SOME REFLECTIONS ON THE INCRIMINATION CONCEPT AND THE CRIME CONCEPT[*)]

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Abstract

The author fathoms the process of thinking which leads to enunciation of the crime's essential features and of incrimination's essential features. The author distinguishes these types of features, drawing therefore some consequences, and also considering in this respect the vision expressed by professor Vintilă Dongoroz.

A significant piece of present study has been consecrated to the analysis of crime's essential features comparatively to new Penal Code and to the crucial issues which have been raised in this domain.

The author also makes a deep-seated analysis of a compared law according to the subject already discussed.

Keywords: *crime's essential features; incrimination's essential features; legal model; guilt*

Introduction. 1. To put it simply, crime should mean an exterior human behavior (action or inaction) by which a certain rule that should be observed in society is infringed, breached or ignored; by a crime, the will of the rule's author is infringed by a contrary behavior, an expression of the perpetrator's will.

Just as primitive people could not survive without associating under various forms (family, horde, tribe), because the individual is not capable to defeat life burdens in isolation, it was extremely necessary to set up certain rules regarding the conduct of social group's members, which had to be adhered to by all means, since the group's existence depended on it. The infringement or ignorance of such rules by an individual used to trigger all the members' opposition, since adherence to such rules was considered to be a vital condition for the entire community's existence.

Considering this very simplified definition of crime, the crime's essential features, that is the fundamental elements forming the crime will be just the perpetrator's behavior and the rule which the perpetrator ignores. As such elements have the role of fundamental real facts of the crime, it means that a

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crime could not exist without the abovementioned elements, the lack of any such elements excluding the existence of crime.

We may assume that this is how crime was conceived at a certain stage of the human thinking development level. A behavior breaching a compulsory rule and the existence of a causal relationship between the behavior and the inconvenient consequences of the deed were enough to trigger the perpetrator's liability (objective liability).

2. Human thinking made an important step when it was established that a person could not be held liable for ignoring a compulsory rule unless the deed involved the perpetrator's guilt, that is it expressed or revealed features of the personality of the one who breached the rule. This is how the subjective liability, the investigation of the psychological position to the deed and its consequences shown by the person who breached the rule (intention, guilt, *praeter intentionem*) appeared. In this way, guilt will become, in its turn, an essential feature of crime.

Only the deeds committed by a human could belong to the scope of crime (animals' behavior, as well as the consequences of natural phenomena being excluded); also, the scope of crime included only individual deeds; societies or any form of associations could not be held criminally liable in ancient times *(societas delinquere non potest)*.

During this stage of human thinking and social practice, the concrete exterior behavior was considered in the criminal law theory as an essential **objective** feature of crime, and guilt was considered to be an essential **subjective** feature of crime.

3. The lawmakers of old times were also faced with the problem related to the drafting of the incrimination norm and the wording of the rule of conduct that should have been complied with by the perpetrator and included in the criminal norm.

At a certain point in time, we can assume that criminal law was worded in the same style as Moses' commandments („thou shalt not steal, thou shalt not kill, thou shalt not make thee any graven image, thou shlat not desire thy neighbour's wife"), but in a more complete manner, showing that the deed of the person who kills, steals or desires the neighbor's wife is punished. Thus, in order to make the law easier to understand, it included both the description of the forbidden or required deed (the person who will kill, steal, does not respect another man's wife), and the rule of conduct that could be inferred from such a description (if a deed is forbidden or imposed by the law which describes it under the threat of a punishment, it means that the rule resulting therefrom must be observed, to avoid the punishment (do not steal, do not kill etc.).

Humankind gradually simplified the wording of the rule of conduct that was forbidden or imposed, meaning that it did no longer specify in the norm the forbidden or ordered rule, meaning that it did not specify the forbidden or ordered rule in the norm as well and chose just to describe the deed the perpetration of

which is punished, since the perpetrator breached the rule of conduct that is **inferred** from the description of the deed. The reasoning was as follows: if the law punishes the person who kills, it means that such deeds are forbidden and therefore should not be perpetrated; therefore, the description of the forbidden deed followed by a punishment revealed the rule of conduct, *i.e.* you must not kill unless you want to be punished.

The incrimination norm was reasonably said to create the crime and determine the conditions under which the concrete deed becomes a crime. Therefore, the incrimination norm has the role of basic requirement for the existence of a crime, because if the norm had no description of the features of the forbidden or imposed deed, the concrete deed would have nothing to relate or compare to, in order to infer the conclusion that the concrete deed breaches or ignores the rule of conduct included in the incrimination norm.

The rule of conduct can be inferred only from a description of the forbidden deed in an incrimination norm, followed by the provision of the sanction enforced for a behavior different from the one described in the rule. The concrete deed is transformed only if the results of comparing the description in the norm with the concrete deed show that the two categories of features coincide.

The description included in the incrimination norm was conceived both as a description of a forbidden or ordered deed, together with the potential basic requirements thereof and with the causal relation between the material element and the immediate consequence, and also as a description of the subjective position which the perpetrator should have shown by acting (or refraining from acting) so that its exterior behavior can be considered a crime.

If no such description of the deed and the consistency between the concrete deed and this description is provided, it is impossible to infer the rule breached by the perpetrator and implicitly the existence of a crime. If certain data (such as, the presentation of the characteristics of the forbidden or imposed deed would be incomplete and modified) were missing from the description of the deed set forth in the norm, the concrete deed corresponding to such model might form the substance of another crime, the absence of the description of the incriminated deed and of the consistency between the features of concrete deed and the features of the described deed exclude the existence of crime, the abovementioned description and consistency forming, as we have shown above, the prerequisite for the existence of a crime.

The description included in the incrimination norm highlight the constitutive features of the incriminated deed (material element, essential requirements, immediate consequence, causal relationship between the material element and the immediate consequence), as well as the constitutive features of guilt (intellective element, volitive element), and the ways in which it is expressed (intention, fault, *praeter intentionem*).

4. From this standpoint, the name of „basic features" of the crime (used by the criminal law under article 17 of the applicable Criminal Code and the Criminal Code adopted by Law no. 301/2004, later repealed, as well as the wording of article 15 of the new Criminal Code, adopted by Law no. 286/2009) should be limited, in scope, only to the features of the concrete deed. Besides such features and before identifying them, we should identify first the constitutive features of the deed described in the incrimination norm, since such features influence the existence of the crime and a crime exists only to the extent that the constitutive features of the incriminated deed can be found in the essential features of the concrete deed. Therefore, we should make a distinction between the **essential** elements of a crime (concrete deed, incrimination norm, compliance between the incrimination norm and the concrete deed features and guilt) and the **constitutive** features of the incriminated deed, *i.e.* the features of the deed described in the incrimination norm. If we analyze the crime of theft, for example, we distinguish, as essential components of the crime, the concrete exterior behavior, the incrimination norm describing the punishable deed, the consistency between the described deed and the concrete deed and the guilt. In addition, we could also identify, as constitutive features of the deed of theft, incriminated under article 228 of the new Criminal Code, elements such as the material element, *i.e.* taking a movable asset from somebody else's possession, and essential requirements (without the holder or owner's consent, for misappropriation purposes). We could not refer to these latest features as essential features of the crime, but as constitutive features of the incriminated deed, whose decisive role for the existence of the crime cannot be denied and which take into consideration the deed described in the incrimination norm, and not the concrete deed.

Thus, the structure of the **crime** would consist in the concrete breach of a compulsory rule (rules forbidding or requiring a certain conduct inferred from the description or the forbidden deed or imposed in an incrimination norm and out of guilt). We are going to retain, separately, the existence of a structure of the **incriminated deed**, *i.e.* the existence of the constitutive features of the deed described in the incrimination norm, used as a basis to infer the rule of conduct, *i.e.* forbidding or imposing such a behavior. Such elements that would belong to the incriminated deed, and not to the concrete deed, would be: material element, essential requirements, immediate consequence, causal relationship.

5. The developments so far allow us to analyze more thoroughly some of the theses revealed in the „Criminal Law" paper written by professor Vintilă Dongoroz.

According to the professor and in relation to the stage of the legal-criminal thinking at that time, the description of the incriminated deed included in the incrimination norm would be an ***in abstracto*** crime, and the crime described would be the **„hypothetical illicit breach"**. When a concrete deed corresponding to the description included in the incrimination norm is committed, "the crime

becomes a concrete object, a real judicial fact". Therefore, concrete crime is only the fact actually perpetrated under the conditions included in the incriminatory description of the abstract crime[1)].

We can see that, according to this vision, the notion of deed was not used distinctly when referring to a concrete deed and when referring to the deed description included in the incrimination norm (which the professor calls an abstract deed). In both situations, the deed had the same characteristics, and it was called a concrete deed in one case or an abstract deed in the other case.

As regards incrimination, the professor considered it a mere „proclamation as a crime of a socially inconvenient action. When saying that a certain fact was incriminated, it means that the law considered it a crime".

As we can easily see, the professor considered that the deed described in the rule was an abstract crime and not a reality with its own significance, ignoring what seems obvious today, *i.e.* the described deed (the incrimination) is a reality, but it is distinct from the concrete deed (crime).

According to this vision, incrimination was only an attribute, a characterization of the concrete deed made by the lawmaker in order to become a crime, and not a reality (as the deed was described in the incrimination norm).

6. In fact, it is not the law that arbitrarily transforms the concrete deed into a crime, by describing the deed in the incrimination norm, but the law just describes the inconvenient deed as such, the concrete deed becoming a crime not only by the mere act of description, but also by the objective fact consisting in the **consistency between its features and the requirements included in the incrimination norm**.

The professor's statement would correspond to reality only if we give the following interpretation to it: by creating the legal framework to which the concrete deed relates, the lawmaker imposes the fundamental requirement that the concrete deed becomes a crime, *i.e.* it makes the consistency we referred to possible; in this respect, we may say that the law creates the crime *(creatio crimini sub specie juris)*.

Therefore, incrimination is not only a proclamation, a mere label, a legal characterization of crime, but a means used by the law to create (through a description) the decisive condition for a concrete deed to become a crime, permitting to compare the two categories of deeds (the concrete deed and the described deed) and to highlight the abovementioned consistency. In this respect, it is the law which creates the crime.

7. There is no such thing as an abstract crime, there is only a description of the inconvenient deed included in the incrimination norm. Abstract crime does not

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[1)] Vintilă Dongoroz, *Drept penal* (Criminal Law), Bucharest, 1939, repubished by the Romanian Association of Criminal Siences, Bucharest, 2000, pp. 158-161 (the source of all the quotations included on this page).

exist, since we understand by crime the **concrete deed** whose features correspond to the description included in the incrimination norm. Crime is a segment of the real life, a concrete exterior behavior whose features superimpose on the requirements of the incrimination norm. On the other hand, crime is a deed perpetrated by a concrete individual, a deed that meets certain requirements. The individual, the active subject of the crime, may not commit an abstract deed, but only a concrete deed. Incrimination consists in the description of an abstract deed, it is a legal pattern. Just as an abstract crime is unconceivable, we cannot conceive a concrete incrimination, as the description of the deed forbidden or imposed in the incrimination norm is a definition of the incriminated deed, and like any definition, it is based on the general and abstract features of the defined deed and not on its concrete characteristics.

8. When the concrete deed is related to the legal pattern in order to establish whether the characteristics of the concrete deed superimpose on those of the deed described in the incrimination norm does not mean that the two categories of characteristics are identical, but only similar. In fact, each of these categories of characteristics have their own history, express different wishes and appear as essentially distinct entities (some are descriptions of deeds, the others are concrete achievements), although they are formally (nominally) similar.

It is obvious that the mere comparison of the two categories of features means nothing but underlining their formal aspect, their coincidence in terms of form. It is for this reason that the definition of crime by underlining the formal similarities of the two categories of features was named as formal definition of crime, and the concept promoting such a way of defining crime is known as a formal concept on crime.

The circumstance that the descriptions of incriminated deeds are called crimes and not incriminations in legislation and even in specialized papers can be explained by the fact that the notion of incrimination meaning a *description* of the deed in the norm appeared much later than the notion of crime (we admitted before that professor Dongoroz himself considered incrimination as a proclamation, and not as a description of forbidden or imposed deeds), and scientists, as well as practitioners, got used to such terminology.

The existence of such a terminological substitution was also acknowledged by professor Dongoroz who, referring to the norms included in the special part that were referred to as „crimes", used to write: „the norms in the special part contain incriminations that depend on a form of protection required by law, on the one hand, and on the absence of a cause that removes the criminal nature of the deed, on the other hand"[2)].

[2)] Vintilă Dongoroz and collaborators, *Explicații teoretice ale Codului penal român.* (Theoretical Explanations of the Romanian Criminal Code), tome I, general part, Editura Academiei Române, Bucharest, 1970, p. 23.

9. However, the following question was asked too in the criminal doctrine: the crime could be defined only formally as a concrete deed whose characteristics coincide to those included the incrimination norm?, *i.e.* by relating to the content of the incrimination norm. Would it not be possible to develop a *material* definition of crime, in other words, starting from the social, political and legal justification of the rule infringed by the perpetrator, from the social values protected by such rules and therefore, the crime would not be the deed forbidden by law, but the deed that harms the values that should be respected in society and in relation to which the compulsory rules the infringement of which would justify the enforcement of a punishment were drafted?

Such conclusions were reached in time, but their authors failed to agree on a unique substance based on which crime could be defined. Although we are referring to a substance of the crime, in fact (this is another case of terminological inconsistency), the substance would be related to incrimination, and not to crime, *i.e.* this would be a substantial justification of the legal framework to which the concrete deed will relate in order to become a crime. The description of the deed prohibited or imposed by law should reveal the substantial justification of the fact that the law prohibits or imposes a certain conduct. In other words, since the crime is nothing but the concrete deed evaluated as a crime, depending on whether it corresponds to the legal model or not, such legal model is decisive for the content of crime, where the materiality elements to become requirements for the concrete deed should express themselves within such model.

In order to avoid repeating the materiality requirement in each incrimination norm, the lawmaker could meet the abovementioned requirement in the general part, by developing a definition of crime which should also reveal the materiality elements that would justify the incriminations set forth in the special part of the Code.

10. These materiality elements were treated by authors in different manners. **In the natural law theory**, for instance, crime was substantially conceived as an infringement of the **eternal values** of human nature, such values being an expression of **reasoning or wish of God**; according to the **positivist school,** crime was a **symptomatic deed**, **revealing of the perpetrator's dangerous status**; according to some authors of the following period (Maggiore), crime, in its aspect of materiality, would be a deed **offending ethical order**; according to Garofallo, crime would be a deed violating the **altruistic feelings of devotion and integrity**; Ferri considered the crime as a deed resulting from **selfish and anti-social impulses**, and according to Antolisei crime would be the **deed that contradicts the purposes pursued by the State**[3)]. According to professor Dongoroz, crime is a deed mainly characterized by **violence, fraud, social**

[3)] Francesco Antolisei, *Manuale di diritto penale, parte generale*, Giuffre Editore, Milano, 2000, p. 154.

disorder, which may cause a **social alarm, disruption to public order and insecurity**. The Nazzi journalists considered that crime was a deed which contradicted the **people's feeling of justice**, and in the Soviet journalists' opinion, soon after Revolution, crime contradicted **the peoples' revolutionary consciousness**.

These difficulties in defining the materiality elements of crime (incrimination) made authors give up defining crime in terms of materiality and just limit to the formal aspect (a crime is what the incrimination norm defines as such).

11. The Romanian criminal law in force did not accept these last conclusions of the doctrine and targeted a *material* definition of crime. In this respect, the definition of crime set forth under article 17 included the requirement that the deed is a **social danger**, a substantial feature materialized in two fundamental elements (article 18 of the Criminal Code):

a) crime has to be an action or an inaction that harms any of the social values protected by law and listed under article 1 of the Criminal Code;

b) a punishment is necessary to sanction the deed.

As we can see, the lawmaker did not content itself with qualifying a deed as dangerous if such deed only harmed the **social values** listed under article 1, both because the listing in the abovementioned text was not complete (only **Romania, sovereignty, State independence and indivisibility, the individual, individual's rights and freedoms and ownership** were listed, individually, as social values, and then **the entire rule of law** was *globally* mentioned, such expression meaning all the other protected social values that were not mentioned explicitly), and because the prejudice to the listed values was not in itself a criterion sufficient to differentiate criminal deeds from extra-criminal deeds. It is well known that any infringement of the (criminal or extra-criminal) law is an evil deed, prejudices certain social values protected by law and the lawmaker should react against such evil. If an infringement of law did not cause any harm to society, the lawmaker would not intervene to fight against such infringement by enforcing a sanction.

The abovementioned criterion could not be corrected even we made a distinction between the very important values that would be protected by the criminal law and the less important values, protected by other categories of norms. The special part of the Criminal Code incriminates not only the deeds of major or average severity, in order to underline that only the deeds harming important and fundamental social values are incriminated thereby. Even though this were the rule *(de eo quod plerumque fit)*, the Criminal Code includes multiple incriminations for which low punishment limits are provided, and even incriminations for which the alternative punishment is a fine. In this case, the incorporation of such incriminations in the Criminal Code can not be justified by the prejudice caused to certain important and fundamental social values protected by law, but by the lawmaker's concern to **stigmatize** such deeds, to highlight that they are not convenient for the society, although they are not too serious. In this

case, incrimination serves as a way of underlining the intolerable nature of a deed in a civilized society.

12. Ascertaining such realities, the criminal law authors that insist on the need to have a material definition of crime, made efforts, in time, to also identify other criteria of delimiting the various categories of deeds that harm the social values protected by the criminal law. Such attempts revealed that criminal illicit breaches could not be differentiated from the extra criminal deeds according to **quantitative** criteria, *i.e.* depending on whether the danger is more or less serious, since, according to Binding, there may be infringements of the civil law (such as the debtor's failure to pay the debt) that trigger the creditor's bankruptcy or even death, and there may also be incriminated deeds which entail mild sanctions (hitting or other types of violence, sexual harassment etc.). **Qualitative** criteria are not totally relevant either. However, Professor Dongoroz looks at an **objective qualitative criterion** of differencing criminal illicit breaches from extra-criminal breaches, *i.e.* a criterion consisting of two elements of characterization: the criminal deed involves violence, fraud, social indiscipline, and secondly, it must have certain social effects and generate a state of anxiety and insecurity among the social group's members[4)].

According to professor Dongoroz, all these means cause prejudice to social order, implicitly to the interests of the social group's members, interests which must be protected in order to ensure the group's preservation and progress; unlike the breaches of extra-criminal law, crime appears as a deed contradicting the objectives pursued by the criminal norm, *i.e.* imposing discipline in the relation-based life in order to achieve social order and ensure the social group's preservation and progress[5)].

13. However, if we talk about the argument invoked by Binding, we could say that such a prejudice to social order could also be caused by the perpetration of extra-criminal deeds (the social effects of ruining a creditor could be more serious than those of hitting a person, and the failure to perform a civil contract could be a deed whose consequences are much more serious than a burglary). This shows that no satisfactory conclusion can be reached if we use only the abovementioned criterion in order to distinguish between criminal and non-criminal deeds. The reason for the State involvement and legal liability for any breach of law can be justified by the very fact that in all cases, either major or minor, the interests of maintaining the State and the judicial order are prejudiced or jeopardized.

This conclusion is also confirmed by the fact that sometimes, the deeds that were initially considered as crimes end by being excluded from the regime of crime and classified as minor offences or the other way round. This shows that the criterion consisting in the importance of the endangered social values cannot be

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[4)] Vintilă Dongoroz and collaborators, *op. cit.*, p. 19.

[5)] *Ibidem*, pp. 13-14.

considered as an absolute criterion for distinguishing between the various infringements of judicial order.

14. The weaknesses of characterizing social danger only in terms of the prejudice caused to certain social values, also specified in almost the entire doctrine, made the Romanian lawmaker add, besides the prejudice caused to the social values harmed and listed under article 1, **the punishment criterion** as a factor used to make an additional differentiation between crime and the other forms of illicit breaches, even though the lawmaker considered that such a criterion ranks second, in terms of importance, after the criterion consisting in the social values harmed or jeopardized by the crime (although there are certain authors who believed that the punishment criterion is the most important).

As a matter of fact, it was professor Dongoroz who, as soon as 1939, after reviewing the criteria of distinction between criminal illicit breaches and extra-criminal illicit breaches reached the conclusion that no other differentiation between crime and other forms of illicit breaches is possible in the positive law, apart from the formal (normative) criterion of the type of sanction. The professor wrote that „illicit criminal breaches are those for which judicial norms provide a punishment, and extra-criminal illicit breaches are those for which the sanction enforced consists in a mere remedy"[6)]. In the same vein, in the Italian doctrine, Antolisei underlined that sanction is the only criterion of distinction between crime and other forms of illicit breaches[7)].

The double position of the punishment is worth noting. On the one hand, criminal punishment is excluded from the crime's essential features (although there are certain authors who characterize crime also by punishment), since punishment is the *consequence* of the crime and not an essential feature thereof. On the other hand, in a material concept on crime, sanction appears as a criterion used to evaluate the social danger and therefore becomes part of the crime's material element, expressing the seriousness degree of the deed (when punishment limits *correspond* to a significant danger posed by the deed) or the interest to stigmatize the deed (when punishment limits correspond to a slight danger posed by the deed), therefore, the whole social danger degree that justifies the deed incrimination.

15. However, the introduction of the social danger as a materiality element in the criminal law in force was not consistent, since the lawmaker had to find a solution both for the assumption that the concrete social danger posed by the deed is slighter than the social abstract danger of the incriminated deed (the consequence being the exclusion of the crime), as well as for the assumption that the concrete social danger of the deed is more significant than the abstract social danger reflected in the incrimination norm (the consequence consisting in the

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[6)] Vintilă Dongoroz and collaborators, *op. cit.*, p. 21.

[7)] Francesco Antolisei, *op. cit.*, p. 156.

extension of incrimination, by analogy, in order to also incorporate such deeds into criminal repression).

The Romanian lawmaker recognized only for a short period the need to extend the incrimination by analogy (24 February 1948 - 29 February 1956) in connection with the concrete deeds whose social danger was more significant than the one enshrined by an incrimination norm, and after that the legality principle acquired its full authority over this category of deeds. However, the provisions removing the crime if the concrete deed did not pose a social danger at the same level as the abstract danger were maintained. This means that the applicable Romanian criminal law embraces an *inconsistent materiality*, or even an imperfect or incomplete materiality since it gives limited effects to materiality, using it only if the concrete social danger is below the abstract social danger, and not in the case when the abstract social level were less important than the concrete social danger.

Therefore, we could say that our criminal law does not totally reject the principle of the incrimination and punishment legality. However, our criminal law does not totally meet the materiality principle, since the incrimination norm is no longer observed (by the lawmaker's will) and is replaced by a specific solution (the concrete deed is not a crime) only in the case of concrete deeds posing a slight social danger, whereas the incrimination norm exerts its full authority when the social danger posed by the concrete deed is higher than the abstract danger.

From this standpoint, it seems to be clear that the applicable criminal law is on an intermediary position (neither total materiality, nor total formal legality); between these limits, we could also speak about a mixed definition of crime, which places us far away from the legislations which are consistent in terms of formal legality, and from the legislations which would be on a substantial consistent position.

16. These contradictions of our legislation's position relating to social danger as a materiality criterion made the doctrine propose that the material definition of crime should be waived and a formal definition of crime should be adopted. The second new Criminal Code of 2009 took over these proposals, adopting a formal definition of crime.

According to this new vision, **the first essential feature of crime is the provision of the criminal law deed**; this feature is mentioned as first, unlike the applicable criminal law where such feature is placed the last (as in the first new Criminal Code adopted by Law no. 301/2004).

This essential feature expresses the existence of three realities, such as

a) existence of a concrete deed (action or inaction), with the appropriate immediate consequence, including the causal relationship between exterior behavior and immediate consequence;

b) existence of a legal incrimination model;

c) consistency between the features of the concrete deed and those of the legal incrimination model (typicity).

17. As regards the first aspect, please note the requirement regarding the existence of a concrete deed, which means that the crime may only be conceived as an *individual's* exterior behavior, irrespective of whether such individual acts directly over the surrounding world or stirs a foreign energy, which he directs so as to generate certain consequences, or whether he uses unanimated instruments, as an extension of its own limbs, which helps him fulfill his objectives. Animals' reactions or natural phenomena are not considered as a behavior liable of criminal consequences, although the results caused might be similar to those generated by human deeds and despite the fact that, in remote times, they were treated in the same manner as human behaviors (for instance, animals which killed were judged and punished; sea waves were whipped if they made boats shipwreck). Likewise, criminal thoughts could not be incriminated and sanctioned, although they might be known through certain chemical substances, such as truth serum or through other means. In the same manner, the mere expression of an intention to commit a crime may not be incriminated unless it takes the form of a threat susceptible to cause a fear, or unless the exterior behavior expresses the concern for finding other individuals willing to get involved in the plot, or another type of criminal association. Criminal law regulates only the relations among humans *(relatio inter homines)*, *i.e.* social relations, and not the behaviors by which humans do not build relations with their fellows.

Actions requires a certain use of energy and may take the shape of acts or gestures (hitting the victim, destroying certain goods, threatening a person with the fist, in order to frighten him/her), or could consist in pronouncing certain words (public instigation by words) or using written instruments (forging public documents or documents under private signature, written defamation etc.).

Inaction means the individual's passive attitude despite its obligation to act. The person who refrains from acting does not participate directly (direct antecedent) in the development of the causal process, but only facilitates such process and creates favorable conditions for other forces to generate the result; such forces would have been inefficient or their effects would have been annihilated if the individual had acted and prevented their evolution by an action; thus, omission is an indirect antecedent of the causal process which led to the respective result.

The obligation to act instead of failing to act can result from the provisions of law, a contract, from certain functions exerted by the individual (for example, an employee with the Lifeguard or Mountain rescuing service etc.), from certain *de facto* circumstances (the person generating the risk that someone else gets injured has the obligation to take the measures required to prevent any dangerous consequences: for example, the person digging a hole where other persons pass by is obliged to take measures in order to warn pedestrians of the danger), or when

active behavior is considered to be a natural need (for example, the mother's obligation to feed her newborn).

18. The „action" and „inaction" notions should not be mistaken, as forms of the material element of the crime objective side, for the crimes of action or omission. In the case of an action crime, the subject does what the law forbids. Such crimes are usually committed through an action, although there may be cases when they are committed by an inaction (for example, a doctor omitting to give the rescuing medicine to his/her patient, for the purpose of killing the patient); in this case, the subject does what the law forbids, *i.e.* killing someone, although this result is obtained by an omission. In the case of omission crimes, the subject fails to do what the law orders (for example, fails to report certain crimes, although the law compels it to do so under certain circumstances). Such crimes are usually committed by inaction, but there may be cases when they are committed by an action (for example, the subject who is not willing to report a crime he/she knows about, gives imprecise and contradictory information, so that authorities may not take any measure based on such information). Action or inaction, seen as exterior behaviors, together with the immediate and natural consequence caused by such activities and with the causal relationship between action (inaction) and the immediate consequence are the content of the *deed*.

19. An exterior behavior will not belong to a certain individual unless it also expresses the individual's free will, *i.e.* is the result of the perpetrator's self-determination; therefore, the deeds committed under physical threats, or automatic, reflex or instinctual, unconscious deeds will not be considered as deeds of criminal relevance unless they were controlled by the perpetrator's will. *Potential* volitive acts, that is the acts which are not controlled by the perpetrator's will, but in relation to which the perpetrator could have removed the will inertia and avoid the immediate consequence, were considered as triggering criminal liability[8)]. Will is aware when the subject has an accurate representation of action (inaction) and the consequences thereof. Such requirements cover only the exterior behavior that consists in committing (acting), and not the behavior that consists in omitting (not acting).

20. As regards the second aspect, crime involves the *pre-existence of a legal model*, *i.e.* an incrimination norm describing the deed which the lawmaker intends to prohibit or order. The legal model is not a factor (term) of crime, *i.e.* an entity intrinsic to crime, because the incrimination norm and implicitly the constitutive features by which it describes the deed prohibited or ordered by law does not form an element of the crime, but creates the crime, as already shown above; this is the legal covering of the deed, the legal framework that gives to a concrete deed the character of a deed provided by the criminal law.

[8)] Ferrando Mantovani, *Diritto penale, parte generale*, Cedam, Padova, 1985, p. 315.

The incrimination norm incorporates, in the deed description, not only objective elements, but also subjective elements. Thus, the incriminated deed, deprived of the subjective element, would have no significance for the legal order. Killing someone, for instance, has a legal significance only if the deed was committed in guilt (deliberately, culpably, with a *praeter intentionem*); otherwise, taking someone's life would be the same as if that person were killed by a thunder or in an avalanche.

It is true that in the description included in the norm, the subjective element does not always appear (the guilt always appears as explicitly shown, whereas intention and *praeter intentionem* do not appear so very often), but the legal model is supplemented, in this respect, with the rules on guilt included in the general part.

The provision of the criminal law deed is not only related to the deed actually perpetrated by an individual, but also to the attempt and to the deed that is jointly perpetrated. Imperfect forms of crimes (attempt) or the contributions to the perpetration of a deed as an instigator or an accomplice should also be precisely determined by law. In other words, a legal pattern to which the respective deeds could be related should be in place.

In this respect, we can see that the legal pattern of the crime committed by a subject appears as a simple model included in an unique criminal norm, the only relevant provisions being in the special part of the Criminal Code or in a special law, whereas the legal model of the attempted deed (the attempt) or the deeds committed as an instigator or an accomplice consists in a norm set forth in the special part of the Criminal Code (this includes the description of the deed to which the attempt and the contributions as a participant relate) and a norm included in the general part, where the attempt and the forms of participation are defined and the existence conditions and the punishment methods thereof are presented. Therefore, whereas the legal classification of the deed perpetrated by the subject is established in relation to the simple incrimination model, as regards the imperfect from of crime and participation, the legal classification is established by relating both to the legal model of the incriminated deed and the complementary legal model included in the general part.

The incrimination norm included in the special part of the Criminal Code is complemented, under certain circumstances, not only with a norm included in the general part, as in the examples above, but also with a norm from another branch of the legal science: for example, the incrimination of the family desertion deed (article 378) relates to the norms included in the family law. The abuse of power incrimination norm (article 297), as well as the at-work negligence incrimination norm (article 298) regarding the job duties of public servants are supplemented with the administrative legal provisions and the regulations in the labor field regarding the job duties of each employee. Likewise, the norm incriminating the deed of practicing a profession or performing an activity without being entitled to

it (article 348) is supplemented by the administrative law norms regulating the conditions for practicing various professions or performing various activities (for sanctions, reference has to be made to the criminal law).

The provision of the deed by the criminal law should be checked against the objective existence of the deed, and the extent to which the consistency with the legal model actually exists in reality, and not only in the perpetrator's mind (putative deed); the perpetrator could believe, sometimes, that it perpetrates a crime, although the deed committed is not a crime, in fact. For example, a man considers himself bigamist, because he concluded the second marriage without knowing that, in the meantime, the first wife had died and therefore the first marriage no longer existed. The legal model of incrimination is the lawmaker's work (just like disincrimination), and not the work of the individual who would erroneously believe that he/she infringed the law. Therefore, the conditions of criminal liability shall be established by the lawmaker, and not by the person who thinks that he/she committed a criminal deed; for this reason, the putative deed has no criminal relevance.

A deed can be described by a specific incrimination norm, but also by a more general incrimination norm (for example, the unfair repression deed has its specific incrimination model in article 283, but such a deed is also a form of abuse of power and is described in a more general form under article 297). Such situations (the conflict of criminal laws between a special norm and a general norm) can be settled by giving priority to the special norm, the general incrimination norm being replaced by the special incrimination norm. If the unfair repression deed is abrogated, this will not mean that the deed is disincriminated because the incrimination in the general rule will produce its effects. This is the reason why it is stated that if an incrimination norm is repealed, it does not always mean that the respective deed is no longer a crime, that it was disincriminated.

The disincrimination of the deed which means that the deed is excluded from the criminal law scope and the non-existence of an incrimination mode do not always mean that the respective deed became legal, *i.e.* permitted by public order, because such a deed may be forbidden as a minor offence, misconduct, or infringement of cohabitation rules. Likewise, a deed forbidden as a minor offence, misconduct etc., may subsequently become a deed incriminated by the criminal law if a reevaluation of the abstract social danger generates the conclusion that the such a treatment would be more appropriate.

21. As regards the third aspect, crime requires a full **consistency** between the concrete features of the deed and the incrimination norm. This consistency can appear under a typical, perfect form (in case of an attempt or a contribution to the crime as an instigator or accomplice), or a more than perfect form (in the case of a crime which, after having taken place, reach a moment of exhaustion).

Although the concept of *typicity* was hardly used in the Romanian doctrine as an essential feature of crime, this feature of the concrete deed of corresponding to

a determined incrimination norm was not ignored, but it appears within the essential requirement that a concrete deed is provided by the criminal law, meaning that the features of the concrete deed correspond to the features of the deed described in the incrimination norm; this consistency can be analyzed by comparing the concrete deed with the legal model in terms of objective conditions, *i.e.* the conditions regarding the object and the objective side.

Typicity, as provided in the Romanian doctrine and explained earlier, can be achieved only by comparing the object of the concrete deed with the object of the incrimination norm, since the concept used in terms of the subjective content is a different one, *i.e.* guilt, which is an essential and distinct feature of crime, and thereby of the deed provided by the criminal law.

Typicity should not be mistaken for the incrimination norm, since typicity is a feature of the concrete deed (it becomes typical if its features correspond to the features of the deed described), whereas the legal model serves only as a term of comparison with the concrete deed.

The typicity of a concrete deed may not be established if such deed has no correspondent in a legal model of incrimination; therefore, the deed will not be considered as a crime. It was decided, in the legal practice, that if the individuals assigned to perform the alternative military service (*i.e.* the service that substitutes itself for the military service in certain cases) fail to appear for performing such service shall not be deemed as a crime (Supreme Court of Justice, United Sections, decision no. VI of 15 October 2001).

In certain manuals, the conditions regarding the object, subject, place and time of perpetrating the deed are considered to be preexisting conditions and are treated separately from the objective side of the incriminated deed, but this is due to a didactic rather than a dogmatic interest because, in fact, the objective side of the incriminated deed (material element, essential conditions, immediate consequence, causal relationship) could not be totally and deeply analyzed, without any reference to the subject, the object and the place and time-related conditions.

This argument is valid also in connection with the differential treatment of the *premise situation*, because its analysis is unavoidably resumed in the analysis of the material element of the objective side of the incriminated deed (for example, when analyzing the objective content of the incriminated abortion deed, it will not be possible to omit the reference to a pregnant women who was subject to the abortion intervention).

As we have shown above, the consistency between the features of a concrete deed and the deed described in the incrimination norm which we talked about in the previous paragraphs should actually exist, in the real world, and not in the perpetrator's imagination. The potential erroneous representation, by the perpetrator, of the deed committed, believing that it is a crime (putative deed) will have no criminal relevance, because the existence of incrimination and the

consistency between the concrete deed and the deed described in the norm should actually be a fact.

22. The requirement that the deed is provided by the criminal law, as well as the correlation it involves, generated certain misunderstandings due to the extremely concentrated nature of legislation and doctrine formula. A certain ambiguity generated by this formula (the deed provided by the criminal law) comes from the fact that it uses the notion of „deed" in a generic manner, without indicating whether it is about a concrete deed or a deed described in the incrimination norm. At first sight, we would be tempted to identify the „deed provided by the criminal law" phrase as equivalent to the incrimination norm, giving to the deed word the meaning described in the incrimination norm. Such an interpretation would be incorrect; because the requirement that the deed is provided by the criminal law is one of the crime's essential features, it can only relate to a concrete deed, since only such a deed would be a crime; in other words, in order for such a deed to be classified as a crime, it should have the feature of being provided by the criminal law, *i.e.* its features should be consistent with those of the deed described in the incrimination norm.

Therefore, the phrase „deed provided by criminal law" does not mean a deed described in the incrimination norm, as we are speaking about different entities; crime is the concrete deed related to the incrimination norm, but the latter is the legal reference model of the concrete deed. Concrete deed does not identity itself with the deed described in the norm, but only compares to it (criminal norm is the comparison element, the legal pattern), verifying whether the features of the concrete deed correspond to those of the described deed.

The incrimination norm also includes (in order to be compared) the psychological (subjective) requirements to be fulfilled by the action (inaction), irrespective of whether such requirements are part of the very content of the norm or of the provisions included in the general part, complementing, as we have already shown, the incrimination norm included in the special part. However, the concrete deed compares to the legal model only in objective terms, which means that the objective features of the concrete deed should correspond to the objective features of the described deed (the objective generic content of incrimination), since in psychological terms, the comparison of the concrete deed with the described deed takes place within another basic feature of crime, *i.e.* guilt (the subjective generic content of incrimination). According to professor Vintilă Dongoroz, „A deed is provided by the criminal law when the criminal law determines the content of the respective deed (...), a determination that should indicate the objective element of the deed"[9)].

23. Another essential feature of crime, as provided by the new Code, is guilt.

[9)] Vintilă Dongoroz, *op. cit.*, vol. I, p. 112.

Before looking at the forms and modalities of guilt (an analysis that we are going to make in a distinct comment), we would like to note that the position of guilt among the basic features of crime is questionable. In principle, the consistency between the features of a concrete deed and the features of the deed described in the criminal law, *i.e.* the typicity of the concrete deed, could, indeed, suggest the idea that such a provision covers not only the objective elements of the deed, but also the subjective ones. There are, indeed, several incrimination models that also included data about guilt (for instance, in the case of a crime committed in guilt, the legal model compulsorily provides the guilt, as an element of the constitutive content of crime). The legal model does not include very often intention as a constitutive feature; an example would be the crime of collision [article 345 paragraph 2 of the Criminal Code in force], where the aggravated content of crime explicitly contains the reference to the perpetrator's intention when he acted. This can be explained by the fact that the huge majority of crimes are committed through a positive attitude (by action), and the presumption inferred from article 19 paragraph (2), *i.e.* in such cases the perpetrator's conduct is based on intention, shall apply in this case. Such a presumption inferred from article 19, the last version, of the applicable criminal law, integrates and complements all the contents of the crimes committed by action, since such crimes can be committed only deliberately. As typicity is specified as an essential feature, different from guilt, it can only refer to the consistency between the objective elements of the concrete deed and the objective elements of the deed described in the incrimination norm.

24. The first new Criminal Code, adopted by Law no. 301/2004, as well as the Code recently adopted by Law no. 286/2009, use a new and similar formula, *i.e.* both the deed consisting in action and the deed consisting in inaction are a crime if committed deliberately. The deed committed in guilt shall be a crime provided that the law specifies this explicitly. This common wording could probably have been more clear if the elements indicated in connection with guilt had been underlined in connection with intention as well. The correct wording of paragraph 6 sentence I of article 16 (through a better correlation with article 16 sentence II) should have been the following: „The deed consisting in an action or an inaction is considered as committed deliberately unless otherwise provided by law; the deed consisting in an action or an inaction is a crime committed out of guilt, unless otherwise explicitly provided by law".

25. According to the new Criminal Code that was recently adopted, another basic feature of crime is the **unjustified nature of the deed**. This feature is an innovation of this new piece of legislation, indicating that the lack of justificatory causes would be, in its turn, an essential feature of crime. Such a feature does not exist in the applicable criminal law because the law failed to regulate the justificatory causes, and doctrine denied the need to use such a concept, motivating that there is no difference between such causes and the causes

removing the criminal nature of the deed (already regulated by the applicable law). However, this feature is missing from the definition of crime included in the first new Criminal Code adopted by Law no. 301/2004, although this code regulated the institution of justificatory causes. It was considered that the definition of crime should list only the *positive* conditions of the existence of crime, and not the *negative* conditions, which are supposed to be inferred. The definition did not specify either the causes removing the criminal nature of the deed, although the nature of crime is attributable to the deed only in their absence (assuming that the other essential features are present). Likewise, it is only in the absence of justificatory causes that the existence of crime could be conceived (since positive conditions are fulfilled).

According to the second new Criminal Code, the unjustified nature of the deed were to be a condition for the existence of crime, together with the other features (the deed should be provided by criminal law, and the deed should be committed in guilt), expressed, however, by a negation. We cannot really say that the solution chosen by the lawmaker is the right one. We do not believe that unjustified and lack of justificatory causes are one and the same thing. In the Romanian language, the meanings of the word unjustified are much more numerous than should be expressed in a text (a payment, an ungrounded settlement, a behavior could be unjustified etc.), whereas the lack of justificatory causes refers to well defined realities, which may remove the existence of a crime (legitimate defense, unavoidable necessity, exercise of a right or fulfillment of an obligation, the victim's consent) which also extend to the participants in the crime. Such modalities could not be expressed by a single word, but by the entire name of the respective institution (lack of justificatory causes), or by the anti-juridicity notion (as in the German criminal law, Rechtswidrigkeit).

The second innovation of the second new Criminal Code in connection with the definition of crime is that of including the **imputable nature of the** perpetrator's **deed** as the fourth basic feature of the concept of crime (the deed should be imputable to the person who committed it). In the Romanian criminal doctrine, the notion of imputable nature was considered to express the idea that a deed was attributed to its author objectively and subjectively, in other words, the deed committed belongs to it, being a deed committed out of the perpetrator's will. Imputing a deed to a person means considering, objectively and subjectively as well, that the deed was committed by the respective person, that it is the result both of the consciousness function and of its will, its physical and psychological energy. In other words, imputing a deed to a person means that the consciousness factor influenced the will and, therefore the deed, *i.e.* the respective person perpetrated the deed in *guilt* (both the intellective and volitive factor being present)[10)].

[10)] Vintilă Dongoroz and collaborators, *op. cit.*, p. 104.

Similar ideas were also supported in the German doctrine. According to certain authors, imputing a deed means attributing (zugerechnet) the perpetration thereof to a certain person. The general theory of crime analyses the conditions under which a deed is attributable to its perpetrator[11)].

According to this reasoning and considering that the notion of imputing a deed expresses the idea that a person committed the deed both objectively and subjectively (in guilt), the fact that the Romanian lawmaker lists the imputable content of the deed among the basic features of crime appears as a tautology, since guilt was already included among the basic features of crime, and objective imputability was already defined through the content of the material element of the deed that also includes the causal relation between action (inaction) and immediate consequence.

26. As regards article 15 paragraph 2 which provides that „crime is the only ground of criminal liability", we can see that this provision expresses the concept which also formed the basis of the new Criminal Code (as in the case of the applicable criminal law), according to which the fundamental institutions of criminal law would be crime, criminal liability and punishment, all the provisions of the Criminal Code being structured around such realities. Crime is the cause of criminal liability, and criminal liability is the effect of crime and also the cause of punishment, and punishment is the effect of criminal liability. Paragraph 2 of article 15 expresses the first side of this correlation, *i.e.* if there is no crime (cause), the existence of criminal liability (effect) is unconceivable. If a concrete deed did not have any of the essential features, the existence of crime being excluded, there would be no criminal liability.

27. The second criminal Code, inferring consistent conclusions from the organic relationship between crime and criminal liability, excluded the possibility of replacing criminal liability with another form of liability (extra-criminal liability) and the possibility that, under certain circumstances, a deed could entail a sanction of an administrative nature, which is regulated in the applicable criminal law (articles 90-98). Since crime can only result in a criminal liability, it is difficult to admit that it could be replaced by another type of liability entailing an extra-criminal sanction.

28. The close connection between crime and criminal liability does not exclude the possibility that, under certain circumstances, the lawmaker treats criminal liability independently, considering the possibility of a distinct regulation meant to remove criminal liability (although the deed would continue to be a crime, for instance in the case of amnesty, when criminal liability is time-barred, in the case of a preliminary complaint); likewise, the organic connection between criminal liability and punishment does not exclude the possibility of certain

[11)] H. Jescheck, Thomas Weigand, *Lehrbuch des Strafrechts,* Allgemeiner Teil, Dunker und Humblot, Berlin, 1996, p. 195.

autonomous provisions removing the punishment (voluntary withdrawal, preventing the effects of a result), although the deed would continue to be a crime and there would be a criminal liability.

Conclusions. 29. The characterization of crime by the essential features we have looked at is not the only response of the criminal doctrine in the field. According to the French doctrine, for example, crime is characterized by one *legal* element, one *material* element and one *moral* element, and according to the German doctrine, crime would be defined by four essential characteristics, such as: *action/inaction (Handlung, Unterlassung), consistency between the deed and the incrimination norm*, but only in objective terms *(Tatbestand)*, *anti-juridicity (Rechtswidrigkeit)* and *guilt (Schuld)*[12)].

According to Italian authors, a formally consistent vision in the field should reach the conclusion that crime could only be characterized by the existence of a *deed* and a *subjective* attitude. As a matter of fact, this is also the traditional conception that Italian doctrine has about crime. In the Italian doctrine, crime consists of a deed, *i.e.* a free exterior behavior, and a psychological element, since the deed may not be a crime unless it is committed willingly and consciously (Carrara distinguished the physical force of crime from the moral force of crime). These twofold distribution of the elements characterizing the crime would also have a logical support, since man consists of spirit and matter, and in any human deed, we can identify a material element and a psychological (moral) one. Since this dualism is part of the nature of things, it not only permits a complete and thorough analysis of the criminal matter naturally grouped around these two pillars, but also corresponds to the criminal law practice, where crime is also examined in relation to the two fundamental elements (objective and subjective)[13)].

From this standpoint, the opinion according to which crime would also be characterized by a punishment (Battaglini) was criticized, since the punishment would eventually be an overall characterization of crime and may not be an element converging towards the existence of crime[14)]. In the Italian doctrine (Antolisei), not even anti-juridicity could be a characteristic of crime, since this is only a relation judgment, expressing the idea that the deed conflicts with a precept of judicial order; therefore, it cannot be a constitutive element of crime standing beside deed and guilt, as the two are phenomena from the natural world, and not relation judgments.

These opinions should not be taken for granted. It is true that punishment is not included in the deed description provided in the incrimination norm, and

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[12)] Hans Heinrich Jescheck, *Lehrbuch des Strafrechts*, Allgemeiner Teil, Berlin, 1988, pp. 176-177. Francesco Antolisei*, op. cit.*, p. 179.

[13)] Francesco Antolisei, *op. cit.*, pp. 192-194; Ferrando Mantovani, *op. cit.*, p. 135.

[14)] *Ibidem*, p. 191.

therefore it is not directly a basic feature of crime, but it is present in the whole characterization of crime. For example, the precept characterization as an interdiction or an order can only be made by reference to the sanction provided by law. It is only the deed described and punished that suggests a *non facere* or de *facere* precept. Likewise, the characterization of social danger involves the reference to a punishment. The deduction made by the recipient of the criminal law based on the description of the deed included in the norm, *i.e.* that such a deed should not be committed since it is dangerous, results from the finding that the respective deed is punished by law.

As regards anti-juridicity and the reason why it is maintained among the essential features of crime (according to the German doctrine), we should note that, although anti-juridicity expresses a relation judgment between action (inaction) and the rule of law, the action (inaction) shall be a crime only if such a correlation does not turn out to be true. We cannot ignore that, since the abovementioned correlation also appears as the action (inaction) characteristic of meeting the requirements of judicial order or not, it becomes an objective and natural reality and can be included among the essential features of crime (incrimination).

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