NEW CRIMINAL LAW. TRADITION AND REFORM

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ABSTRACT

The article includes the author's reflections on the criminal law and the criminal procedure law, pointing both the positive aspects of the new criminal provisions, as well as certain regulations likely to raise controversies and critical discussions.

Keywords: new criminal law, penal reform respecting tradition

1. ***General considerations***. Criminal law emerged in human history as a systematic, orderly reaction against some serious bad deeds committed against collectivity, against members of society against property and other social values, appreciated as extremely important for the social group.

Although the criminal regulation was not distinct from the moral, religious, civil regulation at a time, specialized legal acts have gradually been issued (*Lex Iulia Majestatis, Lex Cornelia de Sicariis et Venefiiciis, Lex Pompeia de Paricidis*).

In these traditional regulations, the legislator defined the bad deeds, mentioned the persons who committed such deeds and who were to be held accountable, indicating the penalties to which the perpetrators were exposed. The scheme gradually becomes more complex, and these legal acts do not contain anymore the provisions regarding the enforcement of criminal law in time and in space, the plurality of persons, the unity and plurality of deeds, the causes removing the offence or excluding the penalty.

Besides the traditional scheme, a lot of reforming rules have been issued over time, which represent the expression of some immediate or temporary needs, such as: the provisions regarding the manner in which the penalties are executed, the Inquisition, the religious offences, the offences against the sovereign, or other amending reforms of certain criminal institutions.

As far as these reforms were consolidated, generalized, they were introduced in the traditional mechanism of criminal repression, supplementing it. It could be argued that in the past, as well as at present, the space of emergence of some reforming provisions was determined by the enhancement and consolidation of the traditional scheme, i.e. it was enlarged or diminished in with respect to the traditional scheme volume.

The objective basis of the existence of traditional elements, namely of the provisions subsequently referred to as *constants* of the criminal repression, consists of a certain unitary objective structure of the crime phenomenon itself, the existence of certain similar elements, which are present as regards the object of the criminal protection (very important social values which are susceptible to criminal protection, shall be limited). The forms of aggression against these values do not objectively have a great diversity, and the manner of sanctioning serious offences has not varied so much throughout the human history (either the deprivation of life or of freedom, or the deprivation of rights or of property is applied), and the respective sanctions get an individual character after the possibility of applying sanctions to a collectivity disappeared.

With a view to the perspectives on criminal reform, as well as on maintaining the traditional mechanism of criminal repression, they depend on the evolution of the crime phenomenon. Insofar as this is expanded, the traditional mechanism shall be held and be inevitably supplemented by

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those possible new reforming provisions, which shall be generalized and consolidated in parallel, diminishing the space of the proper reforms of criminal repression.

On the contrary, if the crime phenomenon is diminished as a result of the improvement of social organization and of an intense educational and preventive activity, the appeal to the traditional mechanism of criminal repression and to the emergence of more numerous and frequent reforms, as well, which should set forth new, attenuated methods of criminal repression will be expected to be diminished. For instance, this would be the case of the provisions setting forth the taking over of the duties by the collectivity, to sanction the bad deeds of the members of the social group, as the collectivity is able to exercise a more powerful educational and preventive influence than the official authorities.

2. *Special considerations.* We should try to review, in the light of these general considerations, the special situations of the evolution of criminal law in our country. First, we could wonder whether the new criminal law represents a moment of progress of the criminal institutions? Does it provide more efficient methods of fighting crime phenomenon?

The clear and comparative analysis of the previous and recent criminal law does not allow us to give a clear answer to this question.

We feel the need for a general discussion. Is there inevitably an evolution of the criminal institutions at the same time with the change of the political regime? We would be actually contradicted by reality. For instance, the German Criminal Code dates from 1871 and was used both during Hitler's totalitarian regime and during the democratic regime which preceded and followed it. Likewise, the Italian Criminal Code, which became effective in 1931, served both the Fascist regime, and the subsequent democratic regime. Similarly, the French Criminal Code has survived for more than 180 years under governments of different structures and political tendencies.

It could be said that these examples deal with some changes of political regime within *the same form of dominant ownership,* which would have operated as a uniting factor.

However, in case of moving from this form of ownership, namely, from the private property to the socialist property, would the situation be radically changed and, consequently, would the immediate adoption of a new Criminal Code which could be made up in a more advanced law be strictly necessary? In this case as well, the answer could not be totally different from the answer above. The experience of our country shows that the new Criminal Code of 1969 became effective after more than 20 years from the instauration of the communist government, being also used within a period when it was stated that the working-class struggle reached its maximum intensity, when it occurred the fall of Monarchy, the nationalization of the basic means of production and the co-operativisation of agriculture, the reorganization of the State apparatus, of the education system occurred.

But, even if the new Criminal Code of 1969 was adopted, did it represent a revolution in criminal matters, a progress comparable to that of the fall of a social class and its replacement with another class? This is difficult to assert. The new criminal law of 1969, even if this is an expression of a new reality, as regards the political power, from the criminal point of view, took over the basic scheme of the previous law, which became tradition, protecting the important, but similar social values, such as man, State, social cohabitation, ownership and others, it was also recognized the need for further use of the penalty, as a means of pressure. Neither the ***forms*** under which these values were prejudiced suffered too much: betrayal, espionage, plot and other crimes against State; theft, deceit, breach of trust and other crimes against ownership, homicide, bodily injury, hit, in the matter of protection of person and so on, remained identically formulated and sanctioned, even in the circumstances of the new social structure.

Thus, it was confirmed the sentence according to which the conclusion could not be totally accepted, in the sense that, at the same time with the change of the form of ownership, of the company structure, also the superstructure of the company shall be inevitably changed, among which the law, including the criminal institutions. *The sentence of constants of law* arose from this reality, to which the Legal Research Institute of Romanian Academy acceded as well, recognizing that, from the objective point of view, *the criminal matter* relates to human acts which claimed identical regulations over the years, no matter the political changes. People have always felt the

need for rejecting serious deeds committed in the society and which could have threatened even the supreme values of the social group, this being the essential condition of their existence itself.

The conclusion which we draw would be that the idea of reform could not be separated from the idea of tradition, that criminal reforms occurred according the traditional framework, and the previous legal institutions gradually adapted to the new necessities.

We could assert that ***tradition has been coexisting with reform*** in the criminal law.

In this light, we should compare several provisions of those two Criminal codes:

We would record as ***positive sides*** of the new Criminal Code:

- the deletion of the purpose of the criminal law;
- the deletion of the social danger from the definition of crime;
- the elimination of the relatively inappropriate attempt;
- the voluntary enforcement of the more favourable law after the judgement remains final;
- the justified causes;
- the separation of the author and co-author from the participants;
- the more reasonable, lower limits on punishment as regards certain crimes;
- and so on.

We hereby record certain questionable sides of the new Criminal Code, susceptible to controversies and contradictory solutions:

- the separation of the principle of legality and indictment of punishment in two principles, namely the principle of legality and the principle of punishment;
- *unjustified and imputable,* as essential features of the crime;
- the intermediate plurality instead of cases where there is no repeated offence;
- the offence of *crime by omission*;
- *the oblique intent* among the main forms of guilt;
- the place of non-imputable excess;
- the manner of regulating reconciliation (very restrictive);
- the murder upon request by the victim (1 - 5 years of imprisonment);
- and so on.

Certain regulations of the new Code of criminal procedure may be subject of controversy, as well.

Thus, the new Code of criminal procedure which entered into force on 1 February 2014, introduced the concept of *suspect* (art. 77), instead of *accused*. *The suspect* is defined as the person on whom there is a reasonable suspicion that he/she committed a deed provided by criminal law, a definition which is extremely *ambiguous* (cannot the defendant be also a person who induces a reasonable suspicion of having committed a deed provided by the criminal law?); nevertheless, the *defendant* is defined as the person against whom the criminal proceedings were initiated. The criminal prosecution, as a whole (art. 285 of the Code of criminal procedure) has as object the gathering of evidence related to the existence of crime, to the identification of the persons who committed the crime and for establishing the criminal liability. However, at the end of the criminal prosecution, aren't we still at the stage of a reasonable suspicion that an offence provided by the criminal law was committed? So, why should we make this analysis only in relation to the person alleged to be suspected?

In our opinion, it was more correct to use (as in the previous Code of criminal procedure) the concept of *accused* (the person against whom no criminal proceedings were initiated) since the phrase *reasonable suspicion* cannot differentiate the suspect from the defendant, *and the certainty appears in all cases only after the judgement remains final*.

The new Code of criminal procedure uses the phrase *the right **to** defence* (art. 10). In fact, this deals with the *right **of** defence* (art. 6 of the applicable Code of criminal procedure). *The right **to** defence* expresses only one of the mechanisms through which the right of defence is achieved, namely, when we refer to the right to have a counsel for the defence. Whereas, the *right **of** defence* is a broader concept which refers to all mechanisms through which the defence is achieved in the criminal proceedings.

A new institution was introduced in the new Code of criminal procedure (art. 342) referred to as *preliminary hearing*, which has the duty of checking the lawfulness of the notification and of the evidence-taking. In the past, among the procedural institutions there was the so-called *preparatory hearing,* in which the lawfulness and the substance of evidence were checked before the file was sent before the court. This institution was into force for a short period, since the prosecution body used to draft the file correctly and produced evidence in an adequate way. Only on the occasion of the public, oral and contradictory hearing of the case, when the produced evidence was subject to the parties' analysis, the insufficiency of evidence occurred, and the conclusion often drawn in the respective case was that the evidence was not correctly produced. The experience of this institution had to make the legislator think and give up the new institution which, probably, will have the fate of the previous institution.

A new judicial body emerges in the new Code of criminal procedure, namely the *judge of rights and freedoms*. His usefulness is questionable. However, don't the concerns for ensuring rights and freedoms belong to the entire panel? Why should a certain judge be concerned with these issues?

Other provisions of the new Code of criminal procedure also raise such remarks, questions.