THE NEW CRIMINAL LAW. TRADITION AND REFORM

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Abstract:

The article includes certain reflections of the author in relation to the criminal law and to the criminal procedural law, showing both the positive aspects of the new criminal provision and certain regulations susceptible of controversies and critical debates.

Keywords: *the new criminal law, criminal reform, observance of the tradition.*

1. General considerations

The criminal law emerged into the light of world history as a systematic, ordered reaction against certain serious negative facts against the collectivity, against the members of the society, against property and against other social values, considered to be extremely important for the social group.

Although there was a time when the criminal regulation was not different from the ethical, religious, civil regulation, certain specialized regulations have appeared (*Lex Iulia Majestatis, Lex Cornelia de Sicariis et Venefiiciis, Lex Pompeia de Paricidis*).

In these traditional regulations, the legislator defined the negative deeds, indicated their perpetrators who were to be held accountable for the respective deeds, showing the penalties to which the guilty persons were exposed. Gradually, the plan has become more complex and these regulations have not contained anymore those provisions related to the enforcement of the criminal law in time and space, to the plurality of persons, to the unity and plurality of deeds, to the causes removing the offence or excluding the penalty.

However, besides the traditional scheme, numerous reforming rules have emerged over time, which are the expression of certain immediate needs or have a temporary nature, such as: the provisions regarding the method of execution of penalties, the Inquisition, the religious offences, the offences against the king or other amending reforms of certain criminal bodies.

As these reforms were being consolidated, they became widespread, were inserted in the traditional plan of the criminal repression and replenished it. One could state that in the past, as well as nowadays, the space of the emergency of certain reforming provisions has depended on the amplification and consolidation of the traditional plan, in other words, it has been extended or decreased with respect to the volume of the traditional plan.

The objective grounds of the existence of the traditional elements, namely of the provisions subsequently referred to as *constants* of the criminal repression, is represented by a certain objective and unitary structure of the criminal phenomenon itself, the existence of certain similar elements, which are present regarding the object of criminal protection (very important social values, susceptible of criminal protection, are limited). Neither the forms of aggression against these values have objectively presented a large diversity, nor the manner of punishment of serious crimes has differed too much over the years (it was applied either the deprivation of life, or of freedom, or of rights or of assets), and the penalties had an individual nature after the exclusion of the possibility of applying penalties to a certain collectivity.

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In relation to the perspectives of the criminal reform and of the preservation of the traditional plan of the criminal repression, they depend on the evolution of the criminal phenomenon. As this phenomenon enlarges, the traditional plan will be preserved and shall be inevitably supplemented by certain new contingent reforming provisions, which shall be generalized and consolidated in parallel, thus reducing the space for the proper reforms of the criminal repression.

On the contrary, if the criminal phenomenon decreases as a result of the improvement of the social organization and of an intense educational and preventive activity, the appeal to the traditional plan of the criminal repression and to the emergence of more numerous and more frequent reforms which could provide new, attenuated methods of the criminal repression, will be expected to be reduced, as well. These would be, for instance, the provisions which should set forth the collectivity taking over the duties of sanctioning the negative deeds of the members of the respective social group, as the collectivity is able to exercise a stronger educational and preventive influence than the official authorities.

2. Special considerations

We should try to examine, in the light of these general considerations, the special situations of the evolution of the criminal laws in our country. Could we wonder initially whether the new criminal law represents a moment of progress of the criminal institutions? Does it provide more efficient methods of fighting the criminal phenomenon?

The rational and comparative analysis of the previous and of the recent criminal law does not allow us to give a clear answer to this question.

We feel the need for a general debate. Is there perhaps, inevitably, an evolution of the criminal institutions along with the change of the political regime? We would be contradicted by the reality. For instance, the German Criminal Code has been lasting since 1871 and has been used both during the totalitarian regime of Hitler, and during the democratic regime which preceded and followed it. Similarly, the Italian Criminal Code entered into force in the year 1931, and served both to the fascist regime, and to the subsequent democratic regime, like the French Criminal Code, which has resisted for more than 180 years under governments of different structures and political tendencies.

It could be said that these examples show the changes of political regime within the *same form of dominant estate*, which would have acted as a unifying factor.

However, in case of shifting from this form of estate, namely from the private estate to the socialist estate, would the situation be completely changed and, consequently, would it be absolutely necessary to immediately adopt a new Criminal Code which would be established in a more advanced law? In this case, as well, the reply could not be completely different from the above one. The experience of our country shows that the new Criminal Code of the year 1969 entered into force after more than 20 years of the institution of a communist government, being used as well, in a period about which it was said that the working-class struggle was extremely intense, when the overthrow of Monarchy, the nationalization of the basic means of production and the co-operativization of agriculture, the reorganization of the State apparatus, of the education system took place etc.

But, even if the new Criminal Code has been adopted since 1969, has it represented a revolution in the criminal matter, a progress comparable to the overthrow of a social class and its replacement with another class? It is difficult to state it. The new criminal law of the year 1969, even if it has been an expression of the new reality, as regards the political power, from the criminal point of view it took over the basic scheme of the previous law which became a tradition, protecting the important social, but similar values, such as the human being, the State the social cohabitation, the ownership and the other values, being recognized as well, the need for further using the penalty, as a means of constraint. The ***forms*** under which these values were prejudiced, have neither suffered much: the treason, the espionage, the plot and other crimes against the State; the theft, the fraud, the abuse of trust and other crimes against estate, the murder, the personal injury, the hit, in

the matter of protection of person and so on, have remained formulated and punished in a similar way, even under the conditions of the new order of things.

Thus, it has been acknowledged the sentence according to which the conclusion cannot be totally received, in the sense that, along with the change of the form of ownership, of the society structure, the superstructure of the society inevitably and totally changes, together with the law, including the criminal institutions. *The thesis of constants in law* originated in this reality, to which the Legal Research Institute of Romanian Academy adhered to, as well, and it has been recognized that objectively, the *criminal matter* concerned with human actions claiming identical regulations over the years, no matter the political changes which occurred. People always felt the need for rejecting the serious deeds committed in the society and which would have threatened the supreme values of the social group, this being the essential condition of their existence.

The conclusion that we draw would be that the idea of reform could not be separated from tradition, and the criminal reforms have occurred in compliance with the traditional framework, and the previous legal institutions gradually adapted to the new needs.

We could say that ***tradition coexisted and continues to coexist with reform*** in criminal law.

From this point of view, we should compare some provisions of the two Criminal Codes:

We would record the following as ***positive aspects*** of the new Criminal Code:

- the removal of the purpose of criminal law;
- the elimination of the social danger from the definition of the offence;
- the elimination of the relatively improper attempt;
- the optional enforcement of the more favourable law after the decision remains final;
- the justificatory reasons;
- the separation of the perpetrator and of the co-perpetrator from the participants;
- the more rational punishment limits which are lower in relation to certain offences;
- and others.

We hereby record some controversial sides of the new Criminal Code, which are susceptible of controversies and contradictory solutions:

- the separation of the principle of the legality and of the incrimination of punishment into two principles, namely that of legality and of the punishment;
- *unjustified and imputable*, as essential features of the offence;
- the intermediate plurality instead of cases where there are no repeat offences;
- the offence of *committing by omission*;
- *the oblique intent* among the main forms of guilt;
- the place of the non-imputable excess;
- the manner of regulating the reconcilement (very restrictive);
- the murder upon the victim's request (from 1 to 5 years of imprisonment);
- and others.

Some regulations of the new Code of Criminal Procedure may be a controversial subject, as well.

Thus, the new Code of Criminal Procedure which became effective on February 1, 2014 introduced the term of *suspect* (art. 77), instead of suspected person. *The suspect* is defined as the person in relation to whom there is a reasonable doubt that he/she committed a deed set forth by the criminal law, this definition being extremely *ambiguous* (isn't the accused a person who induces a reasonable suspicion of having committed a deed set forth by the criminal law?); however, *the accused person* is defined as the person in relation to whom criminal proceedings have been initiated. The criminal prosecution, in its entirety (art. 285 of the Code of Criminal Procedure) has as object to gather evidence related to the existence of the offence, to the identification of the persons who committed the offence and to establish criminal liability. Is it possible that at the end of the criminal prosecution we are still dealing with a reasonable doubt that a deed set forth by the criminal law has been committed? In that event, why should we provide a characterization only in relation to the so-called suspect?

In our opinion, it was more correct to use (as in the previous Code of Criminal Procedure) the term of *accused person* (the person against whom no criminal proceedings have been initiated) as the phrase *reasonable doubt* cannot differentiate the suspect from the defendant, *since the certainty occurred in all cases after the decision remains final*.

The new Code of Criminal procedure uses the phrase *right **to** defense* (art. 10). In fact, it is about the *right **of** defense* (art. 6 of the applicable Code of Criminal Procedure). *The right **to** defense* expresses only one of the methods through which it is performed, namely when we refer to the right to have a defender. Instead, *the right **of** defense* is a broader concept, referring to all the methods through which the defense is performed in the criminal trial.

A new institution (art. 342) was introduced in the new Code of Criminal Procedure, referred to as the *preliminary hearing* in charge with verifying the legal nature of the referral and of the taking of evidence. In the past there was, among the procedural institutions, the so-called *preparatory hearing* within which the legal nature and the merits of the evidence were verified before referring the file to the court. This institution was into force for a short period of time, since the prosecution body, regularly drafted the file accurately and produced evidence adequately. It was only in the public, oral and contradictory hearing of the case, when the evidence produced was subject to the parties' examination, that the evidential insufficiency appeared and they often drew the conclusion that the evidence had not been adequately produced in the respective case. The experience of this institution had to make the new legislator think and waive the new institution which, probably, would have the same destiny as the previous one.

A new judicial body appears in the new Code of Criminal Procedure, namely, *the rights and freedoms judge*. Its utility is arguable. Don't the concerns for the provision of rights and freedoms belong to the entire panel of judges? Why should a certain judge concern for these matters?

Other provisions of the new Code of Criminal Procedure give rise to such remarks and questions.