NEW CRIMINAL LAW. ACHIEVEMENTS AND SOME CONTROVERSIES[*)]

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Abstract

The new Criminal Code (Law no. 286/2009) adopted by the Government through an accountability statement was designed as a legislative act superior to the Criminal Code in force designed to better suit current preventive and repressive needs. It remains to be seen whether the reality confirms these expectations. Following we will consider some of the provisions of the new Criminal Code, i.e. the General Part (A) and the Special Part (B) and of the New Code of Criminal Procedure to check if the expectations which we have referred to, are confirmed and to what extent.

Keywords: *New Cod of Criminal Procedure, Law no. 286/2009, Criminal Code, expectations, reality.*

The new Criminal Code (Law no. 286/2009) adopted by the Government through an accountability statement was designed as a legislative act superior to the Criminal Code in force designed to better suit current preventive and repressive needs.

It remains to be seen whether the reality confirms these expectations. For now, we want to consider some of the provisions of the new Criminal Code, i.e. the General Part (A) and the Special Part (B) and of the New Code of Criminal Procedure to check if the expectations which we have referred to are confirmed and to what extent.

I. First, let us consider some of the provisions of the general part (A).

1. A positive feature of the Criminal Code which I analyze is the fact that it abandoned art.1 (the purpose of criminal law) of the criminal law in force. It was properly considered that the said wording does not actually include a settlement of an institution but is more of a statement of principles which is also incomplete because it does not list **all** the social values protected by the criminal law against crime but only the most important of them, the rest being covered by a global formula, namely "**the entire rule of law**".

2. Referring to the principles of the legality of incrimination and of sanctions, the new Criminal Code embodies them in two successive texts, with different marginal names: "legality of incrimination" and "legality of criminal law sanctions".

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We know that the criminal rule structure contains in a full unity the description of both the deeds prohibited by criminal law and the sanctions the perpetrators of deeds forbidden by the law or those ordering such deeds are exposed to. Criminal sanction could not be detached from the description of the offense charged (except possibly for educational reasons); The Criminal Code is not a textbook, but a regulatory document whose content must comply with certain rules of legislative technique.

Regulating the principle of legality of criminal offenses and penalty in separate texts as referring to offenses or penalties, security measures or educative measures, would deviate not only from the requirement of unity in criminal indictment rule structure but also from the provisions of art. 49 of the Charter of Fundamental Rights of the European Union, which expresses, in a unified wording, the principle of legality of criminal offenses and penalties.

Moreover, the new legislator is neither consistent, for it defines the legality of criminal offenses by referring to the penalty as well (art. 1 par. 2); although, defining only the legality of criminal offenses it should have referred just to the deeds described in the indictment rule. Consistently, if it would have deferred to its option, although questionable, the legislator would have had to phrase paragraph 2 of art. 1 as follows: “A deed is an offense only if it has been described as such in the criminal law at the time it was committed”.

3. It is a positive thing that in the systematization of the New Criminal Code the Section on criminal law enforcement in time was moved before the Section on the criminal law enforcement in space, as proposed by the criminal matters doctrine, rectifying the error in the criminal law in force which gives priority to the Section on the criminal law enforcement in space, followed by the Section relating to the criminal law enforcement in time. Before deciding on the conditions of criminal law enforcement in space, the legislator must decide on the *existence* of criminal rule as a temporal phenomenon, as such, this issue precedes the rules relating to how the existing criminal law applies in space.

4. The new Criminal Code kept the regulation of more favorable criminal law enforcement for final penalties, giving up only the provisions for their *optional enforcement* and keeping those on mandatory enforcement, although the doctrine proposed waiving both types of provisions. It was reasoned that, in addition to any provisions on decriminalization, no other circumstances justify the enforcement, even compulsory, of the more favorable criminal law once a sentence is final, as the optional enforcement of more favorable criminal law (abandoned solution) was also not justified because these violate the intangibility of the res judicata and the authority of the judiciary. On the other hand, neither the doctrine nor the jurisprudence suggested such a solution and it was not adopted by any other reference legislation such as the French, Italian, and German.

5. The solution of the new Criminal Code (art. 8 par. 4) is questionable as it introduces in the definition of the *ubiquity principle*, in addition to perpetrating acts, both the incitement and complicity, although the current law makes no reference thereto. The previous legislator considered that such actions are criminally relevant only insofar as the offender, by using thereof, would actually commit a deed of crime or a punishable attempt; otherwise, their mere mention would have no relevance (in this case, those acts would be simple un-punishable acts of preparation). This explains why only the mentioning of performing acts appeared to be necessary in defining the principle.

6. Defining the principle of the criminal law personality (art. 9), the new Criminal Code restricts the enforcement of dual criminality provision only to the offenses for which the Romanian criminal law provides penalties other than imprisonment for life or imprisonment exceeding 10 years. Such a restriction is not justified as the principle is universally applicable in addition to the fact that it expresses a fairness and justice requirement to be observed in the relationships between states. No one could be punished for a crime committed abroad – even if it is of minor gravity - according Romanian law if the crime concerned would not be incriminated in the country where it was committed whilst violating that country's criminal law.

7. However, the conditions under which the reality principle of criminal law applies are equally unduly extended compared to the criminal law in force. Thus, according to the New Criminal Code, the reality principle operates if any offense against the Romanian state was committed (instead of a offense against the Romanian state security, as it is provided for in the criminal law in force) or was committed against Romanian citizens (instead of an offense *against the life* of Romanian citizens, or by which serious personal integrity or health injury was perpetrated against Romanian citizens, as provided in the criminal law in force). Such dilation has been suggested neither by the Romanian criminal doctrine nor by the case law.

On the other hand, the principle applies in some cases more injunctive than required by current law as it is subject to application of the requirement that the deed shouldn't have been the subject of judicial proceedings in the State on whose territory it was committed.

Such conditionality can seriously damage our country if, for example, the State on whose territory an offense against another State's security was committed triggers legal proceedings against the offender but understates the gravity of the deed providing very low penalties for such offenses. Thus, the foreign state would block any possibility of proper accountability of persons engaged in aggressive actions against another State (including against Romania).

8. Offenses are defined in the new Criminal Code by eliminating the requirement that the deed should present a social peril. Thus, an earlier suggestion of the doctrine was met, namely to adopt a *formal* definition of offenses and not a *substantial* one. In this regard, the new definition is a step forward, bringing the Romanian criminal doctrine closer to other doctrines that conceive offenses this way (an *offence* is an act provided for by the criminal law and committed in guilt). Unfortunately, the new definition of offense is not limited to this but also includes two new features, namely the act should be justified and imputable to the person who committed it. The first requirement would enshrine the idea that the offense is subject to the lack of proof. Although this corresponds to reality, as offenses are defined also through a negative requirement (not just the positive ones that we stated above), namely the lack of supporting reasons, the concept of "unjustified" is not able to render the reality to which we refer. In Romanian, this term has multiple meanings (unjustified severe, mild, unjustified in the sense of not having a basis, a reason, etc.) and not only the meaning of lack of supporting reasons.

The discussions on this formulation held before the parliamentary committee noted that it would be the best to play the whole idea which is to be expressed, namely, the lack of supporting reasons ("and without having a supporting reason"). The requirement that the deed should be imputable to a person is also questionable. The criminal doctrine outlined long before that time the ambiguity of the imputability concept. This requirement may mean that the deed should be committed intentionally (*imputatio facti*, a deed is imputable to X

because it is the result of X's will), as it can also mean culpability; a deed is imputable to X because X committed it whilst having regard to the consequences thereof (mental imputation). Some authors identify chargeability with criminal liability (de facto and mental imputation). In all these assumptions, the chargeability concept appears unnecessary because it is the same with guilt, which is explicitly stressed when defining the concept of offense.

9. We note as positive the fact that exceeded intent was also introduced in the definition of guilt as a mixed form of guilt. Abandoning the difference in treatment that currently exist (Art. 19 par. 3) between offenses committed by action (commissive) and those perpetrated by inaction (omission) is also positive

As you know, in present times, a crime by omission could be committed either with intent or by negligence, unless the law sanctions only the perpetration with intent (e.g., the omission is accompanied by the expressions of "in bad faith" or "knowingly"); in the absence of such expressions, the omission is identically punishable if it was committed willfully or by negligence. Such resolution has been rightly criticized, the doctrine emphasizing that between the two behaviors (by omission and commissive) there is a clear difference compared to social peril and this should also be reflected in their different sanctioning (e.g. a person notes that under his very eyes murder is committed; if he/she does not deliberately denounce the act, then his/her attitude shall present a much greater degree of danger than if he/she was concerned about their daily occupations and failed to denounce the act witnessed).

This differentiated assessment of the two situations in terms of the social danger thereof is avoided by the new Criminal Code which unifies the above situations, providing that both the commissive deeds and those by omission constitute offenses when committed with intent and by negligence only when the law provides it explicitly.

10. The new Criminal Code inserts a new provision in this matter regulating the situation of crime by *omission*. Such an addition to existing criminal law was not required by doctrine or case law, as the problem itself is definitively solved in the criminal doctrine which indisputable states that a crime committed (e.g., the perpetrator does what the law prohibits) can also be committed by omission (for example, when the mother refuses to give her newborn to eat so that the latter may not survive: in this case the mother commits, by omission, a deed forbidden by the law).

Such a combination is known in the Romanian criminal doctrine for a long time, meaning that a crime can be done by omission as an omission may be made by offence; yet, no need for specific regulation of these situations was felt, lacking any controversy within doctrine or judicial practice. It is incomprehensible why the new legislator still felt the need of such a regulation. The situation is different in the *Spanish criminal law*, where the provisions of art. 11 regulate the assumption of a deed committed by omission (the Romanian text is a copy of the Spanish text). It naturally raises the question why such a Spanish-inspired regulatory situation was needed when neither the Romanian legislation traditions, nor the doctrine and nor the case law have not requested this?

11. The non-imputability reasons are regulated in Chapter III of Title II of the new Criminal Code. In reality, it is about the reasons eliminating the criminal effects of the deed by removing the guilt (name under which the vast majority of these reasons are included in the Criminal Code in force). Changing the name of this chapter is questionable as the non-imputable ambiguous term is used. In addition, neither the doctrine, nor the case law had requested such a settlement.

A new reason for *non-imputability* was introduced among the existing ones (compared to the current law), i.e. "the non-imputability excess" (art. 26). The excess justified by legitimate defense and the excess justified by the state of necessity are included under this name, covered by a single text, while currently are regulated in different texts (art. 44 par. 3 and art. 45 par. 3) together with the assumptions of legitimate defense and the state of necessity.

In these cases, it is true that the perpetrator is not actually in legitimate defense or in state of necessity, because the conditions thereof are not met. In the first case (legitimate defense) the condition of proportionality of defense to the seriousness of the attack is not met, and in the second case (the state of necessity) the condition that by his / her reaction to the threat, the perpetrator should not produce more serious consequences than those which would have occurred if the danger hadn't been eliminated is not met. However, currently, the first case of the above is treated as legitimate defense to the extent that the imbalance between defense and attack was due to a state of disorder or the fear of the one defending itself and, in the second case, assimilation with the state of necessity takes place whenever the agent doesn't realize, when committing the crime, that it causes more serious consequences than those that could have occurred if the danger hadn't been eliminated. Both situations justifying assimilation pertain to the mental state of the one defending itself or the one who reacts to a danger and apparently this would justify the solution of the new Criminal Code and the treatment thereof as reasons of innocence and not as supporting reasons. However, their close connection with the legitimate defense conditions and those of state of self-necessity entitle the solution of the criminal law in force to regulate improper legitimate defense and improper state of necessity under the same wordings also regulating both self-legitimate defense and self-necessity state.

This is also the solution of the Italian Criminal Law which deals with the defense excess and the retort excess in case of danger in the chapter governing the legitimate defense and the state of necessity[1)], and not in the chapter governing the justifying the reasons for the lack of chargeability.

12. The new Criminal Code regulates only self and absolutely improper attempt, abandoning the relatively improper attempt (when committing the offense was not possible due to insufficient or failure of the means used or due to certain circumstances, i.e. that the object was missing from the place the perpetrator thought it was when perpetrating the offence). The New Criminal Code solution seems more accurate. As self and absolutely improper attempt were regulated (par. 1 and 2 of Article 32), regulating the relatively improper attempt no longer seemed necessary; this solution was easily deducted from the aforementioned. It was also argued that such splitting up of attempt was justified in relation to the regulation of this institution in the Criminal Code of 1937 because, according to this law, relatively improper attempt had a different sanction regime from both self-attempt and

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[1)] For legitimate defense and improper state of necessity the Italian criminal law deems that the excess is non-imputable only if the excess was intended; if the excess was due to the fault of the perpetrator, this entails criminal liability for a deed committed by negligence (art. 55). The Romanian criminal law does not cover such a solution. However, the Romanian law stipulates that if a deed does not meet the conditions for improper legitimate defense or improper state of necessity, the deed shall be punished, whilst enjoying a legal mitigating circumstance [art. 73 item a) "Overtaking the limits of legitimate defense or state of necessity (excess excusable)]. The Spanish Penal Code (art. 21 par.1) provides a similar solution. Failure to meet the conditions of legitimate defense or state of emergency, the offender shall benefit from a mitigating circumstance.

absolutely improper attempt (in this case, the law stipulated that there is no attempt). Or, due to the lack of such distinct sanctioning regime in the criminal law in force, regulating relatively improper attempt appeared no longer necessary (relatively improper attempt is treated as self-attempt). The Criminal Code in force, provided for the relatively improper attempt in addition to self-attempt and only out of regulatory excess. The new Criminal Code rightfully removed such excess regulation dealing only with self and absolutely improper attempt.

13. The way the new Criminal Code defines the continued offenses by adding the condition that the deed should be committed against the same *passive object* is questionable. Such a requirement would have been justified if it were a continuing offense against persons since, in this case, the criminal doctrine, with few exceptions, considers that, if the deed is committed against more many passive subjects, there is a concurrence of offenses and not a continuing offense (shall be as many offenses against persons as the existing passive subjects). The solution is however controversial when it comes to offenses against property. According to some authors, in this case there is also about continuing offense and not a concurrence of offenses (for example, if someone steals things from several stalls of a building from time to time with the same finality, even if the stalls belong to different owners, the perpetrator commits a continuing crime of theft and not a concurrence of offenses). As it is a matter where there is serious controversy within the doctrine and in the judicial practice and multiple conflicting solutions, this issue (unity or plurality of passive subjects) should have not be referred to as an integrant general feature of the continuing offense suggesting the idea that the solution would enjoy the entire doctrine's adhesion and would refer both to offenses against property and offenses against persons. In this regard, the solution of the Criminal Law in force defining continuing offenses without adding the mentioned feature seems more accurate than that of the New Criminal Code.

14. The new Criminal Code explicitly refers to the existence of intermediate plurality of offenses, although in this respect there are still many reservations (whether such intermediate plurality exists or not).

We know that what separates the concurrence of offenses relapse is the existence of a previous final judgment (relapse) or lack of such a judgment (concurrence of offenses).

A third possibility of plurality of offenses is excluded (*tertium non datur*); the Criminal Code in force explicitly expresses it under art. 32 (plurality of offenses constitutes concurrence of offences or relapse, as the case may be). The new Criminal Code failed to keep on reproducing such text, and one might think there could be another form of plurality of offenses called intermediate plurality, defined under art. 44.

The reasoning underlying this solution is questionable. The forms of the plurality of offenses are defined by their structure and not according to their legal treatment, and the structure of the forms of the plurality of offenses arise from the position of the offense in relation to the existence or absence of a final judgment for a previous deed. In this regard, the so-called intermediate plurality has the structure of relapse because it is a deed committed subsequent to a final judgment of conviction previous to committing a new crime. The circumstance that, within the intermediate plurality the relapse rules do not apply but those of the concurrence of offenses, does not consider the structure of the institution but its criminal treatment. As a result, this so-called intermediate form of plurality of offenses is actually a relapse, but the sanctioning rules of the concurrence of offenses apply. Since the forms of the plurality of offenses differ in relation to their structure, intermediate plurality occurs as a

relapse in terms of structure, without being a *state of relapse*, too, namely a plurality meeting certain conditions investing it with the state of relapse attribute.

By doing so, the legislator has developed two concepts of relapse. Relapse *de facto*, as a form of plurality of offenses and defined in relation to the existence or absence of a previous final conviction and the *legal* relapse, defined by the relapse *de facto*, plus some restrictive conditions on the terms of relapse. Therefore, a certain structure of relapse in relation to the existence of a final conviction is a joint requirement for both de facto and the legal relapse and the intermediate plurality would be a relapse in structure but lacking the additional conditions to be a legal relapse. This plurality treatment cannot influence the plurality structure so that intermediate plurality should be defined as a relapse in terms of the decisive criterion, to which a specific reference on relapse should be added in these conditions. In this regard, the marginal name of art. 40 of the law in force appears unsatisfactory. The situation regulated there should have been defined as relapse not meeting the legal requirements to be sanctioned as such.

15. The new Criminal Code correctly separates participation from the authors, considering that the participants in the crime are only the instigator and the accomplice contributing in perpetrating the offense through the author, whilst the author is the one directly committing the deed. In this regard, the solution of the new Criminal Code is more accurate than that of the criminal law in force.

16. The new Criminal Code, just like the criminal law in force, continues to remain in the deeply questionable position according to which the acts of participation must be related to the deed provided for in the criminal law and not to the offense; this solution characterizes our criminal law in relation to other legislations. Even if, in isolated cases, the instigator and the accomplice can been held accountable, and if the author commits the deed without fault or by negligence (improper participation), this does not rule out that as a rule, participants (the instigator, the accomplice), act through the author who directly commits the offense, namely a deed provided for by the criminal law, committed in guilt. The solution of the New Criminal Code, just like that of the law in force, has a character of exception; the participation institution cannot be defined this way, namely by reference to the deed provided for by the criminal law, but by reference to general rules (*de eo quod plerumque fit*, about what happens more often), or by reference to the offense.

17. In our opinion, the New Criminal Code correctly abandoned the regulation on incitement not followed by perpetration (Article 29). This instigation hypothesis, besides being extremely rare in practice, may lead to arbitrary solutions. Sanctioning the instigator would depend on the statement of the allegedly instigated: if the latter says it was led to commit an offense, although not committing any act of perpetration, the instigator shall be punished; if such person declares that it was not determined to commit the offense, the alleged instigator shall not be punished.

18. Article 83 of the New Criminal Code regulates a new criminal institution, namely the *conditional adjournment of sentence*. It is about the possibility to postpone the *punishment established* for certain offenses (including the result of a concurrence of offenses) if certain conditions are met.

The reproof which might be done to such a wording would be that usually, as it is about the same punishment (the one established and the one whose application is postponed),

one cannot use both terms (established and applied) because it expresses absolutely the same operation. Not more than either the *delivery* or the *execution of the sentence* could be delayed and not the punishment already established (applied), as the sentence application deadline coincides with that of the punishment setting. What is intended to be expressed is delaying a punishment which currently does not exist, and not the postponement of a punishment which was already established at that time.

The punishment to be applied is the one being postponed, meaning that the specified punishment has not been established, yet. In case of concurrence of offenses, one can speak of one or more established punishments and an applied resulting punishment; the latter acquires a new attribute: a resulting punishment in relation to the punishments set. But where a single punishment, the punishment set is also applied and as such, a possible delay could solely refer to the delivery or execution of the sentence to be established, which is the same with the punishment to be applied.

The *conditional adjournment of sentence* institution was taken from the French criminal code (Articles 135-60-132-70). The wording in the French text is much clearer and more logical. According to articles 132-60 the Court may defer sentencing under certain conditions: in this case, the Court shall set a date to rule the sentence (within 1 year). Postponement may be simple or by requesting evidence or requesting to fulfill certain prescriptions provided for by law.

As noted, the French wording does not require a postponement of a punishment that has already been established, namely applied, but sentencing to be executed by the convict is postponed.

19. *Minor treatment* exclusively through application of educative measures, as it is characterized by the New Criminal Code, is an appearance as custodial educative measures such as internment in a detention center are essentially punishments. On the other hand, non-custodial educative measures will be difficult to carry out due to lack of the necessary probation services employees and, because many juvenile offenders living on the streets or in abandoned houses, their supervision or recording on weekends or their daily assistance shall be impossible. As a result, for very many children, even non-custodial educative measures will turn into custodial educational measures and therefore in punishments, in some cases.

20. According to art. 125 of the New Criminal Code, internment in an educational center does not involve a security and surveillance system, unlike the educative measure of internment in a detention center. We wonder if such a thing would be possible since, as a concept, admission in an institution where custodial educational measure is running (educational center) involves in this situation, too, a minimum compulsory security and surveillance measures, especially if we consider that in such institutions can also be admitted minors who have committed serious offenses, or commit an offense during execution of the educative measures and when the educative measure could be extended to its maximum, or the minor could be admitted to a detention center.

21. According to art. 129, in case of concurrence of offenses, a unique educative measure shall be applied to the minor for all the deeds committed. But what if the acts are committed at different times? (e.g. a minor steals fruits from the neighbor's garden at the different times, even after being subject to an educative measure for some of the thefts and the prescription for other thefts has not been operated. In this case, will there be different educative measures, except for the case when the possibility to review the case and reconsider the educative measures would be regulated?)

22. Article 159 regulates the institution of reconciliation in a new manner, as a reason for exempting from criminal liability. According to the new wording, reconciliation is possible only if crimes are prosecuted ex officio and not, in general, upon prior complaint of the injured party, as it is now, and only if the law specifically provides for this. Logically, the reconciliation of the parties should take effect only as exception for crimes whose action was initiated ex officio, unlike the cases where crimes are initiated upon prior complaint, considering that authority judgment is not, as a rule opposable to the party's will to reconcile. However, the new legislator provided that reconciliation shall take place only if crimes are prosecuted ex officio and only if the law expressly provides so. The New Criminal Code solution is surprising, because it reverses the roles granting authority with the right to allow reconciliation of parties as a rule only if the offenses are initiated ex officio and if the law provides, and not if actions are initiated upon prior complaint, although it is about private cases where the crucial role should be usually entrusted with the parties; the latter should primarily decide whether to reconcile or not and not the authority because where crimes prosecuted upon prior complaint, private interests come first and not the public ones.

23. Article 175 paragraph 1 item c) stipulates that individuals who exercise powers within a declared legal person for public interest are civil servants, too. Similarly, in art.175 par.2, persons operating a public interest service invested and supervised by the authority are civil servants, too.

Does not the civil servant area expand too much? For example, private banks perform a public service, as well; they are established with the approval of the authority and are subject to authority supervision. Do thereby the bank officers become civil servants and therefore the documents originating from a bank could be considered official documents (Art. 178 par. 2)?

The income source of a person is essential in characterizing it as a civil servant or private officer: the budget or private sources.

The mere declaration of a legal person stating it is of public interest or that it exercises public service has little significance if the servant is paid from private funds.

(B) Let us consider some new provisions in the Special part of the new Criminal Code.

24. In the *Special part* of the new Criminal Code offenses are systematized in a different order than in the criminal law in force.

Indeed, Title I of the Special Part contains offenses against persons (Articles 188-227) as opposed to the criminal law in force which in title I of the Special Part includes crimes against state security (Articles 155-172) and only after such title the offenses against persons are listed (Articles 174-207).

The doctrine argued that, given the crucial role persons have in carrying out criminal repression, it would be reasonable for this category of indictments to be also placed at the beginning of the Special Part of the Criminal Code. To that effect, the French and Spanish model was invoked, as they systematize in the same manner the indictments under the special Part. This point of view can be discussed. If it is true that the protection of the human person has undoubtedly decisive importance among the social values which should enjoy the attention of the criminal legislator, is not less true that such protection will be most effective if the necessary tools would belong to a well-organized, powerful State and able to prevent and tackle the criminal phenomenon at a high level. This explains why other countries (Italy, Germany) give priority to crimes against the State in systematizing the Special Part of criminal law.

I personally think that the Italian and German systematization model is more realistic in terms of the worrying criminality; such level of the phenomenon exists now in our country.

25. The new Criminal Code introduced a new indictment “assault on the fetus” as in the Spanish model (Articles 157-158 of the Spanish Criminal Code), although such an indictment was not required either by the doctrine or case law, the incrimination under art. 185 Criminal Code in force (Inducing illegal abortion) satisfying all requirements in this area. On the other hand, there was no such indictment in the previous Romanian Criminal Codes.

26. If in the current law was already introduced as new indictment (art. 203 “sexual harassment”), text copied from the Spanish Criminal Code (art. 179 *“hostigamiento sexual”*) without much results in the judicial practice, in the new Criminal Code is a new provision in addition to harassment, on another indictment (art. 208 *harassment*), when the deed is *likely to cause fear*, also taken from the Spanish model. The introduction of this indictment is incomprehensible, as it was not required by the doctrine or judicial practice. Also, there is no criminological research showing phenomena such as those that constituted object of indictments.

27. It is understandable that, in relation to beggary, two indictments were introduced (Articles 214-215), taken from the Special Law (Law no. 274/2004) and leaving the impression that such deeds would be subject to habitualness, rather than only operating with the Special Law imposed as a result of international obligations.

The Special part of the New Criminal Code still raises many observations that will be subject to further analysis.

II. As regards the *Code of Criminal Procedure*, some observations are to be done in this matter. We limit ourselves to a few of them.

28. The new Code of Criminal Procedure introduced the notion of *suspect* (Art. 77) instead of defendant. Suspect is defined as the person on whom there is reasonable suspicion of having committed an offense under the criminal law, an extremely *ambiguous* definition (isn't the defendant a person causing reasonable suspicion of having committed an offense under the criminal law, too?); however, the defendant is defined as the person subject to the setting in motion of the criminal proceedings. The criminal prosecution as a whole (Articles 285 C. pr. pen.) aims to gather evidence on the existence of the crime, on identifying the persons who committed the offense and to establish criminal liability. Is it not true that at the end of criminal prosecution acts one is still under reasonable suspicion that an offense provided for by the criminal law has been committed? If so, why is such characterization only in respect to the alleged suspect person?

In our opinion, it was correct to use (as it is currently used) the concept of defendant (person against whom no penal action was initiated) because the term “reasonable suspicion” can not distinguish between suspect and defendant, as certainty occurs only after the final judgment.

29. The new Code of Criminal Procedure uses the expression “right ***of*** defense” (Article 10). In fact, it is the “*defense* right” (Article 6 the Code of Criminal Procedure in force). The right of defense expresses just one way the defense right is exerted, namely when it comes to the right to have a defender, while the defense right is a broader concept, referring to *all* the means the defense in criminal proceedings is carried out.

30. The new Code of Criminal Procedure introduced a new institution (Articles 342) called the *preliminary chamber* to confirm the legality of the writ of summons and of

producing evidence. In the past, among the procedural institutions there was held a so-called preparatory meeting, where verification of the legality and validity of evidence before the case was sent to the court. This institution has been in force for a short period because the prosecution body usually prepared correctly the case and produced evidence properly. Only in oral and contradictory public debate of the case when the evidence produced were analyzed by the parties, insufficient evidence appeared, often leading to the conclusion that evidence was not properly produced in that specific case. The experience of this institution should start the new legislator thinking and abandon the new institution, which is likely to have the fate of the former.

31. The new Code of Criminal Procedure introduced two new judicial bodies, namely of the *rights and freedoms judge* and *the Preliminary Chamber judge*. Given the acknowledged lack of judges, it is hard to believe that these two new judicial bodies may be established; their usefulness is also questionable. The provision of rights and freedoms is it not the concern of the entire panel? Why should a particular judge be concerned with these issues? The previous observation covered more of the Preliminary Chamber.

The new Code of Criminal Procedure, in addition to some undeniable qualities, still raises many observations which will be subject of future studies.

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