THE NEW ROMANIAN CRIMINAL CODE. GENERAL AND PRELIMINARY CONSIDERATIONS IN THE LIGHT OF THE KEY PRINCIPLES OF THE PENAL POLICY

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As the present President of the *Association Internationale de Droit Pénal*, established in 1924 in Paris by very eminent personalities, and among them, Professor Vespasian V. Pella, it is for me a very special honour to address you this introductory speech on the occasion of the *International Conference on the new penal legislation: tradition, recodification, reform and juridical progress*" that the Romanian Association of Penal Sciences and the Institute of Law Research have organized in this marvellous building of the Romanian Academy. Thank you very much for your invitation.

Remembrance of Vespasian V. Pella[1]

In the AIDP's annals, President Pella remains as a fundamental personality.

He was not yet 27 years old when he went to Paris, in 1924, to take part, at the Law Faculty, in the meeting that decided the establishment of the International Association of Penal Law. In that meeting, President Carton de Wiart was elected President but the presence of Vespasian V. Pella was already very influential, as he took the position of Vice-president of the Association.

Vespasian Pella was convinced of the need and convenience of the unification of Penal Law and, since the beginning of the Association's life, the proposals of Vespasian Pella for this purpose became one of the first purposes of the Association. And, following this trend, our first Congress in Brussels (1926) adopted by unanimous vote Pella's proposal on the unification of penal law, stating the following[2]:

The Congress,

Having considered the reports on the present legislative position and

Considering it highly desirable to unify the fundamental principles of penal law as adopted by various States in accordance with the principles with the contemporary science of Penal Law has unanimously consecrated.

Seeing that many States are now preparing new draft laws,

Expresses the desire:

That the commissions entrusted by the various governments with the task of preparing drafts of Penal Codes should meet in an international conference. This conference should discuss and unify the principles at the base of the plans evolved by the commissions, and to adopt as far as possible, a common basis for the exercise of repression.

[1] M. Dutu, *Vespasian V. Pella (1897-1952). Founder of the international criminal law. Promoter of the unification of the criminal law. Architect of the international criminal justice*, Universul Juridic, Bucharest, 2012.

[2] J.L. de la Cuesta (ed.), *Resolutions of the Congresses of the International Association of Penal Law (1926-2004)*, Toulouse, 2009, p. 18.

To this end, the Congress entrusts the Bureau of the International Association of Penal Law to make known the present suggestion to all governments of the States in which new Penal Codes are now being evolved.

Vespasian V. Pella took part, very actively, in the Warsaw Conference for the unification of penal law (1927) and was particularly engaged in the conference in Rome, in 1928, when he became the Vice-president of the Conference and was elected Secretary-General of the permanent Bureau, which organised eight international conferences.

The position, the presence and the activity of Professor Vespasian Pella was also of very high importance in the Association's first efforts concerning the establishment of the International Criminal Court. He intensively participated in the drafting of the Geneva Convention on international terrorism, adopted on 16 November 1937 at the initiative of the League of Nations. This Convention, which never entered in force, was accompanied by another international instrument providing for the establishment of an international criminal court for the prosecution and punishment of these crimes.

Inside the AIDP, Vespasian V. Pella organized also different congresses. One of the first congresses of the Association was held here, in Bucharest, in 1929. Elected President in 1946 after the passing of the first president of the association, Carton de Wiart, he organised the Fifth International Congress of the Association in 1947, in Geneva and, very active in the United Nations in New York he got the recognition of the AIDP as consultative organisation at the level of the United Nations. He remained President of the Association until 1953.

In order to remember and honor our President and all his achievements, the Association has a special medal: the *Vespasian V. Pella Medal*[3].

The first medal was given by Mrs. Pella to Benjamin Ferencz, in 1958, as a special AIDP award. Each recipient is recognized by this medal as a champion of international criminal justice and retains the medal during those ten years and then he decides to which personality, among the members of the Association, the medal is then going to be given after this ten year mandate.

The recipients of the medals, until now, have been Ferencz, Bassiouni and Schabas.

The Codification Ideal

Codification, as an ideal, aims to give rationality to the legislative production, promulgation, interpretation and implementation. Legislation transforms policy into law and provides the means to incorporate rationality at the level of legislative production. We all agree that several dynamic processes need to take place not only concerning the drafting of the projects, but also the deliberation, approval by (very often reinforced) majority.

Obviously rationality should also be present at the level of interpretation, and legal dogmatic and argumentation pay here a great role. Furthermore, in order to assure rationality, any legislative process should also integrate monitoring and evaluating the implementation of the legal norms: in fact, considering and taking into account the consequence of the legal reforms is equally a fundamental approach in any rational legislative production model.

Legislation makes policy become law and, at the penal field, legal norms are therefore the result of penal policy. This policy based process should always seek to reinforce the constitutional principles and particularly democracy. Penal policy, criminal policy are very often employed as synonymous, but the founders of the International Union of Penal Law - the predecessor of the International Association of Penal Law - established in 1899 in Wien, saw and manifested the clear differences between these concepts.

Criminal Policy, departing from the knowledge of the criminal phenomena provided by different sciences, tries to define and propose those measures that can better serve to crime prevention and to contain criminal acts at a bearable level. Criminology is a fundamental source of

[3] http://www.penal.org/?page=mainaidp&id_rubrique=24&id_article=323&lang=en.

knowledge for criminal policy. In this sense the traditional three levels of criminological interpretation (Pinatel)[4] nowadays should be completed by the victimological perspective (victimisation is also a process that needs to be studied at the same level as the criminalisation) and, also, the permanent monitoring and evaluation of the social reaction that follows the commission of a certain crime or crimes.

Penal policy represents only one aspect of the criminal policy; a very important one, indeed, as the consequences of penal policy on individuals and society are very sensitive. But along side penal policy, a modern criminal policy should always integrate other social political policies, programs and lines (concerning poverty, housing and urban planning, populations at risk...).

Main principles of the penal policy

Necessity, legality and culpability are frequently considered the main principles of the penal policy. Of course, the main purpose of penal policy is protection: it is the protection of those main social and legal values that merit, need and are susceptible of being protected through the Penal law. A fundamental issue in this point is the selection and definition of those values and the establishment of the levels of aggression that will justify the penal intervention, which should never be disproportionate or ignore its natural condition of *ultima ratio* instrument.

Along with the principle of necessity, the principle of legality presents a double rationale. On the one hand, according to liberal philosophy, only the citizens are legitimated to define the limits of their freedom. In a democracy, citizens' representatives meet at the Parliament and the Parliament's norms are integrated in Acts; therefore only the Parliament's act can define crimes and punishments. On the other hand juridical safety is a fundamental principle of the Law State, that demands that prohibitions, mandates (and the consequences -sanctions, procedures and execution systems- derived from their non-respect) must be clear, publicly established and drafted, so that citizens can know them before behaving in a certain manner.

Source of any penal responsibility should always be the commission of a relevant fact (or a serious omission) (actus reus), either intentionally or by negligence and in order to receive a punishment citizens must be declared individually responsible. Culpability is therefore a main pillar of penal responsibility that cannot be merely a responsibility for result or a responsibility due to a certain way of being or life.

Professor Hans-Heinrich Jescheck, who was also President of the International Association of Criminal Law (1979-1989), added to these three principles the principle of humanity[5], considering that due to its fundamental link with the prohibition of torture and other inhuman or degrading treatment its main field of application was in reference to punishment. In my humble opinion, among the set of axioms that the *ius puniendi* must respect in order to maintain its legitimacy, in a democratic society, centred on the value of the person, the principle of humanity should a very relevant role. Certainly, a first consequence of the principle of humanity in criminal law is the prohibition of torture and all inhuman or degrading punishment or treatment, that has to produce its effects not only on the special part of criminal law, but also causes in the field of punishment, putting barriers against death penalty, life imprisonment and very long punishments, inhuman or degrading prison systems and maintaining resocialisation as the main focus of the penitentiary intervention. Respect to the principle of humanity in penal law, nevertheless, should go further and also apply in the field of victims. Victims need to be treated in a humane way and with full recognition and respect of their rights as victims: in particular, their right to information and truth, the right to access to justice and to integral compensation that should not be restricted to the financial. But the principle of humanity equally has demands at the substantive level where, at least, desistance and post-offense behaviour towards the victims should be properly treated,

[4] J. Pinatel, *Criminología*, 2nd ed., Caracas, 1974, p. 93 et seq.

[5] Jescheck/Weigend, *Lehrbuch des Strafrechts. Allgemeiner Teil*, 5th ed., Berlin, 1996, p. 27.

victimological considerations should take a place at the sanctions level -promoting criminal law reactions that protect victims, creating barriers to further victimization processes (for example, special prohibitions relating to the family environment, restrictions to defendants or convicts residing in certain areas, or to approach or communicate with the victim, submission of the perpetrator to cultural, educational, professional, sexual and similar education programs), better integrating the circumstances related to the victim within the processes of the judicial determination of criminal punishment, which currently are only focused on the seriousness of the offense and circumstances of the guilty person; and opening opportunities for victim participation or in the context of enforcement and execution of the punishment. Mediation and restorative justice should also find a place, as well as the improvement of the regulation of civil liability, making of compensation a third way of criminal justice, and giving community service a function of victim compensation[6].

Some general and preliminary comments on the new Romanian Criminal Code

Concerning the new Romanian Criminal Code, as far as I have read, the law was adopted with certain doubts from the democratic point of view because of the procedure that was followed. I don't not want to concentrate in this point, other than to say that it is clearly necessary to have a strong majority on the election of the protected values and the extent of penal intervention by way of incriminations and punishments.

Technical improvement of penal legislation is recognised as one of the main purposes of the new codification. Naturally any codification effort should aim to building a coherent legislative framework, avoiding the overlapping with the special legislation, simplifying the legislation in order to facilitate a quick and unitary enforcement...

Respecting Constitutional principles and the international compromises is also one of the recognized aims of the new criminal code, and harmonising and learning from comparative law[7] to assure mutual acknowledgment and trust.

Criticisms have already been raised against many passages of the new Code, not only from the point of view of the penal policy decisions, but also concerning the technique. I cannot enter into a lot of details about the following, but I must say that I have also found very interesting provisions, for instance, on the subject of the principle of favourability and relating to the consequences of the unconstitutional situations. Also the regulation of the universal jurisdiction, linking it with international engagements appears to be adequate, although the requirement of the voluntary presence of the person in the Romanian territory probably will restrict too much the possibilities of application of universal jurisdiction.

The code maintains the criminal liability of legal persons and that was already introduced before. In Spain we have just introduced the criminal responsibility of legal persons two years ago, and we have very little experience in that area. In fact we are still discussing the model and consequences, as we fear that several provisions introduced in this field by the criminal code are not going to produce the results that were pursued or intended.

Concerning the theory of the penal infraction, the establishment of a material definition of the crime, mentioning not only illegality but also the material injustice *(Unrecht)* and culpability appears to be consistent with the developments of the penal dogmatic. Furthermore, I have found that the definition of commission by omission is very close to the Spanish one; this provision is for me a good definition, even if the correspondence (equivalence) between doing and not doing is not perfectly addressed. Sure, there are also other points and elements that you are going to discuss in

[6] J.L. de la Cuesta, "The principle of humanity in Criminal Law", *Revue Internationale de Droit Pénal*, 82 (3-4), 2011, p. 457 et seq.

[7] Ch.L. Blakesley, "Law, Language, Crime, and Culture: The Value and Risks of Comparative Law", 49 *Crim. L. Bull.* No. 3 (May-June 2013).

this conference: on the regulation of attempt, continuing offences, the concurrence of offences, among others.

I have already mentioned that assuring international engagements is one of the recognized purposes of the new criminal code. Among these compromises, the promotion of the International Criminal Court appears as a fundamental one. The new Code is, of course, taking care of the core crimes of International Criminal Law even if aggression is not yet perfectly in force in the Rome statute. The punishment provided for genocide, however, provokes a great surprise in one who reads the new provisions. Imprisonment for 25 years is not a short one, but the comparison appears to be unbalanced with the one provided in relation to either homicide or homicide of certain special protected persons (until 30 years).

Of course, international compromises are not only those contained in the Rome Statute. According to Bassiouni, the former president of the AIDP-IAPL there are more than 280 international instruments with a penal profile[8]. Among these those concerning organized crime or its "typical" traffics, as well as the ones on corruption, cyber-crimes and terrorism, deserve a very relevant position. These are the most important fields of intervention in this era of globalisation of the penal system.

Certainly, the new Romanian Penal Code has, of course, various provisions concerning all of these elements; and for instance, concerning corruption, the report of the GRECO on the Romanian legislation indicates that the legislation is quite adequate concerning the required penal provisions in this field.

Compromises derived from the European Union criminal policy have also an important role when we are talking about the respect of international compromises. In fact, although the European political community was not conceived as union with penal competences in the earliest times, this lack of competences was soon perceived as a problem and, progressively, particularly in the most recent decade, we have witnessed the development towards a certain European Union criminal law. The institutional conflict that was experienced in the field of the protection of the environment allowed the directives to enter in a field that was until then the field exclusively reserved for the framework decisions. Nowadays, the directives can intervene directly in the harmonisation and establishment of minimum elements for infractions and for sanctions: according to Article 83 of the Lisbon Treaty, minimum rules concerning the definition of criminal offences and sanctions can be established by Directives in the case of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis, and in these particular fields: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime. Equally, the effective implementation of EU Policy in harmonized areas can be assured by penal sanctions, if it proves to be essential.

The idea of enriching the national legislation with solutions inspired in the comparative criminal law is also a very rational one, and in this sense it should be positively evaluated the fact that the drafting of the new penal code has taken into account the different elements coming from France, from Spain, from Germany, from Portugal, and from Italy [9]. In any case, legislators should always take into account the key rules for a quality comparative work. In fact, modesty should be one of the most important features of the comparative work that, according to Françoise Tulkens[10], professor at the Université Catholique de Louvain and now a magistrate at the European Court of Human Rights, should always respect the following parameters: 1) departing from a real problem

[8] M.C. Bassiouni, *Introduction to International Criminal Law: second revised edition*, Leiden-Boston, 2013, p. 139 et seq.

[9] Ch.L. Blakesley, "Law, Language, Crime, and Culture: The Value and Risks of Comparative Law", 49 *Crim. L. Bull.* No. 3 (May-June 2013).

[10] F. Tulkens, "Les systèmes de justice pénale comparés: de la diversité au rapprochement. Les politiques pénales et le comparativisme. Rapport de synthèse", in *Les systèmes comparés de justice pénale: de la diversité au rapprochement/Comparative criminal justice systems: from diversity to rapprochement*, Toulouse, 1998, p. 63 et seq.

and not from a concept or a theoretical issue; 2) studying all the foreign law and not exclusively certain elements; 3) understanding the ensemble of the foreign law, not only part of it; 4) confronting the juridical solutions, 4) taking into account the nature of the juridical sources, 5) distinguishing among legal texts and jurisprudence, 6) putting the norms in their context.

In any case, as I have already explained, any penal reform should make real efforts in order to assure the respect of the principle of humanity that merits being accepted as a key postulate of any modern criminal policy[11]. Effects of this principle are to be found, in the first place, at the level of punishments. The new Romanian Penal Code does not include capital punishment among the penal sanctions; however, life imprisonment is foreseen even excluding all kinds of possibilities for suspension, but for reasons of age. In the Spanish Criminal Code the upper limit length of prison sentence that could not go further than 30 years even in the Dictator's time, was established in 40 years by the 2033 reform in case of concurrence of certain very serious crimes. At the same time different provisions were equally introduced in order to assure an effective full execution in prison of long sentences to deprivation of liberty; a later reform (2010) introduced equally a security measure of monitored freedom to be applied after the execution of this long imprisonment in case of rape and terrorism. Regrettably, nowadays the new political majority resulting from the last elections has decided to include life imprisonment (and also the measure of supervised interment) in the list of punishments of the penal code. In this sense a Draft already pending at the Parliament (2012) and also, as a security measure, of the security internment, that could be applied after the execution of several long prison sentences in certain cases of dangerous recidivism.

Life imprisonment without any possibility of suspension has already been considered incompatible with the European Convention of Human Rights, and this has been the line followed, for example, by the European Court of Human Rights in relation to life sentence imposed in the United Kingdom, and also by the European Court of Human Rights[12]. In my opinion the same should apply to any other kind of life imprisonment and also to very long sentences, if we are talking in the light of the principle of humanity. Furthermore, there is a full contradiction between life imprisonment and resocialisation; and in Spain, resocialisation is proclaimed as the main orientation of the prison.

Another fundamental issue in criminal and penal policy is the treatment of minors of age. Many reasons fight in favour of a regulation of this question outside the Penal Code. In fact, the inclusion of the responsibility of minors of age in the Penal Code, as the new Romanian Penal Code does, is not for me the best solution. I'm convinced that minors and juveniles can be declared responsible; furthermore they should be recognised as such by the penal law, if they committed an offence intentionally and in full knowledge of its criminal significance. However the intervention towards minors and juvenile delinquents should be treated separately from the penal code, and be inspired by other principles and considerations, following international and European instruments and recommendations. In my opinion, a special legislation, and not the penal code, will allow, in this regard, a broader field in order to provide for those kinds of peculiarities that must be applied concerning minors and juvenile delinquents.

Last but not least, another fundamental and key issue in our contemporary societies is the treatment of the victims of crime. There is a general lack of provision concerning victims. These, in the best case, are only referred to concerning reparation and compensation, mainly through civil measures. Sure, the establishment of an adequate system of compensation proves to be fundamental. Complementing it with an efficient protection and assistance is equally urgent. However, victims

[11] A. Beristain, "Axiomas fundamentales de la Criminología ante la globalización y la multiculturalidad", *Eguzkilore*, 17, 2003, p. 89 et seq.

[12] See also, German Constitutional Court in 1977 (BVerfGE 45, 187). VERELST, S., "Life imprisonment and human rights in Belgium", *Human Rights Law Review*, 3-2, 2003, p. 282-283. In 1983 (*Solem v Helm*), the lack of possibility of conditional liberty was also the decisive reason in the USA of its qualification as disproportionate (and therefore contrary to the Eighth Amendment: cruel and unusual punishment). However, subsequently, despite intensive debates and split votes within the Supreme Court life imprisonment without possibility of conditional liberty has been considered fully constitutional VERELST, S., *ibidem*, p. 281.

not only need compensation, protection and assistance: they need an integral reparation and integral reparation for the victims, which is really a very difficult task. It can only be the result of a complex intervention, where, along with assuring the participation of the victims in the penal process, victims' vulnerability and participation should also be taken more into account by legislators in order to improve the victimologist perspective of the penal legislation, where, notwithstanding the procedural rights of the accused persons, the victims' interests should take a prominent place. Even sanctions, nowadays focused on the criminal, in a nearly exclusive way, could be much more oriented towards the victim's protection, a concept that should be one of the leading ideas at the time of choosing one punishment or another. We should also be aware that, as Prof. Tony Peters liked to underline[13], empirical research more and more evidences that restorative justice -that should be considered a full justice, and not an ancillary or secondary one- can be frequently (even in very serious cases) the best way to go, in order to give an adequate alternative path, to give an answer to the punitive demands generated by criminal offences[14], satisfying at the same time the victim's interest.

This should be particularly relevant for a Penal Code, like the new Romanian Criminal Code, that includes reconciliation as an important element in the administration of the criminal justice.

[13] T. Peters, "Victimisation, médiation et pratiques orientées vers la réparation", *Annales Internationales de Criminologie*, 2000, pp. 135 et seq.

[14] K. Daly, "Restorative Justice: the real story", *Punishment & Society*, 4(1), 2002: pp. 55 ss. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper12.pdf.