THE CONCEPT OF CRIMINAL LAW IN THE NEW CRIMINAL CODE

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Abstract

Following several introduction explanations, the author examines in detail the interpretation rule laid down in Art. 173 of the new Criminal Code, both in relation to the provisions of the Constitution of Romania, republished, and to the fully-fledged membership of our country to the European Union as of 2007.

Key-words: *fundamental law, criminal law, organic law, emergency ordinance, criminal rule, interpretation.*

Introductory notions. 1. In the process of elaboration and formulation of legal rules, the law-maker employs, apart from the ordinary terms, of general use, various terms and phrases that are own to each branch of law.

It is known that criminal law provisions should be drafted and worded precisely and clearly enough so that their grasp and application will not require great effort for their interpretation - *in claris non fit interpretatio.*

However, the need of interpretation is also required by the fact that the legislator's will is expressed by words that do not always have sufficient precision, clarity and power to provide in a reliable way the content of this will, as well as by the fact that the real substance which has to be regulated is so large, complex and changing, that sometimes it is quite difficult to embed, within the scope of the legal provisions all its aspects and nuances[1)].

The same process occurs with respect to criminal law rules as well. Consequently, an explanation of these own terms and phrases, specific to the criminal law is needed for a correct understanding and application of the criminal rule. Solely such an explanation would enable a right interpretation of the criminal law, too.

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[1)] Vintilă Dongoroz, *Criminal Law* (republishing the edition of 1939), Romanian Association of Criminal Sciences, Bucharest, 2000, p. 81.

Out of these reasons one has felt the need to introduce into the content of the Criminal Code certain explanatory rules that are *mandatory* and *univocal*[2)] to explain the meaning of certain terms or phrases utilised by the legislator both in the two codes, the criminal and the criminal procedure one, as well as into special laws also containing criminal provisions in order to ease the right explanation and interpretation of the criminal rule.

2. The new criminal law enshrines the definition of certain terms and phrases having a *content that is specific* to the criminal law (i.e. having a different significance than the one utilised in the ordinary language or in other branches of law) under an entire title: Title X entitled – „The meaning of certain terms or phrases in criminal law" – of the General Part. Whenever criminal law employs a term or a phrase of the ones outlined in this title, their meaning is the one provided for therefrom, unless the criminal law provides otherwise. For instance, the term of public servant for the purpose of the criminal law has a different content (a wider one) as compared to the one provided in the administrative law. This meaning that is specific as compared to the one provided for in other branches of law is also explained in the criminal law, for the purpose of Art. 173 of the new Criminal Code.

As to the regulation in force, the new Criminal Code comprises certain amendments and supplements. Thus, the meaning of the criminal law concept has been harmonised with constitutional regulations in force, including organic law and emergency ordinance, as well as the acts that had been adopted prior to the current Constitution, which, at the time of their entry into force, represented criminal law sources (Laws, Decrees of the ex-State Council, Law-Decrees etc.).

From Title X – „The meaning of certain terms or phrases in criminal law" – the explanatory rules relating to the term „the territory" and the phrase „offences committed on the territory of the country" were superseded. They were transferred to Title I – Criminal law and its application limits, Chapter I – Criminal law application, Section 2 – Spatial application of criminal law, being more closely linked to the rules referring to the territorial principle of the criminal law [Art. 8 para. (2), (3) and (4) of the Criminal Code].

As compared to the criminal law currently in force, Title X has been supplemented with new explanatory rules referring to the meaning of the phrases: "electronic pay instruments"; "information system and information data" and "exploiting a person".

3. Certain texts have been reconsidered, being given a different content than the one provided for under the criminal law currently in force (the ones referring to: "public servant", which, in the opinion of the editors of the new criminal law, had to be harmonised with the wordings from other relevant legislations and international conventions; „family member" in which the concept of "close relatives" has been integrated, as well as certain new categories;

[2)] Victor Roşca, *Preliminary Explanations* (The Meaning Of Certain Terms Or Phrases In Criminal Law), in "Theoretical Explanations of the Romanian Criminal Code. The General Part" by Vintilă Dongoroz, Iosif Fodor, Siegfried Kahane, Nicoleta Iliescu, Ion Oancea, Constantin Bulai, Rodica Stănoiu, Victor Roşca, vol. II, Ed. Academiei Române, Bucharest, 1970, p. 430. The same ideas are to be found in Ştefan Daneş, *General Provisions* (Comment), in "The Criminal Code Commented And Explained" by Teodor Vasiliu, George Antoniu, Ştefan Daneş, Gheorghe Dărângă, Dumitru Lucinescu, Vasile Papadopol, Doru Pavel, Dumitru Popescu, Virgil Răмureanu, Ed. Ştiinţifică, Bucharest, 1972, p. 693.

"state secret information and official documents"; "offence committed in public", therefore the legislator removing from the scope of offence-related circumstances the *potential publicity*; "war time"); others have been simplified (the rule related to the phrase "very serious consequences" only retained the criterion referring to the value; the concept of "public"), whilst a part has been improved by means of the supplements required by the criminal doctrine and judiciary practice ("criminal law"; "computation of time"); the remainder of the texts have been retained in the form currently existing in the criminal law in force ("general provisions"; "penalty provided for by the law"; "commission of an offence"; "firearms").

4. One has to mention that these are not the only genuine interpretation rules laid down in the new criminal law, yet there are numerous cases where the meaning of a term or a phrase is in-built in the legal provision in which it is utilised [e.g. Art. 8 para. (2) and (3) contains the meaning of the phrases „Romania's territory" and „offence committed on Romania's territory"; in Art. 213 para. (4) one mentions the meaning of "practicing prostitution"; in Art. 254 para. (2) one explains the meaning of the term "disaster"; in Art. 367 para. (6) one defines the concept of "criminal organised group"; in Art. 374 para. (4) one mentions the meaning of "pornographic materials with minors"] or sometimes even in a distinct text (e.g. in Art. 333 one explains the meaning of "railway accident").

5. The new criminal law maintains the two modalities of genuine interpretation introduced by the Criminal Code in force: a) the meaning of a term or a phrase is explained by means of general rules, especially worded for this purpose (Art. 172-187 of the Criminal Code); b) the meaning of the term or phrase is explained in the legal provision under which it is employed or in separate texts, to the end of the incrimination group in which it is utilised (please see the afore-mentioned examples).

The distinction made between the two modalities is needed since, in the first situation, the amendment or repeal of certain legal provisions containing an explained term or phrase does not affect the general provision that explains the meaning of the respective term or phrase, which continues to produce its effect for the other application cases remaining in force; conversely, in the second situation, the amendment or repeal of the legal provision that contains the explanation also produces effects upon the interpretation of the term or phrase employed in that particular provision[3)].

The concept of criminal law. 1. This notion as defined by Art. 173 of the new Criminal Code[4)], adopted by Law no. 286/2009, was brought into line with the constitutional provisions in force, (organic law and emergency ordinance), as well as with the acts that had been adopted prior to the current Constitution, which, at the time of its entry into force represented sources of criminal law (Laws, Decrees of the ex-State Council, Law-Decrees etc.).

[3)] Victor Roşca, *Preliminary Explanations* (The Meaning Of Certain Terms Or Phrases In Criminal Law), *cit. supra*, p. 431.

[4)] *Art. 173.* – „*Criminal law* means any criminal provision contained in organic laws, emergency ordinances or other legal instruments which, on the date of their adoption, were at a law-level".

This concept was considered[5] superfluous, just as the previous one, in the concept that represented the foundation for the wording of the Criminal Code of 2004, as compared to the provisions of the Constitution [Art. 73 point (h)] which confers the features of an organic criminal legislation to any law that contains criminal provisions (offences, penalties, and the execution thereof) and as compared to the fact that the phrase "criminal law" is sufficiently explained in the criminal doctrine, therefore criminal law can only mean a legal act adopted by the Parliament as organic law, which contains criminal provisions. Potential exceptions from this rules (individual pardon decrees of the President of Romania, decrees with offences and penalties pertaining to the criminal legislation previous to 1989 and which are being phased out, as well as the criminal provisions contained by extra-penal law would not justify, in this vision, the provision of another meaning for the phrase "criminal law" than the aforementioned one.

2. The reason that lays behind the introduction of this explanatory rule, under the concept that was the foundation for the Criminal Code of 1969[6], was determined, firstly, by the fact that this phrase inevitably occurs in any legal regulation having a criminal feature.

Secondly, this phrase, in the terminology of the criminal law, has various uses. For instance, it is used in order to name the totality of criminal rules (just as in the formulation "the purpose of the criminal law", in which "criminal law" has a general meaning) or in order to point out solely a certain provision (just as in the wording "offence provided for by the criminal law", that is by a criminal law provision, this being the limited meaning of "criminal law").

Thirdly, by explaining the phrase "criminal law", one aimed at delineating the concept of "criminal rule" from the concept of "rules of criminal law" as the former refers to the offences, criminal liability and criminal penalties, whilst the latter regards any rule meant to serve the achievement of the purpose and functions of the criminal rules. The principle of legality of incriminations and criminal penalties requires as a sole source of criminal rules the criminal law, for the purpose of Art. 173 of the Criminal Code.

As other authors argue[7], the phrase "provisions having a criminal feature" signifies those legal provisions containing rules on offence criminalisation, criminal liability and criminal penalties.

Recently[8], one has argued, in a well-reasoned way, that a „legal provision having a criminal feature" means a provision contained in a legal instrument that prescribes a certain behaviour or that forbids a certain conduct under the sanction of a penalty.

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[5] George Antoniu, *New Criminal Code. Previous Criminal Code,* Comparative Research, Ed. All Beck (All Beck Publishing House), Bucharest, 2004, p. 48; Idem, *New Criminal Code And The Previous Criminal Code,* A Comparative View, in "Criminal Law Review" issue no. 4/2004, p. 32.

[6] Victor Roşca, *Preliminary Explanations* (The meaning of certain terms or phrases in criminal law), in "Theoretical Explanations of the Romanian Criminal Code. The General Part" by Vintilă Dongoroz, Iosif Fodor, Siegfried Kahane, Nicoleta Iliescu, Ion Oancea, Constantin Bulai, Rodica Stănoiu, Victor Roşca, vol. II, Ed. Academiei Române, Bucharest, 1970, p. 432-433.

[7] Ştefan Daneş, *Criminal Law* (Comment), in "The Criminal Code Commented and Explained" by Teodor Vasiliu, George Antoniu, Ştefan Daneş, Gheorghe Dărângă, Dumitru Lucinescu, Vasile Papadopol, Doru Pavel, Dumitru Popescu, Virgil Rămureanu, Ed. Ştiinţifică, Bucharest, 1972, p. 694.

[8] George Antoniu, Costică Bulai, *Dictionary of Criminal Law and Criminal Procedure*, Ed. Hamangiu, Bucharest, 2011, p. 280.

Substantively, the explanatory rule has adopted a general determination criterion, pointing out that „criminal law" means any criminal provision, that is any provision that contains offences and penalties, as well as those from the General Part of the new Criminal Code.

Formally, they can be contained only in organic laws, emergency ordinances or other legal instruments which, at the moment of their adoption were at a law-level. This provision is meant to ensure the observance of the principle of legality in criminal matters.

From the content of Art. 73 of the Fundamental Law, one draws the conclusion that Parliament adopts constitutional laws, organic laws and ordinary laws.

In a hierarchy of laws *organic laws* hold the second place and they may intervene only in the areas explicitly provided for in Art. 73 para. (3) of the Constitution of Romania, republished[9]. Amongst these areas there are: offences, penalties, and the execution thereof; granting of amnesty and collective pardon and the statute of the public servants. In this concept, the areas reserved by Constitution to organic laws could not be subject to legislative delegation. As such, the Government may not intervene by means of ordinances in any of the fields of organic law, aspect which does not exclude the capacity to intervene by decisions, as the case may be, in order to arrange their implementation. From a procedural viewpoint, organic laws are adopted by qualified majority of the members of each Chamber.

Accepting the reality that, in numerous cases, the Government issued emergency ordinances in areas that fall under the field of organic law, the same author points out, in a subsequent paper[10] that when the Government refers to a Chamber a draft-law for approving an *emergency ordinance*, whose content regulates the field of organic laws, its adoption is made by absolute majority. Unless this majority is reached, the draft-law for approving the ordinance automatically converts into a draft-law or law for rejecting the ordinance, irrespective of the number of the persons who have cast their vote against the organic draft-law.

By mentioning emergency ordinances[11] as legal instruments that may contain criminal provisions, the legislator has taken into account the constitutional solution chosen in 2003 and the existent legislative reality, thereby putting to an end the controversy whether they may or may not be sources of criminal law.

Until the amendment of Romania's Constitution of 2003, the matter whether emergency ordinances may or may not cover social relations pertaining to the area of criminal law was an arguable one, yet after that moment, following the amendments brought to Art. 115, one explicitly admitted the possibility that these legal instruments contain „*rules of an organic law nature*" and therefore to regulate in areas such as: offences, penalties, and the execution thereof; granting amnesty and collective pardon.

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[9] Ioan Vida, Types of Laws (Commented), in "Constitution of Romania, Commented and Explained" by Mihai Constantinescu, Ioan Muraru, Ion Deleanu, Antonie Iorgovan, Florin Vasilescu, Ioan Vida, Ed. Regia Autonomă Monitorul Oficial, Bucharest, 1992, p. 168.

[10] Ioan Vida, Types of Laws (Commented), in "Constitution of Romania. Comments on Each Article", by Ioan Muraru, Elena Simina Tănăsescu, Dana Apostol Tofan, Flavius A. Baias, Viorel Mihai Ciobanu, Valerian Cioclei, Ioan Condor, Anastasiu Crişu, Ştefan Diaconu, Andrei Popescu, Sorin Popescu, Bianca Selejan-Guţan, Milena Tomescu, Verginia Verdinaş, Ioan Vida, Cristina Zamşa, Ed. C. H. Beck, Bucharest, 2008, p. 689.

[11] For further details on this matter, please see: Viorel Paşca, *"Emergency Ordinance, Source of Criminal Law"*, CLR issue no. 2/1999, p. 56-61; Ioan-Augustin Molnar, *"Sources of Criminal Law From the Perspective of Law Systems"*, CLR issue no. 1/2003, p. 39-47; Constantin Butiuc, *"Criminal Law" Concept*, CLR issue no.

The fundamental change introduced by the constituent legislator of 2003 is a conceptual one. If in the initial version the emergency ordinance was founded upon exceptional situations which, pursuant to Art. 93, justified the establishment of the state of siege or emergency, in the new concept, *the extraordinary situation* means a state of emergency in regulating an aspect that may not whatsoever be subject to procrastination[12)].

Mention must be made that *simple ordinances* do not fall under the concept of criminal law, for the purpose of Art. 173 of the Criminal Code and, as such, they may not be sources of criminal law, since, according to Art. 115 para. (1) of the Constitution of Romania, republished, the mandate of the Government to issue such legal instruments may only cover „fields outside the scope of organic laws".

The phrase „*legal instruments that, at the moment of their adoption were at a law-level*", the law-maker had in view those *laws* that, at the moment of their entry into force represented sources of criminal law (we refer to the laws that had been adopted until 1991, to the extent to which their content would not contravene to Constitutional provisions, irrespective of the field of social relations covered, because in that particular historical period the division of laws into organic laws and ordinary laws was not known) or *decrees* containing offences and penalties that had been adopted prior to the entry into force of the Constitution of Romania of 1991 (more specifically, the reference is made to the Decrees that had been adopted up to 1989 by the ex-Council of State or by the Law-Decrees that had been adopted after 22 December 1989 by the Council of the National Rescue Front and subsequently by the Interim Council of National Union) which are currently being phased out as a consequence of the adoption of superior legal instruments, which are modern, in lieu of them.

3. Following 1 January 2007, the date of Romania's accession to the European Union, criminal provisions are also to be found in the *community legal instruments, which are binding* (they are sources of criminal law[13)], and have primacy over the national provisions which are contrary to them, by observing the provisions of the accession act.

Conclusions

It follows from the foregoing the efforts made by the Romanian legislator of 2009 to harmonise the new criminal legislation with the provisions of Romania's Constitution, republished, as well as with the new realities that Romania is going through as a fully-fledged member of the European Union.

2/2003, p. 51-55.

[12)] Mihai Constantinescu, Ioan Muraru, Antonie Iorgovan, Revision of Romania's Constitution, Explanations and Comments, Ed. Rosetti, Bucureşti, 2003, p. 95.

[13)] For this purpose, for futher details, please see Gheorghe Ivan, *Community Law As A Source of Criminal Law*, CLR issue no. 2/2008, p. 85-96; George Antoniu, *Reflections Upon the Concept of Incrimination*, CLR issue no. 3/2008, p. 15 *et seq*.; Gheorghe Ivan, *Community Law Principles As Sources of Criminal Law*, CLR issue no. 1/2009, p. 31-47.

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