryo, according to biologic science a new life starts from the fecundation. From this perspective, a right of life of the embryo can be stated, but in legal terms, this right is relative, considering the disposition right on this subject, which is stipulated in certain legislations, by not sanctioning the abortion up to a certain age of the foetus. In the specialized literature, there have been discussions on the relation between the recognition of the right to terminate the pregnancy and the protection of the foetus[2]. It is stated that “the recognition of the foetus’ right to life represents a compromise between the respect for the life to be born and the right to abortion, as an expression of the interests of the pregnant woman; it does seem that the latter prevail” [2]. A 2003 Report of working party regarding the protection of human embryo and foetus – constituted within The Steering Committee on Bioethics of the Council of Europe – states that there is a broad consensus on the need to protect the embryo in vitro, but on matters related to defining its status, a considerable diversity of opinion exists [3]

Conclusions

In Romania, the issue of the human embryo has not been approached in any way and it is currently difficult to determine when the right to life of a person really begins. Article 202 of the New Criminal Code shows that the passive subject of the offence is a foetus, during the pregnancy or about to be born. The moment of the birth (protected by the accusation of murder for its violation) is defined as the moment when the foetus is completely separated from the mother’s umbilical cord, meaning the moment when the product of conception is no longer a foetus, but a newborn. Hence, it is considered that, up to that moment, the foetus does not seem to have a right to life. However, art. 176 par. (1) lett. e) Crim. code incriminates as first-degree murder the murder whose passive subject is the pregnant woman, regardless of the pregnancy stage, as the doctrine shows that there is a double violation of the human life. The New Criminal Code pays more attention to the subject my introducing chapter IV – Aggressions against the foetus, which represents a progress from the current regulations [4].

The precedent was already set by transferring the offences of the Special Law 678/2001 on the prevention and suppression of human trafficking to the New Criminal Code, by the corresponding offences in

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3 See art. 80 par. 3 Crim. code. (Law no. 301/2004)
4 Decision no. 3/2005 on adopting the Status and Code of Medical Deontology of the College of Physicians in Romania, Annex no. 2 (Code of Medical Deontology), (Of.G. no. 418 of 18 May 2005).
Title I, Chapter VII – Trafficking and exploitation of vulnerable persons. We believe that, following the same procedure, the provisions of the Law no. 39/2003 on the prevention and suppression or organized crime, as well as of art. 2 par. (1), point b) 19 – which states as aggravated offence the traffic of human tissues or organs – should have been transferred. The same goes for the provisions of the Law no. 17/2001 on the Ratification of the convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human rights and Biomedicine, signed at Oviedo on the 4th of April 1997. In the same sense, it is worth mentioning the Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings, signed in Paris, on the 12th of January 1998. Hence, the Member-States of the Council of Europe are aware of the rapid development of biology and medicine, but also of the need to respect the human being, both as individual and as pertaining to the human species; the Member-States also acknowledge the importance of ensuring the dignity of human beings. This is the only provision meant to annihilate a network of such traffickers; these persons are extremely dangerous and they should represent a focus for the legislator, considering the contemporary reality.

References
Currency and other valuables counterfeiting offences in national and european regulations

Tita-Nicolescu G.

Associate Professor Ph.D. at the Faculty of Law of Transilvania University of Brasov (ROMANIA) 
titanicolescu@yahoo.com

Abstract

Currency counterfeiting is a major problem of the European Union. To fight this phenomenon, the Council of the European Union has adopted several Decisions meant to facilitate the international legal cooperation and to stop such practice. In terms of Romania’s internal legislation, the new criminal code has brought changes meant to eliminate the shortages of the old legislation and to make it compliant with the European norms.

Keywords: currency counterfeiting, payment instruments, new criminal code

Introduction

Currency counterfeiting has always been a severe problem for all states, and the European Union is not unfamiliar with this phenomenon, as the European Commission records a significant increase in the percentage of counterfeit euro coins which have been withdrawn from circulation.

The number of the euro coins withdrawn rose by 17%, from 157,000 in 2011 to 184,000 in 2012. Taking into consideration that currently there are 16.5 billion authentic euro coins in circulation, the ratio is 1 forged coin to 100,000 authentic coins. The 2 euro coin is by far the most affected by this criminal activity, accounting for almost 2 of 3 identified counterfeit euro coins.

| Counterfeit euro coins in circulation between 2009 and 2012 |
|-------------|----------|----------|----------|
|             | 50 euro cents | 1 euro | 2 euro | Total |
| 2012        | 31,000     | 32,000  | 121,000 | 184,000 |
| 2011        | 28,000     | 34,500  | 94,500  | 157,000 |
| 2010        | 24,900     | 30,800  | 130,300 | 186,000 |
| 2009        | 18,000     | 26,500  | 127,500 | 172,100 |

Fig.1 Statistics about the number of counterfeit coins in circulation between 2009 and 2012[1]

With regard to counterfeit euro banknotes, in 2012 approximately 561,000 banknotes were withdrawn from circulation, according to the official data of the European Commission[2].
Criminal repression in the context of the economic crisis and the maximization of crime at European and global level (May 9-13, 2013, Bucharest, Romania)

<table>
<thead>
<tr>
<th>Period</th>
<th>2009/2</th>
<th>2010/1</th>
<th>2010/2</th>
<th>2011/1</th>
<th>2011/2</th>
<th>2012/1</th>
<th>2012/2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of counterfeit banknotes</td>
<td>447,000</td>
<td>387,000</td>
<td>364,000</td>
<td>296,000</td>
<td>310,000</td>
<td>251,000</td>
<td>280,000</td>
</tr>
</tbody>
</table>

Fig. 2 The number of counterfeit banknotes between 2009 and 2012, by semesters.

Regarding the structure of the rate value of the counterfeit banknotes, the official data of the European Central Bank show that the note that is most affected by such phenomenon is the 20 euro banknote, followed by the 50 euro banknote, as illustrated in the table below.

<table>
<thead>
<tr>
<th>Banknote</th>
<th>5 EUR</th>
<th>10 EUR</th>
<th>20 EUR</th>
<th>50 EUR</th>
<th>100 EUR</th>
<th>200 EUR</th>
<th>500 EUR</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percentage of banknotes</td>
<td>0.5%</td>
<td>1.5%</td>
<td>42.5%</td>
<td>40.0%</td>
<td>13.0%</td>
<td>2.0%</td>
<td>0.5%</td>
</tr>
</tbody>
</table>

Fig. 3 Percentage of the total number of counterfeit banknotes

According to the same source, most (97.5%) of the counterfeit notes recovered in the second semester of 2012 were identified in Euro-zone countries and only approximately 2% came from EU member states outside the euro zone and 0.5% from other regions of the world.

EUROPEAN regulations

1.1 Regulations regarding offences of currency counterfeiting

When the Euro currency was introduced and the Euro Zone was created, it was necessary to adopt some special regulations meant to fight and sanction as efficiently as possible any counterfeiting act, as well as related acts, such as distribution of counterfeit valuables, possession of forgery instruments etc. For this purpose, the Council of the European Union adopted the Framework Decision of May 29, 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro (Decision 2008/383/JAI). By this decision, by virtue of art. 2, the member states were required to adopt the necessary measures to sanction the following actions:

a) any fraudulent action of euro coin or banknote manufacturing or alteration, irrespective of the means used to obtain the final product;

b) fraudulent release into circulation of forged euro coins and notes;

c) import, export, transport, receipt or procurement of counterfeit euro banknotes or coins for the purpose of distribution and being aware that they are forged;

d) Fraudulent manufacturing, receipt procurement or possessions of: instruments, objects, software and any other means specifically conceived to manufacture counterfeit euro coins or banknotes or to alter euro coins or banknotes; holograms or other elements serving to protect euro banknotes and coins against counterfeiting.

At the same time, it was stipulated that coin or banknote alteration or counterfeiting offences are subject to penalties of deprivation of freedom, whose maximum level may not be lower than eight years.

Requiring the member states to adopt the above mentioned measures was meant to consolidate the criminal legislation of all member states, taking into consideration that some of them had not adopted efficient measures to fight this phenomenon, but also because in some states, the sanctions were too mild. Due to the free movement inside the European Union, this led to the offenders being encouraged to perform their criminal acts in the states with the mildest sanctions for currency counterfeiting. This situation was solved by laying down minimum penalties across the European Union.

Although in most of the cases the internal legislation of the member states already had in place provisions for sanctioning coin or banknote counterfeiting or release into circulation under the criminal law, the practice proved that, most of the time, an individual convicted for such act would commit similar acts after
serving the punishment. Even if the majority of legislations stipulate for the repeat offences in case of criminal acts, which leads to the increase in the special limits of the penalties, may times, such provisions could not be applied because such acts have a cross-border nature and, consequently, the offenders could transfer their entire criminal activity into another state. Thus, in order to prevent the offenders’ avoidance of the application of higher penalties following repeat offences, by means of the same decision, the Council established that: “Each member state recognizes the principle of repeat offences under the conditions laid out by its internal law and recognizes, under respective conditions and as causing repeat offences, the definitive convictions handed down in another member state for one of the offences mentioned above in this framework decision”. This provision acknowledged that, for an act committed in a member state the rule of repeat offence may be applied, which leads to the increase of the special limits of the penalty, according to internal law, even when the first offence was committed in another member state.

Another cause that substantially contributed to the adoption of the above mentioned regulations is that, given the relatively low penalties for currency counterfeiting in some member states of the European Union, the relevant authorities may give low priority to criminal investigation and criminal proceedings for the acts mentioned. Furthermore, this aspect has a negative impact on cross-border cooperation of the relevant bodies, namely in one state an individual may be sentenced to imprisonment of less than four months or sanctioned by fine, which makes impossible the issuance of a European arrest warrant [4].

1.2 Regulation on offences of forging other payment instruments

Since the development of information technology, the offences of forging electronic payment instruments have become more frequent. In order to keep up with this phenomenon, The Council of the European Union adopted the Framework Decision of May 28, 2001 combating fraud and counterfeiting of non-cash means of payment (Decision 2001/413/JAI). By means of this decision, the member states were obliged to apply criminal sanctions for certain acts, such as: theft, forgery, acquisition, transport and sale of payment instruments; entering, changing deleting computer data without being entitled to do it; unauthorized intervention in software functioning and others.

The framework decision avoids deliberately making reference to certain offences under the current criminal law, since such offences do not cover the same elements in any location. On the contrary, the framework decision simply lists various types of behaviour that should be deemed as offences across the European Union. Several types of behaviour are defined depending on whether the offences relate to either the payment instrument itself or the manufacturing of payment instruments, one or more payment transactions or the systems of payment transaction control, collection, processing, checking and performance.

Furthermore, in order to make the adopted provisions as effective as possible, agreements were concluded to guarantee that the public and private bodies managing, monitoring, and supervising payment systems should cooperate with the national authorities in charge with the investigation of the offences described in the framework decision and should take measures against offenders. Thus, it was stipulated that additional cooperation mechanisms may be established among the EU countries in accordance with the bilateral or multilateral covenants and agreements or with any other applicable agreements.

1.3 Regulations to be adopted

Although the Decisions mentioned above have been implemented in the national legislations of all European Union member states, they did not have the expected impact. Thus, as we have shown at the beginning, the statistics on euro coin and banknote counterfeiting is alarming, increasing continuously. One of the substantial causes is the partial inefficiency of the EU regulations in this field. Hence, although the above mentioned Decisions oblige the states to set the maximum special limits of penalties to at least 8 years imprisonment for the commission of the acts listed earlier, there is no regulation at the level of the European Union that sets also a minimum limit of the penalties. For this purpose, in 2013, the European Commission drafted a Directive proposal [5] whereby it obliged the European Union member states to set also a minimum special limit for the imprisonment punishment for money counterfeiting acts. We believe that this initiative is welcome and could actually lead to the decrease of the number of counterfeit coins and banknotes by deterring certain individuals to commit such acts.

Even if there is no set date for the adoption of the abovementioned directive, as it is still under debate, we hope that it should be implemented as soon as possible, so that it could stop the offences, which have a serious impact on the entire European Union.
National regulations

1.4 The regulation in the criminal code of 1968.

The criminal code of 1968 contains a single article that criminalizes both currency and other valuables counterfeiting. Thus, par. (1) of art. 282 stipulates that: “The counterfeiting of coins, banknotes, public credit bonds, cheques, any securities for making payments, issued by banks or other relevant crediting institutions, or the counterfeiting of any other bonds or similar valuables shall be sanctioned by 3 to 12 imprisonment and the restriction of some rights.”

With regard to the object of the offence, the judicial practice has stated that promissory notes belong to the valuables art. 282 of the Criminal Code refers to. Yet, payment orders, because they cannot be released for circulation, cannot serve directly as means of payment, so that their forgery cannot be the object of the offence of currency or other valuables counterfeiting.

In all the cases, the object of the objective aspect is an action which may consist of counterfeiting or alteration.

Counterfeiting means the manufacturing of currency or other valuables by imitating the genuine, authentic currency or valuables, without the need of such imitation being perfect, whereas alteration means the change of the content or look of a genuine currency or other valuable, which leads to an appearance not compliant with the truth that such currency or valuables is meant to express.

In addition to counterfeiting acts, par. 2 of art. 282 also criminalizes the acts of circulating, in any manner, of the counterfeit valuables shown in the previous paragraph or their possession for the purpose of circulation.

Although the above mentioned acts are stipulated by the same article, they constitute different offences. Therefore, the act of an individual of, firstly, counterfeiting the above mentioned valuables and then circulating them represents multiple offences. Nevertheless, bearing in mind that the act of forgery cannot exist without the later possession of the valuables obtained, without circulating them, such act has all the elements of a single offence, namely the counterfeiting offence provided for by par. (1), and the rules of multiple offences do not apply.

At the same time, as regards the object of the offence, according to art. 284 of the Criminal Code, not only the counterfeiting of the national currency is an offence, but also the forgery of any foreign currency or of other valuables listed above, and the same sanctions apply, namely 3 to 12 years imprisonment.

We may notice that in terms of sanctions, the Criminal Code, although passed in 1968, complies with the Framework Decisions mentioned in the previous chapter, namely, the maximum limit of the imprisonment penalty is higher than 8 years. We believe that the relatively high imprisonment penalty (even higher than that set by the European Commission) has the role of deterring currency counterfeiting, therefore Romania boasts a relatively low number of counterfeit banknotes withdrawn from circulation. This is also the effect of withdrawing paper banknotes and replacing them with plastic banknotes, whose level of security is higher.

1.5 The regulation in the new criminal code

The new criminal code, which is to be enacted as of 1st February 2014, has introduced some changes regarding the acts mentioned earlier. Firstly, we may notice that the legislator has given up the incrimination of all the acts related to currency counterfeiting in a single article. Thus, art. 310 criminalizes separately currency counterfeiting, whereas art. 311 incriminates the forgery of credit bonds or payment instruments. As compared to the criminal code of 1968, the new criminal code also incriminates the counterfeiting of currency issued by relevant authorities before such currency is officially circulated on the market. This situation requires that the relevant authorities have developed a new currency, but it has not been officially released in circulation, such currency being counterfeit. Taking into account that such currency is not a payment instrument until it is officially released into circulation, the counterfeiting act cannot be sanctioned under the old criminal law. The offender could be convicted only for releasing the currency into circulation or for possession of such currency for the purpose of putting it into circulation provided that the act was committed after the official release of the currency.

Another change is the reduction of the penalty limits, thus the special maximum limit is reduced to 10 years, while the minimum is kept to 3 years.

At the same time, according to the European regulations, the new criminal code also criminalises the forgery of electronic payment instruments, which has been expected, given the development of technology and, consequently, the higher number of such acts.

The offence of releasing counterfeit valuables into circulation has also received a distinct regulation, in art. 313. In addition to the manners in which this offence is committed as described by the old criminal code, the new criminal code stipulates that it may be committed also by receiving or transmitting counterfeit valuables for the purpose of their release into circulation, and not only by possessing them. The legislator intended to prevent...
the case where an individual, although at the time they received or transmitted the valuables were aware they were counterfeit, could be acquitted because the old criminal code did not specify that such acts were part of the object of the objective aspect of the offence of currency or other valuables counterfeiting. In the best case scenario, the offender could be convicted for the commission of another offence, namely abetment in crime, concealment or other.

Also, we must say that the new criminal code expressly stipulates that, in case of the offence of releasing counterfeit valuables into circulation, the offender in counterfeiting may be the active subject of this act, which was acknowledged by the old code, too, but which was not expressly specified.

Conclusions

Since the progress of technology, the offenders invent new ways of forging money, but especially electronic payment instruments. In order to adjust to this situation, the European Union has adopted several regulations meant to consolidate the legislation of all member states and to facilitate international criminal cooperation. Nevertheless, the practice has proven that the adopted regulations have not had the expected impact, so that the authorities have to find new solutions to fight this phenomenon which may affect very seriously the entire financial system of the European Union. To adapt to the new realities, the national authorities, by means of the new criminal code, have criminalized more clearly all the acts that may constitute currency counterfeiting offences or other related offences. We can only hope that the new regulations to be adopted shortly will have the expected impact and will become an effective instrument in fighting currency counterfeiting and forgery of other payment instruments.

References

[4] According to art. 88, par. (1), letter. b of law no.302/2004 on the international judicial cooperation for criminal matters, an European arrest warrant may be issued if the penalty or the security measure of deprivation of freedom applied is at least 4 months, if the arrest and turning are requested for the execution of punishment or of the security measure of freedom deprivation .
[8] T.Toader, Drept Penal Roman, Partea Speciala (Romanian Criminal law, Special Section), revised and updated 5th edition, p.373
[9] In 2011 only 5,700 counterfeit banknotes were discovered, which was an insignificant amount as compared to the euro. Please visit: http://economie.hotnews.ro/stiri-finate_banci-12683723-2011-falsificat-5-700-bancnote-romania-cea-mai-des-falsificata-bancnota-100-lei-dar-fost-descoperit-bancnote-de-leu-falsificata.htm
Crime repression in the field of crimes against the person. 
Realities and perspectives in the light of the economic crisis and growth of the crime phenomenon at European and worldwide level.

Toader T.

Faculty of Law, “Alexandru Ioan Cuza” University Iași, Judge at the Constitutional Court of (Romania) 
ttoader@uaic.ro

Abstract

The fundamental attributes of the person are granted at constitutional level and protected by the regulations related to incrimination. Regulations which are included both in the Criminal Code and in the special laws containing criminal provisions. The field of crimes against the person was subjected to serious amendments, determined by the need of harmonization with the standards of the European Convention of the Human Rights, standards reflected in the jurisprudence of the European Court of Human Rights, either by the obligations deriving from the treaties and conventions which Romania became a part of, or by the statute of member state of the European Union, or by the new socio-economic realities that we are currently living. The criminal lawmaker proceeded to a new ranking of values protected by means of the criminal law, mainly treating the fundamental attributes of the person, extended the sphere of criminal protection through new incriminations, proceeded to the perfection of existent incriminations, decriminalized some facts, also proceeding to the reduction of some penalty limits.

Keywords: attributes of the person, amendment of the criminal law, a new ranking of social values, harmonization with European standards, extension of criminal protection, decriminalization of certain facts, reductions of penalties, law accessibility and predictability, principle of proportionality.

Preliminaries. The field of crimes against the person has known serious amendments, determined either by the need of harmonization with the standards of the European Convention of Human Rights, standards reflected in the jurisprudence of the European Commission of Human Rights, or by the obligations deriving from treaties and conventions which Romania became a part of or by the statute of member state of the European Union, or by the new socio-economic realities that we are currently living. In this context, some amendments occurred through the effect of European or international regulations, others were adopted in the limit of the margin of appreciation of the national lawmaker, and others started from the appreciation of the need to prevent and fight against some unlawful manifestations specific to the period of crisis, irrespective of its nature.

Based on these coordinates, crime repression in the field of crimes against the person has the following features:

- the priority granted for the protection of the attributes of the person, in relation to the other values protected by the criminal law. According to the new Criminal Code, crimes against the person are conceived as part of title I, unlike the effective criminal law, where these crimes are part of title II, being distinctively grouped according to the title regarding crimes against the national security. In this way, the new Romanian lawmaker assimilated the French and Spanish solution of systematization, unlike the effective Criminal Code which grants priority to crimes against the national security, according to the model of the German and Italian Criminal Code. The manner of regulation of crimes against the person has therefore, at its base, the conception adopted by the new Romanian lawmaker, which, after the protection of the person has priority towards the state protection, abandoning the contrary solution adopted by the effective Criminal Code, as in other codes, which grants priority to crimes against the state.

Considering this option as being correct, we need to notice however the fact that in the case of some incriminations, the social relations referring to patrimony are considered more important compared to those referring to the attributes of the person. Therefore, in the new Criminal Code (article 207), the crime of blackmail has the basic form when it is committed in the purpose of unlawfully acquiring a non-patrimonial benefit, being punished by imprisonment from one to five years (paragraph 1) and has a severe form when facts
are committed with the purpose of acquiring a patrimonial benefit in an unlawful manner and is punished by imprisonment from 2 to 7 years (paragraph 3).

- the extension of the criminal protection of individual attributes, through the new incriminations. The values that replenish human personality are protected by means of the new incriminations. As an example, there are the incriminations from the effective Criminal Code, referring to facts of domestic violence or sexual harassment. The new Criminal Code enlarges the sphere of criminal protection of the attributes of the person, through the new incriminations referring to slaughter upon the victim’s request (article 190), slaughter or killing by the mother of her new-born (article 200), injury of the fetus (article 202), harassment (article 208), violation of professional premises (article 225) or violation of private life (article 226).

- amendment of the contents of some incriminations against the person, incriminations provided by the Criminal Code. To that effect, as an example, we refer to the crime of threat, provided by article 193 of the effective Criminal Code, respectively article 206 from the new Criminal Code. The new Criminal Code enlarges the sphere of persons who can be the victims of the crime or the prejudicial fact that forms the object of threat (any close person can be referred to), unlike the current regulation which, besides the threatened person, only takes her husband or a close relative into account. Considering the feelings which relate persons, regardless of the relations between them (spouses, close relatives, cohabitants, friends, etc.), the lawmaker considered that the moral freedom of a person can be taken away not only when he/she is informed of the negative consequence which is to be produced against him/her, but also when this consequence would concern one of the close persons. The new regulation takes into consideration the quality of relations between the threatened person and the person who would directly suffer the consequences of the threatening crime or prejudicial fact, unlike the current regulation which takes into consideration the civil relation between those persons. In the same manner, the new Criminal Code considers the possibility of the threat to produce a state of fear, unlike the current regulations, article 193 of the Criminal Code, which considers the possibility of the threat to alert the injured person, the difference being the intensity of the immediate consequence.

- amendments of the contents of some incriminations against the person, incriminations provided by special laws. Thus, adopted in 2001, the law in reference with the prevention and fight against the human trafficking [1] has known to multiple amendments with regard to the incriminations from article 12-19, amendments that are meant to ensure a more efficient protection besides facts of human trafficking, facts which are in a continuous enlargement and diversification. We refer to the incrimination from article 14², treated through the law no. 230/2010 [2], according to which a crime is the fact of using the services provided by article 2 point 2 [3], provided by a person about whom the beneficiary knows to be a victim of the human trafficking or of trafficking of minors and is punished by imprisonment from 6 months to 3 years or with a fine, if the fact does not represent a more serious crime.

- including some incriminations against the person into the new Criminal Code, incriminations provided by special laws. Even after adopting the new Criminal Code, the attributes of the person will also be protected through the incriminations provided by the special laws including criminal provisions. With several amendments, the lawmaker included some incriminations from the special laws, treated in title I, referring to crimes against the person. Therefore, with some amendments, the crimes of human trafficking (article 210) and trafficking of minors (article 211) are included in the new Criminal Code in reference with the prevention and fight against the human trafficking. Taking into consideration the fact that the victim of the crime is a minor, the lawmaker established a new crime, even if the minor is a person too. In our opinion, as in the case of other incriminations, the fact of the victim being a minor entails the aggravation of the crime.

We appreciate that a more consistent systematization of incriminations from the special laws was required, providing them in the special part of the Criminal Code, avoiding the double incrimination and, as a consequence, the different interpretations and non-unitary legal practice.

- decriminalization of some facts meant to prejudice the attributes of the person. One has to notice that both the effective Criminal Code and the new Criminal Code remove a distinct chapter, namely the one referring to crimes against dignity, solution which is profoundly disputable both under substantial aspect, as traditionally the facts of insult and slander have always been incriminated in the criminal code, being referred to as facts that prejudice the dignity of the person, an important social value which deserved to be protected through the criminal law (notice that in the German Criminal Code there are 3 incriminations protecting the dignity of the person) and under procedural aspect, because article 1, point 56 of Law no. 278/2006, through which articles 205, 206 and 207 of the Criminal Code were abolished, was declared non-constitutional [4], and the previously abolished texts regarding insult, slander and the proof of truth automatically entered into force again. Considering that there is a non-unitary legal practice in terms of the automatic re-entering into force of the texts mentioned by the High Court of Cassation and Justice through decision no. 8/2010, pronounced in an appeal in the interest of the law, decided that the texts from the Criminal Code regarding insult, slander and the proof of truth, although there is a decision of the Constitutional Court through which their previous abolition was declared non-constitutional, would not be effective, therefore treating the solution of removing the three
provisions from the criminal code. This solution has determined that the new lawmaker to not incriminate facts of insult and slander in the new Criminal Code either.

- **reduction of penalty limits**, in some of the crimes against the person. The crimes against the person are provided with limits of sanction, in some cases higher than in the effective criminal law, while in other cases they are more reduced. Therefore, for example, hitting or other violences are sanctioned by the new criminal code with imprisonment from 3 months to 2 years or fine, while the effective criminal law provides a sanction with imprisonment from one month to 3 month or fine; on the other hand, bodily injury is punished by the new criminal code with imprisonment from 6 months to 5 years or fine, while the effective criminal law sanctions the same crime with prison from 2 to 7 years. Similarly, in the case of crimes of beating or death-causing injuries, the regulation of the new Criminal Code (article 195) provided the punishment by imprisonment from 6 to 12 years, while the effective criminal code (article 183) provides imprisonment from 5 to 15 years. In the case of the crime of unlawful deprivation of freedom, the current criminal code (article 189 paragraph 1) provides the punishment by imprisonment from 3 to 10 years, unlike the new Criminal Code (article 205, paragraph 1) which provides the punishment by imprisonment from 2 to 7 years.

We are reserved on the necessity of these amendments, with regard to the limits of punishment, given the fact that neither the doctrine, nor the jurisprudence made proposals in this sense.

- **including some of the incriminations comprised in other titles from the effective Criminal Code**.

Therefore, if in the current Criminal Code the bad treatments applied to a minor (article 306) are part of the category of crimes which prejudice some relations concerning the social cohabitation, according to the new Criminal Code, the incrimination with the same nomen juris (article 197) is treated in title I concerning crimes against the person, the chapter referring to crimes against body integrity or health. Similarly, according to the effective Criminal Code, the crime of affray (article 322) is a part of the category of crimes which prejudice some relations concerning the social interaction, according to the new Criminal Code, the incrimination with the same nomen juris (article 198) is treated in title I concerning crimes against the person, the chapter referring to crimes against body integrity or health.

- **ensuring predictability of regulations regarding the incrimination**. Referring to the criminal regulations adopted in the matter of crimes against the person, as a principle, we appreciate that it observes the requirements for legibility and predictability.

We still express reserves regarding the clarity and predictability of some of the incriminations from the new Criminal Code, incriminations referring to the protection of the person’s fundamental attributes. For that purpose, as an example, we refer to the provisions of article 226, paragraph 4, letter d), regarding the crime with the nomen juris **Violation of private life** [5], provisions according to which the committed fact does not represent crime „if it contains facts of public interest, which have significance for the community life and whose disclosure presents public advantages higher than the prejudice produced to the injured person."

Sometimes, the lack of predictability of criminal regulations referring to the attributes of the person was also stated by the court of constitutional legal department. Therefore, through decision no. 1258 from October 08, 2009 referring to the exception of unconstitutionality of the provisions of Law no. 298/2008 regarding the storage of data generated or processed by providers of services of electronic communications intended to the public or by public networks of communication, as well as for the amendment of Law no. 506/2004 regarding the processing of personal data and the protection of private life in terms of electronic communication [6], the Constitutional Court retained that the addressees of the legal regulation represent in this case the totality of natural persons or legal entities in their capacity of users of services of electronic communication intended to the public or public networks of communications, therefore a broad sphere, including subjects of law, members of the civil society. Or, they must have a clear representation of the applicable legal regulations, so that they can adapt their conduct and anticipate the consequences that result from their non-observance. To that effect is also the jurisprudence of the European Court of Human Rights, which, for example, in the case Rotaru versus Romania, 2000, pronounced that „a regulation is «predictable» only when it is drawn-up with sufficient precision to allow any person – who can ask for specialized consultancy when necessary – to correct his/her conduct”, and in the Case Sunday Times against the United Kingdom, 1979, it ruled that “[...] the citizen must have sufficient information on the legal regulations applicable in a given case and be capable to anticipate to a reasonable extent the consequences that may result from a determined act”. In brief, law must be accessible and predictable at the same time. The Constitutional Court has the same jurisprudential practice, relevant to that effect being Decision no. 189 from March 02, 2006, published in the Official Journal of Romania, Part I, no. 307 from April 05, 2006. Furthermore, the Constitutional Court notices the same ambiguous manner of draw-up, which does not comply with the regulations of legislative technique regarding the provisions of article 20 of Law no. 298/2008, according to which "in order to prevent and counteract the threats on national security, national bodies with attributions in this field can have access to the data retained by the suppliers of services and public networks of electronic communications, in the conditions provided by the regulatory documents that regulate the activity of achieving the national security." The lawmaker does not define the meaning of "threats to national security", so that, in the absence of some precise criteria of delimitation, different actions, information or common activities,
of routine, of natural persons or legal entities can be appreciated, in an arbitrary and abusive manner, as having the nature of such threats. Law addressee can be included in the category of suspect persons, without knowing this and without the possibility to prevent, through their conduct, the consequence of enforcing the rigors of the law. At the same time, the use of the phrase "can have" induces the idea that the data referred by Law no. 298/2008 are not retained for the exclusive purpose of their use only by the national bodies with attributions specific for protecting the national security and the public order, and also by persons or entities since they "can" and do not "have" access to these data, according to the law.

However, the legal regulations, including the criminal regulations, cannot have an absolute certainty. In terms of clarity and predictability of a law text, the European Court of Human Rights also pronounced constantly, ruling that the predictability of consequences resulting from a regulatory document cannot have an absolute certainty, as, irrespective of how much it is desired, it would give birth to an excessive rigidity of the regulation (Decision from May 20, 1999, pronounced in the Case Rekvenyi against Hungary, paragraph 34). At the same time, through the Decision from May 24, 2007, pronounced in the Case Dragotoniu and Militaru-Pidhorni against Romania, paragraph 35, the European Court of Human Rights retained that the meaning of the notion of predictability greatly depends on the context of the law text, on the field it covers, as well as on the number and quality of its addressees. (Also see the Decision from March 28, 1990, pronounced in the Case Gropper Radio AG and others against Switzerland, paragraph 68). As the Constitutional Court [7] also retained, invoking the jurisprudence of the European Court of Human Rights, because of the principle of generality of laws, their contents cannot present an absolute precision. One of the standard techniques of regulation consists in applying general categories rather than exhaustive lists. Furthermore, multiple laws use, more or less, the efficiency of vague formulæ, in order to avoid an excessive rigidity and to adapt to changes of situation. The decisional position granted to courts serves exactly to eliminate doubts that might occur in terms of interpreting regulations, taking into account the evolutions of the current practice, provided that the result is coherent.

Conclusions

The lawmaker proceeded to reconsider the values protected by the regulations concerning incrimination, granting priority to the fundamental rights and freedoms of the person. To that effect, the criminal law was subjected to serious amendments, determined by the harmonization with the modern standards of protection and by ensuring relations between national regulations, European and international regulations in the field. At the same time, amendments must observe the requirements of clarity and predictability of criminal regulations, the constitutional principles and values.

References

[3] by the exploitation of a person we assume:
   a) the execution of a work or the performance of services in a forced manner or with the violation of the legal regulations regarding the conditions of work, payment, health and security;
   b) using slavery or other procedures related to the unlawful deprivation of freedom or servitude;
   c) the obligation to practice prostitution, beggary, pornographic representations in order to produce and broadcast pornographic materials or other forms of sexual exploitation;
   d) sampling organs, tissues or cells of human origin, with the violation of the legal provisions;
   e) carrying out some other such activities which violate fundamental rights and freedoms of the human beings.
[5] The prejudice of the private life, with no right, by taking, catching or recording pictures, listening with technical means or audio recording of a person situated in a house or room or a related annex or a private conversation is punished by imprisonment from one month to 6 months or fine.
Theory and practice in the indivizualization of the penalty for crimes related to drugs

Tomita M.

West University of Timisoara (ROMANIA) ceptim2005@yahoo.com

Abstract
This paper presents an overall analysis of the main problems related to drug law enforcement, in terms of the individualization of the penalty. There are presented in this context, not just some comments on the regulatory framework but also problems and solutions appeared in the judicial practice. Also, in this paper there are highlighted aspects related to the social realities that shape the drug phenomenon in the Romanian society. The complex nature of the legislation on drugs very often leads to different points of view in the interpretation and application of the law. The analysis undertaken is based on both the Criminal Code, and Law 143/2000 on combating trafficking and illicit drug use. We appreciate that a real reform of justice, does not consist only of the structural changes of the system or a legislative reform that would create the necessary framework for the judiciary power, but also a practice that achieves the community requirements.

Key words: drug trafficking and consumption, penalty, offense, Criminal Code

Introduction
The Member States and the European Commission constantly develop common drug policies, designed to give a unified, balanced and complex approach to the scourge of drugs. These policies are based on the assumption that the drug problem is a transnational phenomenon that can only be addressed in a global context and with unconditional support of all actors involved.

A comprehensive and integrated perspective on the drug phenomenon is important for managing the efforts to combat this scourge, continuing, thus, the international efforts of reforming, rebalancing and developing the global official positions and also adopting balanced and fundamented measures to reduce the drug demand and drug supply, including through actions of dismantling the international networks involved in economic and financial offenses associated to the drug phenomenon.

The National Anti-drug Strategy is the main strategic document of the national policy of drug demand and drug supply and the set up of integrated institutions and public services systems that ensure the reduction of the incidence and prevalence of drug use among the general population. The local drugs strategies are based on the specific needs identified at the level of each community, respecting at the same time the liberty of all social actors.

The formulation of local strategies concerns the participation of all social actors in order to find solutions adjusted to the local communities' needs, so that the prevention of drug traffic and use involves contact with the local community.

In the same respect, the problem of the new psychoactive substances represented, in the recent years, one of the topics of interest for the political class in Romania. The Romanian Parliament developed new legal initiatives that amended and completed the existing legislation in the drug field. The Government of Romania got involved in stopping the expansion of trading and use of the ethnobotanical plants, by a Measure Plan to counter the trade and use of new psychoactive substances/products that are health damaging, as well as by a legal initiative, validated by the Parliament under the form of Law no 194/2011, aiming to counter the operations with substances susceptible to produce psychoactive effects, others than the ones regulated by laws [1].

Actualities and Trends
Effectively countering drug-related crimes require a uniform response from institutions in the area. In this regard, lately, a particular attention was given to enhancing interinstitutional cooperation at national and international level. Thus, there was improved the operative exchange of data and information by exploiting all channels of communication between institutions actively involved in combating drug trafficking and there were set up joint working groups to be involved in the conduct of investigations and specific operations. The
contemporary process of globalization creates the need for a comprehensive strategy to combat drug trafficking, based on a strong international cooperation. Thus, the competent national structures have intensified the cooperation with Europol, cross-border cooperation by participating in international profile reunions, by entering in the composition of international working groups aimed at resolving cases of international traffic and by sharing data and information with similar bodies in other European countries. The combined efforts to combat this phenomenon are also visible in the tendencies outlined in the illicit drug market in Romania.

The legislation on drugs is complex and requires special attention in terms of the issues raised by the interpretation and application of some provisions of the law with consequences in training criminal liability of those who are guilty of violations of the provisions governing the drug laws.

The diversification of criminality for different actions, such as drug trafficking or consumption, distinctions between categories of drugs (risk or high risk) not only reflect social realities that we find in the drug phenomenon but circumscribe to the international laws that sanction illicit drug trafficking and use.

Combating drug trafficking and use was and is nationally a complex social problem, whose ways of manifestation, consequences and ways to address interest both the institutional factors of the state and the public opinion, because it is a very serious phenomenon for human health and for the socio-economic stability and proper development of the country's democratic institutions.

Obviously, lately, there have been made a number of amendments to Law no. 143/2000, implicitly in terms of measures aimed at dismantling drug use, measures that have not proved their total effectiveness, given the present proportion of drug users among the population.

**Individualization of the penalty**

The individualization of the penalty, even in the context of the existence of mitigating circumstances, retained in favor of the defendant, must take into account the degree of social danger of the offense, the offender and the circumstances that mitigate or aggravate the criminal liability in terms of Article 72 of the Criminal Code.

In the activity of individualization of the penalty, the penalty limits provided in the incriminating text are just one element, a criterion that determines the sentence, the court being required to take into account all the criteria stipulated in the mentioned article. [2]

In judicial practice, courts appreciate if that defendant indicted for drug possession, which during the criminal investigation, indicates the person from whom he bought drugs, can be eligible under Article 16 of Law 143/2000, of the special case of sentence reduction by halving the penalty limits provided by article 4 of the same law. Compared to this, it is very important the conviction that the court has, in relation to the defendant's position, namely whether he can be considered only a consumer or not.

Buying drugs both for own consumption, without right, and to provide people with whom one consumes, does not represent the offense provided by article 4 of the law, but the offense under Article 2, committed by providing psychotropic substances.

In certain ways of committing (possession, cultivation, experimentation, organization), the offenses under Articles 2, 4, 5 of the law, have the character of continuing offenses, thus existing a moment of exhaustion, namely the cessation of tort.

The offenses of this law are likely to take the continued form, if committed several times at different times and in the same criminal resolution.

The offenses provided by the Law. 143/2000, are committed in many normative ways (cultivation, production, manufacture, extraction, preparation, processing, circulation, import, export, tolerance, prescription, administration, promoting consumption, organization, management, financing), and each of these ways may have different ways determined by the actual circumstances in which the offense was committed.

The offense under Article 8 of the Law (providing, for use, toxic chemical inhalants to a minor) is committed with direct intent qualified by purpose, and for the aggravating referred to in Article 12 (offenses referred to in Articles 2, 6-8 and 11 and having as a consequence the death of the victim), the form of guilt required by the incrimination text is the praeterintention.

Important for the existence of these offenses is that the person who traffics these substances knows the fact that they are substances under national control.

Article 16 has the legal nature of legal mitigating circumstances of special nature, but its application has no effect on the sentence provided by the law, that shows the specific limits for each offense and is determined by the incrimination text without being considered the changes that may occur by applying by the court the mitigating causes, conditions and circumstances.

This is obvious, because, otherwise it would mean that the court has the jurisdiction to intervene in the legal individualization of the punishment and not just in the judiciary one, with respecting the limits of the punishment established by the law text.
Regarding the institution of suspension of the punishment, as a means of individualization of the penalty, the legislature has set as a condition for granting it, that the penalty provided by the law, in the case of intentional offenses, not to exceed 15 years.

The new Criminal Code, unlike the one still in force, contains several ways of judicial individualization of sentences execution, with a number of consequences in terms of the regime of custodial sentences execution.

[4]

Conclusions

The justice reform should be conducted based on qualitative rather than quantitative criteria, aiming especially, increasing the efficiency of justice, the speed processes and quality of the solutions. This can be achieved not only by modernizing the regulatory framework and providing the necessary resources, but also by increasing the professional competence and ensuring the continuous training of magistrates. As shown, the uneven practices, the numerous contradictory solutions can strongly impair the confidence in justice. This harmonization should be done not only internally, by eliminating divergences, but also in the exterior, in relation to the practice of the European Courts in Luxembourg and Strasbourg. [3] Clearly, the reform of the judiciary system and of the criminal law has consequences on the liability and the sanctioning system.

Without exceeding the analysis that we proposed, we believe that in the matter of drugs, a consistent unitary application of the regulatory framework can be an effective measure within the penal policies, including in terms of preventing this devastating scourge.

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Illegal creation of human embryos and cloning

Tudurachi E.

1 “Al.I.Cuza” University of Iasi, Faculty of Law, (ROMANIA) elena.tudurachi@gmail.com

Abstract

Cloning is a much-discussed issue and its ethical, legal, and social implications have not been fully grasped yet. There are several ways of cloning, but the most developed one is to transplant the nucleus from an adult cell, reason for which multiple clones of an adult may be created. This technique does function, but it is completely forbidden for humans. If there has been the possibility of cloning plants and animals, this does not mean that it should also be applied to humans (this process was possible by cloning a viable human embryo whose evolution was stopped at the stage of gastrula). Cloning can reduce the genetic variability; the production of clones may increase the risk of creating a population to a large extent identical. This population would be prone to the same diseases and contracting such a disease would mean the destruction of most of the population. This theory is less likely to happen, but many issues may arise, with the same devastating effects caused by the lack of genetic diversity.

I believe that, in the contemporary period, all States have to regulate the potential confusions related to the social and legal tasks of the responsibilities resulted from cloning. An article of the “Washington Post” (Published in November 2001.) examined the fears that the development of the technologies related to “genetic improvement” would create a “market of preferred physical features”.

Keywords: cloning, human embryo, offence, regulation.

Introduction

The Parliament Assemble of the Council of Europe has already issued a statement on the relation between genetic engineering and the human rights (See the Recommendation of the Council of Europe no. 934/1982.). On one hand, it is stated that the rights to life and to human dignity protected by Articles 2 and 3 of the European Convention on Human Rights imply the right to inherit a genetic pattern which has not been artificially changed. On the other hand, there is a statement on the fact that the explicit recognition of this right must not impede the development of the therapeutic applications of genetic engineering, which holds great promise for the treatment and eradication of certain diseases which are genetically transmitted. This is why gene therapy must only be used with the free and informed consent of the person concerned. The boundaries of legitimate, therapeutic application of genetic engineering techniques must be determined by independent specialized commissions, before being effectively operative, and they are subjected to practical re-appraisal. Besides the invitation addressed to the Member States to set a regulatory framework that observes the ethical criteria set, there are also recommendations for the Committee of Ministers to draw up a European Agreement on what constitutes legitimate application to human beings (including future generations) of the techniques of genetic engineering, mainly for the respect of human rights. Furthermore, this agreement also has to comprise the genetic engineering measures, to ensure that the human being will not be influenced (directly or indirectly), even accidentally.

The Universal Declaration on the Human Genome defines it as the heritage of humanity through the UNESCO Declaration of 1997, which 186 States attended. The declaration set the limits of the interventions on the genetic heritage of the person, forced the international community to protect the genome, to respect the dignity of the individuals regardless of their genetic characteristics, and to reject any genetic determinism.

Art. 1 of the Universal Declaration on the Human Genome highlights the fundamental unity of all members of the human family in the recognition of their dignity and diversity, by declaring the human genome as the heritage of humanity, which means that the research on human genome involves the responsibility of the entire humanity. This dignity (art. 2) makes it imperative not to reduce the individual to his genetic characteristic and to respect his uniqueness and diversity. Hence, genetic determinism is rejected, and the knowledge on the human genome will not be interpreted against the dignity of the individual as free and responsible being, regardless of the natural and social environment concerning the development of the individual’s genetic potential. Art. 4 states that the human genome in its natural state shall not give rise to financial gains. All research in the field must be grounded on the Universal Declaration of Human Rights, meaning on the right to...
individual freedom (which leads to the free consent), on the right to respect for the private life (which leads to the imperative of confidentiality), on the principles of interhuman and interstate solidarity (which leads to the right of all individuals to benefit from the scientific progress in the field). Hence, the research on human genome is admitted only if it brings a direct benefit for the health of the individual, as the respect for human (individual) rights prevails over the research needs. In this sense, the declaration states again that the practices which are contrary to human dignity, such as reproductive cloning of human beings, shall not be permitted; under these circumstances, the freedom of research, though part of the freedom of thought, will only seek to improve the health of individuals and of humankind, implicitly. A multidisciplinary ethics committee of the State will encourage the research focused on identifying, treating, and preventing genetic diseases and it will foster the dissemination of knowledge as an element of the general-humanitarian culture. The implications of the research on human genome are of interest for human society, reason for which the application of this declaration will be fostered. In the same sense, the International Bioethics Committee of UNESCO will contribute to the dissemination of these principles, and this declaration of ethical principles can represent the grounds for a treaty of imperative legal principles in the field.

The above-outlined aspects are only some of the arguments that prove – beyond any doubt – the direct relation between human rights and genetic engineering, a relation which should always be underlined and studied.

**Illegal creation of human embryos and cloning**

In regard to the offence, it was stated in art. 195 par. 1 of the Law no. 301/2004 (Criminal Code) and it concerned the creation of human embryos in other purposes than procreation.

According to the provisions of par. 2 of art. 195 in the New Criminal Code, it constitutes an offence the creation of a human being genetically identical to another human being either living or dead, by cloning.

The special legal object would have been represented by the social relations whose existence and normal progress regard the protection of the human being, both as individual and as pertaining to the human species, against the acts which could endanger his dignity through a misuse of biology and medicine. The material object is represented by the human genetic material taken from the source organism.

The active subject may be any physical or legal person who meets the general conditions of criminal responsibility. Criminal participation is possible under all its forms (co-authorship, instigation, and complicity), as the passive subject is the human collective, threatened by the creation of human embryos in other purposes than procreation, or by the creation of a human being genetically identical to another human being either living or dead, by cloning.

### 1.1 Constitutive content.

#### 1.1.1 Objective side.

The material element, in case of paragraph 1, is represented by the action of creating human embryos in other purposes than procreation, while in paragraph 2 by the action of creating a human being genetically identical to another human being either living or dead, by cloning. The human embryo is the product of conception aged through the eighth week of development. Procreation represents the sexual activity of conception and gestation. Human cloning concerns reproductive cloning and therapeutic cloning. According to the definitions used in genetics, reproductive cloning is the process of taking genetic material from the nucleus of an egg cell from the surrogate mother and replacing it with the DNA taken and isolated from a body cell of the individual to be cloned. Therapeutic cloning is related to the production on undifferentiated stem cells, which have the ability to differentiate along multiple pathways, which include tissue and organ cells. Therapeutic cloning refers to the use of those cells in therapeutic purposes. Thus, the difference between the two types of cloning is made by the destination of the cloned embryos [1]. Though the New Criminal Code does not make the difference between reproductive and therapeutic cloning, the formulation of the text does indicate that only reproductive cloning is considered an offence.

The immediate consequence is the creation of a human being genetically identical to another human being either living or dead, by cloning.

There is a causality relation between the action of the wrongdoer and the immediate consequence.

#### 1.1.2 The subjective side.

The blame corresponding to this offence is direct intention.

FORMS, WAYS, SANCTIONS.

Forms.

Preparation acts, though possible, are not sanctioned. The attempt is sanctioned (art. 196 Crim. code). The offence takes place when the immediate consequence occurs.
Ways.

The offence includes two normative ways: the illegal creation of human embryos and the creation of a human being genetically identical to another human being either living or dead, by cloning. There are various ways of committing the offence which correspond to these normative ways.

Sanctions.

The punishment for this offence is strict imprisonment, from 3 to 10 years, and the prohibition of certain rights. The legal person is sanctioned with a fee from 10 million to 5 billion lei (See art. 80 par. 3 Crim. code. (Law no. 301/2004)

These offences should also be incriminated by the Romanian Criminal Code as, presently, only the Code of Medical Deontology (Decision no. 3/2005 on adopting the Status and Code of Medical Deontology of the College of Physicians in Romania, Annex no. 2 (Code of Medical Deontology), (Of.G. no. 418 of 18 May 2005). states, in art. 112, “Human cloning experiments are prohibited”. The prohibition of human cloning and of other dangerous offences in the field of genetic engineering also represents an obligation of Romania, in conformity with the Convention of Oviedo, in 1997, on human rights and biomedicine, as well as the Additional Protocol regarding the Prohibition of Human Cloning, in 1998, ratified through the Law no. 17/2001. (Adopted at Oviedo on 4 April 1997, it came into effect on 1st December 1999, being signed and ratified by 19 States. Romania signed the Convention on 4 April 1997 and ratified it through the Law no. 17/2001 published in the “Official Gazette of Romania” no. 103 of 28 February 2001.

The first Additional Protocol to the Convention for the protection of human rights and dignity of the human being with regard to the application of biology and medicine, on the prohibition of cloning human beings was adopted on 12 January 1998. It came into effect on 1st March 2001, so far ratified by 15 States, among which Romania. The second Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin was signed on 24 January 2002, to enter into effect on 1st May 2006, was ratified by 5 States. The third Additional Protocol on Biomedical Research was signed on 25 January 2005. The Romanian Constitution of 1991, revised in 2003, mentions only a general right to life and physical and mental integrity, without giving any details on the specifics of bioethics principles.)

In regard to the human embryo, according to biologic science a new life starts from the fertilization. From this perspective, a right of life of the embryo can be stated, but in legal terms, this right is relative, considering the disposition right on this subject, which is stipulated in certain legislations, by not sanctioning the abortion up to a certain age of the foetus. In the specialized literature, there have been discussions on the relation between the recognition of the right to terminate the pregnancy and the protection of the foetus[2]. It is stated that “the recognition of the foetus’ right to life represents a compromise between the respect for the life to be born and the right to abortion, as an expression of the interests of the pregnant woman; it does seem that the latter prevail” [2]. A 2003 Report of working party regarding the protection of human embryo and foetus – constituted within The Steering Committee on Bioethics of the Council of Europe – states that there is a broad consensus on the need to protect the embryo in vitro, but on matters related to defining its status, a considerable diversity of opinion exists [3]

Conclusions

In Romania, the issue of the human embryo has not been approached in any way and it is currently difficult to determine when the right to life of a person really begins. Article 202 of the New Criminal Code shows that the passive subject of the offence is a foetus, during the pregnancy or about to be born. The moment of the birth (protected by the accusation of murder for its violation) is defined as the moment when the foetus is completely separated from the mother’s umbilical cord, meaning the moment when the product of conception is no longer a foetus, but a newborn. Hence, it is considered that, up to that moment, the foetus does not seem to have a right to life. However, art. 176 par. (1) let. e) Crim. code incriminates as first-degree murder the murder whose passive subject is the pregnant woman, regardless of the pregnancy stage, as the doctrine shows that there is a double violation of the human life. The New Criminal Code pays more attention to the subject my introducing chapter IV – Aggressions against the foetus, which represents a progress from the current regulations [4].

The precedent was already set by transferring the offences of the Special Law 678/2001 on the prevention and suppression of human trafficking to the New Criminal Code, by the corresponding offences in Title I, Chapter VII – Trafficking and exploitation of vulnerable persons. We believe that, following the same procedure, the provisions of the Law no. 39/2003 on the prevention and suppression of organized crime, as well as of art. 2 par. (1), point b) 19 – which states as aggravated offence the traffic of human tissues or organs – should have been transferred. The same goes for the provisions of the Law no. 17/2001 on the Ratification of the convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human rights and Biomedicine, signed at Oviedo on the 4th of April 1997. In the same sense, it is worth mentioning the Additional Protocol to the Convention for the Protection of
Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings, signed in Paris, on the 12th of January 1998. Hence, the Member-States of the Council of Europe are aware of the rapid development of biology and medicine, but also of the need to respect the human being, both as individual and as pertaining to the human species; the Member-States also acknowledge the importance of ensuring the dignity of human beings. This is the only provision meant to annihilate a network of such traffickers; these persons are extremely dangerous and they should represent a focus for the legislator, considering the contemporary reality.

References

Aspects regarding the economic analysis of crime under the economic crisis

Udroiu M.1, Predescu O.2

1 Judge Ph.D., the Bucharest Court, 2nd Criminal Section (ROMANIA)
2 Professor Ph.D., "George Barițiu" University, Brașov (ROMANIA)
mihai_udroiu@yahoo.com, opredescu@clicknet.ro

Abstract

The authors address the analysis of the crime from a new perspective, using microeconomic concepts and principles to explain some crime phenomenon-related aspects. Economic analysis of crime falls within the broader economic analysis of the law, which has had a great development in the last fifty years in the old-established Anglo-Saxon countries. The economic analyses of crime interferences with criminology are marked out. However, a number of prerequisites/basics that a person is considering in the strategic analysis performed upon engaging itself in illegal activities are analyzed from an economic perspective.

Keywords: crime, criminality, criminology, punishment, offence, statistics,

Introductory issues related to criminology and economic approaches in the analysis of crime

Crime and criminality concepts have autonomous meanings in the language of criminologists, respectively in that of economists. Thus, for present purposes, crime shall mean the deed provided for in the indictment rule. Not only criminal offences undermining human life are considered, but also other offences against other social values, for example, property, bodily integrity, proper conduct of employment relationships, etc. Criminality shall mean all criminal offences committed in a defined geographic area (e.g., state, group of states) within a certain period.

The study of Criminality was primarily the subject of concern in the field of criminology (the science of crime phenomenon and of the ways of preventing it [1]), and later in the field of economic analysis.

Criminal law and criminology traditional theories examine criminal behaviour by providing causal explanations (the Italian positivism, psycho-biological theories, psychological and moral theories, psychosocial theories), or non-causal explanations (classical utilitarianism, dynamic theories). They propose definitions of crime, current explanations for deviant behaviour and address the issues of criminal policy effects on criminality, etc.

The link between criminology and economics has been thoroughly analyzed in order to "get criminology away from the scientific insulation it was imbedded in, in order to unite the two areas so that to form a whole". [2].

Criminality economic analysis is focused on the behaviour of a reasonable person confronted with the option to engage in any lawful activity or to adopt a deviant behaviour. The option is always the result of a subjective reflection. Intentional tort plays thus an important role in the economic analysis structure, having the following functions: identifying the type of guilt, estimating the probability of being caught and convicted, determining the extent to which criminal sanctions will be effective deviant behaviour means of control, justified in cost terms. [3].

Criminal behaviour is results-oriented, having its own reason that takes into account the opportunities offered to the offender in the specific temporal or spatial context, and the third parties conduct. There is thus a strategic analysis most criminals use to choose the most appropriate means for achieving the objective pursued [4].

In this context, we will analyze how the legislator determines the penalties to be imposed for an offence concerning the relationship between the seriousness of the offence and the severity of the criminal sanction and the way a rational person (homo economicus) evaluates the opportunities to commit an offence, or the relationship between the seriousness of the offence and the criminal sanction expected to be received for committing a crime.
The analysis we plan to accomplish aims generally at drafting certain guidelines in this area considering the current lack of statistical resources nationwide. Thus, the economical crisis effects cause a reflex, for example, in the field of domestic violence, theft of certain categories of goods (mobile phones, motorcycles), insurance fraud, or in connection with obtaining bank loans, which can not be fully apprehended in a scientific manner in the absence of statistical data from the authorities. All these should develop a careful concern in the field of criminality analysis in general, and mutations thereof caused by the economic crisis.

**Legal individualization of sentencing**

Legislator should exercise great maturity in the cost - benefit analysis that must be performed both when indicting for certain offences and determining criminal sanctions. In this last regard, regulating effective sanctions requires the legal individualization process’s reference to real criminality [all criminal offences committed in a defined geographic area within a given period (mainly due to the peculiarities of the economic crisis), whether the perpetrators were found or not] and not to apparent criminality (all criminal offences for which legal authorities were notified), or to the legal one (all criminal offences for which final judgments of conviction were delivered).

The author considers in abstracto the seriousness of the offence, establishing the general or special limits of punishment or the categories of criminal sanctions that can be imposed. By setting a relationship between the severity of the criminal offence and the severity of punishment, we find that the penalties become increasingly severe as the seriousness of the offence increases.

Increase in the penalties provided at some point in the law must be the consequence of finding inefficiencies of current punishments in terms of reduction in crime phenomenon.

For example, the activity report of the Prosecutor's Office attached to the High Court of Cassation and Justice (www.mpublic.ro) revealed that 15,777 cases for tax evasion offences were investigated in 2012, representing an average increase of 29.4% as compared to 2007, of which 1,313 ended in indictments, representing an average increase of 54.4%, with 1,620 defendants prosecuted, representing an average increase of 53.3% over 2007.

As a consequence of this situation, Law no. 50/2013 has increased penalties for tax evasion which caused significant damage (greater than 100,000 Euros or, as the case may be, exceeding 500,000 Euros, both in the local currency equivalent).

It must however be noted that the optimal tool for effectively combating crime in times of economic crisis is not an exaggerated increase in punishments, but a sanctioning system proportional to the seriousness of the offences committed, supported by the judicial bodies’ prompt application of such punishments.

**Judicial individualization of criminal sanctions**

Judicial individualization of criminal sanctions, as part of law enforcement, is the responsibility of the judge and involves concrete determination and actual individualization of criminal sanctions that can be imposed within a particular case, as a coercion response of the State against those who have committed criminal offences.

According to art. 52 par. (1) of the Criminal Code, punishment’s immediate purpose is a preventive one, thus achieving both a general prevention (warning the society about the consequences that may be incurred as a result of committing a crime), and a special prevention for offender’s coercion and re-education [5].

Punishment functions, i.e. the means by which it undertakes preventative purposes (general and special), concern the way punishment should be designed so to determine the recipients of the criminal provision, collectively, as well as the individual who committed the tort, the concrete unlawful deed to meet the purposes of criminal law which are to no longer commit offences and to keep intact the fundamental social values, hence the prerequisites for the existence of society [6].

Both for the offender of full age and for the offender of minor age (when the Court considers necessary the infliction of a sentence), individualization of sanctions must observe the principle of proportionality of punishment with the nature and the seriousness of the offence, taking into account the fundamental rights and freedoms or other protected social values the offence has caused, but mainly the economic and social context in which the offence has been committed. One must also consider the offender’s degree of participation in the criminal activity.

Thus, the judge, during the punishment individualization process must consider both the criteria set out in art. 72 of the Criminal Code and the need to observe the principle of proportionality. Thus, early in the last century, C. Proal showed that “severe punishment, commensurate with produced moral evil and special evil, cease to be legitimate if one could ensure the compliance with the law using less rigorous means. A really very mild punishment shall be also illegal if it can be replaced by another sanction. That much is socially important the punishment to be not only fair, but necessary, indispensable. It is also true that social justice must take into
account social danger resulting from the criminal offence when determining the punishment, as its mission is to protect the society” [7].

Economic analysis of criminal offences committed during the economic crisis

The effects of economic crisis are reflected primarily in the decrease in population’s incomes during such a period, the increase in unemployment, and the temptation of those who do not find lawful maintenance options to engage in illegal activities for immediately solving their acute financial problem.

The Activity Report 2012 of the Prosecutor Office attached to the High Court of Cassation and Justice revealed an increase in the number of people prosecuted for crimes against property committed during the crisis [18,476 (in 2007), 16,447 (in 2008), 17,245 (in 2009), 20,030 (in 2010), 22,454 (in 2011), and 22,157 (2012)].

Looking at this situation concerning the fraudulent criminal component (offence of deception), an increase in the number of persons prosecuted is also noted [1,635 (in 2007), 1,755 (in 2008), 1,605 (in 2009), 2,155 (in 2010), 2,070 (in 2011), and 2,479 (2012)].

From the economic analysis point of view [8] the criminal sanction which the person, who decides to commit an offence whilst being determined by the particular economic crisis, expects to receive if convicted is important both with reference to the limits of punishment prescribed by law (legal individualization) and with reference to the sentences actually imposed by judges for certain offences (judicial individualization).

To determine the criminal sanction the person expects to receive when committing a criminal offence we will consider the following four assumptions: (1) $G$ representing the seriousness of the offence and $V$ representing the gross income received by a person as a result of committing an offence, thus having the function: $V = V(G)$; (2) $P$ representing the criminal sanction that may be imposed for a $G$-serious criminal offence, thus having the function: $P = P(G)$; (3) $Pb$ representing the probability [9] that a person be found, arrested or convicted for a $G$-serious criminal offence, thus having the function: $Pb = Pb(G)$; (4) $C$ representing the criminal sanction celerity (We consider the subjective celerity, i.e. the awareness of person’s who decides to commit a criminal offense of the fact that criminal justice is carried out expeditiously, thereby leading to the prompt infliction of criminal sanctions for committing an offense.) for a $G$-serious criminal offence, thus having the function: $C = C(G)$.

Within the strategic analysis an individual carries out when engaging in unlawful activities, the criminal sanction he/she expects to receive for committing an offence is equal to: $P(G) x Pb(G) x C(G)$.

The offenders calculate the net revenues they expect to get from committing a crime, which are equal to the earnings minus the criminal sanction that may be inflicted multiplied by the probability of being caught and convicted, and with the criminal sanction celerity. Thus, an offender will decide to commit the offence as long as the earnings that can be obtained are greater than the criminal sanction that might be inflicted.

Since the person who decides to commit a criminal offence of a certain seriousness seeks to maximize his/her net income obtained as a result of involvement in illegal activity, he/she will always have in mind the difference between the gross income $V(G)$ and criminal sanction he/she expects to get for committing an offence, namely: $\max V(G) - Pb(G) x C(G) x P(G)$ [8].

The option for maximizing net income is the one that ensures equality between marginal revenue and marginal cost (In the production supply economic theory, the profit-maximizing output is the level that ensures equality between marginal revenue and marginal cost.,) which means that $V^m = Pb^m C + Pb C^m P$ where: $V^m$ is the marginal value of $V$ and reflects changes in the revenue that the offender expects to obtain as a result of changes in the seriousness of the offence, and $Pb^m$, $C^m$ and $P^m$ are the marginal values of $Pb(G)$, $C(G)$ and $P(G)$ functions, reflecting the changes in the probability of being discovered, arrested or convicted, changes in the criminal sanction celerity and in the severity thereof when the offence seriousness changes [8].

Thus, the marginal punishment the offender expects to get for an additional offence unit (the marginal cost of conviction that the offender expects to bear) has three components: i) changes in the probability of being found, arrested or convicted (due to the novelty of the illegal activity carried out, adapted to the urgent needs determined by the economic crisis) multiplied by the severity of the criminal sanction (including relying on social pleas that led to the commission of the offence) and the criminal sanction’s celerity degree (in the context of offences’ multiplication or diversification); ii) changes in the severity of the criminal sanction multiplied by the degree of probability to be found, arrested or punished for the criminal offence and the criminal sanction’s celerity degree, and iii) changes in the criminal sanction’s celerity degree multiplied by the degree of probability to be found, arrested or convicted and by the criminal sanction’s level.

Existence of clear and predictable legislation, an honest and impartial judicial body and more rigorous application of the criminal law may increase the marginal probability of offenders punishment - $Pb^m$; inflicting restrictive conditions for the conditional suspension or for execution of imprisonment suspension under supervision, increasing the special minimum thereof, increasing the efficiency of punishments’ enforcement system are to increase the seriousness of the criminal sanction’s marginal value ($P$); creating simple, flexible
and predictable procedures increases the the celerity of solving criminal cases and, consequently, of the criminal sanctions infliction ($C^m$).

Increase in $Ph^m$, $C^m$ and $P^m$ marginal values may determine, accordingly, the decrease in criminal offences committed by a rational offender. Infliction of certain penalties within a lawsuit carried out expeditiously can decrease the number of crimes committed as a result of significant reduction of benefits arising from the criminal activity.

Legal literature [8] showed that the assertion according to which criminal offences’ seriousness and frequency decreases when the punishment the offender can expect to receive increases, corresponds in economic language to the statement: the requested quantity is a decreasing function of price. This implies that a price decrease causes each current consumer to buy a larger quantity of goods and the negative slope of the curve means that certain consumers (Potential consumers begin to purchase goods that otherwise would have not bought.) buy goods that otherwise would have not bought.

Transposing the laws of demand in the area of the economic analysis of crime, we can say that an increase in $Ph^m$, $C^m$ and $P^m$ or a decrease in $V^m$ will lead to fewer criminal offences.

Elasticity of demand to commit crimes will reflect the sensitivity of demand (whether people commit fewer or more offences) as against price changes (for example, when the punishment the offender can expect to receive increases, or when the chances of being caught or convicted decrease).

If demand is elastic, the authorities may achieve crime reduction by modestly increasing the prospect of conviction of those who commit crimes, or increasing the criminal trial celerity. Where demand is inelastic, one should consider other variables as well, such as unemployment rate, drug addiction, schooling, family, etc. [8]

References

Plurality of actors and organized crime offenders

Ungureanu M.E.

Romania Monica.ungureanu@scj.ro

Abstract

An issue that raises more discussion in the modern doctrine is the one regarding plurality of actors and participants role in organized crime, a phenomenon that has grown greatly in recent years.

Criminal doctrine argued the need to distinguish between the position of leaders who hadn’t taken part directly in committing specific acts in implementing the program of association and the position of criminal association members, concluding that co-autorship concept is better suited than other forms of authorship and participation to certain ways of committing the crime, in which the "brain" or the primary responsible actor is not present at the actual committing of the crime, but in close connection with it, controlling it and determining its accomplishment. In these cases, the basis of co-autorship is called functional prevalence over the offense, disregarding the requisite for co-perpetrate, the main argument being that not only the intervention is important in accomplishing the crime, but also control or management, even though the leader doesn’t take part in the actual committing(in narrow sense) of the crime.

Keywords: plurality, participation, co-authorship, organized crime, perpetrator

Plurality of actors is constituted when the criminal law incriminates the agreement by two or more persons to form a group in order to commit a criminal act (e.g. conspiracy, association to commit crimes) [1]. Such an offence is complete upon formation of the unlawful agreement and incriminates the simple fact that two or more individuals agreed or/and associated to commit a criminal act [2]. Therefore, the crime exists, as of the arrangement among the individuals, irrespective of committing of criminal acts the group have associated for or have agreed upon. The crime exist because the fraudulent agreement among those persons [3].

Related to the nature of this agreement, some authors consider it is less powerfull than a preparation of the criminal act itself, as the conspiracy agreement rather belongs to the conceiving phase of the substantive crime and because it is more of a planning, than a preparation of the means to commit it. This agreement proves an obvious tendency to commit a criminal act or a series of criminal acts, so that, incriminating such an agreement, as an independent crime, becomes legitimate in criminal law.

The reason of its distinct criminalization in Criminal Code, emerges from simple assembly of some persons for criminal cooperation, that uncontested represents by itself a dangerous manifestation to the peace and public safety and for maintaining legal order, against which one must react in their embryonic form. [4]

These criminal groups are a very serious threat because of the way they are organized: hierarchical structure (leaders and their subordinates), division of labor (each has certain tasks), program activity (agreeing by detail, how they will work), making rescue plans, etc. [5]

According to the law, a plurality of actors emerges, if these requisite elements are met:: a group of persons, a well organized assembly, a lasting existence of the group and a criminal program (to be assembled by the members of the group).

An issue that raises more discussion in the modern doctrine is the one regarding plurality of actors and participants role in organized crime, a phenomenon that has grown greatly in recent years. In relation to the organization and business conduct of these criminal associations, the question raised is whether the bosses, organizers, leaders could be held criminally liable, automatically, for acts committed by members of the association, even if those people (having a leading role in the association) did not take part, directly, in committing such acts. Criminal doctrine advocated the need to distinguish between their position in management of the group in order to commit crimes and their position held in planning and organizing the group. In the first case, members with leading role in the group will be held liable, like any member thereof, for the respective crime (for instance, the plot or the association to commit crimes), if the association in order to commit crimes is established. In the latter case, the doctrine has been argued that people with leadership could not be held accountable, automatically, for action plan implementation association members, but only if they met the minimum conditions of criminal responsibility in relation to each of offenses committed in making program [6]. This involves identifying specific activities of management, leadership, organizing these activities by the persons mentioned. They could not answer, for example, for crimes committed by subordinates, even if those facts as a
whole, entered in the general plan of action of the association, if they were committed to the initiative of isolated members without the knowledge and approval of management.

A second problem posed by organized crime in the field of conspiracy requires the criminal liability of persons who are not members of the association, but performed actions falling within its objectives (such as some professionals (doctors, lawyers, accountants) and which serves to the leader of association or politics or the authorities or economic enterprises, banks).

According to some authors, it would be difficult to distinguish between the contributions of internal and external participants in a joint criminal actions, starting from the idea that usually the people who contribute systematically to the actions of such an association, become gradually, members and integrates as internal members of the association. This does not exclude, at least theoretically, the possibility of illegal contributions (random, occasional) of persons outside the association, in which case usually will work occasional participation provisions and not those of plurality necessary [7].

The issue of criminal liability of leaders arises often in the French doctrine and regarding the directors of companies [8]. because they are the most concerned, creating great controversy in doctrine. Some authors argue that it is a hypothesis of vicarious criminal liability, instead other authors, the majority sees only a legitimate application, though subtle of rules of criminal liability. Criminal liability in such cases seems in fact that would be a vicarious liability because it allows to declare the leader criminal responsible for material acts committed by another person, in case of an agent. Doctrine qualifies the leader as the indirect or mediated author, his liability approaching the intellectual author of the crime. French legislature goes so far as to predict an indictment against intellectual authority distinct from the one provided for the material author, in order to punish more severely the latter.

Art.222-34 Penal Code punishes with life imprisonment the leader or organizer of a group covering drug trafficking, while the person who are trafficking with imprisonment within the limits established by art.222-35 and 222-36. Similarly, art.412-4 - 412-6 insurrectionary movement participants distinguish between those who are leaders or organizers. Similarly, organizers are punished more severely battle group or groups than ordinary members.

Based on the concept that the author can cover different realities, the French legislature incriminated certain acts, so that their author may not have himself committed acts materials.

The same difficulties in determining the author of the crime, in matters of the organized crime and corporate crime, are raised in Spanish literature also [9]. The conceptual difference between many forms of authorship and many forms of participation is determined much harder in crimes committed not by many individuals, each with distinct grade of contribution or responsibility, but by the same individuals integrated in groups or organizations that built a common plan to fulfill the unlawful act. In these cases, not only the impeachment for group membership or group leading of the individuals is imposed, but also the impeachment of those individuals for the crime, even if they were’t taking part directly at the main criminal act (committed by other members of the group), but planned and assumed decision and leadership of the criminal act (this is why the impeachment of some criminal associations members for the responsibility of their deeds is difficult to accomplish in cases of terrorism, drugs smuggling, and money laundry). The same issues are raised in large economic crime and financial fraud within corporations or criminal organizations.

In order to solve this dilemma, related to the crimes against humanity and the genocides committed by high officials with decisions roles in German government between 1933 and 1945, Claus Roxin stood behind a theory in 1963, which stated that one could determine someone’s mediated authorship, even if that “someone” had not directly taken part in committing those serious crimes, but had led and controlled their completion, using a powerful state apparatus, which worked like perfect machine, in which the material executors took orders from the intermediaries who organized and controlled the fulfillment of the orders [10].

The same author thought three elements should be identified in order to determine the mediated author of the crime: domination from the mediated authors over the others, the replaceability of the material executors and a power apparatus which acts outside the law.

Against this theory some objections were formulated stating that mediated authorship, accredited by the Spanish Criminal Code in art. 28, is not applicable if the material executor is fully responsible of his actions, but only if the material executor is not being attributable or doesn’t even perform the typical or anti-judicial action, meaning that he is just an irresponsible instrument in the hands of the real author of the crime.

Another type of debatable authorship is that concerning criminal organizations, like terrorism against the state, mafia organizations, secret organizations or other forms of criminality. In these cases, co-authorship fits better than other forms of authorship and participation to certain forms of accomplishing the unlawful act, cases in which the “brain” of the operation or the principal in not present at the actual committing of the act, but in closed connection to it, controlling it and deciding its achievement. The validations of co-offending, the Spanish doctrine (Roxin’s theory adept) requisite for co-authorship, is only the consequence of a formal-objective theory which had been proved to be generally insufficient, including the way it expained the authorship concept; therewith, it doesn't suffice in explaining the concept of co-authorship, at least in some areas of

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criminality in which the decision conduct and planning related with the committing of the unlawful act are the same or even more important than the committing of the act itself. For the previous arguments, co-authorship comprises not only the executive co-authorship, but also other forms of collectively doing the crime by one or more co-authors, most of the time the most important ones, that are not present to the actual commission of the unlawful act. The co-authorship basis is the functional prevalence over the offense, in these cases; not just the intervention in accomplishing the unlawful act is relevant, but also the leading and controlling the act, even if it doesn’t intervene in commission itself (considered in the narrow way). Only this way, not just the “boss” and other decision leaders of the gang, that have planned and organized the crime act, will be qualified as co-authors, but also the other members of the same gang who, without taking part in commission of the actual crime, helped, for instance, with transport or surveillance. Similar issues are raised in cases of terrorist attacks, where, on the basis of functional prevalence over offense, the individual interventions that don’t occur precisely in the executive phase of the crime, could and must be qualified as co-authorship, with no shadow of a doubt, as having a global value and more adapted to reality; these interventions should not be considered as simple forms of participation or conspiracy.

In corporate area, the criminal operations are done based on a complex organizational chart, comprising in horizontally division of positions and vertically, in hierarchical subordination. For this reason, it is obvious that not only the lowest level of the criminal organization network should be held accountable as being the author of the crime -in the commission stage, but also the non-perpetration conducts being as relevant or more. The decisions levels (highest leves) are more relevant than the perpetration ones (lowest levels) in this type of enviroment.

The dogmatic issue consists in finding the material criteria that leads in assigning the author, the mediated author or the co-author to those who made the decision of committing the crime, even they didn’t take part in the its commission. For this reason, one sould not consider only the structure and operating mode of a criminal organization, but also the nature of the crime [11].

Given that there are numerous and complex situations, crimes being accomplished by many different actions, during a longer or shorter time, in numerous places, by one or more persons, each having a prior determined role in the crime act, being part of a given strategy or politics by those who have control and decision over the organization, it makes delimiting the authorship and charging someone with it have some particularities. Thereby, for instance, the theory of mediated author, using a power apparaus, is not easy to apply here. The main issue in this matter is the replaceability of ordinary executors, as the executor of concrete actions is not always an anonymus piece who can be arbitrarily replaced in the organization, but a person that possess special skills without which the crime would not be accomplished. That kind of executor is harder to be replaced (for instance, an accounting specialist or fiscal advisor, a stock exchange broker or a banking officer specialized in offshore transactions). In most cases, even if he has special knowledge and abilities, he is just an instrument acting with no actual “criminal intentions”, but limiting himself to a given conduct, following the given instructions, and not to gain a personal profit out of his actions and without having the comprehension of taking part at a criminal act. Anyway, there is a co-authorship of those who decide, organize and plan the committing of the unlawful act, but they are not necessarily co-perpetrators. The co-perpetration concept is even more arguable in corporate crime. At the same time, one can argue, as far as those who perform the concrete actions of the crime are simple irresponsible tools, that there is a mediated co-authorship, combining the co-authorship criteria with mediated authorship one, in the narrow sense.

References

[1] Vintilă Dongoroz, Drept penal, Tratat, București, 1939, p384
[2] The 1864 Romanian Criminal Code incriminated plurality with the provisions regarding conspiracy, armed gangs (article 86) and „the association of wrong deeds doers” (articles 213-216). Similar provisions were found in Stirbei Code (articles 70, 71, 209-2012). Afterwards, Act on Public Peace And Order from 1924, stated „just the simple act of association in order to plan or commit crime against individuals or properties, no matter the duration of the association and the number of members” is considered an offence. In 1933, one act of law incriminated even the settled agreement to commit crimes against individuals and property, even the goal was to commit only one crime, if that crime is done towards establishment of dictatorship or overthrowing the social order. Carol II Criminal Code had many provisions regarding plurality (conspiracy, association in order to commit crimes, the gang or organized group). State Order Protection Act of 1938, articles 13-23, incriminated not registered political associations.

[5] Ibid.


[7] Ibid, p. 478-479. In the same sense are the resolutions of Congress of the International Association of Penal Law (Budapest, September 5 to 11, 1999). In Section I of the resolution adopted by Congress emphasized that people with decision-making power and control can be held criminally responsible for the acts of the members under their control, unless it is shown that gave the orders to commit such acts or in consistently failed to prevent their commission. In the resolution adopted by the sanction of Congress II has shown that participants who are not members of criminal association, but have acted in achieving its goals will be subject to criminal liability for complicity in crimes committed by members of the association, if they contributed illicit actions to achieve these goals. Conversely, if helped by some lawful actions such as legal or medical advice, provision of food, etc., to support the association, even if they know its illegal nature, these persons could not be held criminally liable, cause their activity did not exceed the natural field of profession. - Association Droit International Criminal Lettre d’information, 1999, No. 2, p. 24-28.


The security of computer data and systems and the romanian criminal law: realities and perspectives in the light of the economic crisis and the increasing cyber threats at global level

Vasiu I.¹ , Vasiu L.²

¹ Faculty of Law, Babeș-Bolyai University, (ROMANIA)
² Faculty of Law Cluj-Napoca, Cantemir University (ROMANIA)
ioanav3@yahoo.com, lvicianvs@yahoo.com

Abstract

Cybercrimes can result in very significant and far reaching adverse effects. As threats evolve continuously and perpetrators become increasingly sophisticated, fighting cybercrime is a growing challenge for stakeholders. Legal measures play an essential role in the fight against cybercrime. In the first part of this paper, we look into categories of cybercrime and outline the security attributes associated with computer systems. The second part of the paper discusses the Romanian criminal law measures aimed at preventing and combating cybercrime. We conclude this paper with recommendations.

Keywords: Cybercrime, cyber-attack, threat, security attributes, computer vulnerabilities, cybersecurity, Romanian criminal law.

Introduction

Along with many socio-economic benefits, information and communication technologies brought about many challenges, such as protection of personal data and informed consent [23], children’s online safety and the prevention of cybercrimes. Cybercrimes are a major concern worldwide, as Internet and the global economy present unprecedented opportunities to conspicuously bad offenders: from highly organized crime syndicates to large-scale criminals and perpetrators that threaten public safety [4, 9, 11, 18, 20, 21]. These unprecedented criminal opportunities arise foremost from the very large number of Internet hosts and the increasing use of mobile devices [13], paired with software vulnerabilities [16, 21] (some allowing zero-day attacks [2, 3]), sophisticated and evolving threats [7, 14] and the availability of advanced tools and services, accessible on the black market as commodities [1, 17].

The economic crisis and the actual very high unemployment level may be considered additional factors that increase the risks to the security of computer systems. This context can determine a significant numbers of individuals to resort to illegal solutions as response to their problems or needs. Things are more concerning when computer specialists are out of work or in need of extra money and decide to resort to illegal means. Existing situation is further complicated as, due to reduced revenue and increased complexity of computer programs, software makers may spend less on testing their products, which can result in even more flaws that can be exploited by offenders.

Cybercrimes now represent the fastest growing area of crime [12] and an important percentage of all crimes. Cybercrimes are increasingly sophisticated and sometimes connected with other criminal activities. According to Europol, cybercrime proceeds make it more profitable than the combined global trade in marijuana, cocaine and heroin [8].

Cyber-attacks are not limited by national borders, or targeting just certain entities. Whether financially, politically or personally motivated, successful intentionally malicious actions against computer data and systems can have very significant and far reaching consequences, at individual, organizational and even national or international level [21]. Consequently, the prevention and combating of cybercrimes must be a major concern for stakeholders.

As the European Commission emphasizes, the security of computer systems is critical for our society and covers many aspects, of which the fight against cybercrime is a core element [5]. The prevention and combating of cybercrime is considered a strategic objective by the Romanian Government, as stated in
Ordinance No. 1040/2010. The fight against cybercrimes can only be successful if approached holistically. According to the ITU [10], cybersecurity approach should be based on five pillars: Legal Measures, Technical and Procedural Measures, Organizational Structures, Capacity Building, and International Cooperation.

In this paper, we discuss the Romanian Criminal Law measures aimed at preventing and combating cybercrimes. The remaining of this paper is structured as follows: Section 2 looks into categories of cybercrime; Section 3 explains the security attributes associated with computer systems; Section 4 discusses the Romanian criminal law provisions; finally, we draw our conclusion.

Categories of cybercrime

There is no widely agreed definition of what constitutes cybercrime; moreover, terms like ‘computer crime’, ‘cybercrime’, ‘e-crime’, ‘network crime’, ‘Internet crime’, ‘computer-related crime’ or ‘hi(gh)-tech(nology) crime’ are used interchangeably [5].

Professor Brenner [4] identifies a range of cybercrimes, including crimes that target computers (such as the use of computer contaminants or distributed denial of service attacks) and crimes in which the computer is used as a tool (such as cyber extortion or cyber theft). The Convention on Cybercrime [6] proposes four categories of cybercrime: Offenses against the confidentiality, integrity and availability of computer data and systems (e.g., illegal access or system interference), Computer-related offenses (e.g., computer-related fraud), Content-related offenses (e.g., offenses related to child pornography), and Offenses related to infringements of copyright and related rights. Gercke [10] uses the classification proposed in the Convention on Cybercrime, although he remarks that the typology is not wholly consistent, as it is not based on a sole criterion to differentiate between categories.

COM(2007) 267 final [5] proposes three categories of cybercrimes: traditional forms of crime (such as fraud), dissemination of illegal content over electronic media (such as child pornography), and crimes unique to electronic networks (such as denial of service attacks). The UNODC [19] classification of cybercrimes comprises three broad categories that include acts widely regarded as cybercrime: Acts against the confidentiality, integrity and availability of computer data or systems, Computer-related acts for personal or financial gain or harm, Computer content-related acts, and one category named Other cybercrime acts, which includes acts that may also be considered cybercrimes.

Security attributes

To accomplish their goals, computer criminals breach one or more security attributes associated with the proper use of computer data and systems. The most widely discussed security attributes by researchers and commentators are confidentiality, integrity and availability [21].

Confidentiality is an attribute that applies to computer data that should not be obtained without right. Confidentiality is a very important issue with respect to trade secrets and personal information (such as medical records, financial records or attorney-client communications). Confidentiality can have several levels of restriction, from restrictions to reading, printing or transmitting data through a computer system, to restrictions regarding even the existence of certain data.

Integrity refers to maintaining accurate and complete data unaltered in an improper or subversive manner. Data integrity concerns data stored, processed or in transit. In the context of databases, data integrity also regards the metadata and functions involved. Computer data integrity has both physical and logical components, and involves certain desirable conditions, maintained over time. The level of sensitivity varies, depending on context and ranges from no tolerance to any changes, up to a certain tolerance to minor data changes.

Availability refers to computer data and systems timely and reliably obtainable or accessible for legitimate users at all times or upon demand, as per their authorized use. Availability implies preventing all actions that negatively or improperly affect authorized access to or use of data or systems, including actions that encrypt, delete, delay or deny access to data or services.

Parker [15] proposed three more security attributes: authenticity (that is, assurance that a message, transaction or communication is from the source it claims to be from), possession or control (in certain situations, computer data could be possessed or controlled by unauthorized persons without breaching the confidentiality attribute) and utility (which concerns the usefulness of computer data). An important study [22] discusses these six attributes in paired format: Confidentiality & Possession, Integrity & Authenticity, and Availability & Utility.

Romanian criminal law measures
Criminal law provisions aim to protect computer data and systems from unauthorized exploitation and subversion (such as disrupting, disabling or maliciously controlling computer systems), which means protection against actions that would breach the security attributes discussed above. For this paper’s purpose, we consider the criminal law provisions that refer to the cybercrimes that fall under the categories of misuse of computer data or systems for profit and impairing computer systems, which affect legitimate interests.

Law No. 161/2003 contains, in Chapter II of Title III, provisions regarding the prevention of cybercrimes, including prevention programs, promotion of policies, procedures and standards, realization of studies that examine the causes and conditions that drive cybercrimes, the maintenance of a database dedicated to cybercrimes, and the organization of education and training programs. Title III’s Chapter III of Law No. 161/2003 follows very closely the Convention on Cybercrime and in Section 1 (Articles 42-47) incriminates the offenses against the confidentiality and integrity of computer data and systems.

Article 42 prohibits the access without right to a computer system. According to the law, a person acts ‘without right’ if it is not authorized by law or a valid contract, exceeds the limits of authorization or does not have the permission from the entitled entity (that is, owner or administrator) to use a computer system (Article 35). The Explanatory Report for the Convention on Cybercrime defines access as “comprises the entering of the whole or any part of a computer system (hardware, components, stored data of the system installed, directories, traffic and content-related data)”. We would define access to a computer system as the ability to successfully read, write or execute computer files. Points (2) and (3) of Article 42 stipulate more severe penalties for those that access a computer system without right in an attempt to obtain computer data and by breaching existing security measures.

Article 43 makes it illegal to intercept, without right, non-public computer data sent to or transmitted from or within a computer system. This Article aims to protect the right of privacy and the confidentiality of data sent from or via computer systems.

Article 44 makes it illegal to modify, delete or alter computer data, to restrict access to computer data and to transfer without authorization data from a computer system or storage device without right.

Article 45 criminalizes the impairment, without right, of a computer system by the input, transmission, modification, deletion or altering of computer data or by restricting access to such data. The Article stipulates that the impairment of the proper functioning of computer systems must be "serious" to cause criminal sanction, but does not define the concept.

Article 46 criminalizes the possession, making, selling, importation, distribution or providing, without right, of devices or computer programs that would be used to perpetrate the offenses criminalized in Articles 42-45; it also makes it illegal to possess, make, sell, import, distribute or provide, without right, passwords, access codes or computer data that would allow access to a computer system to perpetrate the offenses criminalized in Articles 42-45. Article 47 stipulates that the attempts to perpetrate any of the offenses address in Articles 42-46 shall be punished.

Section 2 (Articles 48-49) of Law No. 161/2003 comprises computer-related crimes. Article 48 criminalizes an offense that is the high-tech variant of physical forgery of documents, to protect the legal interest in the integrity and reliability of computer data, as these may have consequences for legal relations. As the Explanatory Report for the Convention on Cybercrime emphasizes, “computer-related forgery involves unauthorized creating or altering stored data so that they acquire a different evidentiary value in the course of legal transactions, which relies on the authenticity of information contained in the data, is subject to a deception”.

Article 49 criminalizes computer-related fraud, which is understood as the causing of a patrimonial loss by any unauthorized computer data input, altering or deletion, the restriction of access to computer data or by the impairment of the normal functioning of a computer system, with the intent to obtain a material benefit for themselves or others.

Chapter VI of Law No. 161/2003 contains provisions regarding the international cooperation. According to Article 60 (2), international judiciary assistance can include extradition, identification, seizure and confiscation of products or instruments used in the perpetration of cybercrimes, information exchange, technical assistance for gathering and analyzing information etc.

Law No. 365/2002, in Chapter VIII (Articles 24-28), contains provisions regarding crimes related to the issuing and use of electronic payment instruments and the use of identification data.

The new Romanian Penal Code (Law No. 286/2009, not in force at this time) also contains provisions that regard the security of computer data and systems. Chapter VI of Title VII (Crimes against public safety) criminalizes in Articles 360-366 offenses against the security and integrity of computer data and systems: illegal access to a computer system, illegal interception of a computer data transmission, altering of computer data, impairment of computer systems, unauthorized transfer of computer data, and attempts to perpetrate these offenses, respectively. These articles have very similar provisions to those found in Law No. 161/2003, the only significant difference being a lower punishment for these offenses. Article 325, part of Title VI (Chapter III),
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Criminalizes computer forgery (identical with Article 48 of Law No. 161/2003, except the punishment, which is lower). Article 391(3), part of Title IX (Electoral crimes), prohibits the use of computer programs that would alter the recording or computation or voting results, while Article 391(4) prohibits computer data or procedures input that would alter the election result.

In Chapter IV of Title II (Articles 250-252), the new Romanian Penal Code criminalizes frauds perpetrated using computer systems or electronic payment instruments. Article 249, very similar to Article 49 of Law No. 161/2003, criminalizes computer fraud. Article 250 makes it illegal to use, without authorization, electronic payment instruments or data that identify such instruments, the unauthorized use of identification data or the use of false identification data, and the transmission of identification data to third parties to fraudulently use such data. Article 251 addresses the acceptance of fraudulent financial transactions knowing that the electronic payment instrument is counterfeited or used without the owner’s consent. Article 252 stipulates that attempts to perpetrate these offenses are punished.

Following several European initiatives mandating an adequate level of protection for computer data and systems (such as Directive 2009/136/CE, Directive 2009/140/CE, or Directive 2006/24/CE) and the direct responsibility of organizations in cases of insufficient security measures that made possible the perpetration of cybercrimes (such as Decision 2005/222/JAI), several Romanian laws have provisions regarding mandatory measures that aim to ensure the security and privacy of computer data and systems (such as Law No. 677/2001, Law No. 311/2002, Law No. 182/2002, Law No. 506/2004, and Law No. 8/1996 modified in 2004 by Law No. 285/2004).

Conclusion

Cybercrimes encompass a broad range of acts or conducts. Successful cyber-attacks can result in significant, far reaching adverse effects. Consequently, the prevention and combating of cybercrimes must be paramount for stakeholders.

In this paper, we discussed the security attributes associated with computer systems and the Romanian criminal law framework with respect to preventing and combating cybercrimes. We believe that the effectiveness of existing legal measures needs to be reassessed. There is a need to better describe, in an unambiguous manner, the elements of the prohibited conduct and take into account developments in computer technology and perpetration techniques.

We further believe that cybercrimes and sentencing should be correlated. As punishment is an important crime deterrent, we consider that it needs to be toughened, not softened, as the new Penal Code does. Finally, we consider that laws must better address cybersecurity, investigative and evidence collection issues, aspects regarding jurisdiction and international cooperation, and the development of programs regarding awareness raising, education and training of employees.

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Theoretical aspects regarding the differences between certain crimes against human life and its integrity

Vlad B.

Police Academy „Alexandru Ioan Cuza”, (ROMANIA) vlad_apr@yahoo.com

Abstract

In this paper we will analyse the differences between certain crimes against life, physical integrity and health. These differences will be emphasized by case studies and by discussing the constitutive elements of the crime. In the end we will present our point of view regarding the importance of knowing these differences.

Keywords: murder, guilt, harm, crime, similarity, dissimilarity

The crimes against persons can be found in the present Criminal Code in the Special Part’s Second Title (art. 174-207). When mentioning “defending the private person” the articles mentioned have in view the human being with all the attributes that compose it. The Special Part’s Second Title groups the crimes against persons in four chapters. This is based on the following criteria: the social value that was harmed, which is actually the group’s object, and by object we understand one of the person’s basic attribute. The chapter about crimes against human life, integrity and health is divided in more sections:

- Section I, entitled "Homicide" (articles 174-179), includes offenses of murder, manslaughter, aggravated murder, infanticide, manslaughter, causing or aiding suicide;
- Section II, entitled "Hitting and bodily injury or health" (Articles 180-184) includes hitting or other violent offenses, personal injury, serious injury, or injury blows causing death, injury negligence;
- Section III, entitled "Abortion" (Article 185), includes the crime of illegal abortion challenge.

(Criminal code Law no. 275/2006 regarding the execution of sentences, Publishing House . Hamangiu, 2011)

As respects the crimes in Section 1 and 2, the prior element that makes them different is their typical consequence, what is to say that if the crimes in section 1 (homicide) are about abolishing human life, the crimes in section 2 are about the human’s integrity and health, and not the life of a person.

The present essay sets to bring out the differences between murder- manslaughter, murder- hitting or injuries causing death and attempted murder- grievous bodily harm. By committing these crimes the social values defended by law are disturbed, harmed, a problem that can grow into a bigger consequence as abolishing human life, but it can also diminish into less important consequences as bodily injury or health. Between these crimes there are obvious differences, not only if we speak about the penalties that the legislator has in store for the perpetrator that commit these crimes.

Article 174 of the Criminal Code speaks about murder as killing a person. Having in view both article 174 and article 19, line 2 of the Criminal Code, it can be said that “Killing the person is done in the case of murder with intent, with the knowledge and willingness of the offender and it is easier to understand how much this offense distances in terms of gravity, from all other offenses against life”. Although article 174 does not name the crime as “simple murder”, silently, the Criminal Code accepts it if we take a look at the following legal text that speaks about aggravated forms of murder “degree murder” and “extremely serious murder”, which is why, according to the legal rules, “degree murder” and “extremely serious murder” are opposite with murder.

Manslaughter offense is criminalized in Article 178 of the Criminal Code and is that person who negligently caused the death of another person. Manslaughter is a type of Homicide, but the law defends the human lives against crimes committed with guilt. The Criminal Code has a lighter punishment for manslaughter than for murder. Therefore, manslaughter has an obviously diminished danger from murder. Still, by committing this crime the humans’ lives and security are put in grievous harm.

The similarities between these crimes can be identified through many aspects that are characteristic to them. Thus, the special juridical object and the material one of the negligent murder (manslaughter) is identical to the special juridical and material object of murder- the first consisting of good social relations which involve the protection of life and requires ongoing criminalization that might prejudice, and the last the victim’s body. It can also be observed, not only in the case of murder but also in the case of negligent killing that the prior active subject can be any person that fits the legal terms for criminal responsibility, because the law does not ask for a
specific quality of the subject, but in both cases, if we speak about an aggravated situation in which the law asks for a special quality, the active subject must have it. For instance:

- For the crime of degree murder - the spouse who commits murder the other spouse or the perpetrator is the victim's kin
- The offense of manslaughter – a mechanical traction vehicle driver or other person in the exercise of profession or trade - for the existence of an aggravated form of crime [2] in what concerns the passive subject, it can be any person whose life was taken due to the activity of the active subject. In the negligent killing offense it should be noted that the same person can be sometimes the concomitant, active subject and passive subject of the crime-example: traffic accident caused by a vehicle driver negligence, accident in which he found death).

The objective side of murder has the same content has the same content as manslaughter, the latter being accomplished just as murder- through killing. This can be caused by an action or inaction(the killer either does something the law forbids to be done, or does not do, though the law imposes it).

Still, the subjective side of manslaughter is different from murder through the form of knowledge required by law. If in the case of murder the law requires as form of knowledge intent in both its ways direct intent( the author foresaw and wanted the result of his activity- to kill the victim) or indirect intent ( the author foresaw the result but, without wanting it he accepted that it may occur). Manslaughter has as knowledge form imposed by law the guilt in both its ways, that is to say either the fault with provision( for example, a service mechanic is ordered to lower two heavy panels fixed on a cooling tower platform and without ensuring, he drew out one of the panels and threw it down causing the death of a worker) or negligent fault ( for example, we have a military offender, that is doing his guard service, puts the gun loaded and unattended near a group of children and one of the children plays with the gun and accidentally kills another child) [4].

Also, the law accepts attempt in all its ways in murder situations. Thus, if the dangerous result (the victim’s death) does not occur, due to the circumstances that made the killing activity interrupt or even though it was not interrupted the desired effects did not happen, or the methods used were insufficient, the material object was absent or the action itself had some issues, there will be an interrupted attempt. Yet, manslaughter, being an unintentional crime, it is not susceptible to attempt. The crime consumes at the time of the victim’s death, as a result of the author’s culpable activity.

The legislator took in account the different social danger that was created by the crimes and as a consequence, he gave different sanctions for these 2 crimes as follows: for murder, the penalty is stated in article 172, line 1 of the present Criminal Code- prison from 10 to 20 years and forbidding some rights- and for manslaughter the penalty is stated in article 178 of the Criminal Code in a typical variant( line 1 with prison from 1 to 5 years) and other 3 aggravated variants ( the first speaks about negligently killing as a consequence of not following the legal rules or the preventing measures for a certain job, or for doing any activity that is punished in accordance with line 2: prison from 2 to 7 years, the second one supposes the manslaughter of a person by a driver having in his blood alcohol that exceeds the legal limit or that is simply drunk, deed punished under line 3 with prison from 5 to 15 years and the third variant that describes a person that commits the crime during work, being drunk, deed also punished under line 3)

For a clear distinction between these crimes there will be given some real case studies as examples, that will emphasize the differences mentioned above.

Decision in the case of murder.During the period 2000- 2005 the accused was married with the victim C.A.M, marriage that resulted in procreating the minor P.K.D. During the marriage, the couple encountered many disputes that were caused due to the accused’s jealousy, that grew bigger after the victim left for a period in Spain and confessed to the accused that she had been having intimate relations with other men during the period she was out of country. Because of these disputes the parties separated in February 2005 and the minor was given to the victim. As the victim soon returned to Spain, she made a deal with the accused to take care of the minor with the help of his parents during the time she was out of country. Soon, the accused was given the child’s custody by the court, in basis of the action initiated by him. In July 2005, the two of them in the accused’s apartment so as to talk about the little girl’s custody. Inside the apartment they had the same usual conversations, but at some point the accused proposed to the victim a massage, a habit they used to have during their marriage, which she accepted. While the massage was taking place the victim reinitiated the discussion about her life in Spain and their girl. The victim told the accused that she wanted to take the girl with her in Spain. Hearing this, and thinking that the victim cannot procure the child the material and moral needs, he lost control for a moment and took advantage that the victim was with the face against the pillow, suffocating the woman to death. Seeing what had happened, so as to hide his tracks, the accused lit a cigar and put it in the victim’s hand, knowing that in the end it would burn as well as the bed linens, then he left the apartment at about 4 AM. On his way, he stopped in a taxi station at Hunedoara Railway Station and met some colleagues with whom he carried out a normal conversation, in order to have an alibi in case he was suspected for the victim’s death. These being, the court sent the accused to prison for 15 years and also gave a complementary punishment that is forbidding rights- in accordance with article 64, letter a, b of the Criminal Code- for 4 years for murder as stated in article 174. (Hunedoara Court, criminal section, criminal sentence no. nr. 27/2007, file no. 49/97/2005)
Decision in the case of manslaughter. The accused D.A is employed as a driver. Having this quality, he transports people with a microbus. On the morning of 31.08.2005, around 5 o’clock, the accused drove the microbus from Craiova to Melinesti, because he was supposed to transport some people on the route Dutelesti-Craiova. On leaving Craiova, on DJ 605, DA drove the vehicle with the dipped beam lights as there was another car coming from the opposite way. When the other car passed he intended to switch the lights, but he observed a group of people moving in column on the right side of the road, in the same direction as he was. The accused, slightly turned left, without slowing down and he hit with the front right side of the microbus a caporal I.F.I, whom he took on the hood. The caporal was taken to the District’s Emergency Hospital but he died during the same day. The group of persons that were walking on the right side of the road was of military people from the Military Unit 01178i01083 Craiova. One man was in front of the column, and one at the back of it, the others were standing 2 inline. They were with their commander. The victim, that was in the back of the column at approximately 2 meters from the other 2 colleagues, held in his left hand a lantern, that was used for signaling through a vertical balance. Rightfully, the deed committed by D.A was in accordance with article 178, line 2, which was also the basis that helped at his conviction. When individualizing the penance, the jury also had in view article 72, the real social danger that was produced, the ways and circumstances in which the accident occurred, the common fault, the fact that the accident had as consequence the death of the victim, the fact that the accused did not have any criminal record, that he cooperated. Therefore, he was sentenced to 3 years in prison. (Craiova Court, criminal section file no. 460/08.02.2007)

According to article 193, blows and injuries causing death can be defined as causing the death of the victim after doing any of the actions present in articles 180-182.

In the comparative analysis between these 2 crimes, we must have in view the structure of any crime: legal content, preexistent conditions( object, subjects), the constitutive content,( objective and subjective), the ways, methods, and sanctions.

One first similarity between these 2 crimes is the legal object, that is actually common for all the crimes against persons, and that has in view the sum of activities that take place in order to defend the person with all its attributes.

Also, another similarity is the special legal object that can be defined as the ensemble of social relations whose normal ongoing is not possible without defending the human life. The material object is similar in both situations and it consists in the body of the living person.

As respects the subjects of these crimes, in both cases, the active subject is any person that fits the general conditions. As for the passive subject, there is no difference, it can be any living person whose life is in danger.

The objective side of the crimes also has some similarities and dissimilarities. If the material element is almost the same in both cases, the socially dangerous result is identical: the death of the person. Essential dissimilarities can be found between the causal links of the material element and the results. In the case of blows or injuries causing death the causal process is complex, composed by a cause( a prior factor that starts the action or a secondary one, that was started) and one or more conditions( human activities), circumstances ( certain states or situations- drunkenness, caducity), with causal links that evolve one form another, and that can also be prior factors( that start) or secondary ones( started). In murder, the causal process is linear towards an immediate connection to the primary cause (and unique) to effect. So in the case of blows or injuries causing death it is a sinuous process with multiple intersecting pathways, and the worst outcome is not caused by the initial wounds, but it appears lately.

If within the causal link, the aggressive act-harm- death do not interfere conditions (circumstances) that are preexistent, concomitant or subsequent, hence the cause being suitable and sufficient in itself to produce the death, then the effect( the harm) in naturally absorbed by the more grievous side effect( death), which means that the author’s deed will be held as murder and not manslaughter[4]. For example, it was clearly observed in practice that in the case where the victim was careless with the wound caused by the culprit – the victim refused hospitalization, medical care for 6 days, favoring the occurrence of septicemia[1] - will not be an interruption in the causal link between the criminal activity of the culprit and the victim’s death, because as results from the forensics, the septicemia had as starting point the wounds caused by the author. In such situation, the causal report primary cause- harm- death is altered by a circumstance that appeared after the aggression, which is the victims refuse to hospitalize ( who maybe would not have died, if he had been properly treated) and therefore, the justice agreed to applu article 183 of the Criminal Code for the present deed.

The main dissimilarity between these crimes exist within the subjective side, In murder cases, the subjective side is represented by intent, whereas in blows or injuries causing death, this side is represented by praeterintention. Having these said, if we should explain the latter, the crime is not only done with intent( direct and indirect), but also out of fault towards the result that came out. ( the victim’s death)[3].

In support of the statements mentioned above comes the practice that emphasis the same aspects about the similarities and dissimilarities that occur within the subjective side between the two crimes, as follows:
a) As long as the accused did not have the intent to kill, but only to hit the person that was the actual target, but out of mistake the hit injured someone else, causing the death of the person, the deed will not be murder, but blows and injuries causing death. It would have been a different situation if the culprit had acted with intent to kill the target-person, because in this case it would have been murder. (Court Suceava, criminal section, file 468/1977, p.269)

b) If the accused hit with his feet and fists the victim in the vital parts, having as consequence broken bones and other wounds that caused the victim’s death, it is considered that the culprit had foreseen the victim’s death and accepted it. In this situation we are talking about murder, and not blows or injuries causing death, as the latter in characterized by praeterintent, which is not our case. Therefore, if we say blows and injuries causing death, the harm was produced with intent, but the result is out of the author’s fault, that is not foreseeing the result, although taking in consideration the given situation he should have foreseen it, or if in fact he did, he hoped it would not occur. (C.S.J.,c. 7, file 18/ 07.03.1994,C.D.,p.144)

c) If the offender threw a big piece of metal at a group of children, hitting one of them in the head, causing his death, it would be murder, as the culprit could have realized that in such conditions and doing what he did, he could cause the death of any child. So, he accepted the result, which means that he acted intentionally, and not out of fault, which is why we are in the presence of murder. (C.S.J.,penal section, dosar 1042/1990, p.104)

As a final analysis, the main dissimilarity is the subjective position of the perpetrator. If in the case of murder we can talk about attempt, if the author’s deed did not result in what he wanted- the victim’s death- we cannot do the same in the case of blows and injuries causing death, because for the legislator the victim’s death has relevance if it is produced, not if it is not. If the legislator does not meet with this result it will be one of the following crimes: Grievous bodily harm (art. 182), hitting or other violence (art 180), personal injury (art. 181).

The differences also appears in the methods of committing the crimes and their sanctions, because of the subjective side. The offender that killed the victim has a harsher punishment (article 174: prison from 10 to 20 years and forbidding some rights) than the one that is accused of blows and injuries causing death, because in the latter’s case we do not talk about intent, but of fault (article 183: prison from 5 to 15 year).

Changes from murder to blows and injuries causing death

The victim B.G and the accused M.V lived in city B, district G, and they knew each other from sight. In the summer of 2006, between the shepherds of the city and the culprit started many disputes, the main reason being the area where the sheep ate.

During the day of 10.01.2007, at about 3 o’clock in the afternoon the victim B.G and the witness A.V.S went to the V-C point to cut some wood for fire in an acacia forest. Having this purpose, the victim took from home an ax and a saw.

The two of them stopped at one side of the forest and started cutting the trees of the forest that did not belong to any of them.

The culprit being drunk, grabbed the ax from the victim’s hand and reproaching that he came to steal wood he started hitting the man with it. First the victim defended his head and got hit only around his left cheek and shoulder and then hit the accused back, only that the latter was standing on a higher surface of ground and he missed. It was then, the culprit pushed the victim, which lost balance and fell in a ravine.

Being asked by the witnesses NG and NM who had been the ones that cut wood, the culprit told them they were AV and BG and that he took the ax from the victim, slapped him and pushed him in the ravine.

After this happened, the M and N family went home in their carriages. On their way home, they came across witness BM- the victim’s brother. The offender told him that he argued with the victim BG because he had been cutting his trees and because of that, he slapped him and took his ax. Also, the culprit showed the witness the ax that belonged to BG. Meanwhile, seeing that the victim BG had not returned home for some time, the witness AVS went to search for him, finding the victim at the bottom of the ravine, dead. Understanding that the man was killed by the culprit, the witness called the police and the man’s relatives.

The perpetrator, with help from his lawyer, asked to have his crime switched to blows and injuries causing death (art. 183) from murder (art.174), and for the previous framing to order the acquiting the culprit on the basis of art. 11 point 2. (Code of Criminal Procedure in ref. art. 10 letter ‘s Criminal Code, that shall be governed by the provisions of art. 44 Criminal Code. Galati Court, criminal sentence, no.549 din 30.10.2007, file no.1241/121/2007)

Attempting murder is stated in article 174, line 2 “ attempting murder is punished”. GBH is stated in article 182 Criminal Code and can be defined as the action that has caused the integrity or health of a person a harm that needs medical treatment for more than 60 days. The deed has a harsher punishment if it had one of the following causes: losing a sense or an organ, stopping their functioning, a permanent physical or psychical infirmity, abortion, endangering a person.
Both GBH and attempting murder suppose a state of danger for the victim’s life. The essential dissimilarity between them lies in the subjective side. This side is the reason why it is sometimes difficult to decide if the crime committed can be considered as GBH or attempting murder, and the solution is often given by the form of knowledge.

Another similarity stands in the subjects of these crimes. Not only in the GBH case, but also in the case of attempting murder the active subject can be any person that meets the legal conditions regarding the age, responsibility, and the passive subject can be any person whose life is put in danger.

According to the doctrine, attempting murder can happen in all the following cases:

- Attempted murder offense may be interrupted when the activity the author was stopped and prevented from external causes. For instance, in practice, interrupted attempt was established in the following case: one person wanted to murder another through stabbing in the chest, but the perpetrator was immobilized by those present at the scene.

- Also, attempted murder can have the shape of a perfect attempt, when the dangerous activity followed its course until the end, but the result- the victim’s death- did not happen. For example, in practice, there was a case when the offender threw the victim from the 5th floor of a building, but the victim did not die due to the fact that he landed on a soft soil full of vegetables.

- Another form of attempt is the improper one, characterized through this improper attribute, or the dysfunctional ways that were used, the lack of object at the place where the author thought it would be. This type of attempt has also been encountered in practice; for example the offender insufficiently poisons the victim and does not die, although he wanted her death.

- Attempting murder can also be committed with indirect intent, if the criminal hit the victim with various hard objects, of which some of these hits were in the head area, with great intensity. The accused had foresaw the possibility of killing the victim, but even though he did not want this result, he accepted it, or if the culprit stabbed the victim in the stomach, causing grievous wounds.

After analyzing attempting murder we can bring out the fact that if someone should want to make a difference between GBH and attempting murder, they should pay great attention to the subjective side: attempting murder can be committed with intent in both ways, whereas GBH can mostly be committed with praeterintent, which means that when we say GBH, the violence or hits are with intent but the author does not want or accept the fact that the result can grow into something bigger, that is to say suppressing a human life. He may foresee this result and may hope without any real basis that it will not produce but he might as well not see the result, although he should have.[5]

The victim D.N is married with the witness D.M, the daughter of the accused. As a consequence of the fact that the victim used to drink, the witness moved with the accused for some time during year 2009. On the evening of 8 August 2009 she returned home, where the victim, drunk, also arrived and started to hit her. In this circumstance she yelled after her mother, the accused B.A. that lived close by, asking for help. The accused came and tried to calm down the situation but the victim also hit her in the stomach with his foot. Therefore, the accused took a knife and stabbed the victim in the stomach, causing grievous wounds.

This state of fact was proven with the corroboration of the victim, culprit and witness’ statements, the forensics, and other evidence mentioned earlier. Concerning the type of crime, it was considered attempting murder under article 20 of the Procedural Criminal Code and article 174 of the Criminal Code. This decision was taken having in mind that the accused acted with intent to kill (indirect intent). The evidence made it clear that the accused wanted the death of the victim and that she accepted the result that might have occurred if we take in consideration the intensity of the hit and the weapon used, which is why the request to change the framing from attempting murder to GBH in accordance with article 182. Line 2, was rejected.

The right to live is not only an individual value, but a social one, because each person’s life involves social relations. After analysing all of these crimes we have reached the conclusion that they put in danger the most important values: the person’s life, integrity and health. We believe that the difference between these crimes is very important so as to know how to punish the offenders in accordance with the crime they committed. This difference may be observed correctly if we take in consideration all of the objective and subjective circumstances that reveal the social danger of the deed.

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The influence of the new civil code on the criminal code in the area of offences against life

Vladila L.M.

Faculty of Law and Socio-Political Sciences, “Valahia” University of Târgoviște (ROMANIA)
laviniavladila@yahoo.com

Abstract

The article aims to analyze from a general and comparative overview how the new Civil Code (C.civ.) influences the situation of certain offences against life stated by the Criminal Code. The litigations which may arise, though they really seem far away, cannot be excluded from a closer analysis, so that they deserve our attention. Can the surrogate mother kill her “baby”? Is this first degree murder or infanticide? Can the donor be suspect of first degree murder in the case of murdering the child to whose genetic inheritance he has contributed? These are a few questions that are still waiting for their answers.

Keywords: murder of husband or of a close relative, infanticide, surrogate mother, donor.

Special and material judicial object of the offences against life.

The first regulation from we start our analysis is the articles 58, 61-68 of the Civil Code (Civil Code – Law No. 287/2009, republished in M.Of. No. 505/15.07.2011.). Due to the fact the special judicial object of the offences against life is the very life as a fundamental right of the human beings [1]; its judicial protection is also stated by the Civil Code, considering it the most important prerogative right of human beings. This double protection, both civil and penal, is a synergic one, complementary, of mutual support, covering different sides of the judicial area: first, the civil one, the private sector, the second one, penal, the area of public relations and general interests of society. Thus, although it must be appreciated the novelty standpoint of the persons who have contributed to Civil code, according to whom the protection and reconsideration of the human life must also be found in the Civil Code, developing afterwards in a fractal branching the protection of all our rights till nowadays, is still necessary the emphasis of the fact that, even in the absence of a civil regulation, the Criminal Code (C.pen.) aimed, since forever, the protection of life.

Also, according the art. 61 C.civ. "The human body is inviolable" and to art. 66 C. civ. "Any acts that have the purpose of giving property values to the human body, elements or its products, are treated with absolute nullity...". As we all know, the human body is the material object of all offences against life [2]. However, it must not be disrespected, especially from the perspective of it being the carrier of physical life [3]. Also, starting from art. 66 C.civ. we should not consider the human body as being only an object, which could be used by some individuals as an object of transaction.

This is why art. 66 is completed by art. 68 C.civ., stating that “the procurement and transplantation of human organs, tissues and cells from living donors is made according to the law (in this case Law No. 95/2006 on healthcare reform Law No. 95/2006 on healthcare reform, published in M.Of. No. 372/28.04.2006, actualized until 2011.) ... based on a written, free, prior and express agreement only after they were briefed on the risks of the intervention. Law No. 95/2006 updated points the same elements found in art. 68 C.civ., also stating a series of medical procedures which must be accomplished in the case of living donors, regulating besides the Civil Code the modalities of donation and transplant of organs from deceased persons, incriminating a number of six offences if the law is not obeyed (The Chapter V Penalties - art. 154-159).

At the same time, outside the framework established by the Civil Code and the offences established by the Law No. 95/2006, the criminal protection of the different component parts of the human body is completed by the dispositions of art. 2 pct. 2 lit. d), corroborated with those of art. 12 alin. 1 from the Law No. 678/2001 on the prevention and combating trafficking in human beings (Law No. 678/2001 on the prevention and combating trafficking in human beings, published in M.Of. No. 783/11.12.2001, actualized until 2011.), which consider a crime and punished with prison from 3 to 10 years, the procurement of human organs, tissues and cells, this being one of the forms of the exploitation of a person.
First degree murder of the husband or a close relative.

Until the Civil Code, this aggravated circumstance did not raise special issues. Determining the area of application was circumscribed to the notion of husband/wife and to that of a close relative, the first one defined by the former Family Code (art. 3-24, art. 37-44 which stated marriage and divorce), and the second one by the Criminal Code (art. 149).

1.1 Divorce.

Though the Civil Code does not bring important modifications in the area of marriage, there are two moments to which the quality as husband/wife must be related, compared with the previous regulation, namely, the moment when the decision of divorce is definitive, which involves that a divorce pronounced by a court (art. 382 alin.1 C.civ.) and the moment when the certificate of divorce is issued, which involves getting divorced by a notary or by the officer of the civil state (art. 382 alin.3 corroborated with art. 375 C.civ.).

1.2 The issue of the nullity of marriage.

Besides divorce, a marriage can be ended by declaring its nullity. Also in this case the actual Civil Code brings innovative elements, which can influence the judicial framing of murder. According to art. 304 C.civ., “The spouse of good faith, when the null or void marriage is concluded keeps, until the decision of divorce is definitive, the status of a spouse in a valid marriage”. But, unlike the spouse of bad faith, the effects of nullity or annulment are retroactive, which will generate issues in establishing the circumstances of a murder, involving such subjects, if it was just murder or first degree murder. In our opinion, given the difference made by the civil law between the spouses, it results that the murder of the spouse of good faith, until the conviction of the spouse of bad faith is definitive, is considered first degree murder, but the judicial framework of the opposite situation would be just murder, because being a spouse of the good faith person when the marriage is concluded, should be in his advantage, not disadvantage. On the other hand, being a spouse in this special situation must regard the victim of the offence and not the perpetrator.

1.3 The issue of human reproduction assisted by a third party donor.

But these are not the only new elements inserted by the Civil Code. The most spectacular ones regard the human reproduction assisted by a third party donor (art. 441-447 C.civ.). The hypothesis mentioned by the civil law is that of a couple (not necessarily married) who unwilling to have children because of the man, agrees that the woman be artificially inseminated by another man, called the donor. According to the civil law, the donor is not relative to the child, between the two is not created a legal relation, with advantages and disadvantages (for instance, no civil action for liability can be taken against the donor). The question in this case is if the child, getting to a point where he meets the donor, shall kill him or vice versa, the offence can be considered as first degree murder [art. 175 lit. c) C.pen.]? We have not discussed yet this plausible hypothesis in which the two persons, the donor and his biological child, are not aware of the medical reality, than, perhaps, before the murder, because it is covered by a de facto error, which waves the aggravating circumstance.

Pro and cons can be supported for both hypothesis. Thus, if we start our reasoning from the wording and from the idea resulted from art. 149 alin.2 on the relation between adopted children and their natural relatives or their new relatives from the adoptive family, and then in this case we should also consider that the offence is first degree murder. Likewise, from a medical standpoint, the donor is the child’s father, while the man who will raise this child, being registered as his parent in the birth certificate is just the legal father.

If we adopt the restrictive opinion of the Civil Code, who aims to relieve the situation of such child resulted from an atypical birth, both from the perspective of his rights, as well as from the perspective of his right to inherit his biological father, would mean to ignore an obvious reality and to consider that we have only murder, in the absence of other qualification.

I consider that the essence of the answer in the criminal law should start from the interest that it protects, being a general interest, hence the idea of protecting life and morality above private interests.

From our standpoint, murdering the judicial father by the child or vice versa, murdering the child by the person who raised him and who is his legal father, even if he is not his biological parent should offer the offence the “first degree” feature. Because the Civil Code supports the hypothesis that the biological father of the child is registered in his birth certificate, we cannot neglect to consider that raising the child is an important reason in justifying this penal qualification. Of course that the simple fact of raising the child cannot generate the consideration of the offence as first degree murder, in the absence of an express text of law, in the civil law can generate certain consequences regarding the alimony. Maybe this hypothesis should also be reconsidered in the meaning that the fact of raising a child should be assimilated to a judicial action generating legal consequences.
1.4 The issue of the surrogate mother.

An even more complex situation than the previous one is that of the surrogate mother, situation not stated by the Civil Code, but met in practice, even in our country. Here, the Civil Code no longer states the lack of claims from the surrogate mother for the biological or legal parents, nor it prohibits anymore the reality of a convention between these parties regarding the child’s situation after his birth. Also, the possibility that in the future the child become aware of the existence of the surrogate mother is larger than in the case of the male donor. In order to define the concept of surrogate mother we have two possible realities:

- She is, on one hand, the woman artificially inseminated with genetic material of a man who cannot have children the woman becoming the biological mother by transferring a part of her genetic material to the child;
- On the other hand, the woman carrying the embryo formed by the genetic material of a couple, who is only the carrier of the fetus growing in her body, but the genetic result of a man and a woman, called biological parents [4].

This situation is more complex than the one of the donor, because the Civil Code gives efficiency to the act of birth, stating that a mother is a woman who gave birth (art. 408 C.civ.). But the child cannot “be” hers at all, such as the situation of the surrogate mother!

Murdering this child by the surrogate mother or murdering the surrogate mother by the child, while the birth certificate shows another legal reality, is first degree murder or just murder?

But what about murdering the legal mother, who in the first definition is not even the biological mother of the child thus born?

We consider that in all these cases giving efficiency to the legal reality, by ignoring the biological or the medical one (the pregnancy and birth) or the social one (the relation between the civil mother and her child) cannot satisfy the general interest of society.

It must also be considered the fact that, in the second hypothesis of the surrogate mother, she is just a “simple” depository of the genetic material of another couple, with no connection to that fetus, but just the fact of hosting and giving birth to him. Can this woman invoke that, though she carried a fetus in her womb, he was not hers? And even if she does, what penal legal value can such defense have? If in the other mentioned situations we consider the offence as first degree murder, in this last hypothesis we have reserves if such qualification would correspond to the general interest.

Though, we do not exclude and even propose for a new incrimination, in order to efficient such social realities, extracting the ambiguities from such legal, moral, medical, biological and religious complicated situations.

Infanticide.

It is known the fact that in order to be considered infanticide, the offence of murdering the newborn child must be committed by the mother [2] [5]. But the simple fact of giving birth, in the conditions of such advanced genetic and neonatology technology could create penal complications!

Thus, the situation of murdering the newborn child requires a brief analysis as an effect of the provision of the Civil Code regarding the establishment of the filiations towards the mother. As it was already shown, the Civil Code considers as mother the woman who gave birth to the child. Also, for infanticide, the Criminal Code offers relevance to the act of birth, and no to different social realities. Because this aggravated form of murder is based on physical and psychological disorders resulted from birth, only the surrogate mother can invoke art. 177 C.pen. But even more, we consider that only for her are applicable the provisions incriminating infanticide, and not for the civil mother, even if the latter one, in the second hypothesis as surrogate mother contributes with the feminine side of the genetic material of the child. If, hypothetically, the civil mother murders her newborn child, because she did not physically gave birth to him, his “birth” being conventional or legal, her will commit first degree murder [art. 175 alin. 1 lit. c) și d) C.pen.], and not infanticide.

But if murdering the child right after birth by the surrogate mother, without the existence of a disorder caused by her, can be determined by abject reasons (for instance, she has not received the amount of money or material advantages claimed for carrying the pregnancy and giving birth), which could generate the aggravation of the penal liability, after considering this aggravating circumstance (art. 75 lit. d) C. pen.).

Also, even in the hypothesis in which we will not consider the carrying woman of the fetus like a mother in the mean of the criminal and civil law, we shall not forget the employment of the fact like murder of first degree, from the perspective of the art. 175 lit. d) C.pen., meaning by taking advantage of the failure status of the victim to defense herself.

Though, in the following hypothesis we shall be placed in the area of the civil law, the question worth being raised. If the surrogate mother dies giving birth because of the child, are the biological parents criminally liable? Or, if she is bodily injured as a consequence of giving birth? Can be parents be guilty of bodily injuring the carrier? How about their civil liability to her?
Unlike the principle of individual criminal liability, we appreciate that the answer to the first question is that biological parents cannot be liable for murder, but could be liable for murder out of negligence or for bodily injuring out of negligence, having a great responsibility for the carrier as herself, together with the doctors who were unable to find in time her medical problems due to an incompatibility with the fetus or malpractice in assisting the birth.

Abortion.

In accordance with the teleological interpretation of art.185 C.pen., murdering the product of conceiving by the mother is not an offence [2] [5]. But, in the hypothesis in which the future mother is only the carrier of the fetus, and not his biological mother, and she does not want to continue the pregnancy until its due date, without medical consequences to her, can such an action be an offence? Through the wording of the actual Criminal Code, this action cannot be an offence. But in this case the following question arises: the genetic and biologic parents of the fetus could claim material or moral damages because the surrogate mother did not carried the pregnancy to birth, turning their hopes in having a child in just dreams?

We must look at this situation also from the perspective of the New Criminal Code. According to art. 201 alin. (7) and art. 202 alin. (7) from the New Criminal Code it is not offence the action of the pregnant women interrupting the course of her pregnancy, nor the offence of injuring the fetus during pregnancy.

But if these actions are not offences, injuring the fetus during pregnancy or as a consequence of his birth with malformations or medical problems could represent a legal ground, or a civil offence, in claiming material or moral damages by the biological parents to the surrogate mother?

Conclusions.

It is obvious to us that the issues raised by the entrance into force of the Civil Code on establishing filiations in atypical cases of the donor and surrogate mother, generates penal implications. If the situation of the donor, by receiving a civil regulation, easily finds a solution in the penal area, the issue of the surrogate mother should be firstly stated by the Civil Code and after that in the criminal area. Though, apparently theoretical, these issues can in any time become cruel Romanian realities. In addition, how can we stop the technological progress in the area of genetic and neonatology engineering?

References:

Regards and proposals for establishing the legal settlement of prostitution in Romania

Zaharie C.G.¹, Balasoiu A.E.²

¹Romanian – American University, Law Department (ROMANIA)
²Romanian – American University Law Department (ROMANIA)
cristian_giuseppe_zaharie@yahoo.com, anca_balasoiu_red@yahoo.com

Abstract

The present study discourses a series of conclusions regarding legal provisions for prostitution, as a phenomenon in the context of having a succession of criminal and administrative regulations and giving the prospect of a more permissive legislation in which prostitution could be practiced as an authorized occupation in Romania.

Key words: prostitution, Penal Code, authorized occupation.

Following the idea of a non incriminated prostitution activity, by abrogating the relevant legal provision regarding this criminal deed, a redefinition of the notion comes as a necessity, through:

- sanctioning the phenomenon with administrative tools, in its whole or taking into consideration only some of its manifestations that would affect public order (for example activities like attracting clients, practicing prostitutions in locations situated near public authorities headquarters, schools, cultural or religious establishments etc.) or public behavior (for example obtaining incomes from high class prostitution and not subjecting them to public taxes);
- enforcing a legal permissive regulation system, in order to increase legal activities of prostitution and decrease illegal activities of such kind;
- enforcing a criminal or administrative offence for illegal practicing of prostitution, when the term in defined.

In our opinion, the current legal definition of the prostitution is a satisfactory one, as we find in the legal text of our Penal Code, taking into consideration that the text dates from the beginning of the '90s.

The double punishing standard, both penal and as an administrative offence (even if the administrative part should be only about attracting clients), led to various effects, mostly negative ones, creating an unfortunate image of the legal system in this matter and also allowing the enforcement authorities to choose between the sanctionatory regime that they would apply in each situation (since the law claims the necessity of proving the occupational nature of the offence). A legal clear definition of the notion comes as mandatory for the future and this could be done as a general rule, taking into consideration the necessity of a permissive or a restrictive provision regarding modus operandi and social effects of the prostitution. A future legal provision regarding prostitution should make a clear distinction between the prostitution activities and other activities that may have an artistic, educational, cultural, medical, erotically, sexual, pornographic or entertaining purpose but also may have some common features with prostitution (e.g. Pornographic productions with paid actors, video chat, erotic massage etc.).

The enforcement of a permissive regulation comes as mandatory towards the idea of preventing this activity to be controlled by criminal organizations representing a real danger for public order, the prostitutes, their families and sometimes, even for the clients.

We appreciate that a good definition of this social phenomenon would be the following: prostitution consists in a person's action of committing sexual activities with one of more persons, for the purpose of obtaining material advantages, outside and artistic, educational, medical or scientifical environment.

The legal provisions has to establish warranties for the purpose of:
- Assuring restrictive penal regulations punishing human trafficking for sexual purposes, panderism that involves constraining or deceiving the victims or situations in which someone takes advantage of a person being unable to defend herself or expressing his or her will;
- Maintaining a moderate penal sanctionatory provision for committing unauthorized prostitution and panderism that doesn't involve constraining or deceiving of the prostitute, but his or her free will;
- Enforcing an administrative sanctionatory system for the infringement of legal activities of prostitution.
In the development of this social phenomenon, we observe two forms of prostitution: the ordinary one and the luxurious one. The second category can produce outrageous incomes giving the way they are being obtained. Regarding this aspect, in a future permissive regulation, we could take into consideration the Belgian provision that limits the maximal value of the requested fees. Therefore, our future regulation should provide the right of a person to request money for sexual services, but the fee for an hour shouldn’t be higher than minimal wage, regardless of the activity of the prostitution.

A non incrimination in the criminal legislation combined with administrative sanctions will not be enough to control this social phenomenon.

It is only a coherent legal provision for this activity, enforced after observing regulations form other states and taking into consideration the Romanian legal expertise in this matter, both before and after World War II, that can lead to transforming a negative social aspect into an acceptable activity for society, economy, fiscality and public health.

In our opinion, the only way to improve the lifestyle of the Romanian prostitutes and to provide control over this activity is enforcing a legal permissive system, including special provisions for protecting the rights and freedoms of prostitutes. Such legal provisions should include:

- Protection for the person practicing prostitution towards her employer and client;
- Creating a contractual relation, legal and moral, between the prostitute and the client, in order to protect both their interests and the interests of third parties;
- An obligation for the prostitute to return the fee to the client in case the sexual service is not provided and the right to request the fee in the opposite situation;
- Interdiction for the employer and client to force the prostitute in providing a sexual service;
- The right of the prostitute to select the clients and to refuse a certain type of sexual service;
- The possibility for the prostitute to claim the payment of the fee in a court of law, personally, without the involvement of the pander;
- In case of a employer – employee relation, the obligation for the parties to close a written employment contract, so that the employee can have a right to social care and pension;
- Express obligation for the employer to pay taxes including to social care and pension funds;
- Legal provisions for prostitutes that want to practice this activity as a liberal profession (having to pay taxes like an employer);
- Limiting the legal responsibility of the prostitute or the pander, if they prove they obey all the legal regulations;
- Public authorities and local administration having to authorize the prostitution activity;
- Obligation for the prostitute to periodically (monthly) medical visits;
- Sanitary and public order verifications made at certain periods of time;
- Minimal age both for prostitutes and clients at 18 years old.

In case internal authorities should choose a perm issive legal system for practicing prostitution in Romania, we appreciate that expertise of countries like Belgium, Germany, Austria, Holland, Spain, Denmark, Switzerland, Hungary, Greece, Turkey, Mexico, Columbia, Venezuela, Australia and New Zeeland should be analyzed, and also the causes for which there have been some legal changes in U.S.A., United Kingdom, France, Italy, India, China, Japan, Brazil and Argentina.

In case of such a legal regulation for the sexual workers acting in brothels or other special location for paid sexual services (west European system- E.g. Spanish, Belgian system or German System –Eros Centers.), the provision of the Criminal Code should include an exception of appliance for persons that found or work in those location, in the conditions provided by the relevant special law.

The legal texts regarding prostitution must exclude pejorative formulations (e.g. prostitute or person practicing prostitution). The legal text could include expressions like: sexual worker, provider, authorized person, authorized person for providing sexual services and others.

The legal terminology mustn’t exclude the possibility for men to practice this activity and shouldn’t create discriminative situation for men in this matter.
A permissive regulation for legally practice of prostitution has to be enforced along with a penal one regarding prison punishments for illegal practice of this activity. There is also a possibility for instating an administrative sanction for prostitution, but it wouldn’t be as efficient as a penal one regarding prostitution.

In order for Romania to be forced to withdraw herself from The Convention on Action against Trafficking in Human Beings, the prostitution activity should be legally authorized as an independent profession and less as an activity that involves getting hired in a brothel (that would be owned and financed by another person) or working in an Eros Center, in which parts of a real estate is rented for practicing sexual activities. Also, there is the need of taking this activity away from the criminal groups that control it in the present time, that exploit and traffic the prostitutes.

After analyzing the foreign provisions, we have come upon restrictive, permissive, limitative or prohibitive legislations, that are concentrated in some distinctive directions:

- a severe sanctionatory legal system (in Iran, Afghanistan, North Korea, South Arabia, Tanzania, Kenya, Egypt, Vietnam and others);
- a moderate legal system, sometimes conditioning the repeating of the practice in order to be sanctioned (Romania at the moment, Russia, Ukraine, Haiti, Japan, Thailand, South Africa and others).

In some countries, only the client is punished (Sweden, Norway, Iceland and others) or both parties (Illinois, Alaska, Colorado, Texas, New York and others);

- a generally permissive system with administrational sanctions for some manifestations of the deed (Romania after enforcing the New Criminal Code, United Kingdom, France, Spain, Italy, Canada, Bulgaria, India, U.S.A. – Arizona, Columbia, Brazil, Argentina, Israel, Dominican Republic, R.D. Congo, Ethiopia and others);
- a permissive system, precisely regulated, sometimes doubled by a fine punishment or even penal sanctions for practicing prostitution in non authorized conditions (Germany, Holland, U.S.A. – Nevada, Switzerland, Austria, Greece, Hungary, Turkey, Columbia, Venezuela, Ecuador, Peru, Chile, Uruguay, Paraguay, Bolivia, Mexico, New Zealand and others). A future permissive legal system of this activity should use the expertise gathered from enforcing the mentioned above provisions by making a detailed analyses of their social effects.

A future legal system should include provisions regarding the condition for obtaining the authorization form local authorities as well as from the Ministry of Internal Affairs, local bureaus of the Ministry of Health. Also, persons practicing prostitution should be noted in the data bases of fiscal authorities in order for them to pay both income and authorization taxes. Local authorities could establish areas in which locations for sexual services would be founded.

In this regulation, the person practicing prostitution would have to assure the confidentiality regarding the client’s identity. This aspect mustn’t be mentioned or made public, excepting the cases involving judiciary or administrative procedures, sanitary aspects and at the request of a court of law, police or public order authorities, administrative authorities.

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Criminal repression in the context of the economic crisis and the maximization of crime at European and global level

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Section 2
Criminal Procedure Law
Universal jurisdiction in national concurrent criminal jurisdiction

Aghenitei M.

University „Dunărea de Jos”, Galați, Institute “Andrei Rădulescu of Romanian Academy” (ROMANIA)
m_aghenitei@yahoo.com

Abstract

According to the Rome Statute, International Criminal Court jurisdiction is complementary to national ones. The ICC cannot request the transfer of proceedings as long as they are pending in a domestic Court.

The Princeton Principles on Universal Jurisdiction define universal jurisdiction as “criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or the convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.” This is not the appropriate forum in which to attempt to define universal jurisdiction; a general understanding of the theory is essential to distinguish what universality is not, especially with respect to an assessment of conventional law.

Both the Council of Europe and the European Union have legislated on the issue of concurrent jurisdiction and the solution of conflicts of jurisdiction. It is irrelevant whether the jurisdictional principle applied is universal jurisdiction or any other principle of jurisdiction: what matters is the fact that there is overlapping jurisdiction. But there is no country that would establish express “criteria” to decide upon competing national jurisdictions.

Key words: “Universal jurisdiction”, “Concurrent Criminal Jurisdiction”, “International Criminal Tribunals”, “conflict of jurisdiction”.

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Concurrent Criminal Jurisdiction is not the solution of conflicts of jurisdiction.

In the context of the Council of Europe, the European Convention of Transfer of Proceedings in Criminal Matters is relevant, because 24 states ratified this convention, which is a relatively low number in comparison the European Convention on Extradition has 47 ratifications and the Transfer of Sentenced Persons has 61 ratifications. First Convention provides a mechanism based on a consultation procedure between the concerned states to solve problems resulting from what it calls a plurality of criminal proceedings.

In the European Union, article 31, paragraph 1 Treaty on European Union provides that “Common action on judicial cooperation in criminal matters shall include (…) (d) preventing conflicts of jurisdiction between member states.” Article 31, paragraph 2, Treaty on European Union states “The Council shall encourage cooperation through Eurojust by: (a) enabling Eurojust to facilitate proper coordination between Member States' national prosecuting authorities.”


So, much more effective in practice are the consultations that take place within Eurojust. It is within this agency that various prosecutors of the European Union states make operational decisions with regard to serious forms of cross-border crime by which more than one European Union state is affected. [2] Article 31, paragraph 1 of the Framework Decision provides that it shall be Eurojust’s objective in the context of investigations and
prosecutions concerning two or more European Union states, to stimulate and improve coordination between the competent authorities of the states. Article 6 gives further criteria to determine which of the European Union states is in the best position to investigate or prosecute certain offences.

There is no country that would establish express criteria to decide upon competing national jurisdictions. In Finland, conflicts of multiple jurisdictions are taken into account by the Prosecutor-General when prosecution in Finland is appropriate. In Japan, there is no rule, but the legislator tacitly understands that the state connected with the case should exercise its jurisdiction. In some countries there are rules about competing extradition requests that can serve as model for the resolution in case of conflict of multiple jurisdictions.

In Germany the law offers rules for the resolution of cases on the juxtaposition of an extradition request and a domestic criminal proceeding in the same matters. If domestic criminal proceedings concerning the same act have been carried out in Germany and the court has rendered a judgment or a decision, the statute of limitations has elapsed or an amnesty law has been enacted, no extradition shall be granted to the requesting state. The same applies if a judgement or a decision has been rendered by an international court. The German prosecutor has discretion to dispense with prosecuting an offence if the accused is extradited because of the same or another offence or if he is transferred to an international court. [3]

In the Netherlands if the extradition would be requested by two or more countries, the law stipulates that the Minister of Justice has to take into account criteria of the so-called good administration of justice. In addition reference is made to the following criteria: the seriousness of the offences for which the extradition is requested; the locus delicti; the date on which the requests were done; the nationality of the requested person; the possibility of the requested persons being transferred to another country. [4]

In Finland some criteria are mentioned in the case of multiple extradition requests. When selecting between multiple extradition requests, the Ministry of Justice takes into account such criteria as the nature of the offence, the time and place of its commission, the order of arrival of the extradition requests and the nationality and domicile of the person whose extradition is sought. This list of criteria is not exclusive and therefore other relevant circumstances may be taken into account as well. If a national court and the International Criminal Court have both requested extradition, the request of the International Criminal Court has primacy. [5]

In Germany, due to the subsidiarity of the exercise of universal jurisdiction, a flexible ranking of concurrent jurisdictions has been established concerning the prosecution of international crimes: primacy is given to the state of commission, the perpetrator's home state and home-state of the victim as well as to an international criminal court.

In Spain the law has developed the principle of subsidiarity by virtue of which the state where the crime was committed has priority over the Spanish jurisdiction when exercising universal jurisdiction.

In Germany, several proposal are being discussed on the proposal of the academics, on how to determine the most effective jurisdiction in cases of conflict of multiple jurisdictions. It makes a distinction between two basic models: a) flexible handling of the allocation of jurisdiction on a case-by-case basis; b) a hierarchical order who determines which state is authorized to exercise its jurisdiction according to the classification of links which underlie those principles of jurisdiction.

However, it’s questionable whether such a ranking already emerged as a rule under customary international law. It can be assumed that in such a case, the primary jurisdiction will always be that of the state of commission. In USA, with the Princeton Principles on universal jurisdiction, the best approach would be a balancing test of the different elements, departing, as a minimum condition, on the existence of a readily accessible forum and fully effective remedies in the different states.

In Belgium, it was established a list of criteria to solve the conflicts of multiple jurisdictions. The priority order of criteria is: the jurisdiction of the State of commission of the crime; the international jurisdictions; the jurisdiction of the state of the nationality of the author or of the state where the alleged offender has been arrested; the jurisdiction based on universal jurisdiction combined with the extended passive personality principle.

However, Universal Jurisdiction was applied in International Criminal Tribunals.

The International Military Tribunal was not based upon an assertion of universal jurisdiction but was predicated upon the Allies’ exercise of sovereign power over the German territory as a result of their occupation and the unconditional surrender of the German military. [11] Similarly, the Subsequent Proceedings, which were conducted by the various Allied nations on German territory, were founded upon occupation law. The jurisdiction of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda is territorial in nature. The jurisdiction of the International Criminal Court [7] is based on territorial and active personality principles. According to Article 12(2) of the International Criminal Court Statute, the Court has jurisdiction if the crime occurs on the territory of a state party or the accused is the national of a state party. Yet, there is one aspect of the International Criminal Court’s jurisdiction that may be described as universal, in referrals by the Security Council pursuant to Article 13(b). According to these, “the Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the
provisions of this Statute if: (a) situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.”

With the exception (until Oct. 2007) of the USA, Japan and Turkey, all other countries have signed and ratified the International Criminal Court Statute on 10 December 1998. [8] In Germany, the Constitution was amended authorizing the parliament to enact a law allowing individuals to be turned over to certain international courts. In Finland, some provisions of Statute are considered to conflict with the basic rules of the Constitution, but the Constitution is currently being amended. In Hungary, although the International Criminal Court Statute was ratified several years ago, it is still not implemented in national law, because is very difficult to amend the Constitution.

About the conflict of domestic jurisdiction with the jurisdiction of an international court, it is convenient to make a distinction between the jurisdiction of the International Criminal Court and the jurisdiction of the United Nations ad-hoc tribunals. [9]

The Primacy of the Tribunals for the former Yugoslavia and Rwanda, created by two United-Nations Security Council resolutions, over the national courts is clearly established by Article 9 and Article 8 of their respective Statutes. These international tribunals can require the national courts, at any stage of the procedure, “to defer to the competence of the International Tribunals”. These imply that domestic criminal proceedings that fall within the jurisdiction of the tribunal shall be transferred to it at any stage of the tribunal's request, such in France and in Germany. In Germany and in the Netherlands the domestic Acts approved in order to regulate the procedure and the means of judicial assistance with these tribunals. [7]

The domestic authorities such prosecutor or criminal court, have no discretion once the transfer of proceedings is requested by the ad hoc Tribunals. For example, in Hungary proceedings for crimes under the International Criminal Tribunal for the Former Yugoslavia or Rwanda Statutes must be suspended on the request of the respective Tribunal.

In some countries it is controversial whether the domestic authorities have a duty to review the competence of the tribunals in each individual case. In France the Court de Cassation reviews the requests and has to verify if there is any mistake. In the Netherlands, the District Court is bound to declare the surrender inadmissible in case of mistaken identity or if the surrender has been requested on account of offences in respect of which the Tribunal has no jurisdiction under its Statute. [8] In Belgium the Cour de Cassation decides to defer the competence at the request of the ad hoc tribunals, and the duty to review the Court is limited to the identity of the person and the facts.

In Germany, the authorities do not officially check the competence of the tribunals if they do not request the transfer of proceedings. The prosecutor or the court may bring forward the case to the tribunals in order to trigger a formal request.

The International Criminal Court jurisdiction is complementary to national jurisdiction, according to the Rome Statute and he has no mandatory primacy over domestic courts, except if the investigating or prosecuting state, having jurisdiction, is unwilling or unable to carry out its responsibilities. [12] Positive jurisdictional conflicts may emerge in two situations, related to requests for surrender and extradition.

In some countries, the universal jurisdiction of domestic courts is subsidiary to the International Criminal Court’s jurisdiction. In Croatia, domestic courts will have jurisdiction to prosecute perpetrators of international crimes according to the universality principle only if criminal proceedings cannot be conducted before the International Criminal Court, but is not explicitly stated how it is to be determined whether such proceedings can be conducted before the International Criminal Court. The decision as to whether to initiate an investigation lies within the discretionary powers of the Chief State Prosecutor. The universal jurisdiction of Croatian courts is not only subsidiary to the International Criminal Court’s jurisdiction, but also to that of other states more closely connected with the criminal offence. In Finland, the requests for surrender of a suspected offender made by the International Criminal Court have primacy over proceedings in their country.

In some situations, the proceedings can be transferred to the International Criminal Court, such in Belgium’s legislature or in Spain, who has decided to reverse a complementary rule: claims can be transferred to the International Criminal Court. The Ministry of Justice can submit to the competence of the International Criminal Court. The procedure prescribes that the Minister of Justice in consultation with the Council of Ministers issues an executive order informing the International Criminal Court of its intention. This is not possible for a claim that refers to a crime committed by or against a Belgian national, unless this crime is identical with or connected to a crime for which the International Criminal Court has accepted a claim as admissible.

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The human behavior simulation in front of the judicial psychologist

Aron I.

Transilvania Brasov University, School of Law (ROMANIA)

Abstract
The non seemingly behaviour is precursory, a behaviour oriented towards attitude.
Between the seeming and the non seeming behaviour there is the following relation:
- the simultaneous existence of the two ways of behaving.
- The non seeming way through its anticipative preparing and orientation can come after the seeming way.
- The non seeming behaviour can succeed a done and finalized activity without having been doubled by a notable exterior expression.
- In the blueprint of simulated behaviour we distinguish two important elements:
  - the moment when the stimul is given or is refreshed something significant for the subject.
  - the evaluation, the selection of different types of answer; here we have to watch the seeming way that the simulating subject expresses his intentions.

That what is fake is the meaning the individual gives to the component he offers towards direct observation, meaning that must be assignng after his intention to the seeming behaviour.

On the basis of the initial contacts, the investigator appreciates the expressed behaviour, especially the subject’s facial gestures, as an obvious reality, as a sum of dynamic features and characteristics, that bring out emotional states, states that need to be correctly interpreted.

Specialised literature emphasizes that the most common of these manifestations are: blushing, dilatation of blood vessels (noticeable in the temple area), spasms, voice trembling, shivering hands and feet or sudden blockage of a person’s movements, reduced saliva, an expanded time of response, not looking in the investigator’s eyes. It is obvious that an experimented investigator cannot miss this kind of behaviour. For such a person, voice trembling, hands trembling, picking imaginary lints, mollycoddling their purse, pauses in conversation, answering a question with another question will be more than sufficient for him to tell upon someone’s behaviour and discomfort when being questioned by authorities. Experience brings out not the difficulty in seeing these aspects, but the deficiency in correctly interpret them.

In light of these physical manifestations and the way they are being put out, control techniques have been created to observe honesty in statements.

Ever since Ancient times, the judges from that time use a very famous method of testing the accused: the rice method. It was about the accused having to swallow quickly an amount of rice, after each false statement, basing itself on the principle that through God’s will, any person who has given a false statement would find it impossible to swallow that rice.

Altough this method sounds naive, it has a scientific argument: in strong emotional states, the amount of saliva shrinks, and so you cannot swallow a hand of dry rice.

Being accused of doing something bad and the emotional state created with this feeling and also bringing Divinity into the question is not very conclusive; on the other hand it is real; the method allows observing the emotional state, but is not conclusive in establishing the subject’s honesty, given the differences between individuals (some may be emotional without being guilty).

Practice has brought out the fact that despite rare exceptions (persons that have had repeated contacts with justice), an open attitude, an open look, a fluent telling of the facts, the good will on answering the questions, the witness’s regret that he can’t answer some questions, with the reason that if he had known that those kind of circumstances are of interest to justice, he had tried to remember them, together with a gesture and mymics that are matching the facts that are being told, usually stands for a sincere behaviour, non simulated. On the contrary (exceptions are the persons that don’t usually have contact with the authorities and frustrated individuals) trying to be overcarefull, reserved, hesitation, contradictions, confusion, blushing, acceleration of sweat, studied gestures, low tone of voice, asking for a glass of water, they all indicate a simulated, dishonest behaviour.

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We must keep in sight that all of these observations that come out from observing the expressive attitude and behaviour of the witness, mean just an orientation upon some psychologival clues. They need to be carefully evaluated no matter how strong of an impression they make, because appearances don’t always match reality and a novice investigator can fail.

Here is why we must keep in mind that the individual is born with the capacity of disimulating, lying, disordering his true feelings, his true emotional states and that the witness can control his emotional states, states that are not accurate to his real psychic ones.

**The non verbal communication – specific tactical rules of interpersonal opposition and confrontation report**

Communication between the investigator and the accused is done not only through verbal language, but also through other ways, the so-called non verbal communication (gesture, mymics).

A great part in transferring the information of affectiveness takes place throughout non verbal channels. During the conversation, the non-verbal communication and basically eye contacts that take place between the persons involved in the communication are very important. The control on eye contact is sent out by the accused, even as he speaks. During the discussion he watches closely on his partner’s reaction, non verbal reaction, and based on what he thinks he sees in his eyes, he adjusts the second part of his story.

These kind of eye contacts are frequently made in the questionnaire room, especially when the accused doesn’t know what evidence the investigator has and especially when the investigator puts out disordered or false information.

During a common conversation, the eye contact can variate. In crucial times, specifically on the important arguments, wherever it may be, the look returns to the accused to verify if he has understood, if if he agrees or not with those that have been said. Watching closely for this eye contact requieres the investigator very much experience and intelligence, because coming back to a common eye contact may mean that the accused has reached a crucial point where he wants to sneak in a lie, a lie that could have great significance.

The investigator must control his eye contact an gain perfect control upon it. As the investigator would want to be permissive, he must not leave question of a doubt and must be in control of his smallest gestures, for he would else provide the accused with a serious weapon.

The eye contact of the receiver is not a source of information, but a means of conditioning him. On the accused’s first hearing, where he will tell the facts in his favour, the investigator should let him say what he wants, let him be fluent in his telling. If during his spontaneous telling the accused is not interrupted, even more, he is encouraging him by nodding his head and by mymics, is very likely that the accused will provide sufficient material for once the monologue is over to turn it into a critical dialogue. This conditioning through approval is an efficient trap, that will help the investigator, later on, to elaborate a suitable method for the situation.

It is common to say that those who avoid eye contact to the person they are speaking to are not honest. Most psychologists think that avoiding to look into someone’s eyes, especially someone with authority, is a sign of frustration.

**The non verbal components of the assertive, agressive and passive behaviour**

Assertiveness, aggressiveness and being passive are three different ways to approach interpersonal relationships. Each of them has a matching set of verbal an non verbal components.

When, during social interactions, we send information, the way that we send them plays a big part in making our message understood. The non verbal components we are speaking of here include visual contact, personal space between the persons talking, body position, hands gestures, facial expressions, head movements, but also voice inflexions, volume or tone. Each non verbal component can be done to clarify the verbal component of the message. In other words assertive, agressive and passive communication are each defined by a specific verbal and non verbal content.

1.1 **Assertive non verbal behaviour**

Assertive statements take into consideration the needs of the one speaking, but also the needs of those that are listening, and non verbal assertive components have the same effect. When someone looks straight up at the one who is speaking to him shows that he is really interested in what he is being told, without thinking less of himself, at the same time. During a speech, relaxed and soft moments emphasize the words and the tone of voice must be at a suitable volume for everyone.

In the assertive communication, someone’s answer to a verbal message should be prompt, without any delay or hesitation.
About the proximicty or ideal personal distance it is said to be between 0.5 up to 1.5 meters, as far as European and North American culture say.

### 1.2 Aggressive non verbal behaviour

Aggressive statements take into consideration only the speaker’s wishes, trying to ignore those of others. This intention is emphasized by the non verbal behaviours that come with them. The eye contact is very straight, rigid and very tensed. A body position leaned to the front may seem aggressive and threatening, the hands are usually made under fists, with movements that suggest violence. All of these behaviours are meant to intimidate, in the idea that the speaker is the one dominating and all of the others’ wishes must subject to his owns.

### 1.3 Passive non verbal behaviour

Passive statements subject their own needs and desires in the favor of the ones belonging to others. This behaviour includes gestures like: avoiding eye contact, a rigid body position. Hand movements, if they exist are reduced are are very close to the body.

The speaking rate is very low, and the volume is always the same, as if that person would want to say that it is no use to say what he means to say because it doesn’t matter anyway. There are delays in his time of response, telling us again that the message coming from other persons is more important than the personal message. Personal distance is maintained under the inferior limit of 0.5 meters

Other considerations:

- When the verbal messages are consistant with the non verbal ones, the communication of the assertive, agressive or passive intentions is done without difficulties. When they are not consistant, communication is rather confuse and it is more difficult to be responded to.

- Another aspect that should be taken into consideration is the cultural one, which, if it is regarded of, can misleade the interpretation of some behaviours.

The non verbal communication is of the utmost importance, due to the fact that it is present everywhere (we verbally comunicate from time tot time, but more often nonverbally). Even from the beginning of evolution the non verbal communication had been the utmost necessary, being the artefact of the species’ survival.

<table>
<thead>
<tr>
<th>Assertive behaviour</th>
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</thead>
<tbody>
<tr>
<td><strong>Visual contact</strong></td>
</tr>
<tr>
<td>Straight visual contact, without being too perssistant.</td>
</tr>
<tr>
<td><strong>Posture</strong></td>
</tr>
<tr>
<td>a). Looks up to the person;</td>
</tr>
<tr>
<td>b) looks straight in the person’s eyes, while his body has a non simetrical posture: his hands and feet are relaxed, held in the same position on each side.</td>
</tr>
<tr>
<td>c) slightly bended towards his interlocutor.</td>
</tr>
<tr>
<td><strong>Gesture</strong></td>
</tr>
<tr>
<td>Easy, relaxed hands that emphasize verbal expressions.</td>
</tr>
<tr>
<td><strong>Distance</strong></td>
</tr>
<tr>
<td>He maintains an apropiate personal distance, of aproximatelz 0.5-1.5 meters.</td>
</tr>
<tr>
<td><strong>The time of response</strong></td>
</tr>
<tr>
<td>He offers the answers, without hesitation, as soon as the speaker has finished talkng, and he interruptes him onlz to finish his interraction.</td>
</tr>
<tr>
<td><strong>The voice</strong></td>
</tr>
<tr>
<td>Ferme, an appropriate volume of the voice, without being too loud or slow.</td>
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<table>
<thead>
<tr>
<th>Aggressive behaviour</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Visual contact</strong></td>
</tr>
<tr>
<td>Lack of expressiveness, narrow, cold.</td>
</tr>
<tr>
<td><strong>Posture</strong></td>
</tr>
<tr>
<td>Rigide</td>
</tr>
<tr>
<td><strong>Gesture</strong></td>
</tr>
<tr>
<td>His hands are clenched, he has wide gestures, especiallz over his shoulders.</td>
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</tbody>
</table>
Distance | Smaller than 0,5 meters.
---|---
The time of response | Low, with often interruptions.
The voice | Very low with a high conversational rate.

**Passive behaviour**

Visual contact | Looks down or other ways.

Posture | Not facing the other person, rigid, symmetric.

Gesture | Continuous moves, with small gestures besides the body.

Distance | Larger than 1,5 meters.
The time of response | A great distance between the time when the speaker has finished his message and the time he must respond.
The voice | Very low volume, with a low conversational rate.

It is important to say here that, in generally, the consequences of the assertive behaviour are good, meanwhile, the ones of the passive and/or aggressive are not.

**The behaviour dimension of emotions**

The emotional process has external behaviour manifestations, accessible to observation: gesture, movement or immobility of the body, facial expressions, vocal expressions and so on.

These manifestations combine in specific configurations - facial, vocal, gestures – on the basis of what can be described as a specific emotional state.

Facial expression seems to be the most eloquent to the observer. For example: joy or anger can immediately be read on someone’s face. The central nervous system is responsible for the facial muscles’ control, causing them to frown, relax, tremble.

The epiderm’s colour also represents an immediate clue for emotion (white as snow, in the case of blood vessels’ constriction, red as a hot steam, in the case of blood vessels’ dilatation.) The tone of voice (intensity, inflections, accent, pauses) can translate states of joy, sorrow and so on.

Emotional expressions are done throughout a sum of born reactions, combined with conditioned and voluntary reactions. The elementary forms of emotional conduct are reducible to unconditioned reflexes that appear, independent with any experience. For example a small noise makes a little baby to start from surprise and a change in his body posture, although he hasn’t had a bad experience before concerning any noise.

Watching the role of visual imitation, Dumas, Thompson and Fulcher have comparatively studied emotional expressions with people blinded from their birth and people who can see. They have discovered that laughter, shouting, fear reactions, anger, joy are the same with both cases, in the case of blind people the voluntary expression is lower and decreases with the age. P. Eckman and H. Oster have studied facial expressions in isolated populations, that are not subjected to different types of emotional models coming from culture or magazines. Here is what they discovered:

- the verbal labels attached to emotional expressions are universal and do not depend on cultural interpretation;
- the request to imitate certain particular emotional expressions leads to identical expressions in different cultures;
- the recognition of emotion in different cultural groups is pretty precise, offering correct verbal labels.
- at least six basic emotions - as it was shown – seem to be universal: anger, disgust, joy, sadness, fear and surprise.
The mymics listen to a native command and a voluntary one. The social environment selects the basic expressions, developing some and repriving others; they create a true mymics language where conventional gestures and signs develop spontaneous expressions.

Due to this overlap, emotional expression becomes a social exchange technique: a smile can enlighten the speaker, a disgust mymics can stop someone from doing something bad, crying brings out compassion. Myme and pantomyme—says V. Pavelcu—becomes a language, as the articulate word is; they are learned by taking the social form of patterns and models sent out for generations. The possibility to modulate voluntary emotional expressions creates the premises of judging between the outside and the inside, between objective and subjective. Finally, the man has created—during his historical development—a wide range of expressing emotional states, and here we think of poetry, lyrics, music, dancing, and generally artistic means of expressing emotion.

Slowly, as we collect data from different kinds of studies upon human activity, we see that the idea that says emotion is a multidimensional phenomenon, gets into shape, concluding that emotions have thinking, behaviour, physical and subjective aspects.

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Judicial biodetection

Aron I.

Transilvania Brasov University, School of Law, (ROMANIA)

Abstract

Simulated behaviour (disimulated) stands for one’s refuse to confess and admit a real attitude towards a certain person or the attempt to hide from himself a certain desire he feels.

Simulation is the action in which someone imitates or consciously provokes himself physical or psychic changes in order to obtain certain advantages. Simulation is the specific form of deviant behaviour that stands between normal and pathological, with psychopathological substance or without it.

The intention of misleading is done, on anxious persons, usually by three ways:

a) by rationalisation, in which the person offers the most plausible reasons to justify certain acts that he himself blames.

b) others try projecting (projection) their personal attitudes in someone else’s tab.

c) the opposite of this kind of misleading is identification, in which the person is willingly taking upon himself other people’s behaviour.

Key-words: simulation, deviant behavior, biodetection, poligraph examination

The main feature of simulated behaviour is intentionality, where lie is an intentionall mistake.

The poligraph, usually knowned as „the lie detector” is a mecanic or electronic recorder, which pneumatically takes over the modifications of the blood pressure, puls, respiration, powered with a system for recording the electromagnetic resistance and of muscle’s micromovements.

The poligraph does not record the lie as it is, but the physiological modifications of the organism during the multiple emotional states that associate with the simulation. The poligraph is simultaneous recording on a diagram the changes of five psychophysiological parameters: the thorax respiration, the abdominal respiration, the electrodermal reaction, the blood pressure-puls and the neuromuscular motion. Each graphic recorded psychophysiological parameter, on the poligraph’s diagram, represents certain specific features which the examiner will put to analysis and will interpret, and so, the examiner will formulate conclusions regarding the authenticity, or the absence of honesty of the subject, conclusions which will be noted in the expert’s psychological report of ascertained technical and scientific fact.

The examination will only take place in a phonic isolated room, especially made and furnished. The room must be as austere as possible, without any ornaments, paintings, or any other objects that may distract the attention of the subject, and so to deform the psychophysiological recordings. The room’s temperature must be a normal one, and also a proper lighting. There must be a second room also, the so called „room of observation”, that must be proper equipped for this intent.

Before any examination with the poligraph technique, must take place a pre-test interview with the subject, and also the examination is finalised with a post-test interview. The examiner will have to obtain the exact data, regarding the facts and the circumstances that make the hard-core of the suspicion or the charge of the subject which is to be examined. In the case of the examination with the poligraph it is grave to round up the cause that is amplifying the emotional state of the subject (the instability of his psychobehavior, his criminal past, his health state, the deliacte problem of the cause for which the subject is suspected or accused, etc).

The pre-test interview requires an emotion of mutual confidence and trust, and also an open and free dialogue. The absence of this ambiance can influence in a bad way the psychoemotional reagency of the subject and implicit the result of the poligraph test.

During the test, the examiner’s voice must be under absolute control.

The examiner’s attitude must be objective and reserved, and to manifest impartial regarding the frankness or the absence of authenticity of the individual which is examined.

The examiner must make sure that is a convenient atmosphere, disposing of any causes which may affect the poligraph technique inquiry.

The questionary used in the poligraph examination, has on average 10 questions numbered by the examiner from 1 to 10, order which coincides with de poligraph diagram. The questions that are asked will refer only to one aspect, and will have a short enunciate, in order to get a spontaneous respons. The questions
regularly, contain the most colloquial terms for the questioning. The questions are answered only with "YES" or "NO". The examiner notes down on the polygraph diagram, the number of the questions, adding, according to the affirmative or the negative answer, the mark "+" or "−". In the questionnaire are included 3 sorts of questions: relevant questions (charging, accusing, critical ones), neutral questions and control questions (psychological discomfort, etc.).

Ex. Test.
1. Your name is A.G.? YES
2. Do you have a licence to carry a gun? NO
3. Do you know how your wife caught fire? NO
4. Do you wear glasses when you read? YES
5. Did you torch your wife by throwing gas on her? NO
6. Have you ever thought of killing someone? NO
7. Were you born in Bucharest? YES
8. Did you set your wife on fire? NO
9. Did you throw on your wife gas from a can? NO
10. Have you answered with the truth to all the questions? YES

There is in every man the normal drive to meet one’s eye, in the best way that they can, in the best light, even more, if it is possible (more intelligent, more important etc.). This leads to some willed exacerbation of some features or to hiding some of them (even more to individuals who committed crimes). As a general rule a reaction is far more faster, more close to the edge of spontaneity, as it is true.

Some individuals manifest a delay, a bigger or smaller lack of superposition, between the real structure and the one presented through "the mask or picture", which triggers a hidden and forced behavior.

We can well observe the way the subject reacts in a given situation with an determinant character.

Next, the sources of important elements are analyzed in the labile symptomatic and some conclusions can be drawn:

The expressive conduct includes the dynamic manifestations of the human body: pantomime, the vegetative changes and the speech. The systematic observations, the accumulated experience, have led to mixtures between the features of expressive conduct and some outpourings of the mental life. In other words, the expressive conduct can be "critic" and it is worth to puzzle out because it gives us clues of the inner psychic life.

The pantomime represents the set of reactions to which participates the whole human body: through walking, gestures, figure, pose, etc.

The Pose or Attitude – most often, the position of the body is illuminating for the psychic feeling of the individual at a certain moment. The attitude in which: the shoulders are "fallen", the body is leaned towards the front, the head is leaned, the hand are stretched along the body, denotes either the fact that the individual is tired, either depressed. Similar body aspects may indicate: modesty, lack of opposition or resistance, defensive attitude, a low level of energetic vibe, sadness.

Firm shoulders, a head high, hands evolving along the body, and legs spread a little, denote self confidence, strong spirit, a "martial" and provocative attitude. For a right interpretation of the meaning of the several general attitudes you must correlate them with the objective situation and with some other conduct elements.

The walk – gives us some clues of the psychic features of individuals. The most important features are speed, flexibility, and backbone. Are to be signalized some of the walking types: slow and bumpy, slow, shy, rapid, energetic, firm and graceful. The speedy walk denotes a very big neurophysic mobility. Good mood, optimism, self confidence are denoted by a firm, fast walk with long steps, and sadness, depressive moods determine a slow walk with small steps.

Gestures – represent along walking, one of the oldest ways to examine the reaction of the organism to changes occurred in the external or internal environment. Gestures can be classified in 3 classes:

- Instrumental gestures, which are made when it is made a certain action. In this case, the most important role comes to the hand, which now has diversified anatomophysiological features (to take hold of, pulling, pushing, pulling up, punching, pulling down, etc.);

Therefore, fast gestures, but with little precision, denote a mood of hyper-excitability (a characteristic to the choleric temper)

- Prompt gestures, accurate precise denote a calm nature, self control, self confidence, sharpness (sanguineous temper)

- Slow gestures, but accurate and precise, denote meticulousness, a special care for details (phlegmatic/irresponsive temper and melancholy/sombre temper)

b) Reticent gestures, taking place for the speech – have the purpose to determine the companion to make him feel a certain feeling, emotion.
Rare gestures, of little amplitude (close to the body) can denote: defensive attitude, fear, a low level of energetic mability, indifference, boredom, drive to isolation.

Very rich gestures, denote a very good mood, happiness, a very high level of energetic mobility, openess towards an ideal or a cause.

Rapid and violent gestures, when they come alog with a speech with a high tone, represent: irritability, a hot temper, nervousness, will for domination, a will to exercise authority.

c) reactive gestures are those movements of the body and of the hands and legs, as a response to different unexpected situations,that the individual is confronted with, and most of the time it has a defensive role.

C. Nierenberg and H. Calero, in a consistent paper regarding the movement of the hands, underlined the fact that if the friction of the hands denotes a negative attitude, hands in a helmet shape suggest confidence (if the helmet is directed towards up, it means that it is an individual self confidence, if the helmet is towards down characterises good listeners).

Taking your hand to your face, to your mouth, eyes, ears, or even the collar, has negative connotationes, characterising lie, fear, etc. Using the whole hand to support your head, denotes boredom,lack of attention, and the position that expresses the most lack of attention is the one with the head put on the table.

The knited hands or legs suggests the fact that the subject thinks that he is placed in an hostile enviroment.This is a gesture underlineing frustration, disallowance, defensive position. Experts say that it is a highly negative gesture if the hands are knited.

As much as the knitting of the hands,or arms, gesture is difficult for the eye to see, these gestures are very popular among individuals very „exposed”.

Knowing what the gestures of the arms mean,is extremely usefull regarding human relationships.

Movement of the hands as well as the eyes, seem to be made consciously.Therefore the movement of hand are not a vrey sure source of information about telling the truth or not. It seems that individualt who lie, focus their attention to hide their palms, hands, and even face, because they know that their companion would give a special attention to these parts of the body.They don’t control the legs as much as te hands because the legs ar not as exposed as the hands are when they are interactin with a companion. One of the gestures that gives away a lie is „the covering of the mouth”. Actions that are made to cover the mouth with the hand , are also notable when the palm supports the chin, and a finger toches the mouth,lips. By putting his hand on his mouth or next to it, the liar, acts like a murderer who can not resist the temptation of revisiting the crime scene. Like the outlaw, the hand is offered far detection – at any point those around him cab observe, that covering or toching the mouth, is a attempt to hide a lie.

Even said that, there is a substitute for the touching of the mouth, when the subject lies, anf that is touching his nose. It is an indicator of hiding, even though he touches his nose he actually wants to touch his maouth, but not doing that he thinks that he will not draw so much attention on to him.

The voice and the speech may concur in some cases, to expose criminals. In the act of speech may occur ample voices, crystal vorices, baut because of some disturbances they can present saome characteristics (tubby voices)

Speech has its features: sonority(vocality) – intensity, the sounds average, fluency, debit or speed, intonation and pronunciation(articulation).

The pantomime – represents the entirety of expressive changes to which take part the noble parts of the face: the eyes, the eye brows, the mouth, the forehead, the cheeks, the chops.

In the act of pantomime, an essential role comes to the sight, which represents the key to any expression of the face. Depending on the way the eyes close and open, the direction of sight, the successive positions of the eye brows, the movement of the lips, the expression of the face are extremely varied, expressing: astonishment, perplexity, acceptance, sadness, happiness, anger, severity, boredom, caution, suspicion, surprise, confusion, etc.

Since immemorial time, the eyes have represented authentique windows for "the great insides” of the beeing, as Novalis would say. As E. Hess shows in his paper "The Teii-Tei Eyes” ( The eyes which betrayl), the eyes have a very important place in the translation of the non-verbal communication, not only because they are placed in a central side of the face, but also because by this way we can accumulate 87% of the information from the enviroment.In addition, the size of the pupils changes unconsciously, and it is dependent, not only by the oscillation of the light, but also by the psychological moment of that individual ( sadness or anger can make the pupils contract, the"snake eyes”, and joy and erotic emotions make the pupils expand, even 4 times as they were in the begining).

The individuals that are shy, nervous, or those who lie a lot, they do not look into their companion eyes.

The course of looking eye into eye between two individuals influence the begining of a good relation, generally, but for this to be possible, this action must take place with a duration of at least 2/3 of the time spent together by the two individuals.

Also there are places where looking directly to ones eyes is a sign of disrespect. In order to approach a formal sight, our sight, must remain "hung up” to the companion’s forehead. If teh sight in focused between the
eyes and the lips, the climate begins to be friendly, and if the sight is focused between the eyes and the chest, that is a more informal look, we can say that this look is even an erotic one.

Opening the eyes is in a big part illuminating for the situation in which that person is. The eyes wide opened may denote lack of knowledge, absence of guilt, or fear, an attitude very receptive, interest, trying to understand the new information that is provided.

The eyes not so wide opened may represent an attitude of fortitude, objection towards the new information, suspicion, the drive of understanding and unlocking the hypothetical hidden thoughts, of the companion of speech, the drive to hide, his own thoughts, or intentions, fatigue, tiredness, boredom.

The direction of sight is very important in understanding the features of the face.

Sight represents the most dynamic element, the most expressive, and the most important, for the non-verbal communication. The degree eye opening represents a relevant indicator of the subject’s attitude regarding the situation he is facing.

Between how much we open our eyes, and the mass of information received, there is a proportionally reverse rapport. Certain is the fact that sight incorporated with the other elements such as pantomime, features of the face, can suggest an extremely large variety of emotions, feelings, behaviors.

Another so called sign of recognizing a lie, is the quickly blinking of the eyes. Even though a lie is often associated with quick blinking, some people blink very facts from their eyes because there are under a lot of tension, or stress.

Also, there are moments when liars have normal blinking.

An indicator of evaluating the sight is the direction of it. The sight towards nowhere suggests perplexity, the effort of remembering; sight toward down or aside, suggests humility, feeling of guilt, shame, sight towards up, above the companion’s head represents lack of respect for him, and the firm sight directly towards the companion, represents honesty, an opened attitude, critic attitude, and also sometimes instigant attitude.

The sight’s mobility can also give us a lot of clues about the subject. Excessive mobility of sight, seems to be a sign of lack of determination, the drive of hiding his thoughts, his intentions or even his feelings of guilt, on the other hand the immobile sight denotes a lack of contact with reality, a lack of facing the companion.

Usually when two individuals are looking each other eye to eye, and one of them changes his sight, that represents the fact that he is backing down, he is taking a defensive position.

Dissimulation, masking effect – when somebody tells a lie on purpose, he must hide two things: first the true, and second any track of emotions that could give him away, in his action to dissimulate the true. Emotions lived by persons who lie, are usually negative ones – guilt feelings, fear feelings, fear of being caught – but liars can get their rush from thinking that they succeed in fooling someone, this phenomenon was named by Paul Ekman “the satisfaction of fooling”.

When a person tells harmless little lies, usually they don’t feel any negative feelings.

Still, when he tells a big important lie, the individual, lives strong, deep negative feelings, which must remain hidden in order to succeed his plan. A negative emotion, can be hidden by turning his head around or by covering his face with his palms, or even by masking the lie with some neutral or positive emotion.

People utilise a big number of non-verbal signs to underline their rank, their position in society.

A manager, for example, manifests his power through gestures, position of hands, chest etc. On the other hand, his inferiors, lean their head.

In the judicial proceedings area, the utility of knowing extra-verbal communication consists in the fact that through this channel is sent an overplus of information, and under pressured conditions, under which the hearing is taking place, these kind of reactions are not any more censored by the subject, he looses control consciously. The polygraph diagram or map, represents a graphic expression of the physiological parameters (the thorax respiration, the abdominal respiration, the electrodermal reaction, the blood pressure-pulse and the neuromuscular motion), at the same time as the subject is being questioned.

At the end of the examination, begin the analysis and interpreting the polygraph diagrams. After having interpreted both the polygraph diagram and the subject’s behavior during the examination with the polygraph technique, the examiner can draw a conclusion, either positive, negative or doubtful.

Any examination with the polygraph technique ends with a post-test interview.

Some say that using the polygraph is equal to a derogation to the dignity of the person, they also say that the polygraph might be a way of intimidation that can trigger the person to confess facts that he would not have acknowledged.

All these charges against the polygraph are without a strong scientific fundament, they come into place only in those environments which know very little or even nothing about the polygraph technique.

In Romania the polygraph technique gives us data on which we can find out clues, allowing to:

- eliminate the suspects who prove out to be not implicated in the case, and so a lot of time and is spared;
- identify criminals, whatever their crime;
- determine the honesty of the persons using the polygraph and of their confessions;
• determine the circumstances that point to criminal facts;
• eliminate the contradictions between parties involved in a criminal law trial (suite)
• detecting false charges, etc.

The qualification of the examiner, and his personal attributes, are very important in the utility and in the accuracy of the results of using pligraph technique. It is a must for the examiner to be a highly intelligent person with a superior educational background, also to manifest interest in job. He also has to master the fundamentals of psychophysiology, behavior both in general, and particular.

Some of the qualities of the examiner are: empathy, brightness, sharpness, equilibrium both moral and affective, etc.

The exceptional results obtained in the investigations, using the poligraph technique, brought them in the attention of jury courts and of judges from Romania.

The psychological report on the simulated behavior is subjected to free appreciation of those who work in the legal system.

Bibliography

The criminal action and its start off
Practical aspects and controversy

Babeau N.

Romania cleopa_nicu@yahoo.com

Abstract

The moment of criminal action start off is chosen by the criminal procedural bodies and is due to a base resulting from the guilt evidence administered in the cause. These must exist both in case of indictment and the criminal action start off, representing the positive condition required by art. 228 line 1 c.p.c.

Keywords: culprit, criminal action start off, indictment

Criminal action

1.1 Purpose and objective of the criminal action

Pursuant to art. 9 c.p.c. the criminal action has the purpose to the bring to criminal account the persons that committed crimes, and can be performed during the entire criminal trial.

1.2 Subjects of criminal action

Active subjects:
- Prosecutors and legal courts
- The harmed person

Active subjects:
- Persons that committed crimes no matter the type of involvement

1.3 Specific traits of the criminal action [6]:

- The criminal action belongs to the state
- The criminal action is compulsory
- The criminal action is irrevocable and unavailable
- The criminal action indivisible
- The criminal action is individual

1.4 Manners to start off criminal action

The moment of criminal action start off is chosen by the criminal procedural bodies and is due to a base resulting from the guilt evidence administered in the cause. These must exist both in case of indictment and the criminal action start off, representing the positive condition required by art. 228 line 1 c.p.c. The guilt evidence taken into account when the preventive arrest measure is inflicted against a culprit (art. 146 c.p.c.) may constitute, to a large extent, also the reasons for the criminal action start off.

The culprit is the passive subject of the criminal trial. He/she is the passive subject, required as well as indispensable. He/she shall maintain this status until the pronouncement of a definitive conviction, when he/she becomes a convict. Pursuant to the criminal procedural law, the criminal procedural act make a differentiation between the three categories, respectively malefactor, culprit and convict within the criminal trial. [6]

The malefactor is a part of the trial and does not make the subject of rights and obligations. The culprit, pursuant to art. 229 c.p.c., the person against which the criminal research procedures are taken, as long as against him/her a criminal action has not been started off. This is a part of the trial, however not a procedural subject. [6]

The culprit is the person against which a criminal action was started off and becomes part of the trial thus acquiring a plenitude of procedural rights and obligations through the effect of indictment action statement, compliant to the law. These procedural rights and obligations are:
He/she has the right to be notified regarding the indictment
Is entitled to state requests (evidence administration art. 66-67 c.p.c., challenge art. 51 c.p.p., for replacement, rescission or termination of the preventive measure provided against him/her by art. 136, 139, 140 c.p.c. )

To compulsorily participate to the fulfillment of certain criminal research actions (hearing, confrontation, restoration or presentation of the criminal follow-up procedure material)

The criminal action start off is not possible if the malefactor is not known, as the criminal action can not be directed against anything else but against a specific person. Also, the criminal action shall not be started off in the presence of any of the situations which, pursuant to dispositions of art. 10 c.p.c., prevent the criminal action start off. [7]

A criminal action start off, through ordinance

During the criminal research, the criminal research body, acknowledging that there are enough reasons to start off the criminal action, forwards its suggestion to the prosecutor. After the file study, the prosecutor supervising the criminal research, pronounces regarding the criminal action start off. If the prosecutor confirms the criminal action start off, he/she shall issue an ordinance. The criminal action start off ordinance ex officio or at the suggestion of the criminal research body, shall be pronounced by the prosecutor pursuant to art. 235 line 1) and 2) c.p.c., at the same time being motivated, whereas pursuant to art. 203 line 2 c.p.c. shall compulsorily include:

- the prosecutors surname and first name
- the cause referred in the ordinance
- action object
- legal base
- signature

If the person who committed a crime is a military, pursuant to art. 226 c.p.c. ( with the amendment of the art. 1 point 126 of the Act 356/2006 ) if the military committed any of the crimes provided by the art. 331, 332, 333, 334, 348, 353 and 354 p.c., the criminal research may start only through an appraisal made by the respective commander.

Criminal action start off, through indictment

After the presentation of the criminal research material, the Public Ministry, through the prosecutor supervising the criminal research, shall start off the criminal action with the issuance of an indictment disposing the culprit summons by appraisal of the court for cause solving. Through the indictment issuance activity and through that of criminal action start off, the prosecutor shall support the indictment stated in the indictment document, and shall request from the court to proceed to the legal research start to the purpose of convicting the culprit.

Criminal action start off, regarding other material deeds and other actions and persons

Article 335 c.p.c. provides, that when during the trial, data is discovered in the culprit’s behalf regarding other material deeds included in the crime’s content, the respective crime for which he/she has been started the trial against, the court, through closure, shall extend the criminal action concerning these deeds and shall proceed to adjudicate the crime as a whole. When, during the trial, in the cause other authors are discovered against whom a criminal action has not been started off and who have not been put on trial , the court ex officio may apprise concerning the extension of the legal research also against the other persons. For these persons, as a criminal action has not been started off, it shall become the direct task of the meeting’s prosecutor.

Criminal action start off, in case of complaints before the judge against prosecutor’s resolutions or ordinances for not-putting to trial ( art. 278 ind. 1 c.p.c. )

If, following a complaint based on art. 278 ind. 1 c.p.c., the judge pronounces the solution provided by the art. 278 ind. 1 line 8 letter c ) i.e. admits the complaint, through closure, dissolves the resolution or the contested ordinance and, when the existent evidence in the file are deemed enough, apprehends the cause for trial, as he/she deemed the evidence as enough, context in which one witnesses the criminal action start off through a closure by which the judge admits the complaint and apprehends the cause for trial. [3]
From a certain perspective, the closure by which admits the complaint, represents the investiture document, which leads to the conclusion that the court is performing a deed which, as a matter of fact, is one of the criminal research body’s tasks. Thus the occurring controversy, as one considers the current provision of the art. 278 ind. 1 line 8) letter c) c.p.c. breaches the principle of legal functions separation and the second of the trial laws, the condition of dispute and equity.

On the other hand, certain authors [1], believe this institution as an important step towards the criminal trial privatization.

The controversy occurred may be casted away if, after the court admits through closure the complaint and apprehends the cause for trial based on art. 278 ind. 1 line 8 letter c) c.p.c. during the first trial due term, the criminal action start off shall become the meeting prosecutor’s task, alike the situation of legal research extension based on art. 335 and 336 c.p.c.

Bibliography

The sanction in the philosophical-legal thinking

Badescu M.

„Alexandru Ioan Cuza” Police Academy (ROMANIA)
mihai.badescu@mai.gov.ro, mihai.badescu@academiadepolitie.ro

Abstract

Punishment should be seen as a natural reaction against members of society who damage a value; it is related to the idea of evil, applicable by the state against those who violate the rules of coexistence. In modern societies, the link between legal sanctions and the idea of "evil" of "aggression" is limited, because society reactions can be not only positive but also negative. The right of the society to punish is a manifestation of reason and must remain closed within the idea of justice and humanity. As a measure of society for its own defense, the punishment is justified by its utility and necessity. The law shall not be confused with force and strength and force cannot explain the law. The law establishes the sanction and not the other way round.

The aim of the sanction is triple: rehabilitation of the offender, victim satisfaction and protection of society. The theory of sanction is based on the following principles: legality of sanction, equal punishment, punishment personality, moderation, inevitability and celerity, the proportion between crimes and punishments.

Key words: sanction, crime, responsibility, law, rule, society, theory, criminal law, reward, virtue.

1. By its norms the law has to ensure social order, public wellbeing and social progress and „to lead to the happiness of the biggest number of individuals, avoiding the highest degree of suffering”[1].

In most of the situations the legal norms are respected by their recipients, but there are cases when the enforcement of law is necessary because the patterns of behavior imposed by regulations have been breached [2]. In this context one can see the inevitable link between law, its enforcement and the idea of legal sanction.

Although there are different points of view in the doctrine regarding the coercive nature of the law, [12] one thing is for sure: legal liability and sanction have been from the beginning and will remain instruments of law.

The repressiveness and the educational character of the law – some of the dimensions like sociability, normativity, imperativeness and value – seek to underline “its capacity of generating a collective reaction against those who violate the rules and whose anticipation induces respect from the members of the society who do not want to be sanctioned.” [7]

The philosophy of the sanction – may be considered part of the studies regarding the history of philosophy and was analyzed by well known historians and philosophers like Aristotel, Platon, Kant, Hegel.

2. Thus, sanction is regarded as a natural reaction of the society against the individuals who damage a value;[1] the sanction is linked to the idea of evil which is applied by the state to those who break its rules.”

Another opinion states that the punishment is “the evil done in the name of the society and while enforcing a court decision to the offenders [21].”

However, we notice that the evil included in the punishment may also be expressed as a form of organized aggression against the members of the society and against those who break the rules.

However, we can say that in modern societies, the association of legal sanction to the idea of "evil", of "aggression" is limited, because - as highlighted by Prof. Nicolae Popa - reactions of society can be not only positive but also negative. "In both situations, but especially in their positive aspects - based on harmonized system of values and criteria for assessment – it represents a strong element of social control." [16]

Expressed in terms of "the right to punish" the issues related to sanction were reduced to forms which legitimized in terms of society and state power. * The idea of social contract has become in modern times the starting matrix, from which was developed the right of the state to punish [16].

In the nineteenth century, almost all treaties and manuals of criminal law included the right to punish as a particular part of study for criminal law, the most exciting topics of analysis being related to the right to self-defense exercised by society, a divine punishment, punishment justification with reference to the principle of corrective justice involving state power and the need to fulfill the mission of control or punish offenders and their social rehabilitation [16].

3. The sanction is a defining characteristic of law, it does not characterize only the law but is a feature of all systems and types of social normativity, "and the logical definition is formulated by invoking only the
specific difference" [18]. Legal sanctions are auxiliary to existence and legal compliance; not the law is explained through sanctions but the other way around.

Eugene Speranția recognizes that social peace cannot be designed, provided and guaranteed without coercive actions. A legal norm is not respected because of the sanction that comes with it, but thanks to "the feelings of those who fear punishment ... the circumstances when legal rules are respected are those when the sanction does not apply”[18].

When only the fear to be punished represents the foundation of law enforcement one can see in the existence of societies a cyclical period, like a tide. That is why:

- "When the punishment is higher the fear is higher;"
- "When the fear is higher the respect for the law is higher;"
- "When the respect for the law is higher the frequency of punishment decreases;"
- "When the frequency of punishment decreases, the fear decreases;"
- "When fear decreases, the respect for law decreases;"
- "When the respect for law decreases, the frequency of punishment is higher;"

Etc., etc."[18]

In conclusion, the law is complied with for other reasons than fear and sanction. Thus, the law generates sanction but not exclusively but only as a mean of coercion.

4. In the view of Mircea Djuvara, legal sanction, as an element of the positive law, represents „putting the organized force of the state in the service of the law” [11]. He states that the sanction does not characterizes the law but remains as an accessory; otherwise one would mistake the law with force, which is a confusion contradicted by the history [11], as, in similar way violence is not a characteristic of „revolution” [11].

Sanction as coercion, in general, „comes from the essence of law but they are only accidental and do not have to be included in a definition of law” [18]. Sanction must be fair, otherwise is illegal; it does not have a rational sense but only „applied to a relatively small number of cases; [18] it must not be generalized.” [18]

If the sanction sometimes it is necessary, becoming an obligation, on other occasions it is absurd (punishing the children) or it is not wanted (public authority heading against itself). In order to accomplish peace, says Djuvara – „the evil must not be the answer to evil” [10].

Sanction is not only the coercive side given by the positive law. It is also ethical [10].

Lack of sanction in positive law, far from being an ideal, has also an immoral aspect, because the obligations of that positive law, good or bad, shall be accomplished only by those whose moral character impose this, while the others – who fulfill only rational obligations because there is an external sanction – shall be exempted [5].

Law does not mean force - explains Djuvara – and force cannot explain law; at the same time, sanction without law is only brutal and violent force. This proves that the law generates the sanction [9].

5. Why do we use sanction?

The answers to this question have come late in the history of criminal law [15].

The answers to this questions are to be found in the texts from the Bible, in the Egyptian Book of the Dead and in the books belonging to the Hellenic and roman civilization or medieval theology. This question arises from the initiative of Cesare Beccaria and the illuminist writers from 1789 and 1848.

The specialized doctrine classifies in two the arguments found in favor of the sanction:

The Kantian argument for the autonomy of the sanction, as it is a correlative of crime as it is a shadow for a tree; the sanction has no aim, it is a value;

The heteronomous justification of the sanction, which includes theories about its social value and its pedagogical utility [15].

The scientific spirit in the period post Beccaria, with its research on the genesis of crime questioned the existent system of sanctions.

Is the sanction autonomous or heteronomous? Can the individual be used as a simple instrument? How can one use some individuals to intimidate and educate others? In order to achieve the goal of general prevention one uses offenders that fall under the category of special prevention.

All these questions offer answers for the heteronomous character of the sanction, understood as social value [15].

6. Not without reason it was brought under discussion the issue of how far may the reaction of the society go and its right to punish the individuals that break the rules, in other words what are the limits?

The right of the society to punish is a manifestation of the reason and has to remain within the limits of justice and humanity, says Hugo Grotius. (Hugo Grotius (1583-1645), or Huig von Groot, legal practitioner, philosopher, historian, teologist and Dutch diplomat is the one who explained the genesis of the legal institutions starting from the research of the primitive man and studying, from a historical point of view, the development of that institutions. He is the father of the international public law, marritime law and natural law. Grotius is one of the persons who influenced the Declaration of the Rights of Man and Citizen 1789, and his conception about the
law is a new one, of a pure rational law. in his well known paper – De Jure Belli ac Pacis- Grotius tried to find a common ground for understanding between people in order to safeguard the man against the war.)

As a result of society and living conditions, the right to punish is a natural right.

The right of the society to punish does not have to be arbitrary, as it is revenge, but to represent a manifestation of the reason and to be exercised within the limits of justice and humanity. For those who take revenge the evil is a goal; for the society that punishes, the suffering it generates is a tool. While individual revenge is a destructive activity, social sanction has to be an act of preserving the society [20]. „When an individual – says Grotius – punishes another individual, who is, according to the nature, his equal, he has a goal. That is why they say that the spirit of the one who punishes does not have to enjoy the evil he is doing.” [14]

For Grotius, the purpose of the sanction is triple: “reparation of the defendant, reparation of the victim, protecting the society” [20].

„The sanction – stated Grotius – is beneficial both for the defendant and for the victim.” [14]

The sanction rehabilitates the defendant, because he will feel deeper the evil he committed, physically by physical pain (prison, deprivation), morally, by general disapproval. At the same time these physical pain is meant to clean his soul and prevent him commit more offences [20].

Sanctioning of the defendant gives satisfaction to the victim; this punishment represents the natural need of the victim to see the defendant punished.

The right of the society to punish prevents social revenge which would have negative effects on all of us and would go beyond the margins of social utility [20].

The sanction defends the society: The punishment deters those who would like to break the laws [20]. Grotius stated that the punishment varies according to the nature of the offence committed. For him the illegal acts are against the society, against life, against family and marriage and against property. Their seriousness is not the same. The punishment also varies according to the education, family, income of the defendant [20].

As regarding how far one can go with the punishment, Grotius states that it can go to the capital punishment. In his opinion death punishment is legitimate when several easier punishments could not stop the defendant commit more crimes. The right of the society to use the death punishment is like a corollary of the natural right to self defense [20].

7. The origin of the right of the society to punish and the foundation of this law represent the origin of Cesare Beccaria’s Theory of punishment.

The principles formulated by Beccaria within his doctrine are met in the modern criminal law. These are: [20]

The legality of the sanction:
- Only the law may establish the punishment for each offence and this is the authority of the law maker;
- A punishment which exceeds the limit established by the law means a fair punishment plus another one.

The equality of the sanction:
- All citizens must have the same punishment for the same act;
- Every citizen must know when he is a victim and when he is guilty;

The personality of the sanction:
- Only those guilty may be punished;
- There is no criminal liability for the acts of the others; only the defendants are responsible for his acts.

Moderation of sanction:
- Sanctions should be moderate, because the goal is not to destroy the criminal but to stop him causing more prejudice and to deter”;
- one shall chose and impose only those sanctions that will generate a powerful and lasting feeling on people;
- sanction should not be excessive: „the judge loses his dignity by imposing cruel punishment. He loses it only by assisting to its enforcement”;
- moderation refers both to quality and quantity; it also depends on the civilization and habits („the severity of sanction has to be proportionate with the state of the nation”);
- the sanction has to be efficient: „for a punishment to achieve its goal it has to overcome the advantage coming from the offence.”

* Cesare Beccaria (1738-1794) is a rationalist thinker of the XVIII century, who was against the criminal legislation which was cruel and lacked humanity. His well known paper – Dei delitti e delle pene – (On crimes and punishments), represented a big clash in the doctrine of the European history of criminal law, announcing the apparition of a new society and the French Revolution (P. Malaurie, Antologia gândirii juridice, Humanitas Publishing House, Bucharest, 1997, p. 182).
Inevitability and celerity of sanction:

- "one of the most powerful instrument against crime is not the cruelty of punishment but their inevitability";
- "the certainty of a sanction, although mild, will always be more powerful than the fear caused by a more serious one but with the hope of impunity." [3]

Proportionality between crime and sanction

Beccaria stated that "there has to be a proportion between the seriousness of the crime and the sanction." He made a table with two parallel columns: one for crimes and one for sanctions. For Beccaria the social prejudice is the measure for the crime." [20]

Formulating these principles Beccaria acknowledges the fact that the organization and functioning of repression is not enough to reduce crime; along with a system of criminal measures there has to function a system of preventive measures (economic, social, educational, cultural etc.). [20]

Beccaria’s view on criminal law and on sanction had a great importance in developing the Declaration of the Man and the Citizen.

References

The employee’s provisional arrest – legal consequences over the labour relations

Badoi I.

The Bucharest University for Economic Studies – The Doctoral School (ROMANIA), iulia.badoi@yahoo.com

Abstract

The provisional arrest of an employee constitutes the rightful ground for suspending the individual labour contract/working relations. In the case foreseen by the Labour Code, the employee’s provisional arrest for more than 30 days represents within the Romanian labour legislation a possible reason to dismiss the employee. There are also cases when a dismissal is not possible until the final decision of the court in relation with the charge for which the employee was provisionally arrested. In all those cases when a final conviction is issued, the labour relations are lawfully terminated; subsequently we are not in the presence of a dismissal situation. The present article aims to assess the legal consequences of the employee’s provisional arrest from the labour relations point of view.

Keywords: provisional arrest, presumption of innocence, labour relations’ suspension, dismissal, lawful termination of labour relations

Legal framework

1.1 The rightful suspension of the individual labour contract/working relations in case the employee is provisionally arrested

In accordance with article 50 letter g) of the Labour Code [7] the individual labour contract is rightfully suspended when the employee is provisionally arrested, in compliance with the rules foreseen by the Criminal Procedure Code.

Similar provisions are applicable also to the public servants and policemen (public servants with special statute from within the Ministry of Internal Affairs). Thus, article 94 paragraph 1 letter f) of the Law no. 188/1999 (Published within the Romanian Official Journal no. 600/8.12.1999.) on public servants’ statute stipulates that the working relations are rightfully suspended when the public servant is placed under provisional arrested.

In what concerns the situation of the public servants from within the Ministry of Internal Affairs, they benefit from special provisions, not much different from the general framework, but with some particularities. The Law no. 360/2002 (Published within the Romanian Official Journal no. 440/24.06.2002.) on policeman statute, namely art. 65, foresees the legal consequences over the working relations for the situation of the provisionally arrested policeman. In accordance with article 65 paragraph 3 the provisionally arrested policeman is suspended from the post. The paragraph 5 of the same article is describing the effects of such a suspension. During the suspension, the policeman doesn’t benefit of the rights foreseen by this law and the gun and the badge must be turned in.

The policeman’s statute stipulates other juridical institutions with an impact over the working relations. For instance, the policeman who is prosecuted or trialled in liberty or provisionally released, is placed at disposal [6]. The policeman placed at disposal will fulfil only those tasks and assignments establish in written by the police unit’s management and benefits from all the basis salary rights according to the professional rank and all other rights foreseen by the present law. [6]

If the criminal prosecution ended or the policeman was acquitted, the policeman will regain the previous rights, inclusively the compensation for those relative to the disposal/suspension period of time, according to the competencies established through the ministry of internal affairs’ order. [6]
1.2 The dismissal of an employee provisionally arrested for more than 30 days

In accordance with the Labour Code the dismissal represents the employer’s initiative to end the individual labour contract. The termination of the labour contract may arise either for reasons related to the employee’s acts or for reasons not related to his/her activity. (Article 58 of the Romanian Labour Code.)

One of the reason for which the employee may be dismiss is foreseen by the article 61 letter b) of the Labour Code and it refers to the dismissal for the case when the employee is provisionally arrested for a period of more than 30 days, in compliance with the Criminal Procedure Code.

The Labour Code provides the general legal framework within this matter. There are also other provisions to establish more favourable conditions in what concerns the dismissal of a provisionally arrested employee. As an example, the Law no. 188/1999 and the Law no. 360/2002 stipulate a distinct framework related to the provisional arrest of an employee (public servant or policeman).

In what concerns the situation of public servants and policemen, as it was already appreciated within the doctrine, “we are in the presence of some relations characteristic to the public law field, which are different than the employment relations, being subjected to a special juridical regime, namely a public law regime.” [2]

During the provisional arrest, the public servant is suspended until a final decision is taken in relation with his/her prosecution or trial. [5] The public servant will not be dismissed even if he/she is provisionally arrested for more than 30 days.

If the public servant will be convicted to serve an imprisonment penalty, the working relations will be lawfully terminated[5], without being in the presence of a discharge in compliance with article 61 letter b) of the Labour Code.

Article 65 paragraph 1 of the Law no. 360/2002 stipulates that in all situation regarding a policeman against whom criminal proceedings are in motion or who stands trial, the termination of the working relations is decided upon a final decision in the case is reached, except the situation when the person also committed other misconduts, when the regular disciplinary procedure is being followed.

Within the analysis of the dismissal case foreseen by article 61 of the Labour Code, there has to be taken into consideration the provisions of the Criminal Procedure Code in relation to the provisional arrest (art. 146-150) [4], which may be disposed when there are grounds or justified suspicions that the person in question committed an offense foreseen by the criminal law. [4]

With reference to the applicability of the legal text, there are some aspects that need to be underlined:

a. The fundamental condition for the employee’s dismissal is the absence from work, caused by the provisional arrest; the legislator presumes that, after 30 days, it is possible that the employer to find himself/herself in the situation of not being able to continue maintaining the post effectively not filled in. [3] The necessary and sufficient condition for the validity of the dismissal in such case is the person’s absence from work, which may negatively influence the unit’s continuous activity. [4]

b. The employee’s dismissal may only operate in case of provisional arrest; [1]in connection to the public servants or policemen, the provisional arrest for no matter the period of time doesn’t represent a reason for dismissal. If the public servant/policeman is provisionally arrested, we are in the presence of a rightful suspension of working relations.

c. As the text doesn’t distinguish between calendar and working days, the employer may dispose the employee’s dismissal if he/she is provisionally arrested for more than 30 calendar days. [3]

The 30 days term is calculated as calendar days (it includes the date of beginning and the day it ends) and it’s being calculated from the date of arrest (and not from the day the employee didn’t show up to work). [4]

d. The dismissal is illegal if it’s being operated prior to 30 days. Nevertheless, the nullity is covered if the detention is prolonged for more than 30 days. If the employee was released within the 30 days term, the employer has to obligation to have him back at work, his refusal being considered illegal. [4]

e. Taking into consideration that the dismissal is an option for the employer – and not mandatory –, if the person in question returns to work after being released[4] and he/she’s labour contract didn’t end yet, such a measure is no longer justified.

The employee’s dismissal for the above mentioned case is not an obligation for the employer. So, it’s possible that the employer not to fire the employee until the date of release, even if the he/she was provisionally arrested for more than 30 days. If, in such situation, the employee returns to work after his/her release, the employer no longer has the right to end the labour contract. [1]

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It would be considered a rightful abuse to discharge an employee after 30 days of provisional arrest, if the person in question – not showing up to work for objective reasons – informed the employer about his intention to return to work. [3]

f. The deed that justified the provisional arrest may be in connection with the working activity or not work related. Even so, if the employer filed a penal complaint or if the person in question was trialled for offenses incompatible with the post, if the employer took knowledge of this incompatibility, has the obligation to suspend the employee, in accordance with the provisions of article 52 paragraph 1, letter b) of the Labour Code and not to end the labour contract. [4]

g. The notice for dismissal is not granted, due to the fact that there are no grounds for its existence (the person in question is arrested) [3] The notice is a legal protection for the employee in order to avoid the negative consequences of an immediate termination of the labour contract and to give him/her the possibility to finding a new place of work. The notice is no longer applicable in this case. [1]

The arrest by itself doesn’t involve the existence of guilt. Only in accordance with the final decision related to the prosecution or trial, it’s possible to establish if the person in question is guilty or not. In the affirmative case, the dismissal is imputable to the employee. If the person’s innocence is set up, the employer will be obliged neither to reintegrate the person nor to pay damages, in all cases when the dismissal was operated after more than 30 days from the arrest; therefore, the legal provisions were complied. The person in question will be able to request damage compensation for the prejudice caused by the arrest, according to article 504 and following of the Criminal Procedure Code. [4]

Within the jurisprudence there are opinions in accordance with which the previous text (similar with the current Labour Code; nevertheless the previous text referred to a minimum period of 60 days) would have been rendered obsolete on the grounds of article 154 paragraph 1 of the Fundamental Law (the Constitution) because this would contravene the constitutional provisions which establish that, until the conviction decision is final and binding, the person is being considered innocent. Through decisions no. 63/1996, no. 256/2002 and 5/2003 (Published within the Romanian Official Journals no. 286/13.11.1996, no. 746/11.10.2002 and no. 79/7.02.2003.), the Constitutional Court rejected the above mentioned exception, sustained by a series of arguments that are still valid, such as: [4]

Through Decision no. 5/2003, the Constitutional Court appreciated, that the Labour Code provisions in question don’t target the employee’s guiltiness for committing an offense, the grounds for terminating the labour contract residing exclusively from the necessity of preventing the damaging effects for the employer caused by the employee’s extended absence from work, which consequently cannot fulfil the working contract obligation. [4]

In the absence of the text in question (article 130 paragraph 1 letter j) of the previous Labour Code), the individual labour contract of the arrested employee could be terminated sooner, for unjustified absence from work (disciplinary dismissal). The text (inclusive the current one) is presented not like a restriction of the right to work, but on contrary, like a temporary guarantee for the employee (meaning that for a certain period of time – 30 days- even if he/she is not present at work, the employee is not disciplinary fired). Therefore, there is not the guilt presumption that justifies the dismissal, but the absence from work (more than 30 days) combined with the employer’s need to find a replacer. [3]

The employer’s right to dispose the dismissal is this case is based on an objective situation, the employee’s provisional arrest, which represents a necessary and sufficient condition for taking this measure. The employer’s right is independent from the existence or absence of the employee’s guilt, especially that establishing the guilt is not one of the employer’s prerogatives. For that reason, the juridical characteristic of the provisional arrest measure and establishing the guilt for committing an offense, are not relevant. [4]

### 1.3 The lawful termination of the individual labour contract/working relations

In accordance with the provisions of the Labour Code (art. 56 paragraph 1 letter g) of the Labour Code), the existent individual labour contract lawfully ends as a result of the employee’s final conviction to an imprisonment penalty, starting with the date when the decision becomes final and binding.

This situation also applies to public servants, with the only particularity that we are talking about the termination of the working relations and not the end of the individual labour contract. The particularities of the public functions upshot from the fact that the working relations in the case of the public servants are borne and are exercised on the basis of the administrative assignment act, issued in compliance with the legal provisions. [2]

According to article 69 paragraph 1 letter b) of the Law no. 360/2002, the termination of working relations for policemen is being disposed when the person is convicted through a final and binding decision, except the cases when the conviction consisted in serving a penalty on probation or a penal fine for the unintentionally offences.
The dismissal decision

When the dismissal is operated for the case of the employee’s provisional arrest for a period of more than 30 days, the employer has the obligation to issue the dismissal decision within 30 calendar days from the moment the cause of dismissal was revealed. (Art. 62 paragraph 1 of the Labour Code.)

The decision is issued in written and under the amendment of absolute nullity, it has to be motivated and must contain information related to the appeal term and the competent judicial authority. (Art. 62 paragraph 3 of the Labour Code.)

The dismissal is not valid if it’s being disposed without compliance with the legal rules. (Art. 78 of the Labour Code.)

Conclusion

It’s very important for the employer to establish what are the actions to be taken from human resources and juridical point of view in all cases when the employee is provisionally arrested, under prosecution, trialled or convicted in order to identify the applicable legal provisions for each case and to assess the impact of such situations over the labour relations.

A correct legal classification of the circumstances will help the employer to avoid possible litigations for illegal dismissals.

In compliance with article 80 of the Labour Code, in case of illegal or unjustified dismissal the court will dispose its annulment and will impose to the employer damage compensation payment.

References

The protection of the victims of human trafficking offenses in the European Union. Comparative examination. Critical remarks

Balan-Rusu M.I., Varvara Coman L.

“Dimitrie Cantemir” Christian University of Bucharest, Universitatea Danubius din Galati
oanarusu_86@yahoo.com, varvara.coman@univ-danubius.ro

Abstract

Objectives of the research are to examine the provisions of the European normative act, concerning the protection of victims of human trafficking offenses, a comparative examination concerning the national law of Romania and some critical remarks.

The paper also contains other examinations, especially those on preventing and combating the human trafficking in the European Union and can be useful both to theorists and practitioners in the field.

The essential contribution to the paper, its originality, consists in examining the normative European act, comparative examination regarding the protection of victims of these crimes especially in the critical remarks which may be useful to the Romanian and to the European legislator.

Keywords: Crime, underage, assistance in criminal proceedings.

Introduction

In recent years, due to dysfunction caused by a different legal system and gaps in providing effective activities of judicial cooperation in criminal matters, organized crime experienced new dimensions within the European Union.

Therefore one of the biggest challenges the EU is the capacity of the Member States to ensure appropriate environment of civic order and safety on their national territories.

Achieving this goal is only possible by focusing on two main objectives respectively, harmonization of the European legislation and increasing the specific activities of judicial cooperation in criminal matters between the judicial authorities of the Member States.

For this purpose, at the EU level were created specialized structures for both the prevention and combating of cross-border crime and to identify, capture and prosecution of perpetrators of criminal offenses to evade prosecution or execution of sentence. Simplifying the extradition procedures by introducing the European arrest warrant is a clear example of this point of view [1].

Currently the human trafficking offense is regarded, rightly, as one of the worst, with very serious consequences.

In addition to preventing and more effectively combating these types of crimes, protecting the victims, should be a priority of the judicial authorities.

In order to ensure the assistance, support and protection of victims of trafficking in persons, adults or juvenile in the European Union were noted more laws, the last of which is The Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in persons and protecting its victims, as well as replacing the Council (Published in the Official Journal of the European Union L101 / 1 of 15.04.2011. framework Decision 2002/629/JHA.)

The European normative document referred to [2], provides the assurance to assistance and support to victims of human trafficking as well as their protection in criminal investigations and proceedings, both to for adults and for juvenile.

The assistance and support for victims of trafficking in persons. Their protection in criminal investigation and proceedings

According to the provisions of the legislative European Act mentioned [2], the assistance and support for victims of human trafficking should be provided by authorized institutions before the criminal proceedings,
during the criminal proceedings and for an appropriate period after the conclusion of criminal proceedings in order to give access to the rights provided for in the Framework Decision 2001/220/JHA, as well as those specified in the law examined.

The assistance and support should be provided by the competent authorities as soon as the judicial authorities of a Member State has a reasonable clue that it is possible to believe the person concerned is a victim of a human trafficking offense, as specified by the provisions 2 and 3 of Directive [2].

The assistance and support should not be subject to the cooperative attitude of the victim during the course of the investigation, the prosecution or trial.

For this purpose, the Member States shall take the necessary measures to establish appropriate mechanisms to enable early identification and early granting of assistance and support for victims, in cooperation with the support organizations.

The measures of assistance and support will be provided on a consensual and informed basis and shall include at least the standards of living capable of ensuring the subsistence of the victim through measures such as the provision of adequate and safe accommodation and material assistance as well as medical treatment necessary, including psychological assistance, counseling and information services, translation and interpretation, as appropriate [2].

It also will have in view also the victims with special needs, such as: being pregnant, health status, disability, the existence of a mental or psychological disorder, or a serious form of psychological, physical or sexual violence to which they were subjected [2].

A special attention is given to victims of human trafficking, in the course of criminal investigations and proceedings, including the trial phase, in which case they will be provided legal advice and legal representation, including to request compensation (if the victim does not have sufficient financial resources, they will be ensured for free).

The victims, depending on the particularities of each case, will receive adequate protection, based on individual risk assessment, witness protection programs or other similar measures.

Without prejudicing the procedural rights established by the domestic legal rules of each state shall be taken measures that victims receive specific treatment aimed at preventing secondary victimization by avoiding, where possible, the following:

- unnecessary repetition of questioning during the investigation, prosecution or trial;
- visual contact between the victims and defendants including during the giving of evidence, such as during interviews and crossing, by appropriate means, including the use of appropriate communication technologies;
- testimony in open court, as well as
- asking unnecessary questions on privacy [2].

**Assistance and support to child victims. Their protection in criminal investigations and proceedings**

Unlike the adult individuals, child victims have a special status in the sense that assistance support and protection during criminal investigations and proceedings has certain specific features.

Thus, for child victims of human trafficking, the Member States shall ensure that the specific actions, on short or long term, in their physical and psychological recovery process is done based on an assessment of the specific situation of each case, taking regard to the views, needs and concerns of the victims concerned.

Another feature is the fact that it will appointed a guardian or a representative for the child victim from the moment of its identification by the authorities where, under the national law, a conflict of interest between holders of parental responsibility and the child victim prevents them to defend the interests of the child and / or to represent the child.

Also, will be taken some measures in order to provide assistance and family support for the family of the child victim of trafficking in human beings if the family is in another Member State.

In criminal investigations and proceedings, the competent judicial authorities will appoint a representative for the child victim of trafficking in human beings in the situation mentioned above. Moreover, child victims will have immediate access to free legal advice and free legal representation, including requesting compensation.

In order to protect the child victims during criminal investigations, prosecution and judgment without violating the national rules, will dispose the following measures:

- the hearings of the child victim will be carried out without unjustified delay after the competent authorities were notified about the offense;
- the hearings of the child victim will take place, when necessary, in places designed or adapted for this purpose;
- the hearings of the child victim will be carried out, where necessary, by and with the help of professionals who have been trained for this purpose;
- where possible and where appropriate, all the hearings of the child victim will be conducted by the same person;
- the number of hearings will be as limited as possible, which shall take place only when strictly necessary for the investigations and proceedings;
- the child victim will be accompanied by a representative or, where appropriate, an adult named by the child, unless a decision has been taken contrary to that person [2].

Also, will be taken measures that all the hearings of a child victim or witness to be filmed, and such evidence to be accepted under the law of that Member State.

In special cases it is recommended that the hearings to take place without the presence of the public or the hearings to take place through the use of appropriate communication technologies without actual physical presence of the child in court.

A special procedure is required if unaccompanied child victims, in which case will be appointed a guardian.

At the same time, for child victims of human trafficking, in other special cases shall be taken measures of appointing a representative where the child is unaccompanied or separated from his family.

### Comparative examination

The Romanian legal framework document which deals with preventing and combating trafficking in persons is the Law no. 678/2001 on preventing and combating the human trafficking, as amended and supplemented.[3]

The Romanian internal legislative act provides for a series of offenses of trafficking in persons in article 12 and separately regulated under article 13 are several ways of committing juvenile’s traffic offenses.

In both incriminations are provided as required by the European legislative act, aggravated versions of the offense of trafficking in persons or juvenile.

A first observation concerns separate the incrimination of these offenses, respectively, adults and juvenile, as well as the provision of aggravated versions in both cases.

The Romanian law punishes also the offense of the person using the services of a person who knows that he is a victim of trafficking in human beings as well as an attempt to human trafficking offense.

Regarding the protection of the victims, adults or juvenile, we specify that the Romanian law provides for a number of provisions in accordance with the European legislation.

Therefore, according to article 26 paragraphs (1) and (2) of the normative act mentioned, for the victims of human trafficking offense, adults or juvenile, are specifically provided physical, psychological, medical, legal and social protection and assistance, depending on each case and can be included in the witness protection program.

Also, the victims are entitled to recovery of their physical, psychological and social, privacy and identity, being protected.

The juvenile also benefit from, protection and special assistance according to their age. Thus the hearings in cases of child trafficking and the spread of video, photos, etc., representing the juveniles in sexual positions or with pornographic character, are not public [3] and the hearing of witnesses children under the age of 14 years shall be made in the presence of at least one parent or other legal representative attendance being compulsory also a psychologist and a representative of the general Directorate of the social assistance and Child Protection.

The victims of human trafficking can be accommodated upon request, temporarily in assistance and protection centers for victims of human trafficking or in protected housing. To the same the victims, depending on each case, Romanian citizens may be granted social housing, mainly by the local council place of residence.

The Romanian judicial authorities facilitate foreign victims to return to their countries of origin without undue delay also transporting them safely to the Romanian state border. The foreigner victims applicant for protection in Romania can be accommodated in specially equipped centers being informed in a language they understand, about the judicial and administrative procedures applied and benefit from psychological, medical and social assistance as well as from medicines and food at the same conditions as the Romanian citizens victims.

A special provision of the Romanian law refers to the treatment of victims nationals of a Member State of the European Union or of the European Economic Area which will be identical to those of the Romanian citizens [3].

From the investigation of the Romanian special law detailed rules it can be concluded that at present, it is generally in accordance with the European normative act in for the protection of victims of human trafficking.
Criminal repression in the context of the economic crisis and the maximization of crime at European and global level (May 9-13, 2013, Bucharest, Romania)

Critical remarks

The examination of European normative act's provisions and of the Romanian special law governing the protection of victims of human trafficking offenses adults or children, leads to the conclusion that both have some imperfections, in terms of protecting the victims of human trafficking offenses, adults as well as juvenile.

Starting from the observation that protecting the interests of children should be done in two main directions, namely by sanctioning rules of criminal law and criminal proceedings taking place after the offense, we will refer to both of them.

The first and most important criticism that we formulate concerns the way the Romanian and European legislator protect the victims, from the perspective of the ways of incrimination of these offenses. From the legal content of juvenile traffic offenses provided in both acts, it follows that this crime will exist only while the subjective aspect, the act is committed for the purpose of exploitation the juvenile. Under these circumstances, if the active subject of the offense does not pursue this purpose, but a totally different one, we will not be in the presence of this offense. Under these circumstances, we consider it useful to incriminate the offense of selling or giving of a newborn, to another family, to raise and also educate him, which is identified with a hidden adoption [4].

The second critical observation that we consider regards the completion of the existing criminal law detailed rules, which would impose conducting the hearing without public participation, if the child is a victim or witness.

Conclusions

In the past years, the trafficking in human beings has experienced unprecedented growth in the European Union. Preventing and combating more effectively this type of offenses involves solving two major problems with priority, namely, adopting a realistic framework, its harmonization across the Member States and the improving of the cooperation between the judicial authorities of the Member States.

On this background, at the European Union level was adopted the normative act examined, giving special attention the protection of the victims of these offenses, action supported by the Member States, including Romania, through the adoption of specific national laws.

The normative acts to which we referred are meant to contribute greatly to the reduction of crime in this area, but the continuous improvement of the legal system and particularly its harmonization across the Member States, should be a constant concern taking into consideration the development and also the diversification of crime.

References

Reflections on the legal nature of the superior council of magistracy’s notice in the case of the magistrate’s perquisition, detention or arrest

Barbu V.¹, Verginel L.²

¹Police Academy „Alexandru Ioan Cuza” (ROMANIA)
²Police Academy „Alexandru Ioan Cuza” (ROMANIA)
vlad_apr@yahoo.com, afaceriinterne@yahoo.com

Abstract

The purpose of the study is to present an matchlessly practice of the national courts concerning the legal nature of the Superior Council of Magistracy’s notice with regard to the approval of perquisition, detention or preventive arrest of judges, prosecutors and assistant-magistrates. The arguments presented impose a legislative intervention in this matter.

Keywords: magistrates, perquisition, detention, arrest, legal nature, notice

The magistrates’ criminal responsibility is a delicate problem in Romania which has a major impact on the public opinion and on the media regarding the justice’s independence. Notorious cases reflected in the national media demonstrated that the legal system requires new legislative interventions. In the case of magistrates, the approval given by the Superior Council of Magistracy’s departments concerning perquisition, detention or preventive arrest is qualified differently in practice.

The purpose of this study is to define more accurately the legal notice that the Superior Council of Magistracy is required to issue with regard to the perquisition, detention or arrest of the magistrate suspected of committing an offence.

In the legal literature ,the opinion that the notice is in fact an authorization [1] or a criminal procedural act [2] was expressed.

Firstly we point out High Court of Cassation and Justice’s jurisprudence also regarding this matter. In the decision (Decision nr.687 from The 9th of February 2012) of a case, The High Court of Cassation and Justice decided, with regard to the annulment of the acts that approved perquisition, detention or arrest, issued based on art. 95, paragraph (1) from Law no. 303/2004 concerning the statute of magistrates and prosecutors, according to which “judges, prosecutors and assistant-magistrates can be searched, detained or be preventive arrested only with the approval of the Superior Council of Magistracy’s departments”:

“This approval, qualified in correlation with the dispositions of art.10, paragraph(1), point f) Criminal Procedure Code, is a special condition imposed by the law so as to execute certain criminal procedure acts or to initiate criminal proceedings , a special condition that refers to the quality of the person concerned.”

The same interpretation is also found in the Constitutional Court’s jurisprudence ,which decided that the notice ,that was issued by the Ministry of Justice based on article 91, paragraph (2) from Law no. 92/1992 regarding judicial organization (Repealed by Law no. 304/2004 regarding judicial organization and Law no. 304/2004 regarding the statute of magistrates and prosecutors republished in Romania’s Official Gazette ,Part I, no. 826 from September the 13th 2005), notice that, from the point of view of its effects is equivalent to the approval given by The Superior Council of Magistracy’s departments based on the present legislation , has the legal nature of a condition-act to initiate criminal proceedings (Decision no.53/The 21st of March 2000, published in Romania’s Official Gazette no.366/ The 7th of August 2000) and is a rational protection measure for magistrates,a legal guarantee of the consolidation of justice’s Independence (Decision no.4 /The 13th of January 2004, published in Romania’s Official Gazette no.107/ The 4th of February 2004).

Therefore, although The Superior Council of Magistracy, according to its constitutional role and attributions established by Law no. 317/2004 exerts, mainly, an administrative activity regarding the career and rights of judges and prosecutors, the disciplinary jurisdiction and the organization and activity of courts and prosecutor’s offices, the approval of perquisition, detention or arrest stated in art. 42 from Law no. 317/2004 , this activity does not have an administrative nature but a criminal- procedural nature.

According to art.2, paragraph (1),point c) from Law no. 554/2004 regarding the contentious administrative (Published in Romania’s Official Gazette, Part I, no.1154 from the 7th of December 2004) matters,
the administrative act is a public authority’s one-sided manifestation of will, issued in public power regime, in order to organize the execution of the law or to concretely execute the law, which gives birth, modifies or extinguishes essential legal relationships. When analyzing the legal nature of an administrative act, the effects that it produces are the object of the measures taken.

If the thesis, according to which every manifestation of will that emanates from a public authority is an administrative act regardless of its legal object or nature, without making any difference between the acts of authority through which an administrative activity is performed and the acts through which the public authorities (other than the proper administrative authorities) exert other types of attributions that are related to their own competence, were accepted, we would reach the conclusion, pointed out in the specialized literature, that the prosecutor’s refusal to declare an appeal or the way that a civil or criminal court order is executed, could be challenged through contentious administrative matters, situation that clearly exceeds the competence of the court specialized in contentious administrative matters.

The argument according to which the rejection as inadmissible, of legal actions in contentious administrative matters, is a violation of the principle of free access to justice, established in art.21 from The Constitution of Romania, and in the dispositions of art.13 from the European Convention of Human Rights, correlated with the dispositions of art.20 from The Constitution of Romania, is not valid because art.44, paragraph (1) from the Criminal Procedure Code offers a procedural remedy, establishing the criminal court’s competence to try any preliminary issues that the case’s solution depends on, even though, through its nature, that issue may be the competence of another court. Therefore, nothing obstructs the court, during the criminal trial, to verify the formal legality of the approval of perquisition, detention or preventive arrest, given that, as it results from the facts stated above, concerning its substance, this approval was conceived as a measure of protection for the magistrate, as a prerogative of the Superior Council of Magistracy that is a guarantor of the independence of justice, according to art.133 from The Constitution of Romania.

An additional argument, which supports the inadmissibility of legal actions in contentious administrative matters, is that in the situation in which an approval, a notice or an agreement would be expressed by a public authority in order to issue or adopt an administrative act, in other words when the legal relationship would have a purely administrative nature in all its dimensions, the notice, the approval or the agreement, as preliminary administrative operations, cannot be challenged separately in court but only along with the final act, according to art.18, paragraph (2), from Law no. 554/2004.

It is true that the court of first instance wrongly decided that the exceptional situation established in art. 5, paragraph (2) from Law 554/2004, according to which:” the administrative acts for the modification or abolishing of which another legal procedure in established through organic law, cannot be challenged through the contentious administrative matters “.

This reason is the effect of the misinterpretation of the quoted legal dispositions, which, as it results from their express content, refer to administrative acts that meet all the defining elements comprised in art.2, paragraph (1), point c) from Law 554/2004, but for which the law intentionally established special appeal procedure, derogatory from the contentious administrative matters.

In this case, for the reasons that have been previously presented, we question ourselves if the manifestation of will of the Superior Council of Magistracy is indeed an administrative act, but removing the reason incidence of art.5, paragraph (2) from Law 554/2004 does not bring a different solution in this matter, because the judge at first instance also took into consideration the criminal-procedural nature of the approval, reason that the judicial control court considers correct.”

In another decision, The High Court seems to reconsider its position regarding this notice. Through decision no. 505 from the 31st of January 2013, The High Court of Cassation and Justice accepted the appeal of the complainant B.C. against the sentence given by Pitesti’s Court of Appeal – second civil and of administrative and financial contentious department. The court modified the challenged sentence by accepting the action expressed by the complainant B.C. in contradiction with the defendant the Superior Council of Magistracy. The court also canceled a part of the Judges’s Department from the Superior Council of Magistracy regarding the approval of the complainant B.C.’s house search (Currently the investigation in this case is not finished.)

The current disposition concerning the preliminary notice is criticized in the doctrine [3] in terms of the competence of the departments and not of the Superior Council of Magistracy’s plenum, showing this way that the participation of the civil society’s representatives in these decisions is eliminated.

Over time, the absence of the secondary legislation and the absence of any dispositions that regulate the procedure that must be followed when the notice is requested, has been also criticized. The legal dispositions should be supplemented, meaning that the issuing of the notice- positive or negative- should always be preceded by the hearing of the person concerned, according to the constitutional dispositions applicable in identical cases to the members of the Parliament (The Constitution of Romania from the 21st of November 1991, reviewed and republished in the Official Gazette, Part I, no.767 from the 31st of October 2003.)

Starting with 2011, through the decision of the Superior Council of Magistracy no. 267/2011 (Published in the Official Gazette, Part I, no.350, the 19th of May 2011)
, the Rules of procedure of the Superior Council of Magistracy (Decision no.326/2005 regarding the approval of the Regulation of organization and functioning of the Superior Council of Magistracy, published in Romania’s Official Gazette, Part I, no.867/27.09.2005) was completed with dispositions that establish the procedure that must be followed in case of a request for a notice of perquisition, detention or preventive arrest of a magistrate. We find it useful to present these dispositions:

**Art. 26** – (1) The judges, the prosecutors and the assistant-magistrates can be searched, detained or preventive arrested only with the approval of the Council’s departments.

In case of a flagrant offence the judges, prosecutors and assistant-magistrates can be detained and searched, according to the law, and the Council will be informed immediately by the authority that ordered the detention or perquisition.

**Art. 261** – The requests regarding the approval of the perquisition, the detention or the preventive arrest of judges, prosecutors or assistant-magistrates are registered in a special secret register that is kept by the Office of the clerk of the court, which will include: the current number, the authority that submitted the request, the term that was granted for solving the request, the solution given by the proper department of the Council and the date that the solution will be communicated to the prosecutor’s office or the instance that requested the approval.

**Art. 262** – (1) The decisions through which the Council’s departments solve the requests mentioned at art. 261, paragraph (1) will comprise, mainly, the following elements:

a) the description of the action for which the prosecution has started and its legal qualification;

b) the reasons for which the approval of the magistrate, prosecutor or assistant-magistrate’s perquisition, detention or preventive arrest has been requested;

c) the reasons for which the request has been approved or denied;

d) the legal base for solving the approval request

(2) The decisions mentioned at paragraph (1) will be edited immediately by the clerk of the court and will be communicated to the authority that submitted the request. These decisions will not be published.

**Art. 263** - (1)The registers mentioned at art. 26 (Decision no.326/2005 regarding the approval of the Regulation of organization and functioning of the Superior Council of Magistracy, published in Romania’s Official Gazette, Part I, no.867/27.09.2005) paragraph (1) and the file that contains request for approving the perquisition, the detention or the preventive arrest of judges, prosecutors or assistant-magistrates will be archived by the Office of the clerk of the court.

(2) The approval file and its annexes cannot be consulted and copied. Also the information regarding the documents contained by it cannot be communicated.

(3) After receiving the communication about accomplishing the search or about taking the measure of detention or solving the proposal of preventive arrest, the Superior Council of Magistracy, through its spokesman, can issue an official statement through which the fact that the request of the prosecutor’s office, its object and the concerned person were approved, will be brought to the public’s knowledge.

(4) The prosecutor’s office will communicate immediately to the Council that the search was accomplished or the measure of detention was taken.

(5) After judging the preventive arrest proposal, the president of the panel of judges will communicate immediately to the Council the solution adopted.

We can only notice that the criticism presented above, criticism that we fully approve of, is completely maintained. The alleged secondary legislation adopted in 2011 regulates the circulation of the file only within the Superior Council of Magistracy and the content of the decision of granting the notice or the decision of rejecting the approval request. In fact, no legal disposition establishes what and how much the members of the Superior Council of Magistracy verify when issuing the notice. If we accept the fact that the notice is conceived so as to avoid abusive procedures against magistrates, it would be reasonable to assume that the Superior Council of Magistracy should have access to the case’s file in order to verify if the magistrate is subject to an abusive activity of prosecution. From the mentioned legal dispositions it results that only a request (In practice, the prosecutor’s office also lays down some copies of the relevant evidence from the investigation’s file) would be submitted to the Superior Council of Magistracy, request based on which the competent department decides. This leads to the conclusion – demonstrated in practice- that the department of the Superior Council of Magistracy is working formally and gives its notice without any verification.

There have been situations when the magistrates were investigated and after that discharged (File 25/1/2000 solved in 2005, file 8348/1/2008 solved in 2009). In practice, as shown, there have been only two situations in which each of the two departments did not grant the preventive arrest notice. (At the end of 2007 the Prosecutor’s department did not grant the notice in the case concerning the fraud of the contests of appointing the prosecutors in leading positions. In the Prosecutor’s department of the Superior Council of Magistracy four abstentions were formulated from the total of six votes. On the 27th of January 2007, according to an official statement from the NAD, the defendant U.A., a judge at Law Court I, requested an attorney, denouncer in this
case, a loan of 500€. On the same occasion, the judge U.A. hinted the attorney that she will take the proper steps so as to expedite the editing of a court order that she had given in November 2010 during a civil trial in which the attorney represented the legal interests of the part that won the trial, diting that is followed by the judge’s signing of the decision. The request for the loan was made given that U.A. had never discussed privately with the denouncer and only in a professional context. The next day, the defendant received from the attorney the amount of 2500 lei , that represented the requested loan , reiterating the promise to expedite the editing and signing of the decision. In this case the Judge ‘s department did not grant the notice for preventive arrest.)

Another criticism of the present regulation concerns the exclusion from notice of the starting of the prosecution or the initiation of the prosecution , situation that we think empties preliminary notice’s content , it becomes useless and it cannot reach its goal of protecting the magistrate against possible abuses of the criminal investigation bodies , even more so , according to art.62 paragraph (1) point a) from Law 303/2004 regarding the statute of magistrates and prosecutors when initiating criminal proceedings the Superior Council of Magistracy orders , based on art.62 paragraph (2) from the same law, the magistrate’s suspension from office.

The sudden change of The High Court of Cassation and Justice’s jurisprudence imposes , in our opinion, a legislative modification.

References


Brief comment on some impediments in the effective implementation of the new code of criminal procedure

Bogea M.C.

Bacau, (Romania)
bg_cip@yahoo.com

Abstract

The reform of the judiciary system in Romania, in strict correlation with the need for changes in the legislation, is imposed by the assuming of rights and obligations arising from the accession to the European Union, as well as by the imperativeness of an effective functioning of the institutions in the field. The adoption of Law No. 202/2010 (small justice reform), followed by the entry into force of the new codes (civil and civil procedure) constitute important steps taken with regard to the modernization of the legal framework to meet the needs and expectations of society, resulting of course in its natural evolution. The entry into force of the future codes - Criminal and Criminal Procedure – estimated for the date of February 01, 2014, must not happen anyway, and under any conditions; it is also not sensible to the pressures resulting from the implementation of the Cooperation and Verification Mechanism of Justice, considering that the impact that the new regulations must produce have as essential aim the creation of a modern regulatory framework that would respond to the imperatives of an effective judiciary, adapted to social expectations and not the upheaval of the whole criminal justice system in our country.

Keywords: legislative changes, logistics, human resources, impediment, effects, proposals for improvement.

Introduction

This paper is intended to refer to any legislative inconsistencies identified in the text of the new Code of Criminal Procedure. I also presented and argued proposals for amending and supplementing the content of some articles/institutions, as well as the analysis of logistic and human resources difficulties identified at present, with implications for the efficient functioning of the judicial bodies in the event of application of future regulations on the conditions of the current judicial system.

Starting from the premise that the mere enactment of the rules of procedure is not efficient to ensure the reform and increase in quality of the judicial system in our country, the analysis carried out, albeit short, mainly focuses on the proposed regulatory changes to the legal framework and on the need to supplement the personnel schemes of the courts and public prosecutor's offices (magistrates and auxiliary staff), in close correlation with the need for improving the technical facilities of these institutions.

A short comment refers to the potential difficulties encountered not only by practitioners, but also by terminal year students or law faculty graduates who intend to take the exam for the posts of magistrates in 2014, in a situation where the possible date of entry into force of the new Code of Criminal Procedure will be February 1.

Legal inaccuracies and proposals for their amendments/review

An overall analysis on the topic of the paper cannot be done without considering the criminal procedure legislation in force [1], the regulations of the future Code Of Criminal Procedure [2] and last but not least the content of the draft law on the implementation of Law No. 135/2010 and for the modification and completion of some legislative acts containing provisions on criminal procedure (draft) [3].

By going through and analyzing the institutions of the New Code of Criminal Procedure (N.C.C.P.) from the outset we note the existence of rules that are elliptical, interpretable and un-doubled by any procedural safeguards. Thus, article 31 recognizes the right of a lawyer to assist/represent only the main procedural parties/subjects of the trial, other procedural subjects (listed in article 34) can only be assisted and only with the
consent of the judicial body. Realizing the obvious discrimination against the participants in the proceedings (listed in article 29) with regard to the right to be assisted or represented by an attorney, but especially the possible negative practical implications in the absence of reciprocal obligations imposed on the judicial bodies in case of disapproval, the specialists who worked on the project propose the amendment of this article in the sense that “the lawyers represent or assist the procedural parties or subjects in accordance with the law.” (Title III, point 15). This form is a much more comprehensive and balanced one.

Although in the explanatory memorandum of N.C.C.P., one of the mentioned expected changes refers to the division of first instance competences between local courts and county courts, following that the county courts would have general jurisdiction and local courts a limited one (offences on prior complaint and those sanctioned with punishment by imprisonment of up to 5 years), the proposals for the future legislation in this area does not corroborate the earlier statement. Thus, according to article 35, “the local courts in the first instance judges all offences except those which, by law, fall in the jurisdiction of other courts.” Moreover, from analyzing the article 36 compared to the rules in force (art. 25 C.P.C), it appears that the local courts will have a much diminished competence in comparison with the current provisions, even though, in the draft, the article in question has been modified and completed (title III, section 16 and 17). In this respect, a relevant analysis is required. This analysis should also take into account the crimes, contained in special laws, in close correlation with the actual human resource present and possibly future of the magistrates.

Another element with negative impact on the volume of activity of judicial bodies relates to the competence of the Prosecutor. This competence should not be subjectively examined and determined, but in terms of ensuring a balance between the cargo of the criminal investigation bodies (especially those of the judicial police) and the crimes given in the personal prosecution of prosecutors (of course, taking into account their seriousness, functional personnel and financial resources). Thus, the future legislation diminishes in comparison with the rules in force (article 209, paragraph 3), the number of offences for which prosecution is mandatory carried out by the public prosecutor (art. 39). So, although this article has been modified and supplemented in the draft (title III, point 25) we appreciate that this should be reviewed by specialists because it should be taken into consideration the fact that 95.7% of the total signaled crimes are in the investigation of the criminal investigation bodies of the judicial police and only 4.5% of the over 1.757.000 cases that needed to be settled in 2012 were circumscribed to the private prosecution of the prosecutor.[4]

With regard to the means of proof necessary, short clarifications regarding the provisions of threatened, protected and vulnerable witnesses are imposed. Even if Title III, section 60 of the draft proposes the abrogation of regulations circumscribed to some persons that could attend the hearing of these categories (we believe that this aspect is correct, for ensuring the role of this categories of procedural subjects and for respecting their own rights) we appreciate that changes in the normative content of Law No. 682/2002 are in particularly necessary [5]. Thus, the sphere of witness protection measures should be revised and broadened and a structure of the State that should handle the implementation and supervision of their protection should be established. Considering the information possibilities, technical and human resources, as well as the necessity of relieving workers of the judicial police of these tasks, we propose that the Department of information and internal protection of the Ministry of Internal Affairs takes over these duties.

In the absence of an objective possibility in addressing, commenting and proposing solutions for the improvement as a hole of the regulations (some are still unclear in our opinion) of the future code of criminal procedure and the draft which amends and supplements it, we punctually mention other provisions that we believe require the reconsideration of the specialists in the field: article 131, on the confrontation and the procedure that are to be followed, should be supplemented by mandatory provisions relating to the inadmissibility of administration of this evidence procedure between the suspect/accused and undercover investigators, collaborators, protected or vulnerable witnesses – the realization of this activity via audio systems or audio-video which can distort the voice or respectively the voice and image is an exception; article 148 and article 149 (in the form proposed for amending and completing by Title III, section 65 and 66 of the draft) should be supplemented by details relating to the sphere of people who may or may not be collaborators, as well as their rights and obligations; in the case of article 352, paragraph 9 the widening of the sphere of protected persons, which should also include the undercover investigators and collaborators, is required; article 352, paragraph 12 (in the form proposed for amending and completing by Title III, section 163 of the draft) should be reformulated so that an administrative act by the O.R.N.I.S. to not be an impediment to instituting criminal proceedings against of the accused.

We fully agree with the adoption of the draft law for the modification and completion of the new code of criminal procedure, whose proposals de lege ferenda is unquestionably a breakthrough by reference to the initial regulations (it is more clear in terms of provisions and more realistic in terms of the procedure), but not by tacit approval (as there is a risk today) but through parliamentary debate.

The above mentions do not cover, nowhere near, the need for extensive and sensitive analysis on the institutions of NCCCP, however, we express the hope that in the following period, until the entry into force of the
future legislation, theorists, practitioners and experts in the field will identify and remedy through legislative proposals the eventual disparities.

Logistical and human resource difficulties

Starting from the statistical analyses of the High Court of Cassation and Justice [6] and of the Public Ministry afferent to the years 2011 and 2012, an increase can be observed in the workload of the courts and prosecutors’ offices in our country, and especially of the stock of criminal cases on the role of work at these organizations. Comparing the number of cases that needed to be settled with the number of cases tackled shows us the fact that in 2000 there were a number of 532,986 cases to be solved, of which 372,528 were solved and in 2012, and there have been a number of 1,756,001 to be solved, of which 591,025 were finalized. To these the over 450,433 of cases with unidentified authors found in the records of the judicial police authorities (compared with 84,766 in 2000) can be added.

Even though the number of cases settled had risen in the last 12 years, the effort of the magistrates is worthy of being appreciated. However, the stock of cases remaining is worrying, with implications for non-compliance with the principle of settling lawsuits in a reasonable time.

In addition to the tasks referred to above the judicial activity in the criminal field of the prosecutors must also be remembered. In the year 2012, they have participated to a number of 336,190 meetings of the Court, respectively 215,368 of verified judgments. In addition, the 162,000 number of complaints, memoranda, petitions registered at parquet units should not be overlooked. This number has increased by 23 percents compared to the volume registered in 2011. Last but not least it should be anticipated the increase of specific activities in the field of international judicial cooperation in criminal matters (transfers of procedures, communication of acts, etc.) in the conditions of globalization of the criminal phenomenon due largely to the free movement of people.

In this respect the role of N.C.C.P. is primordial in terms of acceleration and simplification of procedures. In order to achieve this aim, we must have in mind solving the logistical aspects (the acquisition and implementation of the electronic systems of automatic writing after dictation, computerization, equipping with technical means of reproduction of documents, modifying the ECRIS application in relation to the provisions of the new code, etc.) and human resources(occupying the vacancies of magistrates and auxiliary staff, termination of the rationalization procedure of courts and prosecutors’ offices, providing specialized personnel in interpretation and translation, etc.).

Some of these measures constitute a priority for the Ministry of Justice [7]. Providing the functionality of the system in terms of logistic requires a consistent budgetary effort which must be ensured even in the current economic crisis, if we want a real fundamental reform of the judiciary and increase in the quality of this public service.

In terms of ensuring human resources the system must be taken into account not only the occupation of 234 vacant posts of judges, 390 vacant posts of prosecutors [8], but also supplementing the system of auxiliary staff from the prosecutors’ offices and courts in directly proportional correlation to the volume of their activities, so that delaying resolution of some cases to represent exceptions that are not caused by excessive length of procedures or lack of personnel. On the other hand the human resources policy must be established on the basis of a relevant and predictable analysis, not just in the short term (until 2014), but especially on medium and long term. It is necessary to have in mind the legal removals from the system (by reaching the retirement age) and the possibility of the National Institute of Magistracy to train future magistrates.

No matter how evolved, modern and precise, the law is, its application will not be able to achieve the desired and expected level without the tools needed to implement them, respectively the material basis and sufficient and specialized staff.

Negative subsequent aspects

January 1, 2014, the date proposed for the entry into force of the two codes - criminal and criminal procedure - may also have a negative impact in terms of the quickness of understanding the new legislation. Thus, in order to speed up the application of the new rules, the legislature can create problems for both practitioners (lack of judicial practice, the possibility of different interpretations of the rules by the staff employing judiciary authorities etc.), as well as theoreticians or terminal year students or graduates of law faculties from previous years who intend to sustain the exam to accede in the judiciary in 2014.

From the practical point of view and that of the subsequent efficiency it is recommended that the date of entry into force of future regulations to be October 1, 2014.

Thus, it would create the time required for the establishment of any necessary institutions and operation of the necessary modifications, ensuring a clear and precise content in terms of procedures, and the persons interested in sustaining the admission examination for the judiciary will have predictability in the preparation of
Criminal repression in the context of the economic crisis and the maximization of crime at European and global level (May 9-13, 2013, Bucharest, Romania)

the matter. Last but not least, the pressures on the State budget for ensuring the material base would be reduced taking into account the time elapsed until a possible application.

Also a period of time would increase the chances of full employment of vacant positions and full completion of the deficient staffing scheme.

Conclusions

Without claiming to address all issues related to the complex measures that are to be taken so that the future application of the Criminal Procedure Code to answer as many societal needs, goals and objectives pursued by the rules contained in it, we must recognize the effort made and the undisputed merit of the experts, theorists and practitioners who worked on it.

So that the effects of the regulated institutions under the new code of criminal procedure to have a strong positive impact on the conduct of the criminal trial, we must ensure that the balance between the normative content and the possibilities of criminal judicial bodies to apply it under the conditions and in accordance with the approved terms.

From this point of view we consider that any impediment likely to affect this balance must be rectified as soon as possible, so that the implementation of future legislation to be carried out with as little syncopation as possible in order to maximize the effectiveness of the practice.

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Mediation in criminal cases regarding rape in its simplest form

Buzatu N.E.

"Dimitrie Cantemir" Christian University (ROMANIA) nicoleta_buzatu@yahoo.com

Abstract

During the last two decades, the criminal judicial systems of most European countries have acknowledged a new concept, that is restorative justice. Its main constituent is mediation between the victim and the criminal. It regards a more effective resolution of conflicts and, at the same time, is a solution for the diminution of trails in the court. The possibility of successful mediation and even its use in the case of a assault trial have led to ample debates in the law systems with great tradition in alternative settlement of criminal conflicts. Both the nature of the deed and its effects on the victim as well as the criminal’s psychologic profile raise serious issues in the case of a possible mediation process. Mediation is only permitted in the case of assault, but not in the case of aggravated assault.

Keywords: mediation, mediator, crime, victim, criminal

Introduction

Mediation between the victim and the criminal has been used for decades in what specialized literature calls restorative justice. It is based on programmes which aim at reconciling the victim and the criminal and finding adequate solutions for remediating the tort caused by the crime.

The set of values and suppositions laid down by restorative justice coincides with the set of values established by social assistance. The objectives aimed at by the restorative justice are found especially in modern social assistance, that is: restorative justice aims at guarding the criminals who committed non-aggravated crimes from prison. Thus, they remain in the community where they benefit by the support of the family and social services. Both social assistance and restorative justice avoid stigmatization of criminals and labeling them as wrongdoers within several community development programmes [1].

In criminal law, mediation is extremely useful within less important conflicts which start from good vicinity or inter-personal relationships to which the lawmaker left the parties the possibility to comply in order to start the criminal action and reconciliation in order to stop arraignment. The nature of criminal conflicts differentiated criminal mediation from the other types of mediation. The emotional charge of the parties brought to conflict by a criminal deed is hard to overcome and the basic discussion takes place after a long period of time when the parties are detached from active listening and the other mediation techniques that the mediator has to apply.

For this reason, mediation cannot be used in the cases where even if the parties reach agreement, they can escape criminal charge as a means of finding inner peace in restorative justice where it is important to understand the drives which laid the grounds for the crime and the means to cure the psychic traumas deriving from it.

Criminal mediation has developed in the European space reaching a great number of extrajudicial lawsuits for solving the conflicts. They were led by a third party freely elected or reelected by the judge. In this context, mediation appears as an alternative to prosecution having as objective to avoid over exhaustion of courtrooms and a fast, efficient and useful answer to the crimes victims [2].

In the criminal matter, the system of out-of-court settlement of disputes (Alternative Dispute Resolution) is rarely applied due to the special nature of criminal deeds, which, due to their aggravated nature and the social danger they imply, are tried by trial courts after long investigations underdone by the prosecution [3].

The legal framework of mediation for criminal cases is the Law no 192 of 16 May 2006, regarding mediation and the profession itself published in the Official Gazette no 441 of 22 May 2006, with further modifications and additions whose general provisions are applied in criminal cases and, at the same time, stipulates the special provisions for mediation in criminal cases. These provisions were added the amendments brought to the Criminal code brought by Law 202 of 25 October 2010 regarding the measurements of speed trials published in the Official Gazette no 714 of 26 October 2010.
Mediation in criminal cases regarding rape in its simplest form

According to article 197 line 1) of the Criminal Code, rape is any type of sexual assault with a person of different sex or same sex by coercion or by taking advantage of the person’s inability to defend herself/himself or express consent and is punished with imprisonment from 3 to 10 years and denial of certain rights.

Mediation is possible only in the typical case of the crime, not in the aggravated cases of assault.

In the following lines, a short analysis of the rape crime as described by article 197 line 1) of the Criminal Code [4] is presented:

The judicial object of rape consists of the social relations referring to the person’s freedom and sexual intangibility, the person’s right to freely dispose of its body within the moral and legal rights.

The material object is the person’s body regardless the sex who is the victim of the assault.

The subjects of the rape crime. In the present regulation, within the content of the crime, there is no prevision regarding the subjects, meaning that both the the active immediate subject – author and the passive subject of the crime can be any person regardless his/her sex. Participation under all its forms is possible.

Content of the crime. As a result of sustaining the appeal in the interest of the law by Decision no III of 23 May 2005 of the High Court of Casation and Justice, the United Sections, [5], was defined the area of sexual acts of any nature sanctioned by the law: “any means to obtain sexual satisfaction by use of sex or act on the sex between different or same sex persons by exertion or taking advantage of the person’s inability to defend himself/herself or express his/her will”.

As the sexual act with a different person is the material element of the sexual assault crime is necessary that it is done by forcing the person or by taking advantage of the person’s inability to defend himself/herself or express will. Constraint can be physical or moral.

The immediate effect of the sexual act is a state of fact opposed to the state of normal social relations regarding the person’s freedom and intangibility and represents the effective assault of the person’s freedom and sexual intangibility and the social relations regarding these values [6].

The subjective element is the guilt as intention. It presupposes the criminal’s thorough knowledge of the circumstance that the sexual act took place without the victim’s consent.

Trial forms and criminal processual law - The preparatory acts, when committed by a different person than the criminal, can constitute acts of aforethought if at least rape had been attempted.

The simple or typical variant of rape is sentenced from 3 to 10 years imprisonment with no rights.

Criminal action is started as a result of the victim’s complaint addressed to the criminal research representatives and the prosecutor.

In the case of aggravated assault, mediation is not possible.

From a judicial point of view, proving the rape in its simple form is often a very sensitive matter. In order to mediate the case, the parties have already agreed on the situation and the difficulties met in the judicial practice will not influence the mediation process in these cases.

The idea of restorative process in the case of rape is faced with a lot of skepticism by feminists, whose main objection is the fear that in this way rape attempt would be treated in a plain manner and the “punitive justice” would be replaced with a new idea of “cheap justice” [7].

Another cause of reticence upon this type of trial is the real danger that these crimes, which are based on a difference between the attacker’s physical and psychological force over the victim, is that the process of mediation, which means a direct meeting between the victim and the criminal, amplifies the victim’s insecurity, thus causing her more harm than healing [8].

Mediation, is defined in art no 1 of Law no 192/2006 regarding mediation and the mediator profession as a discretionary means of out-of-court settlement which is solved with the help of a third party specialized as a mediator, in neutral, impartial and confidential conditions. It is turned into a real alternative to the exercise of the criminal action by the inclusion of the Project of the new Criminal Code. Thus, anyone who sue, including the parties which have already initiated a trial within the court, in the matters foreseen by the law - civil, family, certain criminal cases – are obliged to take part in the information meeting regarding the advantages of mediation. After the presentation, if the parties still decide to go to court, the mediator issues a certificate of information which must be presented in the court.

The previsions of the existing legislation (Government Emergency Ordinance no 90/2012 for the amendment and addition of Law no 192/2006 – mediation and organization of the mediator profession [9] and the Government Emergency Ordinance no.4/2013 regarding the amendment of Law no. 76/2012 for applying the Law no 134/2010 on the Civil Code as well as the amendment of annex norms [10]) recommend information of mediation and not mediation itself which can only take place with the victim and the criminal’s agreement.

In case of a face to face meeting, it is not the mediator who advises the victim to condone the criminal as, according to the mediation universal principles, the mediator is neutral and impartial. It is not the mediator who advises – this role belongs to the lawyers who can assist the victim along the mediation process. The mediator facilitates communication and helps the parties identify the best solutions in each case.
Both parties can be assisted not only by the lawyers, who make sure that their clients’ rights are not breached, but also members of the family and friends to offer the necessary support and emotional assistance.

The mediation process makes it possible for the victim to express his/her pain and shame directly caused by the deed. The parties can not try to solve the conflict through mediation with the express mention that neither the victim nor the criminal are compelled to accept the mediation process. The victims have the possibility to present their own version in an uncensored manner beyond the strict aspects of the case which makes the object of the criminal case.

The main difficulties faced by the mediator in this case are generally related to the following facts: the rape criminals do not consider they have committed a crime if the means of the victim’s constraint violence was used.

In case the victim accepts the mediation, at her request, the mediator can take the necessary steps so that the criminal is invited and informed regarding the possibility to enter the mediation process. If the invitation is accepted, a mediation contract is drawn between the mediator, on the one side, and the criminal on the other side. The mediator’s honorary is established conjunctly with the parties and as a rule, it is equally supported by the participants.

In case the aggressor wants to take responsibility for the wrongdoing, he can proceed to it. In case the victim considers he deserves financial aid for the sufferance produced, he/she is entitled to ask and discuss it with the criminal who can accept or not. The victim’s sufferance is hard to evaluate financially. The costs supported by the family must not be neglected either both moral and financial for medical care, judicial assistance – lawyers, expertise, medical certificates. Regardless the decision, it is made only by the parties, on equal agreement without suggestions or solutions offered by the mediator.

In case of mutual agreement, the parties have the legal binding to present in the court in order to confirm that this is their will. Per a contrario, if the mediation fails, the victim can address the court, her/his right not being enclosed in any way.

Conclusions

The law binds the victims of rape in its simplest form to attend a information meeting on mediation but the procedure will not harm the person in any way, especially as the victim is not bind to participate together with the aggressor. Regarding the consequences of refusal to take part in mediation, the sanctions are strictly binding for civil cases and it is up to the courts to establish sanctions in criminal cases.

The women’s rights say that, by being bind to receive information on mediation, the victim undergoes further pressure and the criminal can escape unpunished and, on the other hand, the Mediation Council, the body which handles these actions, believes that mediation can be a solution for women who do not wish to go public.

The main benefit of mediation is that nobody can impose any action on the victim and nobody can judge a person according to a law text as long as one has the ability and possibility to make one’s decision according to one’s needs and interests within the legal framework. One benefit is that the party constructs the solution within dialogues with the other party. The solution belongs to the parties, it is long-standing as the decision is made willingly, and as mediation is a volunteer procedure.

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Sanction imposed on for breach of art. 341 crim. Proc. C.
Procedures related to the culprit’s final word

Ciobanu A.

Romania aurel.ciobanu@drept.unibuc.ro

Abstract
Entered with principle value for the criminal procedure, the culprit’s presence before the Court – has its meaning in the particular situation the culprit stands during this procedural instant. Standing in the position of giving account for criminal responsibility, the culprit is supplied with certain rights and warranties which effectively lay out his/her defence right.

Key words: culprit, criminals, final word, legal provisions

The importance of following provisions of art. 341 c.p.c. regarding culprit’s final word.
Entered with principle value for the criminal procedure, the culprit’s presence before the Court – has its meaning in the particular situation the culprit stands during this procedural instant. Standing in the position of giving account for criminal responsibility, the culprit is supplied with certain rights and warranties which effectively lay out his/her defence right.

Culprit’s possibility to defend himself, next to the obligation imposed on the legal bodies to take into account issues belonging to defence, also the culprit’s right to benefit from attorney assistance, represent the most important warranties meant to embody the right to defence. The particular importance of culprit’s presence during trial is explained by the fact that the cause judges may create easier and closer to the truth an opinion regarding the most appropriate sanction for his/her social reeducation and reinsertion.

Practice of the European Court for Human Rights regarding this issue.
To that end, the European Court showed that it is in the culprit’s interest to be present during the procedures development [5], to drive his/her own defence, counseling his/her attorney, when necessary [6]. Thus, let. c), d) and e) of art. 6 paragraph 3 of CEDO acknowledge for each culprit “the right to defence by himself/herself”, “to ask for or acquire witnesses hearing”, and, respectively, “the right to be assisted, free of charge by an interpreter, if he/she does not understand or does not speak the language used for hearing”, rights which are unconceivable in case of culprit’s absence [7].
Moreover, this practice has been reaffirmed within a few recent reviews by C.E.D.O. given for the cases Jeremeiev versus Romania [8], Spânu versus Romania[9], Andreescu versus Romania [10].
At this level of warranties offered to the culprit, his/her final word represents one of the most important ones, both due to the manner the institution has been regularized within provisions of art. 341 Crim. Proc. C., and especially, due to its role played in culprit’s defence lay out, which can not be replaced by the fact that the Court already heard the culprit, an opinion also shared by C.E.D.O for causes Constantinescu versus Romania [11] and more recently in the cause Popa and Tanasescu versus Romania [12].
Thus, placing the culprit’s final word right before the recess stage, gives power to culprit’s defence due to the fact that the final words heard by the Court belong to the former. The manner in which the culprit’s presents his/her final word, his/her attitude about the committed deed, about the harmed social values and nonetheless about the trial, as well as about the Court during this final contact between judge and culprit, may be definitive for the solution decided for the respective cause.

Procedural consequences
From the point of view of procedural consequences coming from the breach of art. 341 Crim. Proc. C. procedures, we belive that the sole sanction that might be imposed upon the cause is relative nullity [1].
Thus, in the Criminal Procedure Code provisions have been provided in a limitative manner whose breach inflicts the sanction of plenary nullity, on basis that they protect criminal trial’s essential values. These provisions are provided at art. 197 line 2 C.p.c. referring to: legal bodies competence and Court contents, trial session advertising, prosecutor’s and culprit’s participation during the trial, insuring legal assistance for the culprit, performing a social inquiry in causes with minor criminals.

As, not granting the final word for the culprit is not included in any of the dispositions listed among the above ones, the sole logical conclusion resulted is that we are in the relative nullity area. Taking into account that, by judging from the above-mentioned, through breach of this legal provision which is sanctioned through relative nullity, under the deliberate harm issue, parties’ procedural interests and rights area is exceeded, thus justice interests being harmed – finding the truth and the just solving for the cause, we thus believe [2], together with other authors that the breach of provisions in art. 341 Crim. Proc. C. is included in the are of nullity which pursuant to provisions of art.197 line 4 Crim. Proc. C. („The Court takes into account ex officio, all breaches in any stage of the trial, if the document invalidation is required to find out the truth and the just solution for the cause“) are taken into account ex officio by the Court.

Moreover, repeteadly, national Courts decided that one of the fundamental warranties of defence in the trial stage, mening the culprit’s final word, provided by art.341 Crim. Proc. C., in case of failure to grant it, generates a harm included in provisions of art.197 line 4, thus requiring the invalidation of the sentence pronnounced under these circumstances, with the purpose to find out the truth and the just solution for the respective cause. (See crim. dec.1801/15.03.2005 of ICCJ S.Crim., site scj.ro; Crim. Dec.. for the cause 840/179/2007 of the Appeal Court Constanța, not published.)

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Retributive justice - cause or effect of criminality

Ciongaru E.

Institute of Legal Research, “Acad. Andrei Radulescu” of the Romanian Academy, Bucharest, (ROMANIA)
emil_ciongaru@yahoo.com

Abstract

Retributive justice is an important part of justice and is based on the principle that an important step towards achieving justice is to establish the guilt of those who violate legal norms and implicitly to apply to them sanctions that are proportionate to the gravity of the offense(s) committed by them, and to the losses suffered by the victim and community. Therefore, an unlawful act can be defined as a breaking of the social and judicial norms, directed towards an individual, or against property and, therefore, against the state, the latter being the only one who is entitled to apply sanctions. In order to prevent and avoid violent and inadequate forms of punishment against an individual who has committed an offense, the penalty should only be the one established by law, and it has to be public and expeditious and its lowest limitations have to be applied for the committed offences. It is more and more desirable and recommended that the nature of retributive punishment is replaced with punishment that provides social utility with the specific purpose that the penalty imposed should be the general prevention that can be achieved by the force of example and special pre-emption, as a deterrent effect achieved by punishment.

Key words: retributive justice, delinquency, crime, guilty, rule of law.

The concept of justice can be defined as the concept of moral justice based on ethics, reason, law, natural law, fairness and equity and the concept of justice is an essential feature of society. [1]

Starting from Aristotel's theory concerning the classification of the forms of justice [2] in the theory and practice of law, we can distinguish different ways of achieving justice [3] in society, one of these being represented by distributive justice. This is a type of justice which is based on the principle of equal proportion, each person getting exactly what they deserve, according to the offences committed. Basically, when bestowing honours, riches or when it comes to appointing in an individual to public office, merits are taken into account in order to avoid an imbalance by treating unequal individuals as equals.

Giorgio Del Vecchio, an Italian researcher of the philosophy of law, assimilated [4] Aristotel's distributive justice with public justice, and the corrective justice with civil and criminal justice. Logically, it should be vice versa, whereas through distributive justice even though the offence against the state is suppressed, the principal of proportionate equality is applied in the field of criminal law by giving each offender "what he deserves", according to the seriousness of the offence. However, this does not mean, for example, that for crimes like homicide, adultery, theft, the offenders should be punished according to the "eye for an eye" principle.

In this sense, Aristotel considered that when restoring the balance, or when correcting such acts, violence should not be met with more violence, but instead reasonable judgement should be used, stating that "there can be no righteous city where a single innocent man is sentenced". [5]

In 1977, American psychologist Albert Eglash [6] distinguished between three types of criminal justice: retributive - the emphasis is on punishing offenders; distributive - the emphasis is on rehabilitation of offenders; and restorative - the emphasis is on repairs being made for the damages inflicted by the crime. But all of the offenses committed within a given territory in a given period, represent criminality. [7]

However, a distinction can be made between real criminality, discovered criminality, and legal criminality. Real criminality means all crimes committed in a certain territory in a given period, regardless of how many of them were identified and investigated. Discovered criminality (apparent) consists of all offenses discovered by criminal prosecution bodies. Legal criminality represents the criminal offences for which final sentences have been made.

The anti-social acts and crimes which, for various reasons, remain unknown to the bodies of the criminal justice system represent the difference between real criminality and apparent criminality and it is also called the "black number of crime".

The science that studies the social phenomenon of criminality, in order to prevent and combat it, is called criminology, and it is a complex science that rests on biology, psychology, sociology and legal science. [8]

Crime and criminal justice issues concern the highest global forums, including the United Nations Organization, which created a section for criminal justice and crime fighting in the Economic and Social Council (ECOSOC). By the Resolution of the General Assembly of United Nations Organization, no. 46/152, 18
December 1991, was established the United Nations Commission for Crime Prevention and Criminal Justice consists of experts from 40 Member States, which discuss and make recommendations on crime policy.

Criminal justice systems in Europe were heavily influenced by the development of the civilizations of ancient Greece and the Rome. Greece's criminal laws (Sparta – Licurgo, IX century b.Ch.; Athens – Draco, VII century b.Ch. and in Solon, sixth century b.Ch.), limited the power held by priests, thus establishing the fundamental distinction between public and private offenses, and allowing criminal justice to be perceived as a function of state sovereignty. [9]

The suppression of crime by the state, which is the last form of repressive reaction, was based primarily on the retributive idea as a logical consequence of historical development in terms of the idea of justice. This view was questioned by the Greek philosopher Platon [10] who believed that punishment could not be justified by itself in response to violations of the law, but should be oriented towards a future goal that had to provide social utility and that had to consolidate itself as the legal and philosophical basis of its application. In Platon's view, the purpose of punishment was to have a special pre-emptive effect (the intimidating effect of punishment) and general pre-emption (by example). Plato also distinguished between the incorrigible dangerous offender who was to be exiled into the wild, and the recoverable offender who was to be re-educated during imprisonment.

Platon's ideas [11] have influenced both philosophical thought and legal concepts, including their further development until modern times. The idea of a social utility penalty was resumed by the ancient philosophers, for example, Aristotel and Seneca, and modern ones, such as those from the French Enlightenment.

The ideas of the classical school of criminality have their origin in the works of philosophers and rationalist encyclopaedists from John Locke and Jean Jacques Rousseau to Voltaire and Montesquieu. Their works later contained ideas dedicated to the French Revolution and the Human and Citizen Rights Proclamation of 1789.

In essence, the classical school of criminal law is based on the theory of "free will", postulating the following principles: all men are equal before the law, man is a rational being, and his behaviour is controlled by reason, and by living under the rule of his own free will, man must be held accountable for his actions.

Punishment must be proportionate to the seriousness of the offense and sentence attributes must be severity, certainty, uniformity and must be expeditious, for the purpose of individual and collective intimidation. However, Beccaria [12] spoke against brutal and infamous punishment, considering that criminals will increase their criminal activity if they realize that they have nothing to lose. He spoke against the death penalty, saying that this measure should be applied only in exceptional cases.

French criminal law from 24 July 1790, the French Criminal Code from 1810, the German Criminal Code from 1871 and the Italian Criminal Code from 1889 were based on the principles of the classical school of criminal law.

Classical theory formulated by Beccaria was reproduced and reinforced by British philosopher Jeremy Bentham in his famous formula "What justifies punishment, its usefulness or, more specifically, its necessity ?" [13]

According to the author, the punishment should have the following objectives: to pre-empt the commission of criminal acts, and when pre-emption fails, to determine that the offender commits a less serious offense; to determine that the offender should not use a greater force than necessary for committing the crime; and to keep the crime rate as low as possible.

According to Enrico Ferri [14], the classical school of criminal law set the basis for reasoning and set boundaries for the state when it came to punishing offenders, lead to a milder nature of the forms of punishment, removed the degrading ones, and prompted the enactment of procedural guarantees, in pursuance of rights for the accused. The limits of this penal doctrine were focused solely "on crime and the punishment as an abstract judicial entity, isolated from man who commits a crime and is convicted, and from the environment from which, and to which, he returns after punishment". [15].

In positivist theory, the principle of legality refers only to criminalize not to punishment so that the latter can always be modified by the legislator. [16]

The legal responsibility lato sensu - understand the obligation to bear the consequences of breach of the rules of conduct. [17]

The penalty is the third element of legal rules that reveals the consequences of failing to follow the prescribed demeanour. It has an essential role to ensure the legitimacy of legal accountability in order to achieve the rule of law. Sanctions represent the way that society answers those who disregard its rules, the means through which damages and suffering are repaired, and a means for social reintegration of the offender. Sanctions indicate the disadvantages and discomforts that are entailed by disobeying the norm. Illustrious Professor Eugeniu Sperantia noted that fear of punishment acts as a kind of ebb and flow [18]: "When increasing the frequency of punishment, fear increases also. When increasing fear, respect for the law increases. When increasing respect for the law, the frequency of punishment decreases. When you decrease the frequency of punishment, fear decreases. When fear decreases, the rule of law decreases. When the rule of law decreases, the frequency of penalty increases etc."
The paradigm of retributive justice is characterized by the following: crime affects the state and it’s laws and justice seeks to establish the guilty of the parties to measure the level of suffering that needs to be applied by punishment; justice is achieved through a conflict between opponents and the offender is placed against state; rules and intentions of legal procedures exceed penalty results.

So, could retributive justice be a cause or an effect of criminality? Could increasing penalties tame the crime phenomenon?

In accordance with the recommendations of criminal policy of the Havana Congress, retributive criminal justice, as a repressive tendency, should manifest itself especially in the case of terrorism, organized crime, crimes against the environment and against the corruption activities of public officials.

During 1970-1975, the ideas from the classical school of criminal law were resumed in the field of criminal policy theory. Their followers were supported by the actual criminal reality, the "explosion" of criminality in Western countries and the universal trend of this phenomenon. On this occasion, their old theories about the deterrent effect of punishment and the importance of short-term imprisonment, which would have a beneficial impact on perpetrators, were reiterated, supporting the necessity of giving up the alternative measures to imprisonment and strictly limiting the frequency of parole. An increase in the severity of punishment and the limitation on judicial individualization of the criminal sanction were proposed. [19]

Due to general pressure caused by these views, the United States had a tendency to abandon the curative model and to replace it with a justice model, further clarified by establishing more rigorous criteria to apply to the measure of parole through limiting the possibility of punishment individualisation by the courts. Thus, in 1976, California adopted a uniform system of sanctions, limiting discretionary elements of uncertainty and variability entailed by the curative model. [20]

In Europe, this trend was marked by the law entitled "Security and Freedom" adopted in France on February 2, 1981. Regarding this law, French criminologist Jacques Verin said that it resembled the American model by replacing the individualisation of the sentence and the re-socialization treatment of offenders returning to the classical system of fixed penalties, in accordance with the gravity of the antisocial acts that were committed. [21]

Without being a partisan for repressive measures, Jean Pinatel recognized that this trend is somewhat justified by the serious increase in the crime rate, especially of those who were committed by using violence, which causes an aggressive defensive reaction from society, and is reflected in the legal system. However, the author points out that there are major issues raised by the prison system, which are that it can be a true "crime school", in which criminals come out more skilled, more inveterate and often more psychologically scared than before they went in. [22]

A thorough and critical analysis of this problem was made [23] on the occasion of the European Seminar on Alternatives to Imprisonment, held in Helsinki, between 26-28 September 1987, organized by the Helsinki Institute for Crime Prevention and Control (Heuni). In the General Report presented on this occasion it was emphasized that in the government’s responses, "whether they are from north, south, east or west, imprisonment is persistently described as a sanction which in most cases that cannot bring any improvement for the personal or social situation of the convicts. On the contrary, there is general concern that society's concern for satisfactory adjustment using imprisonment often leads - some claim always - to a deteriorating situation. "To strengthen this conclusion, the author cites the Swedish Government’s statement: "...improving an individual’s situation (re-socialization) by depriving him of freedom is an illusion. On the contrary this penalty leads to minor rehabilitation and a high recidivism rate, and also has negative effects on personality."

During the seminar, conclusions [24] were discussed that showed that imprisonment is deemed necessary, according to two criteria: when serious offenses (such as those directed against life, limb, personal freedom, and acts of terrorism, trafficking drugs, fraud and other economic crimes, those against the environment, or those that pose a threat to national security); and for incorrigible offenders that do not respond to non-custodial sanctions.

This recommendation was reinforced with the occasion of the Havana Congress. So, it was stated that "governments should give top attention to the promulgation and implementation of the most appropriate laws and regulations to control and combat transnational criminality and illegal international transactions ...". Also, national laws should be reviewed to ensure appropriate and effective responses to new forms of crime, not only criminal sentencing, but also legislative measures in civil matters or the administrative. [25]

An example in this direction is the new Italian legislation for fighting organized crime. [26] It is has been also noticed that, not only do the former Socialist republics enact more severe incrimination norms, but also the more developed Western countries act in the same way (as is the case of the new French penal code).

**Conclusion**

The process of the actual enforcement of the law cannot be separated from the idea of sanctions, of punishment, and of liability, because legal responsibility and the sanctions are, have been, and will remain
genuine tools for achieving the rule of law. In the whole social order ensemble, social sanctions and legal penalties are important. The penalty is a part of the norm and refers to measures and means that have been adopted towards those individuals who violate the rules or other normative prescriptions. The penalty does not entirely identify with coercion, which is characterized by resorting a coercive force. The range of legal sanctions is wider than coercion.

There are some legal penalties - for example, set aside an unlawful act - which can be applied without resorting to coercion.

The fight against crime may tend to be confused or associated with the community's social reaction against crime by using specific means to defend the social values, namely through legal proceedings. This can be harmful for the social order but can also hurt the ensemble, which consists of all means used to combat crime, is the fact that they have been implemented without a genuine concern for knowing the sources of this complex phenomenon, based on a scientific approach.

As a consequence, the concept of "reaction" can be both a means of reacting, in terms of responding to an external action, and a way to respond to a counter reaction as deemed necessary. The tendency towards severity is effectively balanced by another trend that is moderately inclined to use the repressive levers provided by criminal law, as well as identifying other non-custodial sanctions. However, to combat crime it is necessary to act on its sources, in what causes an illegal deed which, in most of the cases, can produce irreparable harm.

References

Fighting Crime At European And Global Ecological Level

Cobzaru A.

Ecological University of Bucharest, (ROMANIA) angiecobzaru@gmail.com

Abstract

The phenomenon of organized crime is booming. Within this context, the destructive actions against the environment that led to the environmental crime widened. In terms of terminology, there is no clear definition of the concept of environmental crime, using other terms such as: environmental delinquency, crimes against the environment. European and global level are important steps towards a more rigorous control of crime. The work captures the situation of Romania and France in terms of concerns for stopping crime in ecology.

Keywords: organized crime, environmental crime, environmental protection

Current European approaches to organized crime

In recent years there has been an unprecedented development of organized crime which led to a sustained battle against dangerous actions that threaten the safety and security of citizens of the world. Globalization, as the expanding current phenomenon brings with it not only benefits, but also many negative aspects that will influence all areas such as economic, cultural, social and political. Component products and environmental protection has remained unchanged under the influence of worsening crime at European and global level, on the contrary: there is an increase in destructive actions against environmental and legal sanction is often severe enough, even ineffective.

On European and global level there is no consensus regarding terminology environmental crime phenomenon. Attempts to define the concept are quite clumsy and controversial and often avoid defining the term; whichever is only a functional classification of offenses to which it refers.

However, important legal steps were taken towards the creation of a suitable legal framework to better cope with the current crime. It is commendable and welcomed the adoption at EU level Decision - Framework 2008/841/JHA of 24 October 2008 on the fight against organized crime is a concrete example of harmonization in the field, which can contribute to a stronger reaction and qualified judicial authorities [1]

Decision - Framework 2008/841/JHA [2] on the fight against organized crime aims to 'improve the common capability of the Union and the Member States and transnational organized crime. This objective is pursued in particular by harmonizing legislation. There is a need for closer cooperation between Member States of the European Union to counter the dangers and proliferation of criminal organizations and to respond effectively to citizens' expectations and their requirements. (art. 1)

Extrapolating from the general to the particular, from the organized crime in generally to environmental crime in particular, there is an analogous situation to both. Environmental crime in all forms becomes serious at European and global level. The new directive - approved framework not only to strengthen and support the idea that each Member State must contribute to better cooperation at European and global level for better control of this phenomenon.

Areas that developed mainly in environmental crime are illegal wildlife trade, with rare or endangered, trafficking in nuclear and radioactive materials, hazardous waste trafficking, intentional pollution of water, air, soil, subsoil, etc..

In this context, it is increasingly evident that the current generates new targets for scientific research: defining international crimes, global, transnational, global, crime analysis and detection of manifestations of globalization, transnational crime structure, the fundamental role of organized crime, crime factors and globalization processes. [3]

The situation in Romania regarding the phenomenon of crime in the field of environmental protection

Particularly regarding the situation of Romania, tending to remark concerns the national and, as a result of global awareness of the need to take more serious measures to limit and stop the phenomenon of crime is booming.
Although there is no clear definition given environmental crime in Romanian legislation, it is clear that this is part of organized crime in general, demonstrated the reality and relevance of the concerns in this regard.

As existing systems of sanctions were not sufficient to ensure that the whole of the environmental protection legislation is needed to prevent harsher provisions extent of crime in the environment. Community is concerned at the rise in environmental offenses and their effects that extend increasingly more outside states where they are committed. Such offenses pose a threat to the environment and therefore require an appropriate response.

As a member state of the European Union, Romania held internally transposed Directive - Framework 2008/841/JHA on the fight against organized crime, with all the consequences of its contents. Also, Romania has transposed the Directive internally. 2008/99/EC on the protection of the environment through criminal responsibility for serious violations of applicable provisions of EU law on environmental protection. The enactment complete environmental law and shoot a warning on serious facts against which harm the environment and be prepared an arsenal of severe sanctions.

Incrimination contained in the new law relating to breach of certain statutory provisions governing specific important aspects of management or environmental pollutants generally consist of either transposition provisions of Community legislation, even of regulations in the European Union.

Regarding the new Penal Code approved by Law no. 286/2009 and updated by Law 202/2010 state that the Romanian legislator has devoted a separate chapter environmental crime.

However, provided a number of offenses relating to environmental protection, human health in Title VI - Offences affecting public activities or other activities regulated by law, Chapter IV - Offences relating to regulated activities regime for some law and Title IX - Offences affecting the social life relationships, Chapter II - Offences against public health [4]

In Chapter IV of Title VI, the following acts are punishable: failure concerning ammunition (art. 279), failure to observe the nuclear material or other radioactive materials (2791) and not respecting the explosives (art. 280).

In Chapter II of Title IX are devoted to three offenses relating to human health that can be extended to consequences that may result from the environment. These are: the spread of disease from animals or plants (art. 310), water infection (art. 311) and trafficking of toxic substances (art. 312)

Analyzing the Romanian legislation on "environmental crime" shows a large number of regulations in the field, but hardly a "criminal" environment, in the sense of creating a beam coagulated under a proper system of "environmental crime "uniform and effective." [5]

In the absence of strict penal provisions exclusively dedicated environmental crime, the most active role in the implementation process of sanctioning misconduct, returns Environmental Protection Act now in force - Government Emergency Ordinance no. 195/2005.

Since its approval, the Government Emergency Ordinance no. 195/2005 and assumed the role of regulator - on the liability of legal framework, including the criminal. Ordinance, "failed, unfortunately, to build and to provide a type of environmental crime that express specific field, both in terms of content, scope and penalties, remaining tributary to the traditional conception, with a minimal effect on the customization environment "). [5]

Thus, in the art. 98 are provided for activities likely to be punishable by penal order. Penalties prescribed for those crimes range from a minimum of 3 months - 1 year and reach a maximum of 3 years - 10 years for serious works.

Article 98 of O.U.G. 195/2005 establishes a number of offenses 25 type, containing very different criteria grouped the sentences into four categories according to their gravity. A consensus exists; however, between these offenses relate to criminalize those acts that "were likely to endanger life or human, animal or plant." [6]

Ordinance establishes and aggravating forms of some of these offenses, namely those provided in par. 3 and in par. 4 of art. 98, and intervening where facts endanger the health or physical condition of a large number of people, have any of the consequences referred to in art. 182 Criminal Code. (the old Criminal Code) (serious injury) or have caused significant material damage, or if the death of one or more persons or substantial damage to the national economy. In these cases, the attempt is punishable (under art. 98 para. 6 of the Ordinance). Finding and researching office crime is from the prosecution, according to legal competence.

**Environmental crime. The French model**

In France, the fight against environmental crime is much more active. A large-scale event was held during 27th to 29th of March 2012 in Lyon attended by over 70 countries, with the objective of facilitating the agreement of a global strategy of environmental law and respect for harmonization and unification fight against environmental crime. [7]
Regarding term environmental crime in the discussion is mention of a report by the American Government in 2000 regarding international organized crime, during which time environmental crime is a deliberate violation of national or international law regarding pollution control hazardous to health or the environment, uncontrolled exploitation of natural resources, protection of plant and animal species threatened or endangered.

The terminology in this respect is not very clear or unified, using the concept of "ecological delinquency" in France and other countries, or "crimes against the environment", all, but, referring to serious offenses are directed against the environment.

In the Lyon Summit, discussed some of the most serious problems in the plan of expansion brought ecological crime: illicit wildlife trade, trafficking in radioactive and nuclear waste traffic.

1.1 The illicit trade in wildlife

According to the World Customs Organization, the illicit trade in wildlife can be considered as dangerous as narcotics. Also according to the World Customs Organization, "illicit trade in wildlife can be as profitable as drug trafficking. Tibetan antelope wool shawls, which is totally illegal sale, sold almost 20,000 euros / per piece and sturgeon caviar sells for about 8000 euro / per kilogram. "[7]

In March 2012, Thai police announced that a single raid seized a large number of wild animals for illegal trade: five tigers, thirteen lions, three cougars, three kangaroos, four flamingos, 66 marmosets, two orangutans and two panda. Shares belong to three members of a criminal gang who were arrested and indicted. They had imported animals from Africa, Canada and other countries and would resell them in the U.S. and China. [7]

1.2 Trafficking in nuclear and radioactive materials

International Atomic Energy Agency (IAEA) has a database on incidents which its Member States have knowledge. Thus, from 1993 to 2011, the number of adverse incidents was in 2164, consisting of unauthorized possession of such materials (radioactive and nuclear) activities related criminal cases of loss or theft, and other events about which information sufficient. [7]

One thing is certain, these statistics show that the demand for this type of product exists, and that traffic is facilitated by the lack of control of radioactive and nuclear materials.

1.3 Trafficking in waste

According to the International Labor Organization, "each year, up to 50 million tones of waste electrical and electronic equipment ("e-waste") are generated in the world." A Report of the United Nations Environment Programme (UNEP), published Monday, February 22, 2010, indicate that the amount of electronic waste will continue to increase significantly in the next decade. [8]

Faced with an increasing demand for electronic waste, organized crime groups abound especially in developing countries. Every five to eight years, inventories of personal computers are replaced, transformed into waste, which are the targets of trafficking.

In November 2010, eleven British people and four companies have been prosecuted for breaching EU rules on recycling waste from electronic devices (phones, computers, printers, TVs, etc). The investigation carried out by the Environment Agency British abolished a pathway illegal export of waste that goes to several West African countries where electronic devices were removed for much lower costs than those received for recycling in Europe.

Conclusions

Environmental crime is a serious and growing problem which manifests itself in various forms. It is not limited to air, water and soil, but pushing commercially valuable wildlife species closer to extinction. Environmental crime can include also crimes that accelerate climate change, destruction of fish stocks, deforestation and depletion of natural resources essential. These crimes can have a harmful impact on the economies and security of nations, in some cases, may even endanger the very existence of a country or a people. In addition, a significant proportion of the pollution offenses and those on wildlife have proved the involvement of organized crime networks.

Lately, organized crime groups have expanded their criminal activities in the trafficking of plant and animal species, the export of hazardous waste, radioactive materials, which give an added danger of these facts and outline a strong connection between organized crime and environmental crime.

Although environmental crime offenses were considered non-specific business crime, and only when the cause or threaten to cause substantial losses, involve special knowledge in business and the offenders were...
committed by businessmen professions or functions, be taken into account, we should not neglect the fact that environmental pollution offenses (especially) are committed by "white collar" crime aspect that strengthens the link between business and environmental crime.

References

Considerations regarding the unsolved civil action in criminal proceedings

Coca G.

Faculty of Law and Public Administration Spiru Haret Bucharest (ROMANIA) georgecoca59@yahoo.com

Abstract

The civil action is exercised in the criminal proceeding besides the criminal proceeding and in principle it is governed by the availability principle, but for the exception provided by article 17 of the Code of Criminal Procedure, namely the situations of the persons deprived of legal competence or with limited legal competence, when it is exercised automatically.

Key words: civil action, criminal proceeding, reconciliation.

The civil party in the criminal proceeding is the aggrieved party which suffered a physical, material or moral damage and which becomes civil party.

According to article 313 of Law no. 95/2006 on health reform, hospital units can become civil parties in criminal proceedings.

The law generally regulates social relations, establishing a certain conduct for the subjects of the legal relations.

The infringement of the law by performing an illegal act leads to the violation of the protected interest, namely it affects the legal order and creates a conflict of law. [1]

The legal action represents the means or the legal instrument by which a person is held liable [3] before legal court, namely to suffer the proper constraint corresponding to the norm violated. [2]

Without going into the usual preliminary aspects or introductory concepts on the exercise of the civil action within the criminal proceeding, I shall get to the subject of this paper.

The relevant provisions are represented by article 346, paragraph 4 of the Code of Criminal Procedure. It is about the acquittal or termination of the criminal proceeding.

We identify three situations:

A. When the acquittal is ruled, as provided by article 10, paragraph 1, letter b of the Code of Criminal Procedure
B. When the termination of the penal proceeding is ruled for one of the cases provided by article 10, paragraph 1, letter f
C. When the termination of the penal proceeding is ruled for one of the cases provided by article 10, paragraph 1, letter j
D. When the termination of the penal proceeding is ruled in case of withdrawal of prior complaint.

Let’s analyze them by turns:

A. Acquittal because the deed is not covered by the criminal law

Things are clear, even if there is an act which causes a damage, namely an illegal act, as provided by the New Civil Code, because here we do not speak about offence, which is an act that represent a social danger, it is perpetrated with guilt, but it is not covered by the criminal law (as in case of the offences found in the Special Part of the Criminal Code or special non-criminal laws, but with criminal provisions). Here, we can give an example of the legislation which regulates the labour relations, labour protection, commercial companies, unfair competition and many others).

Therefore, even if initially, there is a civil action accompanying a criminal action, it will remain unsolved, because one of the sine qua non conditions on the exercise of the civil action in criminal lawsuits is that the damage must represent the result of an offense.

Yet, how can an unsolved civil action be solved?

We also add that the recovery of the damage is performed:

- In kind, by the restitution of the thing, thus bringing back the situation to the state before the offence was perpetrated, by total or partial abolishment of a document and by any remedies, as provided by article 14, paragraph 3, letter a of the Code of Criminal Procedure
- By payment of a monetary indemnity, as long as the compensation in kind is no longer possible, as provided by article 14, paragraph 3, letter b of the Code of Criminal Procedure.
The solution to solving the unsolved civil action is in this case represented by article 20, paragraph 1, of the Code of Criminal Procedure, namely that the damaged person which became a civil party in the criminal proceeding may (the principle of availability governs) start a civil action before the civil court, in case the definitive ruling of the criminal court left the civil action unsolved.

Attention must be given to the 3-year statute of limitations provided by the New Civil Code. The statute is suspended during the criminal suit and resumes on the date the criminal ruling is definitive. To this end, see the provision of articles 416, 416 1, 417, Code of Criminal Procedure.

In case during the criminal proceeding, precautionary decisions are ruled, they shall be maintained, if the court does not solve the civil action and they shall automatically cease, if the damaged party does not initiate a legal action before the civil court within 30 days of the definitive decision. 

Per a contrario, if the civil action is brought within the 30-day term, these precautionary decisions subsist, either by seizure, registration of mortgages or criminal sequestration.

Failure to solve the civil action should not be confused with separate solving of the civil action.

The relevant provisions are represented by article 348 of the Code of Criminal Procedure, marginal title “Separate solving of the civil action”.

“Even is there is no civil action in criminal proceedings, the court rules on the recovery of the material damage or moral damages in the cases provided by article 17 of the Code of Criminal Procedure and in the rest of the cases, it may rule only on the restitution of the thing, total or partial abolition of a document and restore the previous situation before the offence was perpetrated.”

The cases provided by article 17 of the Code of Criminal Procedure are:
- The aggrieved person, with no legal competence
- The aggrieved person, with limited legal competence

The second thesis of article 348 of the Code of Criminal Procedure also speaks about “the other cases”. We wonder which the other cases are, because in our opinion there is only one case, namely the creation of the civil action.

Does the legislator refer to the special cases of solving the civil action, as provided by article 20 of the Code of Criminal Procedure?

Does it refer to the situation when the civil action is exercised by or in relation to the successors provided by article 21 of the Code of Criminal Procedure?

Does it refer to other cases than the one when the civil action remains unsolved?

B. Termination of the criminal proceedings in case of lack of prior complaint, authorization or notification to the authorized body or any other action provided by the law in order to bring the criminal action.

It is obvious that a lack of the prior complaint is a cause which removes criminal liability and therefore there is no adjoining civil action.

The person which suffered a physical, material or moral damage as a result of the criminal act is called aggrieved party, if it participates at the criminal proceedings and it gets the capacity of civil party, if it exercises the civil action. The hospitals, within the meaning of the Code of Criminal Procedure, can have the capacity of aggrieved party in the criminal proceedings.

In the absence of the prior complaint of the aggrieved party, as active subject of offense to life and integrity of a person, the hospital may file a prior complaint within 2 (two) months of the date is knows the offender. It is the situation in which the aggrieved party hospitalized does not intend to file the prior complaint, but communicates and can record in the observation sheet the identity of the offender or, in the absence of these records, finds out who the offender is. In our opinion, the filing of the prior complaint by the hospital unit by the hospital unit is performed on the date it is found out who the offender is, as provided by the Code of Criminal Procedure.

In our opinion, such a situation is possible, and thus the hospital unit may recover the hospitalization expenses by the means of a civil action, exercised in the criminal proceedings.

C. Termination of the criminal proceedings when there is a precedent case

We have nothing to comment.

D. Termination of the criminal proceedings in case the prior complaint is withdrawn

We are in the presence of first thesis of article 10, letter h (the prior complaint has been withdrawn, or the parties reconciled or a mediation agreement has been executed, according to the law, in case of the offenses for which the withdrawal of the prior complaint or reconciliation of the parties removes criminal liability).

Just a remark.

In our opinion, it does not also refer to the justified reconciliation of the parties, because according to article 132, first paragraph of the Code of Criminal Procedure, the termination of the parties terminates the civil action.

Also in the situation of parties’ reconciliation, we want to add that according to article 132, paragraph 2 of the Code of Criminal Procedure, it must be personal.
The legal text refers to the reconciliation of the parties.

My opinion is that since a personal reconciliation is necessary, it must take place not only between the aggrieved party as passive subject of the offense and the defendant, but between the defendant and all aggrieved parties, which brought a civil action, in our case, the hospital unit as well.

Many courts, in case the reconciliation of the parties take place (within the meaning of active and passive subject of that offense), leave unsolved the civil action of the hospital unit. Though in our opinion, not even the criminal liability can be removed in the absence of an authentic document which legalizes the reconciliation with the hospital unit as aggrieved party and subsequently as civil party.

As for the withdrawal of the prior complaint, we have some remarks.

According to article 131, paragraph 2 of the Code of Criminal Procedure, the withdrawal of the prior complaint removes the criminal liability. But, it can not leave unsolved the civil action of the hospital unit, but must solve it by its admission or rejection.

The only solution is the admission, when in the case file there is a creation of the civil party and the payment report proving the civil damages is enclosed.

Bibliography

Some considerations on special procedural rules in cases involving juvenile criminals

Crisu A.

Romania

Abstract

The Criminal Procedure Code has a title that includes specific procedural rules which derogate from the common provisions on the conduct of criminal proceedings. The special rules, derogating from the common law exists for dealing with cases of juvenile criminals, both for the criminal prosecution and for the court.

However, we note that diminish them, indicating that this trend, should not affect the structure and effects of criminal procedure important institutions, such as the right to defense.

Specific reference is made in the article on the assessment report and the presence of juvenile accused at the trial.

Key-words: juveniles, special procedure, assessment report, the probation service.

1. The Criminal Code contains a special system consisting of rules and measures to prevent and combat juvenile delinquency. The special juvenile criminal system has specific procedural rules, appropriate for achieving the goals of the criminal provisions; creation of this framework consists of special rules, is justified by the special situation of the juvenile, by his psycho-physical condition, specific to his age.

The rules of criminal procedure include special provisions relating the juvenile offender, the juvenile injured party, or the one summoned to participate in the criminal trial.

In addition to establish additional procedural safeguards, these special provisions also offer the most thorough examination of cases involving juveniles. (Mandatory assessment report, possibility to summon certain persons at the hearing of the juvenile provides supplementary data for solving the case.)

2. Thus, art. 481 and art. 482 of the Criminal Procedure Code include provisions regarding persons called to the criminal prosecution body and the mandatory assessment report (made by the criminal prosecution body or by the court), art. 483-486 of the Criminal Procedure Code regulates issues governing the composition of the court, persons summoned to the judgment of the cause regarding a crime perpetrated by a juvenile, the session involving the judgement, judgement of cases with multiple defendants, juveniles and majors. Article 493 stipulates provisions regarding the appeal in the first instance and appeal in the second instance; and art. 487-492 stipulate provisions regarding sanctions imposed by the court (execution of reprimand, enforcement of the freedom under surveillance, recalling of the freedom under surveillance, internment of the juvenile, changes regarding the internment of the juvenile, recalling the measures taken for the juvenile).

Article 480 of the Criminal Procedure Code as amended by Law no. 281/2003, entitled “General provisions”, states that the prosecution and the judgement of crimes perpetrated by juveniles, as well as the enforcement of the decisions regarding these juveniles are done according to the common procedure, with the completion and derogation in this chapter and in the Section IV1 of the Chapter I, Title IV of the General Part (special provisions for juveniles in the field of prevention measures). (Unlike art. 466 of the Criminal Procedure Code which states that flagrant crimes are investigated and judged according to the special provisions mentioned in Chapter II, which complete with other provisions of the code.)

3. Prosecution in cases involving juveniles is conducted according to the common rules of competence and procedure, exceptions being those in the art. 481, art. 482 as well as those in art. 160\textsuperscript{a}-160\textsuperscript{b} of the Criminal Procedure Code.

For the juvenile investigated for committing a crime or for the accused juvenile, the derogatory regulated issues are those relating to "persons called to the criminal prosecution body" and "the assessment report". The Code contains special provisions for juvenile criminals and also in the matter of legal assistance, preventive measures and presentation of the prosecution material.

The reason for summoning such people is that at a hearing or at a confrontation must be created a framework for making sincere declarations, or the presence of such persons can help to create this framework. (We believe that summoning persons referred to in art. 481 para. (1) of the Criminal Procedure Code is all the more, as listening and confrontation, when making at the criminal investigation body headquarters, acquires a
We consider that the provision contained in art. 481 para. (3) of the Criminal Procedure Code, namely the absence of the persons legally summoned is not an obstacle against the drafting of the prosecution material, it only may reduce the importance of this moment. In this regard, the solutions of the courts are open to criticism, where the courts ascertained that the criminal prosecution body made the presentation of the prosecution material without summoning those indicated in the above mentioned text, considered that this omission was covered by the court itself, which settled the case by summoning persons referred to in art. 483 para. (1) of the Criminal Procedure Code.

4. Special protection established by these special regulations is not provided in the conduct of preliminary acts and is left to the criminal’s prosecution body option the summoning and participation of parents and legal representatives of juveniles, or a lawyer, though, in the spirit of the UN Convention on Rights of the Child, any child suspected or accused of having infringed the criminal law has the right to receive legal advice or any other assistance for preparing his defense.

5. From art. 482 of the Criminal Procedure Code results that in criminal cases where the person investigated for committing a crime or the accused is a juvenile, shall be made a mandatory report of assessment.

Recent amendments to the Criminal Procedure Code have essentially changed the legal status of the assessment report. Currently, due to the adoption of the Government Emergency Ordinance no. 31/2008, preparation of the assessment report within criminal prosecution phase was left to the prosecutor’s appreciation that supervises or, where appropriate, conducts the prosecution. It looks so specifically that the prosecutor who supervises or, where appropriate, carries out the prosecution may ask, when deemed necessary, that the assessment report to be carried out by the probation service attached to the court in whose constituency the juvenile resides, under the law. Obligation to make the assessment report is provided solely for the court.

The assessment report has the role to provide data on the juvenile from the social perspective. The assessment report shall be in accordance with the structure and the content provided by the special legislation regulating the activity of the probation services. The data could refer to physical and psychological profile of the juvenile, his intellectual and moral development, family and social environment in which he lived in and developed, the factors influencing the juvenile behavior that favored its criminal behavior, criminal history behavior of the juvenile before and after committing the act.

The assessment report shall be made by the probation service attached to the court in whose jurisdiction the juvenile resides.

From the provisions regulating of the assessment report results that the data it provides are of particular importance in taking action or a sanction to the juvenile.

6. Regarding the nature of this act, although it is performed as requires the law, by the extrajudicial bodies, it was considered that its nature still retains the one of a procedural act. This nature could be explained by the fact that the bodies which are empowered to perform the act are provided by the Criminal Procedure Code, its content is defined in the Code, and its purpose contributes to accomplish the criminal proceedings role. Thus, performing this act, its content and its purpose are given by the procedural rules binding upon those who perform them. However, the analysis of the content is made by the judiciary, serving the final solution, which is motivated, among other things, by data provided in the assessment report. Also the penalties due to missing or making incomprehensive assessment reports are provided by the procedural rules.

7. Under the previous legislation, the requirement to carry out the assessment report was for criminal prosecution body and the court, the provisions of art. 482 para. (1) of the Criminal Procedure Code being interpreted as the application of these provisions by the criminal prosecution body or by the court in the trial stage was for them to decide regarding the juvenile. However, failure to carry out the assessment report in criminal prosecution phase was sanctioned by absolute nullity.

We believe that the actual provision, regarding the duty to carry out the assessment report during trial deprives it by the effect desired by the legislator in solving the case. Given its content, wisely, the legislator intended that the criminal prosecution body to order measures or acts, taking into account the assessment report. Indeed, the lack of the assessment report in the criminal prosecution stage is covered by its performance during the trial, but the effect desired by the legislator, namely to be evaluated in the context proper to procedural prosecution phase, even to the solution proposed by the prosecutor, is no longer achieved.

Please note that the rules of the New Criminal Procedure Code are similar to the current one.
8. The assessment report, as it is regulated, is an indispensable procedural act for the legal resolution of the case, since it provides data on the juvenile, his physical, mental, intellectual development. The assessment report not only has the nature of a procedural guarantee, in respecting the rights of the juvenile, but it is an important element, even necessary to establish guilt and penalties to be applied [6].

To meet its duties, the assessment report must include complete data, even details, using general or vague terms, such qualifier, can determine the judicial body to reach incorrect conclusions regarding the juvenile.

The data presented should help the criminal investigation body and the court to adopt the most appropriate measure for the juvenile’s rehabilitation. Therefore, although the art. 482 para. (1) of the Criminal Procedure Code not only specifies that the assessment report is done by the probation service on the court in whose jurisdiction the juvenile resides, a great importance is the training of individuals who actually carry out the work, allowing them on the one hand to understand the importance of the work they perform, and on the other hand, to draw full assessment reports, using appropriate and suggestive language that reflects reality [7]. Proceedings on the basis of incomplete data without serious checks make the court decide unwittingly, the given solution not fulfilling its purpose.

It cannot be considered as valid an assessment report done before perpetrating the facts for which the juvenile is accused, act being made and used for placing the juvenile in a care facility [8]. The same assessment report cannot be received whenever a new criminal prosecution phase started. Therefore, the assessment report used in a previous case cannot be used in a new case. If we admit this, it would mean that a single report can be used throughout the juvenile [9] period.

9. Compared to the prosecution, where typically, the parties are presented separately when conducting the investigation, the trial is conducted usually, in the presence of the parties, in the front of the court legally constituted, in public session, orally, in an unmediated and contradictory way (art. 289, art. 290 of the Criminal Procedure Code).

Presence at trial is considered a fundamental right of the parties, as in this way they can participate effectively in the development of judicial investigation, within the procedural rights granted by the law [10]. Under these conditions, the exercise of the right of defense is granted, with the simultaneous presence of the parties, which may support or counter requests, assist in the administration of evidence and orally support their point of view.

First, the presence of the accused is absolutely necessary in view of the activities taking place during the judicial investigation (hearing the accused, if necessary, make confrontations, supporting defenses, etc.). However, his presence allows a better knowledge of the accused by the court, of his behavior, the respective data being used to individualize the sentence. (The presence of the juvenile accused is of particular importance because, in addition to direct contact with and his behavior, the court can check some of the information contained in the assessment report. Also, if there is a doubt about his mental state, the court may order a psychiatric expertise.)

10. In some cases, the legislator considered the presence of the accused at trial is required [11]. These cases are justified by the special circumstances of the accused, which requires the idea of the right to defense, his presence at the trial of the case [12].

These explanations justified the previous regulation on the juvenile’s presence at the trial, which provided that a proceeding for an offense committed by a juvenile is made in his presence, unless the juvenile eluded from trial (art. 484 para. (1) abrogated [13]).

The text was interpreted in order to ensure the presence of a juvenile to the trial, his absence being an exception accepted only if it was proved that he eluded from trial.

As the compulsory presence of accused at the trial, failure to do so was sanctioned by absolute nullity. These provisions were abrogated, following that for the juvenile accused to apply the common provisions which ensure his presence at trial.

We consider that the abrogation of the special provisions regarding these aspects eliminate the protection existing before that.

The guaranty of the presence at trial, along with other special rules provided the proper procedural framework handling of cases with juvenile criminals.

11. In recent years, there is a tendency to reduce the special regulations regarding criminal procedure, one of the purposes is probably to ensure a better efficiency. Given the criticism regarding the resolution of cases within a reasonable time, the attitude is justified, but we note that this simplification should not affect the exercise of fundamental criminal procedural institutions, including those concerning the right of defense.

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[9] Sibiu County Court, Criminal Decision no. 108/1993, in Law Magazine no. 8/1994, p. 101. In this case there has been a "summary-social inquiry" (the case was solved before replacing the social inquiry with the assessment report) which was nothing more than a copy of a social inquiry conducted a year ago. Obviously, this social inquiry did not contain data regarding the changes in the juvenile’s behavior in the late period.
[12] Art. 314 of the Criminal Procedure Code provides that the trial can only take place in the presence of the accused, when the latter is held. The arrested accused is obligatorily brought to trial.
[13] This provision was abrogated by art. XVIII point 61 of the Law no. 202/2010, on measures to accelerate the settlement of trials, published in the Official Journal no. 714 on 26 October 2010.
Law and liberty. Legislative inconsistencies. The importance of differentiating between law and freedom

Dabu V. 1, Gusanu A.M. 2

1 University at S.N.S.P.A
2 Bucharest Bar
valerica.dabu@comunicare.ro, amavgusanu@yahoo.com

Abstract

The authors treat the concept of distinct right and freedom, in the meaning of behaviours, guaranteed to satisfy such needs through coercive force of the State. Highlights of some normative acts in semantics and the significance of the inconsistencies of the two terms, including their implications for theory and practice, and presenting some proposals of lege ferenda related articles. 10 from E.C.H.R.

Keywords: law, freedom, difference, behavior, precision, sharpness

The notion of law has more senses such as "all legal norms", "Science of legal norms" and that the State guaranteed the behaviors a teen-agers. In doctrine [1], in legal documents, and even in the basic acts we find the expressions "right to liberty", "right is a freedom" and "freedom is a right" or that "the right of freedom from" what creates problems of understanding and uniform implementation of the law, and sometimes confusion with great implications [2]. Having regard to the requirements of the principle of legality as regards the accuracy, clarity, accessibility [3] and forecasting [4] you need to specify the legal norms, we believe that there is a short utility approach to the concepts of law and liberty in the meaning of behaviours. Unfortunately even in the Universal Declaration of human rights we find expressions with different meanings for the words right and freedom, even incompatible, you might say. Thus in article 2 and article 3. 29 it follows that the rights are freedoms when it states: "everyone is entitled to all the rights and freedoms set forth in this Declaration ...", or when using the expression "rights and freedoms". In article 18, art. and article 19. 20 of this declaration uses the expression "right to liberty" which may be considered a tautology if these concepts would be the same if not identical, to opine that phrase, is contrary to the concepts used above. In the article. 30 of the same act, the expression "rights and freedoms" induce the idea of differences between these two concepts though. 18 and article 19 we find phrases like "this right includes freedom to" establishing a different relationship between the two concepts. Different, inconsistent meanings of this kind appear in art. 5, article 9, article 10, article 11, article 17 of the European Convention on human rights. [5] The expressions "rights and liberties proclaimed", "rights and freedoms" used in the Convention would result that these are two different concepts. Instead of the terms "right to liberty" and "this right includes freedom"[6] It follows other uses and meanings for concepts of law and of freedom what appears as inconsistency. [7] In the Romanian Constitution does not find the expressions: "right to liberty", "this right includes the freedom" but on the contrary we notice a distinct usage of those two concepts. Instead of the terms "right to liberty" and "this right includes freedom"

In the second opinion, we consider that there are differences between the rights and freedoms, on the other hand. First, we consider that it is necessary a few words about free will, absolute freedom, freedom and
necessity, right and obligation. The right to an instance of an individual right or as a collective are able, Faculty recognized by society, or behavior imposed by it through the State to meet the needs of active and passive subject, in the spirit of fairness, to do, to do, to give or not to give, or to claim or receive anything, provided the needed by the force of compulsion of the State. Right into the assumption above is always at least a correlative obligation it owed to a person, group, company, which may be in the form of positive obligation [12], negative or mixed requirement. We believe that the obligation is recognised or enforced by the company through the State, a topic to another topic, whereby the first is kept as in the spirit of good and of equity, to do, to do, to give or not to give something, according to the rights and freedoms of the second, under the sanction of state coercion. So the obligation is a legal person whose execution is guaranteed to need through the force of compulsion of the State. [13] In this instance the law society recognizes, protects and guarantees the interests of legitimate goods, and other values of the individual, the community and society in order to meet needs, while ensuring the necessary force necessary in bringing about compliance. So in this respect the right assumed behaviors [14] of the subject and the subject right obligation law, correlative behaviors, guaranteed and protected by the State to defend certain values. This instance has the right not to be confused with the acceptance of the law as a set of legal norms governing the rights, freedoms, obligations, duties. Through freedom, according to D.E.X. means "able to act after its own will or desire; the possibility of conscious human action in terms of knowledge (and under) the laws of nature and society development " [15]This definition is questionable because it relates only to a part of physical liberty [16] and action and no inaction as the part of other activities. Also, this definition does not include mental freedoms, intellectual, faith, conscience etc. ... On the other hand we see that this definition is freedom shores of knowledge (and rule) the laws of development of society and nature. Referring to the social laws which limit the freedom we appeal to John Stuart Mill who draws a clear distinction between the scope of the acts, conducts individual concern the sphere in which neither the state nor community have nothing to intervene, the individual is fully sovereign acts or conducts field concern (touch) and the other (the only sphere in which state and society would be entitled to interfere, affecting the interests of others or certain general interests) "[17]. The notion of "free will" requires absolute freedom of man, completely independent of the need [18] and objective causality [19] what behaving discussions. We reckon that a man can not have absolute freedom if we consider the possibility or impossibility of removing causal, and the need for natural laws. In a universe [20] where there is no natural causal [21], necessity, links more or less stable, natural law, natural order would certainly not exist to enable the existence, construction, processing, mastering nature, systems, ecosystems, etc.. Montesquieu define freedom as "the ability to do what the law allows, if a citizen could do what they forbid he would not have the freedom that others could do the same"[22]; If we consider the natural laws then current count this definition. But reporting her to social laws can not agree with this definition because social laws can be unjust certain natural rights and freedoms against which would affect so-called freedom. [23]Jean Rivero considers that freedom is the power to self-determination, by virtue of which man himself chooses his behavior [24], so it is a power that exerts himself. Other authors the freedom to accept that "freedom" and "power" are "two antithetical terms, naming two contrasting realities and therefore incompatible: the relationship between two people, one of them extending power (the power to command or prohibited) reduces negative freedom of the other, and vice versa, as the two expanding its sphere of freedom, decreases the power of the former." [25] We note that this definition of freedom only reporting what another power does not include the nature. In an essay Humboldt State shows that the objective is only "safety", understood as "freedom’s certainty in the law." [26] We consider that is questionable phrase "freedom within the law" because we believe that freedom is infinite and can not be defined and exhausted in law because the law defines what is forbidden showing freedom and not its contents or what is permissible. [27] Article 29 of the Universal Declaration of Human Rights also defines freedom shores it only the rights and freedoms of others, man-made laws, just requirements of morality, public order and the general welfare in a democratic society omitting the limits set by necessity (laws of nature, cause and effect, forces of nature, etc.). [28] Therefore we believe that freedom is the class that defines the scope of the individual in relation to the need, the laws of nature and laws of social objectives, including legitimate rights and freedoms of others [29]. As a result, between law and liberty in the sense provided above we believe that there are differences, as follows: a) the exercise of a person's freedom assumes certain powers by it what it requires from other subjects only a negative obligation, not to do anything to prevent the exercise of that power unhindered (freedom) by the holder thereof; b) freedom does not require, as a rule, the positive obligations on the part of other subjects individuals [30], concerned to do something its correlative, as it implies a right [31]; c) freedom involves only the State an obligation to defend and ensure the conditions for unhindered exercise thereof; c) as opposed to liberty, the right to assume obligations, both positive and negative, that is to do, Yes, required, not required, and does not give; It is true that freedom means and obligations, but only for the State, in a limited way, where a guarantee is required to prevent the violation of them and defend it when breached, while positive obligations assumed and rights for others; d) contents of a right shall be governed by rule defined by law, in order to establish credentials for the right and obligations of the positives and negatives of others, its correlative, including of the State so those behaviors that are allowed and those behaviors that are required and the correlative warrant, such as in the case of the right to compensation
for expropriation, the right to education, the right to pension, etc.; e) subject to the right is specified, or it involves delivering, marking, regulation by law, when the subject is limitless and liberties but sometimes exercise of freedom is limited by the legitimate rights and freedoms of others, and other prohibitions laid down by law [32]; outside these limits the freedom of behavior with the exception of prohibitions is infinite and cannot be described in a law; [33] f) in terms of the behaviors included the right number is located in a closed interval when freedom is an open interval; g) it can be argued that the right to liberty, the right of appearing as a limitation of the freedom [34]; h) in terms of limiting social freedoms are absolute freedom of thought, freedom of conscience, freedom of opinion, freedom of conscience;

Thus, we consider that, in the right way, in the Constitution of Romania, [35] how differently and in a number of international documents, is spoken differently about the fundamental rights and fundamental freedoms [36] So we consider that the provisions of article 4. 10 section 1 of the European Convention on human rights (ECHR), are not sheltered from criticism when they provide: ’ 1. everyone has the right to freedom of expression. This right includes freedom of opinion and freedom to receive or impart information or ideas without interference of public authorities and without regard for borders. This article shall not prevent States from subjecting undertakings broadcasting, cinematography or television licensing arrangements. 2. the exercise of these freedoms involving the duties and responsibilities, may be subject to certain formalities, conditions, restrictions or penalties as are prescribed by law which are necessary in a democratic society, for national security, territorial integrity or public safety, for the maintenance of order and preventing criminal offences, the protection of health or morals, the protection of the reputation or rights of others, for preventing disclosure of confidential information or to ensure the authority and impartiality of the judiciary. Firstly, the use of the phrase "the right to freedom of expression", in the spirit of the above, we consider this inaccurate and ambiguous; that's why we believe that the wording "Any person has the right to freedom of expression.", is outdated and that it could be replaced with: "everyone has the freedom of speech" or "freedom of expression is guaranteed under the law, any person." Secondly, the phrase "this right shall include freedom of opinion" we find questionable because: a the possible behaviours) freedom cannot be contained in a law, because the law subject, behaviours and secured permits, are laid down in law, while in the case of the law only prohibited behaviors and not allowed; b) deem wrongly included freedom of opinion in the freedom of expression because only the freedom of expression of opinion may be restricted by law and freedom of opinion. On the other hand, freedom of opinion is a fundamental freedom in its own right with a different legal regime. The formation of opinions must be free, on the basis of the necessary information, accurate, complete and timely. [37] No one may be coerced to adopt an opinion. But freedom of expression of opinion can be included in the freedom of expression but with some distinctions, as the expression of opinions is usually very limited. The third article. 10 section 2 of E.C.H.R. as it is worded as follows: "the exercise of these freedoms involving the duties and responsibilities, may be subject to certain formalities, conditions, restrictions or penalties as are prescribed by law ...", may lead to confusion when referring to freedom of opinion and freedom of expression of opinion. We believe that the freedom of expression of opinion and behaving like the freedom of expression in general duties and responsibilities and may be subject to certain formalities, conditions, restrictions or penalties as are prescribed by law which are necessary in a democratic society, for national security, territorial integrity or public safety, for the maintenance of order and preventing criminal offences, the protection of health or morals, the protection of the reputation or rights of others in order to prevent disclosure of confidential information or to ensure the authority and impartiality of the judiciary.”

In conclusion, we believe that in both theory and practice, particularly in the law, it is necessary to use two distinct terms of law and freedom.

References

[1] For instance Jean Morange confusion of public liberties critique and rights. This author points out that: "public individual rights, represents” the possibility recognised individuals to require the State to take concrete steps, assuming positive obligations, so that they can fully benefit from the exercise of these rights. Thus defined, individual public rights are distinguished public freedoms, they shall only be recognized individuals opportunities to exercise, sheltered from any external pressure, a number of activities. " Jean Morange, Public Freedoms, Editura Rosetti, 7th Edition, updated 2002, p. 5. The doctrine and the jurisprudence, we find the phrase "the right to liberty and security" in a questionable background such as: "the right to liberty and security are intended to protect the person's physical freedom against any arrests or detentions arbitrary or abusive (Engel and others, on June 8, 1976 in GACEDH, nr. 4 paragraph 58). Frédéric Sudre, european law and international human rights, Polirom, Iași, 2006, p. 239. We have reservations concerning the expression "right to liberty" but also to the fact that physical freedom would only reduce the protection of freedom of the person against any arrests or detentions arbitrary or abusive because apart from freedom of physical state can be affected by any
person or entity other than daughter State. In other treaties, we find the expression "rights-freedoms" in Jean-Francois Renucci, Treaty of european human rights law, Editura Hamangiu, Bucharest, 2009, p. 85.

For example, the expression "the right to work is guaranteed" (art. 77 of the Romanian Constitution of 1952, article 18 of the Constitution of the 1965 Romanian) requires in addition to protecting it and providing a job for the State. Or the phrase "freedom of work is guaranteed or defended" differ from the first because it does not require the provision by the State of a job through distribution (art. 21 para. 3, of the Constitution of Romania in 1923 to provide "freedom will be defended," work).

In a ruling, the ECHR refers to conditions with which they must comply with a law that "...applicable law must be sufficiently accessible to the citizen. Other condition: the law must be sufficiently precise to allow the citizen to provide, to an extent reasonable, the consequences of its behaviour. (The case of Silver and others v. United Kingdom, Judgment of 25 March 1983 (room) (series A No. 61) Vincent Berger, jurisprudence of the European Court of human rights, 6th Edition of IRDO, Bucharest, 2008 p. 507.

Finally, the notion of predictability depends much on the content of the text in question, its scope, and even the number and quality of its recipients. " See ECHR, 28 March 1990, Groppera Radio AG and others v. Switzerland, series A No. 175 paragraph 68. In another decision of the ECHR is spoken by the requirement that the law must be reasonably predictable. (Case C.R. v. the United Kingdom Judgment of 22 November 1995 (room) (series A No. 335-C) Vincent Berger, op. cit. p. 387.

The same observation can be made if we are referring to some articles of the International Covenant on Civil and political rights ratified by Romania by Decree nr. 212/1974, and other foundational documents.

If we consider that both the right and the freedom are concepts that define the behaviors to satisfy needs we will find it difficult to accept that all the acts from the scope of the concept of freedom, which in our concept are endless as forms, contents and number, might be included between the acts falling within the notion of law. It is indisputable that these expressions involve discussions with respect to accuracy, comprehension, accessibility, and compliance with regulatory foresight, including their implications.

In the Declaration of the rights of man and of the citizen we find phrases: "right to liberty", "this right shall include the freedom", instead we find: "men are born and remain free and equal in their rights" (art. 1). "Freedom is to be able to do everything that does not harm each other" (article 4) and "the law is not entitled to prohibit only actions that are dangerous to society. Everything that is not prohibited by law may not be prevented, and no one can be constrained to do what the law does not require it. "(article 5) and in article 3. 11 of the Declaration of the rights of man and of the citizen, we find the following formulation: "the free communication of thoughts and opinions is one of the most precious rights of man," which also forms include discussion because it could be interpreted that induce the idea that freedom of communication is a right. What's more in the article. 2 of the Declaration of the rights of man and of the citizen, we find the expression: "these rights are liberty, property, security ..." what in our view the formulation does not meet the requirements of accuracy, clarity, accessibility and forecasting because it asserts that freedom is a right.

Unfortunately, contrary to art. 31 of the Romanian Constitution. 70 of law no 287/2009 amended by law No. 17/2011 on the new civil code it uses the words 'right to free speech, "" the exercise of this right "and not" free speech "and the exercise of this freedom.""

Here we believe that the opinion has the meaning of respect, discretion, judgment, reflection, consideration.

Frédéric Sudre says: "Apart from the fact that the distinction between civil and political rights, on the one hand, and economic, social and cultural, on the other hand, between" rights ... ", which I assume an abstention on the part of the State, and" rights ...", which advertises its part, benefits from an extremely simplifying terminology (more individual liberties appear under the name of" rights. "in the relevant international conventions: the right to liberty and security, the right to a fair trial, the right to freedom of expression, etc.) It is necessary to notice that there is a categorical opposition between the two categories of rights." Frédéric Sudre, european law and international human rights, Polirom, Iaşi, 2006, p. 185.

This prof. Muraru shows: "an explanation is in order. At first, in the catalogue of human rights arose as requirements of human freedoms in opposition to public authorities, and these freedoms do not signify any from other than a general attitude of abstention. The evolution of freedoms, in the wider context of political and social developments, resulted in the crystallization of the concept of human right, the concept and complex legal meanings. Especially in relation to State authorities, human rights (public liberties) got involved and correlative obligations of respect and defence. Over time, these freedoms had to be not only proclaimed but also promoted and, especially, protected, guaranteed. We can thus see that today, between law and freedom there is a synonymous of legally binding." I. Jordan, Mike West, constitutional law and political institutions, Editura Lumina Lex, had barely, 2001 p. 162.


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In the article, 1164 of the New Civil Code provides for that. "the obligation is a right by virtue of which the debtor is kept to provide a benefit to the creditor, and it is entitled to obtain the benefit due."

Referring to this last thesis of law, Al. Otetelăianu: show the 'right includes rules of conduct that are born under the influence of social factors and individual factor, in order to achieve the happiness of individuals who cannot be provided with due regard for national interests "Show Of Otetelăianu., Some basic principles of science, law, law number festive Magazine, 1942, Bucharest, p. 82.


Until the coming of the island Friday it is conceivable only a physical, mental, etc. of Robinson Crusoe obviously limited. At this stage we can't talk straight as a correlative obligation of another person. After his appearance Friday on the island appears on competition and limitation of freedom to those two people but also any rights of everyone if they lay down certain rules, habits.

"The need to designate properties and relations that have an internal theme, arising inevitably from the essence of things, their laws," Paul Apostule and collectively, dictionary of philosophy, Political Publishing House, Bucharest, 1978, p. 490.


In such a universe that only God can create, transform, destroys an object, act without regard to causality, necessity and any natural law. Without natural order, space, structure, system time, stability, interaction, motion, etc., is amorphous, undefined and only God could let them out of the spatial-temporal dimensions, motion, energy, etc. The man can act taking into account the necessity of knowledge and foresight, avoiding the effect by removing the causes or prevention or delay of the causes, but cannot destroy the necessary natural link cause and effect. For instance, the man does not destroy the causal link between the fire and the heat level but there is acting on the cause of the fire, extinguishing or controlling can protect a loose but does not prevent heat dissipation of the heat. We consider that even freedom of conscience is not absolute and is limited to the individual's physical and mental capabilities of its preparation, experience, etc. Romans said sublicata tollitur effectus "(cause and effect fades away). Or, and this is a way to act on time effect but does not destroy the causal link required such as that of fire and heat.

The indeterminism determinism denies claiming that the phenomena and processes in nature and society are not causally determined, not subject to the natural law of objective necessity and are determined by the hazard, FREIWill manifesting itself as a chaos of chance. In our opinion that we do not discover, or we don't know the cause doesn't mean that it doesn't exist.

Montesquieu, the spirit of laws, vol. I, Editura Ştiinţifică, Bucharest, 1959, p. 82-83; Immanuel Kant defined the idea right through the idea of freedom of the individual, but respect freedom limited to others.

Patrick Wachsmann defines such freedom: "freedom is the person who does what he wants and not what one wants to do; It assumes the absence of extraneous constraints." Patrick Wachsmann, Libertés publiques, ed., Paris, Dalloz, 1996, p. 1., and this definition is questionable because it does not specify what "strange compulsion" shall mean respectively a natural compulsion, coercion or arbitrary constraint should be human. The concept of freedom means not only the greater than or less than independence which possess the individual versus society, but also the degree of independence which it considers as normal and happy both to society and nature. Thus one can speak of freedom or liberty limited.


According to article 4 of the Declaration of the rights of man and of the citizen of 1789 as part of the Constitution of France ordering: "freedom is to be able to do everything that does not harm another. Thus, the natural rights of each man knows no limits other than those required of other members of society to enjoy the same rights. These limits can be determined not only by the law. " In our opinion, that definition of liberty is restricted and is only in relation to social constraints and omits reporting freedom from the necessity of the natural limits of the object oriented individual. And in article 5 shall read: "the law is not entitled to prohibit only actions that are dangerous to society. Everything that is not prohibited by the law may not be prevented, and no one can be forced to do what the law does not require it."

"Freedom consists precisely in understanding the necessity of objective laws, knowledge of reality and the forces of nature and social life, based on this knowledge," Paul Apostule and collectively, dictionary of
philosophy, Political Publishing House, Bucharest, 1978, p. 407. F. Engels, quoted in this paper show: "freedom is not in your dreams, independence towards the laws of nature, but also in the knowledge of these laws and the possibility of putting them consistently into action in order to achieve certain purposes."

[30] For instance, the property is the result of an agreement that restricts the freedom of others in space became private property. Understanding and fulfilling a "legitimate property fair" does not mean the limitation of freedom since surrendering to the exercise of a discretion does not mean limiting freedom.

[31] Freedom to work does not imply the obligation of the State to provide employment, or another is the situation when constituantul has the right to work is guaranteed, provided that it would assume and ensuring employment by the State;

[32] For instance, the right to life "under whose protection is established by article 2 of the Convention, is of the essence, requirement of a general nature to the Contracting States not to prejudice, through its agents, this right, that is not the cause of death of a person, except as specified in the second paragraph of the text, and interpreted narrowly. At the same time, the text imposes a positive obligation on States to take all appropriate measures for the effective protection of the right to life." Carter, Helga the European Convention on human rights, vol. I, rights and freedoms, ALL Beck Publishing House, Bucharest, 2005, p. 175; It also assumes debt obligations of the borrower to pay the creditor's claim; right to vote implies the obligation of authorities to organize and carry out the exercise of this right (to do), including to comply with it;

[33] Freedom of expression as freedom of expression, so in a private environment is unlimited as long as does not exceed the private sector. Only when we speak of freedom of expression as freedom publishes some limitations, are involved specified in the Constitution, in relation to the rights and freedoms of others. For example: "freedom of expression may not harm the honour, dignity, private life of the person and the right to their own image," says art. 30 section 6 of the Romanian Constitution or this provision implies certain limitations.

[34] We consider that it is wrong to argue that everything that is not forbidden is permitted without expressly excludes from this assertion, constraints, limiting exercise, suppression, etc. implies that there touches the right or freedom. Or just the constraints, limiting exercise, suppression, etc. implies that there touches the right or freedom to be allowed should be provided for in the regulations, and subject to certain conditions provided by law otherwise abuse appears in law or in fact. For example the doctrine referring to the breach of the right to privacy through audio and video records without the consent of the person claiming that the authorities may make such intrusive while expressways are not prohibited. "whereas the audio or video recordings may be authorized when, and about the preparation of some serious crimes and for identifying and locating offenders, what it involves and information work, in the absence of a prohibitive, these records text can be carried out and that, if precursory act are authorized according to the law." Gregory Levin, treatise on Criminal Law 2nd Edition, Editura Hamangiu, Bucharest, 2008, p. 416. Unfortunately such mistakes we find them in law. By way of example might invoke and art. 916.2- sentence in c. proc. pen. where the legislature provides: "any other recordings may constitute evidence unless they are prohibited by law."

[35] Thus, freedom of thought, belief, and opinion is unlimited; that's why we believe that the talk of a right of thought, belief, expression, incorrectly, as a means to induce the idea of thinking, of faith, of what they think or believe, which seems absurd. We consider that it is inspired, and the phrase "the right to freedom of thought, freedom of preexistând the right and the right rule implies some restriction of freedom. "Men are born free and equal in rights."

[36] The fundamental freedoms are recognized and guaranteed: individual freedom, freedom of conscience, freedom of expression, freedom of Assembly, freedom of movement and that the fundamental rights: the right to life, the right to defence, the right to life or private family, the right to information, the right to education and others. We believe that the difference between law and liberty is useful in theory, in practice and in legal jurisprudence, with special effects: a) is a difference between the terms: "the right to work is guaranteed" and "freedom of work is guaranteed; in the first case, the State is obliged to provide jobs, while in the second case; b) right to information covered by article 31 of the Constitution of the Romanian and the obligation to assume the information, while the freedom to receive information, not without a provision of the Act, the obligation to inform the freedom to receive information; c) freedom of opinion, freedom of belief, freedom of conscience cannot be limited by any law, as opposed to rights that may also in certain circumstances be limited by law.

[37] In article 2 of the Declaration of the rights of man and of the citizen provides: "Everyone is entitled to all the rights and freedoms of all set forth in this Declaration, without distinction of race, colour, sex, language, religion, political opinion, or other opinion, national or social origin, wealth, birth or any other situation resulting therefrom."
Unfortunately some journalists consider themselves opinion makers in violation of art. 29 of the Constitution which guarantees freedom of opinion as well. 21 of its resolution 1003 (1993) of the Parliamentary Assembly with respect to journalistic ethics, which States: "21. Therefore, journalism should not distort the information true, unbiased, honest opinions, not to exploit them for their own ends, in an attempt to create or shape public opinion, because its legitimacy is based on the respect of the fundamental right of citizens to information, as part of the respect for democratic values. For this purpose, the legitimacy of the investigative ziaristicii depends on the truth and accuracy of the information and opinions expressed and is incompatible with the Journalism organized campaigns based on predetermined positions and interests."
Criminal repression in the context of the economic crisis and the maximization of crime at European and global level (May 9-13, 2013, Bucharest, Romania)
Current international criminal justice – legal exigency or political challenge?

Gentimir A.M.

Al. I. Cuza University of Iasi, Faculty of Law (ROMANIA) agentimir@yahoo.fr

Abstract

Current international financial and political situation causes instability all over the world no matter which type of dispute is happening, international armed conflict or non-international armed conflict or domestic political troubles. International criminal justice functions in complementary rapport with national criminal justice and would represents an optimal alternative, despite the advantages of the others mechanisms of justice. Its structure is strengthen continuously taking into account the development of both normative side composed by general principal of criminal law, human rights and humanitarian law and procedural or judicial side. Nowadays, unfortunately, it is acknowledged the frequent political involvement within international criminal justice system which affects its legitimacy and independence, transforming it in a selective justice.

Keywords: criminal justice, political involvement, international crimes, human rights, armed conflicts.

Introduction

The latest developments in law, morality and criminal justice are influenced by the crisis which happens nowadays to the all levels of international society: ideology, spirituality, policy, economy, finance. A profound analysis of this phenomenon shows that, in fact, we witness a crisis of authority which has as result a geopolitical and economical mutation.

The assurance of going in the right direction and the right to the truth of international community imply the settlement of strong guaranties by international bodies. If international obligations are broken during this process, it has to be offered alternatives of accountability [1]. Two soft solutions can be preferred for light international wrong acts: the confession of the truth in front of whole international community or the redress of the illegal situation. The third solution is justice, indifferently if it functioning at international level or at national level. To this point it has to be underlined the interdependence between national justice and international justice, knowing the mutually influenced consequences which exist for the collapse of one of them. More than this, the inefficiency of justice is increasing the number of alternative mechanisms as “gacaca court” in Rwanda [2] or negotiations in Uganda or Truth Commission in El Salvador or South Africa [1].

Legal Implications of International Criminal Justice

International criminal justice has emphasized its originality according to its interdependent stages. As it is naturally, the first stage implicated the establishment of international criminal justice structure. Being applied to complex cases, its domain reunites necessarily principles belonging to the international law and criminal law. A simple presentation of theoretical concepts doesn’t reach the goal of effectiveness if are not settled the rules of procedure. For this reason, judicial rules are important as much as the normative ones: good legal concepts have no results if in practice are applied according to an improper system; as well, a suitable procedure can become useless with notions completely different in ideology.

1.1 Normative Implications

The domain of international criminal justice is a sui generis [1] one. As normally, it contains, first of all, the basic rules of criminal law. Secondly, it has to take into account the international trends for establishing strong connections between its ratione materiae – international crimes, such as genocide, crimes against humanity, war crimes, crimes of aggression, ratione personae, ratione loci and current development of areas of international law and its branches, such as international human rights law, humanitarian law.
1.1.1 International Criminal Law Principles

Taking over the common national rules of criminal law, international criminal law has its own specific features [3]. Two concepts seem to have an important relevance in current political context: sovereignty and criminal responsibility.

The concept of State sovereignty in terms of international criminal law includes that international crimes committed within the territory of a state have to be prosecuted and punished by that state, not another member of international community. A possible de iure or de facto immunity stipulated by national legislation has as result no impunity for the direct or indirect offenders [4].

The concept of criminal responsibility in international criminal law presents original features, being analysed in closed relation with the active subjects of the field. The common national rule of criminal law regarding the individual criminal responsibility is adopted with its particularities: specific grounds for excluding criminal responsibility. In time, despite all the doctrinaire disputes, it has been found to be necessary the introduction of new categories of active subjects of international criminal law. First category is composed by non-State actors, such as paramilitary groups, armed civilian bands in former Yugoslavia and Rwanda. Another category is formed by head of states and others persons with immunity, which have a substantive or temporal immunity depending on international crimes committed and national judicial organs; it is not the case before international judicial mechanisms have established a new trend: to offer to the notions consecrated initially to the common national rule of criminal law has as result no impunity for the direct or indirect offenders [4].

The main aim of human rights being the effective protection of human rights, the international and regional judicial mechanisms have established a new trend: to offer to the notions consecrated initially to the national level in human rights field a broader interpretation [7]. Connecting this principle with a deeper sense of social justice and the indignation against structural violence in historical situation such as colonial or neo-colonial domination it is noticed an improvement of analysis of international crimes content [6]; for example, certain acts included in war crime or crimes against humanity which were considered in the past as “inhuman and degrading treatment” are classified now as torture.( ECHR, Selmoni v. France, Application number 00025803/94, Date of Judgment: July 28, 1999)

Another important achievement in human rights field with big impact on international criminal law is the emphasis of fundamental rights of groups correlated with the principles of dignity of human beings and of discrimination, regardless considerations of nationality, ethnicity, religion or race. No matter what economic situations or other national factors exist to the national level, the states have positive obligations to do anything to avoid grave, repeated and large-scale violations of the rights, otherwise the international community is justified to intervene by peaceful means[6], such as international criminal justice.

1.1.2 Human Rights Principles

Taking into account that states invented and established human rights firstly to the national level, then, after the Second World War, it is underlined the inherent character of human rights. But the question which can be asked is whether human rights represent a legal or a political exigency? The states agreed to create legally binding instruments which cover the whole range of human rights [6], both at the universal and regional level, where there is more cultural, ideological and political homogeneity.

It is well known that the role of international acknowledge of human rights themselves and their implications in all the areas has shifted the world community from bilateral legal interests to a core of fundamental values based on satisfaction of public interests and collective needs[6].

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1.1.3 Humanitarian Law Regulations

Since the Geneva Conventions were adopted in 1949, it is signalised the progressive convergence [8] between humanitarian international law and human rights principles, having in common the protection of human dignity, life, health, property and judicial guarantees during specific types of conflicts whereon regulate: international armed conflicts or non-international armed conflict.

These provisions clarified the rules of the warfare, updating the legal settings to the field reality, clarifications which become in time very useful for international criminal justice. The main dichotomy existing in humanitarian law between combatants and civilians, completing combatants category with partisans, guerrillas, mercenaries or mentioning the “flawed” category of “unlawful combatants”, specific prohibitions on weapons chemical and bacteriological, nuclear and so on), emergence of principles of distinction and proportionality as methods of combat[6] have been essential for establishment of criminal charges.
In addition, in case of serious violations of human rights and humanitarian law, it is allowed the prosecution both at the national level – universality principle – and at international law. Others fundamental dichotomies specific for humanitarian law between inter-State disputes and internal clashes, between armed forces of government and insurgents contributes essentially for setting the competent court. For example, national legislation applies to the rebels in case of detention and lex specialis – humanitarian law – is applicable for use of force [8].

As conclusion of the normative analysis, it has to be mentioned that international human rights law, humanitarian law and international criminal law prove their complementarities and mutual influence in the content of an essential international regulation: International Criminal Court Statute (International Criminal Court Statute or Rome Statute was adopted at a diplomatic conference on 17 July 1998 at Rome and entered into force on 1 July 2002).

1.2 Judicial Implications

International criminal justice has its own procedural rules. Some of them are taken over from national criminal procedure regulations; others are created especially for its efficient functioning, according to its international character.

International criminal justice being a method of accountability [1], it would be interesting to present some the procedural particularities of alternative mechanisms.

1.2.1 Controversial principles of International Criminal Justice

The most controversial principles are the principle of universal jurisdiction and the principle of complementarity.

Taking into account nationalisation of international criminal justice through the introduction of international crimes in domestic criminal law, it is necessary to be reopened the discussion concerning universal jurisdiction. Nevertheless, the international criminal law doctrine and case law has not established yet rules accepted by all the states. The current proposals concern (Resolution of the XVIIIth International Congress of International Association of Penal Law, Istanbul (Turkey, September 2009)) the necessity of its recognition by all states for the fundamental interests of international community as a whole. Ratione materiae of universal jurisdiction should be the crimes committed abroad, which concern international community as a whole and are not covered by any other jurisdictional principle. As well, others aspects of universal jurisdiction are stipulated with more or less general acceptance: trial in absentia to be forbidden, only investigation being possible to be done in absentia; regulation of conflicts of jurisdiction is creating more confusion than resolving the problem because it is too general, being mentioned that this should be the attribution of international community. Maybe this provision has the role to emphasis the future strengthen status of International Criminal Court. In addition, the exercise and the limitations of universal jurisdiction should respect fundamental human rights and international law. Not less important is the requirement of international cooperation in criminal matters.

The principle of complementarity is the central feature of International Criminal Court Statute [9]. It seeks to accommodate the concerns of states about their sovereignty and to redress the obstacles that have prevented effective national repression of ICC crimes in the past. It is underlined the duty of every state to exercise its criminal jurisdiction willing and being able to punish effectively the perpetrators. Only in case of unwillingness to take measure at national level or to enhance international cooperation or in case of inability due to immunities stipulated in national legislation, international court makes investigations, prosecutes, trials and pronounce sentences.

1.2.2 Procedural Particularities

Between international criminal justice rules and the ones belonging to the alternative mechanism there are qualitative and quantitative differences which underline the superiority of the international judicial criminal regulation. Even alternative mechanisms have speeder trials or procedure and assure popular participation and are based on forensic and contextual truth, fundamental procedural guarantees, such as proposal of defence witnesses and presumption of innocence are completely ignored [2].

In addition, it could be mentioned that, despite a good procedural regulation, practice proves that international criminal justice have big difficulties for investigations and prosecutions. Obstacles, such as language of parties and witnesses, disclosure or exclusion of evidences, delays during the procedure are influencing the rhythm and effectiveness of trials.

Political Implications

Since the first discussions on international criminal justice [11] have taken place, the political involvement in justice process have been invoked by the contestants. Anywise, Military Tribunals of Nuremberg and Tokyo did justice ever were established for political reasons.
1.3 **International Implications**

The current international justice system is composed by United Nations tribunals, hybrid tribunals and International Criminal Court.

Regarding first type of tribunals mentioned – International Tribunal for former –Yugoslavia, International Tribunal for Rwanda, Special Court for Sierra Leone, Special Tribunal for Lebanon – the simple clarification of the aim of the international organisations which organised them, simplifies the discussion: political aim. The question is if this kind of aim could be reached by judicial participation? The answer can be obtained easily analysing the jurisdiction *ratione personae* of each ad-hoc tribunal. There is no prosecution of perpetrators belonging to North Atlantic Treaty Organisation in front ICTY, to Tutsis in front of ICTR, Israel in front of Tribunal for Lebanon. Consequently, the suspicion of politicization of international criminal justice appears to be well founded.

If these examples can be qualified as factual speculations, certain provisions of Rome Statute have been criticised since its adoption in 1998 for the same suspicion. Even if ICC is an independent organisation, article 2 of Rome Statute stipulates the relations of ICC with UN which depend on the ICC. If this provision is rather ambiguous, other provisions are more explicit. Article 15 bis, referring to exercise of jurisdiction over the crime of aggression, statues that ICC Prosecutor may proceed to the investigation of crime of aggression only in cases where Security Council is made such a determination or hasn’t decided otherwise accordingly with article 16, which provides the deferral of investigations or prosecutions: Security Council may request to ICC to not start nor continue the proceedings for twelve months; more than this, the request can be renewed. The article 15 ter, stipulating the Security Council referral, begins the vicious circle of political involvement in ICC procedure.

If are analysed the situations investigated by Prosecutor of ICC and the cases judged by Chambers of ICC, easily can be noticed that only African states are highlighted in front of international community. The current political situations in Latin America or Middle East could be more suitable to be in attention of ICC, taking into account their fundamental consequences on stability of international community.

1.4 **National Implications**

The politicization of the single permanent international tribunal would determinate the strengthening of domestic criminal system, especially after the general introduction of international crimes in domestic criminal law. Reforms of procedural criminal regulations and judicial system in accordance with political willingness to assume completely the principles of sovereignty and universal jurisdiction are the main guarantees of a fair prosecution of international crimes to national level. Successful cases are the tribunals from Canada and Belgium, where political suspicions didn’t appear [1].

**Conclusions**

The gaps of international criminal normative framework create the main arguments for qualifying the international criminal justice as a selective justice, a justice done by Security Council, the main political organ of international community. A possible direct consequence is that, sooner or later, the legitimacy of international criminal justice will be completely denied in the eyes of international community and it will not be any longer considered a viable modality of redressing the breaches of international obligations of state or international, regional organizations. Thus, the discrediting of international criminal justice will prevail to the good faith of its founders.

**References**


Critiques and proposals related the place and role of the prosecutor in the criminal trial according to the new criminal procedure code

Griga I.

Ecological University Bucharest (ROMANIA) ctinduvac@yahoo.com

Abstract

This paper presents a brief analysis as well as the critiques for the text of art. 480 paragraph 3 of the NCPP, with respect to the conditions for concluding the agreement, which provides that the benefits of the defendant in case of guilty plea and bargain, consists in reducing by one third the limits of punishment provided by law for imprisonment and by a quarter for penalty of fine,. The authors also offer some proposals regarding the analysed text.

Key words: courts solutions, agreement, New Criminal Procedure Code

The critical point of view are:

- place of this text is wrongly situated in art. 480 paragraph 3 of the NCPP related to conditions for concluding the agreement, its place being with the provisions related to courts solutions.

- Through the manner of formulating the benefits it provides for the defendant, it may lead to other solutions than those agreed and waiver solutions for punishment or delay of punishment provided by art. 396 paragraph 3 – 4 are being skipped. This explains that, through art. 123 of the draft law to implement NCPP, the repeal of art. 480 paragraph 3 was proposed.

- On the content of the guilt plea and bargain, the current text of art. 482 is incomplete, because it omits: type and amount, as well as the execution of punishment or punishment waiver solution or deferral of punishment with regards to which an agreement has been concluded between the prosecutor and the defendant. This explains that through art. 124 of the draft law to implement NCPP the modification of letter h) is proposed, in the way of introducing the above mentioned text.

- In our opinion, text of art. 480 paragraph 1 of the NCPP, which limits the possibility to conclude the agreement only concerning the criminal offences for which law provides the penalty of fine or imprisonment of maximum 7 years, should be modified in the sense to extend the possibility to conclude the agreement also with respect to criminal offences for which law provides imprisonment of maximum 10 years. With this extending the purpose of these procedure might be better achieved, that of reducing the trial duration, the burden of courts and thus, to reduce costs for the state, society and parties.

Procedure before court:

- If the court finds missing mandatory particulars or that the conditions on the content of the agreement or those of the court referral have not been respected, a coverage of these omissions is ordered within 5 days, referred urgently to the head prosecutor who ordered the agreement;

- The court shall give its decision following a non-contradictory procedure, in open court, after hearing the prosecutor, the defendant and its lawyer, as well as the civil party if present

- Courts decisions : according to art. 485 paragraph 1 of the NCPP in the current wording, the court, analyzing the agreement, pronounces one of the following solutions:

  - Allows the agreement and disposes conviction for the defendant to a punishment whose limits have been reduced by one third in case of imprisonment and one quarter in case of fine (if all conditions provided by art. 480 - 482 with respect to all deeds adduced against the defendant are fulfilled)

  - Denies the agreement and submits the case file to the prosecutor for continuing the criminal prosecution, if the fund conditions provided by art. 480 – 482 are not fulfilled (with respect to the deed existence and guilt).

Appeal: the decision may be appealed within 10 days of notification.
Critiques:

The solution provided by art. 485 paragraph 1 let. a) of the NCPP is wrong because, through the wording, it may lead to other solutions, different of those established in the agreement (more severe than those agreed). The wording omits the waiver solutions for punishment or delay of punishment, provided by art. 396 paragraph 2 – 4 of the NCPP.

Practically, text of art. 485 paragraph 1 let. a) of the NCPP is in obvious contradiction with the text of art. 396 of the NCPP concerning courts solutions in solving criminal action.

This explains that, through art. 125 of the draft law for implementing NCPP, it was proposed the amendment of paragraph 1 art. 485 of the NCPP concerning courts solutions regarding guilty pleas and bargains, as follows:

- Allows the guilty plea and bargain and orders one of the solutions provided in art. 396 paragraph 2 – 4, which cannot create for the defendant a situation worse than that agreed on, if the conditions provided by art. 480 – 482 are fulfilled, with respect to all deeds adduced against the defendant, which made subject of the agreement;
- Denies the guilty plea and bargain and submits the case file to the prosecutor for continuing the criminal prosecution, if the fund conditions provided by art. 480 – 482 are not, or if it appreciates that the solution with respect to which an agreement was reached between the prosecutor and defendant is unjustifiably mild in relation with the gravity of the criminal offence or dangerousness of the offender.

Other new competences of the prosecutor in ordering and authorizing special surveillance or investigation techniques.

The New Criminal Procedure Code introduced in the field of evidence procedures, special surveillance or investigation techniques (a number of 11 special surveillance or criminal investigation techniques listed in art. 138 of the NCPP).

Although, according to art. 139 and 140 of the NCPP these special surveillance or investigation techniques are ordered by the rights and freedoms judge in accordance with art. 3 let. b of NCPP, because they invoice restrictions of constitutional rights and freedoms or serious interferences with these rights, NCPP provides, at art. 141, that, **by exception, the prosecutor may authorize for maximum 48 hours, technical surveillance measures, when:**

- **emergency exists** and obtaining the surveillance mandate from the rights and freedoms judge would lead to a substantial delay of the investigations, a loss, alteration or destruction of evidence, or would jeopardize the safety of the injured party, witness or his family members;
- **Conditions provided at art. 139 paragraph 1 and 2 of the NCPP are fulfilled**, namely:
  A **reasonable suspicion** with respect to the preparation of committing one of the criminal offences provided in art. 2 of the NCPP (namely: against national security; drug trafficking, arms trafficking, human trafficking, terrorism, money laundering, counterfeiting or other assets, falsification of electronic payment instruments, extortion, rape, deprivation of liberty, tax evasion, for corruption offences and criminal offences against the financial interests of the EU and the criminal offences committed by informatics system or other criminal offences for which the law prescribes imprisonment of seven years or more)

Critiques:

- Claiming the existence of an emergency and the fact that obtaining the surveillance mandate from the rights and freedoms judge would lead to a substantial delay of the investigations, a loss, alteration or destruction of evidence, or would jeopardize the safety of the injured party, witness or his family members cannot justify a breach of the separation principle of judicial functions, which without respecting a fair trial cannot be ensured. The argument that the rights and freedoms judge cannot urgently authorize these special surveillance and investigation techniques does not withstand, because when regulating the rights and freedoms judge competences, was considered primarily and specifically that he will have to cope with emergency situations. In this respect, it is noteworthy that all the competences of the rights and freedoms judge to authorize and order restriction of fundamental human rights and freedoms during the criminal prosecution, involve emergency interventions of this new judicial body.
- The condition provided in the first sentence of the text of art. 139 paragraph. 1 lit. a of the NCPP, regarding the existence of a reasonable suspicion with respect to the preparation of a criminal offence, it is contrary to the constitutional principle of the criminalization legality, since criminal law enshrines the principle which does not criminalize preparatory acts, only by exception, in case of a
small number of crimes, in which the preparatory acts are expressly criminalized. As a consequence, without being criminalized in the preparatory acts, these criminal offences cannot justify ordering a surveillance evidence procedure unless there is a **reasonable suspicion with respect to executing the decision to commit any of the respective criminal offences.**

**Place and role of the judge in the court stage.**

According to the new code, as a holder of the criminal action, the prosecutor must prove the accusation by administrating evidence.

Since the beginning of the judicial inquiry, the president orders the prosecutor to read or make a short presentation of the document instituting. (art. 377 paragraph 1 NCPP).

In hearing the defendant, the prosecutor can ask questions directly. (art. 378 of the NCPP).

The new regulation also provides a limitation of the principle of hierarchical subordination of the prosecutor participating in the hearings, consecrating his independence in the meaning of drawing conclusions fairly according to his intimate belief, based on the evidence administrated.

**Place and role of the prosecutor in the extraordinary appeal.**

In accordance with art. 436 paragraph 1 lit. a of the NCPP, the prosecutor may submit application for appeal in cassation, regarding both the criminal and civil side, but only in favour of the defendant. In this respect, art. 434 paragraph final of the NCPP, provides that the appeal in cassation exercised by the prosecutor against the decisions of acquittal cannot have as purpose the conviction of the defendant by the court of appeal in cassation.

In the event that the appeal in cassation reviewed in the Council Chamber of the SCJ is admitted in principle and the case is sent for the judgement of the appeal in cassation, the participation of the prosecutor at the trial is mandatory.

As for the review, the prosecutor may formulate this extraordinary appeal only for the criminal side of the final decision.

NCPP removes the obligation for the prosecutor to perform investigation acts, stating that the request for review, formulated in written, must be motivated by showing the review case on which it is based and the means of evidence to prove this and that it is addressed to the court that tried the case in first instance.

In examining the admissibility in principle, as well as the re-judgement of the request for review, participation of the prosecutor is mandatory.

The element of novelty consists in, that if when re-judgement of the cause after admitting in principle, the court finds that the facts cannot be directly determined or it may be determined at the court but with a very big delay, it orders that the necessary investigation shall be made by the prosecutor from the Prosecutor by this court, writing 3 months.

The prosecutor is obliged to perform investigations and to submit the entire material to the competent court. (art. 461 paragraph 3 and 4 of the NCPP).

**Role of the prosecutor in the uniformity of judicial practice.**

The prosecutor exercises an important role in uniformizing the judicial practice.

Specifically, this role is performed by the following methods:
- by exercising the appeal in cassation request (art. 436 paragraph 1 lit. a of the NCPP).
- by the appeal in interest of law request (art. 471 paragraph 1 of the NCPP).
- with referral to the HCJ for a ruling prior to dispensation of law issues (art. 475 and following of the NCPP).
Abstract

One of the major novelties of the future NCPC refers to the place and role of the prosecutor in the new model of criminal trial.

Novelties on the place and role of the prosecutor arise from the settlement on pillars of new principles, which, along with the classic principles, have been conceived to provide in Romania a new model of criminal trial in accordance with the Constitution, the constituent treaties of the EU, the European Convention on Human Rights and Fundamental Freedoms, other EU regulations, as well as pacts and treaties on fundamental human rights to which Romania is party.

We refer to the principle of separation of judicial functions in the criminal trial (art. 3 of the NCPP); principle of opportunity in the exercise of criminal action (art. 7 of the NCPP); the right to a fair trial within a reasonable time (art. 8 of the NCPP); the right to freedom and security (art. 9 of the NCPP); and the principle of loyalty in obtaining evidence (art. 101 of the NCPP).

Key words: criminal prosecution, criminal investigations, offences, New Criminal Procedure Code

Elements of novelty arising from the principle of separation of judicial functions in the criminal trial.

The legal provision consists is art. 3 of the NCPP, text consisting of two parts:

The first part which expressly lists and defines the four judicial functions that are exercised in criminal trial, namely:

- criminal prosecution function performed by the prosecutor and the criminal investigation bodies (existing in the current code but unnamed and undefined expressly) in the exercise of which the prosecutor and the criminal investigation bodies COLLECT EVIDENCE NECESSARY TO ASCERTAIN WHETHER OR NOT THE GROUNDS FOR INDICTMENT EXIST.

- disposal function on human rights and fundamental freedoms of the person in the criminal prosecution. This new feature will be exercised by a new judicial body, the rights and freedoms judge, which will be empowered to resolve in the course of criminal prosecution, requests, proposals, complaints, appeals, or any other referrals ordering measures which restrict rights and fundamental freedoms, constitutional, of the person in the criminal prosecution stage (preventive measures, precautionary measures, temporary safety measures, the prosecutor acts in cases expressly provided by law, approvals for search, use of special surveillance techniques or research, or other evidentiary procedures provided by law, anticipated administration of evidence).

- lawfulness verification function on the indictment or dismissal which will be exercised by a new judicial body, the pre-trial chamber judge, competent to verify the lawfulness of the indictment ordered by the prosecutor, the lawfulness of the evidence administrated and of procedural acts performed by the criminal investigation bodies and to solve complaints against the prosecutor resolutions of dismissal of cases.

- trial function which shall be exercised by the courts

The second part of art. 3 of the NCPP introduce the principle governing the exercise of the four functions that must ensure impartiality and objectivity necessary for a fair trial: separate exercise of each function. In this sense, text of art. 3 paragraph 3 of the NCPP provides that „in the conduct of the same criminal trial, exercising a judicial function is INCOMPATIBLE WITH EXERCISING ANOTHER JUDICIAL FUNCTION.”

Returning to the criminal prosecution function which is exercised by the prosecutor, we must stress the importance and significance of the statement from art. 4 paragraph 4, that provides: „in exercising the criminal prosecution function, the prosecutor and the criminal investigation bodies collect evidence necessary to ascertain whether or not grounds for indictment exists”.

This statement is of particular relevance because it:
Determines and sets the main attributions of the prosecutor (criminal prosecution and surveillance of criminal investigations performed by the criminal investigation bodies).

Establishes that this attribution of prosecutor consists in collecting evidence necessary to ascertain if the grounds for indictment exists or not.

Establishes that the role and purpose of the evidence collected during the criminal prosecution is to serve as grounds for indictment (or dismissal).

The statement from art. 3 paragraph 4 of the NCPP, first has a theoretical scientific importance because it separates and distinguishes the role, function and purpose of the evidence collected during criminal prosecution (to serve as grounds for indictment or dismissal), from the role, function and purpose of evidence administrated in the criminal prosecution stage (to constitute basis for court decision).

The statement from art. 3 paragraph 4 of the NCPP also has a practical importance to stop the ease with which this difference of role, function and purpose of the evidence collected during criminal prosecution and of those administrated in the court, is ignored by pronouncing conviction solutions based only on evidence from criminal prosecution, unverified by judicial investigation. We make these remarks, recalling of course, that a court decision (of conviction, acquittal or termination of criminal trial) can be based on evidence collected during criminal prosecution, whenever, after verification, in public court, directly and contradictory, the court shall retain motivated, that those expressing the truth are the evidence collected in criminal investigation.

Following the introduction of this new principle of separation of judicial functions in criminal trial, the criminal prosecution function exercised by the prosecutor has been redesigned and simplified, in accordance with EU regulations, to better meet the requirement to conduct with celerity and more efficiency the criminal trial.

Concretely, the main elements of novelty in exercising the criminal prosecution function by the prosecutor, introduced by the new code provisions, are the following:

- **Elimination of preceding acts** and completion of all activities within the criminal prosecution;
- **Structuring the criminal prosecution** in two distinct stages: investigation of the deed stage and investigation of the person;
- **Investigation of the deed begins by notifying the competent judicial bodies**;
- **Investigation of the person begins by the act of criminal prosecution initiation against the suspect**;
- **The notion of accused has been replaced by the notion of suspect** defined as the person on which, from the existent data and evidence in a case, it results a reasonable suspicion of having committed an offence under the criminal law;
- In the first stage of the deed investigation a rapid procedure has been regulated for the referral verification which states that when the instituting document fulfils the requirements provided by law and that none of the cases that prevent the exercise of criminal action provided by art. 16 paragraph (1) exist, the criminal investigation bodies order the initiation of criminal prosecution with regards to the deed. (art. 305 CPP);
- The formal act of commencing the criminal prosecution has been provided from the outset, from receipt of the referral, in order for all activities performed by the judicial police bodies, by the special investigation bodies or by the prosecutor to be performed within the criminal prosecution, a solution designed to ensure the rights and guarantees of the person investigated are respected throughout the entire trial and to eliminate abusive practices that were found by unjustified extension of the preceding acts;
- To ensure immediate exercise, after the prosecutor’s control over the referral of the criminal prosecution activity, it has been expressly provided that the initiation of criminal prosecution ordered by the criminal investigation bodies is subject to confirmation by the prosecutor who supervises the investigation activity by making a reference on the same ordinance by which the criminal prosecution started, in a period of 5 days, with an obligation to present in the same time, the case file to the same prosecutor;
- Upon procedural acts or measures, the prosecutor and criminal investigation bodies order only by ordinance, renouncing at resolution. By exception to this ordinance rule, for reasons of celerity and formalism removal, it has been provided that the prosecutor confirms procedural acts or measures by making a reference „confirmed” and by writing the legal grounds on the same document;
- **Criminal action shall be initiated by the prosecutor** as soon as it is found that evidence of reasonable grounds to believe that the suspect committed the crime and that none of the cases of impediment provided by art. 16 paragraph (1) exist;
Cases which prevent the initiation and exercise of criminal action have been redesigned by introducing new cases or amending and supplementing the existing ones, as follows:

- The deed was not committed with the guilt required by law. (art. 16 let.b NCPP);
- There is no evidence that a person committed the criminal offence. (art. 16 let.c NCPP);
- There is a justifying cause or it cannot be imputed (art. 16 lit.d NCPP);
- A transfer of proceedings with another state, in accordance with the law occurred (art. 16 lit.j NCPP). These cases were introduced as a response to issues rose in doctrine and jurisprudence, throughout the period, that showed deficiencies of the current regulation and the necessity to complete the regulation to cover these situations.

The possibility that the criminal action can be initiated through indictment has been removed, justifying that this way, full exercise of defence right is ensured.

The prosecutor position between the criminal investigation bodies and its competences have been redesigned by expressly providing that the main role of the prosecutor is to conduct and supervise the criminal investigation activity of judicial police bodies and other special criminal investigation bodies and not to mandatory perform the criminal prosecution.

The cases in which criminal prosecution is mandatory performed by the prosecutor have been reduced (only for criminal offences that are judged in first instance by the Court of Appeal or the SCJ, criminal offences committed by military and in cases provided by special laws).

It was introduced the anticipated evidence administration procedure, for the risk when evidence can no longer be administrated in court, case in which the prosecutor may refer to the rights and freedoms judge for anticipated evidence administration.

Express provision that the procedure during criminal prosecution is not public was introduced, to remove practices, more frequent during criminal prosecution that were contrary to these principle.

New solutions for criminal non-prosecution have been provided:

- Waiving criminal prosecution (art. 318 NCCP);
- Dismissal as a unique solution ordered by the prosecutor, instead of all the current solution for when it is decided not to start the criminal prosecution; removal from under or termination of criminal prosecution.

The procedure of presenting the criminal prosecution material has been eliminated, motivating that by regulating the right of the lawyer to assist the defendant during the criminal prosecution and by the express provision of the right for the same lawyer to consult the case file during the entire criminal trial, it has been ensured for the defendant the knowledge of the criminal prosecution material, and is no longer necessary presenting it.

Elements of novelty arising from the principle of opportunity in the exercise of criminal action.

In accordance with the recommendation of the Council of Europe Committee of Ministers dated 17.09.1987, on the simplification of criminal justice, the obligation to exercise criminal action has been attenuated (in accordance with the principle of legality and officially), by introducing a new principle, that of opportunity in the exercise of criminal action.

The legal provision consists in art. 7 paragraph. 2 of the NCPP, according to which, in cases and conditions expressly provided by law, the prosecutor can waive the exercise of criminal action, if, in relation with case elements, there is no public interest in achieving the object of criminal action.

As a direct application of this principle, text of art. 318 of the NCPP provides a new solution for the prosecutor: WAIVER OF CRIMINAL PROSECUTION. In accordance with the above mentioned text, in case of criminal offences for which law provides penalty of fine or imprisonment of maximum 5 years, the prosecutor can waive the criminal prosecution, when in relation to the content of the deed, the manner and means of committing, the purpose and the specific circumstances of committing, the consequences occurred or that could have occurred by committing the criminal offence, the defendant, his conduct before committing the criminal offence and the efforts made by the defendant to remove or mitigate thru consequences of the criminal offence, no public interest in prosecuting exists.

We mention that with the draft law implementing the NCPP, is proposed to extend the possibility to waive the criminal prosecution in case of criminal offences for which law provides imprisonment of maximum 7 years, which represents a welcomed and justified extension.
As far as we are concerned, we consider that the solution to waive prosecution should be extended to a greater extent, without being limited to the amount of imprisonment. In our opinion, we believe to be reasonable to provide a listing of criminal offences with a high social risk that should be excluded from the possibility of such a solution. In this way, a greater competence can be given to the prosecutor for the evaluation and selection between cases that are mandatory to be indicted and cases in which the criminal trial can be reduced to the criminal prosecution stage. Such a regulation would be likely to reduce the criminal trial duration, the load of cases pending before courts, as well as the costs for the state, society and parties.

This new competence for the prosecutor introduced on grounds of the principle of opportunity in the exercise of criminal action, is taken from the North-American legal system and tested with good results in the practice of many states with continental legal system (France, Germany, Italy, Spain, Netherlands, Portugal, etc.).

Agreement admission of guilt – a new competence for the prosecutor

Legal basis consists in Title IV, chapter I, art. 478 – 488 of the NCPP. NCPP introduces this new institution as first special procedure that may be used during criminal trial which is another new competence, attributed for the first time to the prosecutor.

The procedure guilty pleas and bargaining is inspired from USA legislation, where it is known as „guilty pleas and bargaining”. It was taken, adapted and successfully applied in the legislation of many continental countries, such as Germany, France and Greece. In Romania, the legislator has inspired from the German and French legislation, with specific adaptations required by the Romanian judicial system.

The basic reason of this simplified procedure is that of economic and moral benefits, consisting in lower costs for the state, society and parties, in the course of criminal justice, as well as other benefits, such as stimulating the identification of new solutions, in extinguishing criminal law conflicts through such means and forms of justice. However, through it, it is aimed to decrease the burden of the courts and to reduce the duration of the criminal trial.

Analyzing the new provision, it results that the defendant has, within this procedure, the opportunity to negotiate with the prosecutor and to participate, thus, when taking the decision over the sanction

Conditions, content and conclusion procedure between the prosecutor and the defendant and the validation of the agreement are provided by art. 479-484 on the NCPP, which, in essence, are the following:

- the agreement can be concluded during the criminal prosecution, after the initiation of criminal action
- the agreement can be initiated both by the prosecutor and the defendant
- limits of the agreement are set by prior written approval of the hierarchically superior prosecutor
- the agreement involves admitting the guilt by the defendant and accepting the legal classification
- effects of the guilty plea and bargain are subject to approval by the hierarchically superior prosecutor
- if the criminal action has been initiated for more than one defendant, a different guilty plea can be concluded for each of them, without prejudice to the presumption of innocence of the person who did not conclude such an agreement
- minor defendants cannot conclude a guilty plea
- the guilty plea can be concluded only with respect to the criminal offences for which law provides penalty of fine or imprisonment of maximum 7 years
- the agreement is concluded when, from the evidence administrated, there exist sufficient data with respect to the deed and guilt of the defendant for which criminal prosecution was started
- when concluding the agreement, legal assistance is mandatory
- the agreement is concluded in writing, and when concluding the agreement, the prosecutor no longer drowns the indictment act for the defendants which concluded the agreement
- the guilty plea and bargain contains, besides personal data of the defendant, the quality of those between the agreement is concluded, legal classification of the deed, the penalty provided by law, evidence and means of evidence, the defendant’s express statement of recognition and acceptance of the legal classification, applications and signatures of the prosecutor, defendant and lawyer. (art. 482 din NCPP)
- after concluding the agreement, the prosecutor refers the court with the competence to judge the cause on the merits and submits to it the agreement along with the case file, for validation.
Some theoretical and practical aspects concerning the reception of forensic tactics rules in criminal trial

Grofu N.

Institute „Acad. Andrei Rădulescu” of the Romanian Academy nicugrofu@yahoo.com

Abstract

The article addresses the issue of forensic methods and techniques reception in criminal trial. In this context, are portrayed on topics within forensic tactics and regarding forms of interaction between proofs giving procedure with forensic tactics. The author expresses views on the limits of hearing the persons in criminal trial with reference to the statement analysis method and the use of the polygraph technique for detecting simulated behavior.

Keywords: criminal trial, forensics, tactical rules, persons hearing, statement analysis, polygraph

Preliminary Explanations

Forensic Science was formed and developed in the jurisprudence requirements in three areas corresponding to its structural parts: the use of technical means and methods of scientific investigation of crimes (forensic technique) tactics of carrying various criminal prosecution acts (forensic tactics); research methods of different categories of crimes (forensic methodology).

The three structural parts of criminalistics: forensic technics, tactics and methodology are not isolated or mechanically linked, but form a single science with unitary, homogeneous and complex characteristics. This conclusion is based on the essential, organic link that exists between the content of the groups of methods and technical-science means of criminalistics [1].

Forensic science should be considered, interpreted and applied in a holistic approach, its results are implemented consistently and at the same time, through practice, it is renewed as science [2].

By its methods and techniques, forensic science identifies crimes tracks and turns them into evidence. Scientific harnessing of traces, those materials, as well as conceptual ones [3] (revealed either by persons hearing and confrontation or profiler [4] methods or by examining simulated behavior with the polygraph) has become increasingly important and indispensable in solving criminal cases [5].

Criminalistics entrance on the criminal justice fight scene against crime is an objective necessity, because the means of the criminal and criminal procedure law are insufficient compared to the number of crimes committed, to offenders professionalization that prove increasingly skilled, better organized, resorting to improved methods and means of committing, trying to adapt themselves to the various achievements of science to the goals of the activity they perform.

Improving forensic methods and techniques used to achieve the goal and the basic rules of criminal trial is justified precisely because they are likely to achieve more effective for this purpose and create the necessary conditions to improve the law of criminal procedure.

Forensic Tactics Incidence

Criminal technical methods are developed for the fair organization of criminal investigating activity and to conduct other criminal acts: the organization and conduct of the prosecution planned actions, crime scene investigation, stating the technical and scientific expertise, hearing the defendant, the witnesses, victims, searches, seizure of objects and documents etc. They are based on the provisions of procedural law on means of evidence and the various actions of criminal proceedings, representing a generalization of the prosecution experience in conducting their research of criminal offences.

Truth as a fundamental principle of criminal trial, expresses the requirement for all judicial authorities to pursue in every criminal case, a full probative activity and of best quality, which requires not only knowledge of criminal procedural law, but also of criminalistics [6].

The evidence necessary to establish the truth in criminal proceedings are brought out through specific forensic means [7]. During criminal trial, evidence has a central place (However the entire development of criminal
law revolves around the changes that evidence system passed through the ages,), constituting the very foundation of criminal justice decisions. Evidences are intended to shed light on the real truth about a specific accusation, highlighting either the guilt or innocence of the suspect.

Finding out the truth does not mean having an accurate picture of the reality, but only the certainty of truth. Limitation of the probative activity only to elements likely to play direct and complete the reality, would mean implicitly waiving justice, simply because judicial bodies do not have the attributes of omniscience and omnipresence reserved by Divinity. Human criminal justice can not start from absolute criteria because all the material from which it is built, does not know the absolute. Even when the truth is objectively settled in the most faithful way, justice’s work remains relatively objective because behind objective reality lies the subjective reality, so hard to distinguish, of the intimate conviction of those who administer justice [8].

The probative activity can not be established on the basis of absolute conception, the evidence does not render the object and effect of reality, but determines the belief that reality must have been in some sense, and thus ensure that the truth could not be otherwise. The lack of certainty or full belief means that there is no evidence.

Making evidence involves both finding that is produced by evidentiary procedures and their management, which is carried out by means of evidence. In terms of consequences, evidences lead to an examination of how they were made and the elements drawn from them, as well as an assessment, determining the probative value of the result of the examination of evidence.

Criminal trial confronts the prosecution and defense, which both have the right (This should not by confused with burden of proof.) to evidences [8].

Criminal Procedure Code regulates the main methods of proof and evidence that the judiciary must use to find out the truth, to the gathering of evidence. Evidentiary procedures as how judicial bodies involved in performing them directly or by means of other people can be divided into two categories: direct observation procedures (The first category includes crime scene investigation, search, seizure of objects and documents, including correspondence, reconstruction.) and indirect information procedures (The second category contains evidentiary procedures by which evidences are obtained from the reports of other persons aware of the imputed deed or who was assigned to examine certain circumstances or elements of this deed, such as hearing of the defendant, hearing witnesses, hearing the injured party, confrontation, technical and scientific expertise, first investigations made by the judicial police.)

Unlike the means of evidence, evidentiary procedures are not only those that have a legal basis. Although in judicial practice, most often, the procedures set by law are sufficient, judiciary bodies can adapt any evidentiary procedure provided that this process may not be stopped by law and without prejudice to public order and morality. These processes are imperative for judicial bodies, however, since it recourse to any of these rules, must be observed that the law prescribes on that process, under penalty of nullity of results or to decrease the probative value of the acts performed [8].

Forensic doctrine [10], for each of the evidentiary procedures, considered forensic tactics activities, were developed general and special tactical rules by which these activities are prepared, are developed and implemented of the obtained results.

**Limits in Hearing People - Forms of Interaction between Evidentiary Procedures and Forensic Tactics**

An important aspect is the verification of the defendant’s statement. This can be done in the classical way by comparing their content with reliable data and evidence given above, but also by identifying operational indicators on the duplicity of people by means of psychoanalytic origins.

Psychoanalytic perspective on the defense mechanisms of ego shows that any impulse repressed in the unconscious does not remain passive, but is always looking to return to consciousness, seeking the most diverse ways, directly penetrating censorship or bypassing it by expressing disguised pulse. Although impulses are directly expressed by censor, they attempt, through sublimation, to return to consciousness, thereby realizing to diminish the psychological tension accumulated and thus easing it. Repressed criminal impulses seek and find their symptomatic expression, not once, in the content of speech, language and communication by specific relations during the hearing.

Philological analysis, semantics and content of the message provides a spoken and written psychoanalytic interpretation of exceptional importance.

In this approach, the investigators use a technique called statement analysis (Statement analysis follows two tactical phases: investigators determine what is typical in true statements, and then try to identify deviations from the usual norm. True statements differ from the one made by form and content.), to discern truth in statements. Investigators and forensic psychologists examine words, independent of the facts of the case to detect symptomatic behaviors of lies and guilt, being careful also to omit information and trying to answer the question why the suspect did so. Then investigators analyze the key proposed by the suspect intentionally and use them during the interview that arises from investigations. Technical analysis is the study of these elements of speech.
(pronouns, nouns and verbs), external information, lack of conviction and statement balance, as well as questionable parts of speech and many indications of lack of information.

It was pointed out that people of good faith declares using pronouns "I", and those who lie just let it be understood that it is talking about them or overplaying the first person plural "we", avoiding personal involvement. Pronoun "my" reveals the writer or speaker attachment to the person or object he speaks about. A suspect will change or will omit the pronoun does not want to show possession or admit association with a particular object or person (For example, in a murder by shooting, it is said "I cleaned the gun, I let her down, and the gun went off." This person, wanting to deny property on the weapon when it discharged, the meaning was false, "accidental", he did not use the pronoun "mine": it was not his gun, under possessive control, but it became only simply weapon.)

Verbs express an action, either currently or in the past or future. When considering the statement, investigators should be careful to the verb used. Typically, a truthful statement uses the past tense to the events already happened. Telling the lie now becomes significant as the events outlined in memory should be declared using the past tense [11].

In serious cases, do not rule out the possibility of using the polygraph technique (Polygraph technique is used by over 60 countries like USA, Japan, Israel, Serbia, and Romania for over 35 years.) for the detection of simulated behavior.

Although it is accepted that the technical means to detect blood tension have a scientific basis, the test result is not included nor accepted in Romania as evidence in criminal [12]. Using polygraph is cited as a valuable method of operative extrajudicial investigation, being permanently between appreciations and challenging, its winding way is strewn with both spectacular failures and remarkable successes; investigating simulated behaviors provide valuable clues about a crime [13].

In Germany, the use of the polygraph is prohibited, even when the defendant, having difficulties in evidence administration, asks himself for this method to show his innocence [10].

In Poland, the use of the polygraph technique is permitted, with the consent of the person examined to reduce the circle of suspects or to determine the probative value of the evidence already given (Art. 192a § 2 Polish Criminal Procedure Code (Kodeks postępowania karnego, ustawa z dnia 6 czerwca 1997 r.) text available at electronics http://www.legislationline.org/documents/section/criminal-codes/country/10 (accessed on January 23, 2013). In Polish literature [15], was shown that in case of a criminal investigation of murder, polygraph examination was the one who removed the unjust accusations imposed on the investigated initially and at the same time indicated the true perpetrator [16].

In Japan, the results of a polygraph examination are admissible as evidence, provided that the person sought consents to be examined and the examination to be carried out by a competent expert [17].

(Case number 2 Ds607/2002, District Public Prosecutor, Wielum, Poland. In a case regarding the disappearance of a little girl of eight years, presented in detail in the Polish national television broadcasts and in newspapers, the main suspect was her father, a professional long-distance truck driver. Criminal investigative bodies had alleged – due to a statement of a witness that in the disappearance day, was seen, in his personal car near the school where his daughter is teaching - that the father sexually abused her, then killed her, though there was no evidence to support this version. The father was accused of kidnapping the girl and arrested, at this contributing some contradictory statements of his wife with whom he was in conflict; after a few weeks, other additional evidence could no longer be managed so custody had been replaced by the obligation not to leave the country, without abandoning the indictment. In these circumstances, polygraph examination was used to examine the father and the witness, by measuring changes in heart rate, blood pressure, respiration and electrodermal response, using Relevant Questions Technique, Control Questions Technique and Peak of Tension Technique. The results indicated that the father did not present simulated behavior, unlike the witness, but they were not communicated to ensure secrecy of the investigation. Criminal investigation bodies introduced the witness in the circle of suspects without withdrawing charges on the father. Five months after the polygraph examination, during one of the interrogations, the true perpetrator (first witness) admitted that he committed the crime and that, ultimately, cremated the victim's body after he kept it in several places. In one of the places indicated was found a part of the victim's hair and through DNA examination was confirmed that it belonged to the eight years girl.)

In one case, where the examination results were used against the defendant to convict him for fraud in connection with illegal withdrawal of money from a post office, the defense argued that they are not accepted as scientific evidence and therefore any use of the polygraph during the criminal trial is inappropriate, even if the defendant has consented to be examined. Japan's Supreme Court held that the results of a polygraph examination are admissible when polygraph examination is administered in an appropriate manner, the measures being taken to ensure the accuracy of the equipment and a competent examiner (Supreme Court Judgment, February 8, 1968, 22 Keishu 55, 509 Hanrei Jiho 19.). The doctrine also noted that polygraph examination results are reliable enough to be used as evidence [18].
Conclusions

Hearings made by prosecution bodies, as the hearing in court, must take place according to methods that are not contrary to human dignity [10].

Criminalistics should act on the matter of means of proof so as to extend the scope by adding them to achieve more value from the positive experience of judicial bodies [19].

References

Some reflections on the contemporary criminal procedural systems

Grofu N.

Institute „Acad. Andrei Rădulescu” of the Romanian Academy, (ROMANIA) nicugrofu@yahoo.com

Abstract

The article addresses the issue of contemporary criminal procedure systems, highlighting the trend towards mixed criminal procedural systems, with the majority inquisitorial or adversarial elements in various stages of the criminal process, according to the requirements of each country’s legal system. In this context, are portrayed topics related to Romanian criminal procedural system and the significant role of the European Court of Human Rights’ jurisprudence in national procedural system configuration in order to protect human rights and fundamental freedoms. The author expresses views on the risk that the movement of the conflicting forces of contemporary criminal procedure system to cause earthquakes to crush the idea of criminal justice and democratic modern society, as a promoter of legal humanism, already proving its vulnerabilities against terrorism and organized crime.

Keywords: contemporary criminal procedural systems, Romanian criminal procedural system, human rights, fundamental freedoms, risk, criminal trial

Preliminary Explanations on Models of Criminal Procedure

In the history of criminal procedure exist three models of criminal procedure, which have worked sometimes exclusively, sometimes simultaneously in the same period of time: accusatorial, inquisitorial and mixed. The first two are typical and do not define themselves in opposition to each other [1], and the third is eclectic and tries to reconcile the other two.

Criminal procedure model reflects on the one hand, the type of relations between the state, judicial bodies and citizens, and on the other hand, political and social values and cultural needs of a determined community, in a certain historical period of its development. Criminal procedure expresses the balance between the requirements of crime repression and those of individuals' interests protection, which indicates the weight given to each of these three essential parts of the procedure: prosecution, defense and trial [2].

In the procedural regulations of various laws, these three models were represented only by their essential and constant characteristics, which varied in their content from one period to another and from one legislation to another [3]; in pure form, attributed theoretically, they did not exist almost nowhere in legislative regulations and practical realities [4].

Contemporary Criminal Procedural Systems

After analyzing the procedural laws on an international scale, in the specialised literature, the criminal procedure is characterized as a system, framing laws in an adversarial system, in the inquisitorial or mixed criminal procedure system, inquisitorial-adversarial [5].

The adversarial system, typical to the Anglo-Saxon countries, where every individual is fundamentally responsible for maintaining public order, provides an important role to the parties and sees the judge as an arbitrator in the dispute between the prosecution and the defense; the accuser and the accused, with their defenders, gather samples and presents them to the judge, a neutral and impartial person, who pursues the dispute taking place in public session and makes a decision based on what was presented, even if it does not match his own beliefs. As a result, the procedure is adversarial, which allows each party to present its own point of view and respond to arguments made by the opposing party.

The inquisitorial system, typical to the Western European laws, in which the sole responsibility of the social life lies with the state [7], with his French model [8], places first the judge, who is administering the evidence, either at the request of the parties or ex officio, and actively intervenes to know the facts.

Lately, the two procedural systems are not strictly defined anymore, being a closeness between them: the adversarial system takes some elements of the inquisitorial and vice versa [6].
In the French doctrine [9], there are discussions about a compromise between the two systems, considering that laws belonging to the inquisitorial have a combined procedure with major inquisitorial elements during prosecution and with adversarial elements during the trial.

The German criminal procedure is inquisitorial, French-inspired, but with some adversarial additions [10].

In England, although most lawyers believe that they have an adversarial procedural system, which has nothing in common with the inquisitorial one, according to Commission on Criminal Justice and Human Rights, clearly the English procedural system is considered a mixed system, incorporating elements of both systems [11].

In Italy, the Code of Criminal Procedure of 1988, the first created after the birth of the Republic, has introduced a new model of trial. In an attempt to inspire the adversarial canons, present in the common law's tradition, wanted to overcome the implant of the joint procedural system, derived from the Napoleonic Code which is still the base for many criminal procedure codes in continental Europe, as is the previous Italian criminal Procedure Code, during the fascist dictatorship. This Italian experience shows but light and shadow. The footprint of the normal court adversarial ritual is given by two principles: the principle of separation of the judicial functions and the principle of the procedural stages’ separation. The principle of judicial functions separation is designed to eliminate any interference between the powers of the prosecutors and judges, each of the two judicial bodies must perform their function autonomously. Trial phase separation principle (fase delle indagini preliminary criminal dell’azione l’esercizio, fase intermedia - l’ udienza preliminare the Anglo-Saxon equivalent of the preliminary hearing and dibattimento with the American-inspired technique cross examination). In 1992, the Code in effect has been the object of a profound inquisitorial counterreform, which substantially restored a situation not far from that of the previous Code. This involution, determined primarily by a rejection of the new principles of the code, lasted for nine years. Only the constitutional reform, called a "fair trial" (1999), and which has reinstated the principles (2001) have reinstated the most important aspects of the code to the original structure [13].

The European protection of human rights aims the compatibility of the national legislation with the European standards by establishing common guidelines (These are represented by the preeminence of law (legality, equality, judicial guarantees), protection of the person (dignity, protection of victims, the presumption of innocence) and the quality of the trial which is targeting fairness (respecting the right to defense and equality of arms) and efficacy (proportionality and speed) in criminal procedure, in order to build a European concept on the criminal trial. The major role of European case law is emphasizing the idea that any national procedural system (adversarial, inquisitorial or mixed) escapes the European censorship in order to protect fundamental rights [14].

**Romanian Criminal Procedural System**

The inquisitorial original footprint of the Code of Criminal Procedure of 1968, developed during the communist regime, was weakened gradually after 1990. Today, Romania is marked by the profound changes that have occurred in all world laws, changes characterized essentially by the similarities between the systems. The Legislative interventions and decisions of the Constitutional Court on procedural criminal law relating to the protection of the defense right and personal freedom, led to the introduction of adversarial elements in criminal procedure law, alleviating significantly the inquisitorial accents in all the criminal trial phases [2]. The introduction of rules from one system to another, with the result of distorting them, ignoring the particularities and national traditions [18], such as in recent years[15], we believe it is questionable and generating potential natural rejection within the criminal justice system [13].

Although of inquisitorial tradition, the Romanian criminal trial, where the court has an active role and leads the administration of evidence in the hearing, involving conflicting parties, falls within the joint criminal procedure, with strong contradictory elements also extended to prosecution.

The Romanian Criminal Procedure Code indicates what is the purpose of the criminal trial and its fundamental principles, thus establishing the basic details of the criminal trial. Applying all institutions and procedural rules, belonging to the Romanian Criminal Procedure Law, is ensured by procedural safeguards adequate to protect the rights and interests of different subjects of the criminal trial [3].

Our criminal procedure system involves a first phase trial - prosecution - sitting on rules which make it compatible with solving crimes, identifying perpetrators and collecting evidence of guilt while the criminals are resisting and try their removal from criminal and civil liability, rules reminiscent of inquisitorial process. The task of establishing the truth comes to a specialized magistrate – the prosecutor, who conducts the prosecution, supervises and controls the work of criminal investigation officers, by administering all evidence considered necessary to establish the truth. The chances of establishing truth in the inquisitorial conception are ensured by two rules: the notified prosecution acts both in favor and against the defendant (Art. 202 alin. 1 C. proc. pen.); the prosecution may act ex officio and may be referred to in any of the ways provided by law, by the parties and
any other person. As such, the parties have access to the procedure, can and should contribute, together with the prosecution, to establish the truth [2].

Although the debates are based on a case investigated by an independent prosecutor for the parties, the binding trial phase is carried out in full advertising conditions, oral, adversarial and immediacy, which are rules of the adversarial trial, but, at the same time, the judge is empowered to act actively in knowing the facts, the solution in case being adequate to the conviction about the facts they found [6].

Although it is considered that European human rights law is an adversarial type of law, inspired by the common law, the European judges refuse to enter into a debate on an option of legislation for inquisitorial or adversarial, this fact being considered connected to a national position of interpretation. Basically, what matters is that prosecution is initiated and that the samples are properly administered, whether at the initiative of the victim or judicial body. The European Convention of Human Rights and Fundamental Freedoms and especially the European Court jurisprudence focus, in particular, on the contradiction, considered the essential part of a fair trial, claiming only that the parties can convene witnesses before the court in order to be able to query them [18]. From this point of view, our system, which is a mixed system, is no stranger to the adversarial principle, which makes it seem generally legitimate and compatible with European principles [2].

In the regulation of the Romanian Criminal Procedure Code the progress of the criminal procedure is from beginning to its end in a contradictory manner, because in the course of the process arise two parallel but contradictory actions: the prosecuting action (primary) and the contrary action of defense against the criminal liability (correlative). These actions, virtual alleged as possible when the criminal proceedings start, become real ever since it was put into criminal action. From this moment the criminal trial must take place in a contradictory manner: tacit contradictory (implicit), while the law does not expressly provide for mandatory contradictory, oral made during the trial (It will be substituted by its tacit contradictory when it is not possible, for example, because the defendant is missing or does not appear in court; in any event, the court shall examine the case in an adversarial spirit and decide, as appropriate, the conviction, acquittal or termination of the criminal trial.) (art. 289 from the Criminal Procedure Code) [3].

Conclusions

When the mixed system was created there has been a combination of the two typical systems, adversarial and inquisitorial: the preliminary phase of the criminal process was regulated according to the inquisitorial system and the trial phase according to the adversarial system; subsequently it has been made a partial overlap of the adversarial elements over the inquisitorial on the prosecution phase, the latter remaining majority. In our opinion [19], currently – under the powerful influence of the implementation current within the criminal trial of all the possible safeguards to ensure the human rights and fundamental freedoms – there is an attempt of a continuation of the two systems’ overlap, adversarial and inquisitorial, as to increase the share of adversarial nature elements in the preliminary phase of the criminal process. The risk is that the movement of contradictory forces of the contemporary criminal procedure system causes earthquakes to crush the idea of criminal justice, democratic and modern society, as a promoter of legal humanism, already proving its vulnerabilities to terrorism and organized crime [20].

References

Criminal repression in the context of the economic crisis and the maximization of crime at European and global level (May 9-13, 2013, Bucharest, Romania)

Some reflections on civil action in relation to the new code of criminal procedure

Ispas O.F.

Romanian-American University of Bucharest, Faculty of Law (ROMANIA)

Abstract

The civil action is the means by which the defendant and the civil responsible party comes to liability in a procedure set by the new Code of Criminal Procedure of 2010 and supplemented by the provisions of the civil law, common law.

The author presents the innovations introduced in the matter of the Criminal Procedure Code of 2010, as well as how to guarantee the rights of the victim, the injured party or the civil party, with some references to the provisions of art. 6 of the European Convention and the other legal systems.

Keywords: Code of Criminal Procedure, defendant, civil party, civilly responsible party, criminal, criminal proceedings, civil proceedings.

Introduction


Currently, the law for the implementation of the Code of Criminal Procedure and for amending and supplementing certain laws which include criminal procedure provisions is submitted to the Parliament for debate and approval, in order for the date of entry into force of the new criminal procedure law to be established.

2. Civil liability is a form of legal liability which represents a legal relationship of obligations, that a person has a duty to repair the damage caused to another by his act or the injury that is held accountable by the law. [5] In another form, liability was defined as a legal institution made up of all the rules of law which regulates the obligation of any person to repair the damage caused to another by his or her outside the contract or contractual act or for which is called by law to answer. [6]

In relation to its source, the civil liability may be contractual or tort. Civil liability is undertaken for breaches of contractual clauses and the liability in tort results in an obligation for compensation for damage caused by an unlawful act. [7].

3. Criminal proceedings as a whole seeks to resolve the conflict of criminal law and sometimes civil law and both brought before judicial authorities through civil and criminal actions. The whole criminal proceedings until final resolution of the criminal case is otherwise determined and focused by the functional ability of the criminal proceedings, stronger within the main moments of the trial, like the start and end of the indictment, the starting of the trial, the course of the trial, and the use of appeals [8].

The formality principle aims throughout the entire criminal proceedings in both the criminal action and the civil action, by which repairing of the damage caused by the offense are obtained, following the principle of availability, typical for the civil trial, with some exceptions in the sense that, for damages to persons lacking legal capacity or having the legal capacity restricted the civil action is started and exercised ex officio.[9].

The Romanian law allows that, apart from the main criminal procedure report and the two auxiliary ones, some adjacent criminal procedural reports to be formed. [10], with an autonomous proceedings progress, but which always extinguish if the main procedural report is extinguished.

As such, a civil proceedings report can be born within the criminal proceedings and adjacent to the criminal proceedings. This report regards the civil claims of the injured party and usually has the same subjects as the criminal procedural report.[11].
Some aspects of civil action in the criminal proceedings

1. The civil action exercised within the criminal proceedings pursues the compensation of the material and moral damages caused by the offense and is exercised by the injured person or by or his successors, who constitutes as a civil party against the defendant and, where appropriate, against the civilly responsible party.

In relation to the new regulation, the civil action shall be resolved in the criminal trial, where it would not be beyond the reasonable duration of the process.

Material and moral compensation of the damage is made according to the provisions of the civil law.

2. Establishment as a civil party may be, until the start of the judicial inquiry, in writing or orally, indicating the nature and extent of claims, pleas and evidence on which they are based, judicial bodies having the obligation to inform the injured party of this right.

By the end of the judicial inquiry, the civil party may: correct material errors in its request for establishment as a civil party; increase or decrease the scope of the claims; or claim material damages by the payment of monetary compensation, if compensation in kind is not possible.

3. The civil party may waive, in whole or in part to the civil claims brought, by the end of the debate on appeal, but cannot return the waiver and cannot bring an action in the civil court for the same claim.

4. According to art. 6 of the European Convention, any person is entitled to a fair hearing, in public and in a reasonable time period, by an independent and impartial court, established by law, which will determine upon the of violation of his rights and his civil obligations, or upon the firmness of any criminal charge against him in the right [12].

From the analysis of the provisions of art. 6 of the European Convention it results that the achievement of a fair trial depends upon the fulfilment of some essential requirements [13]:

- Free access to an independent and impartial tribunal must be provided in the trial and settlement of criminal law, but also in any measure of restraint on rights and freedoms.

In our criminal process, only a court has the right to jurisdiction, to impose a punishment to offenders (art. 21 and art. 126 of the Constitution). Also, there is separation between the functions of prosecution proceedings (indictment) by the prosecutor, who bring to justice the man suspected of committing a crime, and the judicial function exercised by the court [14], which finally judges and resolves the conflict of criminal law and; the penalty can be enforced only by the court.

The guarantee of a due process concerns not only the trial phase, either civil or criminal, but all phases of the notification of the court proceedings to enforce a judgment. Fair trial balance can be found in all the contributions of the European Convention and the European Court, which come to form the famous triptych leaving the right to access to a court, through the proper legal right to get the effective enforcement of the court decision [15].

Guaranteeing the rights of the victim, the injured party or the civil party

In France, as in Romania, contrary to common law which provides to the victim only the role of witnesses in the criminal proceedings, victims of crime were always recognized the opportunity to become a party to the proceedings [16], as a subsidiary of the victim or civil party in relation to the dominant triangular relationship (prosecutor - accused - judge) [17].

The role of actor within a fair trial offers to the injured party the right to have permanent access to their own files and ask legal authorities to perform any act necessary to establish the truth [18]. Adds a recent recognition of a direct participation of victims in criminal proceedings (in the area of the public criminal action) with the right to initiate or promote openness prosecution against the alleged offender or even trigger public action (in the manner of complaints to the court against the prosecutor solutions under Art. 2781 Romanian Penal Procedure Code) [19].

Provisions on victims’ rights are inspired from the principle of equality of arms derived from the European Convention, principle which is an aspect of the guarantee to a fair trial [20]. The criminal procedure must rights preserve the balance of the rights of the parties, which is the fundamental guarantee of good justice; it must provide, on adversarial [21] and fairly conditions, weapons to either party to present its case under conditions that do not lead to situations of disadvantage compared with the net effect [22]. As a party, the victim has the right to participate in criminal proceedings on an equal footing with other parties [23].

Victims have a set of rights (right to recognition [24], the right to accompany [25] and the right to compensation), which is not assured unless the victim is placed in the centre of the legal, psychological and social devices, within an effective strategy designed to recreate the links broken by the crime [26].

Right to recognition involves, within the entire process, access to justice with the respect of the balance of the rights of the parties, with the opportunity to express freely and contradictory the complaint, in conditions of publicity of court proceedings, ensuring the double degree of jurisdiction, in a reasonable term [27]. Also, the victim should be recognized the right to dignity, which may be serious prejudiced by distribution in the media of
the circumstances of a crime for which the victim has not consented, or by disseminating information on the identity of the victim of a sexual aggression or broadcasting an image of the victim that becomes thus identifiable, without the victim's consent [28].

The law on press freedom in France, so serious prejudice to the dignity of the victim are punished with 15,000 euro fine [29].

In the Czech Republic [30], the Law which came into force on April 1, 2009, is mainly aimed at protecting victims of crime of unwanted advertising and provides severe penalties of up to five years imprisonment and a fine of 5 million kronor (200,000 euros) for journalists who publish data on suspects, defendants or victims. International media called "muzzle law" prohibiting the publication of telephone intercepts obtained in criminal cases. An amendment to this law came into force on 1 August 2011, strengthening [31] the protection of privacy, to victims of crimes and sexual violence, pregnant women, disabled and those under the care of other people, as well as to children, but allowing the Czech press to publish information from wiretaps, if they are of public interest, such as in the case of politicians suspected of corruption.

The right to accompanying assumes the victim's right to be informed [32] (on the right to receive compensation for the suffered damages, to become a civil party, the right to be assisted by a counsel, eventually appointed ex officio, to be assisted by an association specializes in helping victims, to notify if necessary the committee to for granting compensation to victims of crime, as well as regarding all documents of interest from the criminal proceedings [33] ) and to be protected (the offender prosecuted in freedom or under judicial control is forbidden any contact with the victim; the victim is protected against new crimes; the victim is ensured concealed statements [34]).

Reparation for harm suffered as a result of the offense must be comprehensive and effective. Compensation is paid by the offender found guilty or by the civilly responsible party. In France [35], the requirement for quick repairs led to the creation of special guarantee funds for victims to avoid the risks of illusory recovery from the offender [36].

In Romania, although with some exceptions, the civil action shall be exercised ex officio, within the criminal proceedings, the court is bound to take an active role in exercising it by the civil party, requesting clarification - in the situations where the civil party is insufficient materialized - and indicate evidence to determine the actual extent of injury [37].

One should reflect about the fact that although both EU law and the national law enshrines the right to repair of the damage caused by the offense, the legislature leaves the victim to enforce the court's decision regarding damage to property, or to look for the offender and pay fee bailiff to get to an effective remedy. We believe that intervention is required by the legislature to correct this, especially since the right to a fair trial aims at all stages, including the stage of execution and enforcement of civil conviction which is part of the criminal response against crime [38]. The technical solution would be to include expenditure of the judicial enforcement in civil matters in the legal costs of the trial [39].

In the specialised literature [40], victim's rights are treated through the connections between criminal proceedings and psychology (the victim's feelings, attitudes, professionals or volunteers involved, public opinion towards the victim), but also between the international [41] norms, like the "home address", and the national rules [42], like the "the residence" regarding the victims' rights [43].

The rights of the victim and those of the accused are not necessarily competitive, but can complement each other, without excluding [44]. The challenge in the matter of guarantees in the Romanian criminal trial is to find the balance between standards of rights granted to the victim and those granted to the offender, not being accepted the decrease of a category of rights in order to reach the other, but the increase in both until the level necessary to ensure democracy and humanism trial is reached.

Increasing procedural safeguards and deepening their effectiveness is an on-going trend of our legislation because, although the social command requires a fast and reliable suppression of crime, the same command does not allow killing entitlements and interests of the person [45].

By all rights, thus protecting the individual against prosecution by the authorities, a real wall of guarantees was built, which protect the human rights against the eventual arbitrary of the State. However, this wall must not lead to disarmament of the state in the fight against crime [46], because the society that relinquishes to act consistently against a crime is an accomplice to that crime [47].

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[10] For example, the procedure resulted in taking preventive or precautionary measures.


[14] In art. 3 of the new Criminal Procedure Code, establishing the principle of separation of all judicial functions (prosecution function, the function of disposition of fundamental human rights and freedoms in criminal prosecution, the verification of the legality of sending or not sending in the trial, the court function).


[21] The defendant claims are controlled by comparing the statements of the victim and vice versa.


[24] The term used in French - re-con-Naissance, that the victim thrown into the abyss dag by the inhumanity of the offense is reborn with his peers, who provides support as the only way to allow him to become again the being that he was. Recognition involves consideration of the victim as a free human being who deserves respect, capable of challenge and response, to exist as a human being means to give and ask for respect, which is the essence of social relationship (for details Eric Fiat, De la dignité du vieillard: réflexion éthique in Jean-Jacques Amyot, Michel Bill Vieillesse interdites, L'Harmattan Publishing House, coll. La Gerontology en actes, 2004, p 123-143, Marcel HENAFF, La dette de sang et l’exigence de justice, in Paul Dumouchel, Comprendre pour AGIR: violences, victimes et vengeances, L'Harmattan Publishing House / Presses de l’Université Laval, 2000, pp. 31-64); Grofu, N. (2012), Op. cit., p 64.

[25] To accompany means to join the victim to go where it goes, at the same time and the rhythm of the victim, means sharing the suffering of the victim, to understand him, meaning that the victim to be heard and believed (Gérard Lopez, Serge Portelli, Sophie Clément Les droits des victimes. victimology et psychotraumatologie, Dalloz, 2004, p 85-108).


[27] Ibid, p 427.


[32] Preliminary Article French Criminal Procedure Code

Article 706-6-1 French Criminal Procedure Code, which has its correspondence in art. 77 of the Romanian Criminal Procedure Code in force with marginal name "Special procedures for listening to the victim and civil party".

In art. 706-3 the French Criminal Procedure Code provides an allowance for full compensation for all damage caused to certain victims who suffered serious harm by the committing of a crime. This allowance is in the nature of aid subject to the existence of resources, the principle of subsidiarity and serious wealth created by the offense. Also a serious psychological condition of the victim justifies awarding compensation. Article 706-4 of the French Criminal Procedure Code governing existence CIVI (Commission des victimes d'indemnisation d'infractions), who decides to pay a compensation of FGTI (Fonds de garantie des victimes des actes de terrorisme et autres infractions), covered by art. 706-5-1 of the French Criminal Procedure Code.


For details, Anne d'Hauteville, op. cit., p 118.


Régis of Gouttes, op. cit., p 133.

Undercover investigator - special method of investigation of corruption offenses

Jirlaianu S.

National Anticorruption Directorate, Territorial Service Galati, Romanian Association of Penal Sciences (ROMANIA) jirlaianu@yahoo.com.

Abstract

Institution undercover as the Code of Criminal Procedure was introduced. by Law 281/2003 brought key additions in terms of prior criminal acts. Thus, the provisions relating to undercover investigators were introduced into our legislation through art. 21 of Law 143/2000 and Government Emergency Ordinance no. 43/2002 of NAPO. Subsequently, the provisions relating to the use of undercover agents were introduced and other special laws: Law 78/2000 on preventing, discovering and sanctioning corruption Law. 678/2001 on preventing and combating trafficking and Law 39/2003 on preventing and combating organized crime.

Key words: undercover investigator, special investigative techniques, conditions of appointment

Amendment of Code of Criminal Procedure. made by Law 281/2003 introduced Article 224 ¹ - 224⁴ undercover governing institution. In order to comply with privacy and correspondence, the new Code of Criminal Procedure establishes procedural rules in the field of special techniques of surveillance and research to meet accessibility requirements, predictability and proportionality.

Nationally aspects of treatment in legal literature undercover investigator institution are relatively few. This is due to several factors related to a certain reluctance towards such an approach from the "secret" of such operations, legal practice that is not published, many times, that in the case solved reference were used undercover investigators or special investigative techniques, from relatively small practice ECHR in this area and the lack of knowledge in situations where criminal prosecution using these techniques [1].

Using an undercover investigator, is a special method of investigation because, in many cases methods, which we may call classical investigation are exceeded or only partially lead to achieving the purpose of criminal proceedings, namely truth and criminal liability the offender [2].

Therefore, recognizing the special quality of an investigation in which investigators used undercover legislature expressly provided for offenses whose sampling may be used undercover investigator.

Thus, the prior acts by undercover investigators in the Code of Criminal Procedure provides in art. 224¹ paragraph 1 that: "If there is probable cause and concrete that has been committed or that an offense prepares for national security under the Criminal Code and special laws, as well as for crimes of drug trafficking and weapons, human trafficking, terrorism, money laundering, counterfeiting or other securities, of an offense under Law. 78/2000 on preventing, discovering and sanctioning corruption, as amended and supplemented, or of any other serious crime that cannot be found or whose perpetrators cannot be identified by other means can be used, in order to collect data the existence of the crime and identifying persons against whom there is the assumption that they committed a crime, investigators under a different identity than the real one."

The investigator noted that the use of a covered identity is used for the investigation of offenses impact on the city, the impact on citizens namely corruption, drug trafficking offenses and weapons, terrorism, money laundering and others.

These types of crimes are offenses introduced under Law No.78/2000 on preventing, discovering and sanctioning corruption. Limiting such offenses as crimes of bribery, bribery, influence peddling and receiving undue benefits provided in art. 254-257 Criminal Code offenses listed in Art. 6 ^ 1, art. 8 ^ 1, art. 8 ^ 2, art. 10, Article 11, art. 12, art. art. 13, art. 13 ^ 1, art. 13 ^ 2, art. 17, art. 18 ^ 1, art. 18 ^ 2, art. 18 ^ 3, art. 18 ^ 5 of Law 78/2000.

It is clear that all these crimes fall within the jurisdiction of the prosecutor's direct research and it may delegate judicial police investigators to carry out certain criminal investigations.

Certainly protected social values are not essentially different, but the tactics of investigation is more difficult in the case of highly hazardous offenses and therefore require special methods of investigation techniques as criminals become more specialized, they become more sophisticated methods and results their actions bring profits not insignificant.

Persons referred to in art.224¹ Criminal Procedure. pen. may conduct investigations only with the prosecutor reasoned that performs or supervises the prosecution.
Authorization is given by reasoned order, for a period not exceeding 60 days and may be extended if justified. Each extension shall not exceed 30 days and the total duration of the authorization, in the same case and the same person may not exceed one year.

The prosecutor applied for must be mentioned data and evidence regarding the facts and persons whom no presumption that they committed a crime and the period for which authorization is required.

Prosecutor's ordinance authorizing the use of undercover investigator must include, in addition to the particulars provided for in Art. 203, as follows:

a) solid and concrete evidence justifying the measure and the reasons for the measure is necessary;
b) activities may conduct undercover investigator;
c) persons against whom there is the assumption that they committed a crime;
d) identity under which the undercover investigator plans to conduct authorized activities;
e) period for which the authorization is given;
f) other particulars prescribed by law.

In urgent and duly justified cases may require licensing and other activities than those for which authorization prosecutor to decide immediately following.

In art. 224 relating to the use of undercover investigators obtained data indicated that the data and information obtained by an undercover investigator may only be used in a criminal case in connection with the persons referred to in the authorization issued by the prosecutor.

This data and information may be used in other cases or in relation to other people, if inconclusive and useful. Article 150 of the new Criminal Procedure Code governing "finding of corruption or the conclusion of an agreement" provides in par. (3) that "the activity of a person participates in finding corruption or the conclusion of a Convention is challenging, contravention or offense ". Specifically it provides that the use of documents or items provided to an investigator, only to achieve the goal of the action is not a crime. Sure it's certain documents or objects that have a special character that cannot be accessed or used by any person normally.

The question could be treated as an undercover investigator acts that exceed the order given by the prosecutor on the case. Here comes the technical and tactical preparation undercover investigator must always act only on the mandate given by the prosecutor and only for the purpose for which it was issued that order, ie, only for identifying evidence and perpetrators, and its shares to after the criminal liability of persons investigated [3].

In setting limits that could work undercover investigator will also consider the provisions of Article 68 of the Criminal Procedure Code which regulates that: "It is forbidden to use violence, threats or other forms of coercion, and promises and exhortations, in order to obtain evidence. It is also forbidden to incite a person to commit or continue a criminal offense in order to obtain a sample."

We conclude that the undercover investigator institution is regulated as a special investigative techniques precisely because corruption offenses, along with others, are considered highly hazardous offenses as intended to affect the basic social values of society.

References:

[5] The new Criminal Procedure Code (Law 135 / 01.07.2010);
[6] Law no.143/2000 on preventing and combating trafficking and illicit drug use, as amended and supplemented;
[7] Law no. 78/2000 on preventing, discovering and sanctioning of corruption, as amended and supplemented;
[8] Law 678/2001 on preventing and combating trafficking in persons, as amended and supplemented;
[9] Law 636/2002 on preventing and sanctioning money laundering, and to establish measures to prevent and combat terrorist financing, as amended and supplemented;
[10] Law 39/2003 on preventing and combating organized crime;
The European prosecutor – novelty and perspectives

Lazar A.¹, Nicolae A.²

¹ Prosecutor’s Office attached to Alba Iulia Court of Appeal.
² International Relations and Programs, Department of International Judicial Cooperation, the Prosecutor’s Office attached to the High Court of Cassation and Justice.
lazar_augustin@mpublic.ro, nicolae_angela@mpublic.ro

Abstract

This paper offers an innovative examination of the subject matter, the phase and the results of the research performed by the group of experts, dedicated to founding the new institution of the European Public Prosecutor (EPP) and the Model Rules of Criminal Procedure of the European Union, in order to ensure the protection of EU’s financial interests. The authors analyze the three main proposals for organizing this institution: the collegial EPP or “Eurojust Plus”; EPP as supranational hierarchical authority, with a central office, assisted by delegates in each Member State, subordinated both to the EPP and to the chief of the National Prosecutor’s Office (as there is a double head competence or not); EPP as an exclusively supranational authority.

This study also analyzes the solutions on the cooperation with European institutions in the field of criminal justice (Eurojust, Olaf, Europol) and national law enforcement agencies. The study also tackles the concept of judicial control, by national or European courts, as well as the different versions for material and territorial competence, recommended by the experts. The research group also envisions a solution to the problem of the “infernal couple” represented by the sense of efficacy and criminality control, an efficient protection of financial interests, corroborated with the sense of legitimacy, of consolidating liberties and justice, through the guarantee of fundamental rights.

Keywords: European Public Prosecutor’s Office (EPPO), Eurojust Plus, Olaf, Europol.

Project on criminal investigation and prosecution of crimes against the financial interests of the European Union

The current issue of regulating and implementing the institution of the European Prosecutor (EP), as well as the model rules of criminal procedure of the European Union, was reexamined, with significant progress, during the debates which took place in plenary as well as on workshops, on the occasion of the National reporters reunion, which ended with the European practitioners and experts conference on the topic of “The European Prosecutor; Model Rules of Criminal Procedure of the European Union”, organized by the University of Luxembourg from June 13th to June 15th 2012 (Detailed information on the research project coordinated by Professor Katalin Ligeti, from the University of Luxembourg (participants, conferences etc.) are available on the project Internet page: www.eppo-project.eu). The reunion finalized the European project on the subject of “The investigation and prosecution of crimes affecting EU’s financial interests” which took place from February 2010 to March 2012, financed by the European Commission through the Hercule II program and coordinated by the University of Luxembourg.

The first phase of the project consisted of an extensive analysis of the national juridical systems of the 27 EU member states. Questionnaires were sent to every national expert in all member states with respect to the general characteristics of the domestic criminal procedure, the investigation and prosecution attributions of the European Public Prosecutor’s Office (EPPO), the procedural safeguards and the standards in the field of criminal evidence. The information provided by the national experts was evaluated through a synthesis and a comparative study on the measures taken during investigation and prosecution, in reference to each and every procedural guarantee. (The national report on the Romanian judicial system was delivered by PhD Augustin Lazăr, Prosecutor General, the Prosecutor’s Office attached to Alba Iulia Court of Appeal, PhD Angela Nicolae, Chief Prosecutor, Office of International Relations and Programs, other than Phare Programs, within the Department of International Judicial Cooperation, International Relations and Programs, P.I.C.C.J. and Claudiu Constantin Dumitrescu, prosecutor, the National Anticorruption Directorate. The work is not an official document, merely representing the personal point of view of the researching authors.) The second phase was drafting the Model Rules by specialized working groups, which represent a synthesis of the juridical traditions in every EU member state.
The conference consisted of a number of plenary sessions with the following sub-topics: “Model Rules of Criminal Procedure of the European Union regarding the European Prosecutor”, “Eurojust Reform and the possibility to set up a European Prosecutor based on Eurojust”, “Olaf’s role in the future European Prosecutor”. During the conference, there were also three workshops conducted in parallel:

- W 1, on “The Attributes of the EPPO and its statute in relation to national criminal justice systems”, conducted by Prof. Thomas Weigend, University of Köln.
- W 2, on “The Attributes of the EP in an investigation case” conducted by Prof. IAE Vervaele, University of Utrecht and Prof. Ulrich Sieber, Max Planck Institute from Freiburg.
- W 3, on “Jurisdictional Control over the activity of the EP and procedural safeguards” conducted by Prof. John Spencer, Cambridge University.

The research results were published in a *first volume* comprising the foundations which inspired the elaboration of the Model Rules of criminal procedure regarding the future EPPO [5]. This will be followed by a *second volume*, targeting the comparative analysis of the national systems with respect to investigative and prosecution measure and procedural safeguards. The second volume will present the Model rules of criminal procedure, accompanied by explanatory notes and will end with a final report on the research findings, including an assessment of the reform prospects.

**Sustaining the objectives of the Corpus Juris research project**

A project for a *European judicial space* [8] was launched in November 1995 by PhD Professor Francesco de Angelis and presented for study to a group of experts from eight European countries (PhD Prof. Francesco de Angelis was Director of the Directorate-General for Financial Control within the European Commission, the study was performed by experts from: Belgium, France, Germany, Greece, Italy, UK, Spain and Sweden.). Two years later, under the coordination of PhD Prof. Mireille Delmas Marty, University of Pantheon – Sorbonne, this group of experts published a volume entitled *Corpus Juris*, which sets the foundations of a set of criminal and criminal procedure rules applicable to the European judicial space, proposing a more effective punishment of crimes against the community Budget [2]. The work group approached substantive law matters (Substantive law issues were approached by Enrique Bacigalupo, Professor at the University of Madrid, Giovanni Grasso, Professor at the University of Catania and Klaus Tiedemann, Professor at the University of Freiburg), rules of jurisdiction and extraterritoriality (The rules of competence and extraterritoriality were examined by Nils Janeborg, Professor at the University of Uppsala, Dionysis Spinellis, Professor at the University of Athens and Christine van den Wyngaert, Professor at Anvers University.), criminal procedure and evidence issues. (The criminal procedure and evidence issues were studied by Mireille Delmas Marty, Professor at the University of Pantheon – Sorbonne and John R. Spencer, Professor at Cambridge University.)

The mission of the *Corpus Juris* group was considered wide and innovative, designed to ensure the protection of Europe’s financial interests. The research methodology consisted of an initial approach of the objectives, the classical principles: legality, culpability, proportionality, impartiality, as well as of the optimal methods of application of these principles. Two innovative principles were outlined as well: a European territorial competence and an adversarial proceeding: not accusatorial (without a totally private investigation), nor inquisitorial (without a judge). The adversarial proceeding is regarded as a hybrid criminal action, assumed by an independent, impartial and responsible public authority. Thus, the idea of a European Prosecutor emerged inspired by the institution of the International Public Ministry, proposed by the Romanian jurist Prof. Vespasian V. Pella, who launched the “creative spark” in 1925. (Jean Graven, president of The International Association of Criminal Law) (See Vespasian V. Pella, *Războiul-Crimă şi Criminalii de Război, Reflecții asupra justiției penale internaționale. Ce este și ce ar trebui să fie*, Universul Juridic Publishing House, 2013, translation from French, PhD A. Duțu, introductive study, Prof. M. Duțu.)

The research group tried to handle the problem of the “infernal couple” (EPPO Conference, Key-note speech PhD Prof. M. Delmas-Marty): *the sense of efficacy* for the benefit of security - actual control of criminality, the efficient protection of financial interests - corroborated with a sense of legitimacy, of consolidating liberties and efficiency, through the guarantee of fundamental rights. At the end of the new project, it was discovered that the management of this issue progressed. New instruments were integrated, representing precise and valuable corpus for protecting fundamental rights: CEDO jurisprudence, The Council resolutions of 2009 regarding the protection of the fundamental rights of suspects and prosecuted individuals; the 2010 Directive on the right to interpretation and translation; the 2012 Directive on the right to be informed during criminal proceedings; the pending proposition of the Directive regarding the right to silence and to a lawyer.

**Propositions for organizing the institution of the European Prosecutor**

In *Corpus Juris*, the group of researchers launched and developed the concept of a European Prosecutor, at the same time proposing practical solutions for managing the lack of investigation and prosecution tools for
fighting against EU’s financial interests. Corpus Juris targeted three areas: a unique set of criminal concepts applicable in all Member States, a common set of procedural rules for investigating and prosecuting crimes, as well as a European Prosecutor to lead the investigations and the prosecution.

As an alternative to the vertical integration model for criminal justice proposed by the Corpus Juris, another rather horizontal model was advanced, inspired by the principle of mutual recognition, as a change of paradigm in judicial cooperation. In this context, the Green book on the EPPO suggests that the organisation of the European Public Prosecutor should be decentralized, as a combination of vertical and mutual recognition. This solution did not solve the problem of fighting the crimes against EU budget. Article 86 of the Treaty on the Functioning of the European Union (TFEU) of the EPPO is, in fact, an acknowledgement that the problems addressed by Corpus Juris are real.

The institution of an EPPO or an EP is regarded as a challenge to the sovereignty of the Member States, as well as to the authority, organization and judicial bodies of these states. In juridical terms, implementing this European institution raises many problems awaiting specialized solutions [5].

A first important aspect is defining the legal competence of the EPPO. According to Art. 86(1) TFEU, the scope of the EPPO will be to “fight against fraud affecting the financial interests of the Union”. Nonetheless, Art. 86(4) TFEU stipulates the possibility of extending the competence of the EP - by decision of the Council - “to include serious crime having a cross-border dimension”. The second category of issues related to the implementation of Art. 86 TFEU refers to the procedural aspects of such a European institution. According to Art. 86(3), the Member States shall determine the general rules applicable to the EPPO, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by the EPPO. Other issues are raised regarding the optimal authority with which the EPPO is invested, respectively the control of the EPPO: whether the control ought to be performed by a national or a European judge. The third category of issues involves solving all institutional aspects regarding the EPPO. According to Art. 86 TFEU, it is certain that the EPPO will be a supranational body in the Field of Freedom, Security and Justice, and therefore must be aligned to the objectives in this field, more precisely “respecting the fundamental rights and the different legal systems and traditions of the Member States.” The debates on article 86 TFEU, after the Treaty from Lisbon came into full force and effect, mostly focused on institutional aspects and on how to establish an EPPO inside Eurojust. In this respect, there were at least three juridical solutions.

A collegial EPPO - after the Eurojust model, entitled “Eurojust Plus” – is a proposition according to which the EPPO would be a body of prosecutors appointed by each Member State, who would make decisions on the initiative of investigations and prosecutions and on jurisdictional conflicts based on a majority. Each EPPO member could be authorized to give mandatory instructions to national authorities regarding the initiation of an investigation. On the other hand, according to Olaf experience, the crimes against EU’s financial interests have an increasing cross-border dimension. Nonetheless, the authorities of the Member States investigating these crimes often do not perceive the facts puzzle as a whole, only the aspects pertaining to one particular state. Difficult and long-lasting international cooperation procedures often prompt national authorities to avoid complications that could result from approaching the investigation on a European level. (OLAF, Eleventh Operational Report of the European Anti-Fraud Office, January 1st - December 31st 2010.) Although Eurojust could participate in coordinating criminal pursuits at a national level in the affected Member States, this network implies, by its nature, fragmenting the prosecution process.

A hierarchical EPPO (EP), a supranational body would represent an institutional alternative with a central office, assisted by Deputy Prosecutors or Delegated European Prosecutors in each Member State. Deputy Prosecutors would operate as “satellite offices” of the central EPPO, in the different Member States. Inside this system, the European Prosecutor (central office) would instruct Deputy Prosecutors to investigate and prosecute criminal cases. The EP would thus be a hierarchical, decentralized and integrated system. The central EP would lead and coordinate Delegated European Prosecutors appointed in each Member State. They will be subordinated both to the European Prosecutor and to the chief of the National Prosecutor’s Office. The integrated approach - versus a centralized approach - means naming the integrated prosecutors in National Prosecutor’s Offices as Delegated European Prosecutors, which would avoid creating a large superstructure and would facilitate the integration in national systems. In their relation with national authorities, an important issue is avoiding duplicate competences, thus ensuring complementary jurisdiction. (See also A. Jurma, Raport privind participarea la Conferința ERA dedicată Procurului European-Propovădări instituționale și practice. Trier, January 17-18, 2013, Prosecutor’s Office attached to the High Court of Cassation and Justice, Bucharest, 2013.)

The EPPO as a supranational body would be, according to another vision, a hierarchical service, made up of a chief prosecutor and several deputy prosecutors specialized on different problems, competent to act inside the EU and directly bringing suspects before national courts.

The problem of finding the competent court to solve, during the investigation, the complaints against the coercive acts and measures of the EP, has at this point two possible solutions. The first one relates to the
material competence of the national court. The territorial competence will be established according to the criteria presented in the Model Rules of Procedure. The second solution refers to the competence of the European Court of Justice, established by regulation, either for all the complaints, or for just a part, the others essentially affecting human rights.

The debates revealed the wish of the European Commission of not waiting for the extension of Eurojust competences, and instead its desire to implement Art. 86 TFEU on the EP, separate from Art. 85. According to Art. 86 of the Lisbon Treaty – which stipulates that “the Council […] may establish an EPPO from Eurojust”, it is considered that: either Eurojust will transform into a EP, or it will cooperate with the EP. The national members of Eurojust could also be double-subordinated Delegated European Prosecutors, or the network could offer just the administrative support for the functioning of the EP. The main idea is that the EP will make use of the Eurojust experience, at the same time having wider investigation and prosecution attributions, not just coordination attributions as Eurojust does at this time. This network exercises the attributions in international judicial cooperation, while the EPPO will be a European authority with its own investigation and prosecution legal powers.

The immediate establishment of an EPPO seems like an imperative, given that this institution has been sufficiently studied for approximately 20 years. According to the 2010 Commission Report on the protection of the Union’s financial interests, the suspected fraud is approximately 600 million euro each year, on the income and expenditure side. The actual economic crisis, the necessity of protecting the EU financial interests and the increased number of serious cross-border crimes (the trafficking in cultural objects, persons and drugs) call for an acceleration of the regulation and implementation process.

This could contribute to the consolidation of the economic and monetary union by enhancing the trust of tax payers in the functioning of EU institutions and to the protection of the fundamental values that form the basis of the European Union. As a first step, the Commission presented in July 2012 its proposition to attune the definitions of crimes against EU’s financial interests. It is believed that this proposition should be followed by a second legislative proposal with respect to the consolidation of the procedural framework for the prosecution of these crimes. According to the ongoing plan, the Commission will present a legislative proposal based on Art. 86 TFEU for the institution of an EPPO in 2013.

**Aligning the Romanian legislation to the European standards in fighting fraud affecting EU's financial interests and in serious cross-border crimes**

As the EPPO is regarded as an essential institution and the fight against crimes affecting EU’s financial interests represents a major objective, Romania has made constant efforts, even during the pre-accession period, to align to European standards. The most relevant are: Law no161/2003 which, among others, modified and completed the regulatory framework in this field with a new section referring to crimes against the financial interests of the European Community, and, on the other hand, it extended the range of the active subject of corruption crimes to certain categories of persons stipulated in the criminal Convention on corruption, as well as the Convention on the protection of the European Community financial interests and its additional Protocols [9]; Law no182/2000 which regulates, among others, the conditions and procedure for prosecuting and returning movable cultural goods taken illegally from an EU Member State [10] etc. In order to protect the competitive environment, Art. 253/1 Criminal Code (CC) incriminates the conflict of interests for the public servant [11].

In this context, the Romanian legislator extended the range of procedural rights and safeguards stipulated by Art. 5-8 Code of Criminal Procedure (CCP) and introduced the right to silence, the authorization by the judge to intercept and record telephone conversations [12]; to communicate the data preserved or processed by public network and electronic communication service providers[13], as well as the trial in the case of admission of guilt through Art. 320/1 CCP[14].

The Romanian specialized literature revealed that as the common market grows and the freedom of circulation of goods, persons and services enhances, favorable conditions emerge for the perpetration of community fraud. They are characterized by a sophisticated and occult modus operandi, by complex schemes and an international chain of intermediaries. Several obstacles to an efficient repressive action have been identified: procedure regulation differences, criminal liability etc [1] Following a study of the specific modus operandi, specialized methodologies for investigating business crimes have been elaborated (See Aug. Lazăr, Ancheta antifraudă in mediul afacerilor, Lumina Lex Publishing House, Bucharest, 2004.), during international judicial cooperation programs. Romania acceded promptly to projects designed to apply community instruments applicable even to the protection of EU’s financial interests: Eurojust, Europol, Olaf [6]. De lege ferenda, the EPPO Structure could be implemented in Romania, without additional expenses, by delegating the DNA Chief Prosecutor as PED, with double subordination. The office would include the present Service which deals with corruption crimes against the financial interests of UE, with tasks relating to criminal investigation in specific cases, provided by Law no. 78/2000, as well as a service which fights against serious cross-border crimes (trafficking in human beings, weapons, drugs and cultural goods), which are of DHCOT competence.
Conclusions

In the face of a great diversity of issues, an unprecedented economic and financial crisis, the European experts deem opportune to establish a European Public Prosecutor’s Office. There are two strong arguments for establishing this new European institution. On the one hand, because of the crisis, the public opinion is significantly sensitive, as opposed to previous times when the protection of financial interests concerned a small segment of the population, the citizen being mainly interested in his or her own personal safety, not in this technical bureaucratic criminality. On the background of the financial crisis affecting Europe, a plea is made for the certain advantage of an EPPO for the protection of financial interests. This protection objective is reckoned extremely close to reality, as it affects each contributor to and beneficiary of European policies. European taxes and the European fiscal police will need an EP, who is regarded as a judicial guarantee both for efficacy and for legitimacy. Given the current situation, more and more European leaders are aware of the necessity to enhance community integrity in relation to the Treaty, and that the EU must not stay immobile when one of its countries is not ready. The idea of a two-gear Europe which fights crisis through intensified cooperation is rooted for.

The EP will ensure the centralized coordination of investigation and prosecution at a European level as an independent judicial body of the European Community; it will be a community body, and the appointment procedure will follow community rules (commission proposal, approval of the European Parliament and approval under the rules of qualified majority voting); the jurisdiction will cover the entire territory of the EU, the space of investigation and prosecution - if the regulation is adopted by all Member States - or the territory of those Member States which will join the EP initiative. Material competence will reside in the protection of EU’s financial interests and the fight against serious cross-border crimes. The EP will be decentralized, under the control of national judges while national court remains competent to try. For the authorization of coercive measures during investigation, common procedural rules will be established.

An analysis of the Statute of Delegated European Prosecutors reveals that the version of the double-subordinated prosecutor (supported by Olaf), ensures a necessary coherence in investigating complex files, in which crimes against EU’s financial interests are connected to other crimes over which the Member States have sovereignty in legal action. The weak element of this solution is the difficulty of conciliating the double-subordination with the principle of independence of the EP and the risk of priority conflict. The second solution, supported by the European Commission is A Delegated European Prosecutor with unique European subordination, having the right to ask the national law enforcement agencies to execute the measures ordered in the investigation. The issue of material competence of the EP is best solved by the solution which entails bringing together crimes which essentially affected EU’s financial interests, cross-border, and organized crimes. This solution is supported by the experience of the Romanian jurisprudence in the field of cross-border criminality, especially in the fight against trafficking in cultural goods in the Member States, from countries with an ancient history, to countries with a developed ancient art market. The difficulties generated by the execution of international judicial assistance requests, especially in the field of stolen or illegally exported cultural goods, reveal the need for unified criminal action managed by a competent EPPO.

The EP must be independent both in relation to European institutions and with national authorities. Its operational authority must be guaranteed and its investigations must be subjected to judicial control both nationally and/or on a European level. Minimal common procedural rules will be adopted and for the difference, the national procedural rules will apply. The EP will answer for the results of its activity before the European Parliament and the EU Council.

During the investigation, the EPPO will cooperate with Olaf, the administrative investigation service, which within the limits of its competence, will assemble the evidence and will send the files to be solved by the EP. In another point of view, Olaf could perform judicial investigations, ordered by the EP in relation with the Member States that will join the project. The EP will cooperate directly with national police agencies. An important cooperation will be established with Eurojust, judicial network with complementary attributions. Eurojust already has a wide experience and a data base which can be made available to the EPPO. There will also be a cooperation with Europol which, according to Art. 88 TFEU, must support and consolidate the action of police authorities and other law enforcement agencies in the Member States.

After the investigation, the EP will send the file to the competent court in the EU Member State. The phases of the trial will be regulated exclusively by national law.

There is already a legal consensus with respect to this institution, but the most difficult step is to transit from a judicial agreement to a political one. Luxembourg, EU’s judicial capital, where the European Court of Justice is based, as a juridical body of the European Community, is one of the proposals for the headquarters of the future EP (Other proposals for the headquarters of the EPPO are Brussels and Hague.). The deadline for the elaboration by the European Commission of a Draft Regulation on the establishment of the EP is June 2013, the end of Irish Presidency. The regulation regarding the EP will be again debated during the Lithuanian Presidency, at the September 2013 seminar. The draft regulation will contain rules relating to: the competence of the EP (crimes affecting EU’s financial interests); the decentralized structure (a central EP and
Delegated European Prosecutors). There are still discussions with respect to the double or unique subordination, the independence and responsibility of the EP. The document will also comprise regulations with respect to: coercive powers of the EP, defense rights, data protection, cooperation with European institutions (EI, Europol, Olaf), the relationship with the national law and the Member States that do not join the EP project. The predictable difficulties regarding the conformity of all Member States with the establishment of an EP call for the solution stipulated under Art. 86 para. 2 TFEU: “in the absence of unanimity in the Council, a group of at least nine Member States may request that the draft regulation be referred to the European Council”. Thus, the European Commission envisages the adoption of the EP regulation by a “consolidated cooperation”, respectively the compliance of at least nine Member States.

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Criminal repression in the context of the economic crisis and the maximization of crime at European and global level (May 9-13, 2013, Bucharest, Romania)

Accelerating criminal procedures in order to prevent criminality in the context of the economic crisis

Lorincz A.L.

(Romania) lelia.lorincz@gmail.com

Abstract

The magnitude of the criminal phenomenon in the context of the global crisis, at a European and global level, imposes, besides repressive actions, an emphasis on the celerity of the procedures specific to criminal law. In the context of globalization and European integration, preventing and combatting the criminal phenomenon, in the member states and in the EU in general, implies the simplification of procedures and an acceleration of the criminal procedures, whenever it is possible. Recent legislative changes brought to the Code of Criminal Procedure of Romania (Law no. 202/2010 and Law no. 2/2013), aim, amongst other desiderates, to ensure the celerity of the criminal trial.

Keywords: celerity, criminal case, legislative changes, degrees of jurisdiction, the competence of the courts of law, the new Code of Criminal Procedure.

Celerity – as fundamental principle of the criminal trial

The celerity (efficacy or rapidity) is required, as fundamental principle of the criminal trial, because it assumes the desire that the conduct of the criminal trial and implicitly, the settlement of the criminal cases, should take place as soon as possible, in a moment as close to the one when the offence was committed [1].

Although it is not legally consecrated together with other fundamental principles of the criminal trial, the principle of efficacy results from other provisions, first of all even from the content of Art. 1 paragraph 1 of the Criminal Procedure Code (the aim of the criminal trial): „The aim of the criminal trial is to acknowledge in due time and completely the deeds that represent offences, so that any person who has perpetrated an offence is punished according to his/her guilt, and no innocent person is held criminally responsible”. [1]

Also, after reviewing the Constitution, Art. 21 paragraph 3 of the fundamental law provides that the parties are entitled to the settlement of the case within a reasonable time.

Art. 10 of Law no. 304/2004 on judicial organization also provides that all persons are entitled to the settlement of the case within a reasonable time.

In the European Convention for the Protection of Human Rights and Fundamental Freedoms, the requirement of celerity results from paragraph 1 of Art. 6 („Right to a fair trial”), according to which „everyone is entitled to a judgement ... within a reasonable time of his/her case”.

The principle of efficacy assumes both the quick settlement of the criminal cases and the simplification, when possible, of the criminal proceedings activity.

Our criminal proceedings system currently knows three degrees of jurisdiction: the trial in first instance, the trial in appeal and the trial in recourse.

The right to two degrees of jurisdiction in criminal matter is one of the principles consecrated in the European jurisprudence [2]. Therefore, Art. 2 paragraph 1 of Protocol 7 consecrates the right of the person declared guilty of a crime by a court to ask for the examination of the „statement of guilt” or of the conviction by a higher instance.

The regulation included in Art. 2 paragraph 1 of Protocol 7 establishes the need that a double degree of jurisdiction should exist not only when a conviction decision was pronounced, but also in the event an instance pronounces a decision which includes a „statement of guilt”. To this purpose, the European Court of Human Rights estimated [2] that the decision by which the court rejects the complaint formulated against the prosecutor’s ordinance by which it was decided the release from criminal prosecution on the ground that the deed does not present the social danger of an offence (Art. 10 paragraph 1 letter b of the Criminal Procedure Code) confirms the legality of the prosecutor’s ordinance and reiterates, in fact, the finding of the prosecutor’s office according to which the claimant was made guilty of having committed with guilt a deed provided by the criminal law (non-declaration of the foreign currency held in his/her bank account abroad). By follow, the
European Court considered that the object of such a court decision may be equivalent with a „statement of guilt”, to the purpose of Art. 2 paragraph 1 of Protocol 7.

At the same time, guaranteeing the double degree of jurisdiction must be effective; the second degree of jurisdiction must satisfy the impartiality exigencies of a court, being required that the proceedings remedy should be independent from any discretionary power of the authorities and should be directly accessible to the parties concerned [2].

Amendments brought, in order to insure the celerity of the criminal trial, by law no. 202/2010

In order to insure the celerity of the criminal trial, a series of amendments were brought to the current Criminal Procedure Code by Law no. 202/2010 on certain measure to accelerate the trial settlement [3]. In fact, Law no. 202/2010 („the small reform”) was adopted both in order to insure the celerity of criminal proceedings and to prepare the implementation of the new codes, this law including some of the regulations included in the new Criminal Procedure Code (Law no. 135/2010).

1.1 The reduction of the number of degrees of jurisdiction

The reduction of the number of degrees of jurisdiction is among the legislative amendments brought by Law no. 202/2010. Despite the fact that our criminal proceedings system still maintains the regulation of the triple degree of jurisdiction, running through these three degrees is not a rule anymore, only some of the cases still being able to be tried in first instance, in appeal and in recourse.

In conclusion, in the current Romanian criminal proceedings system (even after the amendments occurring through „the small reform”) there is no case in which the trial on the merits is limited to a single degree of jurisdiction, not being possible the pronouncing in first and last instance of a conviction decision or which contains a „statement of guilt”, which means that the requirements of Art. 2 paragraph 1 of Protocol 7 to the European Convention are complied with.

1.2 Amendments in the matters of ordinary means of attack

Establishing the principle of the double level of jurisdiction for most criminal cases, Law no. 202/2010 operates changes also in the matters of appeal and recourse.

Thus, subjects to appeal are: the sentences pronounced by courts and by the territorial court of law that decided for the conviction, the acquittal or the ceasing of the criminal trial (and/or where the civil action was settled), as well as the closings given in a first instance trial by the courts (the territorial military court).

The recourse being, in certain cases, the third level of jurisdiction (consequent to the appeal) or, in other cases, the second level of jurisdiction (following the first instance trial), that means that decisions pronounced in appeal, but also sentences excepted from appeal by law, can be attacked with a recourse.

1.3 Amendments in the matters of the competence of the courts of law

Corollary to reducing the number of the degrees of jurisdiction, the Law no. 202/2010 operates substantial modifications in the area of regulating the competence of the courts of law. Thus, it is maintained the functional competence of the first instance court, as well as its material competence, meaning that the first instance court judges all the crimes, except those that are given, by law, in the competence of other courts.

The Law no. 202/2010 also assigns to the first instance court, the material competence to judge the crimes related to the regime of the intellectual and industrial property rights, which were in the competence of the tribunal.

Also, the crime of tax evasion, stipulated by the Art. 9 of the Law no. 241/2005, in order to prevent and fight against tax evasion, moves from the material competence of the first instance court, to that of the tribunal.

In respect to the competence of the tribunal, according to the current provisions (as they are amended by the Law no. 202/2010), this court has the functional competence to judge only in first instance and in recourse. The tribunal is no longer functionally competent to judge in appeal, as the decisions of the first instance court can only be submitted to recourse.

As recourse instance, the tribunal judges only the recourses against:
- sentences pronounced by the first instance courts for which the setting in motion of the penal action is made at the preliminary complaint of the injured party (for example, physical injury, threat, rape in the form incriminated by Art. 197, paragraph 1 of the Criminal Code, breaking and entering in the form incriminated by Art. 192, paragraph 1 of the Criminal Code;
- criminal sentences pronounced by the first instance courts in the matter of preventive measures (for example: court decisions that stipulate the prolongation, the revocation or the legal cessation of the preventive
arrest; court decisions that stipulate the replacement of the preventive arrest with the interdiction of leaving the locality or the country);
- criminal sentences pronounced by the first instance courts in the matter of temporary release (for example, the court decisions that stipulate the taking or the revocation of the temporary release under judicial supervision or bail);
- criminal sentences pronounced by the first instance courts in the matter of precautionary measures (for example court decisions that stipulate the taking or the revocation of the precautionary attachment during the trial);
- criminal sentences pronounced by the first instance courts in the matter of the execution of court decisions (for example, the sentences pronounced regarding an appeal to the enforcement, interruption the execution of punishment, merging sentences etc.) or of the rehabilitation.

There have been some changes also regarding the competence of the instances of appeal. Thus, in order relieve the burden of the High Court of Cassation and Justice. A series of crimes have passed from the personal competence of the High Court of Cassation and Justice into the personal competence of the Appeal Court:
- crimes committed by the leaders of religious courts organized according to law and by other members of the High Clergy, that have the rank of bishop or its equivalent;
- crimes committed by assistant-magistrates of the High Court of Cassation and Justice, by judges of the instances of appeal and of the Military Court of Appeal, as well as prosecutors from the prosecutor’s offices attached to the courts mentioned above;
- crimes committed by members of the Court of Auditors, by the president of the Legislative Council and by the Ombudsman.

By comparing these regulations with the stipulations of the new Code of Criminal Procedure, we observe that this time, the so called “small reform” no longer follows the guidelines of the new Code(According to Art. 40, paragraph 1 of the Law no. 135/2010, “The High Court of Cassation and Justice rules in first instance the crimes committed by the Romanian President, senators and deputies, by members of the Government or persons which are assimilated to these, by judges that are working at international courts, by EU MPs, by judges and assistant-magistrates of the Constitutional Court, by judges and assistant-magistrates of the High Court of Cassation and Justice, by judges of the instances of appeal and Military Court of Appeal, by prosecutors from the prosecutor’s offices attached to these courts, marshals, admirals, generals, as well as the persons that have a professional degree assimilated with the one of marshal or general”), purporting rather to temporary relieve the burden of the High Court of Cassation and Justice in order to strengthen its role cassation and unifying the jurisprudence. [4]

Also, as a result of these modifications, an exception occurs from the rule according to which the qualification of military judges and prosecutors attracts the personal competence of the military instances, for the crimes committed by military prosecutors of the Military Court of Appeal or by military prosecutors from the prosecutor’s offices attached to this Court, as the competence is granted to instances of appeal (as civil courts), and not the Military Court of Appeal (which will continue to have personal competence only for the crimes committed by military judges of the territorial military tribunal, as well as for the military prosecutors from the prosecutor’s offices attached to these instances.

The regulation for the functional competence of the Court of Appeal is maintained, as it became the only Court that can judge on all three degrees of jurisdiction. Thus, as an instance of appeal, the Court of Appeal judges the appeals formulated against penal decisions pronounced in first instance by the tribunals and in recourse, the Court of Appeal judges the recourses against penal rulings pronounced by judges in first instance, with the exception of those in the competence of the tribunal, as well as in other cases stipulated by the law.

Similarly to the dispositions on the competence of the civil instances, changes were made in respect of the competence of military instances. Thus, the Territorial Military Tribunal, as a recourse instance, judges the recourses against the decisions pronounced by military tribunals on crimes for which the setting in motion of the penal action is made at the preliminary complaint of the injured party, as well as the recourses against penal rulings pronounced by the military tribunal on the preventive measures, provisional release or the precautionary measures, of the penal judgements of the military tribunal, in aspects related to the execution of penal judgements, rehabilitation, and in other cases specifically provided by law.

The Military Court of Appeal, as a recourse instance, judges the recourses against judgements of the military tribunal in first instance, excepting those given in the competence of the territorial military tribunal, and in other cases specifically provided by the law.

The competence of the High Court of Cassation of Justice has also suffered some changes, after the “small reform”. As a result of the restraint of the personal competence, the supreme court judges in first instance the crimes committed by: senators, deputies, EU MPs, members of the Government, the Romanian President (for the crime of high treason), the judges of the Constitutional Court, marshals, admirals, generals, questors, members of the Superior Council of Magistracy, judges of the High Court of Cassation and Justice, as well as by the prosecutors from the prosecutor’s offices attached to the High Court of Cassation and Justice.
The sentence pronounced in first instance by the Criminal Division of the High Court of Cassation and Justice can be appealed against before the instance of 5 judges.

The changes regarding the competence of the courts of justice were also made by the Law no. 2/2013 on some measures to relieve the burden of the law courts, as well as to ensure the implementation of the Law no. 134/2010 on the Code of civil procedure [5]. In order to relieve the burden of the activity of the High Court of Cassation and Justice in solving all the transfer requests, some changes were made, to the institution of transfer request, as well as regarding the competence of the appeal courts of law and the High Court of Cassation and Justice.

The High Court of Cassation and Justice is still competent to transfer the judgment of a case from a court of appeal to another, and regarding the transfer from a tribunal or a first instance court to another court of same degree, the competence is of the courts of appeal (the court of appeal in whose circumscription these courts are).

The Military Court of Appeal disposes the transfer of a trial between military courts (Art. 55 of the Code of Criminal Procedure, modified by Law no. 2/2013).

The Law no. 2/2013 modifies the competence in solving a request for transferring a trial. Hence, besides the High Court of Cassation and Justice the courts of appeal also become competent in this matter. Seems that this is a temporary legislative solution, meant only to relief de burden of the activity of the High Court of Cassation and Justice, as the new Code of Criminal Procedure maintains the exclusive competence of the supreme court in this matter (art. 71-76 of the new Code of Criminal Procedure).

Also, the Law no. 2/2013 has supplemented the dispositions regarding the competence of the Court of Appeal and the Military Court of Appeal (Art. 281 and Art. 282 of the Code of Criminal Procedure), by adding the competence of solving the transfer requests, in cases specifically provided by law. Art. 29, paragraph 5, letter e of the Code of Criminal Procedure (which regulates the competence of the supreme court in solving transfer requests) was also modified, by adding the stipulation that it is competent of solving the transfer requests in cases specifically provided by law.

Amendments brought, in order to accelerate the criminal procedures, by the new criminal procedure code

In order to accelerate the criminal procedures, Law no. 135/2010 on the new Criminal Procedure Code [6] also brings amendments as regards the degrees of jurisdiction.

Therefore, in order to insure the celerity of the criminal trial and to accelerate to settlement of the criminal cases, under the conditions in which the guaranties in the stage of criminal prosecution and the trial in first instance will increase, in the matter of ways of attack, the new code provides the ordinary way of attack of the appeal, fully devolutive.

The instance of appeal will be able to administer again the evidences administered in first instance and it will be able to administer new evidences, being obliged, besides the grounds invoked and the requests formulated by the appellant, to examine the case and to check the decision of the first instance under all aspects as to fact or law (Art. 417 paragraph 2 of the new Criminal Procedure Code).

Therefore, the new Criminal Procedure Code maintains only one ordinary way of attack, offering efficiency to the principle of double degree of jurisdiction, provided by Art.2 paragraph 1 of Protocol 7 to the European Convention for the Prevention of Human Rights and Fundamental Liberties.

As regards the recourse, it will become an extraordinary way of appeal (under the name of recourse in cassation - it is made, therefore, the distinction between „recourse in cassation” –extraordinary way of attack that may have as effect cassation (abrogation) of the decision attacked and „recourse in law interest” – extraordinary way of attack that does not have effects upon the reexamined decision and upon the situation of the parties to the trial.), exercised only in exceptional cases and only for grounds of illegality. The recourse in cassation shall pursue the insurance of a unitary practice at the level of the whole country, through this extraordinary way of attack, whose settlement is exclusively in the competence of the High Court of Cassation and Justice, being analyzed the compliance of final decisions attacked with the rules of law, by reporting to the cassation cases expressly and restrictively provided by law.

References

Administrative vision on the situation of the romanian prison system by the end of the year 2012

Lupascu A.

George Bacovia University Bacau (ROMANIA) adrian.lupascu@ugb.ro

Abstract

The Romanian prison system is a public service that contributes to the defense, public order and national security of Romania, being responsible for the application of the detention system in the case of people who execute custodial sentences, and providing recuperative intervention under conditions which guarantee respect for human dignity. Through its functions, the prison system facilitates the empowerment and reintegration of inmates into society, thereby contributing to increasing the safety of the community, the maintenance of public order and national security [1].

Keywords: Romanian prison system, public service, administrative vision.

Introduction

The National Administration of Penitentiaries (ANP) coordinates the work of 31 prisons, 4 prisons for minors and young people, 1 prison for women and 6 sections specifically intended for women in prison, 6 units of penitentiary-hospital and 2 centers for re-education. Two staff training centers - Center for Formation and Training of the officers of the National Administration of penitentiaries Arad and the National School of Penitentiary Agents Ocna, a Supply, Management and Repair Base and a Subunit of Guards and Escorts for Transferred Inmates are also part of the Penitentiary Administration System [2].

In the last period, specifically during the year 2011 an upward trend in the number of detainees has been registered. The trend was maintained, so that in December 2012, the total number of persons deprived of liberty was 31.817 vs. 30.690 in 2011, and 28.244 in 2010.

The budget of the year 2012 for the whole penitentiary system was of 912.505 lei, while the limit for this year's budget is 846.653 lei.

The presentation of the issue

Taking into account the significant dynamic of the persons deprived of liberty, in relation to the Romania’s socio-economic context, the ANP has revised its activities and resources to respond appropriately, both to the needs of the persons found in detention, societies’ exigencies, as well to the international rules in the field of execution of sentences and measures involving deprivation of liberty.

So at the level of the institutions that make up the system of penitentiary administration the following objectives were established to be carried out:

1. Guaranteeing the safety of the penitentiary administration system and application of the prison regime.
2. Increasing the chances of social reintegration of persons who have committed offences and adapting the recuperative interventions to the needs of the inmates.
3. Ensuring quality health care, as well as protecting and promoting health and disease prevention.
4. Promoting a high quality institutional management.
5. Modernizing and development of infrastructure of the prison system.[3]

Resolution solutions

In order to achieve the objectives in question, at the central level and at the level of penitentiary units the following activities were conducted.
1.1 **The strengthening of the legal framework for regulation of the activity of penitentiary administration system**

So, the following normative acts were finalized:
- OMJ no. 3406/2012 approving the Personnel recording system of the penitentiary administration system;

Also, the following projects of normative documents are in the process of being developed:
- Draft order of the Minister of Justice concerning the criteria and procedure for application of remote electronic surveillance systems, in accordance with article 195 paragraph (1) of the H.G. 1897/2006; The Ministry of Justice has transmitted to the National Administration of Penitentiaries observations for the draft order. The recommendations were reviewed and included in the draft order by the specialists of the National Administration of Penitentiaries. The draft order is going to be relayed to the Minister of Justice in March 2013.
- Draft Order of the Minister of Justice for the evaluation of the individual professional performance of civil servants with special status; the final form of the draft is being prepared at the Ministry of Justice;
- Draft Order of the Minister of Justice regarding the Methodological Norms for granting the honorary sign "In Service of the Country" for civil servants with special status of ANP. The final form of the draft is going to be sent to the Ministry of Justice for approval.

1.2 **Profiling prison units subordinated to the ANP**

In this purpose, the young people from the Jilava Prison, Bucharest were relocated in the profile prisons, depending on their domicile.

1.3 **Improving the security system and monitoring of prisoners.**

In order to achieve this very important aspect, as elements of the service, canine units specialized in detecting drugs and mobile phones were implemented into 8 prisons. There were also purchased: 114 TETRA portable Terminals, 141 bulletproof vests, 430 semiautomatic pistols with lethal ammunition, caliber 9x19mm (including lined and ammunition), 15 pistols with non-lethal ammunition caliber 10x22 mm (including the frame and associated ammunition), a high-capacity specialized vehicle for 37+6 places for the transfer of prisoners, 600 pairs of safety shoes for the staff dealing with transfer; Also for this aspect the mobile operators and ANCOM were contacted, in order to exclude the regions were the prisons are located from the operating areas, in order to limit the use of mobile phones by inmates.

1.4 **Development of the conditions necessary for the exercise of the rights provided by law, of the prisoners reported to the enforcement regime set out**

The extension of the time interval for the visits to the maximum legal – 2 hours – was the greatest joy of the beneficiaries. At the same time the interval for telephone conversations was supplemented (30 minutes/day).[4]

1.5 **Modernizing the detention conditions in the ANP system**

CR Găești was reorganized into a penitentiary with open regime (estimated capacity 500 people) through the GD no. 1155/2012.

At the Iasi Penitentiary, a pavilion for the accommodation of inmates was given for use (capacity 200 people).

At the Juvenile and youth prison Tichilești a building was finalized (capacity of 312 people).

And the most important issue at this point, at Vaslui Prison a holding pavilion (510 people) was given for use, which basically meant that the prison was reconstructed.

Attempts to improve the detention conditions will continue throughout the year 2013, in order to comply with the European rules of detention.

1.6 **A particular attention was given to the monitoring of the causes in which Romania is a party at ECHR**

In this sense 46 cases pending before the ECHR have been investigated in the year 2012.
1.7 The development and implementation of a unitary system of assessment and intervention based on the needs of education and psycho-social assistance of the persons deprived of liberty

In this area two national projects have been developed and implemented (“Jail poetry”, “Multi-art Festival for prisoners”).

Another very important project, revised and implemented at the level of the entire prison system in three successive series was the Accreditation system of participation of persons deprived of liberty to activities and programs of education, psychological and social assistance, to lucrative activities, as well as in hazardous situations.

At the same time new programs were elaborated (printed and distributed): 6 educational programs aimed at minors, 2 education programs for youth; 2 educational programs for the general population; 1 specific psychological assistance program for inmates with a history of alcohol consumption; 2 reviewed educational programs.

To boost the educational activities 16 thematic projects were launched and implemented at the level of the entire system.

The revised edition "Collection of normative documents for the conduct of activities and educational programs and psycho-social assistance in penitentiaries" was made available for the teachers from penitentiary education.

Also the “Brochure on ways of working with a group” was developed and distributed in the units, as a basic element for the teacher’s work in the prison system.[5]

1.8 Developing, promoting and implementing a national strategy on social inclusion of persons deprived of liberty

Perhaps the most important aspect of the prison system has resulted in the preparation of the GD project for approving the National Strategy for Social Reintegration of persons deprived of liberty. This project is completed and submitted to public consultation, on the website of the Ministry of Justice.[6]

1.9 Developing partnerships which will facilitate the social reintegration of persons deprived of liberty

33 collaboration protocols at the national level and 2 at the international one were signed. 2 working sessions were held nationally and 32 locally, with the participation of representatives of public institutions and NGOs carrying out activities in the detention units, and as an element of international resonance an International Symposium was held (“Research and applications in psychology of the prison”).

1.10 Ensuring the optimum conditions in terms of specialized medical care for those deprived of liberty, in collaboration with the public health network.

In this respect the Targu Ocna Prison Hospital has been rated and accredited by the National Commission for Hospital Accreditation, but the most important achievement was the project "Telemedicine in prisons", implemented in the period April to September 2012, in the headquarter and 3 prison units (Prison Hospital Dej, Gherla, Oradea).[7]

1.11 A deficient aspect in the prison system is occupying the vacant positions in the ANP

So, 303 management vacancies were put up for contest (internal source) in 15 centers organized nationwide, which was attended by over 500 candidates. At the time this article is being redacted the contests have been finalized, except for the occupation of 72 vacancies for head officer, in the social reintegration, economic-administrative and operative field.

This process will be resumed according to the evolution of the legal framework, budgetary resources and the dynamics of the vacant management positions.
1.12 The implementation of a mentoring program for the staff without managerial experience, which occupied the functions of leadership, has begun

It was organized in 2 training sessions with the participation of 20 civil servants with special status.

1.13 Completing the schooling process in their own education institutions or belonging to the defense system, public order and national security

As a novelty item for the year 2013, 110 seats were approved for the training of prison officers and 264 seats for the initial formation of the penitentiary agents. During the year 2012 there were 247 schooled students (prison officers) and 313 students (prison guards) in the pre-university and University educational institutions.[8]

1.14 Launching the structure with a cross-institutional role relating to computerized application ORACLE RMS of resource management

In order to align the Romanian prison system to the European and international standards two draft normative acts were drawn up. Their main function was to finance the jobs relating to this structure by Memorandum (the increase of the staff number allocated by ANP with 64 posts). The current state of this objective was partly achieved, the projects being rejected by the MFP. Subsequently, a Memorandum draft was submitted to MJ, approved by MM and subjected to the approval of MPF, respectively the Government. The date March 31, 2013 is estimated to be the completion date.

1.15 Improving the documents underlying the performance of the activities of personnel psychology

In the last period, these activities have taken great momentum. This was materialized in the development of the Regulation on activities of personnel psychology.[9]

1.16 Carrying out of studies to detect risk factors and vulnerabilities existing in the Romanian prison system and their evolution trends

We can say that Romania joined the European trend. In this respect 4 specialized studies have been drawn up as follows:

a) Criminal Groups organized within the units of the penitentiary system;

b) Aspects concerning the types of powers and influences exercised by them at the level of detention space;

c) The phenomenon of illegal possession of mobile phones by inmates;

d) Possible negative influences exerted on prisoners by watching certain TV programs

1.17 The implementation of the National Anticorruption Strategy at the level of the ANP was also continued

In this respect the "Inventory of preventive measures against corruption and the evaluation indicators for the year 2011 and 2012, first semester." were drawn up.

1.18 The audit of the ANP system structures has begun.

Once every 3 years for all the activities that took place and annually in the case of high risk activities. During the year 2012, 12 public internal audit missions were conducted. This was done partially (14 planned missions), due to the reduced number of staff employed at the level of the ANP structure, and is expected to end on March 31, 2013.

1.19 The participation of the ANP representatives at the profile international events (EPEA, ICPA, MECR, EUROPRIS, ACA etc.)

In this context, 254 ANP representatives participated at 78 international events, 2 international events were held in Romania (ICPA, MECR) with 158 participants and have developed three cooperation agreements concluded with the prison administration’s abroad.
1.20 Accessing external projects with non-reimbursable financing

At the level of the central structure of the ANP it was established a specialized service that is coordinating this aspect, by successful accessing and implementing projects: EIDHR/2012/295-382 „Enhancing human rights based reforms in Libyan detention system” and FSE-PODCA "Integrated information system for the evaluation and monitoring of the management and security operational processes", the EEA and Norwegian grants. Also, currently there are other 10 projects under implementation, which will finish on September 30, 2013.

1.21 Last but not least, there is still work to be done on the modernization and extension of the integrated PMSWeb application for tracking the calculation of sentences and managing the prisoners' rights.

Two new modules were developed here: "Records on the detainee’s baggage, stored in the stores of the units" and "Planning system of the detainees’ transport between units". These two aspects are designed to considerably diminish the cost of resources consumed with these activities.[10]

Conclusions

By analyzing the situation of the Romanian prison system by the end of 2012, we have identified a number of difficulties such as: insufficient resources; delay in the entry into force of The New Criminal Code and The New Code of Criminal Procedure; steady increase in the number of detainees, lack of financial resources. Thus, ensuring budgetary funds to finance the work of the prison system in 2012 fell within the provisions of an undersized budget (allocated budget - 912 thousand lei, with only about 8% higher than in 2011), in the context of rising prices and increase in the number of detained people.

It is very clear that to meet the expectations and requirements of citizens, Romania, and hence the prison system, must follow, more sharply, the path of renewal and reform, in the sense that all public institutions must become more democratic, more transparent, more effective and more efficient. Thus, as any country integrated into a democratic and globally engaged Europe, Romania must comply exactly with the expectations of its citizens, regardless of nationality and without any kind of discrimination. It is now very clear that in Romania the critical spirit at the level of the mass began to work, so that the citizens no longer have just expectations, they require certainties, in terms of the quality of services provided by the institutions of the order and public safety. The increase in confidence of the citizens in the institutions of order and public security is directly influenced by the constant improving of the quality of services rendered by these institutions, irrespective of their location or their hierarchy.[11]

I consider that Romanian prison system requires the implementation of an appropriate system of quality management, because quality management especially means, action through anticipation and prevention of problems and nonconformities and, less, reaction through their correction. Quality assurance as part of quality management also means increasing confidence among beneficiaries and civil society and creating extra value. By applying to the consistent scale model of the Romanian Police, ensuring and improving quality, must be regarded as an ongoing process of analysis and evaluation, from different perspectives and multiple hierarchical levels, the way each institution from this system works, and the manner in which they respond to their own needs and expectations "clients and interested parties".

In the evolution toward total quality management (TQM) and excellence, ANP, like the Romanian Police must consider the application and consistent compliance with the fundamental principles of quality management in order to improve further the services provided and organizational performance in all subordinate structures. It is known that any weakness that affects the organizational system as a whole will bring the system to the level of performance of the weaker links.

Continuous improvement should be included in the manner of working of each of the organizational structures of the ANP and must constitute a direction of its own crops, assumed as a fundamental value. In addition, continuous improvement must be a management style unique to each leader of the prison system, irrespective of its hierarchical level, whose main characteristic, as regards to fundamental principles of quality management, is that it never ends.[12]

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Criminal repression in the context of the economic crisis and the maximization of crime at European and global level (May 9-13, 2013, Bucharest, Romania)

[12] Idem, pag. 263
Importance and necessity of international judicial cooperation in criminal matters in the current context

Modiga G.¹, Pocora M.²

¹"Danubius" University of Galati "(ROMANIA)
²"Danubius" University of Galati (ROMANIA)
georgeta.modiga @ yahoo.com, monicapocara@univ-danubius.ro

Abstract

Development of human society as a whole, the states and nations of the world was possible as a result of international relations were established and settled over time.

In bilateral or multilateral international relations, countries have made cooperation activities in a variety of areas, focusing on the economic, cultural, environmental, political, military and legal. Progress in all areas during the last century have imposed structural changes in world architecture, something which inevitably led to the creation of a new international order amid intensifying political dialogue that promoted peace, the need to respect human rights and fundamental freedoms, the principles of democracy and the rule of law.

International cooperation based permanent state principle of the independence and sovereignty and hence their domestic law, enshrined in the legal rules developed.

Over time, cooperation was achieved States under bilateral or multilateral legal instruments, resulting in agreements, conventions, treaties, etc.. These legal instruments have a regional character, regional or universal, according to the interests of the Parties, the magnitude and importance of the topic.

Keywords: legal instruments, transnational crime, judicial cooperation

Concerns in the international cooperation existed since antiquity (especially in military and commercial) developing and diversifying them into permanent, over time, according to the existing common interests at a time between different states.

A key element that led to the emergence and further development of international cooperation without which it could not conceive was the mutual trust in a well regulated institutional framework.

In this context, international cooperation is a means of self-help among different states, in different areas, specifically established by treaties, conventions, agreements and so on, ultimately aimed at protecting national interests, regional or global, in the principle of the independence and sovereignty of each Contracting Party.

International judicial cooperation in criminal matters only a specific area of cooperation activities between world states, vitally important area, which has become a necessity since the beginning of last century.

In its historical development, the company has constantly sought and found different ways to self-defence, which accounted for more than immediate reactions to a number of dangers that threatened peace or even existence. Dangers faced by human society can certainly be considered, but only in the general context determined by the overall development of society itself. Thus, some were dangers which threatened the very existence of a community peace or during slavery, others in feudalism and therefore more at this stage. Given the historical development of society, we find that these dangers are not identical; they are ultimately determined by a number of specific features of particular human community, regional, regional or global.

After careful consideration, we can say that in evolution, human society was and is threatened by a number of factors that can be generally divided into internal and external natural. Currently, it is difficult to assess which are the most dangerous threats to a community, requiring a rather complex analysis that ultimately will reveal that each threat as minor would be appropriate untreated immediate response in terms of society, can become a real danger in time, lower or higher. It is known that most of the times; the company acted after an event, taking take a series of measures of self-defence or coercion.

The unprecedented development of international relations in contemporary society has been accompanied by an increase also unprecedented international crime, the proliferation of forms of organized crime in several states.

Scientific and technical progress made, as well as enhancing the democratization process in several states created the possibility of movement of people and goods easily, thus leading to the development of human society as a whole. Unquestionably beneficial effect for the entire humanity, created some advantages for the possible range of proliferation crime phenomena worldwide.

The growing danger caused by the growth of transnational crime, the need to prevent and fight more effectively in a global organized, led to the adoption of international instruments zonal, regional and global efforts to unify the world states.
Thus, the United Nations Convention against Transnational Organized Crime, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and the Protocol against the smuggling of migrants by land, air and sea (both additional to the Convention) adopted in New York on November 15, 2000, set out a series of measures primarily aimed at international judicial cooperation in criminal matters aimed at preventing and combating more effectively (through a joint effort of Member) organized transnational crime.

Under this Convention, "organized criminal group expression means a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences covered by this Convention, to obtain, directly or indirectly, a financial or material benefit."

To avoid a unilateral interpretation of the state or another, the Convention defines the crime of "transnational" as that offence "is committed in more than one State;" - Is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another state is committed in one State but involves an organized criminal group that engages in criminal activities in more than one state or - Is committed in one State but has substantial effects in another State."

A particular danger to the security of states is the unprecedented growth of organized crime in all its forms of expression.

Current stage of development of human society face other hazards models, much different from those seen in previous historical periods. The largest and important in this regard is the danger of terrorism. About terrorism, although it is known in some form since ancient times, has been written and will write for a long time, because currently the most dangerous manifestation of organized crime. Contemporary terrorism is the most advanced form of organization and action in the service of anarchist groups, often religious, with claims of mostly political.

A general analysis of forms of international crime in the first place reveals diversification of methods of action, organization and logistics often perfect those involved in such events in the past 30-40 years, in addition to terrorism, they developed and other forms of crime, namely drug trafficking and consumption, arms trafficking, human trafficking, human trafficking, etc. Immigration purposes., criminal activity, even if not up to the dangers of terrorism, may the subject of analysis and concern at any state.

Romania joined the European Union since 1 January 2007 involved a series of new obligations imposed by other EU status, obligations focused on the need to contribute to ensuring a European area of freedom, security and justice to a high standard.

In this context, Romania became EU border country with the mission of ensuring the external border of Community States against illegal immigration, trafficking in arms, ammunition, drugs, radioactive substances, etc.

Schengen enlargement, which will include Romania, will create new facilities for easy movement without risk offender’s elements from corner to corner of Europe.

An absolute necessity is the improvement of the legislative framework aimed at further criminalizing acts committed in different villages States danger. Harmonization criminalization of acts of danger and discovery procedures, research and trial in the Member States, will allow the best conditions of safety climate civic.

The most important aspect in preventing and combating crime is the intensification and improvement of specific activities of identifying, catching and prosecuting the perpetrators of criminal acts. In addition to this very important bear in mind another, simplifying the teaching of persons who have committed criminal acts in other member states.

It is known that all persons who have committed criminal trying to evade responsibility established by law, adopting different strategies increasingly sophisticated, stretching from corrupt members of institutions with law enforcement to hide the in other states.

If in Romania, to join the European Union target criminals hiding elements that location only country or in some cases risk, other countries, illegally crossing the border by now, especially in the perspective of the Schengen area. Their running and hiding them in other Member States is much simpler, without involving any risk. At the same time, our country can become a space in which to flee to escape the consequences of the law, other elements offenders from other countries within the European Union, other countries that are not members of the Union or even other continents.

Legislative and procedural measures taken in the execution of laws must be consistent with the rights and fundamental freedoms enshrined in international legal instruments of the European Union

The unprecedented development of human society as a whole in the twentieth century paved the permanent developments in line with new scientific achievements in the field of crime unwanted.

In this context, emerged the growing crime increased, reaching a peak during the processing of complex forms of manifestation of organized crime, namely terrorism, production, trafficking and consumption of drugs, human trafficking, trafficking weapons and ammunition, counterfeit currency or other valuables etc.
In recent years, these complex forms of manifestation of crime have crossed the borders of a single state, manifesting itself in most situations in several countries or continents. Although difficult, states with democratic regimes known world understood, however, that the only way to achieve a better control preventive aspect (the phenomenon itself) is related to the implementation of the relevant international judicial cooperation.

Organised crime is now able to create great economic and political tensions, causing even the fall of governments, where it managed to enter the management structures of political parties in the ruling coalition.

Criminal organizations take full advantage of strong growth in international tourism, a certain relaxation in migration policy liberalization, free trade expansion, advanced communication equipment and not least money laundering technique to realize and protect goals.

Circulation facilities to citizens within the European Union, especially in the Schengen area, create other advantages criminal organizations. Moreover, due to difficulties experienced by the economies of many countries and especially in developing criminal organizations were directly involved in the processes of privatization, buying some companies sold some governments trying in this way to restart economies after long periods of national crisis. Thus, the purchase of banks that belonged to the state, production companies, and telecommunications services, served them as a shield covering their clandestine operations while contributing to increased power and influence in the contemporary world.

Crime Developed and always growing so-called "white-collar" is a particular danger, always present for the rule of law, because the heads of these structures have economic and political power to change certain decisions of governments to their advantage.

Currently, and in the future, the most serious threat to human existence is the resurgence of international terrorism which has reached an unprecedented scale, often affecting safety states, destabilizing national economies, organizations and institutions, the default the civilian population, panicked, frightened and outraged cruel and despicable means used by terrorists. The bloody events in recent years, culminating blow to U.S. on 11 September 2001 by members of the terrorist network "Al-Qaida", headed by billionaire Osama bin-Laden (considered responsible and bomb attacks on U.S. embassies in Kenya and Tanzania on 7 august 1998) while terrified and aware throughout humanity, in this context fall and terrorist attacks in Russia, Spain, England, Italy and Japan, resulting in significant casualties and property damage.

During this period, daily press plays through all media, in particular television, cruel consequences of acts of terrorism perpetrated by extremist elements in Iraq who do not want the establishment of real democracy in this country. Aircraft hijacking, attacks bacteriological substances, bomb attacks on trains or subways, suicide bombings are just some of the tools and sites used by terrorists in recent years.

Presence and proliferation concern international crime caused a reaction from the Member solidarity, making them aware of the need to strengthen cooperation in identifying specific activities, catch, arrest and conviction of those responsible.

The ultimate goal of judicial cooperation activities between different countries is to achieve a reduction in crime and therefore acceptable levels of security to their citizens.

The main problem that arises in the current acceleration of the globalization process is to coordinate national policies and strategies with the strategies, policies and regulations stated and accepted internationally.

In recent years, international judicial cooperation has seen new and diverse forms, some domestic legal rules enacted by other provided in various international treaties and conventions.

Specialists have developed defining international judicial cooperation, the institution appeared and manifested only quite active lately due to mutations that occurred in organized criminal activity and the need to prevent and reduce crime generated.

We appreciate that this institution can be defined broadly or narrowly, for the rather complex issues addressed.

Thus, broadly, the international judicial cooperation can understand that form of cooperation aimed at complex tasks by world governments to reduce crime and increase safety of citizens, working together, with each other and help to achieve specific activities as: extradition, surrender under a European arrest warrant, transfer of proceedings in criminal matters, recognition and enforcement of judgments, transfer of sentenced persons, mutual legal assistance in criminal matters or similar forms or rules established by laws, treaties, agreements, conventions or reciprocity.

Narrow by international judicial cooperation means a specific way of action by world governments act giving and mutual support in the forms established by law, agreements, treaties, conventions, to enterprise, proving criminal activity and punish perpetrators of acts proceedings and of the reduction of crime.

References

International cooperation in the fight against cybercrime

Moise A.C.

Spiru Haret University (ROMANIA) adrian_moise82@yahoo.com

Abstract

The development of Internet network created new opportunities for offenders in the computer field to commit remote cybercrimes, their presence not being necessary in the place where the victim is. Starting from the cross-border character of cybercrimes, in this article is carried out an analysis of the main judicial instruments in the field of fight against cybercrime. Moreover, it is carried out an analysis of the Romanian legislation regarding international cooperation in the fight against cybercrime.

Keywords: International cooperation, cybercrime, international judicial assistance, contact points network.

Cross-border character of cybercrimes

The phenomenon of cybercrime has a global dimension, characterized by multiple territorial relations. The offender in the field of computers is subject to the jurisdiction of a certain country, but his/her illicit actions may have as target computers and persons from several countries. Generally, offenders in computer field do not have to be present in the place where the victim is [1]. Due to the extension of communication networks, especially Internet network, it is impossible for any country in the world to fight by itself against this type of crime. The development of Internet network created new opportunities for perpetrators in computer field to commit remote cybercrimes. While the phenomenon of cybercrime does not take into account the conventional boarders established between countries, the law enforcement bodies have to observe them. In such context, it is required the international cooperation in the field of combating cybercrime among law enforcement bodies, in order to obtain results in the investigation processes. The international cooperation in investigating cybercrimes must be carried out with expediency.

The investigation of a cybercrime cannot be performed without formulating a request for international judicial assistance. The request for international judicial assistance supposes an issuing judicial authority and an executing judicial authority. Within the process of investigation of a cybercrime, the difficulty occurs when there is an offender and several injured parties who are in different States, sometimes even on different continent. The object of a request for international judicial assistance may be different: requests for rogatory commissions; video-conferencing; witnesses hearings; notification for judicial documents, etc. The request for international judicial assistance may be formulated both in the stage of criminal proceedings and in the stage of judgment. Thus, in the stage of criminal proceedings are sent from a State to other requests for identifying the holder of a certain IP (Internet Protocol) address or traffic data. In the stage of judgment the most common type of request is represented by the notifications of legal documents, respectively the summons which have to be sent to the victims of cybercrimes in order for them to take note of the development of the criminal process and to state whether to constitute or not plaintiff in a civil suit [2].

In case there is a multitude of victims and who are physically located in different jurisdictions, the international judicial ground which has to be invoked in formulating the request for international judicial assistance shall be different, considering the existence of some bilateral or multilateral judicial instruments which operate between the issuing State of the request and each of the executing States.

Convention of the European Council on Cybercrime

The Convention of the European Council on Cybercrime aims at supplementing applicable multilateral or bilateral treaties or arrangements existent between the Parties. The provisions of the Convention become applicable only in the situation in which between the requesting State and the requested State there is no other bilateral or multilateral judicial instrument in force at the moment of adoption of the Convention by the States-Parties (article 39).

Regarding criminal jurisdiction, there must be emphasized the fact that the States establish their own jurisdiction exclusively based on the national territory [3]. Nevertheless, not always is easy to establish the place
of perpetration of cybercrime. The establishment of jurisdiction is performed differently depending on the national jurisdiction, based on several criteria, such as: the physical location of the computer used in perpetrating the fraud; the residence of the perpetrator; the place where appeared the consequences of the illicit activities.

The States did not have in view the fact that a certain crime can be prosecuted in other State based on the territoriality principle of criminal law, this fact leading to the occurrence of positive conflicts of jurisdiction.

Article 22 of the Convention explicitly refers to the jurisdiction over the offences defined by this, in articles 2-11 (offences against the confidentiality, integrity and availability of computer data and systems; computer-related offences; content-related offences; offences related to infringements of copyright and related rights). In article 22 paragraph 1 of the Convention is stipulated the principle of territoriality. Regarding this principle, it is noticed the fact that the authors of the Convention have not established criteria regarding the place of perpetration of the cybercrime in virtual space [4]. Article 22 paragraph 1 letter d refers to nationality. The theory of nationality refers to the obligation of the citizens of a State to observe its laws even in the situation when they are outside the territory of the State. Thus, if the citizen of a State perpetrates a crime abroad, then shall be applied the criminal law of the State where he/she came from, on condition that the perpetration be stipulated as crime also by the criminal law of the State where has been perpetrated the fact, even if the crime has been perpetrated outside the territorial competency of each State [5].

General principles relating to international cooperation referred to in Article 23 of the Convention establish the obligation for the States-Parties to cooperate to the widest extent possible for the purposes of investigations concerning criminal offences related to computer systems, as well as for obtaining digital evidence. In addition, Article 23 finds that general principles do not apply only in investigations of computer-related offences, but in any other investigation where evidence in electronic format must be collected. Provisions related to international cooperation do not replace the provisions related to international arrangements on mutual judicial assistance and extradition or relevant provisions of domestic law relating to international cooperation.

Principles relating to extradition are referred to in Article 24 of the Convention and are based on the principle of double criminality. Out of the fundamental principle of legality, established in criminal law by the adage nullum crimen, nulla poena sine lege arise also a condition essential to grant extradition, the condition of double criminality [6].

As for the mutual judicial assistance, we notice that the most important provisions of article 25 are stipulated in paragraph 3 of this article, which emphasizes the importance of expedited communication in investigating computer-related offences. Article 25 paragraph 3 stipulates the use of fax and e-mail in emergency cases, on the condition that these means of communication provide appropriate levels of security and authentication (including the use of encryption, where necessary) and with formal confirmation to follow, where required by the requested Party. The requested Party shall accept and respond to the request by any such expedited means of communication.

One of the most important regulations of article 26 of the Convention, relating to spontaneous information, is related to confidentiality of information. Prior to providing such information, the providing Party may request that it be kept confidential or to be used only on certain conditions. If the receiving Party cannot comply with such request, it shall notify the providing Party, which shall then determine whether the information should nevertheless be provided.

Procedures pertaining to mutual assistance requests in the absence of applicable international arrangements are regulated by articles 27 and 28 of this Convention. If other judicial instruments in the way of mutual assistance are already in force, the provisions of articles 27 and 28 are not relevant within the framework of such request. When other regulations are not applicable, articles 27 and 28 provide a set of mechanisms which can be used to make mutual assistance requests.

Mutual assistance in the way of provisory measures is encompassed in the provisions of articles 29 (Expeditied preservation of stored computer data), 30 (Expeditied disclosure of preserved traffic data), 31 (Mutual assistance regarding accessing of stored computer data), 33 (Mutual assistance regarding the real-time collection of traffic data), 34 (Mutual assistance regarding the interception of content data) which represent a reflection of procedural instruments of the Convention of the European Council on Cybercrime. Thus the Convention encompasses many procedural instruments destined to investigations of offences in the field of information technology, comprised in articles 16-21 (article 16 - Expeditied preservation of stored computer data; article 17 - Expeditied preservation and partial disclosure of traffic data; article 18 - Production order; article 19 - Search and seizure of stored computer data; article 20 - Real-time collection of traffic data; article 21- Interception of content data).

Legislators of the Convention have established in article 32 of the Convention the situations in which the law enforcement agencies are allowed to access computer data which are not located on their territory and are not under the control of a person on their territory. The two cases where law enforcement agencies are allowed access to stored computer data outside their territory, without being necessary to request mutual assistance, are related to: information available to public; access having the consent of the lawfully authorized person. With regard to the second case in article 32, access to computer data having the consent of the person...
who has the lawful authority, we emphasize the fact that this authorization has been criticized [7]. Through the mediation of article 18 of the Convention, the legislators allowed to the investigation bodies to order the transmission of computer data. This procedural institution (Order to make available data) cannot be applied within the cross-border investigations, as the appropriate provision within the Convention in the chapter relating to international cooperation, is absent [8].

In order to improve the efficiency of mutual assistance requests, the legislators of the Convention obliged the Parties to designate a contact point for the mutual assistance requests, which is available without limit of time. The 24/7 network of the points of contact stipulated in article 35 of the Convention answers to the provocations related to fight against cybercrime, by increasing speed of communication between the points of contact and the acceleration of processes of investigation by authorizing the point of contact to carry out rapidly certain investigations. Article 35 of the Convention stipulates the direct application of the following measures: technical and judicial assistance; preservation of computer data; collection of evidence; locating of suspects. Moreover, in article 35 paragraph 3 of the Convention it is specified the fact that the points of contact shall have a trained and properly equipped personnel in order to facilitate the operation of the network.

We emphasize that this Convention does not define the body which should be responsible for the operation of the contact point in each Member State.

Consequently, considering the analysis carried out over the Convention of the European Council on Cybercrime, I find out that the provisions of the Convention in international cooperation are not operational all the time, as there are situations frequently met when have priority of application other multilateral or bilateral instruments pre-existent to the Convention. Therefore I believe that this Convention, the most important international judicial instrument in the field of fight against cybercrime, should be signed and ratified by as many States as possible, especially non-European States, so that will become an instrument with global applicability which can allow expedited cooperation among the Member States in the field of investigation of cybercrimes.

**United Nations Convention against Transnational Organized Crime**

This Convention encompasses provisions relating to international judicial assistance in criminal matters in article 18, which are applicable as long as the States-Parties do not have other treaty applicable in international assistance and the offence is perpetrated by an organized crime group. If these States-Parties are bound by such treaty, are applicable the provisions appropriate to it, unless the State-Parties agree not to apply instead of them the provisions of paragraphs 9-29 of Article 18. The States-Parties are especially encouraged to apply these paragraphs if they facilitate cooperation.

**Interpol**

Interpol has made efforts to help Police departments in entire world in fighting against cybercrime. In order to reach this goal, Interpol has developed a network of points of contact (Interpol National Central Reference Points-NCRP-), which permanently provides assistance to its members [9]. These reference points adopted the plan of 24/7 network of points of contact of the European Council Convention on Cybercrime. Therefore, this network is destined to provide and exchange information towards its members as fast as possible, through the mediation of some channels specific to Interpol, and also to provide technical and operational support.

**Convention of the European Union Council on Mutual Assistance in Criminal Matters between the Member States of the European Union**

This Convention allows the communication of procedural documents by mail and regulates modern forms of assistance: hearing by videoconference, controlled deliveries, cross-border surveillance, spontaneous exchange of information. In addition, the Convention allows direct contact between requesting judicial authorities and requested authorities of the Member States. Article 6 of the Convention stipulates as modality of transmission of requests for mutual assistance modern means of communication, such as: fax and e-mail.

This judicial instrument is used by the Member States of the European Union also in the causes in the field of cybercrime, as the deadlines are shorter and the requirement of expediency is easier to observe.

**Framework Decision of the European Union Council 2002/584/JAI on the European arrest warrant and the surrender procedures between Member States**

Framework Decision 2002/584/JAI on the European arrest warrant and the surrender procedures between Member States eliminates the administrative stage specific to classical procedure of extradition, and the cooperation in
the field of surrender of the persons who avoid criminal proceedings, judgment or execution of punishment is strictly performed by the judicial authorities in the European Union States. By this Framework Decision is eliminated the requirement of verifying double criminality for a list of 32 offences where are encompassed the computer crimes.


The goal of the Framework Decision 2008/978/JAI is to improve judicial cooperation by applying the principle of mutual recognition of court judgments under the shape of a European evidence warrant. In case there is needed the carrying out of a search or seizure for the execution of an European evidence warrant, there is a series of offences which are not subject, in no situation, to verification of the condition of double criminality, among these offences being also the computer crimes [10].

**Europol**

The aim of Europol is the investigation of offences in the field of organized crime, presented in an annex to the Decision of the European Union Council 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol), where are encompassed the computer-related offences. Out of the objectives of Europol in the field of cybercrime investigation, it can be mentioned the granting of support to Member States in the processes of collection and analysis of information in Internet network with a view to identifying crime activities facilitated by the Internet network or perpetrated through the Internet.

**European Judicial Network**

European Judicial Network represents a network of contact points between the Member States of the European Union, chosen among the judicial authorities or other authorities with responsibilities specific in the field of international judicial cooperation in criminal matters. The aim of the European Judicial Network is to improve judicial cooperation in criminal matters between Member States of the European Union, both at the legal and practical level, in order to combat serious crimes. The principle which lies at the basis of the European Judicial Network consists in the identification of the relevant persons in every Member State which plays an essential role, in practice, in the field of judicial cooperation in criminal matters, with a view to creating a network of experts in order to ensure the appropriate execution of requests for mutual assistance. The European Judicial Network has a special signification within the context of applying the principle of direct contacts between competent judicial authorities.

**Romanian legislation on international cooperation in the fight against cybercrime**

In Romania, domestic law has transposed qua tale most of the provisions of the European Council Convention on Cybercrime. The provisions of the Convention have been included in Law no.(number) 161/2003 on some measures to ensure transparency in exercising public dignities, public functions and in business environment, prevention and sanction of corruption, more precisely in Title III of this law regarding prevention and fight against cybercrime.

Thus Law no.302/2004 on international judicial cooperation in criminal matters transcribes the provisions of the Framework Decision of the European Union Council 2002/584/JAI on the European arrest warrant and the surrender procedures between Member States as well as the provisions of the European Council Convention on Cybercrime.

The aspects of international cooperation are described in the articles 60-66 of Law no.161/2003. The provisions of article 26 of the European Council Convention on cybercrime relating to spontaneous information have been transcribed in article 66 of Law no.161/2003, as well as in article 166 of Law no.302/2004. In addition, the provisions of article 28 of Convention relating to confidentiality and restriction of use have been transcribed in article 12 of Law no.302/2004. At the same time the provisions of article 27 paragraph 2 letter c of Convention have been transcribed in Law no.64/2004 on ratification of the European Council Convention on Cybercrime and in Law no.302/2004, being established the Romanian central authorities which receive and send the requests for judicial assistance: a) Prosecutor’s Office near the High Court of Cassation and Justice, for judicial assistance requests relating to activities in the stage of investigation and criminal proceedings; b) Ministry of Justice, for judicial assistance requests which have as object the extradition and transfer of convicted
or if are related to the activity of judgment or to the stage of execution of court judgment; c) Ministry of Interior, judicial assistance requests relating to criminal record certificates.

The provisions of article 35 paragraph 1 of Convention have been transcribed in article 62 of Law no.161/2003 and in Law no.64/2004, which stipulate the designation of Service for prevention and fight against cybercrime within the Directorate for the Investigation of Organized Crime and Terrorism related Offences within the Prosecutor’s Office near the High Court of Cassation and Justice, as contact point destined to ensure immediate and permanent international cooperation in the field of fight against cybercrime.

References


Criminal repression in the context of the economic crisis and the maximization of crime at European and global level (May 9-13, 2013, Bucharest, Romania)
Methodology of investigating offences against public health

Nechita E.A.

Social Sciences Department, Faculty of Law and Economics, Agora University of Oradea, Oradea (ROMANIA)  
departament@univagora.ro anaelena2009@yahoo.com

Abstract

The author’s aim with this article is to provide some considerations regarding the methodology of investigating offences against health. In this respect, the article contains definitions of the concepts of public health and public health assistance, the offences against health being presented comparatively in light of the Romanian Criminal Code in force at the time of writing the article and of the New Romanian Criminal Code, with a highlight on the elements of novelty introduced by the legislator. The investigation is customized depending on the social relations being protected, the objective side of the offences in this area, the factual ways of committing the offence and the sequence of criminal activities, the period of time and the consequences these activities have. Crime scene investigation, the hearing of persons of different legal standings, the sanitary and hygienic expertise, biological expertises, the forensic medical expertise, forensic and chemical expertises, sometimes supplemented by searches, presentations for recognition, reconstruction, all these complete the methodology part.

Keywords: forensic investigation, health, treatment, prevention

Introduction

In a world where, at the level of the individual and of the community, health and its role are understood differently depending on the level of education, social class, religion, or membership in a social group in close relationship with the economic possibilities of the respective individual or family, problems that arise in the field of health are quite varied.

In Romania Law no. 95/2006 on public health reform (updated) states from Article 1 that the field of public health is an issue of high social interest. Public health assistance is achieved by political and legislative measures, programmes and strategies meant to determine the state of health of citizens, as well as by organizing institutions that provide services in this field. The purpose of public health assistance is to promote health, the prevention of illness and the improvement of the quality of life.

Health is in the attention of the legislator also from the perspective of criminal law. From the provisions of the Romanian Criminal Code, both in the General Part (e.g. the measure of compulsory medical treatment) and in the Special Part, it becomes obvious that, on the one hand, fundamental human values of the person, such as life, health and physical integrity, are being protected, and, on the other hand, the social relations necessary for a good social cohabitation, in conditions of safety of the community health, by reducing the risk of spread of infectious diseases, spread of certain illnesses, water infection, the trafficking and consumption of toxic substances or the falsification of food products.

The national statistics for 2008-2010 regarding new cases of disease arising per 100,000 inhabitants, show that, for example: a decrease in syphilis: 2008 – 18.7 cases; 2009 – 15.1 cases; 2010 – 10.9 cases; a decrease in food poisoning: 2008 – 8.3 cases; 2009 – 5.0 cases; 2010 – 4.4 cases; a decrease in trichinosis: 2008 – 2.3 cases; 2009 – 1.7 cases; 2010 – 0.9 cases.

A brief review of offences against health from the perspective of criminal law

In the Romanian Criminal Code in force at the time of writing this article (March 2013), the offences against public health are contained in Chapter II of Title IX entitled "Offences against social relations of coexistence” and in the new Romanian Criminal Code [1], the offences covered by this study are grouped in Chapter V of Title VII entitled "Offences against public safety".

Comparative Analysis of Article 308 of the Romanian Criminal Code in force and Article 352 of the new Romanian Criminal Code. Article 308 provides for the offence of Thwarting disease control defined as non-compliance with measures for the prevention and combat of infectious diseases, if it has resulted in the spread of such a disease. It is punishable by imprisonment from one month to two years or a fine. Article 352 of
the new Romanian Criminal Code provides for the same offence in two paragraphs. Thus, paragraph 1 introduces a new term, the combat of "infectious-contagious" diseases, and increases the special minimum penalty from one month to six months and paragraph 2 brings elements of novelty regarding the subjective side, by expressly providing for the possibility of the occurrence of the offence mentioned in paragraph 1 by negligence, in which case the penalty is imprisonment from one month to six months or a fine.

Comparative Analysis of Article 309 of the Romanian Criminal Code in force and Article 352 of the new Romanian Criminal Code. Article 309 is entitled Venereal contamination and transmission of the acquired immunodeficiency syndrome. In paragraph 1, this is defined as the act of transmitting a venereal disease through sexual contact, through sexual relations between persons of the same sex or through acts of sexual perversion, by a person who knows he/she suffers from such a disease, the penalty provided by law being imprisonment from one to 5 years. Paragraph 2 criminalizes as an offence the act of "transmitting the acquired immunodeficiency syndrome – AIDS – by a person who knows that he/she suffers from this disease", the punishment being imprisonment from 5 to 15 years. Paragraph 3 states that the court will order the safety measure of compelling to medical treatment. In the view of the new legislator, the above two paragraphs are transposed into two separate articles, namely:

- Article 353 refers only to venereal contamination in two paragraphs, namely those of Article 309, paragraph 1 regarding the objective side is taken over in the new article and punishment is reduced so that the special minimum is of 6 months and the maximum is of 3 years. Another novelty is the introduction of the alternative penalty of fine. In the new regulation the safety measure of compulsory medical treatment is maintained, the contents of paragraph 3 of Article 309 becoming paragraph 2 of Article 353;

- Article 354 refers only to acquired immunodeficiency syndrome transmission which brings the following new elements. In the case provided for in paragraph 1, the active subject is a person who knows that he/she suffers from this disease, the punishment being imprisonment from 3 to 10 years, the attempt is punishable according to paragraph 5 of this article and, in the case provided for in paragraph 2, it is a person other than in paragraph 1, this being the aggravated form of the offence, representing a greater social threat, punished by imprisonment from 5 to 12 years, with attempts punished in this case;

- Paragraph 3, Article 354, provides for the aggravated form of the offence resulting in the death of the victim – the penalty is imprisonment from 7 to 15 years;

- Paragraph 4, Article 354, on the subjective side, provides for the situation where the offence referred to in paragraph 2 has been committed by negligence, the punishment being imprisonment from 6 months to 3 years, and, if it caused the victim's death, the penalty is imprisonment for 2 to 7 years.

Comparative analysis of Article 310 of the Romanian Criminal Code in force and Article 355 of the new Romanian Criminal Code. Article 310 is entitled Spreading diseases to animals or plants. The text of Article 355 takes over the content of Article 310, with the following changes: in paragraph 1 it replaces the expression "infectious diseases" with "infectious-contagious diseases", it eliminates from among the consequences the phrase "other serious consequences" and inserts paragraph 2, which provides another penalty for the offence committed by fault, in which case the special limits of the punishment are reduced by half.

Comparative analysis of Article 311 of the Romanian Criminal Code in force and Article 356 of the new Romanian Criminal Code. Both articles provide for the offence of Water infection. The new legal text brings as a novelty the reduction of the special maximum of the sentence from 4 years to 3 years and the sanctioning of the attempt. On the objective side, "and" in paragraph 1 of Article 311 is replaced by "or" in the new text in the phrase infection by any means "of water sources or networks."

Article 312 of the Romanian Criminal Code in force provides toxic substances trafficking as the act of "production, possession or any operation related to the movement of toxic products or substances, the cultivation for processing purposes of plants containing such substances or experimenting toxic products or substances, all without right ".

The Romanian Criminal Code in Article 313 provides for the offence of Falsification or substitution of food or other products and the new Romanian Criminal Code provides in Article 357 for the offence of Falsification or substitution by other foods. Article 313 penalizes the act of "Preparation of food or beverages that are falsified, altered or prohibited from consumption, harmful to health, the exposure for sale or the sale of such food or beverages, knowing that they are falsified or altered or prohibited from consumption"; "the falsification or substitution by other goods or products, if by this falsification or substitution they have become harmful to health"; "Making available for public consumption meat or meat products from the slaughter of animals circumventing veterinary control. " The consequences should be: illness of the person or the person's death or injuries differentiated depending on the number of days of medical care or any of the consequences referred to in Article 182, paragraph 1.

Article 357 – Falsification or substitution of food or other products in paragraph 1 refers to the act of "Preparing, offering or exposing for sale food, beverages or other products falsified or substituted, if they are harmful to health" and, in paragraph 2, to "Preparing, offering or exposing for sale counterfeit or substituted medicines that are harmful to health."
Article 358 of the new Romanian Criminal Code provides for the offence of Trading altered products taken from the text of Article 313 of the current regulation, provided for in paragraph 1 as the Sale of food, beverages or other products knowing that they are altered or having exceeded the period of validity if they are harmful to health; in paragraph 2 "the release for consumption of meat or meat products from the slaughter of animals circumventing veterinary control, if they are harmful to health" and in paragraph 3 "The sale of medicines knowing they are counterfeit, altered, or having exceeded the period of validity, if they are harmful to health or have lost all or part of their therapeutic efficiency".

Also, Article 359 – Trafficking of toxic products or substances of the new Romanian Criminal Code – criminalizes the act of "Production, possession, and any operation related to the movement of toxic products or substances, the cultivation for processing purposes of plants containing such substances or experimenting toxic products or substances, without right ".

Romanian special legislation contains provisions that indirectly protect public health. For example, according to Law No. 535/2004 on Preventing and Combating Terrorism [2], Article 32, paragraph 3, acts of terrorism are also the acts of "introduction or spread into the air, soil, subsoil or water of products, substances, material of any kind, microorganisms or toxins likely to endanger human or animal health or the environment or in order to cause fires, floods or explosions which have the effect of endangering human life" if committed for the purposes described in Article 32, paragraph 1, of the present law, namely: in order to intimidate the population or compel a public authority or international organization to perform, not to perform or abstain from performing a certain act, or to seriously destabilize or destroy the fundamental political, constitutional, economic or social structures of a country or an international organization [3].

**Peculiarities in the investigation of offences against public health**

For the correct qualification of an offence and individualization of the penalty, the case should be documented both through the investigation of the crime scene and the collection of objects/documents. The gathering of data and information, the preparation of the crime scene research, the carrying out of the tactics activities and the exploitation of evidence and means of evidence in the criminal proceedings should take place in compliance with the provisions of the Romanian Criminal Procedure Code and of the forensic procedures.

In general, the starting point will be to notify the authorities about the committing of an act and to interpret the first known data in order to distinguish the offence from others that are similar, by proving the constituent elements of the offence, and to determine the investigative bodies competent in the case.

Depending on the offence, the purpose of the investigation will be to determine in what context and by what actions a certain medical measure was not observed, failure that led to a state of danger for others, including the contamination of people. It will also determine how the person avoided the medical treatment, by what means, who helped/ if someone helped him/her, what means of transportation he/she used if he/she left the locality, who noticed and when that he/she did not attend treatment or take the prescribed medication. In the case of the offence of venereal contamination and acquired immunodeficiency syndrome transmission, the investigation will determine the factual modes by which contamination occurred, the number of people who were infected, during what period of time, the area in which the active subject acted, the places he/she goes to and the people he/she met. There are cases where the identification of the persons involved is slow because some victims, for various reasons, do not want to be known. In the case of the spread of plant and animal diseases, action will be taken to determine the zoning of the contamination, the animals, the plants contaminated, looking for the affected areas, the people involved, the treatments that should have been carried out, the measures that should have been taken to avoid the spread of the contagious diseases. Also, water sources will be checked, who had access to certain areas, which are the substances or pathogensdangerous to humans, whether and in what concentration were certain substances used, the technical state of the means used to purify the water. In the case of food or beverages that are falsified, altered or prohibited, the case will be documented by determining how the products, food, beverages, meat or meat products were prepared, counterfeit, substituted, released for consumption, if there was a veterinary control performed, by whom and under what circumstances, if samples were taken correctly, within the recommended time, which is the identity of the persons involved in the process of slaughter and production. Also, there will be a checking of the approvals necessary for the functioning of the slaughterhouses and shops in which the activities related to the persons involved in the case take place.

In all cases hearing the people having different legal standings is compulsory, an activity which may reveal the number of people involved, their identity, the sequence of specialized controls for obtaining or renewing the specialized approvals required for the carrying out of certain activities or for the authorization of certain spaces, how the security of the persons under treatment was ensured, if the active subject had knowledge of the fact that he/she suffered from a certain disease.

There are cases when passive subjects suffer injuries to their health, physical integrity or die. In these cases forensic medical expertises are required to determine the amount of medical care, establish the cause of death, the time when the physical injury occurred, the impact the ingestion of poor quality or adulterated food...
products, meat and meat products had. Forensic medical expertise is also used to determine the state of health of a person or the degree to which his/her health was affected, for example in the case of deaths by intoxication [4]. Also, biological, chemical, sanitary hygienic expertises can be performed. The causal link between action/inaction and the result produced should be determined and, when the offences are threatening, proving the danger to the community’s health is enough.

The searches, the catching in the act, the surveillances, the collection of objects/documents are procedures that help establishing the facts, the mode and means used in committing the offence, the persons involved, the damage caused, the degree of social danger created.

The traceological expertise, the technical and graphical expertise of the documents complete the process of investigation, especially in situations where the offenders falsified documents, labels attesting the quality and validity terms of certain products, food or water quality.

In practice, there are cases in which biological and chemical agents and radioactive substances can be dispersed into the air, water or on the surfaces that we touch. As a result, there may be chemical incidents characterized by the occurrence of medical symptoms or signs easily observable, biological incidents characterized by symptoms of hours and days and radiological incidents characterized by the appearance of certain symptoms within days, weeks or even later, as the case may be. The first intervener must recognize the presence of dangerous goods and immediately seek the help of personnel qualified in the field. It will also announce the Inspectorate for Emergency Situations, the police and gendarmerie, which will transmit the emergency measures to be taken at the scene until specialized crews reach the area.

Collecting as much data about the event as possible, from the identity of the person who notifies the incident, his/her phone number, the place of the incident with its peculiarities and the nature of the problem arising, the name and identification number of the goods in question [5], the carrier’s name, the number of vehicle registration, the type and size of the container, the amount of freight transported and discharged, to the local and weather conditions, the number of people injured or affected, the authorities in the area that were announced, helps preparing the research on the site in the best possible conditions, forming a proper research team and reducing the risks both for the interveners and for the people and plants in the area affected.

As not all the details about the event are known, the exposure time should be reduced and people should be kept as far away from the scene of the incident as possible. Once on site, the situation should be assessed, clarifying the following aspects: if it is a fire, spill or leak, what are the weather conditions, what is the nature of the land; who or what is at risk: people, material goods or the environment; what measures are to be taken: evacuation, excavation of pits, trenches, erecting a dam; the human, material resources and what measures can be taken [6].

Conclusions

Criminal law in Romania criminalizes acts which affect public health, a field of high social interest. Documenting the case, determining the factual modes of the committing of the crimes, the consequences produced and the forensic medical, chemical, biological, forensic expertises, alongside other tactical activities, the hearing of persons, searches, seizure of objects/documents, catching in the act, presentations for recognition are essential in the determination of guilt and penalty individualization.

References

[3] Law No. 206/2012 for the implementation of the new Criminal Code;
[5] The United Nations Organization has developed a coding system that allows immediate identification of dangerous goods being transported and of the danger they represent;
The fiscal paradise the offshore legislation versus the romanian legislation

Necsulescu I.

Law and administration school  “ Spiru Haret” University

Abstract

Everybody heard about the economy globalization, about the relocation of companies, but there are less those ones that understood this evolution of society implies new rules. From this perspective to invest in offshore seems to be the last resort for who wants to preserve the gain. Tax heavens are the new trampolines for business.

Key words: offshore legislation, legislation, tax.

It is important to ask ourselves: “Do individuals, in their capacity of businesspersons, have any legal ways at hand to fight taxation?” The answer would be “Yes!” - the offshore companies. This answer generates another question: “What is an offshore company?” An offshore company is a business organization whose owners are not residents in the state where the company is incorporated and the profit comes from different activities conducted outside the jurisdiction of the state where that company is based. There is also a third characteristic: regardless of the business or profit, that company is tax-exempt or pays a lowered or fixed tax of merely some hundreds of dollars.

Offshore companies are usually limited liability business entities. Such companies are set-up especially owing to the following advantages: reduced taxation, control confidentiality and protection against government intervention. [1]

There are various legal forms that offshore companies may take: companies of the holding-type, mother companies and notional companies.

Holdings do not carry out any business activities, but they own a participation portfolio. If, at a certain point, the tax conditions offered by the territory where the group is located become less interesting, the holding can easily dissolve and transfer their logistics to a more welcoming state.

Mother companies don’t carry out any business of their own either. They are incorporated in countries that have a lower fiscal pressure and they manage the treasury of those who created them. They succeed in concentrating and managing all the commercial and financial gains realized by the branches and offices of the founding group in the countries with high taxation levels. [2]

Notional companies (screen companies) are in fact mere post boxes existing nearby some bank, an accountant or lawyer’s office. Their main purpose is to allow the realized gain to be transferred to the refuge countries and to render the fiscal auditing of that company in the group difficult.

The offshore legislation

Such terms as tax heaven and offshore legislation are much used in the current language. These terms are indissolubly linked, owing to the fact that tax heavens could not exist without said legislation.

The tax heaven includes any state that levies no tax or low taxes on all or certain categories of income, that has a certain level of bank or trade secrecy, minimal requirements from the part of the central bank and no restrictions whatsoever in relation to currency exchange.

Therefore, a tax heaven offers natural and legal entities the legal means to avoid paying taxes or, if they have to pay taxes, those taxes are very low. [3]

Tax heavens are, generally, small entities or states that become place of refuge for low income persons. They spread significantly during the 60s, at the same time as the multinational companies with foreign (E.g.: Starting in 1994, pursuant to its own legislation, Hungary allowed the incorporation of certain offshore entities.) branches appeared.

Currently, an inter-state competition is noticeable worldwide to attract foreign investment to the national economies. In this sense, most of the states are struggling to build less burdening fiscal systems.

Romania couldn’t sit on the fence and, through the establishment of the free economic zones (we have a tradition in this sense - from 1800 to the beginning of the 1900s the ports of Braila, Galati, Tulcea and Constanta were free ports.), it has tried to assume certain particularities of tax heavens.
Law 84/1992 has reinstituted the legal status of the free economic zones through the establishment of 6 such free zones: Agigea, Braila, Curtici, Galati, Giurgiu and Sulina.

Article 11 of Law 84/1992 stipulates that, based on certain licenses or permits issued by the administrations of the free ports, all natural or legal entities, whether Romanian or foreign, may carry out the following activities:

- Exchange operations, and financial and banking operations
- Building lease and concession for terms of maximum 50 years
- Vessel supply
- Provision of services
- Sale and purchase operations
- Handling, storing, packing, processing and manufacturing activities
- Sales by auction
- Organization of exhibitions
- Construction of economic facilities and hotels

Relying on the same law, free zones or ports benefit from a number of easies or advantages:

- The means of transport, merchandise and other goods from abroad or destined for other countries that are entered or taken out of the free zones are exempt from the payment of the customs charges and other duties or taxes.
- Business entities are exempt from the payment of the purchase tax, of excise duties and profits tax for any activities they carry out in the free economic zones for the entire duration of their activity.

It was also in 1992 that the legal provisions regarding the purchase tax were abrogated through the Government Decree no. 3/1991. Later on, in 2000, the Government Decree no. 17 on the value-added tax established a comprehensive regulation of this indirect tax. It was also stipulated by this Decree that all the specific activities carried out by the authorized tax payers in the free zone were VAT exempt [4].

The same normative act instituted sanctions for the persons who breached its provisions [4]. Thus, the following constituted an infringement or contravention:

- The introduction of goods or merchandise without accompanying documents in the free zones or ports;
- The performance of other activities than the licensed ones;
- The performance of other activities than those stipulated in the Resolution of Establishment of the Free Economic Zones.

In what the enabling of the economic development of certain zones is concerned, the “disadvantaged zones” have been established. Their legal status was initially regulated by means of the Emergency Government Decree no. 24/1998, amended by the Emergency Government Decree no. 75/2000, approved, with its amendments, by means of Law 621/2001. More amendments were subsequently made [5].

The fiscal benefits of these zones are:

- Exemptions from customs duties and VAT for the machinery, equipment, installations, means of transport and other amortizable assets that are imported for investment purposes in the zone;
- Exemptions from VAT for any machinery, equipment, installations, means of transport and other amortizable assets manufactured in the country, for the purpose of making and running certain investments in the zone;
- Exemptions from customs duties for imported raw matter for production in the zone;
- Exemptions from profits tax for the lifetime of the disadvantaged zone;
- Exemptions from taxes levied upon the change of destination or removal of certain plots of land from the agricultural circuit to allow making the investment.

In Romania there are also other normative acts that grant natural or legal persons different fiscal facilities or benefits, especially the lowering of or exemption from the profits tax.

- Law 32/1994 on sponsorship;
- Government Decree 70/1994 on the profits tax, with its subsequent amendments;
- Government Decree 26/1996 on the granting of advantages or easies to the persons who reside or work in certain localities in the Apuseni Mountains (the Western Carpathians) and in the Delta Dunarii Biosphere Reserve;
- Government Decree 63/1997 on the establishing of certain easies to allow the development of rural tourism;
- Government Emergency Decree 66/1997 on the exemption from the assessment on income and/or the income tax for foreign consultants who work in Romania within the framework of certain borrowing relations;
- Law 89/1998 – Agricultural Law;
Nevertheless, Romania suffers from the lack of foreign investors. Why do they not come here? The answer is relatively simple: legislative instability, excessive bureaucracy, the absence of certain fiscal advantages or eases to really stimulate autochthonous or foreign investments in the Romanian economy and, last but not least, corruption. These are the relevant elements that might affect the stability and the economical and financial interests of our country.

On the other hand, we find the tax heavens offered by countries like Cyprus, Costa Rica, Caymans and many others. These countries created for the companies a specific and legal climate for lowering or even total exemption of taxation in a manner that renders the fiscal auditing of the authorities from the countries of origin. There are around 70 tax heavens in the world. Some of them has disappeared, (Hong Kong) some of them are just about to disappear and some of them are recently born or reborn.

The judicial and financial structures were until now, an obstacle for the small and medium companies to migrate to such tax heavens, but the growing taxation from countries of origin spurred the “relocation” of these companies to tax heavens.

The paradigm of the contemporary society resides in the state incapacity to exercise its normative function and also the lack of judicial tools to counter the expanding criminality and especially the “white collar” crimes.

References

European evidence warrant

Palcu P.¹, Moisa A.²

¹Prosecutor’s Office attached to the Court of Law Arad Romania. “Vasile Goldiş” Western University of Arad (ROMANIA)
²Legal Adviser Prietenia Arad Foundation (ROMANIA)

Abstract

The Council of the European Union adopted a frame resolution on the European evidence warrant taking into account the increase of the cross-border crimes at the borders of the European Union and on the other hand, the terrorist attacks from USA in 2002, from Spain in 2004 and from the United Kingdom in 2005, which proved the need of an improvement of the mutual judicial assistance. It is a step forward regarding the replacement of the slow-acting procedures of the traditional judicial cooperation with a consolidated procedure based on the mutual recognition of resolutions and decisions issued by a Member State, which shall be executed by a legal authority in another Member State.

Key words: European warrant, mutual recognition, freezing evidence, legal authority.

Introductory notions

Following the steps forward to a better European integration in terms of consolidating cooperation between the Member States made by the Treaties from Maastricht in 1992 and Amsterdam in 1997, “the key element” in this area was the reunion of the European Union Council from Tampere in October 15-16, 1999, which, for the first time, was dedicated exclusively to subjects such as justice and internal affairs.

One of the common beliefs was that the progressive elimination of border controls within the European Union (EU) facilitated both the free movement of citizens and the actions of transnational criminals. To meet the challenge posed by international crime, the E.U. was to prepare new forms of cooperation in this field, particularly through the development of tools based on the principle of mutual recognition, which shall be applied to both court resolutions and other decisions of judicial authorities. [1]

Besides taking into consideration a rapid procedure for extradition without violating the right to a fair trial, there was another issue addressed: that the principle of mutual recognition should apply to pre-trial resolutions, with special reference to those that allow competent authorities to act quickly in order to obtain evidence and to seize easily transferable goods. In this context, the evidence gathered legally by the authorities of a Member State was to be admitted in the courts of other Member States, with a minimum of formalities to be fulfilled.

The principle of consolidated reciprocal recognition

Starts from the assumption that the resolutions to be acknowledged and executed always comply with the principle of legality, subsidiarity and proportionality, but also help in overcoming the difficulties arising due to the diversity of legal systems of the Member States. [3]

1.1 Efficiency parameters:

Considering that mutual recognition has different forms and is required in all stages of criminal proceedings, some parameters for determining its effectiveness have been set:

- If the measure is to be applied generally or is limited only to certain severe crimes;
- If the condition of a double incrimination is maintained or waived;
- The existence of mechanisms for safeguarding the rights of third parties, victims and suspects;
- If the resolution is executed directly or indirectly;
- Determining the reasons and grounds for which the recognition can be refused
- If the states have agreed on the liability regarding acquittal [2].
1.2 Measures necessary for the mutual recognition program

The program for introducing mutual recognition mechanisms for the criminal resolutions must be approached only by taking into consideration the following measures:

- observe the principle of “ne bis in idem” and assess the final resolutions in the criminal record of the offenders (eventually setting a Central European Criminal Record Office);
- recognise and execute the resolutions regarding the preservation of evidences and the freezing of assets.

Such measures are aimed to provide the admissibility of evidence, to prevent their disappearance and facilitate the execution of search warrants and seizure, so that evidence can be immediately administrated in a criminal trial.

During 2003-2008, the E.U. Council adopted ten frame resolutions which are highly important for the judicial consolidated cooperation by which the Frame Resolution 2008/978/JAI as of December 18, 2008 on the European evidence warrant to obtain objects, documents and data to be used within the criminal procedures. [4]

The European Evidence Warrant Methodology

1.3 Objective and definitions

Even since 2003, the U.E. Commission has presented a proposal to create a European evidence warrant, but at that stage it was known that they could not obtain clear evidence from suspects, witnesses, defendants and victims. As they failed to reach a conclusion, in the Hague Programme in 2005, the Council reaffirmed its intention to adopt a Framework Decision in this regard.

The idea that underlies DC 2008/978/JHA is that the European evidence warrant (EEW), is an order that would be issued by a judicial authority of a Member State and whose decision is directly recognized and enforced by a judicial authority of another Member State. Thus, the fast and sure enforcement is granted.

According to the Framework Decision, EEW can be used to obtain the evidence necessary in a domestic criminal case, only if in terms of national law it would have had equal basis in this regard. The requested evidence must be relevant and conclusive for the settlement of the case and proportionate to the purpose of proceedings.

In Article 1, EEW is defined as "a court decision issued by a competent authority of a Member State in order to obtain objects, documents and data from another Member State to use them within certain procedures."

1.4 Procedures for which an EEW can be issued

Regarding the procedures for which an EEW can be issued, Article 5 provides the following:

- a criminal proceeding or pending criminal proceeding must be initiated regarding an offense under the issuing State;
- the decision of the issuing authorities may be subject to an appeal in criminal matters;
- if the initial procedures refer to a business entity, if its liability is regulated in the issuing State.

1.5 Authorities which may issue an EEW

As specified before, it is obvious that the enforcement authorities cannot issue an EEW. Moreover, art. 2 of the Framework Decision, besides defining the "issuing State" and "executing State" specifies the following: "Issuing authority" can only be a judge, a court of law, an investigating magistrate, a prosecutor or other judicial authority acting in the respective case or leading the investigation according to internal competences and who can be entitled to order evidence obtention in cross-border cases:

"Executive authority" is an authority, such as a judge (investigating magistrate) or a prosecutor in a particular court or the Prosecutor’s office, which under the national law has the possibility to recognize or enforce the judgment or order from the EEW.

In Romania, depending on the issuing authority, the executive authority will most likely be a judge if the warrant comes from a court of law, and a prosecutor, if a document is requested during the prosecution.

1.6 The scope of EEW

In terms of EEW scope, the EEW can be issued to obtain, in the executing State, the evidence needed in the issuing State, even if it is already in the possession of the judiciary authorities, provided that such evidence exists.
The search or seizure procedure includes any criminal procedure measures in which an individual or business entity is required, under legal constraint, to provide or participate in providing objects, documents or data, measures which, in case they are not complied with may be enforceable without the consent of such person or can result in sanctions such as confiscation of evidence, evidence warrant by a public authority, house searches etc.

Thus, the EEW can be used neither for taking statements, hearing the suspects or witnesses, etc. nor for analysing available objects, documents and data, except for hearing the witnesses present during the execution of the warrant.

The executing authorities cannot be requested to perform any sampling of biological material, including DNA samples and fingerprints.

The interception of communications, the surveillance under cover or the monitoring of banking accounts shall be required by the general procedure of mutual judicial assistance. These constraints are motivated by the fact that some states have different regulations on hearings, and for the person who does not want to answer the questions during the interrogation, his/her right is violated by wiretapping.

The Framework Decision also addresses the issue that the executive authority can find other evidence than those requested, but which are relevant to the settlement of the case from the issuing State. In this case, the evidence taken shall be sent, whether or not provided in the EEW.

1.7 Content and form of EEW

EEW standard form, contained in the annex to the Framework Decision, shall be signed and confirmed, following which it shall be translated into the language of the executing State and sent to the competent authorities by any means which allow a written record or under any conditions which allow the determination of its authenticity.

By bilateral treaties, the states may include contrary provisions to these rules on the possibility of transmitting an EEW, or on other formal requests.

1.8 Acknowledgement and execution of the EEW

According to art. 11 of the Framework Decision, the executing authorities shall recognize an EEW without any other formality required and shall forthwith take enforcement action as if they had a similar situation in accordance with national legislation. There are some situations when the issuing State requires compliance with specific rules of procedure to be followed in accordance with their legislation, to be used as evidence in court.

Example: In Austria, for searches at home, a lawyer must be called.

Therefore, such procedures must be complied with according to the law of the issuing State, except for the situations that imply the obligation to adopt coercive measures contrary to the legislation of the executing state.

Each Member State shall ensure that the measures available in national cases, including search and seizure, are compatible for the performance of an EEW. Regarding search and seizure, if the issuing authority is not a judge, a court of law, a magistrate or a public prosecutor or if an EEW has not been validated by one of the competent authorities of the issuing State, the executing authority may refuse to search or seizure but only after consulting the competent authority.

1.9 Grounds for the recognition and execution

Grounds for non-recognising or denying an EEW are limited and the principle of double incrimination is maintained only in situations that require a search or seizure. In case of serious crimes, the warrant shall not be subjected to double incrimination. [5]

Among the grounds for non-recognition, the first specified is the violation of the principle of "ne bis idem" and other reasons refer to immunities or privileges which would make the execution of an EEW impossible.

Another reason to refuse the execution of an EEW can also be the case when the enforcement is not possible by means of the executing authority.

Example: In Romania, a fraud was committed by a foreigner with damage of 1000 Euro, the Romanian Prosecutor cannot issue an EEW to obtain the data of the foreign bank account holder in case the law of that country prohibits opening of the bank accounts for damages less than 3000 Euro.

The Article 13 of the Framework Decision provides that recognition and enforcement of an EEW may be refused if the EEW relates to offenses which:

- are considered, under the law of the executing State, as having been committed wholly, partly or mainly in its territory or in a place equivalent to its territory;
have been committed outside the territory of the issuing state and the legislation of the executing state does not allow the initiation of any judicial proceedings in respect to such crimes when they are committed outside the territory of that State;

If recognition / execution of an EEW would harm the essential national security interests or involve the use of classified information, the executing State may refuse to execute the EEW.

Finally, an EEW can be refused if the attached form is not completed correctly or corrected within a reasonable time determined by the executing State.

1.10 Principle of double incrimination

This principle applies only in cases where it is necessary to conduct a search or seizure. In addition, the offenses relating to taxes, customs and currency exchange, recognition or enforcement may not be refused on the ground that the law of the executing State does not impose the same kind of taxes or the same regulations as the law of the issuing State.

Article 14, par. 2 provides a list of 32 offenses considered serious, in which the maximum penalty is at least three years but provides a custodial sentence, in which case it is not necessary to verify the double incrimination, if a search or seizure is necessary. On this list of crimes, one has to check in standard form the offenses for which the criminal investigation is pursued or for which it is sent to the court for trial according to the law of the issuing. [6]

1.11 Grounds for delaying or recognising the execution of EEW

For delay and recognition/enforcement of an EEW, two delay grounds are provided:
- the form provided in the Appendix is incomplete or inaccurate until it is corrected or completed;
- if an EEW was not validated until it is validated;
The Framework Decision provides two grounds regarding the execution of an EEW:
- its execution might prejudice criminal investigations or prosecution;
- objects, documents or data concerned are already used in other procedures and will be submitted when no longer needed for this purpose;

Initially, it was agreed that this should be implemented by the Member States by January 19, 2011 and the text of the law should be sent to the General Secretariat of the Council and Commission.

Conclusions

An EEW has both advantages and disadvantages. Its implementation in national legislations was delayed, primarily because there are very few grounds for refusing the recognition and enforcement of an EEW, as the sovereignty of Member States is limited. Another important issue is the lack of harmonization of EU legislation.

A major disadvantage is that EEW does not include taking statements, taking into consideration that requests for hearings are a large part of the procedures for mutual judicial assistance and this circumstance could decrease the importance of an EEW in practice.

From the point of view of a defendant and third parties, remedies against an EEW are not provided, so that the rights to a due process are violated. Besides, Germany required the adoption of another Framework Decision and the notification of the Commission to the European Parliament was already specified that "the rights of defence shall be consolidated.” This point of view of the committee is vital and necessary, not only to ensure that individual rights are observed, but also to sustain mutual trust between Member States and the trust of citizens in the E.U. [7]

In Romania, the Framework Decision on the European evidence warrant has not yet been implemented by a special law, but many of its provisions are found in the regulations on the freezing and confiscation of Law 302/2004 on international judicial cooperation in criminal matters.

Considering the objections formulated by most Member States, but especially by Germany, the EU Council, within the Stockholm Reunion, asked the Commission to draw a report on the possibility of further harmonisation of offenses, in terms of their definition and the principle of double incrimination. An express reference was made in this regard to serious offenses, listed in article 14, as well as to the remedies and rights of defendants and third parties.

The European Union Council invited the Commission to introduce new models, based on the principle of mutual recognition and flexibility of the traditional system of mutual legal assistance. These models should include more types of evidence and have a wider field of application, only then reaching a real European Evidence Warrant (EEW), replacing all other legal assistance tools and being recognised and applied in all EU Member States.
Bibliography

[3] Ibidem note 2 page 16
The international cyber-criminality in the context of the global economic crisis

Paraschiv G.

Craiova Faculty of Law and Administration, Spiru Haret University, Bucharest (ROMANIA)
gavril.paraschiv@yahoo.com

Abstract

In a world controlled by the internet, power has become asymmetrical. Small groups may achieve major damage, with small efforts. The issues from the IT security are accentuated by the economic crises and the attacks, spam, phishing will be increased.

Key words: financial and economic crisis, cyber-criminality, fraudulent operations, international systems

Preliminary considerations

The IT revolution was compared with the industrial revolution, referring to the impact upon society[1]: except the electrification, no other technological invention affected the manner in which people live, work, learn, communicate or make business.

The IT systems play a vital role in the modern organisations as they provide the necessary information, as well as their processing and disseminating capacities, which are strictly necessary for fulfilling functional requests, irrespective of the context or domain of activity [2].

The tendency of the human nature to cause damages and follow what the passion dictates was largely recognised and disputed, from the time of Aristotle and until the modern commentators [3], and computers create new possibilities in this sense [4].

In the specialised literature, there are various opinions referring to the defining of the IT operations, terms such as „cyber-crime”, „computer crime”, „computer-related crime” or „high-tech(nology) crime” which are used alternatively [5], without a precise definition [6].

The doctrine considers that there are two categories of IT offenses: those in which an IT system is targeted in view of unauthorised breach, dissemination of IT contaminants or the refusal of the service and traditional offenses, such as: fraud or pornography, which are facilitated by a computer. Moreover, we can distinguish 4 categories of IT offenses: theft of money, financial instruments, services or valuable data, obtaining unauthorized computer services, illegal use of unauthorized software and obtaining computer data.

The IT offenses were also classified as: offenses against a computer (for example, unauthorised access), offenses in the computer (for example stocking illegal material) and offenses via computer (for example, certain frauds, achieved by means of e-mail messages) [2].

THE accentuation OF THE INTERNATIONAL CRIMINALITY IN THE CONTEXT OF THE GLOBAL CRISIS

The phenomenon of the transnational criminality increasingly attracts the attention of the national governments and international organizations.

By its nature alone, the organized crime, in the context of the global crisis, tends to extend itself permanently, being used in all types of transactions, legal or illegal, with the conditions that they are profitable and that they offer the possibility of recycling the funds obtained. It intends to achieve power, to destroy the barriers in its way by using all means possible. [8].

The revolutions which took place in the Central and Eastern Europe removed the barriers which divided the world, and the technological revolution from the IT domain, as well as the explosion of the international investments and commerce hastened the globalisation process; the communication and transport systems revolutionised the business and finances, as the transactions were increasingly performed by internet networks.

These mutations influenced the context in which the commercial companies operate, but in the same time, created new and tempting possibilities for fraudulent operations, which are also favoured by the
amplification of the financial and economic global crisis. For example, the banking system „off-shore”, not only eroded the capacity of the states to resist the speculative attacks against the national currency, but also largely facilitated the money laundering operations. Moreover, the internationalisation of the stock exchange has made the attempt to pursue the “hot cash” even more difficult” [9].

The recrudescence of the computer - crime and the appearance of the cyber -terrorism attacks determines change so the security solution market, in the context of the aggravation of the global crisis. If in the real world it is said that criminals are always a step ahead the men of law, in the virtual law, they seem to be ten steps in front of them and the authorities make no headway.

The year 2008 marked the explosion of illegal activities on the internet and words such as cyber-criminality or cyber-terrorism were notions which define a more and more dangerous reality. („We are dealing with a true course of armament”, affirmed Eugene Kaspersky, general director of Kaspersky Labs, another player on the IT security solutions market... Unfortunately the It criminality is a business with reduced risk. Writing a software is relatively easy, you do not have a real connexion with the victim and it does not feels like putting one’s hand in somebody else’s pocket”.)

The real dimension of this real industry is not known, but there are estimations that it amounts to approximately 100 de billion dollars, and the global financial crisis will intensify this phenomenon which already involves hundreds of thousands of people who are working in organised networks– approximately 80% of the mails sent globally are malign, which reveals how much energy is consumed in the world with the cyber-crime activities.

In conformity with the F-Secure analysis, the number of viruses and malign software (malware) which are spread on the internet has increased this year with 200%. Moreover, from the year 2005, computer espionage became the new tendency in the IT criminality.

The main tendencies which are manifesting presently include the control of the infected computer networks, with which various attacks can be triggered on the targets, as well as identity theft („If a year ago, in Romania, one web page of 25.000 was infected, in the month of October of the present year, we observed that one Romanian site out of 200 contained a malign code”, warns Eugene Kaspersky.)

According to the study Report on Underground Economy of Symantec, the leader of the solution market regarding the security of the internet, which held under observation the servers of the underground economy during the period 1 July 2007 - 30 June 2008, 41% of these were located in USA. On second place in this classification comes Romania, which in the period mentioned hosted 13% of the servers (The monitoring of these activities is extremely difficult, as this type of server on which the cyber-criminals develop their activity is active for maximum six months, and after that, the sever is changed.)

During the reporting period, the information provided referring to credit cards represented 31% of the total „goods” on sale”; moreover, this was the most wanted category (24% of the total requests).

The most expensive attack instruments were the botnet programs, which were sold at a medium price of 225 dollars. The hosting services of the phishing sites were offered foe a medium price of ten dollars, and the average price for a keystroke logger (keypad reader) offered in the underground economy was of 23 dollars. With these prices, from cyber-criminality to cyber-terrorism there was only a step, as almost anyone could afford to command a botnet type network which could trigger an attack on the date and time established, to any company or institution and block its activity. The most renowned cases are the attacks on the Estonian, and recently, the Georgian authorities, during the conflicts with Russia. “Although everybody suspects the Russians, it seems that the attacks were triggered by hackers, without actually knowing that an official command or group of anarchists was behind the plot” [10].

At the beginning of the year 2007, Estonia was the victim of a cyber-attack of gigantic proportions. This is one of the most independent Internet countries in the world, as 96% of the total bank transactions are achieved on-line, and its citizens manage to pay their parking place using only their mobile phones.

All cybernetic attacks reached their climax when Hansabanka, the biggest European bank was forced to conclude its online banking operation, on the 10th of May 2007, closing hundreds of ATMs. Practically, Estonia severed her connexions with the rest of the world.

South Korea was also attacked by the internet various times. Thus, in the year 2009, a series of attacks were launched against the governmental and financial sites, and at the beginning of the year 2011, even more attacks began. For example, on the 12th of April 2011, a cyber attack paralyzed the network of the Nonghy bank, for over a week.

On the 19th of April 2011, Sony began to investigate a cyber attack, which was very carefully planned and extremely sophisticated, designed to steal personal information from the credit cards, in illegal purposes.

It was discovered that the data on the e-mail addresses and the credit cards were stolen from the accounts of 77 million users, and as a result of the investigation, it was established that information was being stolen from other 24,6 million persons that loved on-line gambling games.
The current activity of the cyber criminals offers convincing proof that the modern IT systems may be easy to hack and many of these systems were already compromised.

The computers and infected USBs have already introduced viruses in numerous existing systems, and the structure of the internet practically makes the identification of the source impossible, in case of a well executed attack. Thus, it is essential that the governments protect the military control systems, those verifying the financial networks, the money transfer systems and the networks which involve the electric control. (Firstly, the important systems should be disconnected from the external network and all Internet services suppliers should install inspection programs for the data packages.) Moreover, the regulating agencies should possess the power to impose certain standards for the cyber-security of the enterprises. (“We require a more ample understanding of the phenomenon as to avoid a cyber crisis in the following years equivalent to the present in amplitude”, affirms Antonio Maria Costa, executive director of the Drugs and Criminality Office within the United States)

Many companies will oppose these actions, and numerous persons will be concerned related to their lack of intimacy and the issue of government intrusion in the private lives of the population will be raised[11].

Conclusions

The USA is presently one of the most vulnerable and tempting markets for cyber-criminals. This country has an extremely developed commercial infrastructure which is internet dependent[13].

The Americans live in a world which can not function without Internet, and North Korea is the first which could attack it.

Cyber-criminality may provoke as much damage in the following years, as the credit crisis in the present, if the international institutions will fail to improve the regulations.

The criminal organizations exploit the legislative vide and the harmful effects of crisis in the majority of the countries, as well as the vulnerabilities of the systems – the most frequent deviations being the theft of personal information, money laundering, hacking card accounts[14].

Romania embodies a very organised legislation as to fight the IT criminality, says Marco Gercke, lawyer, law professor and specialist in the legislation against cyber-criminality. If measures are not taken against the internet piracy, Romania might suffer, and the internet users will be blocked on the major sites[15].

Each state has legal regulations which establish their own law order, however, they must similarly submit to the international legal regulations, in its connexions with various states or other subjects including public international law[17].

In a world governed by "WWW", the 3rd World War might be cybernetic, thus the best weapon the governments present in order to win the war is defence.

If a cyber-criminal manages to deactivate your military command and your control system, he will shut down your supply network and will succeed in making your telecommunication system collapse, you have no more weapons to fight or defend yourself.

Without these systems, the state would be powerless, as the telecommunications, logistic systems, where the shelves of the supermarkets would be empty and gas stations would be closed.

If the leaders of the great international powers will fail in successfully implementing a defence strategy against the cyber-criminals, the world will lose the 3rd world war[11].

References

Manifestations of criminality at an international scale, in the context of the economic crisis

Paraschiv D.S.

Râmnicu Vâlcea Faculty of Law and Administration, Spiru Haret University, Bucharest (Romania)
drept_vl.paraschiv.daniel@spiruharet.ro

Abstract

The financial and economic crisis, which has manifested itself for several years in numerous countries of the world, favours, the increase of the transboundary criminal phenomenon, with negative consequences regarding the defence of the international legal order.

Key words: financial and economic crisis, international criminality, legal order.

Introductory notions

In the context of the economic and the financial crisis with an international character, an increase in the criminality phenomenon in the majority of the countries on the Globe can be observed.

Thus, scientists have discovered that, at a global level, each increase with 1% of the rate of unemployment corresponds (generally) with an increase of 0,8% of the suicides within the persons with the age under 65 years. Moreover, the number of murders also records an increase with 0,8%, while the victims of traffic accidents decreases with 1,4%; which, in absolute terms, would correspond to an excess in suicides in the EU countries, equal with 1.740 cases of deaths correlated with the abuse of alcohol, which equals 3.500 cases [1], as well as murders.

The economic recession and the rate of unemployment may lead to a significant increase in the level of criminality. When the rate of unemployment increases, people are less involved in activities which should keep them away from committing offenses. Moreover, the decrease of the standard of living, the lack of activity and the unemployment might worsen the family relations.

On the other hand, the rate of unemployment, “may cast a shadow” on institutions, which are tempted to elude fiscal laws [2].

Except the international crimes stricto sensu and distinctly from these, the international community incriminated by international conventions and other facts which represent a social peril at the international level, such as: terrorism, illegal placement or usage of weapons, racial discrimination, the apartheid, slavery, torture, illegal experiments on human subjects, producing serious and international damages related to the environment (committed in other circumstances than those specific to crimes against humanity, war crimes or genocide), piracy, traffic and production of drugs, traffic of obscene publications [3], theft of nuclear material, illegal usage of the post, the interference with submarine cables, forgery and counterfeiting currency, corrupting the official foreign officials etc.[4]

Aspects concerning the increase of criminality in some countries, due to the economic crisis

Crisis situations actually represent planetary businesses for the mafia. Criminal clans are aggressively penetrating the American banks as to recycle millions of dollars. In Greece, the criminal benefit from corruption and make “businesses” with carburant. In Spain, they are infiltrated on the real estate market and are targeting immense profit, such as the Eurovegas project. It actually represents a dirty economy, camouflaged in the sanctuaries of the great finances.

The mafia capitals benefit from the economic crisis as to infiltrate themselves in the legal economy, in a capillary method. They do not only represent the effect of global crisis, but also the cause, as they are present in economic flows from the very beginning of the crisis.

In December 2009, the chief of the UN Office for Drugs and Criminality, Antonio Maria Costa, revealed that he possessed evidence in conformity to which the gains of the criminal gains represent the only unique capital of liquid investments that the banks benefited from during the crises in 2008, as to avoid collapse.
In conformity with the estimations of FMI, between January 2007 and September 2009, the American and European banks lost over a million dollars in toxic assets or non-performing loans, and over 200 mortgage lenders went bankrupt. Many major credit banks also went bankrupt or were commissioned by the government. Thus, it is possible to identify the exact moment in which the Italian, Russian, Balkan, Japanese, African and Indian criminal organizations became crucial for the international economy, this being the second half of 2008, when liquidity became one of the major issues of the banking system. The economic system was practically paralysed due to the refusal of the banks to grant loans and only the criminal organisations seemed to possess immense quantities of money which could be invested and recycled.

The organised criminal organizations has more and more influence on the Italian economy, during the economic crisis, making the mafia become one of the largest “banks” in the country, bringing damage to hundreds of small enterprises. In conformity to a report which fought against the SOS Impresa criminality, the loans with exorbitant costs taken from criminal groups became “a national urgency”. With liquidities of 65 de billion de euro, the Italian mafia became the number one bank of the country. The mafia groups such as Cosa Nostra in Sicily, Camorra in Napoli or ‘Ndrangheta in Calabria have a great influence on the Italian economy, generating profits equivalent to 7% from the Italian PIB.

Crediting at exorbitant costs became a sophisticated and profitable source of income, along with drug trafficking, weapon smuggling, prostitution, gambling and forgery. The perfect victims of these mafia groups are small companies, strongly hit by the economic crisis and which require money in order to survive. It is estimated that, 200.000 of these companies loaned money from the groups of organized criminality[5].

Mafia groups speak many languages, make alliances with groups across the ocean, work in joint-venture and make investments just like any other legal multi-national. It is almost impossible to respond to colossal multi-nationals by local measures, as the mafia capitals must be firstly destroyed, their economic motor, which is more difficult to follow as it represents a tempting capital for many in times of crises, and mainly for Banks [6].

A recent study elaborated by two Colombian economists, Alejandro Gaviria and Daniel Mejia from the University in Bogota, revealed the fact that 97.4% of the income originated from trafficking drugs in Columbia was regularly recycled by banking circuits in the USA and Europe, by various financial transactions. Billions of dollars are involved. The recycling was performed by a system of shareholder packages, a mechanism of “Chinese boxes” by which cash money are transformed in electronic titles which pass from one country to another, and when they reach the other continent, it seems to be clean and especially difficult to trace. Thus, inter-banking credits started to be systematically financed with money from rug traffic or from other illegal activities. Some banks managed to save themselves due to this money.

A large part of the 352 billion dollars from the drug traffic were absorbed by the legal economic system, perfectly recycled. This shows that, during the periods of economic recovery, criminal capitals will determine financial policies of the banks saved with their aid, which leads to the question concerning the importance of the criminal organizations on the economic system in times of crises and the need for a greater control on the banking sector.

If the money from drugs are so useful for the banks and countries that recycle it, this explains why the fight against drugs in many Occidental countries is performed “with terrible delay”. That is because only the production phase and the activities of the criminal quarters are targeted, thus neglecting the recycling phase of the money. The micro-economy of the drugs can be controlled, and not the macro-economy.

The suspension is that the American and European institutions know more than they admit and attacking the major financial groups is not easy for the governments. In the conditions in which the USA banks are used in order to receive large quantities of illicit capitals hidden in billions of dollars which are transferred from bank to bank each day, New York and London would become the greatest money launderers in the world. Not fiscal paradises such as the Cayman Islands or the Isle of Man, but also City and Wall Street [6].

From the commencement of the economic crisis, in New York, the financial difficulties impel more and more Americans to resort to desperate solutions. Police sources show that, in this context, the offenses are getting worse and more and that more and more banks are robbed. For the first nine months of the year 2012, statistics register an increase in the bank robberies with 57 percentages compared to the same period of the prior year. (In exact data, 265 robberies were recorded, comparative with the 177 robberies from the past year)

There is a connection between the economic crisis experienced by the United States and the increase in bank robberies, as many people become increasingly desperate and appeal to this solution to face the difficult times. (And the simple action of shop robbery begins to know a thriving period: from 100 shop managers, 74 claimed an increase in the number of robberies and also, violent incidents took place at four malls, along with the opening of the discount season: two men were mortally shot in Palm Desert (California), a pregnant woman was wounded in Atlanta, a guard officer was trampled upon by clients in Long Island (New York), and a man was murdered by armed thieves in a mall in Miami.)

„We believe that the economy is the reason for which some people, otherwise respectable, do crazy actions which, normally, would not be performed. People who months ago would not receive a fine for parking in an illegal space fall prey to despair”, declared a representative of the National Retail Federation [8].
For many years now, Greece has been confronted with a criminal aggression which the Europe and the
governments used to underestimate. This is one of the causes which led to the economic disaster and the fragility
of the institutions. The perception indicator of corruption for the year 2011, belonging to Transparency
International, appreciates Greece at the same level with Columbia. The corruption in Greece reached the cost of
approximately 860 million euro in 2009 and approx 590 millions in 2010.

The data shows that Greece has been a territory of mafia investments for decades. It is not an accident
that the greatest „summit” of the Russian mafia occurred in December 2010, in Greece, at a restaurant in Salonik.
The representatives of approx 60 mafia families participated in order to end a bloody “war” which commenced in
2008 and which also involved Greece. Here, in May 2010, the European representative of the 73 years
godfather, Aslan Usoian, also known as „grandfather Hassan” suddenly died.

As the official credit channel lacked, more and more Greeks resorted to illegal loans, from
moneylenders. In conformity with the government in Greece, the black market of illegal loans reached a turnover of
approx. 5 billion euro per year, but in reality, this would represent the double of that amount. The activity
seems to have increased four time from the beginning of the crisis: from this turnover, more than half of the
respective amount remains in the pockets of the moneylenders, who apply interests commencing from 60% per
year. In January, at Salonika, a criminal organisation which loaned money commencing from an interest rate of
5-15 % per week was dismembered, and for those who did not manage to pay their duties, punishments were
offered. The group had been active in Salonika for over 15 years and was composed of 53 extorters, among
which two lawyers, a physician and an employee of a football team. The number of victims confirmed was
between 1.500 and 2.000, for a total profit of approximately 1 billion euro [7].

The economic crisis in Greece is escalating in a “war” against immigrants; the actions of the
unemployed were harsh for the immigrants, as many of them are afraid to walk the streets alone; the attacks of
brutal bands has become a daily phenomenon and the police seems to ensure little or no protection at all.

The black market with the most incisive turnovers on the Greek traffic is represented by the carburant.
From illegally trafficking fuel, up to 3 billion euro a year can be obtained (dates from 2008). The laws in Greece
establish the price for the carburant used in naval/ maritime purposes at a third of the fuel price related to
vehicles or household heating. The traffickers transform the economic naval fuel in an expensive fuel for houses
and vehicles. The practice requires an ample criminal infrastructure such as the illegal deposits near ports and
large cities, as to stock the naval fuel, which is counterfeited and sold for another usage.

It is estimated that 20% of the gasoline sold in Greece comes from the illegal market; the traffickers sell
a gasoline which seems to be a mixture of legally bought fuel and carburant purchased from the black market,
which permits the merchants to earn more and avoid taxes. Greece imports 99% of the fuel, however, in
conformity with the turnovers, they would export in neighbouring countries more than they import.

For a long time now, Greece has been, along with Spain, the gate to trafficking cocaine in Europe. In
December 2011, an investigation of the anti-mafia department in Milano led to the arrest of 11 persons and the
confiscation of 117 kg of cocaine, 48 kg of hashish and auto means used for the illicit trafficking of drugs in
South America to Italy, through Greece.

The development of the real estate in Spain constituted the speculation source for the mafia group, and
the crisis in Spain is due to the criminal capitals, the absence of regulations and to fighting only the military
segments of the organisations. Today, Spain is colonised by autochthonous criminal groups (Galician, Basque
and Andalusian) and by foreign organisations (Italian, Russian, Colombian and Mexican). Historically, was a
refuge for the Italian fugitives sought by justice even if along with the entry in force of the European warrant of
arrest, things began to change.

The anti-mafia Spanish legislation ameliorated, however the country continues to offer great recycling
opportunities, amplified by the present crisis. The real estate boom experienced by Spain in 1997-2007 was a
manna from heaven for these organisations, who invested their illegal gains in Iberian constructions [7].

In the year 2006, an investigation was performed within the Central Bank of Spain as to seek for
explanations referring to the incredible quantity of 500 euro bills on the Spanish territory. Known under the
name of „Ben Laden”, as they are always mentioned and yet rarely seen, the 500 euro bills are frequently used
by criminal organisations as they occupy less space when being transported and deposited: in a 45 cm safe, one
can fit up to 10 million de euro in bills of 500 (in 2010, the British prime brokers strived to convert them after
discovering that 90% of the transactions were related to the criminal phenomenon, such as drug trafficking or
recycling). Despite this, in 2011, the 500 euro bills also represented 71,4% from the value of all Spanish bills

One of the most baleful effects of the economic crisis experienced by Romania is the extended
criminality, especially the organized crime, which during crises situations becomes exceedingly troubling.

In the conditions of the economic collapse in Romania, the alarming increase of the unemployment rate,
of reduction in the standard of living, more and more Romanian citizens, especially young ones, resort to
committing offenses in order to survive. The alarming growth of armed robbery, in which the banks, currency
exchanges or pawnshops become predictable targets for offenders are targeted does not represent a novelty; we
frequently hear of bank robberies, of old men killed in their own homes for a few measly hundreds of lei.
The difficulties generated by the global crisis favoured the amplification of criminality in the majority of the domains, which determines the accentuation of the feeling of social insecurity and perception regarding the dissolution of the authority of the state institutions authorised to counteract the illegal activities[9].

The specialists in the domain affirm that in the following period of time, the committing of similar offense will take an extraordinary amplitude. Banks, exchange houses, pawnshops and homes will be targeted [10]. That is why, it is imposed that all states collaborate in order to find the best measures to repress criminality, the globalisation process, the universalization process of the criminal repression, stimulated by the organisation at a global level of the criminality, commenced from the early 20th century [11].

Conclusions

Referring to the things presents, it is considered that, at an international level, the criminality increased along with the amplification of the economic and financial crisis, and thus, measures to fight this phenomenon are imposed, from the legal bodies, but also organizational measures of the states in order to increase the economic performances, to reduce the unemployment, migration etc.

Moreover, it is necessary that the governments and specialised, national and international bodies take the necessary measure for the observance of the human rights, aiming at their not being so frequently infringed by criminal acts [12].

References

Application of special procedure of prosecution and trial of criminal offenses

Paul M.C. ¹, Galan E. ²

¹ “Titu Maiorescu” University Bucharest, Romania
² National Integrity Agency, Romania
av.mihelapaul@yahoo.com; galan.elena@yahoo.com

Abstract

Fundamentals of special procedure for criminal investigation and prosecuting flagrant offenses are found both in the general principles of law, including criminal law and criminal procedure, as well as the objective need of forensics technique, logic and morality. Establishment of a special emergency procedure ensures the full accomplishment of the principle of promptness and celerity and a faster restoration of the infringed rule of law. As the perpetrator must be held accountable promptly, is impetuous needed to regulate a fast procedure to ease prosecution, as well as the flagrant criminal offense trial.

Keywords: flagrant offense, perpetrator, prosecution, special procedure etc.

Introduction

Both in literature in our legislation is difference between flagrant offenses and normal offences, but only criterion for distinguishing the order procedure.

In terms of substantive law are differences between the two offences, punishments within the same both in the case of the flagrant offences and normal offenses. The Romanian criminal procedural law provisions existed in handling criminal cases of flagrant offenses.

Some theorists of criminal law justify the existence of a differentiated regim for flagrant offenses, need, in their case, be increased intimidating effect of punishment that had joined a prompt repression of nature to satisfy the public’s moral sense.[1]

Proceedings of criminal investigation and trial of flagrant offenses is a special procedure itself, consisting mainly of standard procedure norms supplemented with provisions of complementary and derogatory character.

Offenses committed in flagrant conditions justify the need of special rules of prosecution and trial.

Thus, the common rules of procedure should be replaced immediately so that the finding and collection of evidence, which then might be lost, to be carried out. Conditions manifested during the crime make the probation easier, almost totally excluding the possibility of any miscarriage of justice [2].

Establishing special procedure for some flagrant offenses answers, on one hand, the interests of procedural order (increase the valences of the efficiency principle in criminal proceedings [3]), and on the other hand this special procedure hurries restoring the violated order and contributes to enhancing the educational role of trial [4].

Content

Once the conditions stipulated by article 466 of Criminal Procedure Code are fulfilled, the special prosecution procedure governed by articles 467-479 could apply, completed with common law provisions

This special procedure includes, in regard of criminal investigation, few moments of high importance in finding the flagrant offense, taking preventive measures and prosecution [5].

From the marginal title of article 466 itself, could be concluded that special or emergency procedure does not apply to all flagrant offences. Considering the entire economy of criminal procedure rules, two distinct areas applicable to flagrant offences are distinguished [6].

Offenses that meet the conditions of article 465 of Criminal Procedure Code, but do not meet those of article 466, shall be trialed according to the common procedure, supplemented with some derogations provided by the two parts of the Criminal Procedure Code.
In order to apply the special procedure on prosecution and trial of flagrant offenses, the following conditions must be met:

a. To be a flagrant offense;

b. The criminal offense to be punished with imprisonment from 1 to 12 years, as well as the aggravated forms of these criminal offenses.

c. To be committed in towns or cities, inside vehicles, fairs, ports, airports or railway stations, even if they not belonging to territorial units shown above, as well as in any crowded place.

The first condition is met if the judicial authority ascertains the incidence of Article 465 of the Criminal Procedure Code. In terms of punishment, special procedure applies only to offenses punishable with imprisonment from 1 to 12 years, and aggravated forms of these offenses, even if these forms exceed the maximum punishment for the standard type.

Crime and punishment can be provided in the Penal Code or any special law or with specific provisions of criminal procedure. Thus, if the sentence is higher than 12 years for the standard criminal offense, but is done in the attempt phase, which means half the special maximum of the sentence to for the standard offense reaching a penalty lower than 12 years, the procedure will be regular and not a special one.

Special procedure does not justify for criminal offenses of even greater gravity, because those must be guaranteed by the regular procedure, avoiding judicial errors that may occur due to the accelerated pace of the special procedure [7].

Usually, the offenses punishable by imprisonment exceeding maximum permitted by law, have connections to other crimes, which requires regular ongoing of the criminal proceedings for the proper settlement of the case [4].

Thus, some courts have limited the incidence of art. 466 of the Criminal Procedure Code only to those criminal offenses for which a punishment of more than three months and not more than 5 years is provided, and are committed in the circumstances mentioned in art. 75 Criminal Code.

Other courts have considered that special procedure can be applied to the offenses punished in the simple form with imprisonment of more than 3 months and not more than 5 years, committed in circumstances that determine their classification in a qualified or a felony aggravated form, forms that can be punished with more than 5 years in prison; same courts found that special procedure applies also to offenses punishable by imprisonment of more than 3 months and not more than 5 years, committed in the circumstances mentioned in Article 75 of the Criminal Code and which constitute statutory or judicial aggravating circumstances.

In case of criminal offenses punishable by imprisonment for less than 3 months, special procedure does not apply, precisely due to their law social danger.

In case of standard criminal offenses punishable by imprisonment for more than 5 years, urgent procedure does not apply, in order to avoid the judicial errors that might occur during a criminal trial held in accelerated pace, the perpetrator being subject to severe criminal penalties [8].

Criteria upon which crimes that fall under the special procedure can be determined, is that of the punishment for the standard offense. Robbery may not be prosecuted and punished under the special procedure, as the type form of this criminal offense is punishable with prison sentence of more than 5 years [9].

The literature has shown that, for the flagrant offenses that do not meet the requirements of Article 466 Criminal Procedure Code, will usually take place a speed up of the criminal pursuit and trial, determined by the fact that collecting the evidence related to the offense committed and the perpetrator will be done simultaneously when committing the crime. The legislator has limited the applicability area of emergency procedure depending on the severity of crimes committed.

The criminal offense must only be committed in particular places provided by law, as well as in any crowded place.

Crowded place means any place which, by its nature or purpose, is permanently, sporadically or accidentally exposed to congestion of persons, such as meetings or commemorative, religious, sports events, etc.

In case of public transportation, the condition is considered to be met even when on the move between two destinations or even inside a commune or village and has been found the flagrant offense [10].

The text analysis shows that the special procedure applies to flagrant criminal offenses committed inside towns or cities, thus excluding communes and villages, as for the public transportation, fairs, exhibitions, ports, airports or railway stations, the special procedure applies even if not belonging to the territorial units provided by article 466 of Criminal Procedure Code, i.e. municipalities or cities [11].

The judiciary authorities consider the application of special procedure according to the actual data of each particular case, having in mind the condition of the offense location.

Article 479 of Criminal Procedure Code provides two cases in which the crime, although flagrant and meeting the requirements of Article 466, is excluded from the application of the emergency procedure: offenses committed by juveniles and crimes which require a prior complaint of the injured person. In these cases application of the special procedure would impede the achievement of the criminal trial goal.
To the two cases is also added the one provided in Article 10 of Decree no. 203/1974, according to which the provisions of the Criminal Procedure Code concerning the prosecution and trial of flagrant offenses do not apply to crimes within the jurisdiction of the maritime and river sections of courts and tribunals in Constanta and Galati.

Sometimes, due to the links between certain criminal offenses, emergency procedure may overlap the normal procedure, the legislator regulating these situations as well.

a) Concurrent offenses. According to Article 478 para (1) of Criminal Procedure Code, in case of concurrent offenses, when special procedure applies only to some of the concurrent offenses, will proceed to their disjunction, prosecution trial being done separately. When disjunction is not possible, the ordinary procedure will have priority.

The fact that among concurrent flagrant offenses, there is one for which, according to art. 209 para. (4) of Criminal Procedure Code, the prosecution is done by the prosecutor, does not remove the application of special provisions concerning the prosecution and trial of flagrant offenses. Therefore, carrying out the prosecution by the prosecutor will not find, in this case, a mandatory application.

b) Connection or indivisibility. In case of indivisibility or connection between flagrant criminal offenses, meeting the conditions provided by law for emergency procedure, as well as non flagrant or flagrant criminal offenses not meeting these conditions, two situations may occur:

- if flagrant offense may be disjoined from the other criminal offense, shall be followed two different procedures: for the flagrant offense will apply the emergency procedure, and for the other related indivisible criminal offenses, the common law procedure;
- if disjunction is not possible, the prosecution and trial will be done for all offenses following the common law procedure.

Disjunction is a de facto matter, the appreciation of its possibility or impossibility being at the discretion of the judiciary body. Disjunction can be ordered both by the criminal investigation body, and by the court.

Disjunction is not a waiver of jurisdiction, but a split in the conduct of criminal proceedings, held on separately, before the criminal investigation body or the court which ordered disjunction, applying the appropriate procedure for each offense, special or ordinary (common).

Romanian legislation has numerous derogations from the rules of emergency procedure, either in a restrictive way, when the procedure supports some limitations even though the offenses are flagrant, meeting all the conditions stipulated in the Criminal Procedure Code, or in extinctive way, when the procedure is applicable to criminal offenses that do not meet all the conditions for flagrant offenses. Some cases are presented below for exemplification:

- Thus, Law no. 83 of 22 July 1992 on the emergency procedure of prosecution and trial for certain criminal offenses of corruption, requires that, for the corruption offenses provided in art. 1, if flagrant, the special provisions on the prosecution and trial of flagrant criminal offenses shall be applied, without meeting the conditions referred to in art. 466 of the Criminal Procedure Code. Yet, the procedure requires some longer terms to achieve procedural activities. It is considered, however, that these provisions are not in force anymore, being tacitly repealed by Law no. 78/2000;
- Law no. 78 of 8 May 2000 on preventing, discovering and sanctioning corruption acts, amended and supplemented, shows that corruption offenses, the assimilated or in connection with corruption offenses, if flagrant, are prosecuted and judged by specific procedure of flagrant offenses, even if the conditions of penalty limits provided for the emergency procedure are not met (Article 21)

- Law no. 456 of 18 July 2001 approving the Government Emergency Ordinance no. 207/2000, amending and supplementing the Criminal Code and Criminal Procedure Code, has provided that the offenses stipulated by art. 209 para. (3) letter a) of the Penal Code, respectively theft of crude oil, petroleum products or natural gas from the pipelines, storage tanks or rail tankers, to be judged under the emergency procedure under the provisions of articles 465 - 479 of Criminal Procedure Code. The High Court of Cassation and Justice decided that the rules in question are no longer in force, being repealed by Law no. 281/2003 on the amendment of the Criminal Procedure Code;

- Another derogation is found in Law no. 535 of 25 November 2004 on preventing and combating terrorism, which stipulates that the terrorism facts or facts related to terrorism, will be prosecuted and judged under the procedure applicable to flagrant crimes, even if they are not flagrant or do not meet the flagrant offenses conditions (art. 40). Such legislation is justified by the threat posed by terrorism to world peace;

- Finally, must be mentioned the Romanian MEPs situation, as it is regulated by the Constitution. Thus, art. 69 para. 2 stipulates that deputies and senators may not be searched, detained or arrested without the consent of the chamber they belong to. However, in case of flagrant offense, they may be subject to search and detention, with the obligation of the Ministry of Justice to immediately inform the President of the Chamber of detention and search warrant. If the notified Chamber finds no basis for withholding, it shall order the revocation of such measures [Art. 69 para. (3) of the Constitution.
Conclusions

The way the law defines the flagrant offense reveals the approximation in time between the crime and its discovery.

To be noted also that the flagrant state always involves the presence of the offender, in his absence that offense not being considered flagrant.

Given the fact that it represents special forms of perpetration, the prosecution bodies should consider special measures. They have to resort to ascertaining flagrant offense only if there are no other ways for termination. Determining how to act, as well as the intervention moment, should be given a special attention, because of the way these issues are resolved depends, ultimately, the success or failure of the ongoing activity.

As can be seen, the way to carry out the criminal prosecution and trial of the flagrant crime, as well as the actual activities undertaken to achieve those goals differ from case to case. It is essential that the way work is carried out to establish the existence of crime, guilt and flagrant state.

References

Aspects of comparative law on legal assistance

Pocora M.¹, Pocora M.S. ², Modiga G.³

¹ Danubius University of Galati (ROMANIA)
² Tomis University of Constanta (ROMANIA)
³ Danubius University of Galati (ROMANIA)
monicapocora@univ-danubius.ro, silviupocora@yahoo.com, georgeta.modiga@univ-danubius.ro

Abstract

Advocacy is a species of judicial discourse and its legal position is defence, proof of innocence of person to whom justice is delivered. This species of discourse takes place in contradiction with either indictment or the plea of the other party. It has a fundamental role in clarifying issues on which a decision correct. Many times, wealth, prestige, freedom and even a person’s life will depend on the strength of conviction that defending advocate. Starting from this, we can say that study is aim to be a critical and comparative approach of defence right in some countries of EU. Lawyer must carefully monitor the process and retain all data emerging whichever will change discourse. There must be the possibility of adapting to new situations discourse especially when is using the preparation and development discourse.

Keywords: defendant, right, life, freedom, prison

Introduction

A defense lawyer is an attorney that represents an accused party in legal matters, including in a court of law. The accused party is known as the defendant, hence the name, defense lawyer. Many defense lawyers start out as prosecutors for the state. The prosecutor is there as an agent of the state, acting in the interest of the victim, but not representing them directly. There is well known that are often situations where people accused of committing very serious crimes are defended in good faith by successful lawyers, obtaining payment and after to be found guilty of those concerned, and that regaining freedom of opportunity to commit newest antisocial acts.

This situation is also applied to a defendant fails to obtain a conviction for the accused persons - sometimes the death penalty, later to be found innocent of the prisoner. A successful plea must possess qualities such as clarity, usefulness, naturalness, combativeness.

Legal Assistance in France

One of the most important and oldest legal careers is the profession of lawyer. It has a long tradition in France and a development largely different from other European countries. In France, the restructuring of the mentioned legal and judicial professions emerged as an urgent requirement of the existent competition in the European Union between advocates of Member States. This asked for a simplification of all professions related to representation and assistance of the parties in court proceedings.

The Avoué profession within the Courts of Appeal did not disappear. Therefore, at the Court of Appeal the two functions of assistance and representation in the performance of procedural deeds remain distinct. Maintaining this profession by the courts of appeal is often justified by the complexity of cases going through the second instance. People who perform this function have the monopoly of representation of the parties in fulfilling procedural deeds before the courts of appeal. The advocates of the Supreme Court constitute a distinct body and perform both the functions of attorney, as well as that of avoué. They are at the same time lawyers at the State Council.

The profession is organized in a manner similar to that in other European countries. All lawyers are grouped in a Bar Association, which is run by an elected council for a period of three years, the head of which is a batonnier (elected for a term of two years) since 1971, and there is one bar association for every court of higher instance. The legal profession can only be exercised by those listed on a bar chart. In 1990, there was established an institute and a national council of bar associations, public body with legal personality which has the task of representing the profession of lawyer among other public authorities.
In the jurisdiction of the Courts of Appeal there is one regional training centre for lawyers (C.R.F.P.A.) operating for each court. It is meant to provide training and professional development of lawyers. The regional council of training for lawyers can issue certificates of competency, a professional prerequisite for being appointed into the profession. Only French nationals or people from the European Union or the European Economic Area are granted access to this profession. People who wish to enter into this legal profession must show good conduct and not to have undergone criminal convictions or disciplinary or administrative sentences, under the law relating the reorganization and judicial dissolution of companies. Also, candidates must have legal studies or other equivalent degree of education to practice this profession.

The candidate should also attend an entrance examination in the Regional professional development centre for lawyers. The exam is organized at the law faculties specifically assigned for this purpose. The examination committee is made up of two university professors, one of whom is the president of the jury, a magistrate of the judiciary appointed by the prime president of the Court of Appeal, a member of the examination committee is made up of two university professors, one of whom is the president of the jury, a function, dignity and prestige of the profession, as well as to promoting its ethical principles; exercises administration of justice; it grants the title of lawyer and trainee lawyer; supervises the achievement of social justice. Therefore, the lawyer is required to exercise conscientiously his or her function, to tell the truth in court, not to engage in causes that might cast doubt over his or her independence, to observe the professional secrecy and not to accept hiring parties with conflicting interests. Lawyers also have an obligation to contribute to the training of future specialists, being bound to accept regular internship of students.

The relationship between lawyer and client is set based on a contract of services, which requires from the lawyer only diligent liabilities and not an obligation of result, as judiciously decided in the practice of the Federal Court of Justice. The attorney's fee is determined by the minimal rate approved under the federal code regarding the remuneration of lawyers. Note also that the German legislation prohibits the pacts of quota litis and any deals giving the lawyer the right to receive payment depending on the outcome of the trial [3].

Legal Assistance in Germany

One of the frequently requested careers in Germany is that of lawyer [5]. In Germany, the lawyer is considered an independent body of justice that exercises its profession freely, in order to advise and represent parties. To become a lawyer, it is necessary to obtain a license, in addition to the second state examination. The German law grants considerable importance to the lawyer status, considering law as a body of public service of justice. Therefore, the lawyer is required to exercise conscientiously his or her function, to tell the truth in court, not to engage in causes that might cast doubt over his or her independence, to observe the professional secrecy and not to accept hiring parties with conflicting interests. Lawyers also have an obligation to contribute to the training of future specialists, being bound to accept regular internship of students.

Legal Assistance in Italy

In Italy, representing and assisting the parties is done through attorneys who are organized liberally. Italy has traditionally distinguished between the representation function of parties in the fulfilment of procedural deeds and assisting them before the court. The performance of procedural representation was done by legal agents (defender legal agent representative), and the defence or assistance by lawyers [5]. By Law no. 27 from 24 February 1997, the two functions were combined into one, which is performed by lawyers since then.

Legal Assistance in Portugal

The Portuguese law distinguishes between lawyers and solicitors, meaning between the people assisting the parties in the pleadings and those representing them only in fulfilling the procedural acts. Both professions are liberal and have organizational structures of their own. The most important role within the judicial procedure is that of the lawyer, who according to art. 6 par. 1 of Law 3/1999, participates in administering justice, performing exclusively the exercise of defending the parties, with the exceptions provided by law. For this purpose, the law recognizes technical independence to the lawyers, the latter being bound to observe only the criteria of legality and the ethical rules of their profession. Also, the lawyer is entitled to the confidentiality of professional secrecy, the right to communicate freely with his client and the right to call for the intervention of competent jurisdictional bodies in order to secure the individual rights and guarantees of his client.

Lawyers in Portugal are organized in a professional order and their status is established by law. The current status of the Order of Lawyers was approved by Decree-Law no. 84 of 16 March 1984, amended by Decree-Law no. 80 of 20 July 2001. The Order of Lawyers is considered as one of the typical examples of public associative organization dealing with the exercise of freelancer professions. Among the duties of the Order of Lawyers we mention: defending the rule of law, human rights and individual guarantees and collaborating for the administration of justice; it grants the title of lawyer and trainee lawyer; supervises the achievement of social function, dignity and prestige of the profession, as well as to promoting its ethical principles; exercises
disciplined functions. The organization of the profession is carried out on principles similar to those promoted in other democratic countries, including Romania.

Conclusions

The profession of lawyer is one of the most significant legal professions and represents the connector of litigants to courts. Based on the rights guaranteed by constitution and criminal procedure, the lawyer exercises legal advice and diligence in defending his client. As proposals of de lege ferenda derived from the topic analysed here, we suggest the following:

- a legislative intervention aimed at reducing the trial duration and simplifying the criminal judicial proceedings by introducing new institutions, such as plea bargaining agreement;
- compatibility of means of evidence or of current evidence procedures with the European standards in the field,
- reducing the degrees of jurisdiction;
- regulating the appeal in cassation, as an extraordinary remedy.

In this context, it appears urgent the adoption of the Criminal Code and Criminal Procedure so as to ensure the creation of a national, unitary jurisprudence, observing the highest and most demanding international standards of criminal procedure, namely those of the European Court of Human Rights.

References

From eu internal security to global security

Popescu C.

„Alexandru Ioan Cuza” Police Academy (Romania) cristian.popescu@academiadepolitie.ro

Abstract
The existence or appearance of conflicts – either ethnical, political, social or religious – and the manifestation of serious organized crime by using high technology enhances the risks and threats against European and global security. Thus, if we analyze the events that have happened lately we notice that the concern related to uncontrolled use of weapons, including non-conventional ones, is well justified, and the response measures have to meet the needs of the society as a whole.

Key words: threat, citizenship, rights, freedom, interests, justice, protection, risks, security, state

Internal security of the space of freedom, security and justice

The EU is composed of a number of 27 countries where 500 million people live. Promoting the common interest in the area of freedom, security and justice requires Member States to protect European citizens from possible actions of terrorist elements or other types of criminals who seek to use the values of a democratic society for abusive, destructive and malevolent purposes. The considerable increase of the movement of persons is a challenge in protecting the freedoms of EU citizens.

Security is a crucial factor in ensuring a high quality of life in European societies and our critical infrastructure protection by preventing and combating common threats.

Zero risk does not exist, but despite this, the EU must create a safe environment where people of Europe feel protected. Moreover, the necessary mechanisms should be established to maintain a high level of security, not only in the EU but also, to an extent possible, to citizens traveling to third countries or in virtual environments such as the Internet.

In this context, EU internal security means protecting people and the values of freedom and democracy, so that everyone can enjoy daily life without fear. It also reflects the common vision of Europe about the challenges of integration and the determination to present a common front in dealing with these threats, if necessary, through policies that use EU added value. Lisbon Treaty and the Stockholm Programme enable the EU to take ambitious and concerted measures to make Europe an area of freedom, security and justice. In this context, the Internal Security Strategy of the European Union [1]:

- exposes common threats and challenges we face that are becoming increasingly important so that Member States and EU institutions work together to tackle new challenges beyond our national, bilateral or regional capacities;
- establishes the common EU internal security - and the principles underlying it - in a comprehensive and transparent way;
- defines a European security model, which consists of common tools and a commitment to: a mutually reinforced relationship between security, freedom and privacy, cooperation and solidarity among Member States, involving all EU institutions, addressing the causes of insecurity and not just effects, improving prevention and anticipation, participation, since they are involved, of all sectors that have a role to play in the protection - political, economic and social and greater interdependence between internal and external security.

The main challenges for EU internal security lay in the fact that crime takes advantage of the opportunities offered by a globalized society, and high-speed communications, high mobility and instant financial transactions. Also, there are phenomena that have a cross border impact on security and safety in the EU. One can identify, therefore, a significant number of common threats[1]:

- terrorism, in all its forms shows no respect for human life and the democratic values. Its global dimension and devastating consequences, the capacity to recruit people on the internet and its different forms of financing make it a serious threat to national security.
- serious crime and organized crime are becoming increasingly significant. Under different forms, they tend to manifest when there are bigger financial benefits with minimum risk, irrespective of borders. Drug trafficking, economic crime, human trafficking, clandestine
immigration networks, arms trafficking, sexual exploitation of children and child pornography, violent crimes, money laundering and document fraud are just some of the forms of organized crime that occur in the EU. Moreover, corruption is a threat to the foundations of the democratic system and the rule of law;

- cybercrime is a global, technical, and anonymous threat against our IT systems and therefore poses many additional challenges for law enforcement authorities;
- cross-border crimes as minor offenses or offenses against property, often committed by gangs, where they have an impact on the daily lives of Europeans;
- violence itself, as youth violence or hooligan violence at sports events, increases the damage already caused by other crimes and could seriously harm our society;
- natural disasters are caused by men, such as forest fires, earthquakes, floods and storms, droughts, shortages of energy and information and communication technology panels, are challenges in terms of safety and security. Currently, civil protection systems are an essential element of any modern and advanced security system;
- there are a number of other common phenomena that cause concern and pose threats to the safety and security of people throughout Europe, e.g. traffic accidents, in which tens of thousands of European citizens lose their lives each year.

The answer to these challenges is to achieve cross-border cooperation at the bilateral, multilateral and regional level.

However, as these efforts are not sufficient to prevent and combat such criminal groups and their activities, which go far beyond our borders, the need for EU approach is becoming more apparent. Member States should make continuous efforts to develop tools so that national borders, different laws, different languages and ways of working do not hinder progress in preventing cross-border crime.

The Stockholm Programme and the strategies adopted (European Security Strategy, Strategy for the external dimension of the area of justice, freedom and security and information management strategy) is a good starting point for a practical approach to achieving a European secure environment.

They must be supported by common tools and policies to address common threats and risks in an integrated way - in fact it is the main objective of the Internal Security Strategy.

Local / regional conflicts

In the current stage of development of human society, due to military alliances and control of weapons production and trade, the possibility of states to use unilateral conventional force against other states weakened considerably.

The sources of regional conflicts take an extremely wide and diverse range of forms. Among the most representative we can illustrate:

- breach of agreements or cease-fire by one of the parties to the conflict (e.g., "Angolan President Dos Santos and the rebel group UNITA lead by Jonas Savimbi signed in 1994, the Treaty of Lusaka, which was to put an end to two decades of civil war that left more than 500,000 victims. The conflict persists even today.") [2]; another illustrative example is the ongoing conflict between Israelis and Palestinians and between Israel and Arab countries);

- hatred of ethnic separatist ideas fueled by ethnic cleansing (in Rwanda the power was taken over after the genocide between the Hutu and Tutsi populations, Rwandan Patriotic Front has failed to restore peace throughout the country, the massacre of civilians by Hutu ethnic militias continues especially NW region; another example may be conflicts in the former Yugoslavia - especially in the area of Kosovo - where many ethnic Albanians were massacred by the Serbian paramilitary armed forces);

- Kosovo area – where Albanian ethnics were massacred by the army of the paramilitary Serbian forces - disasters and / or natural calamities affecting large areas and a large number of human communities with adverse economic effects (e.g., "extreme drought that caused famine and civil war in Somalia was the origin of the evolutionary crisis") [3];

- radical religious ideologies ("... the most problems with their Islamist movements are in the Philippines. In the south there are two large islands with a large Muslim minority. Islands of Mindanao and Sebu, where many Muslims live - so-called" Moro " population. Moro are asking to create on these islands an independent Islamic state. Proponents of more moderate Islamists on Mindanao island were satisfied with local autonomy, while those on the Sebu - terrorist movement "Abu-Sayaf linked to Osama-bin-Laden - remain in their original positions and continue guerrilla warfare and undertake further terrorist intimidation of Western tourists to determine Manila to capitulate." [4] Other examples can be Israel versus Arab countries, Taliban versus Afghan government forces etc.);

- actions of criminal groups led by local seniors, aimed at maintaining or expanding areas of interest (clashes between government forces and drug cartels in Columbia);
Criminal repression in the context of the economic crisis and the maximization of crime at European and global level (May 9-13, 2013, Bucharest, Romania)

- acute crisis followed by "street movements" political confrontations between extremist groups (for example, after independence in 1960, on 30 July 2006 the Congo held its first multiparty elections. Joseph Kabila won 45% of votes and his main opponent, Jean-Pierre Bemba, won 20%. Following this result on August 20, 2006, violence erupted between the two factions in the capital, Kinshasa. 16 people died until the UN mission - MONUC - has taken control of the city [5]).

- combined sources, often related with economic interests, are the most common and most cases involve "external support" (e.g., "the armed conflict in the Democratic Republic of Congo, in which had been involved at some point other eight African countries - Angola, Namibia, Zimbabwe, Chad, Sudan on the one hand and Rwanda, Uganda and Burundi, the other side - restarted due to a failure of the ceasefire agreement by one of the insurgent groups [6]; "or, diamonds and ferrous minerals in the Congolese region Shaba, the Sudanese or Nigerian oil generated conflicts of interest materialized in the form of inter-ethnic tensions and conflicts). And the examples could continue. In any moment a new conflict may appear. If we analyze the current conflicts and their causes we would see that they are generated by geographical conditions (territory, population, economy) and political reasons. On these conditions depend the methods used in the field such as:
  - intimidation by political, economic and terrorist means;
  - expulsion or forced relocation of certain ethnics (the methods used are extermination and physical violence, the so called ethnic cleansing);
  - using different heterogeneous groups (paramilitary forces, criminal groups, law enforcement units or religious or union groups);
  - promoting liberties for certain groups and restraining freedoms for other groups by violating human rights.

Usually the belligerents are financed by illegal trade under different forms – donations from diasporas, support from neighboring governments, illegal trafficking in weapons and drugs. This is a kind of war mingled with crime, violation of human rights as the law enforcement agencies, according to some specialists have to be made of soldiers and policemen [6].

Romania's contribution to the maintenance of international peace and security

As an intrinsic part of its national security, Romania gives great importance to engaging in the political-military support to stabilization and democratization processes in adjacent spaces. This approach falls within the definition of a coherent regional vision encompassing extensive South-East, the Black Sea and the Caucasus, the Middle East and the Mediterranean and Central Asia area.

Being actively involved in the cooperative security approach, Romania has made a number of proposals for potential use of the Organization for Security and Cooperation in Europe (OSCE) in the regulation of conflicts, through involvement in the maintenance and restoration of peace in Bosnia-Herzegovina, Serbia and Montenegro, Macedonia and Georgia.

In its contribution to the UN peace operations, Romania has made a series of commitments by signing the Memorandum of Understanding with the UN and participated in a number of missions, such as those in Iraq, Afghanistan, RD Congo, East Timor, Kosovo, Haiti and Macedonia.

Together with the Ministry of Defense, the Ministry of Internal Affairs makes an important contribution to Romania's commitments through participation in missions to maintain or restore international peace and security.

The main tasks performed by personnel of the Ministry of Internal Affairs outside the Romanian territory are:
  - training activities of the forces of public order;
  - establishment of international forces for fulfilling tasks in the global conflict prevention and crisis management;
  - strengthening, counseling, giving assistance, training and monitoring of local police or substitute them in all fields.

Since the presence of military operations and peacekeeping restoration is still widely publicized we want to present briefly the Romanian police - both the structures of Romanian Police Inspectorate as well as those of Romanian Border Police Inspectorate that take part in such missions.

These missions are performed both under UN auspices such as UNMIK-Kosovo MINUSTAH, Haiti, Timor-Leste, UNMIT, MONUC-RD Congo or under the auspices of the European Union, as EUPM - Bosnia-Herzegovina, Kosovo EUPT EUPOL - DR Congo and under the auspices of the OSCE mission in Macedonia.

The importance of engaging in these missions is expressed by the CEO of Save the Children - Romania showing that it exists "... a humanitarian crisis that the world chooses to ignore. Today, 43 million children face the risk of being recruited and forced to fight, be exploited as cheap labor and live in danger of being trafficked or abused, all because they cannot go to school. If we do not ensure that the aid for education reaches children affected by conflict, their future - and the future of their nations - will remain bleak” [7].
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The use of active listening techniques in judicial investigation

Pruna M.

Romanian-American University, (ROMANIA) mjitea@yahoo.com

Abstract

The present article explores how the efficiency of active listening technique in interpersonal communication can be used in a judicial interrogation process. Assuming that at the basis of judicial interrogation stays, or should stand, effective interpersonal communication, one can assume that the investigator, formally invested with authority, may establish independently of the examined person, the communication strategy and also can effectively manage for finding the truth.

Key concepts - interpersonal communication, effective interpersonal communication, judicial inquiry, active listening techniques, interest

The observation underlying this study is that the process of communication, through its extensive character in relation to any interpersonal relationship and through its permanent character, can be analyzed and explained by the logic of effective interpersonal communication. Judicial investigation, as a particular social situation, goes into this logic.

In the first stage of the comprehensive approach, one can require a conceptual analysis of interpersonal communication and that of an efficient communication, in order to understand the theoretical tools used in this very analysis.

Most definitions of interpersonal communication are linked to one's personal interest; interest is considered a fundamental aspect in defining communication. Compared to the satisfaction of needs, from a pragmatic perspective, communication becomes a tool that makes managing our interests to be effective or ineffective.

On the other hand, based on the idea of an effective or ineffective approach, I define communication as a person's ability and capacity to exchange information in order to accomplish its own interest [1]. The force of one's interests, the desire to meet them, hall-marks the interpersonal communication.

Being based on personal interests, interpersonal communication is mostly subjective and selfish. Interest is a necessity or a need that has great importance for an individual, at some point [2]. Top prioritize interests is a subjective approach, significantly marked by one's personal history, or value system and beliefs. In everyday logic, the communication is primarily aimed at achieving individual interests, disregarding the interests of the other.

On the other hand, starting from an individual's interest, one must accept that the process of interpersonal communication is in fact a power factor, since "communication has the power to persuade us all [3]".

Last but not least, interpersonal communication is a process aimed to influence[4]. Through the logic of influence, the individual is aware that he can not live without the other, he needs them in order to get what he wants and not ultimately to develop and progress. He fails to recognize that he can not really know his life chances unless understanding the others life chances, individuals who are in the same circumstances as him (W. Mills, the sociological imagination). Only then can effectively manage the social space in which he acts and can control the events in his favor.

Both actors involved in the investigation, the investigator on the one hand and the person examined on the other hand, a priori have a mental representation of how the investigation should be conducted. The most common problem, almost always treated individually, considering the different positions of the two, is to identify interests, adequate power and influence, to get what they are searching for. This solution to the problem is reflected in the logic of effective interpersonal communication process.

An issue that emerges from this interpretation refers to the speed and ease with which individuals can achieve their goals through communication. One can observe through an empirical evaluation without the claims of quantitative scientific rigor, that not everyone manages, in a short time or with minimal effort, to satisfy their interests. This is explained by the different communication capabilities and skills. If we refer to the narrower issue of this present study, selection and systematic professional education should be relevant to the inquiry form so that it will not end up in a situation of ineffective communication.
A second issue that emerges from the definition of effective communication, as mentioned above, refers to the interaction of individuals in the communication process. As result, we return to the idea expressed earlier, that communication becomes effective when a person, while reaches its interests is trying to promote, at the same time, the interests of others. In the process of judicial investigation such an idea may seem unrealistic. However we consider relevant, the fact that the investigator seeks evidence that may lead to the prosecution of the person who is questioned, but also takes into account both the information elements that may lead to his acquittal. Thus, noting that through the dynamic process of communication, directly or indirectly, the interests of the examined person are viewed as key elements of the investigator's communication behavior.

In a second stage of our explanatory approach, for a better understanding of the particular frame of manifestation of interpersonal communication, one should define and establish the conceptual situation of judicial inquiry.

From this point of view the investigation - understanding the all forms of verbal contact that occur between investigator and the person cross-examined - it is a relationship that is established between two people with different statuses and roles through which one seeks to obtain relevant information for the case investigated at that time. It reflects a special communication situation in which interpersonal communication initiative belongs to the investigator (queries, hears). The logic of dialogue brings forward rules determined by the need of an interpersonal process of exchanging information.

Some authors consider that the judicial inquiry can be defined as a research carried out by a state agency (investigator) conducted systematically and scientifically organized in order to gather evidence relating to an offense, then the processing and checking to clarify the circumstances in which offense occurred and to find the one that committed the offense [5]. Thus, indirectly one can conclude that the research is based on direct communication, face to face, between the investigator and the investigated.

Other authors prefer to use the concept of questioning when referring to the communication between investigator - investigated by assigning investigation a broader meaning that includes the communication processes between the investigator and victims, witnesses, etc.. For these authors [6] the cross-examination is defined as "the verbally interpersonal contact, an emotionally strained relationship, conducted systematically and scientifically organized that the representative of the state bears with the suspect, in order to collect data and information about a criminal act as to, in the end, process and clarify the circumstances in which the offense was committed, to identify the perpetrators and determine liability based on truth."

In this study we shall continue to operate exclusively with the the term of judicial investigation, enough to not cause confusion.

Judicial investigation, understood and accepted as an effective form of interpersonal communication, leads to the idea that the investigator should have strong communication skills.

Psychologically there are situations of great complexity, as determined by verbal contact between dialogue partners, and one should bear in mind that, regardless of the position they have in the judicial investigation, at the same time everyone is subject and object of knowledge. No only the officer is interested in knowing and quickly assess the accused but also the latter seeks to learn more about the investigation, along with the information obtained while being in custody, so that one can rapidly adopt a defensive tactic and thus obtain benefits. From this point of view I believe that mastering the art of active listening and using it effectively can tip the balance in favor of the investigator.

The process of cross-examination is much more complex than it seems, at first site. Many people confuse interrogating with a simple act of reception of sounds that reflect the significance of the verb "to hear". The latter is automatically act of receiving and transmitting sound waves to the brain caused by a sound source, at a physiological level. In addition, in the process of cross-examination, it may also occur:

- the understanding, through which we define the act of identification and recognition of sounds as words;
- translation of words into meanings, a stage which involves memory and experience of the listener;
- the assessment of meanings the information, that processes itself;
- the assessment, a process which consists in making judgments about the validity, objectivity and usefulness of the decoded information (inner feedback).

The hearing, in a judicial investigation, translates into what we do with what we hear; is a difficult step that requires an active participation, if we look from the perspective of communication's effectiveness. For the investigator, this process is extremely important.

Preparing for the hearing itself is an important condition in order to use the communication technique. It reflects a special condition that the investigator should have when communicating. Depending on this state, in order to streamline its actions, the investigator may delay the judicial investigation as long as he is not prepared to listen.

Summing up, in order for the active investigating technique to be effective, the investigator must consider two elements, so that he can strategically control communication.
Firstly, the investigator should create a special communication framework, both objectively and subjectively. Secondly, he must manage several obstacles that can arise in interpersonal communication and hinder the investigation process. In retrospect to judicial investigation, in order to create a communication framework, to its advantage, the investigator must take into account:

a) a proper choice of the physical conditions of space, time, noise level, as they can influence psychological barriers, the motivation and willingness to listen, as well as the level of emotional charge of the relationship. Normally the judicial investigation takes place in specially built rooms - interrogatory room;

b) the removal of any preoccupations that are not related to the message managed in the process of communication. The investigator should avoid entering racing the interrogation room, or being stirred, uninformed;

c) developing a relaxed attitude, of understanding each other's needs, in order to encourage dialogue and determine the person examined to participate in their communication;

d) the establishment of a certain purpose and, possibly, the optimal level of investigating.

Beyond these rules, the investigator must take into account the influence of obstacles in the process of investigation, jamming or blockage which limit the efficiency of the judicial investigation and indirectly, of the communication itself. Among them, relevant, in relation to a specific situation of communication for a judicial investigation, are:

a) anticipation of what the speaker wants to say and the finishing of the sentences for him. If we consider the approach of an effective process of investigation, the person heard should be allowed to finish his thought;

b) repeated and unjustified termination of the person who is heard by the investigator. Beyond that interruptions can annoy, they provide the the person investigated the opportunity to rethink how to defend himself;

c) straightening eyes from the speaker to other people or objects in space. Essential for communication control and domination of the relationship is to rivet on the other speaker;

d) improper position of the body (examples: overly relaxed posture, body positioning at the side of the speaker, etc..). Nonverbal communication is important in interrogation;

e) monitoring of any possible contradictions in the argumentation;

f) the perfect correlation of the message with personal experiences with information held on the subject of communication. Free statement and even the technique of detail enable the investigator to compare the information with which he has gathered so far;

g) encouraging the person examined to talk, through questions aimed at developing the message, followed by moments of silence, in order to allow him to respond. An investigator must have knowledge about how to manage questions. The effective and strategic use of them all, can help you find the truth and lay the blame. As we know, a question is never without an answer [7] through it, we can create a new necessary situation and cause the other to react as we expect him to react;

h) requests for clarification, enabling a better understanding of the message, synthesizing ideas and making appropriate use of feedback. As mentioned above, the technique is effective for proving sincerity and providing necessary clarifications. Brief moment of synthesis, through statements such as: "I understand that in this particular issue, your arguments were the following ... isn't it?" warns the person under investigation that is pursued;

Using active listening technique in a judicial investigation aims at, therefore, the general coordinates of interpersonal communication. The very specific situation of judicial investigation offers, thus, additional benefits that lead to potentiation of the effects of using active listening technique. The formal power with which the investigator is invested makes the communication relationship between investigator and investigated to be a predefined asymmetric one. Beyond harnessing feedback through communication, case investigation offers the investigator the chance to plan a communication strategy in which his partner of dialogue has not too much freedom of movement. The investigator has at hand all the possible ways of effectively manage a communication situation. He can decide the onset or completion of an investigation, choosing the way of communication, the place and duration of communication. Also he is the one who sets the theme of the communication register.

In conclusion, the effectiveness of an interpersonal communication in a judicial investigation largely depends on the investigator, the degree to which he masters the technique of active listening and knows how to exploit it, in his endeavors of investigating.
References

Features of the victim-aggressor relationship in case of bodily harm

Pruna S.

Police Academy „Alexandru Ioan Cuza”, (ROMANIA) stefanpruna@yahoo.com

Abstract

This paper studies the victim-aggressor interpersonal relationship in case of bodily harm, starting from the principles of victimology, which show that, in the dynamics of the crime, the victim is often guilty of what is happening to her and the establishment of the victim’s accountability is imperative in order to find the truth. The study is based on a qualitative research, on a total of 50 cases of bodily harm, in 2012 in Bucharest.

Key words – the victim-aggressor relationship, victim accountability, active behavior of the victim, accused victim, defended victim.

The psychosocial dimension of the victim-aggressor relationship

A closer examination of the victims of violent crimes, leads to the conclusion that, unfortunately, in a large number of cases, there are some people who "look for trouble" as they say in the everyday psychology, showing reckless behavior, which often leads to their own victimization.[1]

In other words, these people, through their pro-criminal behavior, determine the aggressor to decide, especially during the dynamic phase, to commit the offense. Moreover, the victim “offers” the modus operandi, the context and the necessary time. These statements are not pure speculations, as they are based on statistical data and examples, kindly offered by the legal practice.

What exactly determines this conduct of the victim? Is it a deliberate action or, conversely, an involuntary one? Without education or certain skills and abilities to correctly radiography the relationship with the other, we unleash hidden desires, instincts and passions. The understood freedom becomes absolute freedom; all is ours to have, the interpersonal relations are there in order to satisfy our instinctive necessities, and not to establish an order, an objective rule. Man has the faculty to transform the instincts in voluntary acts and he is able to deliberate on the means and moments of their satisfaction. But "not every man is capable to know and understand the purpose of the instincts. In these circumstances, the power to choose the means is a dangerous weapon, in the hands of an ignorant or foolish man".[2]

Due to the cultural context, here is a relational incompetence in establishing effective and objective connection bridges with the others. An interpersonal relationship is not built by its own; it takes time and effort. The relational incompetence, related to the features of the victim-aggressor relationship targets multiple aspects: firstly, the idealistic and permissive attitude towards foreigners. The encounter with a stranger should be seen as an uncertain event. That does not mean to turn your back or leave scared when someone asks you the time or the location of a particular street. There is a conventional language and behavior for such situations. The establishment of behavior patterns in such cases is dictated by the moral and social values that dominate a community, values to which the individual relates directly, without an individual strategy. The abuser knows these patterns and uses them for personal gain. He also invokes such reasons in order to establish contacts, to make himself known, to get the attention of the future victim. He already has an attack strategy; he intuited the advantages of assaulting the victim, thus requiring opportunities.

A second aspect worth highlighting is the behavior, rather than permissive, towards random acquaintances. A random acquaintance is a person you met through others at a party, at a show, on vacation or in the neighborhood, about whom you do not know anything, everything resuming to a simple greeting or a past conversation, often trivial. It is basically the same situation as the relationship with the foreigners.

The third aspect is related to unjustified confidence in reciprocities. Most experts feel that the dynamics, thus the effectiveness of an interpersonal relationship, is related to how the people involved use reciprocity. By paraphrasing the saying "eye for eye, tooth for tooth", this means good word for good word, wrong deed for wrong deed. In everyday life, things are slightly more complicated, as emotions, preferences and sympathies occur.
Each of us relies on reciprocity when building an interpersonal relationship. This refers to the willingness to help, only if helped. In our case, the victim uses reciprocity with another meaning, namely: I help, so I will be helped or I wish for good, so I will be wished for good, which is something else. In reality, things are different and we must be prepared.

These situations develop the relational incompetence of the victim and by generating an active behavior she is preparing her own victimization. Besides this mechanism, the step that the aggressor takes in order to achieve his objectives also intervenes. The correct identification of the interpersonal relationship between the victim and the aggressor helps us to clearly distinguish the individual actions of the partners on committing the aggression. The investigator is able to determine not only the quality of the participants, but also their degree of involvement in the aggression.

From this point of view, we believe that discerning the victimization mechanism, the dynamic of the positions occupied by the two partners, of the scenarios that they design and implement, will shed light on the proper identification of the way the aggression is materialized, at the same time following the movements and calculations of the two.

Often, from the time when the victimization was triggered to the commission of the crime, an aggression exacerbation from both partners will occur. Due to the force of the defense system, the limit situations that may occur and the consumed sequences, the positions of the two can change. On a particular sequence, the victim may be the aggressor of vice-versa; the victim or aggressor label is given after consuming the criminal act – the model of violence as situational transaction.

Switching to action and triggering the defense system is the result of nervous tension increase. As shown by some theorists [3], the released adrenaline overloads the neuromuscular system, which discharges outside an exceptional force. The threat of a danger is perceived as an attack on a person’s integrity and even her life, and for every person, victim or aggressor, it triggers the instinct of conservation and her defense mechanisms. The methods of expressing the defense mechanisms are directly related to the personality system.

From this point of view, after the outbreak of aggression, some aggressive actions of the partners, are the result of ontogenetic learning [4], through repetition reinforces aggressive responses that have previously been successful for them to anticipate these results with new aggressive actions. These actions are called voluntary.

To those, latent aggression is added, specific to human being, referring to the psycho-physiological state of the system, through which one can hostilely react, to the sole purpose of destruction, coercion, denial or humiliation to a person that has meaning and value, that it is felt by the aggressor as such and also represents a challenge for him. These aggressive actions are involuntary and arise from human dynamism and activism.

Although during victimization behaviors, there are sequences in which both person's behaviour is involuntary, the entire mechanism of aggression can be divided into two steps, in order to easily follow what is happening: preliminary investigation of the victim and the reaction, itself.

The first stage consists of the preliminary investigation of the aggressor, the one who has the first word in the projection of the victimized act. Specialists are very emphatic when they say that preliminary investigation is the most important point in this set. Does the perpetrator choose his victim or the perpetrator is chosen by his victim? I have always claimed that the person chosen for victimization has a special value for the perpetrator, which determines him to build a true "spider web" to attract and assault his prey. Then, comes the passage to the act itself, which is accomplished by a well designed and verified mechanism.

Features of victim - offender relationship in bodily harm injuries

From the need to explain the behavior and position of the victim in the process of crime, following the theses of classic and modern victimology, we undertook a qualitative research using the method of a case study (the analysis of final criminal investigation reports, indictment reports ordered by prosecutors) for bodily harm offences. The study was conducted on a total of 50 cases, and is a sequence of my doctoral studies. I have followed relevant indicators that I included in the victim chart, written with the occasion of my doctoral research. The assumptions of the study are:

1. The relationship between the victim and the offender, prior to the criminal act, increases the potential victim's active participation in the generation, production or consumption of aggression.
2. The existence of previous relationships of a conflictual nature between victim and perpetrator increases the active role of the person attacked, in the dynamics of the offense.
3. Joining the victim in subcultural models explain its susceptibility to active behavior, in a conflictual situations.
4. In the interaction between aggressor and victim, the aggression is traded situationally, depending on the dynamics of the relationship and of the promoted interests of the two. Essentially, any offense can be translated by the term of conflict.
The analysis and interpretation of the 50 case studies of bodily harm crimes (battery and other violence, injury and serious injury) allowed structuring relevant links regarding the relationship victim - perpetrator. Data were processed according to the chart victim, and generally, have strengthened the results after 10 years, which denotes the idea that certain trends are stable over time and can be traced over long periods.

The first aspect particularly pursued is related to previous relations between victim and aggressor. In almost 75% of the cases investigated, the victim and the aggressor knew each other before the aggression was committed, and in 25% of cases there was no prior relationship between them. In over 45% of cases where the victim and the aggressor knew each other, their relations were closed, the two of them spending time together, being in close family relationship, and about 40% of cases, they only "greeted" each other, so there is a direct relationship between them. Otherwise they each other by sight (school, work, neighborhood).

These data demonstrate that the two partners are living in the same environment, they scrutinizes each other, and many situations allow each of them to form an opinion, a point of view on the other.

Referring to the age of the person victimized, for these types of crime, the most exposed interval is that of 18-29 years (50% of cases), followed by the interval of 30-49 years - 25%, and the range of 18 almost 25%. If we analyze the correlation between age and previous relationships, we observe that for the group age of 30-49 years, in approximately 55% of cases, the victim and the aggressor did not know each other.

In contrast, the closest of relationships between victim and offender meet at the group age of under 18, in approximately 75% of cases.

Another aspect that worthy being explored is the place where the offense was committed. In almost 45% of all crimes investigated, the street is where the offense was consumed. Follows, in order of frequency, public spaces (terraces, bars, discos), almost 25% of cases, the scale of the building, about 10%, housing, less than 15%, vacant places, parks, 5%.

Regarding the marital status, there are no significant differences between married and unmarried victims. Thus, in approximately 50% of cases, victims are unmarried, and 40% are married. The rest are victims living in concubinage.

The analysis of the relevant risk factors to the research, led to the following results: the most common risk factor is the spontaneous conflict that occurs between victim and aggressor, approximately 35% of cases, followed by alcohol addiction, about 35% and tensions previously existing, approximately 20% of the cases investigated. In about 20% of cases, the risk factor is the provocative behavior of the victim.

It is worth noting that in most cases, spontaneous conflicts occur when the victim and perpetrator do not know or know only by sight, over 65% of cases, while alcohol consumption is a risk factor for situations in which there were prior relationship between the victim and perpetrator, in 45% of cases were very close, which means that victims drank alcohol with their abusers.

The challenge, as a risk factor, occurs more frequently in cases where the victim and the aggressor knew each other from sight. Previous tensions, as a risk factor, are linked, in approximately 65% of cases, with previous relationships, which encapsulate the conventional discussions, greatly characteristic to neighborhood relations and collegiality.

If we analyze the nature of the relationships victim - perpetrator, we observe that in almost 30% of cases, the two of them are simple acquaintance, in 25% of cases are neighbors and in 10% of cases are colleagues or friends. In about 15% of cases, they are related or part of the family.

One interesting aspect that I have also shown in investigating homicide cases, was the presence of witnesses. In about 75% of cases, aggression occurred in the presence of witnesses, who were often neighbors or acquaintances of the parties. Of these cases only about in 10% of cases, the witnesses effectively intervened in settling the conflict.

Referring to the very first moment when they met, the victim and aggressor, research data show that the most common was, on average, the attendance of familiar places, about 35% of cases, followed by the fact that they lived on the same street, about 30% of cases, in the same block, over 15%, or had mutual friends, 5%. The working place, as the way of meeting new people, was retained in about 15% of the situations encountered.

Previous conflicts have left their mark, and in the case of these crimes, on the commission of the aggression. In about 65% of cases there were conflicts, from small incidents, misunderstandings, to tensions. Of all previous conflicts, approximately 35% were disagreements on various issues, in 20% of cases there were fights and situations where there were threats represent 15% of the time. Verbal violence were found in 20% of cases. We note that at the group age under 18, in approximately 80% of cases there were previous conflicts, mostly being verbal abuse and threats.

Data processing, referring to the behavioral reaction of the victim revealed that the most common response was the one of instigation, approximately 30% of cases, followed by precipitation, about 20%, neglect, 15%, insult, 15%, repeated reproaches, 10 %. Precipitation, as a behavioral response, is characteristic for the group age of 18 to 29 years and also to victims, who were in neighborly relations with their bullies.
Negligence is encountered most often in cases where the victim and perpetrator were mere acquaintances. Insult and instigation are associated with alcohol consumption, as a risk factor, in almost 40% of cases, and precipitation is associated with spontaneous conflicts in approximately 65% of these cases.

It also may be a link between negligence, as a behavioral response to spontaneous conflicts. In about 35% of cases in which the victim has shown negligence, he or she manifested on a spontaneous conflictual background, emerged between the victim and the abuser.

One thing worth highlighting is that of all injuries, in 30% of cases, victims have precedence over the actions that led to the offense, in other words they have generated the event.

A final aspect that the data analysis revealed is the attitude of the victim towards the aggressor and the aggression. In over 35% of cases, the victim immediately filed a complaint. In about 20% of cases, the complaint was filed after a few days.

In over half of the cases investigated, the victim has not filed a complaint on its own initiative, of fear or maybe because they just did not want that. It is interesting that during the investigation almost 35% of victims withdrew their complaint. Judging from the available data, it appears that another 30 - 40% of victims withdraw their complaint at the trial, particularly because the understanding between the parties.

The large number of cases when the victim and aggressor previously knew each other, indicates the fact that the relationship between the two of them is dynamic and constantly changing. Situational elements, met in diverse conjunctions, put their stamp on generating offences. The observation that the victim and perpetrator are living in the same environment, adhere to the common value systems, know each other's activities, comes to reinforce the idea that the two roles are constantly changing, that their actions are free and independent in choosing a certain behavior. These data verify assumptions and reinforce the idea of active behavior of the victim in managing crime.

References

Presumption of self-defense - law provision imposed by the actual reality of the romanian society

Raducan M.D.E.

Universitatea Titu Maiorescu Bucureşti, Facultatea de Drept Târgu-Jiu (ROMANIA)
diana_morega@yahoo.com

Abstract

This paper tries to reveal the true knowledge of the meaning and significance of the presumption of the self-defense as an institution and the problems that occur when it comes to apply it in judicial practice.

The objectives are to identify, propose, and support scientifically proven solutions to controversial issues of jurisprudence and legal doctrine that had inconclusive or non-unitary solutions on the one hand, and to modify and improve the legal regulations on the other hand.

Keywords: self–defense, presumption of self–defense, trespassing, dwelling-place.

Self-defense has been reviewed, revised, and expanded by introducing par. (21) Art. 44 to the Romanian Criminal Code [1] by Law no. 169/2002, amended subsequently by Law no. 247/2005, because of the Romanian criminal reality, and because of the public reaction to Romanian criminality.

By these provisions it was established the presumption of self-defense for the one who commits the deed to reject the entering without the right of a person by violence, deception, tampering, or by such other means, in a house, room, outbuildings, or enclosed place or delimited by marks.

Presumption of self-defense, so established, is relative [2] [3] [4] because as has been stated, with justified reason, it is unacceptable that any trespassing in locations limited by law to be rejected by any means [2] and to be thus legitimized.

Relating [5] to the jurisprudential solutions from the Belgian or French criminal justice system, the outcome is a presumption juris tantum, and not juris et de jure. French Cassation since 1959, performing similar text from French Criminal Code, upheld that the presumption of the defense necessity is not absolute, but relative.

Another argument to support relative presumption is that under modern legislation based on subjective liability it would be difficult to admit an objective liability of the perpetrator in this case [5].

As far as we are concerned we have to say that we are reticent to this legislative addition of the self-defense presumption, which we consider excessive and albeit with relative character, the only one we might otherwise accept as a compromise solution.

We can not exclude also the possibility that the lawmaker intended to avoid some annoying repetition from using the same formulation for the third time, "is self-defense", had fallen into the trap of legislating self-defense presumption provided to paragraph (21).

Expressing our doubts about the complete justification of the self-defense’s new regulations from Art. 44 para. (21) Romanian Criminal Code, I consider necessary, and by de lege ferenda, I propose removing these legal provisions.

From another point of view, less radical, is that it should at least review the wording of Art. 44 para. (21) by removing the presumption of self-defense and the Romanian lawmaker, limiting the trespassing assimilation in conditions and places legally established with the attack which is capable of legitimate defense. The burden of proof lies in this case on whom is trespassing the specified places, which is inadmissible. It is a violation of the principle that the defendant enjoys a presumption of innocence under Art. 66 para. (1) C. p.p.

What customizes the presumption of self-defense from the other situations provided to Art. 44 para. (2) and (3) C. p. is that the attack, against which fighting back by committing an offense under the criminal law, consists on entering without right of a person by force, deception, burglary, or other such means in a dwelling, room, outbuildings, or places surrounded or bordered by signs marking [6].

So, when the incoming action was committed inside the limited places, and under conditions laid down in Art. 44 para. (21) C. p [1], we can consider it an attack that is likely to legitimize a response and the defense action to reject it.

Intrusion is the action of a person to enter with the entire body and to actually enter inside the places we've referred.
To legitimize the rejection action the action of intrusion must be committed without right. Only to the extent that the incoming action was done without right it legitimizes the deed to repel it.

If that one who enters inside the specified places is operating under a law then he has not fulfilled the essential legal requirement that justifies the presumption of self-defense.

Intrusion into private homes without consent is strictly and exhaustively laid down in Art. 27 para. (2) of the Romanian Constitution [7] in the following situations: the execution of an arrest warrant or a court order, removing risk for the life, for the physical and mental integrity of a person or for its assets, safeguarding national security, or public order such as preventing the spread of an epidemic.

The mentioned constitutional regulation contained in provisions of par. (3) reveals that the intrusion into private homes is also justified when a search is carried out according to the law (a warrant search) [7].

In all these cases the entering into a person's domicile is entitled therefore it is not equated with the attack that legitimizes the defense.

Entry into the residence of a person is entitled naturally when it is consented by the holder or by the person who legally uses that place or represents the owner. Consent may be oral, written, expressed by any means of communication, express or implied, or resulting from gestures or attitudes. He must be however in no doubt.

On the interpretation of the Art. 44 para. (2') C.p a point of view [4] which from our knowledge has remained isolated that the refusal to leave the protected places was equated with the entering into them thus legitimizing the act of rejecting. It submits that the presumption of self-defense is present and acts also when the victim entering in one of the mentioned places was done with the holder consent at the beginning, but after he refused to leave, and the owner commits the deed under the criminal law to remove the victim from the legally protected area. The author's solution that he imposed into his conception [4] is "There must be an identity of legal treatment for both situations when the offense is committed to reject an unauthorized entry in protected places as well as to remove a person who, at the beginning, entered with the consent of the holder, but later refuses to quit the place and used violence, cunning, intrusion, or other such means."

The problem thus brought into question is too important and delicate and the solution offered is too questionable to accept the point made without proper and justified reserves.

The interpretation of the Art. 44 para. (2') C.p. [1] refutes, in my opinion, the mentioned solution. So it was assimilated with the material, direct, immediate, and unfair attack which legitimizes defense reaction, only the action of entering into a specific laid down place, and under specific conditions, not the refusal to leave at the request of the person who has the right to ask for it.

The legal provisions in this regard are categorical and detached from the verb used "entry" in that it does not leave too many discussions and arguments about that.

The refusal to leave the protected areas when the entitled person makes the request is not covered by the provisions of Art. 44 paragraph (2') C.p. and therefore is not assimilated by law as an attack. That it cannot be regarded like that by the way of laws interpretation without the unacceptable risk of adding to its provisions.

Moreover the legislature has assimilated only the entering with the attack because just that has the power to surprise and to induce that fear that justifies a defense. In the presence of a refusal to quit the place the element of surprise that produce fear and panic is missing, therefore the state of self-defense is no longer created and the defense is not necessary anymore. If he will act anyway the action would have the character of an attack (e.g. striking offense) that is not a defense.

Of course refusing to leave the place may constitute the crime of trespassing and if the refusal is followed by actions that can be considered attacks we can find ourselves in a state of self-defense in terms of Art. 44 para. (1), (2) and (3) C.p., not paragraph (2') C.p. [1].

Even the author didn't express himself expressis verbis [4], he based his option on overlay simile of the entry into protected areas, the foundation of the presumption of self-defense, with the offense of trespassing. The repeated references that the author makes to the person's domicile, and to the intrusion of it, is enlightening on this regard. The reasoning of the proposed solution I believe is not consistent with the self-defense regulations.

Entering in protected place legitimize defense only if it is carried out according to the law by violence, wickedness, tampering, or by such other means.

Violence consists of acts of physical assault, physical constraint exerted on a person or multiple persons, acts that may constitute different crimes such as beatings or other violence (Art. 180 C.p), personal injury (Art. 181 C.p), and serious injury (Art. 182 C.p.).

I do not believe that violence against property may as argued [4] legitimize defense. First it is not carried out against the person and is not an act of physical coercion. It is more a mental torment and a threat that acts on the psyche and it cannot be considered an attack as it was conceived and governed by the provisions of Art. 44 para. (2) C.p that was assimilated by the provisions of par. (2'). Secondly, according to the criminal law, violence against property is regarded as a distinct offense (the destruction stipulated by Art. 217-218 C.p) with another legal significance.
Guile is misleading activity, malingering, which hide the real intentions of the aggressor who tries through those methods and succeed to enter inside protected areas. It can be achieved through formal and informal false qualities (e.g. police man, cable guy etc.) through disguise and such other means.

Intrusion (housebreaking) is the activity of removal, destruction in whole or in part, to bring in a state of disuse (total or partial) of latches, or any other locking system.

Listing ways of the entering into the protected areas that is assimilated with the attack is illustrative but not exhaustive of the conclusion imposed by wording of law, "or by such other means". [1] Determining other means like violence, cunning, and intrusion, from the point of view of legal consequences it is left to the jurisprudence. They should be considered and determined from case to case based on their specific factual circumstances. They may consist of climbing (jump over) fences, using false or true keys, and of any other similar modalities.

The protection of Art. 44 para. (2') C. p. goes beyond the domicile term as defined by the criminal law (see art. 192 C.p) the "house, room, outbuildings or places which surround them" [1]. It covers and extends to "any place enclosed or delimited by marks", whether it is related with or completed by the home, rooms, or outbuildings. Sphere is the field of protection afforded by establishing the presumption of self-defense is bigger than the concept of domicile that includes it, not limited to that.

Home is the place for domestic life of a person that satisfies its need to live, not being relevant if it is closed or partially open, fixed or mobile, permanently or temporarily. It is essential to be used for the private life of a person to feed and to rest etc. [8]. Thus it is considered a home, part of the concept of domicile within the meaning of Art. 192 C. p, if it is regular house, the hotel room, boat cabin, caravan, cottage, cabin, and tent so long as the person uses them for his domestic life [9].

The room is a part of a building designed, and being used as home by a person, being separated from the other parts of the construction [9].

Outbuildings are those places that are not part of the house, but are related with it being an accessory, an extension, an addition to it, and whose use creates one whole. There are integrated in the concept of outbuildings all the annexes (cellar, basements, attics, sheds, dryers etc.).

Enclosed place (part of the domicile) means the area of land related with the dwelling and outbuildings and surrounded in any way by fence, wall, etc., which separate it from other places [9].

I criticize the extending of the self-defense presumption to "any place fenced or marked by boundary signs", being obvious that what the Romanian lawmaker wanted was a guarantee of family privacy and property rights that can transform easily into an abuse of law.

Before 1989 private property was legally almost nonexistent and then it was only protected by the Constitution. Its actual guaranteeing consolidated over the time through profound legislative changes and judicial practice in accordance with them.

From a natural legislative process of a state that goes from a totalitarian regime to a democratic one that is enacting of excessive legislative solutions I consider it harmful if not more harmful than the absence of real guarantees of private life and private property rights.

To achieve effective general prevention is preferable aurea mediocritas to the extreme solutions, which are used in the current Romanian legislation.

New Criminal Code [10] is likely to solve the problem by a proposed manner and limits the fenced places only to those "exclusively related to house, room, or outbuildings", therefore giving up permanently to "places marked by boundary signs". So the protected space will be only the domicile.

More restrictive and justified seems to be the regulations of self-defense given by the provisions of art. Art. 36. para. (3) of the Republic of Moldova Criminal Code [11]. "It is in self-defense also the person who commits the offense referred to para” (2) to prevent entering, accompanied by violence danger for the persons life or health, or the threat of application of such violence in a private space or in a room ".

Republic of Moldova's lawmaker did not establish a presumption of self-defense. He was confined to assimilate the entering, under its specific conditions and places, to an attack that legitimizes the action of self-defense. The assimilation was limited to those situations in which entering is accompanied by violence, and not any kind of violence, but only that one which has a certain direction and intensity and are dangerous to life or health. So it was implicitly established a certain proportion between the act of defense, which is usually directed against the person, and social values threatened by the entering, which is intended to be prevented thus avoiding the occurrence of excusable excess of defense. Entering by threat or violence dangerous to life or health was equated with the legitimate defense attack. To exert self-defense the entering must be done only into "a private living space or another room" [11].

Places in which entering is suppose to be done are more limited than to the Romanian Criminal law. They are linked implicitly and exclusively to person, to life, or health. Only under such conditions and places the entering legitimizes the act of defense and is considered to have a serious nature.
In accordance with par. (2), for self-defense to exist the attack, be it material, direct, immediate, and unjust, must be directed and carried out against the person that will react, or against another person or their rights, or to a general interest. The attack should seriously endanger the person, the rights, or the general interest.

As Professor V. Dongoroz underlined [8] the subject of the self-defense attack besides the values that are related to person can also consist in other social values such as those related to heritage.

The category of social values that legitimize defense indisputably includes a person's domicile and personal freedom enshrined as inviolable by the Constitution and a person's assets.

Analyzing the social values that may constitute the subject of the attack we cannot wonder if the lawmaker, enshrining the presumption of self-defense, did not place domicile and heritage above health or human life on the social values scale.

However as we have already said it is hard to accept that the right to life, physical integrity, and health are situated by Criminal law and lower than the inviolability of the domicile or heritage integrity [3]. If it was absolutely necessary to provide such presumption of self-defense we believe that it should be set only for the one whose life, physical integrity, or health were jeopardized by attack (entering without right).

De lege ferenda I consider is appropriate to provide that entering has to be accompanied by violence, but not any violence, only one that has a certain direction and intensity and being dangerous to life or health. That would establish a proportion between the act of defense, which is usually directed against individual, and social values threatened by the entering, which are usually directed to assets, thus avoiding the appearance of the excusable defense excess (Art.73 Let. b). C.p."

The assimilation imposed by law to Art. 44 para. (21) C.p, of the entering under the specific conditions and protected locations with the material, direct, immediate, and unjust attack, has been examined, considered, and treated differently by the jurisprudence that proved to be contradictory in solving this problem.

On a legal case [12] [13] the High Court of Cassation and Justice has considered and decided that "entering of the victim by climbing the fence into the fenced yard, part of the defendant's domicile, not entail the imposition of the Art. 44 para. (2) C.p and therefore the presumption of self-defense as long as he did not exercise an actual attack of the kind covered by the provisions of par. (2). On the other hand aggression was not determined solely by entering without right to the victim's property by the defendant in a context where there was a conflict between the parties that degenerated into mutual aggression. The situation created was not able to surprise the defendant on the manner in which events unfolded and therefore cannot be protected by the presumption established by art. 44 para. (2). In other words the court found that the presumption of self-defense exists and acts may be accepted only in cases where entering into protected areas is followed by unleashing an attack from those set out in art. 44 para. 2 C.p.

On the contrary in another judicial case [14] Craiova Court of Appeal held and decided that in the case provided by art. 44 para. (2) C. p. established presumption of self-defense and is not subject to the initiation and pursuit of an attack as provided in par. (2) if the perpetrator acts to deny the entering without the right as provided and into places protected by law. In arguing its solution the court found reason that if in this hypothesis it would be required that the attack condition would not justify the existence of paragraph. (2) of Art. 44 C. p. Basically it would not be any difference in terms of conditions that must be satisfied for the existence of self-defense between paragraphs. (2) and paragraph. (2) of Art. 44 C. p.

Closer to the spirit of the law and to regulations of Art. 44 para. (2) C. p. is the second jurisprudential solution.

To whom is defending against an entering without right into protected places, the law does not require to be in self-defense to find a way less dangerous than the chosen one because it would be put in a situation of inequality to the attacker [13].

As principle and in the absence of provisions such as those contained in art. 45 C. P., "And can not be removed otherwise", we agree with the idea that the law allow freedom of reaction to whom is in self-defense but I express my total disagreement to the claim that defense action and the rejection against entering without right into the protected areas is unlimited.

However as in all situations of self-defense, the presumption established by art. 44 para. (2) C. p. for defense against attack performed consisting of entering without right into protected areas to be considered legitimate must be a ratio of relative proportionality between the deed committed in defense on the one hand and attack (entering) which imposed the need for defense by the danger created on the other hand.

The worded and enforced condition for attack ensues implicitly from the art. 44 para. (3) C. p that there was self-defense even when the defense limits were exceeded proportionally with the severity and circumstances in which the attack has occurred [8].

For if it is true that the law leaves the liberty to fight back in defense, without being bound to another option, it is not less true that it obliges him to keep an approximate proportion between it and the danger created by attack. Rational and reasonable the law provided that the determination of the relative approximate balance between defense and threat created attack shall be assessed and determined in light of the circumstances under which the attack occurred.
As argued and it argued justified [2] if entering without right was not an attack against the owner of the protected place it does not legitimize the rejection response, constituted by a deed directed to aggressor life, because we have to consider exactly the proportion that must exist between the two terms of self-defense (attack and defense).

The presumption of self-defense is considering only the assimilation of attack with intrusion in protected areas and the proportion that should exist between the danger of attack and the fight back in defense will be determined from case to case.

From another perspective I truly recommend that the lawmaker should analyze more profound all the implications and effects that enactment of the law can create.

So even I agree that the law must be flexible to be in line with the needs of society, but this doesn't mean that we have to change it continuously because the citizens can in the end not be able to know it and its goal of protection could not be achieved any more.

Thus the presumption of self-defense was introduced to Art.44 in 2002 by Law no. 169/2002 after modified in 2005 by Law no. 247/2005, and once again amended by the New Criminal Code [10].

These frequent changes of the law have also a negative impact to the jurisprudence making it more contradictory.[12] [13] [14]

References

Piracy in the light of the 1982 United Nations Convention-
constituent elements.

Rotaru C.S.

Institute For Legal research ” Acad.Andrei Rădulescu”, The Romanian Academy (ROMANIA)
rotaru_cristina@yahoo.com

Abstract

Piracy is a criminal activity that has existed for many centuries, until recently it was a crime that many
thought had gone out of existence. Piracy can cause great harm to economic trade taking advantage of weak or
failed states such as Somalia or the littoral states of the Strait of Malacca. The present article looks to establish
the constituent elements for a definition of the piracy, in light of the 1982 United Nations Convention on the
Law of the Sea.


Introduction.

Piracy is an international crime. A vessel engaged in acts of piracy is legally without nationality
jurisdiction. Flag State of a ship does not have exclusive jurisdiction over it, but rather, such a vessel is subject of
universal jurisdiction [1].

A vessel engaged in acts of piracy is not under the protection of any state, offering all states the right to
stop, search and detain a private ship. This exception to the exclusive jurisdiction of the flag State is perhaps the
most deeply rooted of all exceptions. Indeed, states not only have the right to detain pirate ships encountered on
governs the piracy issue and provides that any state that meets a pirate ship on the High Seas is entitled to its
boarding, the search and to retain it.

Piracy, as defined under the provisions of the 1982 UN Convention.
Constituents of an international crime.

The right to act against a pirate ship and those on board exists unless there is piracy jure gentium- as
defined by international law. While in the national law, a state may regulate piracy, we note that such national
legislation will not produce effects outside the state borders, thus limited, on the high seas, a State may take
action against a ship because it is a pirate ship under domestic law only to the extent that its right follows the
stipulations of international law.

Although there is no simple definition of piracy jure gentium, however, the United Nations Convention
on the Law of the Sea gives the following definition for it, by the provisions of article 101:

Piracy consists of any of the following acts:
(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the
crew or the passengers of a private ship or a private aircraft, and directed:
(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or
aircraft;
(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts
making it a pirate ship or aircraft;
(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Subsequently, the Convention defines a "pirate ship" as the ship on which individuals intend to use it in
order to commit the acts referred to in Article 101 [3]. The same applies if the ship, was used to commit such
actions as long as it is under the control of the individuals guilty of that act. We note that art.101 resumes
without substantial changes, the Article 15 of the 1958 Convention on the High Seas and we assert that this is a
provision intended to be declaratory of established principles of general international law. However, any analysis
of the nature of piracy jure gentium should start with these two provisions whose constituents are discussed below.

1.1 Acts of piracy.

The Convention on the Law of the Sea (1982) describes the piracy as being any illegal act of violence or detention, or any robbery [4]. This provision rejects the traditional notion that piracy actions are limited to those acts committed with the intent to robbing. Instead, the Convention provides a definition of piracy jure gentium that is broad enough to encompass any illegal acts of violence, detention, or plunder, and not only the offenses committed with the intent to rob. The argument that piracy does not necessarily require to be accompanied by an animus furandi, has a historical basis. Therefore, piracy consist of the violence on the high seas, which may or may not involve the stealing intent.

By refusing to limit the pirate’s definition to simple acts of robbery, the Convention describes piracy essentially as a continuing offense and obvious acts of violence are merely evidence of having piracy character. Piracy is a state of fact and the acts of piracy are manifestations of a state of illegality. As such, piracy is distinguished from other criminal acts committed on the high seas [5]. Pirates may commit criminal acts at sea, but the committing of a delict at sea does not turn the author of the crime into a pirate; criminal acts are offenses against a certain state of affairs while piracy is a crime against international law.

1.1.1 Acts of piracy must be committed for private purposes.

According to the definition of piracy, under Article 101, illegal acts of violence, detention, or plunder must be "committed for private purposes." This requirement for "private purposes" transforms the acts committed in support of non-personal purposes - namely, public and political - in the non-pirate actions. Consequently, this definition excludes acts of violence, detention, or plunder committed by insurgents on the high seas in connection with their rebellion. This exclusion match existing custom on historical level, states being reluctant to consider insurgents as pirates – conditioned by that the insurgents will carry out their actions in line with their political objective. The damages unrelated to the insurgency can be adequately defined as private damage therefore having a piracy character. Even if the insurgents cannot be classified as pirates, national law may hold accountable those who rebelled against the status for their actions.

1.1.2 Acts of piracy must be committed by private ships or aircrafts.

Piracy, as defined by article 101 of the 1982 United Nations Convention represents unlawful actions committed by "a crew or the passengers of a private ship or aircraft." This definition therefore leads to the conclusion that public vessels of a State cannot be classified as piracy boats. This provision should nevertheless be considered in conjunction with Article 102 which states that the acts of piracy, as defined in article 101, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft. Therefore, in accordance with the provisions of this Convention, a ship under state’s control cannot commit acts of piracy, while a vessel held by rebellion can commit such acts.

The requirement of "private ship or aircraft" is new to the international legislation in matter of law of the sea. Before the 1958 Convention on the High Seas- whose relevant provisions of the 1982 UN Convention are reaffirmed - was by itself understood that vessels operating under control could be guilty of piracy. The definition of piracy could be applicable to a vessel which, although acting on the orders of a recognized government, commit actions that violate the international law and demonstrates serious and criminal disregard for the human life. Given the long history of supporting the notion that public vessels under control can be guilty of piracy, it is well understood that this provision was excluded from the definition of piracy under the 1982 United Nations Convention and by this has caused some controversy around it.

Finally, state practice and common sense supports the principle that public vessels under control cannot be guilty of piracy [6]. A public vessel under control does not fit the traditional image of predatory pirate ship and free from the law, for the simple reason that the ships under control - unlike the pirate - can be held accountable only by the flag State. This responsibility [7] also explains why a riot control can turn a ship into a vessel capable of acts of piracy. In principle, given that the appropriate state control vessel can be held accountable internationally, the assumption that the officers and members of a ship under control cannot commit piracy unless they remove their own authority, seems correct. Therefore, as long as a vessel of a state is liable to a state, there is no justification to be subjected to universal jurisdiction of states [8] as a result of labeling as a pirate ship.

1.1.3 Acts of piracy must be committed against another ship or aircraft.

The 1982 United Nations Convention established definition of piracy includes the so-called rule of the two ships, which states that acts of violence and destruction on the high seas have a piracy character unless they are directed against one ship or more vessels. Consequently, the actions committed by passengers or crew of a
ship against another ship or against its assets are non-pirate acts [8]. This rule is controversial because it cancels consideration of rebellion uprising as piracy. Before the Convention on the high seas (Geneva, 1958), the precursor to the 1982 Convention, there was a known conclusion that the rebels may be guilty of piracy. It is considered, in the light of the Convention on the Law of the sea that if the crew or the passengers begin a rebellion at sea and the ship and goods using its own purpose, they commit piracy, whether the ship is private or public. The 1982 United Nations Convention on the Law of the Sea claims the change of this assumption. State practice supports the above mentioned rule, but this issue remains uncertain. While the the riot does not have a piracy character as intended under the 1958 and 1982 conventions, a vessel subject to revolt may turn in a pirate ship if rebels gained control after starting to use the ship for criminal purposes. In other words, there is piracy unless the ship itself becomes the instrument of the crime.

1.1.4 Acts of piracy must be committed on the high seas or in any other place not under the jurisdiction of any State.

The final element of the piracy definition established in the 1982 United Nations Convention on the Law of the Sea states that piracy [9] must occur on the high seas or in a place outside the jurisdiction of any State [8]. This requirement is undeniable. Any State may capture pirate ships encountered on the high seas.

Conclusions.

The 1982 UN Convention enshrines the principle of universal repression of the crime of piracy both in terms of retention of pirate ship or aircraft and arrest perpetrators and as that of jurisdiction. Conventional international law has extended the scope of the offense of piracy issues, which may be committed not only by ships, but the aircraft and may commit crime not only against ships but aircraft in maritime areas.

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The role of independent forensic expert, international accredited, in the criminal repression

Stan C.A.

National Institute of Legal Medicine "Mina Minovici", "Titu Maiorescu" University, Bucharest (Romania)
crist1.stan@yahoo.com, crististn@gmail.com

Abstract:

One of the innovating concepts of modern legal models is introducing contradictory debates based on complete equality of the state and of the person charged with a criminal offence. Given the extent of the migration process within the European community, the emergence of this kind of self-employed forensic experts may prove to be the cheapest and most efficient solution when it comes to time allotted to expertise. It will also prove optimal for criminal cases which involve jurisdictions in various countries. Where professional ethics of these forensic experts is concerned, the main difficulties emerge as ethical conflicts between official experts and witness experts of the parties and also as ethical conflicts between forensic experts and legal civil servants dealing with torture or death during detention period cases. Other results obtained after the introduction of this group of experts will be triggered by reciprocal improvement of forensic systems in different countries, a faster putting in place of common standards regarding how to carry out forensic expertise, the decline in the number of judicial errors and by better communication between forensic professionals from various countries.

Conclusions: The only right solution in order to provide real contradictory debates on criminal forensic expertise is the existence of a group of internationally certified independent forensic experts. This solution will increase the efficiency and fairness of the expertise, will reduce the costs and the time allotted to procedures. In addition, it will increase experts’ mobility, which will contribute to a better enforcement of justice. The globalization of justice must be preceded and not followed by unifying scientific observations on evidence and the means of proof by forensic expertise.

Keywords: self-employed forensic experts, ethical conflicts, forensic systems, internationally certified independent forensic experts, globalization of justice.

The most innovator measure introduced by the European Court of Human Rights is the equality status of both the state and the plaintiff who denounces a certain treatment; but the self-improvement of laws regarding human rights is very different at European Court of Human Rights level and at member –states (having signed the European Convention on Human Rights) level (where the rhythm of improvement is much slower or it does not exist at all). The most important rights, guaranteed by the European Convention on Human Rights are: “the right to life” (Art. 2) and respectively “the prohibition of torture” (Art. 3): “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” Breaching these rights has an absolute character.

In order to fall under Art. 3 “the treatment” applied to a person needs to surpass a certain “seriousness threshold”, that is the point from which the suffering of a person is serious enough as to be categorized as “inhuman or degrading treatment” or even torture; obviously, there is great need for establishing the minimal value of the seriousness threshold.

Given the developmental character of the European Convention on Human Rights and the increasing exigency in terms of human rights’ protection and also of other rights under the TFEU, it is not impossible for certain acts which were once qualified as inhuman or degrading treatment to be re-categorized and qualified as more serious, at a future date.

A scientific analysis of the phenomenon of breaching such rights is undermined firstly by the discreet opposition of some of the states which signed the Convention and the TFEU, and also by the plethora of impediments a plaintiff need to overcome in order to prove that such a rights was breached.

Thus, one of the innovating concepts of modern legal models is introducing contradictory debates based on complete equality of the state and of the person charged with a criminal offence: this is stipulated in Art. 6 of the European Convention on Human Rights regarding “the right to a fair trial”, from which both the equality of arms within the criminal law trial (which implies the access to a independent expert) and the principle of contradiction (a person’s right to have quick access to all the constituent parts of the case file based on which a criminal court’s decision or solution is passed on) derive [1,2].
These provisions from international human rights law complement those in the TFEU regarding unifying of the civil practices and admitting criminal evidence among the EU member states [3].

Applying in practice these law concepts in the field of forensics has triggered the introduction of the right of the parties involved in a criminal trial to appoint an expert who would take part in the expertise required by the court (also called forensic expert witness of the party). [4,5]

Putting these principles to practice in our country has been done by expanding the competence of the official forensic experts to the private area of consulting and working as forensic expert witness of the party. This led to imminent incompatibility situations generated by the forensic experts acting as both forensic expert witness of the party and official forensic expert of the public forensic institutions – case in which the forensic expert is hierarchically inferior to official experts who assign cases and directly account for the scientific accuracy of the conclusions of forensic expertise, as chiefs of forensic departments or chairs/ members of scientific commissions.

These ethical interferences occur because in order to become a private forensic expert, the expert of the party is obliged to be employed in a public forensic institution or be retired.

These conflicts of interest are even more obvious in the case of forensic expertise related to life insurances and insurances against accident or medical malpractice civil liability insurances, where forensic experts coordinating forensic institutions where these pieces of expertise both in civil and criminal cases are in the same time employed by insurance companies or by the hospitals against which there is a formal complaint.

The solution, stipulated in the new Code of Criminal Procedure, which is going to be implemented, is that certified self-employed forensic experts should emerge [6]; they are the ones who will have to be appointed forensic experts witnesses. Also, they should be certified by the Ministry of Justice and not by official forensic institutions, since these self-employed experts may find themselves at any time professionally incompatible with such institutions.

The next step in legislating on the activity of these experts should be integrating their activity in the European legal framework by taking the forensic independent experts’ activity in the private sector to European level.

Given the extent of the migration process within the European community, the emergence of this kind of self-employed forensic experts may prove to be the cheapest and most efficient solution when it comes to time allotted to expertise. It will also prove optimal for criminal cases which involve jurisdictions in various countries – a more and more common situation in recent years. Furthermore, in the same time, this solution guarantees to a very high extent fairness and professional non-affiliation.

At the same time, case-law progressively evolves towards giving self-determination rights for human beings from the fetal stage [7] to the precursor cells from human embryonic stem cells [8].

Main domains where independent forensics may contribute to rendering both criminal and civil justice more efficient are:

- Quick forensic expertise in cases of bodily injury or death when the perpetrators and the victims are not citizens of the same EU member state or when the victim receives medical treatment in hospitals from more than one EU member state;
- Quick forensic expertise in cases of medical malpractice when the patient received medical treatment in various countries and also validation of the results of the quantification of physical injury according to various countries’ legislation;
- Validation of the means of proof provided by forensic expertise between EU member states which have different criminal and criminal procedure laws;
- Experts’ objective assessment of torture and/or death in custody allegations by means of hybrid expertise commissions (similar to those in international criminal courts), which reunite forensic experts from that particular country and forensic experts from other countries;
- Assessment of the physical and psychiatric damage suffered by victims of aggression, car or work-related accidents or other types of accidents, which are under criminal or civil investigation in jurisdictions from different countries, including emergency autopsies, exhumations, psychiatric forensic expertise or toxicological reports;
- DNA, toxicological, bio-forensic counter-expertise carried out in labs certified according to ISO 17025 from other countries than the one where the fellony was committed [9]; these are very useful when a certain lab result needs to be verified and thus a result beyond any doubt is obtained;
- Independent forensic experts’ participation in forensic expertise related to criminal deeds of immigrants, which sometimes have a highly damaging media impact in case errors in the initial stages of the criminal investigation occur; such errors could be triggered by miscommunication or cultural differences and could lead to serious consequences including damaging diplomatic relations between states;
- Putting up a group of independent forensic experts in order to investigate crimes related to humanitarian right (torture, breaching the right to life, crimes against human kind, genocide); these experts will have to go on missions according to international criminal courts’ requests.
Improving the quality of learning and scientific research in all domains of forensics by increasing international cooperation and by establishing certain universities as reference points for enhancement in certain types of forensic expertise;

Stimulating extrajudicial settlements of medical malpractice cases through mediation, direct settlement or arbitration, which require direct participation of forensic experts into the proceedings, when jurisdictions and medical/forensic assessments from different countries are involved.

Applying the principles of equality of arms and of contradiction, which are derived from Art. 6 of the European Convention on Human Rights, is a very sensitive subject for modern forensics, when it comes to clinical forensic expertise of convicts or autopsies or exhumation of a convict who died during his/her detention period; formulating conclusions to these expertise reports requires a great deal of caution from both official experts and for self-employed experts appointed by each party (in countries where the law has created the premises for such categories of experts to activate).

Where professional ethics of these forensic experts is concerned, the main difficulties emerge as ethical conflicts between official experts and witness experts of the parties and also as ethical conflicts between forensic experts and legal civil servants dealing with torture or death during detention period cases.

In terms of ethics, the problem is very complex and susceptible to dynamic approaches and different interpretations because of the different stands of experts involved in such expertise and also because the fact that the authorities are reluctant towards these cases – mainly due to the fact that the sanctions applied to civil servants each time allegations of torture or death during detention against authorities are proven to be true are very serious.

In EU law, the term “capacity of detention” (la capacité à la detention-fr) is the only medical specialized term adopted by international courts, which defines the existence of a threshold of physical and/or psychiatric suffering incompatible with human dignity [10,11]; nevertheless, the capacity of detention remains a term without any practical applicability in some EU states because of lack of standard procedures to assess this capacity- it is due especially to the perpetuation of obsolete criminal law.

The formation of these independent forensic experts licensed to practice in EU countries complies to EU legislation regarding the homogenization of forensic practices in the EU member states which have signed the TFEU and also to several European Court of Justice rulings having established that judicial experts are service providers, therefore their activity cannot be exclusively limited to a sole country. [12]

Other results obtained after the introduction of this group of experts will be triggered by reciprocal improvement of forensic systems in different countries, a faster putting in place of common standards regarding how to carry out forensic expertise, the decline in the number of judicial errors and by better communication between forensic professionals from various countries. [13]

The necessity of finding a solution to properly pay these experts, so as they could be really independent is more and more obvious, given that the forensics organizational patterns cause major incompatibilities at all levels of medical and forensic experts hierarchy; furthermore, sometimes, even crisis in legal systems occur, triggered by the inability to have access to genuinely independent experts in criminal cases in the field of complex medical services or of very new treatment methods, in pharmaceutical and vaccines’ industry, in food industry or in the field of public health.

Conclusions

The only right solution in order to provide real contradictory debates on criminal forensic expertise is the existence of a group of internationally certified independent forensic experts. This solution will increase the efficiency and fairness of the expertise, will reduce the costs and the time allotted to procedures (including through competitive mechanisms). In addition, it will increase experts’ mobility, which will contribute to a better enforcement of justice.

International accreditation of this category of experts will automatically lead to the emergence of a self-improvement mechanism in respect not only to forensic experts, but also to forensic labs and criminal law professionals’ activity in each country.

The globalization of justice must be preceded and not followed by unifying scientific observations on evidence and the means of proof by forensic expertise; it cannot become functional unless there is excellent professional communication between the same categories of experts from different countries.

These international forensic experts will be the vectors of the intercultural transfer between distinct legal systems, which will facilitate the unification of civil practice and, maybe, in the future, of criminal practice also, within EU.
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Communication and relationship prosecutors/police and people with disabilities

Tiru G. 

tiru.gabriel@gmail.com

Abstract

In the context of current activities, police relate to citizens who are victims of aggression, or witnesses, or perpetrators of antisocial facts investigated. In any of these legal situations they are as individuals, classical judicial activități obtaining data relevant to the investigation, statements, listening, hearing, etc. must be made in respect of criminal procedure norms and human rights. A special aspect is the health of the person concerned, subject to specific activities and investigations and more so as there is a permanent medical condition recognized that a handicap or disability.

Behavior and attitude of a policeman, in relation with such person, need more necessary attention and this derives from a double perspective, one referring to the concept of interpersonal relationship and the other to the expectations of society from the person in uniform. Breach of the first concept is contrary to morality and self-censorship is subjected to internal feeling and violation of the second conflict with the rules/procedures of the code of ethics of the police and all domestic and international law. Consequently, we have an intrinsic perspective, aimed at self-image and an extrinsic, institutional image, both being equally important in both the short and long term. Any damage must be avoided carefully.

Key words: rights and freedoms, handicap, disability, infirmity or deficiency, non-verbal communication, communication adapted, attitudes, rules of conduct, procedures.

Introduction

In the current work of police, to ensure a climate of normality, civic order and public safety which is always a priority for society, exercise the powers of the fundamental rights and freedoms of individuals, private and public property, preventing and detecting crime, public order and safety compliance.

In doing this work, the police relate with citizens who may be victims of assault, witnesses or perpetrators of antisocial acts investigated. In any of these legal situations they are a person, obtaining traditional judicial relevant data to the investigation, such as statements, listening, hearing, etc., must be made in respect of criminal procedural norms and human rights. A special aspect is the health of the person concerned, subject to specific activities and investigations and the more so as there is a permanent medical condition recognized that a disability.

According to Order no. 1992/200/19.11.2007/Official Monitor, Part I no. 885/27/12/2007 to approve medical and psychosocial criteria on which establish compliance with the degree of disability, no 762/1.992 Ministry of Labour, Family and Equal Opportunities, Ministry of Public Health have withdrawn and withheld items that are essential in understanding the physiological and mental limitations of persons with disabilities. The authorities must know all these issues to understand and interpret correctly described the facts presented by these people, regardless of their legally, whether that witness, victim or suspect. Attorney/police officer should be familiar and know the problems faced by such a person in the communication process, to facilitate access to information (materials that will need to know, statements, photo plates, minutes from various activities etc.) and to obtain necessary information or clarification required from these people.

Communication within the meaning of her daily, completely different from that which requires the presence of people with disabilities. Communication in such cases include the following:

✓ Going to be accepted;
✓ To be receptive;
✓ Going to be understood;
✓ To get a reaction/response;

Severity of disease creates a barrier stronger psychophysiological internalized for each stage separately. When none of these objectives is not achieved means that process has not been effected. This can happen because of several factors that appear in the process.
Rules Of Conduct /Relation

1.1 Prosecutors / Policeman-People with Disabilities

Our behavior in relation to a person with a visible disability, is generally a different behavior from other people and say, we tend to grant protection or physical or psychological support, our whole attitude is one of compassion and condescension. Of course, that there are non-compliant behavior, the ignorance or worse by teasing, rejection, ridicule, something which we will address separately.

But when we consider the behavior and attitude of a policeman, in relation to such a person, the more attention is required and this derives from a double perspective, one referring to the concept of interpersonal relationship and the other, the expectations that society has of the person in uniform. Breach of the first concept is contrary to morality and self-censorship is subject to inside and the violation of the second conflict with rules / Code of Ethics for police and all domestic and international law. Consequently, we have intrinsic perspective, aimed at self-image and an extrinsic, institutional image, both being equally important both short and long term. Any damage must be carefully avoided.

Following the detailed, point out that the terminology is important because words reflect our state of mind and what we think / believe really. People with disabilities or have been used, or were forced by the type of medical condition (blindness, mutism, etc.) to interpret beyond words. However, some terms tend to reflect not due to different perceptions same concrete reality. It is recommended to use simple words and correct. Do not feel embarrassed to use common expressions such as "I understand what you mean" as you should not feel obliged to repeat the question in order to ensure that the person knows what he wants. This is not a "cosmetic" policy, using words and language appropriate to people with disabilities creates a bridge, strengthens confidence in direct relationship with the police investigator, facilitating data and information necessary to obtain the file in question.

Do not use the word disability as a noun (disabled), this implies a homogeneous group separate from the rest of society. Each is an individual, not a disability special group.

People with disabilities are very sensitive to negative connotations of expressions.

People with a medical status in normal parameters, could see as excessive or inappropriate language the concern, but the language is powerful and messages can lead to labeling that discriminates against or minimize human existence in the presence of an illness or a permanent condition. It is very useful and purposeful, there is this concern in choosing words and overall message which they bear, and the police should be encouraged to use an appropriate language.

Unfortunately, some of the terms you often hear around us and that people in popular language, we must recognize that they use most often, contain expressions of those listed below and you should avoid. The policeman must be correct to use such anticipatory expressions, be extremely careful during the meeting, whether it is receiving a complaint, the interview judicial hearing or listening to people. The existence of linguistic and lexical automatisms are extremely harmful, or Autocorrect subsequent apologies was late and unnecessary actions. Another facet as sensitive and important is the use of terms and phrases out loud, in other rooms / offices where it is assumed that the disabled person can not hear, but actually it sounds. Basically it takes great care and concentration to not cause negative emotional states and not to damage the citizen-police relationship.

Non-verbal communication disorders

- Dress code: dress disordered, refined fashion, eccentric dress, dress perverted;
- Facial expressions: hipermimiile, hipomimiile, paramimiile;
- Management: tics, mannerism, oddities gestures, negativity, stereotypes, persevering [1].

Relation With A Blind Person Or Partially Blind

Most used for the primary source for information, not only for reading and writing but also for social interaction and everyday practical activities. Being blind puts a person in a physical disadvantage, educational and social.

When you heard a person as a witness, do not forget to correctly interpret their free account because some are blind, others have partial view. Some people have blurred vision, or can not properly analyze the distance and speed, or can not distinguish between objects with similar colors or shades. Others may be able to see things that are very close, but do not see long distances, while others have a narrow range of view (eg. to the tunnel). Most visually impaired have supporting evidence and only a small proportion do not see at all.
What is important to note when we refer to witnesses or victims, it is natural that the true account of the situation and sequence of events is an important thing, but sometimes to complete the cognitive processes and flow of ideas, reports coming from direct observation elements are completed and merged with others perceived as real or more precisely, associated. Logical content of what must be correlated with disease course of events but also with itself. The investigator should be familiar with the clinical picture of the witness or victim's disability and to interpret the details of whether reports in the context of medical disability or obvious impossibility (climbing a fence, crossing a river, etc.). Here we refer to normality or degree of impairment of visual analyzer, olfactory, auditory, motor actual capacity, etc.

Not all those who are blind or partially blind, use the white cane, read Braille or have guide dogs. A person is considered blind if you need help in learning / experience [3]

Hearing plays an important role, we might say overwhelming, in the process of networking with witnesses or victims who are blind or partially blind. It is important to note that they are unable to read body language or facial expressions, their attitude is the interpretation given the tone and voice volume.

1.2 RULES OF CONDUCT:

- Choose and keep access roads open wider areas to avoid obstructions - police must ensure that the route that comes and goes person to and from the police station, is easily accessible and will not allow hitting or injured person;
- When driving or invite someone to the police station in a room / office that has never been a brief description (size, windows, door position) and contents (furniture, appliances);
- Introduce yourself clear, grade, name, specify your location (police unit), state and others present in the office (prosecutor, other investigators) or laboratory (psychologist, sociologist, medical examiner, etc.) and their role in the investigation. In group conversations, refer to a person using his name when you want to enter into a discussion.
- Do not start from the premise that this person needs your help. When a person to assist visually impaired, ask directly what they want, and if you offer them your arm.
- Should lists to guide and obstacles and change direction. When guiding someone, give instructions / descriptions clear, for example: "here is a step down", "will climb 10 steps" or "three steps we left";
- When offered a place, place your hand on the back seat of the person and tell them what you did;
- Do not let them talk in an empty room. Tell them that ended the conversation and move to another office or that he plans to drive to the exit;
- There are people who come with a dog. There is a natural tendency for the investigator to focus on the task (obtaining survey data, clarification of defense, checking assumptions). Remember that the guide dog needs. It is also possible that the witness should no longer focus on the accuracy of the declaration, being concerned about the dog needs. If the dog back into his hand companion, try to talk to that person, you may need help.
- The investigator should stand in front of the person interviewed or interrogated, not behind the window, because his face will be in shadow.

1.2.1 Communication strategies:

- The vast majority of people prefer using the communication module records, the most common being the great writing, Braille / Moon, tape recordings, e-mail, existing texts or combinations thereof;
- The presentation of written materials, use large. It's recommended minimum font 16 and preferably 18 to 20. Can be achieved through increased xerocopierea or large production directly from your computer - is better than xerox printing;
- The current computer technology offers many possibilities to solve such problems, so can be used to increase writing software (eg Microsoft Windows has Accessibility Options) allows changes in resolution, color and size, text verbalization and controls;
- Some software you have recently made such speech recognition and Voice Dictate - Mac that requires training and practice. It is also available Checker speech "Texthelp!"
- Presenting you movies or photographic drawings, encouraged people to stay where they can hear / see well (for those who can see something);
- Make sure the light is good, minor adjustments can make a big difference. Accommodation will vary from person to person, glare can be as problematic as the darkness. Insist on choosing the right brightness. Due to the presence in the police station to start the conversation may be marked by syncope. -Treat things with simplicity and calm.
- Give you clear instructions and explanations. People with visual disabilities may not have experience in making presentations or descriptions structured italics.
1.2.2 **Relation With A Person With Hearing Impairments**

People with partial or total deafness are completely dependent on the information you see or feel them. People with hearing impairments may depend on their vision to communicate, such as reading speaking, reading lips, sign language. In some cases can use microphones and hearing aids. Note that the difficulties people with deafness can be cultural. For example, phonics and spelling in languages are different, so difficult to learn.

Many people with hearing problems using the devices, even if they use other forms of communication. These devices amplify sounds, but all sounds are amplified equally and therefore noise can be a real problem for them.

1.3 **RULES OF CONDUCT:**

- If you are someone who reads lips consider that only 3 of 10 words are visible on the lips;
- Hold head up when you speak;
- Make sure your face is sufficiently well lit / visible when talking;
- Look at the person interviewed / heard, keep the pace of normal speech but rarely, make sure you can keep up with you, otherwise there is a gap which will strengthen the good relationship and create or misunderstandings, answers out of phase, confusing explanations or communication gaps;
- When you want to talk, make sure that the person with hearing problems is careful and watch your order to attract attention, use few gestures or a light touch on the shoulder.
- Use facial expressions, body language and gestures, if necessary;
- Make sure your mouth when you speak you are not covered by the hand, smoke, chew gum and beard;
- Do not make assumptions about people's ability to communicate or how they do. Always make sure the easiest way to communicate person. If a sentence is not properly understood or not heard at least partially, refer to the way it's written;
- If a sign language interpreter is alongside a deaf person to help in understanding, always stay and talk with the deaf person;
- Remember that raising the tone does not help. Increasing voice volume can not compensate for lack of hearing;
- Try to keep noise to a minimum when working in groups, and do not forget to take into account an alternative space, if it is too much noise.

1.3.1 **Communication strategies:**

- It would be useful to interview you or judicial hearing to be conducted by a judicial police officer or mustache without a beard, or as short as;
- If you need an interpreter, he must be positioned so as to be easily observed, so the police officer and the person interviewed. Set this from the beginning;
- If you participate in activities in the office more people (prosecutors, police officers, psychologists, etc.) the person with hearing problems can be difficult because she does not know who is speaking and should observe carefully whether their interpreter. Rules are still in the preparatory phase of the hearing, so that participants indicate through gestures when they start talking.
- People who depend on their vision to "hear" will not be able to sustain a fluent dialogue with the police officer, but a syncopated breaks generated by necessary or prosecution read from the lips of the interpreter. The investigator should consider this aspect, to devote enough time and not meeting plan their activities, which could then cause discomfort to them and overlapping activities into what we call constantly running out of time. This can be perceived by the interviewee / heard and interpreted as a lack of interest or attention;
- The main ideas you want the investigator to address, can be implemented on a previously printed sheet of paper, so the task will be much easier. Important announcements, technical or legal words should be written on paper or as summary data. When writing, it is advisable that the essential elements of the message to be placed in the first part of the sentence, which has the maximum chance to fix the memory personnel;
- People with hearing problems you may have difficulties with grammar. It is possible that they can not use their first language learned (sign language);
- Remember that you unintelligible speech is a reflection of the skills or understanding [4]
- Do not talk to the person sitting heard back from her. Avoid walking in the office;
- Encourage the person to participate in discussions and be open dialogului. Ajutați person to overcome the inevitable barriers that create the symbol of authority, ie police unit. Mental pressure of the existence of a criminal case, create mental discomfort and lead to communication barriers Be patient, be friendly and allocate more time for communication;
✓ Give the interpreter time to translate the language can sign what is discussed, for example, when you ask questions, allow a person with hearing impairments to respond. Take short breaks if the interview/hearing are very long, to give a short break of interpreting, translation into sign language is a demanding activity.
✓ Beware of non-verbal communication.
✓ Given the shortcomings of hearing and communication dependence by signs, gestures, mimics and general "body language" causes much deeper meanings than in regular communication with a person with a normal medical status.

**Relation With A Person With Language Difficulties And Speech**

There are people who have difficulties in verbal communication. This may be due to either failure to articulate sounds, or as a matter of understanding or reproducing the words written or spoken (dysphasia). The difficulty is not easily observable because these people have a right and understand the same language, speak coherently about concrete results, but problems in abstract issues. In others, the difficulty is immediately noticeable, such as severe stammering. This creates communication difficulties that can not be known or may be associated with such conditions as cerebral palsy that can affect any muscle group, including his and those of the face.

Since learning involves substantially normal communication, particularly through speaking, any difficulty in this area can lead to isolation and stress [6].

1.4 **Communication strategies:**

✓ Show calm, give the person more time to complete what he meant;
✓ Some appreciate the help in completing their sentence - check if the person accepts or whether outside intervention, emphasizes relational discomfort;
✓ Others will want to communicate by computer with a speech synthesizer. As mentioned above, check that such software are available on computers in the office where the person hearing will be held and if the officer involved in the activity, is familiar with their use;
✓ People who have difficulty perceiving language, may have trouble understanding when questions are asked or answered, so be patient, spend more time for information to be assimilated. Usually the delay response is associated by the police as an avoidance, hesitation, attempted to construct a logical scaffolding of a distorted truth, but in such situations is not the case.
✓ If witnesses acknowledge the support and effort made - these people have a speech problem not a low IQ.
✓ Formulate possible questions that require answers light as short.
✓ Listening to a person who is struggling to say a few words, is often embarrassing. Stress often exacerbates the problem. Stay calm and watch the lips of the person, association of ideas, use imagination to provide real support to the communication process.

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Probation, a new constant of the criminal sanctioning system

Tomita M.

West University of Timisoara (ROMANIA) ceptim2005@yahoo.com

Abstract

Situated at the moment of a significant reevaluation, the criminal justice system requires the institutional compatibilizing of our social system with the western one, also entailing, as a priority, the community management of justice, in this register probation proving to be a resource, equally theoretical and practical, of pragmatically continuing the lucid structural reform of the Romanian social space.

At the time of its modernization, probation must retain as much tradition as to give it the signs of its own identity, and enough future to stimulate professional interest for the efficiency of the stringently necessary renewals.

Key words: probation system,

Introduction

"In a world subject to continuous change, especially in a Central Europe still in transition, the challenge of reforming mentality towards victims and felons faces the loud protest that favors more punitive sanctions, even the return to the death penalty. Even specialists have, on many occasions, conflicting opinions related to the promotion of alternative penal sanctions that are not generally appreciated, even if their efficiency was proved on different and numerous occasions, showing also that they allow self respect and an increase in local community safety. Intolerance, racism and discrimination are real obstacles in the way of social progress, but they are not immovable" [5]

Although the fact that detention represents, not a reeducation factor, but a time of "specialization in crime" is well known, at the beginning of the third millennium, experts called upon to find and offer grounded, effective solutions for the prevention of crime and the treatment of delinquents, still face noteworthy dilemmas: the treatment of delinquents should be done inside prison walls, or outside of them?

Indeed, given the controversy raised globally by the role and functions of prison as an instrument of social control, treatment outside custodial establishments, along with its consequences for the detainee, represents a matter of great importance.

The efforts undertaken to find effective substitutes for imprisonment, at least for the case of offenders who pose no danger for peace and public security, have been obvious since the Vth Congress of the United Nations, held in 1975. Regardless of traditional arguments regarding contradictions inherent to the security and reeducation functions of custodial institutions, new impetus was given to movements that promote offender treatment outside prisons, through a new and dynamic community-based approach. These factors are the dehumanizing aspect of imprisonment, the negative and debilitating influences it has on ones personality, realizing and accepting the fact that incarceration is not the solution for improving the chances of felons to choose the correct path, as well as the fact that penitentiary institutions cannot determine a decrease in criminality.

The opinion according to which criminal law should be applied moderately when there exist viable alternatives to it, it having a unique role only at the moment when it represents the sole possibility, is shared by many. Thus, we understand that the efficiency of social control can be higher when possible alternatives are applied, even in the presence of criminal law. [4]

The viewpoints regarding the necessity of resorting to measures aimed at replacing imprisonment, as stated at the VIth United Nations Congress, are based on general requirements of justice, humanity and tolerance, but at the same time, on the inadvertency existing between the stated "purpose"of a conviction, that of rehabilitation of imprisoned felons and the "means" of reaching that goal, namely the penitentiary institution.

The document prepared shows, as previously mentioned, that the criminal tendencies of the convicted delinquent tend to be enhanced in prison; that no matter the nature of the cost-utility analysis, imprisonment is costly, constituting a waste, especially taking into consideration resources of a human and social nature, while other types of sentences, different from custodial ones, are at least as effective as the others, but without being that costly and without constituting such a negative effect.
To this sense, the tradition of Western countries shows that a system based on community involvement and on its resources, is more effective.

Of course essential for the finality of the act of justice is the problem of resources, material, but also human, meaning the need to entrust this task in the hands of staff with professional status, recruited, trained and paid for this purpose.

Our country joined the European Community recommendations and is consequently undergoing an ample process of reforming penal justice. In this process, alongside traditional penal sanctions, community measures are present.

With changes taking place in Romanian society, in order to increase the efficiency of penal legislation in suppressing crime and to influence in a greater measure the attitude of law breakers in view of their social reintegration, particularly those who repeatedly violate the criminal law, the need to adapt our current legislation to the needs of legal practice became apparent [4].

The tendency, according to EU recommendations, has been to perfect the sanctions’ system, through their diversification and the restructuring the means of individualization and enforcement of punishments. All changes, those already made or those currently under implementation in criminal legislation, are situated under the balance between the social danger of actions mentioned by criminal law and the sanctions applied by the courts.

Such a sanctioning regime is established by Law no. 286/2009 of the Criminal Code Thus, Romanian legislation now contains community work, whose purpose is to maintain in the community those persons that committed offenses provided by criminal law and according to which all those that have committed such offenses must be subject to certain restrictions and obligations, temporarily restricting some of their rights and liberties [6].

Situated at the moment of a significant reevaluation, the criminal justice system requires the institutional compatibilization of our social system with the Western one, also entailing, as a priority, the community management of justice, in this register probation proving to be a resource, equally theoretical and practical, of pragmatically continuing the lucid structural reform of the Romanian social space [5]

The place of Probation in the alternative sanctions Field

As mentioned before, the society we live in is caught in a process of continuous and permanent change, this meaning that the mission of different institutions is being remodeled, being caught in the process of adapting to the new conditions and to the social, economic, cultural environment that has an influence on the techniques and methods of intervention in every field, including that of community administration of justice. It is necessary that the theories and models used by today’s justice systems be adapted to the changes that society is undergoing.

There exist a series of structures that can collaborate to find viable solutions to the problem of criminality, the role of each actor involved in the process of social reinsertion of individuals that have committed criminal acts being influenced by external factors and not exerted by only one institution.

The apparition of alternative sanctions to imprisonment is a consequence of the inability of traditional criminal law to further respond to principles growingly accepted by practitioners and specialists from the justice field, such as: the priority given to reactions and to re-socialization in an open environment; the involvement of the community in the response to criminality; the place and rights of both victims and delinquents etc. In the acceptance of Denis van Doosselaere, “the alternative is a measure that allows the delinquent to function in his own environment; it is a particular condition for maintaining him in his family (often)”, targeting “the neutralization of the most violent means, in lack of avoiding resorting to penal law, which represent the failure of will power to prevent certain situations and behaviors” [2].

As a reaction against the system focused on imprisonment and its negative effects, under the impact of a complex of processes and mutations undergone in the sphere of penal law and justice, the legal promotion and regulation of alternative sanctions in general and of probation in particular was done gradually.

In this way, we can state that probation can be viewed as the possibility given to convicted offenders of executing their punishment in the community, under supervision. Probation is an alternative to incarceration, first of all for youth, primary felons and felons convicted for minor violations of the law [1].

Probation represents an institution disposed by institutions of the state, through the courts, institution which ensures the control and at the same time the assistance of the felon, while it is permitted to him to carry out his life in the community, under supervision.

Referring to its origins, probation is a humanitarian method of awarding a second chance to those that have committed minor crimes or those that have committed crimes for the first time. The purpose of probation is not only to prevent the person from committing another crime, but also to reach the stage in which the respective person will have a morally acceptable behavior.

The starting point of this institution, probation, was not related to the promotion of a law or that of a code that would attract attention, but a common sense decision made by the community, focusing on those who
did not make very severe mistakes. Through this the community expressed its refusal to further take away man’s most valued possession, his freedom. Another aspect is the refusal to spend money when money can be saved, even gained; but just as important is the refusal to adopt measures with important social costs, seeing as a more viable solution was at hand. From this standpoint, through work and good behavior, the accused could prove, during a trial period, that the crime committed was a mere accident and does not reflect his real self [1].

Although Romania lacks the vast experience of other European countries in the matter, in the last 10 years considerable efforts were made for the implementation of a viable and complex system of alternative sanctions. Introducing probation in the Romanian justice system represented the first step in the development of the alternative sanctions system. This however was only the beginning. Probation’s consecration in the practices of the courts only came later, the construction of a specific legislation and of an adequate institutional framework being in full process in our country.

The number of alternative criminal sanctions is quite limited, although the preoccupation for diversifying them existed, this bringing prejudice to the good individualization of punishments, having as an objective avoiding the imprisonment of the felon. As a result, criminal dispositions do not contain probation as a main sentence, nor are other sanctions which combine maintaining the convict in the community with the partial execution of detention sentencing, such as the Italian semi-detention, the French semi-freedom, weekend detention in Spanish law, house arrest and electronic monitoring.

The key to individualized sentencing, as an important means of evaluating an offender’s degree of guilt and as a professional agency for fighting the actual causes of the offence, which, if not identified, understood and solved, may lead to a repeat in the criminal behavior, is offered by European probation models. Also, probation proposes to minimize the negative impact on the individual represented by the contact with the criminal justice system. The demand for agents of justice in society will always exist, so as to express the indignation of law abiding citizens towards those that fail to respect the norms. Still, a certain balance is needed in any criminal justice system, a mid place of the proportions between control and care, punishment and treatment, shame and rehabilitation [3].

From the regulation at a superior legal level, it becomes clear that the idea that the punishment of offenders can be done in other conditions than the present ones, based mainly on the custodial aspect, is increasingly accepted by Romanian society.

This is an extremely important aspect, due to the very specifics of probation, because although it includes a series of limitations which target different areas, such as housing, work, entourage, the felon is developing his activities in society, consequently being directly dependent on its accepting and of course contribution.

Cooperation is another principle that springs from the contents of this new legislation, concept which integrates multiple actions with a deeply diversified and specialized nature and that shows good adaptation to the complexity of the aim pursued by the probation services. Noteworthy and remarkable at the same time is the transformation affirmation of partnership cooperation, expressed through the actions of attracting and involving the community in the social reintegration of those targeted by this legislation, the offenders. So, if until now the execution of sanctions and punishment in Romania was exclusively the preserve of state agencies, at present, not only a partial transfer of responsibility is made, but also one of society’s possibility to act, from a simple spectator becoming a participant, due to this new manner of addressing the problem of social sanction and reintegration of offenders.

Discussion and Conclusions

The increasingly active participation of the community in social life, especially through the apparition and afterwards the strong involvement of nongovernmental organizations specialized in social assistance has also contributed to making possible this activity of transfer.

Thus, it becomes obvious that justice cannot be managed efficiently if we attempt to tackle it outside the community it serves. The fact that the enforcement bodies cannot always handle all the needs of the offender themselves is a fact of reality, revealed by reality. More so, the offender’s existence outside the community is impossible, him being an integrating part of it.

Along with the increase in the awareness of the community regarding its rights, but also of its obligations, that while the failure for committing the crime belongs to that who has committed it, but at the same time to society, that the simple containment of offenders does not represent a viable, long term solution and that it is only in its power to produce change, then the purpose of this law, and indeed of the whole of criminal law, can be achieved with greater efficiency.

As an integrating side of probation work, the new strategies of promoting community safety from the perspective of offender social rehabilitation and reintegration place the accent on a better education of the offender, on his physical and psychological health, on better means of relating with those around him, on
superior psycho-social abilities required by the present conditions of society life, of finding a work place, housing etc.

Due to the increased acceptance of society and to the importance awarded to society in the process of social reintegration by the probation services, the continuing of the structural reform of Romanian social space will be ensured, with the approval and collaboration of the entire community.

References
Exclusion of unlawfully obtained evidence under the new code of criminal procedure

Udroiu M.

Bucharest Court, 2nd Criminal Section (Romania), mihai_udroiu@yahoo.com.

Abstract
Exclusion of unlawfully or unfairly obtained evidence was covered by the new code as an independent sanction in matters of evidence. Code provisions reflect the latest doctrinal and case law developments at the European level, but were significantly affected by the proposed amendments incorporated in the Law implementing the new code. Adopting a vision in accordance with the case law of the Strasbourg Court, to ensure efficient conduct of criminal proceedings under the new code model, requires keeping the legislator’s original vision in the matter.

Keywords: evidence, the principle of legality, the principle of fair trial, exclusion of unlawfully or unfairly produced evidence.

Introductory remarks
Reforming criminal procedure law in Romania has become a constant concern of the Romanian legislator since 1990, while the current Code of Criminal Procedure, which entered into force in January 1969, was designed to be adapted to the rigors of the criminal trial within a totalitarian state. However, the many changes of the code during the post-revolutionary period failed to fully meet the requirements of the (European) Convention for Protection of Human Rights and Fundamental Freedoms (hereinafter the European Convention) and of the European Court of Human Rights case law (hereinafter the European Court).

After a long legislative process, in 2010 the Romanian Parliament passed the new Code of Criminal Procedure through Law No. 135/2010, (hereinafter NCCP). But reforming the criminal justice system does not end with passing new codes. It requires both amending and adapting the entire criminal procedural legislation to the standards of the new code and institutional and administrative reform through the Law implementing the new Code of Criminal Procedure (hereinafter LINCCP).

As shown in the explanatory memorandum, the LINCCP draft aims essentially at: establishing the procedural rules to address transitory situations resulting from the entry into force of the NCCP, in relation to the stage of the criminal trial or different criminal proceedings upon the entry into force of the new code; repealing some texts of special legislation as a result of their inclusion in the NCCP to avoid procedural duplication; amending texts of special legislation in order to harmonize thereof with the NCPP provisions; and re-thinking the NCCP institutions by altering certain provisions thereof.

In this context, we propose to analyze the provisions of art. 102 NCCP as passed by the Romanian Parliament in 2010, but also in terms of the proposed amendments the Ministry of Justice has brought through the LINCCP draft.

Relevant legislation
According to art. 102 NCCP “(1) Evidence obtained through torture and evidence derived therefore can not be used in criminal proceedings. (2) Evidence unlawfully obtained can not be used in criminal proceedings. (3) In exceptional cases, provisions of par. (2) shall not apply if the means of evidence shows formal flaws or if there are other procedural irregularities which do not cause a harm for the removal of which the exclusion of the concerned means of evidence is required. (4) Derived evidence are excluded if they have been directly obtained from the unlawfully obtained evidence and could not be obtained otherwise. (5) Evidence derived from evidence provided in par. (2) are not excluded if unlawfully obtained evidence are used under par. (3)”.

The legislator has regulated an autonomous procedural sanction in relation to evidence, i.e. exclusion of unlawfully produced evidence, stipulating the cases where it shall be applied, but also the exceptions where, although provision of evidence does not meet the formal legality requirements, evidence can be used in criminal trial without breaking the presumption of innocence or other conventional guarantees of the fairness of the trial.
Even though the text the Romanian Parliament has adopted regarding Article 102 of the NCCP can be subject to improvement, the proposal to amend this article through LINCCP is not intended to remove the imperfections of the original settlement, but to change the legislator’s vision in this matter, in an unfortunate way.

Thus, LINCCP fully amends paragraph 3 of art. 102 of the NCCP, so that “the nullity of the act ordering or approving the provision of evidence or by which the said evidence was produced shall lead to exclusion of the evidence” and the fifth paragraph of this article is repealed.

Exclusion of unlawfully or unfairly produced evidence theory

**Principle of legality** involves the restricted provision of means of evidence strictly and exhaustively provided by law and under the conditions stipulated by the NCCP, the special legislation and the European Court case law.

**Principle of loyalty** [1] in producing evidence prohibits the use of any strategy or treatment aimed at producing, in bad faith, a means of evidence or leads to causing an offence in order to obtain means of evidence, if these means harm the dignity of the individual, its rights to a fair trial or privacy. Loyalty is a gathering evidence action feature, which aims at lawful criminal rulings whilst respecting human rights and dignity of justice [2].

**Exclusion** is a specific procedural sanction applicable to means of evidence produced in breach of the principle of legality, loyalty and where the fundamental rights and freedoms guaranteed by the European Convention have been violated. This sanction has a special scope, thus differing from the nullity applicable only to procedural acts.

In the legal literature [3] there were several views on the reason for the sanction of exclusion unlawfully or unfairly produced means of evidence. A first opinion stated that the means of evidence exclusion aims to remove for the future the criminal prosecution bodies’ possible deviations from the law, in respect that if they know that they can use unlawfully or unfairly produced means of evidence in the criminal proceedings will be tempted to break the law (disciplinary approach). A second view asserts that attention should be directed to the defendant, who is the victim of the criminal prosecution bodies’ unlawful conduct in provision of evidence and who, by excluding evidence, is restored to the state prior to the breach of his/her right (remedy approach). A third view states that exclusion of unfair evidence is never adequate as long as their reliability is not affected (external approach).

The fourth approach focuses on comparing the two indictable offences: authorities’ unlawful conduct in relation to defendant’s criminal offences. Thus, it shows that, on the one hand, the public will not have confidence in the judiciary if the courts would pass too easily over the illegitimites committed by the criminal prosecution bodies in producing evidence and on the other hand, the public will have a sense of insecurity if offenders are to be acquitted as a result of excluding the means of evidence whose illegality stems from violation of insignificant legal provisions (legitimacy theory) [4].

The Romanian Parliament embraced this last theory in art. 102 of the NCCP, placing the debate on unlawful or unfairly means of evidence provision in a wider context, having regard to the functions of criminal proceedings and the judgment it ends up with. Judgment authority may be significantly affected where it is based on illegally produced evidence. This danger can come from several sources: a) the lack of credibility of evidence which reduces the judgment accuracy b) evidence obtained in breach of the fundamental right to a fair trial lowering judgment’s moral authority c) evidence obtained through criminal prosecution bodies’ abuses committed deliberately. This approach considers all principles contained in the previous opinions, ultimately having to determine the impact the unlawful or unfair means of evidence provision could have on the legitimacy of the judgment [4].

Thus, art. 102 of the NCCP has synthetically shown these doctrinal developments while providing in the first paragraph for unconditional and, by law, exclusion of any evidence obtained through torture or other ill-treatment, considering that the right to a fair trial of the accused is irreparably violated by using them. The Romanian legislator described as founded the (concurring) view expressed by Judge N. Bratza, in the Case Jalloh v. Germany (See ECHR, the Judgment dated 11 July 2006, in the case Jalooh v. Germany.), according to which: ‘(…) use of evidence obtained by means of a treatment infringing the fundamental values protected by art. 3 is contrary to the whole concept of a fair trial, although admission of such evidence is not - as applicable in this case - crucial in obtaining a conviction. Similar to the statements obtained by coercion, violation of equity values and the adverse effect over the integrity of the judicial process and the unreliable nature of the evidence that can be obtained this way oppose such use. It is true that the treatment the applicant was subjected to was considered inhuman and degrading, not being qualified as torture and the rule of exclusion under art.15 in conjunction with art.16 of the Convention on Torture expressly distinguishes between admitting the evidence obtained under torture and that obtained by other forms of maltreatment. However, the line between different forms of maltreatment is not immutable or likely to provide with a precise definition, as the Court previously
pointed out, but fair trial is irreparably injured where evidence obtained by the respective state authorities in breach of the prohibition under art. 3 is admitted’.

Par. (2) of art. 102 NCCP stipulates, as a principle, the exclusion of any unlawfully or unfairly produced evidence, paragraph 3 stating an exception, according to the legitimacy theory where the means of evidence shows form-related flaws or there are other procedural irregularities which do not cause harm for the removal of which the exclusion of the concerned means of evidence is required.

Considering the nature of this institution (taken over in the continental law system from the common-law tradition [5]) and the European Court case law, the courts, pursuant to art. 102 par. (3) NCCP, may order exclusion of the means of evidence only if they ascertain substantial and significant violation of a legal provision regarding the producing of evidences which, in specific circumstances, makes the keeping of the means of evidence produced as such affect the fairness of the criminal proceedings as a whole. Thus, courts must assess the need for applying the exclusion sanction by reference to the seriousness of the breach in the defendant’s rights during the provision of evidence, to the impact the evidence’s unlawful or unfair nature may have on the credibility of the means of evidence and the importance the means of evidence has in supporting prosecution (e.g. exclusive, decisive, unimportant). In this context, it should be borne in mind that some means of evidence, although unlawfully or unfairly produced, can help prove the innocence of the defendant, in which case we cannot speak of breaking the fairness of trial where the Court does not rule on excluding this evidence.

Derived evidence exclusion

Another widely debated issue in the literature concerns the application of the “remote effect” or “fruits of the poisonous tree” doctrine. ([4], [6], [7], [8]).

Art. 102 par. (4) NCCP provides for excluding the means of evidence produced legally, but derived (closely related) from unlawfully obtained evidence.

Thus, if the judicial bodies have produced evidence in breach of the principle of legality, loyalty and where the fundamental rights and freedoms guaranteed by the European Convention have been violated and this means of evidence has resulted in data and information that led to the subsequent and lawful provision of other means of evidence, the derived means of evidence exclusion sanction shall be applied in principle.

In accordance with the European doctrinal developments, an exception to this principle is provided for in par. (5) of art. 102 NCCP, as well, similar to the provisions of par. (3) of this article.

In this matter, the legal literature ([6], [8]) showed that the evidence subsequently produced are not excluded if: a) the relationship between the unlawfully produced evidence and the lawfully evidence subsequently produced is marginal, i.e. the causation has become so much attenuated that unlawfulness was dissipated; b) if subsequent evidence could be obtained through other legal means different from the unlawfully produced initial evidence (from an independent source); c) if the evidence subsequently produced, even if it is related to the unlawfully produced initial evidence, would have been inevitably discovered subsequently by lawful means.

The “remote effect” (excluding the derived evidence) doctrine finds application only where between the evidence produced unlawfully and the subsequently produced evidence (secondary or derived) is required a causal connection (theory of equivalence of conditions, known as the theory of sine qua non condition) and the judicial bodies have primarily and directly used data and information obtained from the unlawful evidence without any other alternative source and without having definite possibility for them to be discovered in the future to legally produce the derived means of evidence ([6], [8]).

Therefore, from art. 102 par. (4) and (5) NCCP it can be concluded that when judicial bodies have produced evidence in breach of the principles of legality and loyalty, prejudicing the rights guaranteed by the European Convention and, this means of evidence have resulted in facts or circumstances that led directly and necessary to the legally provision of other means of evidence (producing unlawful means being a sine qua non requirement for the producing of the lawful means of evidence), the latter will be excluded, the Courts not being able to substantiate the ruling on such derived evidence.

Criticism of the proposals brought by the Ministry of Justice through the LINCCP

Analyzing the above mentioned reasons, it results that wording of art. 102 NCCP is in line with the highest European standards in the field of human rights.

The amendments proposed through LINCCP create doctrinal confusion on the one hand, and, on the other hand, lead to an inconsistent view towards the imposition of the unlawfully or unfairly produced evidence exclusion sanction.
Paragraph (3) of Art. 102 of the NCCP proposed by LINCCP stipulates that the nullity of the act ordering or approving the provision of evidence or by which the said evidence was produced shall lead to exclusion of the evidence, transferring the discussion from the applicability of the exclusion sanction to the sanction of the nullity of the procedural act which approved or authorized the producing of evidence. This way, the confusion between the two institutions, namely the nullity and exclusion, is increasing even more.

The proposal made through the LINCCP is actually a truism, being obvious that the nullity of the act approving or authorizing the provision of means of evidence has as consequence the unlawfulness thereof. Or, in order to see whether it is to be excluded, one must analyze the criteria according to which the unlawful evidence can be maintained or excluded and which relate mainly to guaranteeing the fundamental rights and, in particular, the fairness of the procedure. However, by excluding these criteria from par. (3), one achieves an unpredictability framework in this matter likely to lead to the establishment of a non-unitary practice.

Secondly, eliminating the assessment criteria for the application of derived evidence exclusion sanction through the proposal to repeal par. (5) of art. 102 NCPP hinders even more the possibility of applying and interpreting the provisions on derived evidence.

The doctrinal confusion created by the LINCCP proposals may lead to a dangerous interpretation for the proper functioning of the judicial system in the sense of outlining the possibility of unconditional and legal exclusion of evidence regardless of the nature and seriousness of the breach in the procedural provision, which would distinguish the Romanian legal procedural system at European level, with adverse effects, including in judicial cooperation in criminal matters.

As evidence and provision thereof is the core of the criminal trial, we believe that there is no room in this matter for contextual innovation able to create, *ab initio*, inconsistencies at a principle level.

Therefore, we advocate for maintaining the original form of the wording of art. 102 NCCP.

References

Aspects regarding certain methods for profiling

Ungureanu S.G.¹, Popescu M.A. ²

¹Police Academy „Alexandru Ioan Cuza” (ROMANIA)
²Christian University „Dimitrie Cantemir” (ROMANIA)
av.agata@yahoo.com

Abstract:

Using some specific methods of diagnosis the psychologists make the personality profile of a subject that is a sketch of the personality structure. In most cases the identity of the subject is either known or deliberately ignored.

Key words: criminal profiling, investigation, prevention

Recently psychology faced a new challenge, that of discovery the identity of a subject that does not want to be known [3]. This approach is not completely different from the classical one.

For the specialists that investigate crimes it is well known the fact that the criminal has its own modus operandi. This personal style is discovered by the forensic specialists starting from the physical evidence at the crime scene. Therefore, when committing a new crime the author will behave in a similar way.

For certain types of crimes and criminals the idea of a modus operandi has to be broaden in order to be used in cases where physical evidence have been destroyed. Due to the literature in the field the classical ways can be known by those who are to commit a crime, they will not leave any evidence or they will plant the evidence to lead the police to a wrong way. That is why the investigator has to search the crime scene for non physical evidence which can be essential.

At the same time there are unusual crimes judging by the way they were committed or by the motif. But all specialists are aware of the fact that the personality of these criminals falls under psychical pathology but very few acknowledge the fact that these pathological clues may lead to prognoses regarding the behavior of the criminal as well as searching and interviewing strategies.

In order to fulfill these necessities forensics specialists resort to psychological, sociological and psychiatrical knowledge in order to develop profiling as a new instrument.

We initiate a plea for using personality profiling as a specialised tool to provide guidance in forensic research. We anticipate the interest of certain categories of readers who may include forensic experts and criminologists, psychologists, sociologists and psychiatrists who are faced with domestic violence issues and are training students to work in such areas.

The main documentary sources underlying this series of articles are two books on the forensic use of psychological profile. The first one is the book by Ronald M. Holmes "Violent crime profiling - an investigative tool", published in 1989 by Sage Publishing , California. Ronald M. Homes is a professor of criminology at the Faculty of Administration of Justice at the University of Louisville. He was invited to attend more than 100 cases of murder and rape by police departments throughout the U.S. He is the author of several books, including: "Serial Killer", "Sex Offenders and the Justice System."

The second book, published in translation by George Pruteanu, in 1993, by the House FF Press, Bucharest, is named 'Killer Hunter", was written by Robert K. Ressler and Tom Shachtman. Robert K. Ressler is a former F.B.I. retired, who worked in the Department of Behavioral Sciences. In this institution he has led research projects on the personality of the murderer, worked with local police in solving difficult cases and has trained generations on the forensic technique of profiling.

With the intention to help the justice system in fighting crime, psychological profiling has three major goals:

1. To provide psychological and social assessment of the potential offender. Thus, the profile should include key variables for the process of identification, such as age group, profession, religion, marital status, education, etc., some habits. This information will reduce the scope of the investigation with a direct effect on the duration, resources committed and, of course, on its outcome. It can predict possible future attacks as well as the places of these attacks.

2. To indicate the types of objects that the offender will have possession. Thus, the search at the residence of a suspect will focus on items such as souvenirs, photographs, pornographic magazines, and others which serve to describe the violent episode.
3. To provide suggestions regarding interviewing strategies, knowing that offenders respond differently to different methods of interrogations.

Profiling technique is based on the elements of behavioral and social sciences, but has the characteristics of an art by appealing to profiler experience and his intuition. It was even created an aura of mystery around profilers. They use highly specialized knowledge and usually deal with difficult cases that have resisted traditional approaches (sadistic torture, mutilation, arson without justification, rape, murder).

When a profiler is successful, his work is considered a real magic and the literary fiction amplifies that perception, which is already oversized. The result is not always positive. Some specialists consider that the profiles are too vague and do not bring anything extra, in terms of concrete facts to the information gathered from the neighborhood bartender. Police officers are impressed by the status and academic knowledge. The latter tend to confine the knowledge they have acquired, remaining far from practical aspects of investigative work.

Profiling is based on several fundamental assumptions [4]

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A precursor of the now widely used forensic profiling may be considered the personality profile of Adolf Hitler, made by the American psychiatrist, Dr. Walter C. Langer, at the request of the U.S. Office of Strategic Services. During the war and the period of full glory for Hitler, U.S. military officials wanted to know what is his type of personality that makes him credible, how he might react if the situation would be unfavorable. With the help of three research assistants familiar with psychodynamic theoretical model, Langer has studied all the existing documentation and interviews of people Hitler had known closely in order to provide the Office of Strategic Services an objective psychological profile of Adolf Hitler which would serve as a common basis for future decisions.

According to this profile, Adolf perceived his father as a distant figure. He was cold, cruel and brutal in relation with his wife and children. On the other hand, the mother was seen as delicate, sensitive and excessively affectionate. Young Adolf has developed a strong libidinal attachment to his mother. He wanted her to leave his father and to love only him, however, in the same way. In his adult life, Hitler was not able to develop or sustain a close relationship with a woman or a man, because he considered them all unreliable. His mother would not love him the same way that she loved his father, so she - and women in general - was not worthy of trust or love him.

Like many dictators, he believed himself to be infallible and omnipotent. He had divine protection, was empowered to liberate Germany and turn it into a global superpower. War had been given in response to his prayers. When he was 20 years, young Adolf had grown a beard and wanted to become a Catholic priest. During the Second World War he called himself: "Christ of German people."

It was tried a predilection on the development and end of the dictator. Several variants have been analyzed and it was finally opted for the possibility of mental deterioration in the direction of schizophrenia, and if defeat will be imminent, Langer promised that Hitler would commit suicide. The Fuhrer threatened that he will take his life, in few previous occasions and in addition, he had told Rauschning: "Yes, when the ultimate threat comes I will have to sacrifice myself to the people."

Langer's profile was remarkably accurate in its prognoses. Hitler committed suicide, never married, and as is clear from his writings, seemed to be very close to mental illness. He also left several arguments to show his inclinations towards sexual perversions, urology, and its attractions to homosexuality.

The first is that the crime scene reflects the personality of the killer. This is a crucial assumption, without which profiling would not exist because when investigating a crime, we have no other evidence than that offered by the crime scene. Physical and nonphysical evidence is that which leads us to the kind of personality and finally to the identity of the criminal.

Another assumption is that the offender's personality will remain constant in its essential details. The criminal will commit a similar crime in a similar manner as a result of impulses, compulsions or addictions that marks his personality. As a test shows a certain type of psycho-pathology, crime scene shows a deviant personality type. For example, an investigator will immediately see if an offender is sadistic by the nature of injuries to the victim.

Profiling is not fair from an infallible method. In 1981 an FBI study out of 192 cases has made a profile, and 88 have been solved. Of these 88, only 17% of profile cases helped to identify suspects. But resolving cases in which it applies is not the only criterion by which to appreciate the value of profiling technique. This technique provides an understanding of personality types that commit acts unacceptable and incomprehensible, and the motivations behind such acts.

Following the research undertaken within the FBI's Behavioral Sciences Department a typology of violent offenders has been profiled.

The socially disorganized offender type is characterized by the following: he is below average in terms of intelligence (IQ 80-95), social misfit, unskilled in a particular profession, the father has had an unstable job and created in the family a severe or inconsistent discipline; usually he does not drink, lives alone, is nocturnal,
is not interested in news, lives or works near the crime scene and prior to the crime could be seen a significant change in his behavior, often happens to leave high school, is negligent in terms of personal hygiene, has secret hiding places, and does not usually meet with other people.

In terms of behavior after committing the crime, this type of killer returns to the scene, attends the funeral, can turn to religion, keeps journals or diaries, can change his residence or job.

As interview techniques it is recommended empathy, counseling approach, introducing indirect evidence and interviewing during the night, as it is the period in which this type of offender feels the best (source FBI Law Enforcement Bulletin, 1985, cf. Holmes, 1989).

Such person usually commits spontaneous crimes. If they try to change the address, he does not move in an environment quite different. Some may try to enlist in the army, but typically fail.

Organized criminal antisocial type is intelligent, socially adjusted, performant in terms of sexual performance, usually lives with a partner, has received a severe discipline in childhood, has charm and masculine appearance, is geographically mobile; the etiology of this type of crime is usually situational.

After committing the crime, this type of killer returns to the scene, volunteers to give information and cooperates with the police, may move the corpse to hide or he may put it in a visible place to be seen.

As interview techniques, given that this offender will admit his act only if it is a fact so obvious that he can not deny, it is recommended to use direct strategies, categorical and precise style in the details (source FBI Law Enforcement Bulletin, 1985 , cf. Holmes, 1989)

Antisocial criminal is organized in everything he does. He claims that there is a place for everything and everything must be in place. He is antisocial because he decided to be as such, is lonely because there is not someone good enough for him. He has a history of drug use, especially alcohol or marijuana. He does not take criticism, and thinks very highly about himself.

Differences between the two types of offenders are reflected in the differences between the scenes of crime.

For the antisocial type the crime is more spontaneous and the victim is known. The conversation that takes place while the attack is minimal, and the victim is depersonalized. The crime scene is chaotic, violent, sudden discharges, not using public property, and sex is usually held after death. The body is moved, the weapons are left at the scene and, in general, the crime scene abounds in traces of the author.

The antisocial type plans its action, seeks a rule, personalize their victim (eg. He keeps a souvenir or a picture). He chooses a submissive victim, controlling the conversation, using means of restraint and maintains aggressive sexual acts before his death, the body is moved.

These are only a few items to raise awareness and provide a basis for reading and experiment in this field. Probably much of the knowledge presented is not fully known to practitioners. We believe that the ability to compare different views can lead to better systematization of the everyday experience of forensic specialists.

**PROFILING METHODS**

A useful analysis is based on the principle which holds that behavior reflects personality. J. Douglas (Journey into darkness, p. 13) classifies the profiling process in seven steps:

1. assessing the criminal act (modus operandi: what makes the killer commit murder; signature: why, that thing that turns him emotionally).
2. comprehensive evaluation of the characteristics of the crime scene.
3. comprehensive analysis of the victim or the victims (victimology).
4. preliminary assessment of the reports carried out by police.
5. evaluation issued by the doctor who performed the autopsy.
6. developing a profile of the attacker.
7. investigative suggestions used in profiling.

The next step is to consult the local investigators and suggest proactive strategies to determine the unidentified subject to make a move. This may involve meeting with the victim's family, family members prepare to deal with mocking phone calls coming from the killer, working with the media and others.

**Karpman psychogenetic inventory**

It is a general guide, a method developed by each specialist psychiatric, which is in fact psychological analysis.

Benjamin Karpman's psychogenetic inventory includes 312 questions (the actual number of questions is much larger, the inventory of 312 questions is a condensed version of the current inventory - and even in its complete form is just a guide and does not include those questions that are prepared for each case), and requires the most thorough investigation of all types of sexual deviations and disorders in order to determine the mental state and motivations of the killer.
The inventory
I. family history (questions 1 to 7)
II. family situation (questions 8 to 10)
III. personal past
A. the birth and early infancy period (questions 11 to 12)
B. childhood (questions 13 to 32)
C. education (questions 33 to 37)
D. professional background (questions 38 to 42)
E. military past (questions 43 to 45)
F. habits (questions 46 to 50)
IV. personality composition: general features (questions 51 to 79)
V. personality composition: characteristic features
A. memory (questions 80 to 84)
B. particularities of desire (questions 85 to 89)
C. reactions to external factors (questions 90 to 92)
D. uncertainty (questions 93 to 110)
E. aggression (questions 111 to 125)
F. guilt (questions 126 to 151)
G. prejudices (questions from 152-174)
H. social models (questions from 175-188)
VI. antisocial past (questions 189 to 192)
VII. psychosexual background
A. early curiosity and interest (from 193-203)
B. sexual instruction (questions from 204-208)
C. dreams about sex and involuntary ejaculations (questions from 209-213)
D. masturbation (questions from 214 to 220)
E. heterosexuality (questions 221 to 223)
F. homosexuality (questions from 224-240)
G. voyeurism (questions 241 to 245)
H. exhibitionism (questions from 246-249)
I. sadomasochism (questions 250 to 256)
J. travesty (questions 257 to 260)
K. sequentially (questions 261 to 262)
L. fetishism (questions from 263-264)
M. zoophobia (from 265-267 questions)
N. coprophobia (questions from 268-274)
O. necrophilia (questions from 275-277)
P. sexual stimulation (questions from 278-282)
Q. personal and social factors (questions from 283 to 291)
VIII. dreams (questions from 292-299)
IX. attitudes, opinions, views
A. sex (question 300)
B. marriage (questions 301 to 305)
C. teaching (questions from 306-312)

Graphology
Graphology aims to discover the personality of a famous author and graphoscopia (graphic expertise) identifies the author of a writing whose paternity is uncertain (unknown or disputed).

In graphology it is considering only one writing (or more evidence coming from the same person), establishing the general characteristics and interpreting them psychologically.

Within the Department of Forensic there have been for years graphics expertise through which officers can prove that a document is false or not. Annually, there are analysed a variety of documents, from letters, calls, notes, forms completed by hand to receipts, checks or other official documents. Many times, simply by graphic expertise, the forensic specialists have succeeded to find common criminals.

Tools for measuring writing
Graphological expertise can be ordered ex officio or upon request of either party, either for the prosecution or defense support, or to prove an action or to combat it. Along with other types of expertise
(medical, legal, psychiatric, accounting, engineering), graphic expertise brings an important contribution to research material evidence, primarily by identifying persons and objects. The tools are the same for years: an ordinary magnifying glass, magnifying glass with reticol (which helps to make measurements: point size, the figures, the distance between words or between rows), microscope and new software.

Details and automatisms

After photocopying a document it is impossible to make such an expertise. The police officers examine the original document on the tiniest of details: how to attack a letter, uppercase and lowercase letters. Each person creates a certain automatism when you write. Personality is reflected very well in the style of writing.

Public image

Compare the signature with the rest of writing. If it is decorated with all kinds of ornaments or written is greater than the rest of the letters, he feels the need to "embellished" public image. If the signature is highlighted it means that he likes to be seen as an important person. When the signature is followed by a dot it means that he always likes to have the last word.

It detects as deep feelings are depending on how it is written down. If the letters are written down than you are dealing with a person who can deny the feelings easily. A writing down shows a moderate temperament. A very depressed writing betrays an intense personality that forgets and forgives that.

The proximity of others is detected on the spaces between words. The average distance is the length of a "w". If this is
- less than - he likes to approach people.
- normal - is a balanced person.
- more (twice "w") - prefers to have their personal space, no one enters.
- very high (as three "w") - is difficult to get close to him and becomes claustrophobic if you try to enter his territory.
- regular-sized spaces - complies with the view of others.
- irregular spaces - his attitude toward the relationship is changing.

To see if a person is erratic or not, consider the letters "a", "o", "u" and "n". Compare their size with extensions letters "h", "d" and "l" and "loops" letters "g", "y" and "j"

When the letters in the first category are higher than those in the last category extensions then it is an expansive and extrovert person.
- If points are smaller then he is reserved and introverted.
- If the letters vary in size then he is a crackpot.
- To detect whether a person is violent or quarrelsome you must look at letter "p" and his style of writing: if the "p" loop is smaller than the rest of the letter, then he likes to argue.

A struggling and cramped writing betrays a stingy man (this style is very common to accountants). A general style of writing tells you clearly that he's ready to spend all their money with you.

Graphological verdict

After studying the material and examining it closely, the forensic specialists make a technical-scientific report taking into consideration documents, deeds, contracts, file checks, invoices, notes on various passports, fake stamps. In general, there is no time limit on consideration of a document. There are some documents to be studied and examined in the team. The responsibility is very high because, according to the verdict that we give a person can be blamed or not for committing certain facts.

References:


Criminal repression in European legislation and the respect for procedural guarantees in the context of economic crisis. The right to defense

Urda O.A.

Faculty of Law, "Alexandru Ioan Cuza" University Iasi, (ROMANIA)

Abstract

The aim of the European Union for the procedural safeguards is to ensure a reasonable level for the protection of the suspect or defendant, especially when this one is a foreign citizen. In practice, such a situation has become increasingly common, obviously due to the free movement of the persons. The right to defense is a complex guarantee which is aligned to the contemporary conception of human rights.

Key words: the right to defense, fair trial, legal assistance.

Considering the alarming increase of the number of the violent criminal offenses in Europe and also worldwide, lately, the European Council noted the need to improve judicial cooperation between Member States, particularly in combating of such offenses that are considered serious forms of crime [1].

As new phenomena appeared in the life of the European Union, such as the internal ones (ig. committing serious offenses against the financial interests of the European Union), or external ones (ig. the increase of the activity of multinational organized crimes association, as well as committing serious offenses such as terrorism, human, drugs and weapons trafficking, etc) it was gradually felt the need for emphasizing the above conclusion, supporting the necessity of using the criminal law in certain ways and against serious crimes committed in the European Union.

The importance of the people rights in criminal proceedings was reaffirmed in the Stockholm Programme, adopted by the European Council on 10-11 December 2009. The proposal for a directive was announced in an Action Plan for the implementing of the Stockholm Programme from April 20th, 2010 under "Rights of persons in criminal proceedings" bearing the name Legislative proposal regarding the information of the rights and charges. Previously, in 2004, the Commission presented a proposal for a Council Framework Decision regarding the certain procedural rights in criminal proceedings within the European Union, the proposal could not be adopted by the Council; the proposal was preceded (2003) by a green card concerning the procedural guarantees granted to suspects and defendants in criminal proceedings in the EU.

If so far the task of providing a number of procedural safeguards belonged to States Member of the European Union, the European Commission pointed out that the only action taken at European Union level may be able to enforce common rules of procedural safeguards, hence the necessity of a framework decision related to the procedural guarantees of the suspect or defendant. [3]

In this paper I have analyzed an important aspect of procedural guarantees which must be regulated and protected by the national authorities, namely the right to defense. My approach concerned the matters related to the development of these procedural safeguards by reference to the incidence of the enacted rules of the Council of Europe, and I mean here particularly to the European Convention on Human Rights and to the case-law of the European Court of Human Rights, and also regarding the rules developed in the European Union.

When we talk about criminal repression in Europe is necessary to talk about the inherent procedural issues and a significant dimension in this regard is the procedural safeguards.

Through a permanent case-law, the European Court of Human Rights has developed a general principle, which became almost a style clause in the field, according to which by Convention are protected the real and effective human rights, and not the theoretical and illusory ones [4].

In this regard, under the influence of European case-law, the criminal procedure is not only a formal guarantee, but is itself vital. The standard procedural rules contained in the criminal procedure continue to guarantee the formal regularity of the procedure, in order for the process to be conducted fairly. But today the criminal procedure has acquired a fundamental importance, a right which prevails over all other considerations: the right to a fair trial, which is the core of criminal procedure, becomes the criterion for assessing the compliance by the courts of the substantial rights and thus becomes itself a genuine substantial right [5].
The right to defense is an inherent principle of legal order, which aligns the contemporary conception of human rights, being registered in many relevant international documents [6].

In conducting of the criminal trial, those who participate must be able to perform their legal rights and interests and also to have the assurance that they are protected from the potential abuses by the judicial bodies [6].

In a broad understanding the right to defend includes the whole complex of rights and procedural safeguards that offers to the individual the opportunity to defend himself against allegations, to contest the accusations, to reveal his innocence. [7]

In a narrow sense the right to defense is strictly related to the possibility of the parties to hire an attorney.

The right to defense is a complex security consisting of a series of essential rights for the existence of a fair trial, namely the right to be informed about the accusation nature and cause, the legal assistance offered to the defendant and the possibility to defend its own legal interests but also ex-officio administration of the defense evidences by a judicial body and self-defense of the defendant. [8]

The right to be informed about the accusation nature and cause

These regulations can be found in art. 6, paragraph 3 point a) of the Convention but also in art. 5 paragraph 2 of the Convention according to which "any arrested person shall be informed as soon as possible and in a language which he understands about the reasons for arrest and the charge against him", and also in the Charter of Fundamental Rights of the European Union which stipulates in art. 48 that "any accused person shall be guaranteed the right to defense."

The Directive 2012/13/EU concerning the right to information within the criminal proceedings framework brings a relevant novelty in this regard, namely establishes an obligation for Member States to guarantee the rights of the suspected or accused persons who are arrested or detained to receive a written Notice in a simple and accessible language which will contain the following information: "right to be assisted by a lawyer; any right to the free legal assistance and the conditions for obtaining such advice, the right to be informed about the prosecution according with Article 6, the right to interpretation and translation, the right to remain silent, the right for access to the case materials, the right to inform the consular authorities and a person, the right for access to emergency medical assistance and maximum number of hours or days for the suspected or accused person may be deprived of liberty before they come in front of a judicial authority."

The notice concerning the rights also includes basic information about any possibility, under provisions of the national law, to challenge the legality of the arrest, to obtain a revision of the detention or to request the provisional release.

In case the notice is not available in the appropriate language, the suspects will receive this information orally and then, without undue delay, it is necessary their communication by written notice above mentioned.

The deadline for transposition of the Directive is June 2nd, 2014. Romania has not yet transposed it, and the New Criminal Procedure Code does not come with amendments in this regard.

We notice similarities with the American law where the administrated evidences are declared void if the person examined was not informed about his rights [9].

If we consider the fact that the right to information, the Court recognizes that art. 6 paragraph 3 of the Convention "does not impose a specific form of how the defendant must be informed about the accusation nature and cause against him" [10], we believe that the provisions of The Directive 2012/13/EU are more precise so the margin of appreciation of States in this matter remains very limited. Otherwise, the highly detailed regulation and attachment of Notices patterns which are offered to the suspect or defendant, and which should contain a range of information regarding procedural rights may question the compliance with the principle of subsidiarity by the Directive. I consider that detailed regulation can only be beneficial for the individual, which in the context of free movement of people across the European Union, he is certain of common procedural guarantees in any Member State he may be.

In this regard the provisions of the Proposal for a Directive of the European Parliament and of the Council are more relevant concerning the right to be assisted by a lawyer in criminal proceedings and the right to communicate upon arrest.

The parties oppoRtunity to defend themselves during the criminal trial

Usually the party is not required to have an attorney, except for those mandatory defense cases, but the lawmaker shall provide him a range of rights and procedural safeguards which allows him to defend himself. If the defendant can defend himself, he must have all the necessary facilities to organize his defense [11].

In fact the rule in a criminal defense is the absence of mandatory defense and the exception, the provision by the lawmaker of a mandatory defense [12].
The opportunity of the parties to defend themselves is highlighted in our national laws by giving them extensive procedural rights, particularly to the defendant, such as the right to know the stage of criminal charges and the prosecution material content, the right to propose the use of evidence and to complain against criminal acts etc. and during trial the defendant has the right to be heard, can give explanations about the charges against him, can require the administration of evidence, can speak for these cause, can use legal remedies against the judgment [12].

**Defendant's right to public legal assistance free of charge**

According to the Court, the right to free legal assistance when the interests of justice so require, does not constitute an alternative to the right to defend oneself but an independent right to which objective rules apply. In cases Pakelli against Germany (ECHR, Decision of April 25th, 1983 Pakelli against Germany) and Artico against Italy (ECHR, Decision of May 13th, 1980 Artico against Italy) the Court establishes an obligation for the state and that is to not let the accused to respond by himself if the case raises legal issues that require a certain level of professional knowledge [13]. We can not but ask ourselves if there is the state obligation to provide a quality defense performed by the appointed lawyer. Another issue that was put into doctrine is whether the lawyer who should ensure protection, refuses to grant legal aid may be found guilty of crime of abuse against the interests of persons, stipulated in art. 246 Criminal Code [14]. Considering the fact that the lawyer does not have the status of public functionar, we believe that the penalty which may apply is of a civil nature, through the damages caused to the former client, possibly accompanied by one of the disciplinary sanctions stipulated in Art. 89 of Law 51/1991, which organizes the profession of lawyer, sanctions that may apply when the lawyer commits acts in connection with the profession and outside it that are likely to harm the honor and prestige of the profession or institution.

Article 171 paragraph (1) Code of Criminal Procedure, and art. 89 new Code of Criminal Procedure stipulate that the legal assistance of the accused / suspect or defendant is mandatory when this one is a minor admitted to a rehabilitation center or a medical educational center, when taken into custody or arrested in another case and regarding this matter it was ordered a safety procedure of hospitalization or mandatory medical treatment, even in another case, or when the criminal prosecution body or the court considers that it would not be able to defend himself as well as in other cases provided by law. During the trial for cases where the crime committed the law requires life imprisonment or imprisonment of more than 5 years, in this regard we have the provisions of art. 171 paragraph. (4) The Criminal Procedure Code and art. 91 new Code of Criminal Procedure.

A problem that arises in our criminal procedural law refers to the right of the defender to assist in performing the criminal prosecution acts. Law no. 57/2008 amending paragraph 1 of Art. 172 of the Criminal Procedural Code appeared as a result of the admission of the unconstitutionality exception of art. 172 paragraph 1 and Art. 173 paragraph. Code of Criminal Procedure (Published in the Official Gazette of Romania, Part I, no. 228, March 25th, 2008) by its Decision no. 1086/2007 of the Constitutional Court (Published in the Official Gazette of Romania, Part I, no. 866, December 18th, 2007), though it would have to strike a balance in terms of equality of legal arms by granting the same individual rights both to the defense of the defendant and to the defender of the injured party, civil party and the civilly liable party, it increased the state of ambiguity causing new controversies in judicial practice and in the academic literature.

Given the new vision adopted by the lawmaker, to restore the rights to defense of defendant, as well as the principle of equality of legal arms, which the parties can use within a criminal trial, the Romanian lawmaker ought to devote the same rights to the defenders of the other parts of the criminal proceedings. However the Romanian lawmaker maintains the prohibition for the defender of the injured party, civil party and the civilly liable party to assist just when carrying out the criminal prosecution acts that involve the hearing or the presence of the party to which it ensures the defense [15]. In these circumstances it can be said that politics of the lawmaker in the criminal trial is no longer one that equally guarantees the possibility to exercise the right to defense of any party involved, but gives priority to the defense of the defendant in the detriment of the same criminal trial. Regardless of how the defense is made by elected or appointed ex officio lawyer, the right to defense requires a defendant's right "to communicate freely with his counselor to prepare the defense or for any other reason related to the process."

**The administration ex officio by the judicial bodies of the evidence in defense**

The presumption of innocence imposes to state authorities, and implicitly to judicial bodies, not to start with the preconceived idea according to which the criminally investigated person committed the deed which is accused of and therefore the State through the judicial bodies will have a positive obligation to take evidence both against and in favor of this person. Important to be specified is the fact that this right is enjoyed by every person whether or not a citizen of the State in which the proceedings take place.
The judiciary authorities have the obligation to examine the case in all its aspects, regardless of the position the parts have in the process, having also the obligation to extend the criminal prosecution and the trial if appropriate and if the law allows to facts and new people or expand the judiciary control to other situations than those raised by the parties. [12]

This goal arises naturally from the principle of the active role which the prosecution and the courts must respect in criminal proceedings.

In this respect art. 222 Criminal Procedure Code states that the criminal prosecution agent collects evidences both in favor and against the defendant (paragraph 1), even when it has admitted the offense (paragraph 2).

National legislation seems to provide an effective guarantee of the right to defense of a person accused of committing a crime, but we must not forget that under the European Convention on Human Rights there are guaranteed effective rights and not theoretical or illusory rights. Although the text of the law meets the requirements of the Convention and ECHR case-law, the experience shows however that usually the criminal prosecution bodies often turn into real prosecution lawyers.

Conclusions

The approach of creating an area of freedom, security and justice is an act of courage, act that still faces the reluctance of the States Members. The new rules adopted at the European Union level in relation to the rights of defense are designed to create a uniform legal framework in the EU criminal proceedings. In this regard we must note the changes occurred at the national legislation level and how the provisions of European law standards were perceived and applied internally.

Detailed directives, which in essence can be easily classified as true regulations as well as the case-law of the Strasbourg Court have limited the margin of appreciation owned by the Romanian State. The subsidiarity was therefore subordinated to criminal procedure laws uniformity trend within States Member. Given the fact that the criminality became international, the means of repression must be Europeanized. But they are conditioned and can be carried out only within certain limits namely the compliance with the involved guarantees of the parties.

Limitation of sovereignty in favor of a common European regulations is certainly justified however especially in the matter of the right for defense in the context of freedom of movement.

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Certain reflections on the creation of a European penal law and its implications on the Romanian penal law

Voicescu V.A.

"Acad. Andrei Rădulescu" Legal Research Institute Romanian Academy (ROMANIA) voicescuvlad@gmail.com

Abstract

In order to achieve a significant result in countering crime, within the European Union, so that the differences between the various legal systems will stop being an advantage to the organised crime and an obstacle to cooperation between the member states, steps must be taken towards harmonized criminal law provisions drafted in accordance with a consistent European criminal law policy.

Keywords: criminal law, harmonization, work of art, reproduction, EU criminal law, judicial cooperation

The classical international law accommodated two main theories on the relation between international and municipal law. These two theories are known as dualism and monism. [1]

Dualistic theory - with its followers mainly German and Italian authors, including: H. Triepel, Strupp and D. Anzilotti, promoted by the positivist school, suggests the following concept: international law and domestic law are distinct and separate as they do not have the same object of regulation. Domestic legal norm applies only within the borders of the state and the legal rule of public international law applies only to the relationship between subjects of international law.

Monistic theory, pursued by the disciples "of natural law" states that between the two systems of law there is no difference, being in fact one single system of law, according to the fact that there can be no double definition of the law.

However, the trend is the priority of international law in relation to the municipal law. This is exemplified by the provisions of the 1969 Vienna Convention on the Law of Treaties which expressly provides that a State may not invoke the provisions of its domestic law to justify the failure of an international treaty.

This tendency is even more obvious in the case of EU law which enshrines the supremacy of the EU treaties in relation to the law of the Member States of the European Union. In this respect the EU law is a set of legal rules that require Member States to achieve the objectives that the European Union has to fulfill.

Thus on certain aspects EU law acquires the value of a supranational law varying between this and the classical international law which is essentially a law between states. Regarding this new legal order the Court of Justice of the European Union, stated: "the new international legal order of the Member States of the European Union ceded, although in limited areas, some of their sovereign rights."

The project of a European judicial area was launched in November 1995 by Professor Francesco de Angelis (former Director General for Financial Control Commission) and entrusted to a group of experts from 8 European countries (Spain, Italy, Germany, Sweden, Greece, Belgium, France and the UK). Two years later this group of experts published under the direction of Mrs. Mireille Delmas-Marty, professor at the University Pantheon-Sorbonne University and member of the Institute of France, a work entitled Corpus Juris [2], which establishes a set of rules of criminal law and criminal procedure applicable in the European area and which allows a more effective repression of fraud from the EU budget. [3]

The term corpus juris means body of law in Latin and is usually used to refer to the body of law of a country, jurisdiction or court. In the EU context Corpus Juris was the name given to a limited examination of how European law could be adapted to tackle the problem of fraud directed against EU funds. Corpus Juris was in fact a proposal relating the strengthening of cooperation between the Member States. It is considered as a common, unified system of criminal law rules – both material and procedural – for dealing with fraud against the EC/EU that aims in unification of certain aspects of criminal law by defining a series of specific common offences, followed by provisions determining the general principles governing them in substantive law terms and the centralisation of prosecutions by means of a European Public Prosecutor. The essence of the proposal therefore contains elements of both substantive and procedural legal unification. It provides for establishment of specifically European criminal offences – “eurocrimes” affecting the financial interests of the EU in relation to a single geographical jurisdiction comprising the territory of all EU Member States.
If we are to analyze, there are three main issues which the EU criminal justice system had to tackle: inequity (inconsistencies between systems, which causes serious inequalities for different operators), inefficiency (due to lack of uniformity as a result of legal borders) and extreme complexity (due to the discontinuities of criminal law and inconsistency between different systems).

In order to address this situation three options have been explored so far (to be used as alternatives or cumulatively): assimilation, cooperation and harmonization. However, the reports prepared by the Commission and by the expert group shows the limits to each of these options. The main element of the recommendations of the study on the administrative sanctions and criminal systems is the harmonization measures or greater consistency, aimed at reducing the serious differences between national laws.

Even approaches arising from the case law of the two European Courts (ECJ and ECHR), inconsistencies remain strong, from one country to another in key areas such as: required evidence, the degree of certainty that condition the conviction, the admissibility of documents or by reference to previous statements of the defendant, or the extension of the right to silence.

There is a double risk: on one hand, political opposition to the process, the additional protocols to the Convention signed, but not ratified, leading to ascension of a paper wall in front of a very real booming criminality, amounting to billions of euros and on the other hand, the repudiation by the judicial authorities of this increasingly complex legal system due to the overlapping of national legislations, more or less similar, but never identical and cooperation practices in geographical area with a variable content.

It is to remember, however, that assimilation does not guarantee the efficacy or justice, which would require equal treatment for all parties, that cooperation designed to increase efficiency, increases inevitably the complexity, because, well, harmonization meant to strengthen justice and efficiency, contribute to the complexity of the whole.

In order to align the legal systems so to facilitate judicial cooperation and prevent criminals from taking advantage of the differences between the Member States certain legal steps had to be taken at the European level.

In the early period of the European project, that of the pronounced intergovernmental cooperation, from the Treaty of Rome until the beginning of the 70s, the Union had no competence in criminal law. Criminal law enters within the jurisdiction of the Union with the emergence of the European Union Treaty, which established "judicial cooperation in criminal matters" as a matter of common interest within the meaning of Art. K1 (now Art. 29 by the Amsterdam Treaty and Art. 67 TFEU).

The legislative work began before the Treaty of Amsterdam, when the Council of Europe drew up the first legal acts on judicial cooperation in criminal matters. And with the inclusion of this sphere in the Treaty of Maastricht, a number of European Union agreements joined the existing instruments [4].

Under the Maastricht Treaty three different instruments could be adopted in the third pillar: common positions, common activities and conventions. The conventions, as treaties governed by public international law had appeared to be ineffective, as they were not ratified by all Member States. Furthermore, the ratification procedure was protracted [5]. Also, the other instruments of the third pillar appeared to be insufficient. The closer contacts between the Member States required the introduction of the more effective instruments. In the search for the adequate solutions, the Amsterdam Treaty (which entered into force on 1 May 1999) introduced the framework decision as a specific instrument of the third pillar.

An important contribution was brought by the treaty of Amsterdam and the treaty of Nice. The importance of fighting organised crime was underlined in the new Title VI in the Treaty on European Union, dealing with police and judicial cooperation in criminal matters. This article provides for coordinating the national rules on offences and penalties applicable to organised crime, terrorism and drug trafficking. As regards to the treaty of Nice it mentions several references to Eurojust.

An essential step was made with the Treaty establishing a Constitution for Europe (though it has never entered into force) which integrated judicial cooperation in criminal matters into the common procedures. This treaty made provision for the possibility of establishing a European Public Prosecutor’s Office from Eurojust.

Soon, with the aggressive developments of the organised crime, fighting criminality at the European level proved to be a necessity. Because of this the European Council stated that it was in favour of an efficient and comprehensive approach in the fight against all forms of crime and in particular the serious forms of organised and transnational crime. It highlighted the aspects linked to prevention and called for the development of the exchange of best practices and for the network of competent national authorities and bodies to be strengthened.

Still, the problems regarding the many differences between the municipal legislation remained, so efforts were made to agree on common definitions, incriminations and sanctions. These were focused in the first instance on a limited number of sectors of particular relevance, such as financial crime, drug trafficking, trafficking in human beings, high-tech crime and environmental crime. The Council also underlined the need for specific action to combat money laundering.

In this regard The Hague Programme stresses the need to develop mutual trust and to strengthen the coordination of investigations. Mutual recognition of judicial decisions in criminal matters proved to be the
cornerstone of judicial cooperation. It implied the development of equivalent standards for procedural rights in criminal proceedings. The approximation of laws, in particular by the establishment of minimum rules, was also a priority.

The most important breakthrough came with the Treaty of Lisbon. Legal cooperation in criminal matters finally came within the scope of the Community. This implied the use of the ordinary legislative procedure, co-decision and qualified majority in Council, but also the adoption of conventional community legal instruments that benefit from direct effect and enhanced legal monitoring. International agreements will be subject to the joint procedure, which requires the assent of Parliament.

Amongst many reforms provided for in the Treaty of Lisbon, reform of the judicial cooperation in criminal matters is perhaps the deepest and the most visible. The Treaty of Lisbon has abolished the “third pillar”. The former Article 31 paragraph 1 letter e) TEU [6] has been replaced by the article 83 paragraph 1 of the Treaty on the Functioning of the European Union, which provides as follows:

The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.

The transfer of this provision from TEU to TFEU [7] is not only of technical nature. The regulations of TFEU adopt the so-called “community method” instead of the hitherto prevailing intergovernmental method.

The Treaty of Lisbon brought two most significant changes. First, it is limiting the sovereign power of the Member States to regulate the criminal matters, like for example to define types of crimes and to establish penalties. Under the new regulation a simple veto of a state is impossible. Moreover, after 1 January, 2014, it will not even be sufficient to reject a proposal for a directive. Criminal matters were always recognized as one of the most delicate issues regarding the sovereignty of the state [8].

Secondly, the power of the governments was restrained and the competence of the European Parliament was extended. It is worth mentioning that the prerogatives of national parliaments were also enlarged, however in a very limited scope. Under new regulations, the consent of the European Parliament is necessary to adopt any directive concerning criminal matters.

In order to achieve a significant result in countering crime, within the European Union, so that the differences between the various legal systems will stop being an advantage to the organised crime and an obstacle to cooperation between the member states, steps must be taken towards harmonized criminal law provisions drafted in accordance with a consistent European criminal law policy. But is it possible for a genuine EU penal law to exist? Some may argue that because traditionally the penal law existed as a reflection of the sovereignty of the state which only is entitled to issue mandatory penal legal norms and to enforce them.

In this respect the creation of a European criminal law code is a complex and, to a certain extent unpopular issue. It is complex because it suggests harmonisation of national substantial and procedural criminal law systems and unpopular amongst Member States because indeed harmonisation of criminal law is utterly sensitive, displaying, as already mentioned, one of the last corners of Member States’ sovereignty.

One solution that so far proved to be accepted by the member states would be a set of penal law provisions aiming at ensuring the most important aspects of the European construction which to be legislated by conventions concluded between states of the European Union. In this case, next to the municipal penal law would be applicable an ensemble of common rules with the scope of combating crime, but with specific means enshrined by each state.

Since the Tampere conference in 1999, the EU has, in fact, been pursuing a policy of “mutual recognition” which is exactly the opposite of a “pan-European code”, being a scheme designed to make it possible for the Member States to combat trans-border criminality in Europe using their own separate criminal justice systems.

Despite all these, the general opinion was that more instruments for practical co-operation were needed to confront the fact that crimes increasingly have cross-border elements: victims, perpetrators, witnesses and material evidence located in different countries, and in some serious cases, organised criminals operating across borders.

And because a lack of coordination was still felt, between the judicial and law enforcement authorities, of the member states, the Lisbon Treaty has provided the European Union (EU) with new competences in the area of judicial cooperation in criminal matters and law enforcement cooperation as this area has now become an area of shared competences with the Member States.
Following the path described even since 1997 by *Corpus Juris* the Lisbon Treaty is not the first fundamental legislation that is trying to harmonise the substantial criminal law as a solution towards a European criminal law. Indeed, all multi-annual programmes (Tampere 1999, The Hague 2004, Stockholm 2009) and the former treaty on the European Union, as amended by the Treaty of Amsterdam, already provided for this possibility and/or objective.

Formally, only substantial harmonisation was possible and only in three particular crime areas: terrorism, organised crime and illicit drug trafficking [9]. Treaty on the Functioning of the European Union, have been extended the areas of crime, in comparison to the previous regulation. The new areas are: trafficking in human beings and sexual exploitation of women and children, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment and computer crime.

Such an extension of the list in TFEU can be interpreted in two ways. According to the first option, this change in words does not modify the EU’s competence. This provision is a mere acceptance of the hitherto prevailing practice [10]. However, this extension may be interpreted as giving the expressive competence, which is necessary to the existing acts.

The effect of the various framework decisions adopted [11] was mixed: with framework decisions being obligatory as far as their aims are concerned, all common definitions and penalty ranges adopted had to/should be transposed into national law of all Member States. Those provisions cover an important number of areas. On the other hand, many common standards were felt to be rather non-innovative [12] or were not implemented in a satisfactory way.

Referring to the control over the framework decisions, the competence of the ECJ shall be underlined. The ECJ could control the legality and interpret framework decisions. The jurisdiction of the Tribunal was facultative, depending on the consent of the particular Member States. The facultative jurisdiction of the ECJ suggests an approximation of the role of the ECJ to international courts, what underlines the international character of legal instruments adopted in the former third pillar system.

Harmonisation of specific elements of procedural criminal law and of definitions and penalties for a limited number of particularly serious crimes is, since the entry into force of the Lisbon Treaty, detailed in Article 82.2 [procedural law] and in Article 83.1 [substantial law] of the TFEU. Those harmonisation instruments will be adopted in the forms of directives. Unlike regulations, directives are not immediately applicable into the national legal orders, they should indeed be transposed by each Member State, which could leave some flexibility to the Member States in this particular area.

And since the transposing of these directives as well as the enforcing of the national legislation drafted as a result of the directives is left to interpretation of jurists with different legal backgrounds the result was sometimes inconsistent with their scope. So talks about a European Public Prosecutor’s Office started to take place, and in 2001 already, the Commission issued a green paper on the topic and explained how this new body would function [13]. For the first time, article 86 (TFEU) allows the Member States to establish a European Public Prosecutor’s Office (the Office). If created, its competence would cover crimes threatening the financial interests of the EU and then, if the European Council and European Parliament so wish, it could be expanded to other serious crime areas having a cross-border dimension.

The most important advantage of the Treaty of Lisbon is changing the form of legal act concerning criminal matters. Directives have been the most popular instruments in the legal heritage of the EC and applying them to criminal matters strengthens the consistent of the common legal system. However it is hardly possible that these directives will have any direct effect. Hence the crucial point is possibility to force the Member States to implement the directive.

Another approach was to be considered by the EU, one that would ensure the effective implementation of EU policies, in full respect of subsidiarity and proportionality and other basic Treaty principles. The main principles of this approach were laid down, in Brussels, on 20.9.2011, in the form of the Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions, entitled Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law.

This communication mentions that, while it is not the role of the EU to replace national criminal codes, EU criminal law legislation can, however, add, within the limits of EU competence, important value to the existing national criminal law systems.

Because criminal law must always remain a measure of last resort, the new legislation requires the respect of fundamental legal principles and as in national law, EU criminal law legislation must be carefully considered. In order for these principles [14] to be respected a two-step approach was considered related to the criminal law legislation. The first step would be the decision on whether to adopt criminal law measures at all, by considering the principles of necessity and proportionality and applying the criminal law as means of the last resort. The second step after establishing that a criminal law measure is required would be the principles guiding the decision on what kind of criminal law measures to adopt. These principles are: the minimum rules [15], necessity and proportionality, clear factual evidence and tailoring the sanctions to the crime.
By setting out how the EU should use criminal law to ensure the effective implementation of EU policies this communication represents a first step in the Commission's efforts to put in place a coherent and consistent EU Criminal Policy. And in order to achieve this purpose, the Commission will draft, in close cooperation with Parliament and Council, sample language. This should guide the EU legislator whenever drafting criminal law provisions setting minimum rules on offences and sanctions.

Following the Communication published in September 2011 that was just described, the Commission has set up an expert group on EU criminal policy [16]. This group is composed of twenty high-level legal experts, academics and practitioners. Their roles are to advice European Commission and contribute to improve the quality of EU legislation in the field of criminal law, in the light of the new rules of the Lisbon Treaty and the Charter of Fundamental Rights.

As regards to national sovereignty, of course decisions on the key elements of criminal and police procedure and law should be made by the national parliaments and courts. But the EU’s measures on policing and criminal law do not violate that principle.

First of all, these laws each had to be agreed unanimously by all Member States and so none of them were forced on this country against its will.

Secondly, most of the EU rules concern subjects which are cross-border by nature, and which therefore need to be the subject of agreement between a number of States, since no individual State can address them in isolation: mutual recognition measures (such as the movement of evidence, fugitives or prisoners between States), the exchange of information between law enforcement bodies and the creation of international agencies to assist these forms of co-operation.

The dynamics of Romanian criminal law in accordance with the criminal law provisions of the European Union implies continuity in consolidating the legal norms and accommodating that what is valuable and representative.

In conjunction with the adoption of TFEU, the EU legislation has promoted the idea of approximating the criminal laws of the Member States and the drafting of similar provisions so as to ensure a consistent suppression of those offences affecting the interests of the Community. [17]

Currently we are witnessing the harmonization of European law, uniform interpretation of legal norms that influence the process of enforcing the law, so that in the future certain EU criminal law provisions, that are of significant importance to the EU or indicts offences affecting the interests of several member states, may override the national legal rules, which will become subsidiary rules.

References

[4] 1995 agreement on a simplified extradition procedure based on the 1957 convention;1996 agreement on extradition between Member States of the Union, supplementing the conventions of 1957 on extradition and 1977 on the suppression of terrorism by widening the scope of extradition proceedings;
[5] K. Karsznicki, the Lisbon Treaty - a new opportunity to improve cooperation in the field of justice, "Prosecution and the Law" (2009), No. 11-12
[11] Although some other types of instruments – such as directives when the topical area 'belonged' to the first pillar- were also adopted, the normal and formal harmonisation tools under the former third pillar were indeed Framework Decisions.
[12] For instance, on the minimum provisions laid down by Framework decision 2004/757/JHA in the field of illicit drug trafficking, see Report from the Commission of 10 December 2009 COM(2009)669 final stating that Member States specialists 'regard its importance as minor because it has not resulted in many changes to national legislation'.
[15] EU legislation regarding the definition of criminal offences and sanctions is limited to "minimum rules" under Article 83 of the Treaty on the Functioning of the EU
[16] Commission Decision of 21 February 2012 on setting up the expert group on EU criminal policy (2012/C 53/05)
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