

# THE CONCEPT OF OFFENSE AND ITS ESSENTIAL FEATURES IN THE NEW CRIMINAL CODE REGULATIONS

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## **Abstract**

*In this study, the author outlines the definition of the offense in terms of the new Criminal Code and the Criminal Code in force. He also examines the essential features of the offense stipulated by the new Criminal Code. In the final part, the author presents interesting comparative law elements in the matter.*

*Keywords: definition of the offense, major features of the offense, offense under the criminal law, offense committed with guilt, the offense committed not to be justified, the deed to be imputable to the person who committed it.*

**Keywords:** the new Criminal Code, Criminal Code, offense, definition

## **1. The definition of offense in the new Criminal Code**

The Criminal Code adopted by Law. 286/2009<sup>1)</sup> defines the offense in Art. 15 paragraph (2). According to this text, the offense is the act provided by the criminal law, committed with guilt, unjustified and imputable to the person who committed it.

The Criminal Code in force defines the offense in Art. 17, paragraph (1) as the act presenting social hazard, committed with guilt and provided by the criminal law.

As can be seen, essential differences between the two general criminal laws are noted in the general definition of the offense. The legislator of abandons the idea that the new Criminal Code offense is the act as presenting social hazard, thus meeting the requirements of the doctrine, to abandon the social hazard as an essential feature of the offense.

Another characteristic is referred to instead of this key feature, namely “the act provided by the criminal law” thus granting this essential feature the priority it deserves and which the Criminal Code in force mentions it as a last feature. Further, the new definition refers to guilt, considered the second essential feature, naturally situated subsequent to the characteristic related to the deed provided by the criminal law. The new general definition of the offense adds another two key features to the said ones, namely the unjustified nature (i.e. the lack of supporting reasons) and imputability of the person who committed the crime.

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## 2. Justifying the legal definition of the offense

The general definition of the offense contained in art. 15 par. (1) of the new Criminal Code is justified for several reasons.

First, in this definition the four essential features common to all offenses are highlighted, namely: the deed to be provided for by the criminal law, the deed to be committed with guilt, the deed to be unjustified and the deed to be imputable to the person who committed it.

The essential features of the offense should not be confused with the constituent elements of each offense in particular<sup>2)</sup>.

As the essential features are qualities, features characterizing the offense in general and every offense individually are not covered by the various acts that constitute offenses, but are reflected in this content and highlight its criminal character; on the contrary, the constituent parts come under the contents of each offense regarded in particular, thus customizing the act stipulated by the criminal law.

When an offense referred to in the criminal law lacks an essential feature, it loses the criminal nature and can not constitute an offense. Conversely, when the offense lacks a certain constituent element of an offense, such offense can be another offense, thereby keeping the criminal nature (e.g., instead of murder, manslaughter; instead of assault, threat or personal injury).

This distinction between essential features and constituent elements that the new Criminal Code establishes by regulating each offense presents a real theoretical and practical importance, because it allows a double check on determining the existence in particular of offenses, meaning a generic one on the presence of the key features and a specific one on meeting the specific constituents, both relevant for ensuring compliance with the law.

Secondly, it expresses some general principles, such as the principle that there is no criminal offense and no criminal liability if the offense is not incriminated by law; the principle that there is no crime without guilt and no objective criminal liability, and the principle that there is no offense if the deed was committed in circumstances allowed by law.

Thirdly, the legal definition of the offense has legal relevance in other respects, as well:

a) the definition of offense in general serves to delimit the criminal illicit scope from that of the non-criminal illicit, namely the delimitation of acts which are other illegal acts-type offenses (administrative, civil, disciplinary) or lawful acts-type offenses. Only those acts that are described in the criminal law are deemed criminal deeds. An act not covered by the criminal law can be a misdemeanor, misconduct or a deed permitted;

b) the general definition of the offense serves as a guide for the legislator itself when developing the indictment rules and taking out of the criminal illicit area the deeds that no longer correspond to this concept. Therefore, whenever the legislator evaluates the deed by observing that it actually meets the general concept of offense, that deed shall be incriminated and, conversely, if the act described by the criminal law no longer has the essential features of the offense, it will be decriminalized;

c) the legal definition of crime is particularly relevant also from the practical point of view. In all cases, the judiciary hearing the criminal case must establish the existence of all essential features of the offense within the deed committed. Absence of any of these leads to lack of offense, together with all the consequences of this solution;

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<sup>2)</sup> See V. Dongoroz, S. Kahane, I. Oancea, I. Fodor, N. Iliescu, C. Bulai, R. Stănoiu, *Theoretical explanation of the Romanian Criminal Code. The General Part*, Vol. I, the Romanian Academy Publishing House, 1969, p. 13.

d) the provisions defining the general concept of offense have implications for the scope of the General Part of the Criminal Code provisions governing other institutions concerning the offense. For example, within the provisions on attempt (Article 32-34) or participation (art. 46-52). Attempt shall be deemed an offense provided that, being incriminated by law, it meets the essential features provided for in art. 15. Also, participation acts (co-author, incitement, complicity) shall be sanctioned to the extent that they concern an act that combines the essential features of an offense, according to art. 15 par. (1).

### **3. The essential features of the offense**

#### **A. The deed to be provided by the criminal law**

The provisions of art. 15 par. (1) of the new Criminal Code refer, at first, to the provision of deed in the criminal law because, naturally, the legislator, whenever it considers that an offense of some seriousness was actually perpetrated and which might be repeated incriminates it under the criminal law, i.e. an organic law, emergency ordinance or other legislative act which, on the date of the adoption, had the force of law.

While the conduct rule described by the incrimination rule is observed, the offense takes only this formal and hypothetical aspect; however, if the law is overruled by committing an act that meets the description of the incriminating text in force at that time, the offense becomes a specific illicit, a real judicial fact.

Specific offenses are nothing more than the acts effectively committed under the conditions contained in the incriminating description of abstract offenses. For example, the criminal law describes in the indictment wording acts such as murder, rape, theft, robbery, etc. In these descriptions we have offense in abstracto. But if a criminally liable person actually commits murder, rape, theft, robbery, etc., these deeds, as they match the description in the incriminating wordings, shall become specific offenses.

Given the foregoing, the criminal doctrine<sup>3)</sup> expressed the opinion which we appreciated as justified, i.e. that the provision of the deed in the criminal law as an essential feature of the offense shows the existence of three facts, namely:

- a) the existence of an incriminating rule, a law pattern which, under criminal sanction, prohibits a particular action or inaction;
- b) committing specific deeds like those described by the legislator in the indictment rule;
- c) consistency between the objective characteristics of the offense and those of the offense charged.

#### **a) We cannot talk about offense as long as there is no legal provision to prohibit or declare illicit a particular action or inaction, and to enforce the sanction.**

The indictment rule includes the description of both the objective features of the offense charged and the subjective ones, as the offense charged would have no legal significance without the subjective element.

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<sup>3)</sup> See: C. Bulai, B.N. Bulai, *Criminal law handbook. The General Part*, Universul Juridic Publishing House, Bucharest, 2007, p. 146; V. Dongoroz, *op. cit.*, p. 161; G. Antoniu, *The new Criminal Code with comments*, C.H. Beck Publishing House, Bucharest, 2006, p. 159-160; F. Streteanu, *Treaty of criminal law. The General Part*, Publishing House, Bucharest, 2008, pp. 199-200; I. Pascu, *Criminal Law. The General Part*, 2nd edition, Hamangiu Publishing House, Bucharest, 2009, p. 120; V. Dobrinoiu, G. Nistoreanu, I. Pascu, A. Boroi, I. Molnar, V. Lazăr, *Criminal law. General Part*, Europa Nova Publishing House, Bucharest, 1997, p. 128; T. Dima, *Criminal law. The General Part*, 2nd edition, Hamangiu Publishing House, Bucharest, 2007, p. 131; G. Antoniu, *Some reflections on the concept of indictment and the concept of offense*, in R.D.P. no. 4/2010, p. 18.

The indictment rule applicable to deeds under the Criminal Code, the Special Part, under particular criminal law or non-criminal laws with criminal provisions, describes the legal contents of the offense committed perpetrated by the author and states the criminal offenses attempts which are subject to punishment. Accordingly, the indictment rule related to the deed is a complete rule only when the author commits thereof. For example, Article 228 criminalizes theft, namely taking possession of movable property or appropriation of without the owner's consent for the purpose of misappropriation; if theft is committed only by the author, the rule applicable to the punishment thereof is that provided by this law. When the offense committed by the author is steal attempt, it is punishable under Article 232 which is supplemented by Article 228 criminalizing theft but also by Article 33 which states that the attempted punishment limits are reduced by half compared with the offense committed; likewise, if the theft was committed in joint criminal venture (co-author, incitement, complicity), the provisions of art. 228 will be supplemented by those contained in Title II, Chapter VI, relating to participation.

Thus, the legal pattern of the offense can be that described in the Special criminal rule in relation to committed offenses perpetrated by the author, and when the act is imperfectly committed (attempt, exhausted act offense) or joint criminal venture (co-author, incitement, complicity), the legal pattern of the offense shall be supplemented by the provisions of the General part of the Criminal Code regulating the atypical forms of the offense and joint criminal participation.

Content of the offense charged may be described in a single Special Criminal rule (e.g. theft - art. 228; murder - art. 188, hitting or other acts of violence - art. 193; rape - art. 218, bribery - art. 289, etc.) or by combining several indictment rules, for example: the legal content of the offense of assault arises from the combination of wordings describing threat offenses (art. 206), hitting or other acts of violence (art. 193), personal injury (art. 194), collisions or injury causing death (Article 195), murder (art. 188), first degree murder (art. 189), with the content in art. 257 of the new Criminal Code; robbery offense, the standard type, results from the combination of rules content criminalizing theft (Article 228), aggravated theft (Article 229), threat (Art. 206), the act of striking or other acts of violence (art. 193), with the content in art. 233.

It is possible that a deed to be described in a special indictment rule, but a general rule of indictment (e.g., murder committed against forestry staff related to the performance of service duties was incriminated under art. 42 of Government Emergency Ordinance no. 59/2000 on the status of forestry, but the act of murder is also incriminated by Articles 188 and 189 of the Criminal Code). Such situations (conflict of criminal laws in a special rule and a general indictment rule) are solved by giving priority to the special rule, and the general rule gives way to the special one. If the special rule will be repealed, it will not mean that the act is repealed, as the indictment of the general rule will become operational which, in this example is the Criminal Code.

Certain indictment rules established by the Special Part of the Criminal Code are supplemented, in respect of the objective features, by the provisions provided by other branches of law; for example, the rule criminalizing the act of family abandonment under art. 378 of the new Criminal Code is supplemented by the rules provided by the family law, which establish the persons are legally obligated to provide for maintenance and the persons entitled to maintenance; or the indictment rule on the abuse of office against the legitimate interests of a natural or legal person (art. 297), as well as the rule criminalizing negligence in service (art. 298) is supplemented by the provisions of the administrative law and by the labor

law regulations on the official duties of the public servant in his capacity of author of these offenses; or the rule criminalizing the failure to comply with the explosives regime (art. 346) are supplemented by the provisions of Law no. 126/1995 which regulates the legal regime of explosive materials; likewise, the rule criminalizing the act of exercising a profession or activities without having the right to do so (art. 348) are supplemented by the administrative law regulations governing the conditions for the exercise of various professions and activities with reference to the criminal law in terms of sanction<sup>4)</sup>.

**b) The second reality that must be taken in consideration when assessing the essential feature of stipulating the offenses by the criminal law is committing specific acts such as those described by the legislator in the indictment rule.**

Existence of specific acts always involves an outward manifestation of the individual, capable of falling under the perception of our senses, due to its nature or consequences.

Mental processes that are not likely to fall under the perception of our senses cannot be considered deeds for the purposes of the criminal law.

The mere thought of a person to commit an offense has no criminal relevance, and neither the decision to commit an offense charged cannot stand for a specific deed for the purposes of the criminal law, as long as it is not externally exercised through a preparatory or enforcement action hereof. Similarly, the mere communication of the decision to commit an offense charged to one or more persons cannot be deemed an offense subject to the interest of the criminal law, if it doesn't turn into a threat likely to cause some concern or if the concern to seek followers to form an organized criminal group is not expressed thereby.

A deed forbidden by the law criminal under threat of punishment can be committed directly by its author using its own forces or body or by setting in motion a foreign energy the author directs towards the production of certain consequences, or by using inanimate instruments thus achieving the desired objectives.

Also, the deed can be committed by abstinence, inaction or lack of using one's own force or external energy to stop a causal process triggered in another manner which can endanger or harm a social value which is the object of criminal protection; that process was supposed to be interrupted or removed.

Therefore, any specific deed may be committed by its author action or inaction.

Action as a way to commit relevant criminal offenses, requires energy consumption which violates or endangers a social value protected by the criminal rule and can be practically achieved through words or phrases (e.g., propaganda for war - art. 405, which involves spreading tendentious or fabricated news to start a war of aggression; public incitement - art. 368, which is to verbally urge the public to commit offenses); or through writing (e.g., misleading the judicial bodies - art. 268, where the author notifies in writing the judicial bodies by denunciation or complaint about the existence of a criminal offense provided for in the criminal law knowing that it is not true; false witness - art 273, where, in

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<sup>4)</sup> Art. 387 par. (1) of the Law no. 95/2006 on the healthcare reform stipulates that: "practicing medicine by a person who does not have this capacity is an offense and is punishable under the Criminal Code", and art. 480 states that, "Practicing dentistry by a person who does not have this capacity is as an offense and is punishable under the Criminal Code"; Article 25 of the Law no. 51/1995 on the organization and exercising the lawyer profession stipulates that: "The exercise of any legal assistance activity specific to the profession of lawyer and provided for in art. 3 by an individual or legal entity that is not a lawyer registered within a bar and on the table of lawyers of that Bar is an offense and is punishable under the criminal law". The provisions of these laws governing the conditions for practicing medicine, dentistry or the lawyer profession supplement the framework provisions of art. 348 of the new Criminal Code.

his / her deposition, the witness describes untrue essential facts or circumstances etc.); or through forging written documents (for example, forgery of official documents or documents under private signature to produce legal consequences); or through concrete acts comprising the widest range (hitting, injury, appropriation, destruction, forgery, receiving, transmission, acquisition, etc.).

As a way to commit specific acts, inaction is an outward manifestation where the author of the offense adopts a negative, passive attitude in the sense that the author fails to do what the law requires him to do and thus allowing an energy to work and produce the outcome which the legislator sought to avoid, by forbidding the deed. The person failing to comply with the order described by the indictment rule does not participate directly in the causal process of the outcome, only facilitating thereof, creating the favorable conditions for other forces to cause the result; these forces would have been ineffective or their effects would have been annihilated if the recipient of the indictment rule would have expressed oneself and would have prevented development thereof by taking action; thus, the omission occurs as an indirect antecedent of the causal process and which led to the outcome<sup>5</sup>. The omission falls under the criminal liability only in reference to the subject's obligation to take action.

The obligation may derive from the provisions of the law, a contract, from certain functions performed by the subject of the offense, or from some factual circumstances. The omission is proper when the subject does not meet the legal obligation. For example, the law requires any person to immediately notify the authorities once it has knowledge of the commission of an offense referred to in the criminal law against life or which has resulted in death of a person.

If failing to denounce, or failing to fulfill this legal obligation, it shall be held criminally liable according to art.266 of the new Criminal Code. The omission is deemed proper, as in the said example, when the subject fails to do what the law orders, or improper, when the perpetrator achieves by omission the positive behavior prohibited by law (perpetration by omission); for example, the mother fails to take care of the child pursuing the suppression of the latter's life.

Within the criminal doctrine, two opinions were expressed in respect of proper offenses by omission; the first opinion claims that there may be cases in which such offenses are committed through action, for example, the subject refusing to denounce a serious acknowledged crime, giving inaccurate, contradictory information, so that the authorities cannot take any action based on it<sup>6</sup>; a second opinion considers that proper offense by omission cannot be committed through an action because, what is of interests in terms of the offense by omission is just the fact that the subject has failed to fulfilled its legal obligation; the fact that the subject also committed an action along with this omission has no relevance. In addition, by reference to the offense of failing to denounce through action, this latter view considers that action to provide the authorities with inaccurate, contradictory information cannot be a constituent element of the failure to denounce, but it could take the shape of an autonomous offense - for example, misleading the judicial bodies, as referred to the in art.268 of the new Criminal Code. We believe that the second opinion better suits the intention of the legislator in terms of proper characterization of the offense by omission.

The outward manifestation of the subject in the form of action or inaction must be voluntary, must express its free will, and be the result of the offender's self-determination.

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<sup>5</sup>) See G. Antoniu, *The New Criminal Code*, vol I, *cit. supra.*, p. 160.

<sup>6</sup>) A se vedea C. Bulai, B.N. Bulai, *op. cit.*, p 175.

Both reflex acts and crimes committed under the influence of physical coercion or unconscious acts are excluded from the scope of the actions or inactions with criminal relevance.

**c) Consistency between the objective features of the offense committed with those of the offense charged.**

In order to have the title of offense, the features of a specific act should be identical to those of the deed described by the indictment rule or those of the legal model or pattern of that action.

As shown, the indictment rule includes in its contents both the objective and subjective elements of the deed, but the compliance of the specific deed with the indictment rule concerns only the objective elements of the offense committed under the objective requirements of the content of the indictment rule. With regard to the subjective elements of the offense and their consistency with those provided by the indictment rule, they are discussed within the second key feature of the offense, namely the guilt.

Therefore, examining the consistency of the legal pattern with that of the specific act committed, subject to the provision of the offense in the criminal law as an essential feature of the offense, is performed only in terms of unbiased elements, i.e. those related to object, subject, place and time of committing the deed and the objective aspects with their components: the concrete element, the essential requirements, the immediate result and causality. It is true that in criminal law courses and textbooks the conditions related to the object, subject, place and time of committing the offense are deemed as factors<sup>7)</sup> or preexisting conditions<sup>8)</sup> of the deed and treated separately from the objective aspects, but this is due more to an educative interest than a dogmatic one, because in fact, one could not perform a complete in-depth analysis of the objective aspects of the specific deed without reference to the object, subject, or place and time-related conditions<sup>9)</sup>.

If the specific committed deed is perpetrated by the author, the analysis of its objective elements consistency with those contained in the indictment rule established by the Criminal Code or special laws shall be made by reference to the legal pattern described by this rule. Subject to how the indictment rule describes the objectives of the deed, we can distinguish three categories of indictments of the committed act perpetrated by the author: indictments (offenses) with unique content, indictments with alternating content and indictments with alternating contents.

**The first category** includes the indictment rules whose concrete element and the immediate result are unique, exclusive, and unlikely to have several forms. For example, bigamy (art. 376) is committed by entering a new marriage by a married person; murder (art. 188) is committed by killing a person; theft (art. 228) is committed by taking possession of movable assets or appropriating the property of another person, etc.

In terms of these indictments, consistency between the specific deed perpetrated and the legal pattern is related to such unique way.

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<sup>7)</sup> See: V. Dongoroz, *op. cit.*, p. 162; C. Mitrache, Cr. Mitrache, *Romanian Criminal Law. The General Part*, Universul Juridic Publishing House, Bucharest, 2007, p. 116; T. Dima, *Criminal Law. The General Part*, Hamangiu Publishing House, Bucharest, 2007, p. 163.

<sup>8)</sup> See: C. Bulai, B. Bulai, *op. cit.*, pp. 173, 196; I. Pascu, *op. cit.*, p. 127.

<sup>9)</sup> See: G. Antoniu, *The new Criminal Code, cit. supra.*, p. 164; F. Streteanu, *op. cit.*, pp. 205-207.

**The second category** includes those indictment rules that describe an alternative content of the act where either the concrete element or the immediate result may take different forms. For example, in terms of the offense of perjury (art. 273), the concrete element can be either the witness's action to make false statements or omission to saying everything he knows about the essential facts or circumstances he is questioned on; in what concerns the personal injury offense (art. 194), the result is one of the following consequences: disability, traumatic injury or damage to health of a person whose recovery required over 90 days of medical care, aesthetic injury handicaps, abortion, endangering human life.

These indictment typologies present consistencies between the concrete deed perpetrated and the legal pattern if the author has carried out the execution in any of the ways hereof, or any of the consequences specified by the indictment rule occurred.

By reference to the above examples, the offense of perjury shall fall under the text of art. 273 of the new Criminal Code, whether it was perpetrated solely by action or solely by inaction described in this text, or the author committed both the action and inaction included in the legal pattern; likewise, the offense of injury shall be classified under art. 194 of the new Criminal Code regardless of whether the result was a single consequence or several of those mentioned in this indictment text.

**The third category** includes those indictments where the legislator describes, under the same name, two or more offenses contents, namely several crimes. For example, under art.315 of the new Criminal Code, two deeds are criminalized as "fraudulent issuing of currency": the making of genuine currency in other conditions than the legal ones [art. 315 par. (1)] and the putting into circulation of genuine coin manufactured under conditions other than the legal ones [art. 315 par. (2)]; seven distinct deeds are criminalized as "failure to comply with the judgments" under art. 287 of the new Criminal Code. In this category of indictment rules, the consistency of the committed offense with the legal pattern is outlined with respect to each of the offense content. For example, if a person has produced genuine currency in illegal conditions and puts into circulation such coins, that person commits two concurrent deeds; likewise if the same person commits several offenses referred to in art. 287 of the new Criminal Code.

If the act was perpetrated atypically (attempt, executed deed) or in a venture, when determining its consistency with the legal model, in addition to the objective elements contained in the legal pattern the offense committed was perpetrated by the author, one should also verify and compare with the provisions of the general rules to be taken into account when legally classifying the offense.

It is not sufficient in all cases to be noted that the offense committed corresponds to the legal pattern in respect of the objective elements to say that the essential feature of the deed provided by the criminal law is achieved. For example, if double indictment is lacking for acts committed by a Romanian citizen or Romanian legal person outside the country, if the punishment referred to by the Romanian criminal law is imprisonment of up to 10 years [art. 9 par. (2)] the essential feature of the provision of the offense in the criminal law is not achieved.



When, following the comparison with the legal pattern of the offense committed it appears that one of the objective elements required by the text that provides the content of that deeds is missing, it means that this is an offense not provided by the law.

## **B. The offense to be committed with guilt**

According to art. 15 par. (1) of the new Criminal Code, guilt is the second essential feature of the offense.

For a deed perpetrated to be deemed an offense is not sufficient that the activity of the subject to correspond only in terms of the unbiased items described by the indictment rule, but it is essential that the subject should have acted from the mental position which the criminal law establishes as a requirement for the existence of crime.

Art. 16 par. (1) of the new Criminal Code established the rule according to which “a deed is an offense only when it was perpetrated with the guilt as required by the criminal law”. The types of criminal guilt are: intent, negligence and effect outside the moral intention (*praeter intentionem*).

An analysis of the provisions of art. 16 par. (1) and art. 15 par. (1) of the new Criminal Code shows that the indictment rule, in addition to describing the prohibited action and the obligation imposed, the requirements thereof and immediate consequence, one must specify the type of guilt the deed is required to be committed under in order to constitute an offense.

To determine the form of guilt imposed by the indictment rule for a particular type of deed to constitute an offense, Art. 16 par. (6) of the new Criminal Code established two rules to determine the form of guilt within the content of the indictment rule.

The first rule [1<sup>st</sup> thesis of par. (6) of art.16] stating that “the deed consisting in an action or inaction constitutes an offense when committed intentionally” helps to determine the intended deeds described in the indictment rules.

The second rule [2<sup>nd</sup> thesis of par. (6) of art.16] according to which “the deed committed by negligence constitutes an offense only when expressly provided by law” serves to identify the deeds for which the type of guilt required by the indictment rule is negligence.

Under these rules, whenever the legislator seeks to criminalize a deed perpetrated or one committed by omission that is not intentionally committed, the content of the deed described in the rule should specifically state that it was committed unintentionally.

## **C. The offense committed to be unreasoned**

The third essential feature of the offense under the new Criminal Code is the unreasoned character of the offense committed. Such an essential feature of the offense is not referred to in the Criminal Code in force since the latter does not deal with supporting reasons and makes no distinction between such cases and those that remove the criminal effects of the offense.

By including the unreasoned nature of the offense in the category of the essential features of the offense, the legislator expressed the request of the criminal doctrine<sup>10)</sup> and

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<sup>10)</sup> See: G. Antoniu, *Specificity, anti-juridical matters*, in R.D.P nr. 4/1997, p. 29. The author stresses that promotion of the tripartite conception related to the general features of the offense would allow a more accurate regulation and enforcement of reasons which exclude criminal effects of the offense, as there may be reasons that preclude specificity, reasons that eliminate anti-juridical matters and reasons that remove guilt; F. Streteanu, *op. cit.*, p. 330.

took into account the objective reality which confirms that there may be specific acts whose objective and subjective elements, although meeting the legal pattern, under certain conditions, these deeds do not constitute offenses if, by the will of the law, they are declared as allowed by the legal order. For example, personal injury perpetrated against the aggressor in legitimate defense to neutralize whilst the defense is proportional to the attack is reasoned and therefore not an offense; likewise, the deed of collecting blood from another person with its consent is not an offense, as it is regarded as justified [according to art. 39 item. c) of Law no. 282/2005, collecting blood from a person without its consent constitutes an offense].

Deeds provided for by the criminal law are allowed by the legal order, therefore justifying, to the extent that a higher social value opposes to that protected by the criminal law; the latter shall fail, so that although it corresponds to the legal pattern, the deed is typical, affects social values, and becomes, by the will of the law, a deed allowed. By reference to the above examples, offenses committed in legitimate defense or under a state of necessity or with the consent of the victim, damaging social values (physical integrity and health of the person, intimate private life) in exchange for higher social values such as life, physical integrity of person of gravity higher than the injured, are allowed by law.

The permissive rule (supporting reason) may belong to any branch of the law. Under the unity of the legal system, it will operate independently of where the law is referred to in, as it is inconceivable that an action deemed lawful by a legal rule to be assessed unlawful by another one<sup>11)</sup>. This nature of the permissive rule (being independent of any rule of law) makes so that the permissive rule provided by the criminal law does not actually belong to criminal matters, too; it has a random effect in relation to all the legal rules, to the entire legal order. Therefore, a reasoned action cannot be subjected to any consequences, whether they are civil, disciplinary, and administrative.

The criminal doctrine noted that in the text of art. 15 par. (1) of the new Criminal Code the illustration of unjustified character of the offense is not correctly expressed since the word “unjustified” has more meaning than that of the text<sup>12)</sup>. Indeed, according to the Romanian Explanatory Dictionary, the word “unjustified” can have several meanings, but it is hard to believe that the interpretation of the text of art. 15 par. (1) of the new Criminal Code would give other meaning than the lack of supporting reasons among those regulated immediately after the general definition of the offense.

#### **D. The deed to be imputable to the perpetrator**

It is the fourth essential feature specified by the text defining the general concept of offenses.

To impute the commission of a deed to a certain person is to establish that the deed physically and mentally belongs to that person.

A deed physically and mentally belongs to a person when committed using his / her own physical power or by using external energy (e.g., a man was killed by hitting with the fist or by gunfire); the perpetrator had the knowledge of its action or inaction and was able to master them (he / she did not act under conditions of irresponsibility, intoxication or minority); he /

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<sup>11)</sup> See G. Antoniu, *Specificity, anti-juridical matters, cit. supra.*, p. 21.

<sup>12)</sup> See G. Antoniu, *Observations on a second preliminary draft of the new Criminal Code (I)*, in R.D.P no. 4/2007, p. 12.

she acted according to his own will (not being physically or morally constrained) and had the knowledge of the illicit nature of the deed (he / she wasn't misled).

Imputability, stated Professor Vintila Dongoroz, is the legal situation faced by a person that has been (illegally) awarded a crime as being committed by its own guilt.

#### **4. Critique of the concept of offenses in the new Criminal Code**

The draft of the new Criminal Code in the version submitted to the Romanian Parliament for adoption, art. 15 par. (1) stipulated as follows: "The offense is the deed provided by the criminal law, unjustified and imputable to the person who committed it". The preamble of the draft states that "failure to refer to guilt in the definition of the offense does not mean that it has lost importance in any way, but only that a clarification of the functions it plays within the offense was wanted".

It is widely accepted that the concept of guilt has a double sense; in a first sense, guilt is a compulsory sub-element of the subjective side of the offense and in this context it appears as intention, effect outside the moral intention and fault; into a second sense guilt is as an essential feature of the offense. In the new project regulation, in its first sense, guilt is an element of the internal structure of the offense stipulated by the criminal law and through which the consistency of the offense with the pattern the legislator described by the indictment rule is analyzed. As for the second sense, it was considered preferable to establish a distinct term to define it - imputability - for at least two reasons: first - to avoid a terminological confusion between guilt as a component of the subjective side and guilt as an essential feature; the second, to move the approach on guilt as an essential feature of the offense from the psychological theory to normative theory, currently embraced by most European criminal systems (German law, Austrian, Swiss, Spanish, Portuguese, Dutch, etc.). According to the normative theory, guilt as an essential feature is regarded as a reproach, as an imputation to the offender for having acted otherwise than required by law, although he clearly acknowledged his act and had complete freedom in expressing his/her will, whilst not complying with the sub-element of the subjective side.

During the Judiciary Committee of the Chamber of Deputies debates on the draft of the new Criminal Code it was decided that guilt should be brought back in the general definition of the offense. The general definition of the offense appears as a tautology in the formulation established by the new Criminal Code, as the definition maintains the imputable nature of the deed of the person who committed it, although guilt was also referred to as an essential feature; guilt expresses the same with the concept of imputability. Therefore, the logic was to remove the imputable nature of the offense from the general definition of the offense and to change the title of Chapter III "The reasons for non-imputability" into "The reasons for excluding guilt".

#### **5. Historical references on the legal definition of the offense**

For a long time, it was appreciated that the definition of the general concept of offense was an attribute of the doctrine and not of the legislator. For this reason, all criminal codes adopted in the nineteenth century or in the first half of the twentieth century did not include rules defining the general concept of offenses. The Romanian Criminal Code of 1864 and 1936 were also following this path.

Some criminal codes adopted in the second half of the twentieth century promoted the solution for a legal definition of the offense. In this category are included the penal codes of the former communist countries, such as the Criminal Code of the USSR (art. 7), the Bulgarian Criminal Code (art. 3), the Albanian Criminal Code (art. 2), the Hungarian Criminal Code (art. 3), the Criminal Law of the German Democratic Republic (Chapter II, Section 1, § 1), the Czechoslovakian Criminal Code (art. 4).

Also, other criminal codes adopted during this period proceed to defining the offense. Thus, the Swedish Criminal Code of 1962, Chapter I, Section 1, stipulates that “the offense is the deed described in this Code, other laws or other statutory instruments and for the sanction of which the enforcement of punishment is necessary”; the Greek Criminal Code of 1951, in art. 14, defines the offense as “an unjustified deed, imputable to the person who committed it and punished by law”.

The criminal codes adopted in the last decade of the twentieth century either promote different techniques or resort to defining the offense, such as the Spanish Penal Code of 1995, which defines the offense in art. 10 where it states: “fraudulent or negligent acts or omissions punished by law are deemed felonies or misconduct” or resume only to the classification of offenses in murders, felonies and misdemeanors as the French Criminal Code of 1994 did (art. 111-1 stated that “offenses are classified according to their severity in murders, felonies and misdemeanors”).

The Romanian Criminal Code of 1968 establishes the solution for a legal definition of the offense, a substantial definition thereof by including in its content the social hazard feature.

The new Criminal Code, although admitting the need for a legal definition of the offense by specifying the key features thereof, it abandons the idea that offense is an act which presents social hazard, thus promoting a formal definition of the offense.

## 6. Elements of Comparative Law

The foreign criminal codes contain provisions relating to offenses as the fundamental institution of the criminal law, mainly located similar to the Romanian Criminal Code, i.e. in front of the provisions on punishment. This systematization of the matter belongs to the **German Criminal Code** governing the institution of the offense in Chapter II of the General Part; to the **French Criminal Code**, Book I, Title II, includes all the provisions relating to offenses under the name of “The Criminal Liability”; to the **Spanish Penal Code** governing first the institution of the offense and after that the punishment institution.

On the contrary, the **Italian Criminal Code** governs the institution of the offense in Book I, Title III and Title IV, subsequent to the provisions reserved for the punishment institution. In terms of systematization of regulation regarding the offense matters in the foreign criminal codes above, we distinguish some differences in relation to the Romanian criminal law.

Thus, in Title II of the General Part, the German Criminal Code defines first the committed offense and the offense by omission (§ 13), and further governs the liability of the one who acts through another person (§ 14), guilt (§ 15, § 18) error on the circumstances of the offense (§ 16), error on the criminal effect of the offense (§ 17), minority (§ 19), derangement (§ 20), attenuated liability (§ 21), attempt (§ 22-24), participation (§ 25-31), legitimate defense (§ 32-33), the state of necessity (§ 34-35), and criminal liability of the members of Parliament.

Under the title “Criminal Liability”, **the French Criminal Code** governs the criminal liability of the individual (art. 121-1), the liability of legal persons (art. 121-2), guilt (art. 121-3), participation (art. 121-4, art. 121-6 and art. 121-7), attempt (art. 121-5), causes of irresponsibility or mitigating accountability (art. 122-1, art. 122-8).

Under the title “The offense”, **the Spanish Penal Code** contains the following regulations: defining by negligence and intentional action and inaction (Articles 10-12), defining serious crimes, less serious and light offenses (art. 13), error (art. 14), attempt (Articles 15-16), conspiracy (art. 17), public incitement and apology of crime (art. 18), minority (art. 19), causes exempting criminal responsibility (irresponsibility, drunkenness, legitimate defense, the state of necessity) (art. 20); circumstances that mitigate liability (art. 21); circumstances aggravating liability (art. 22), mixed circumstances (art. 23), participation (Articles 27-31).

The Title III “About offenses” of **the Italian Criminal Code** regulates: the causality report (art. 40); concurrence of causes (art. 41), guilt (Articles 42-43), the objective condition for punishment (art. 44), Act of God and force majeure (art. 45), physical coercion (art. 46); mistake of fact (art. 47); caused error (art. 48), putative deed (art. 51), legitimate defense (art. 52), justifiable use of weapons (art. 53), the state of necessity (art. 54), excessive guilt (art. 55), attempt (art. 56); crimes committed through the media (art. 57-58); circumstances of the offense (Articles 59-70); concurrence of offenses (Articles 71-84).

Title IV of **the Italian Criminal Code** on the offender and the victim of the offense includes regulations on the ability to understand and will (Articles 85-87), derangement (Articles 88.89), emotional or passionate states (art. 90), accidental intoxication (Articles 91), voluntary intoxication (Articles 92.93), of habitual drunkenness (Articles 94), chronic intoxication (Articles 95), deaf dumbness (art. 96), minority (Articles 97, 98) relapse (Articles 99, 100) committing the same offense (art. 101), offenses committed out of habit (Articles 102-110), the criminal participation (Articles 110-119), the right to preliminary complaint (Articles 120-131).

We should note that any of these criminal laws that we use for comparison does not include a definition of the offense. The features of the offense in these laws can be reconstructed only out of the regulation of the institution of the offense as a whole. So, for example, **the French Criminal Code** stipulates in art.121-1 that no one is responsible but for his own deed, thus implicitly linking the existence of the offense to the presence of the deed (the objective element). Similarly, by conditioning the existence of criminal liability to the intent or negligence of the perpetrator (art. 121-3), it means that this also allows the second essential feature, namely guilt (the subjective element). Also, by defining the author as the person who commits a deed incriminated (art. 124-4), implicitly admits that the offense requires the existence of a deed provided for by the criminal law (the legal component). The same reasoning leads us to identify the essential features of the offense also in the German, Spanish or Italian Criminal Codes.

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