NEW CRIMINAL LEGISLATION. PRELIMINARY CONSIDERATIONS*

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Abstract

The author starts by making a brief presentation of the realities of the Romanian society, which demanded drawing-up of a new Criminal Code and of a new Code of Criminal Procedure. These fundamental shifts occurred in the society demanded for a coordinated scientific reaction against the facts liable to weaken the very existence of the society and alter the good cohabitation of people. Maintaining and observing the legal order are critical objectives of the criminal law.

The author explores in details the purpose of the criminal law and the principle of the legality of criminal offences and of the criminal law sanctions, in terms of both the domestic legislation and the legislative experience of other countries in the European Union.

The theoretical explanations of the author are accompanied by numerous remarks on the regulations in the new Criminal Code, as well as by several proposals of de lege ferenda*.*

Keywords: *new Criminal Code, criminal law, purpose of criminal law, legality principle*

1. The fact that our country is on the verge of a new criminal legislation has already become common knowledge. After the profound political and social transformation which took place in Romania towards a new type of society, namely to a society based on private ownership, competition and wide possibilities of turning the individuals to value, the authorities decided that drafting of a new Criminal Code and of an new Code of Criminal Procedure were necessary in order to reflect all these structural changes of the society meet the new demands raised, under such circumstances, by the criminal repression of the deeds which are detrimental to the new reality.

But was this desire of the authorities a justified one?

2. Unlike the other criminal codes of the former socialist countries, the Criminal Code of Romania, entered into effect on 1 January 1969 and drafted under coordination of the late Professor Vintilă Dongoroz, gave in less to the times during which it was drafted and reflected the highly democratic and rational principles of the criminal repression in its structure and provisions. One should not forget though, that the analogy of criminal offences was admitted for but a very short period of time, ensuring the full domination of the principle of legality of criminal offences and penalties, that the private property was protected excessively, providing for exaggerated limits of penalties, which were subsequently adjusted under the new Criminal Code and, among many other criminal provisions, the rights and liberties of the citizens were protected in line with the situation in the most advanced countries with the non-socialist economy.

A wise judgment though, considered that, under these circumstances and even admitting to the genuine qualities of the criminal law in-force, a new criminal legislation is necessary in order to better protect the social values of the new realities.

This explains why the initiative of the competent bodies to draw-up a new criminal legislation was welcomed by both specialists and the large audience.

3. The clear minds of our society realized that the social and political, economic and legal transformations occurred in our country in the past 40 years, have fundamentally altered the *nature* of the

* This intervention will take place in the scientific session, with international participation, of 26 October 2012, dedicated to the analysis of the New Criminal Code and the Code of Criminal procedure, held in the Assembly Hall of the Romanian Academy.

criminal legislation: departing from a legislation which proclaimed itself, from the very beginning of its enforcement, as belonging to a dominant class and aimed at preventing and suppressing the opposition of the former oppressing class, the new legislation had to voice the interests of the entire society concerned about securing its existence and welfare through prevention and combating of antisocial deeds of a certain severity and frequency, such as offences[1]. Therefore, the new legislation had to build not upon the idea of certain social contradictions which are impossible to reconcile, but the idea of the *unity* of interests of all the citizens of our country, showing concern for development of a flourishing economy, equal turning to value of all human energies on purpose of a better cohabitation and of the progress of the entire society.

4. A second major reality which demanded for a new criminal legislation was the progress itself of criminal science and legal thinking which experienced huge breakthroughs over the past 40 years; new visions appeared on crime, new criminal schools, that have combined the classical criminal theory demands with those of the positivism, theories which were reflected in the advanced countries legislation by introducing new penal institutions and by using new methods of offender rehabilitation and crime prevention.

5. These factors, which demanded for important amendments of the criminal legislation, were complemented also by the existence of a new phase in the development of criminality. Crimes not only that spread manifestly, but also took new shapes, such as the more and more organized nature of the criminal actions, as well as penetration of the highest levels of the political, economic and social life, triggering hazards that had not existed in the earlier stages of the phenomenon and criminality the main harmful phenomenon of our society.

This recrudescence of criminality cannot be explained only through economic causes, such as the pauperization of a massive part of the population and use of crime as a desperate means of addressing the individual economic shortcomings, as well as the display of an extreme individual mentality, even by persons who do not act under the impact of dramatic hardships, a trend to obtain, through any means, a plentiful way of living by imposing an unilateral vision of criminal repression by certain small groups of individuals who pursue economic and political dominance and by-pass the democratic processes which underlie the very establishment and development of the modern society.

6. These fundamental shifts occurred in the society demanded for a coordinated scientific reaction against the facts liable to weaken the very existence of the society and alter the good cohabitation of people. The actual *purpose* of the criminal law can be retrieved from here, namely to protect the fundamental social values of the society, such as the democratic state, its sovereignty, independence, unit and indivisibility, improvement of the activity of the state's body to become efficient tools in preventing and combating the crime phenomenon. Other social values which are protected are the individual, the rights and freedoms of the human beings, property, good cohabitation of people, observance of the rule of law in all.

7. The Romanian criminal doctrine frequently emphasized the idea according to which maintaining and observing the legal order are critical objectives of the criminal law. It has been rightly said that cohabitation of people in society is not possible in absence of a certain arrangement[2], namely of a complex set of rules which contain both provisions regarding the conduct of people (precepts), as well as reactive measures (sanctions) against those who violate the precepts of the law.

The social life has been disciplined in time with the aid of the customs, religious precepts, ethical precepts and only eventually through the order of law.

Of these latter arrangements, the criminal law, through its rules, is deemed to be the most energetic form of regulating the social order[3], including the legal order.

8. One should remember though that the purpose of the criminal law is subject to a twofold limitation. A first such limitation would come from the fact that not all the forms of protection afforded to the social values which, in theory, are entitled to criminal protection, do enjoy this treatment effectively, but only the

[1] V. Dongoroz and other, *Explicații teoretice ale Codului penal român. Partea generală*, vol. I, Editura Academiei Române, Bucharest, 1969, pp. 5-7.

[2] V. Dongoroz*, Drept penal* (Tratat), Bucharest, 1939, pp. 6-16.

[3] *Ibidem*, p. 17.

most sever forms of undermining the legal order, namely the existing realities and the fundamental social values of the society.

Assessment of the severity of the facts entitled to criminal protection takes place not only in relation with the sanctions provided for by the law for the respective deeds, but this major importance is acquired also by certain social values, even independently from the penalty limits. For instance, all social values in connection with the individual, life, bodily integrity, freedom, sexual life, dignity of the person have that major value which justify criminal protection, given the role of the individual in the society of forging the society as a critical participant in the social relations.

In this respect, we express our reservations regarding the solution adopted by the new Criminal Code in respect of repealing the offences of insult and slander, although such violations are in close connection with the individual, the attributes which define and justify his/her very existence; this critical aspect will be approached in details at the due time.

9. The second limitation on the knowledge of and attainment of the purpose of the criminal law is the subsidiary nature of the criminal law, namely that this law does not intervene unless and when other types of legal constraints have not proven efficient; the criminal law is therefore "*ultima ratio"* , meaning the last resort one can turn to repress the deeds which, by committing the crime, impair on the social values protected under the criminal law.

A wise law-maker will not, therefore, make use of the criminal tools but in well-grounded cases *(extrema ratio),* that is to say only in the case when other means couldn't be efficient.

10. This matter raises a very difficult question. Should the content of the criminal law include or not a provision which recognizes a certain purpose of the criminal law?

In the criminal legislations of the former socialist countries the answer to this questions received a positive answer, as all such legislations included a provision with this content. The Western countries, however, responded adversely, claiming that this matter rests with the criminal doctrine, and not with the law-maker.

The new Criminal Code aligned to this latter opinion and gave up an explicit provision regarding the purpose of the criminal law.

This different position in respect of whether the criminal law should include or not an explicit provision on the purpose of the criminal law is not an incidental option, but reflects a certain way of designing the role and overall meaning of the criminal legislation.

In an utilitarian approach of the criminal legislation seen as a set of norms with a well defined function, existence of certain declarative programming provisions explaining the general nature and the purpose of the entire legislation is not justified, as these are fundamental aspects falling within the scope of the doctrine and whose task would be to identify these purposes and further develop them. In such an understanding, the legal regulation aims certain very specific limited purposes, namely to articulate the incriminated deeds and the corresponding sanctions and not to proclaim general principles, to outline fundamental features of a legislation seen as a consistent set created to obtain certain results having a criminal policy nature.

In an opposite understanding, the criminal law is seen, in essence, as political and idealogical manifesto aimed at exercising a certain educational influence through the set of the provisions it contains. Such a legislation will proclaim its character, purpose and fundamental principles as educational and political tools underlying interpretation and application of the specific provisions of the law.

This latter solution was preferred by the criminal codes of the former socialist countries on purpose of convincing the mass of recipients of the criminal law of their vital interests to observe and apply the criminal law on a well defined purpose and in a direction meant to support satisfaction of the interests and objectives of the new social order.

The transition of our country from the socialist to the capitalist society entailed, beyond any doubt, also surrendering the obvious political and ideological character of the criminal law and adoption of a more realistic vision, giving priority to the functional and utilitarian character of the criminal law and leaving the duty to examine the fundamental political and ideological aspects of the criminal legislation to the criminal doctrine.

As already shown above, adoption of this new attitude in the drafting of the criminal law did not reflect an accidental interest, a personal way of thinking of the team who drafted the criminal provision, but gave shape to certain deeper requirements in close connection with the new structure of the society which followed the surrender of the socialist arrangements.

Therefore, the new vision on the criminal legislation cannot be unilaterally characterized as good or bad, but only in relation with the general features of the society overall, which have been embraced through the will of its citizens. Should such option of the our country's citizens pursued returning to the capitalist society, logically, it should have decisively influenced and did influence the drawing-up of the criminal legislation.

11. The fact that the Western legislations have never contained any provisions in respect of the purpose of the criminal law can be also explained by the fact that this purpose is designed very differently in the criminal doctrine of these countries.

For instance, certain Spanish authors [4], the building block of the criminal institutions, the essence thereof, would be represented by the violence emerged from apparently contradictory interests of the members of the society. The criminal law is a tool of social control, which defends and protects defined interests responding with violence to the violent reactions of the members of the society.

The social control is attained through incrimination of certain deeds and enforcement of sanctions.

According to another Spanish author, the criminal law in the current society would stand for a means of social control and, consequently, its purpose is to fight against antisocial conducts, turning to defined penalties when such conducts do occur. Thus, the criminal law would stand for a safeguard of the freedom of the citizens by clearly determining the facts deemed as offences and of the penalties applicable to the perpetrators of such deeds.

As we can see, the author makes no difference between the purpose of the criminal law and the means whereby this purpose is attained[5].

In the opinion of the German author Jescheck, the purpose of the criminal law would be to protect life in common *(Zusammenleben)* of the people in the society, peace, society and human social conditions[6].

Another German author, Krey, thinks that the criminal law would stand for a form of social control supported by legal norms, and the purpose of the criminal law would be to ensure security and that people can leave together. Attainment of such a purpose would not be possible without protecting the legal individual assets, such as life, bodily integrity, freedom, honor, property, domicile, as well as the collective assets, such as existence of the state, internal and external security of the state, thorough delivery of the public service, traffic safety, environment, etc.[7]

In the opinion of Günter Jacobs, the material legitimacy of the criminal law and, implicitly the purpose of the criminal law, would be maintaining the existence of the state and of the society by applying sanctions against those who oppose the legal order[8].

Johannes Wessels thinks that the criminal law would have as purpose protection of the common living of the people and of the ethical values of the society, which rely on law and form the foundation of the legal order[9].

Another German author describes the purpose of the criminal law as that of defending the legal order by applying state constraints to the citizens who violate the law norms[10].

In the opinion of an Italian author (Giuseppe Bettiol), the criminal law defends the social values in accordance with the historical situation, that it to say, it protects the legal assets and interests[11].

For another Italian author (Ferrando Mantovani), the purpose of the criminal law would be to protect the critical assets of any organized society, a component part of the common heritage of the human civilization, in whose absence social cohabitation would not be possible.

Of interest is also the way this author breaks-down the criminal law, namely criminal law of oppression, criminal law of privileges and criminal law of freedom, each subcategory with its own specific features, including own purposes of the criminal law[12].

In the opinion of Manzini, one of the founders of the Italian criminal doctrine, the purpose of the criminal law would be to ensure and secure the fundamental and essential conditions for life in common and,

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[4] Fr. Munoz Conde, M. Garcia Aran, *Derecho penal, parte general* Publishing House, Tirant lo Blanch, Valencia, 2002, pp. 29-31.
[5] S. Mir Puig, *Derecho Penal, Parte general*, Editore Reppertor, Barcelona, 2002, pp. 47 and 48.
[6] H.-H. Jescheck, *Lebruch des Strafrechts*, Allgemeiner, Teil, Dunker&Humblot Publishing House, Berlin, 1988, pp. 1-6.
[7] V. Krey, *Deutsches Strafrecht Allgemeiner*, Teil, 2004, pp. 1-3.
[8] G. Jacobs, *Strafrecht*, Allgemeiner Teil, Verlag, Walter de Greiyter, Berlin, 1991, pp. 5-35.
[9] J. Wessels, *Strafrecht*, Allgemeiner Teil, C.F. Müller Verlag, Heidelberg, 1995, pp. 1-3.
[10] C. Roxin, *Strafrecht*, Allgemeiner Teil Band I, C.H. Beck'sche Verlag buchtramdlung, München, 1997, pp. 3-11.
[11] G. Bettiol, *Diritto penale, parte generale*, Cedam Publishing House, Padova, 1973, p. 95.
[12] F. Mantovani, *Diritto penale*, Cedam Publishing House, Milano, 1992, p. 6.

implicitly, to support maintenance and reintegration of the general legal order through stipulation and application of criminal sanctions[13].

In Remo Pannain's opinion, the purpose of the criminal law would be part of the philosophical issues of the criminal and could stand for a matter of concern for the criminal dogmatics, and not of the criminal law-maker.

In its opinion again, the purpose of the criminal law would be to regulate the social relations aimed at defining the limits of the individual freedom, thus ensuring the freedom of each individual in the society according with the existence needs of the community.

In the same train of thoughts expressed by other Italian authors, such as Grispigni and Carnelutti Pannain, he thinks that the purpose of the criminal law would essentially be to support existence and preservation of the society by fighting against the deeds which impair on the fundamental interests of the individual and community[14].

Similar ideas were voiced also by another Italian author, Tulio Padovani, according to whom, the law-maker assign a criminal nature to a deed only it meets a certain obvious social needs, that is to say, if it opposes to the most important interests of the community. The author further underlines the relativity of the social values protected under the criminal law, giving the example of the rape of the wife by the husband, which, in the past, was not liable of criminal sanction, as the wife had the possibility of reacting through divorce, while today these deeds are deemed to have a criminal nature[15].

The relative nature of protecting the social values as a purpose of the criminal law is underlined also by Antonio Pagliaro, according to whom, the criminal law aims to preserve not the society in general, but a certain society[16].

In the French doctrine, the purpose of the criminal law, as seen by Garraud, would be to regulate criminal repression[17].

Other French authors consider that the criminal law would be aimed at defining the fundamental reactions which represent the very content of social life, by determining the antisocial acts of the persons liable to incur liability and setting the penalties applicable thereto[18].

Similar ideas are expressed by other French authors who assign to the criminal law the purpose of fighting against deeds which disturb the social order, namely those actions or omissions liable to impair on the social order and which are sanctioned by the society with penalties. That is to say, the criminal law would represent the reaction of the society to the antisocial deeds[19]

As understood by the Swiss authors, the purpose of criminal law would be to determine the antisocial deeds against whom the society must react, thus protecting the social values (legal assets) and the interests of the society[20].

Similar ideas have been encountered in the British literature too, their authors being of the opinion that the purpose of the criminal law would be to support protection of the fundamental interests of the society against antisocial deeds. Such deeds must be under the control of the society at all times[21].

The North American criminal literature features some interesting ideas about the purpose of the criminal law too. According to Jerome Hall, the purpose of the criminal law would emerge from the analysis of the three fundamental principles of repression, namely the law, the offence and the penalties.

Consequently, the criminal law would aim to clarify the law applicable to a determined case and the applicable penalties. That is to say, the purpose of the criminal law would be to determine the content of a deed committed by a person who willfully broke the law, the offence such person committed and the penalties provided for by the item of law violated by the perpetrator.

In a different piece of work, the quoted American author, admits, even not explicitly, that the purpose of the criminal law is to safeguard the conditions of the very existence of the society against antisocial deeds[22].

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[13] V. Manzini, *Trattato di diritto penale italian, volume primo*, Unione Tipografica Torinse, Turin, 1933, pp. 74-98.
[14] R. Pannain, *Manuale di diritto penale, parte generale*, Unione Tipografica Editrice, Torino, 1962, pp. 20-29.
[15] T. Padovani, *Diritto penale*, Giufré Editore, Milano, 1988, pp. 1-5.
[16] A. Pagliaro, *Principi de diritto penale, parte generale*, Giufré Editore, Milano, 1996, pp. 7-11.
[17] R. Garraud, *Précis de droit criminel*, Sirey, Paris, 1909, p. 1.
[18] Fr. Desportes, Fr. le Gunehec, *Le nouveau code pénal, Tome I. Droit pénal général*, Editions Economica, Paris, 2000, pp. 1-3.
[19] G. Stefani, G. Levasseur, B. Bouloc, *Droit pénal général*, Dalloz, Paris, 1995, pp. 1-23.
[20] Nole/Trechsel, *Schweizerisches Strafrecht*, Allgemeiner Teil, Zürich, 1981, pp. 23 and 24.
[21] C. Ellliot, Fr. Quinn, *Criminal law*, Pearson Education Limited, Edimburg, 200, p. 1.
[22] J. Hall, *General principles of Criminal law,* 2nd ed., Bob-Marrill Company Inc. New York, 1960, p. 18.

12. But, departing from the idea of an explicit proclamation of the purpose of the criminal law, the new Romanian Civil Code could not escape the need to depict the *means* whereby such a purpose could be attained. This time, both the Criminal Code in effect, as well as the new Criminal Code stipulated explicit provisions laying-down the principles of the legality of criminal offences and penalties, articulating that the purpose of the criminal law could only be attained through a competent, clear and convincing description of the deeds the criminal law forbids or instruct and a determination of the abstract limits of the sanctions appropriate to the severity of the incriminated deeds.

This principle is worded by the new Criminal code in two distinct texts: *the legality of criminal offences and the legality of the criminal law sanctions.*

The solution promoted by the new Criminal code by regulating the principle under analysis in different texts, although praiseworthy from a didactic point of view, looses points as it artificially dividing the principle of the legality of criminal offences and penalties into two distinct principles which are dedicated different texts in the new Criminal Code. It has been rightly noticed in the criminal doctrine that such a solution unreasonably separates the structural elements of the criminal norms, formed of precept and sanction, which would entail a consistent wording, under the principle of legality, of the precept (description of the incriminated deed) and of the sanction "The legal and illegal should be doubly seen in the criminal law in terms of: the offence and penalties. Altogether, these two aspects form what we call the legality of incrimination." (Vintilă Dongoroz and collaborators, *Explicații teoretice*, vol. I, Academiei Române Publishing House, Bucharest, 1970, p. 36.)

13. But the new recently-adopted Criminal Law differs also from the previous Criminal Code (Law no. 301/2004) which used to under one single text (and not under two different articles) the legality of criminal offences and the legality of the criminal law sanctions. This solution was confirmed also by the applicable doctrine. The rule according to which "no crime without law" (*nullum crimen sine lege)* is a fundamental rule. It is indissolubly linked to "no penalty without law " (*nulla poena sine lege)* (Vintilă Dongoroz and collaborators, *Explicații teoretice*, vol. I, Academiei Române Publishing House, Bucharest, 1970, p. 36). Falling in with this concept, art. 2 of the criminal law in effect expressed in one single text not only that the law stipulated which deeds amount to offences (legality of the criminal offences), but also that the law provided for the penalties to be applied against offenders (the legality of the penalties).

The solution adopted by the criminal law in effect considered that fact that the criminal law, as it regulated the entire repressive reaction, couldn't have been designed otherwise than as the unity of the perceptive and sanctioning sides. This concept underlie also the wording of art. 2 of the law in effect, which underlined this idea that the law is the one to provide for the deeds which amounted to offences (as it described them as such in the content of the norm), as well as for the criminal law penalties which were to be applied in case such deeds were committed (penalties, educative measures and safety measures). Even if a different norm describing the incriminated deed and another one providing for the sanction could exist (divided norms), this does not exclude the unity of the two sides. "The legality of the criminal offences entails, as a fundamental principle, the unity of the two sides of the criminal norm". (Vintilă Dongoroz, *Tratat*, 1939, pp. 11, 29).

14. But the text referring to the legality of the criminal offences and of the penalties are debatable in other respects.

The wording of the rules regarding the classification the deed as offence before the date when the it was actually committed under art. 2 para (2) of the new Criminal Code (NCC) is found also in the law in effect. This rule worded in a negative form is found in the art. 11 of the Criminal Code in effect ("The criminal law does not apply to deeds which, at the time when they were committed, were not provided as offences by the law") underlining the idea that the criminal liability may only be incurred, first of all, should an incrimination norm providing for the relevant offence exist, and, secondly, such provision should have been in-force before the time when the deed was committed.

The new Criminal Code reiterates this idea and words it as a deviation from a correct systematization of the texts. Indeed, para. (2) of art. 2 of the NCC, providing for the previousness of providing a deed as offence relative to the time of committing the deed, is nothing more than a repetition, in a different wording, of the provisions of para. (2) of art. 1 of the NCC, with the only difference that under art. 1 para. (2), such previousness requirement relates only to the criminal penalty, although the text is aimed at the description the norm gives to the forbidden or imposed deed (*the precept)* and not to the penalty. This latter aspect would be regulated under para. (2) of art. 2 of the NCC.

15. On the other hand, looking into the option of the new law-maker and the wording of the principle of the legality of the criminal offences, we can see that this option is not fully satisfactory. The principle above should have referred only to the description the content of the incrimination norms gave to the forbidden or imposed deed (the legality of criminal offences entailing a full description of the deed forbidden or imposed by the law-maker) and to the previousness of such description by reference to the time when the deed was committed. Thus, the distinct text regarding the legality of the criminal offences would have its own substance, apart from the text regarding the legality of the criminal law penalties, even if such wording couldn't have remove the critics that it artificially separated the elements of the criminal norms which were designed as an inseparable whole, either.

16. The fact that the principle of legality emerged in the history of the legal thinking and of the legislative practice as a principle of a political nature is well known. The Enlightenment supporters asseverated the principle according to which the entire operation of the States should have been in line with the law in order to prevent any excesses of the absolutist state and abuses of the authorities. The law was seen as an **arbitrator** between the interests of the society and those of the individuals, a safeguard against any forms of an arbitrary display of power; the rights and freedoms of the citizens could have been limited only under the law and the public authority couldn't have imposed against the citizens any other limitations, but the ones provided under the law. At the same time, the law stood for a tool to promote, foster and secure the free exercise of the rights and freedoms, as, by defending the citizens against arbitrary dealing, the rule of the powerful and the arbitrary in general, on the part of both the authority and certain citizens, it removes any obstacle preventing the effective exercise of the rights and freedoms of the citizens.

Enlightenment supporters looked at the law as a **principle of organization and governance** of the state, as the law was considered the perfect expression of reasoning in the political and state-related activities; such an activity had to be characterized by good organization and governance. Any arbitrary display in the way the state was organized and governed, the Enlightenment supporters back then used to say, was a contradiction of the reasoning. The spring of the principle of legality was the reasons expressed in the **doctrine of the social contract**.

17. The departure of the legal and criminal consequences from the state and political principle of legality and highlighting its importance for the scope of the criminal repression occurred but later on, in the early 19th century under the hand of the German legal practitioner Anselm Feuerbach (1775-1833), an illustrious representative of the German Enlightenment. In his work, Lehrbuch des Peintlichen Recht, published in 180, he was the first to ever characterize the principle of criminal legality with the famous Latin formulas: *nulla poena sine lege, nulla poena sine crimine, nullum crimen sine poena legali*, transcribed by the subsequent authors as: *nullum crimen sine lege, nulla poena sine lege, nullum judicium sine lege*. Feuerbach should be given due credit for compiling an unitary and consistent concept on the criminal legality. In his opinion, the criminal offences standard performed a general prevention function through the psychological constraints it exercised on the beneficiaries of the criminal law, determining them to abide by the law and refrain from committing antisocial deeds. For the law to exercise such a constraint, the beneficiaries of the law must know well in advance what the society expects from them and such demands should have be determined prior to the deed itself. Thus, Feuerbach managed to produce a scientific and consistent justification for the principle of criminal legality, placing this principle at the foundation of the legislation and jurisdictional activity.

18. The followers of Feuerbach's work revealed that some of his ideas originated in even older times. Although the ancient times and the Middle Age were dominated by the idea that judges had absolute powers in respect of both determination of the deeds which amounted to crimes, as well as of the penalties to be applied, some requirements of the principle of legality appeared as early as in the Hammurapi Code (18th century BC), such as the idea that there should have been clear laws defining the punishable deeds and penalties, and the Roman juristconsults were well acquainted with the principle according to which no one should have been punished unless a law describing the deeds as illegal had existed beforehand, an idea which appeared also in the Digests. This goal was to a large extent attained in case of ordinary crimes (*crimina legitima)* and less in case of extraordinary crimes *(crimina extraordinaria)* when the punishable deeds and penalties were determined arbitrarily by the judges.

Some supporters of the Roman law claimed that the expansion of the criminal offences by analogy in the antique Rome was not allowable but in case of private crimes and not of public offences, while other authors, oppositely claimed that the analogy was allowed only during the Empire age for the crimes against the Emperor.

In the Middle Age, although the legal practitioners believed that the penalty shouldn't have been applied but for deeds previously criminalized, in fact, the analogy was allowed and so were the abuses and arbitrary on the part of the authority. In parallel with the trends to fight against absolutism and despotism, we saw also an increasing discontent with the authorities not abiding by the law.

19. The first piece of legislation to devote the principle of legality against the abuses of the Feudal state was Magna Charta Libertatum (1215) pass by the English king John Lackland. Art. 39 of this document provided that no penalty could be applied to free men unless under a law. More recent English authors considered that the principle of legality would have been devoted for the first time under the Magna Charta of Henry the 1st (12th century). Swiss authors considered that this principle was devoted for the first time under the fight agenda of the peasants during the Peasants' War led by Thomas Münzer (1525). Art. 9 of this agenda claimed that people should have been judged not according to the arbitrary will of the senior, but only under the written law.

20. The modern ideas about the content of the principle of legality are the output of the Enlightenment school (18th and 19th centuries). In their works we find not only sharp critics of the way the society back then was organized, an exposure of the abuses, despotism and social injustice, but also valuable ideas about a more rational organization of the society, putting the supremacy of the law in the social life into the spotlight. If, during the remote time, the law was assigned a divine origin in order to underline the power of law (thus, Minos, a law-maker from Crete, considered that the laws made under his hand were inspired by Jupiter, Licurg, a law-maker from Sparta, thought that he was inspired by Apollo of Delphi, Numa Pompilius, the legendary king of Rome, claimed he found inspiration in a Nymph, Egeria, and Moses proclaimed the 10 Commandments inspired by God), in the thinking of the Enlightenment supporters, the power of law rose derived from reasoning or from the laws of nature (Descartes, Lock, Hobbes), being deeply engraved in the conscious of men. Other minds of the era (Montesquieu, Filangieri, Rousseau, Beccaria) saw laws as originating in the social contract.

The ideas voiced by the Enlightenment supporters were subsequently devoted in the Prussian Criminal Code 1721, the Bavarian Criminal Code of 1759 and in the Austrian Criminal Codes of 1769 and 1787. The concepts of the legality of the criminal offences and of the penalty appeared in the Declaration of Independence of the American States (4 July 1776). The Declaration of the Rights of Man and of the Citizen in the French Revolution (1789) provided, under art. 8, that no one would suffer punishment except it be legally inflicted in virtue of a law passed and promulgated before the commission of the offence. This principle is devoted by the French Constitutions of 1791, 1793 and by the French Criminal Code (1801) which were the source of inspiration for the Bavarian Criminal Code (1813), the Prussian Criminal Code (1852), the Romanian Criminal Code (1864) and other.

Today, the principle of the criminal offences and of the penalty is devoted in all the Constitutions of the states and in all criminal legislations. Similarly, this principle was devoted also in the Universal Declaration of the Human Rights (10 December 1948), in the International Pact on the Political and Civil Rights (15 December 1966) and in the European Convention of the Human Rights (5 December 1950).

The Romanian Constitutions of 1866, 1923, 1938, 19961, the Revised Constitution (2003) and the Criminal Codes of 1864, 1937, 1969 included explicit provisions regarding the principle of the criminal offences and of the penalty.

21. Several guiding ideas emerge from the principle of the criminal offences and of the penalty, which taken together, give meaning and content to this principle. We think here about the idea according to which the repressive activity of the state could not be performed otherwise than under the written law and not under certain instruments inferior to the law or based on the common law (habit) *(nullum crimen sine lege; nullum crimen sine lege scripta);* the idea according to which the criminal rules should have a well defined content *(nullum crimen sine lege certa)*; the idea according to which the criminal law of a strict interpretation, excluding any analogy of the criminal offences *(nullum crimen sine lege stricta);* as well as the idea according to which the criminal law should be prior to the perpetration of the criminalized deeds and application of a criminal penalty *(nullum crimen sine lege praevia)*. Let us a look into each of them in turn.

Nullum crimen sine lege. The criminal rule which regulates the conduct of the beneficiaries of the rule relative to the fundamental social values defended by the state and using the criminal law penalties as a means of constraint, has some particularities which place it among the most important categories of rules. By defending certain values, such as the life, bodily integrity and health, freedom, ownership, national security

and allowing for application of the most sever means of individual constraints, the rules of the criminal law could not be included but in a piece of legislation of a higher value, namely the criminal law, subject to an adoption procedure which involves maximum due care and competence from the law-making body. For this reason, the Romanian Constitution [art. 73, letter h)] provides that the laws concerning crimes, penalties and the regime applicable to enforcement thereof can only be adopted by the Parliament and only under organic laws, that is to say laws of a certain constitutional value, and excluding the pieces of legislation inferior to the law and any interference from the executive authority in the drafting and adoption of items of legislation which lay-down criminal offences and penalties.

In this respect, the practice of adopting criminal rules under Government Emergency Ordinances or Emergency Ordinances when no genuine emergency demanded for such an approach, was rightfully criticized in the criminal doctrine.

Furthermore, other grounded critics in the doctrine targeted art. $18^1$of the Criminal Code (taken-over also in the new Criminal Code), which allows for a deed not to be classified as offence under the criminalization rule adopted by the law-maker, but only after the judge having assessed the deed in question and concluded that it did not pose the social danger of an offence. Such a legislative solution violates the principle of the segregation of powers in the state, vesting the judicial authority with an unreasonable precedence in an area (classifying the antisocial deeds and criminal offences and sanctioning thereof) which rests exclusively with the legislative power.

The supremacy of the law over the other categories of items of legislation and the actions of the executive and judicial power relies on the idea of the segregation of powers in the state, on the trust in the capacity of the legislative power (as an expression of the general will) to draft fair laws in the interest of fostering peaceful cohabitation of all members of the society. Even if today many of the illusions of the Enlightenment supporters of a genuine segregation of the powers in the state, of the genuine possibility of preventing the abuses of the authority with the power of the law, of the ability of the law to support prompt repression in case of the newly-emerged illegal deeds, the illusion of the law-maker's reasoning and possibility to attain a balanced governance able to meet the needs of all members of the society, have dissipated gradually, the supremacy of the law, as unique safeguard of the rights and freedoms of the citizens cannot be waived.

Out of all the ills the absence of the law could flesh, its supremacy, with all its disadvantages, is by far the smallest of all.

The same conclusion was drawn also by certain authors (Mantovani, for instance), when pointing-out the disadvantages of the principle of the criminal offences and of the penalty, namely that a thorough observance of the principle is not enough to fight against the dangerous deeds which have occurred lately in the society, as a sufficiently long time needs to pass until they are classified as criminal offences (the lack of promptness in criminal repression). Likewise, unconditional compliance with the criminal law does not provide any sanctuary for its beneficiaries against the abuses of the law-maker itself; the latter can still draft arbitrary laws and demands observance thereof as such. All these weaknesses of the principle of the criminal offences, even real, would not justify giving-up the law as a regulatory tool of the social relations.

22. In what the sources, the spring of inspiration for the law-maker is concerned, in order to draft the criminal law, the doctrine distinguishes between: **the substantial source** (the natural, social source of the criminal law); it is formed of the needs, requirements and aspirations of the social life; against these realities, the law-maker decides to draft a new criminal rule and relies on the same realities to determine the content and significance of the rule. Another source of the criminal rule is the **will of the competent authority** to draft rules which would meet the social needs (the political sources, the **constituent source** of the norm). The last source of the rule, namely the **formal source** or the legal source of the criminal rule is represented by the item of legislation in which the will of the law-making power is expressed and materialized. This item of legislation contains the precept (which emerges from the description of the criminalized deed) and the penalty laid-down for any violation of the precept.

The criminal doctrine classifies the formal sources into direct (immediate) formal sources of the criminal law and mediated or indirect formal sources. The first category includes the Constitution (in respect of the provisions with criminal consequences), the Criminal Code, the supplementing criminal laws, the off-criminal laws which contain criminal provisions, while the indirect (mediated) sources contain the international treaties and conventions which lay-down criminal provisions, to the extent such instruments were ratified and implemented by the Romanian state, as a rule, through a domestic piece of legislation containing the specific conditions in respect of criminal offences and penalties.

The Romanian criminal law exceptionally admitted that the international criminal law assistance treaties could stand for direct (immediate) sources, in respect of the conditions under which such assistance can be requested and afforded, even if the text of the Constitution itself is subject to no ambiguities or inconsistencies whatsoever, liable to demand eventually for a domestic law, independent of the text of the Constitution, which would address these shortcomings.

Nullum crimen sine lege scripta, expresses the idea according to which, the criminal law, thanks to its major importance and significance, could find its main source in the consuetudinary (usually, *us non scriptum*). In addition to the supporting arguments already presented, which render difficult acceptance of the custom as a source for the criminal law, we added also the fact that the criminal law, in this case, would not emanate from the representatives of the will of the people, that the custom is highly variable from one area to another one of the country, which would represent for an important impairment in the consistent application of the criminal law, and the very moment when the common law entered into effect could not be known for certain based on the custom. All of these create the fear that a criminal law based on custom would blaze the trail for abuses and controversial solutions.

Despite these all shortcomings, the custom is nevertheless admitted as a formal source for the criminal law in certain law systems (the one based on common law, in the Muslim, Indian, Chinese and Japanese law, as well as in the law of the African countries, etc.).

The criminal law accepts that the custom could still function in addition to the law, strengthening the provisions of the written law *(secundum legem)*, or could supplement the positive law *(praeter legem)* if the law-maker takes-over the custom's rule and devotes it's in a text of positive law to serve as an additional means of strengthening the trust in the law and foster the respect for the law. Some other times, the law-maker could provide, as a constituent requirement of the offence, for the deed not to be contrary to the local customs or to fall into the local customs [for example, art. 627 para. (7) of the Italian Criminal Law], in this case the custom is also completed by and integrates the criminalization rules.

The *contra legem* custom is not admissible, namely that custom which would remove the criminalization rule; the criminal doctrine rejects the idea that a criminalization rule could come out of effect through *disuse*, namely after not having been applied for a long time (contra legem custom). In reality, as long as the criminalization rules have not been repealed, it can still be applied anytime. The judges could do nothing more than assessing whether, due to the non-application of the rule of a long period of time, the subjective element of the offence could be further retained or not. Similarly, this circumstance could be considered when individualizing the penalty.

Whether a **supporting consuetudinary** is conceivable or not, meaning admitting a case based on custom and not on the law, is a controversial issue. According to certain authors, such a solution is excluded, given the lack of certainty which characterizes any consuetudinary rule, while other authors believe that such a consuetudinary approach could be admitted as it would be to the benefit of the defendant; it was submitted that the principle of legality, with all its rigors, can only operate to prevent the abuses of the authority, but not to deprive the beneficiaries of the criminal law of a favor of the law *(favor libertatis)*.

The criminal doctrine is featured by certain reservations also regarding the conclusion that the **items of legislation inferior to the law could be completely given-up** in respect of regulating the criminal repression. The experience has shown us that we cannot give up clarifying certain constituent elements of the criminalization rule based on certain items of legislation inferior to the law (for instance, to explain the concepts of religious cult, management, administration, exercise of a profession, etc.). Similarly, articulation of the job duties of the public servant in case of an abuse of an office or a neglect of office is done based on the provisions of the administrative law or of the internal regulations (which fall into the scope of the labor law). Regarding such items of law of lower precedence, a technical supplement to the criminalization rule is mandatory. Similarly, the provisions regarding the illegal exercise of a profession (art. 365 of the Criminal Code) are completed with pieces of administrative legislation which regulate the exercise of a profession or trade and which refer to the criminal law to sanction the defaults of the conditions applied to the exercise of a profession or trade.

The need to turn to items of legislation of lower precedence to clarify the criminal law itself was admitted also by the Italian Constitutional Court (Decision no. 26 of 1966). In particular in case of criminalization of drug-related actions, it was shown that the criminal law should turn to the specialized administrative bodies to clarify the nature of these substances and see to what extent the operations involving such fall or not into the scope of the criminal law. In absence of these clarifications under certain items of legislation, the judge should have done something liable to be trigger an arbitrary and subjective conduct

thereof, which is much worse than just using items of legislation of lower precedence to explain the criminalization rule.

The French criminal legislation system also admits that, when the law is not sufficiently clear, one could even turn to the local practices (for instance in case of commercial frauds), namely to the common law to clarify the criminalization rule.

Admitting, of course, to the possibility of using also certain rules which have lower precedence than the law to explain the content of a criminalization does not meant admitting, under items of legislation of lower precedence (for instance Government Ordinances or Decisions) to introduction of new criminal offences and penalties or of criminal offences under ordinary laws, although this rests with the organic law. Such excesses have been rightfully criticized in the Romanian criminal law. Similarly, the abusive use of emergency ordinances by the Government to regulate criminal matters would not be possible unless a genuine, well-grounded emergency did exist.

Admitting to such interferences of the items of legislation of lower precedence in the area of the criminal repression raise the theoretical problem of whether the principle of the supremacy of the law could be seen as a relative and not an absolute principle. The prevailing doctrine rejects the idea of putting the principle of the supremacy of the law in criminal matters into perspective because, relative to the importance of these matters, only compliance with this principle can stand for a solid guarantee of the rights and freedoms of the citizens and of the good social cohabitation. Therefore, giving up the absolute nature of the supremacy of the law in criminal matters would be inadmissible. Any potential references to items of legislation inferior to the law to complete the criminal law are but interventions of legislative technique which do not alter the supremacy of the law; in all cases, the criminal law adopted pursuant to the procedure for the organic laws must determine the basic content of the criminal offences and of the penalty liable to be applied.

A similar issue appeared also in connection with the supremacy of the criminal rule relative to the Community legislation. It is well known that, pursuant to the Treaties establishing the European Union, the criminal matters were assigned to the national sovereignty of every state. The Community legislation could not provide for criminal offences and penalties in absence of supranational authority to issue criminalization rules and sanction the antisocial deeds committed on the territory of the Union, thus ensuring enforcement of the penalties applied by the supranational courts.

Nevertheless, the Community rule whose supremacy over the national rule is recognized by all the state, could have a certain influence also on the criminal repression at national level. Thus, under a decision of the Court of Justice of the European Economic Communities (decision dated 9 March 1978, in Simmenthal case), it was found that the national judge has the obligation to apply the Community rule, potentially giving-up application of the domestic rule, should the latter contradict the Community one, even before the domestic law having been repealed if opposed to the Community rule. The Italian legislative practice admitted that the guilt of a person who does not comply with the competition rules laid-down under the Treaty of Rome could be found, even if an appropriate norm would be absent from the domestic legislation. It was similarly admitted too that the exercise of a right recognized under the Community legislation could stand for a supporting cause able to remove the offence provided for by the domestic law.

The French courts also admitted that the judge may check in the case whether the domestic rule is or not contrary to a provision of the Community legislation and decide not to apply the domestic law if it is incompatible with the Community one. If the judge does not find such an incompatibility, an appeal may be lodged with the Court of Justice of the European Economic Communities. This appeal is optional when the issue is raised in front of the court of first instance and compulsory when raised in front of the Court of Cassation. Notification of the European court is not necessary if it has already replied to the question at hand or if the text of the domestic law was considered contrary to the Community legislation.

23. Nullum crimen sine lege stricta, expressed the idea according to which the criminal law needs to be interpreted and explained in order to be correctly applied, and such interpretation must be a strict one and clarify the exact will of the law-maker as worded and materialized in the rule. This requirement of the criminal legislation takes into account the reality that the criminal law, no matter how accurate it may be, manages but rarely to attain the ideal of sparing itself for interpretation and explanation. The interpretation is entailed by the fact that the law, due to its abstract and general nature, must apply to specific, variable and isolated deeds, having their own particularities. The law enforcement body must harmonize the criminal law with the actual deed and identify the corresponding legal form thereof. This operation is entailed also by the fact that the words themselves used by the law-maker do not always have the necessary accuracy and clarity to prosify in full the will of the law-maker expressed in the rule and, on the other hand, the social realities the

norm aims to regulate are highly mobile and ever changing, so that the text of law can hardly express them in their entire complexity and all of their nuances.

A certain interpretation is given by the law-maker in the content of the norm which has to be explained (for instance, the Criminal Code explains the meaning of the terms public servant, close relative, weapon, etc.), an operation with is called **contextual interpretation**; some other times the interpretation given by the law-maker come under a subsequent interpretative piece of law. As seen by the classical criminal school (Beccaria), the interpretation used to be considered an operation resting exclusively with the law-maker: only that who drafted the law is entitled to explain it; the judge would be but the mouth voicing the will of the law-maker; the judge does but a syllogism in which the major assumption is the law and the minor one is the case at hand; the judge could not interpret the law, but only admitted that there was a rule standing for a major assumption in his/her syllogism. This situation promoted by the classical school expressed the opposition to the excesses of the Medieval justice in which the judge was free to interpret the law at his/her discretion.

In the modern understanding, the criminal law is interpreted not only by the law-maker (the original interpretation), but also by the body applying the law to the case (judicial interpretation). Both such interpretations are compulsory, although their scope is different: the original interpretation is valid in all instances of applying the interpreted law, while the judicial interpretation is compulsory only for the case it refers to. There is also a doctrinaire non-binding interpretation, but which often prevails thanks to the value of the arguments brought-up to support the ideas of both the law-maker and the bodies applying the law.

The modern doctrine on interpretation departed from the **subjective theory** (according to which the role of the body applying the law would have been to identify the historical will of the law-maker on the date when it was expressed as such), embracing the **objective theory**, meaning that the interpreter had to identify the will of the law-maker as materialized in the rule as this, once adopted, had an independent destiny and the will emerging from the law could be different from the will of those who drafted the law.

The doctrine underlines also the fact that the "will of the law-maker" as such is but a metaphor and the law is the output of multiple and sometimes diverging efforts.

Currently, laws are no longer drafted by one single person (no singular, sole will of one law-maker as it used to be), but there is a collective will of a number of persons, sometimes with contradictory opinions on the regulatory solution and the wording in the law is often the result of mutual concessions and of a compromise reached in the law-making body. On the other hand, the law already adopted can be faced with new situations which didn't exist at the time of its drafting, which it needs to address and put in the appropriate legal form. While the subjective theory promotes a rigid position, looking at the meaning of the law as unchangeable once and for all, the objective theory manages to better capture the dynamics of the modern life.

To find out the will of the law-maker as understood, various interpretation methods can be used, such as literally, grammatical and logical interpretation. The logical interpretation can be systemic, historical and analogical.

The traditional concepts of these interpretation methods give priority to the literally interpretation methods, with the will of the law-maker being identified mainly based on the words used and the structure of the sentence and of the phrase; the role of the interpreter is thus reduced as it is limited to the letter of the text and certain formal arguments *(ubi lex voluit, dixit, ubi noluit tacuit, ubi lex non distinguit, nec nos distinguere debemus; qui dicet de uno negat de altero etc.),* the law being seen from outside the social realities, originating in the rule itself (methodological reversal). Opposite to this logical and constructive concept we find the teleological concept which, although not aiming to overcome the limitations entailed by the letter of the law, gives a decisive importance to interpretation of the rule through its purpose *(teleos)*. Even the Romanian legal advisers intuited the need for a deeper interpretation of the law and of its impact. The Digests showed that "*scire leges non est verba earum tenere sed vim ac potestatem"* (to know the laws is not to be familiar with their phraseology, but with their force and effect). Under such a concept, the interpreter needs to consider the social needs which underlay the rule and reject any solution which is not compliant with the purpose of the norm; the interpreter cannot limit to the formal content of the rule, but must dig deeper in the organic nature of the norm to meet its requirements. Such a method matches better the dynamics of the modern society and is able to achieve a reality-based justice.

The Romanian doctrine admitted only with great reservations the logical and teleological interpretation out of the fear not to blaze the trail for arbitrary, constantly placing itself on a position according to which the criminal law is of the strictest interpretation. This solution is devoted also by the French Criminal Code which, under art. 111-4, stipulates that the criminal law is of a strict interpretation. Similar ideas have been expressed in both the German and French doctrine. The authors consider that, at the very most in case of the

rules which contain provisions favorable to the defendant *(favor libertatis)* a wider interpretation could be accommodated *(in bonam parten),* but never in case of the rules which limit the individual freedom.

The Romanian doctrine accepted an extensive interpretation when the solution under the law is applied also in other cases of the same nature with the ones explicitly laid-down under the law, according to the principle *(ubi eadem ratio, ibi eadem jus)*. The same solution was accepted also by the German case-law (for instance, the meaning of the terms station was extended to cover also an airport as a place of perpetration, while the term dog was enlarged to include also panther).

The British and American doctrine underlined also that the fact that the judges turn to the necessary analogy and the extension of the past solutions to the known judged cases were not violations of the principle of the strict interpretation of the law: Comprehensive collections of solutions given by the courts are available in these countries and the legal classification of the cases is done (when no special law is available) by reference to these solutions which define the forbidden conduct. The English authors consider that thus the indicated principle is more thoroughly observed. The American case-law admitted a certain tolerance from the principle of the legality of the criminal offences in case of vagrancy and begging, which deeds are sanctioned by analogy.

24. Nullum crimen sine lege certa, expresses another rule retrieved from the principle of the criminal legality, namely the criminal law must determine the criminalized deeds in full in order to avoid any subjectivity on the part of the body applying the law, which would clarify any unclear meaning of the criminalization rules. The law-maker, if intending to be respected, must, first of all, make itself understood by the beneficiaries of the criminal law by drafting clear laws, free of any ambiguous wordings, liable to trigger a decisive involvement of the judge. The clearer the criminal law is worded, giving complete descriptions to the deeds it aims to forbid or order, the closer the relation between the judge and the perceptive content of the rule, the higher the chances for the legislative message reaching the beneficiaries of the rule unaltered and efficiently in respect of the degree of influencing the conduct of the citizens.

The authors of the classic criminal school used to think that the criminal laws had to be few, clear and simple so as to be easier to understand and observed by the citizens. In their opinion, a good determination of the criminalized deed in the content of the criminal rule is the best guarantee for knowing and observing the law. The modern reality though has not yet validated these conclusions: determination of the law gives only the possibility of better knowledge of the law, but not the certainty that the law is actually known.

The example given was the one of the English and American precedent system and of the African and Asian system which all admit the custom as the source of the criminal law. In both cases, although the criminal rule is less determined, knowing the law happens in better conditions, the intimidating effect is stronger, and so is the promptness of repression. According to certain authors, the principle of determination of the criminal law (the law must be certain) ensure not only a better knowledge of the law, but also allows for a more efficient exercise of the role of guaranteeing the rights and freedoms of the citizens. Such a role would be hardly exercised should the limit between criminal legality and illegality not be well determined. If the supremacy of the law opposes, as a matter of principle, to the arbitrary by the executive power, the principle of determination prevents the arbitrary on the part of the judges, thus preventing the courts from sanctioning also deeds which have not be explicitly criminalized. Only an accurate determination of the forbidden deed makes possible the legal equality of the citizens, as the criminal law applies consistently to all the beneficiaries of the criminal law (and not according to the arbitrary of the judge), as does the correct legal classification of the deed. Knowing what it has been forbidden, the beneficiaries of the law can consciously direct their own behavior. The German author Welzel used to write that the danged which threatened the principle of legality came from the non-determination of the law beyond the analogy of criminalization. This can explain why the German Constitution, under art. 103 III, explicitly devotes this principle and forces the law-maker to accurately determine the criminal offence and the penalty.

The principle of determination further obliges the law-maker to make use if an adequate legislative technique to be well understood and respected, implicitly. This principle operates not only in respect of the criminal offences and the penalty, but also in respect of the other criminal law institutions, including the provisions concerning the supporting cases, the ones which remove the criminal nature of the deed or the criminal liability, as well as of the provisions of the Criminal Code and of the off-criminal law which criminalize and sanction. When making a complete and correct determination of the forbidden deed, the law-maker must also check to what extent the criminalized deed has a correspondent in the objective reality and, consequently, it can be proven. For instance, the Italian Constitutional Court (decision 9-4/1994) decided that art. 603 of the Italian Criminal Code violated the principle of determination of the criminalization rule as it forbidden a deed (namely exercising a certain mental influence on a person liable to place such person under

total obedience) whose existence in reality couldn't be proven. Such an assumption, the Court found, couldn't be verified in its execution and the result couldn't be proven with the knowledge currently available, that is to say a person could be totally submitted through mental means.

In respect of the determination techniques of the criminal rule, the modern era no longer uses the case-based determination as it cannot summarize all the specific cases the rule could apply to and thus, it would unavoidably lack behind the reality. This legislative technique procedure itemizes the precept in a set of isolated assumptions, but still leaves the general meaning of the rule incomprehensible.

To the extent the rule could not capture all the potential application assumptions, it would unavoidably imply substantial involvement of the judge in the interpretation of the rule. The rule determination techniques were neither effective with their general wording as they urge the law-maker to use evasive, inaccurate and inefficient expressions. To avoid this danger, it was proposed for the law-maker to use the most suggestive expressions and to prosify as clear as possible the distinctive features of the criminalized deeds.

But, no matter how diligent the law-maker would be, certain drawbacks in determination of the criminal law cannot be avoided due to the discussions, controversies and the compromises entailed by the legislative activity. As often the clearest wording of the law cannot be identified, but ambiguous wordings are used, transferring to the judge the duty to explain the rule. Such a transfer is not danger free though. Thus, the case-law because a source for the criminal law, creates criminalization and exceeds its constitutional duties according to which the judge applies the law and not create it.

The principle of determination should be understood in an abstract way as a certain non-determination is possible in any criminalization rule, given the highly general nature of the rule. This does not exclude, however, the possibility for the judge to intend to articulate the **precept** as good as possible, namely the rank of the law or the interdiction expressed by the rule. Such very ambiguous expressions and terms have been spotted in the Romanian criminal doctrine, as follows: "public scandal, obscene; good morals; and other which unavoidably forces the judge to involve decisively in explaining the rule.

The legislative technique of determining the rule can make use of the natural descriptive elements of the common language (human, work, motor-vehicle, etc.). In this case, the meaning of the rule is easily deciphered based on the life experience of the interpreter or on previous data. These elements are also known as rigid because they have but one single meaning and render possible but one single conclusion regarding the meaning of the deed described in the criminalization rule. Another determination means is the use of the **legal elements** (for example other person's good, possession, detention in the civil law) or from other rules of the law (even the criminal law; for instance the term public servant, close relative, weapons, etc. are clarified by reference to the explanatory criminal law provisions in Title IX of the general section of the Criminal Code). Similarly, the **off-court elements** are also used as determination technique (social rules, ethical rules, cohabitation rules, consuetudinary rules, etc.). In these cases, the involvement of the body applying the law should be even stronger (for instance to explain the terms such as severity of the damage, reduced value, nighttime, vile, etc.). Similarly, explaining terms such as honor, reputation, profanation acts, chastity, occurs with the support of the ethical or cohabitation rules or by using the technical rules.

It was noticed in the doctrine that although the law-maker uses, as a rule, descriptive, natural elements out of the concern to make itself better understood by the beneficiaries of the content of the rule, there are still numerous criminalization situations in which ambiguous, elastic evaluation elements are still used, which open a subjective way for the judge in application of the text. It was further noticed that there is a modern trend to draft undetermined criminalization content, as a consequence of the contradictions of the modern society, by exaggerating the political and ideological pluralism, on one hand, and through the inflation of criminal laws, many of which containing ambiguous and excessively general expressions by violating the principle of determination of the criminal law. Some authors explained this also with the weaknesses of the legislative body, its impotence to reach an understanding between the opposed social forces, leaving the explanation of the ambiguous wordings in the criminalization rule to the judicial power. According to Mantovani, a characteristic of the current law-making process (referring to the Italian one) is the drafting of faulty laws in respect of the law-maker's technique, forcing the interpreter to deploy some efforts to recreate the logic of the rule when such is difficult to identify (the author refers to this operation by the interpreter as legal orthopedics).

Another feature of the current legislative process is a certain restlessness, irregularity of the legislative activity, as a consequence of the contradictions within the legislative body, as well as drafting of rules on a case-by-case basis, without a rational holistic thinking. The Italian author further criticizes the case-law for its excessive oscillations and, sometimes, for missing the meaning of the legality, as the judicial instrument is

subjectively use for off-law purposes. The author wonders whether such legal irregularity represents a temporary crisis of the modern society or is a characteristic of the current legal order.

25. The principle of determination of the criminalization rule includes also the requirement for the interpreter to abide by the explicit provisions of the rule and not to make a extension by analogy of the incrimination. Such a procedure would alter the function of safeguarding the rights and freedoms of the citizen of the criminal law, blazing the trail for abuses and arbitrary criminalization. Forbidding the analogy of criminalization in the formal legality system is a natural consequence of the principle of the criminal offences and of the penalty, stopping the expansion of criminalization beyond the limits explicitly set-out under the law.

Expansion of the criminal law by analogy should be confused with the extensive interpretation of the criminal law. Although they both rely on the principle *ubi eadem ratio, ibi eadem jus*, in case of the extensive interpretation, the interpreter stays within the criminalization rule, although enlarging to the maximum the meaning of the terms used by the law-maker, while, to the contrary, in case of the expansion of the criminal law by analogy, the interpreter departs from the criminalization norm making use of another criminalization rule similar to the one in which the actual deed would have been classified to sanction it. It is argued that the actual deed not explicitly criminalized under a rule is similar to the deed described under a different rule, so that application by analogy of the latter criminalization rule to sanction the deed which was not explicitly criminalized would be justified

Despite all these difference between expansion of the criminalization by analogy and extensive interpretation, some authors argue that the limits between the two methods are highly relative, as the extensive interpretation is even an **occult** analogy (for instance, when the term house is enlarged to cover also for the term commodity), while the use of ambiguous wordings in the criminalization rule would be an **anticipated** analogy.

Whether forbidding expansion by analogy of criminalization has an absolute or a relative nature, meaning whether it could operate as such in case of rules liable to ease the situation of the defendant (that is to say *in bonam partem*), remains a controversial matter. The authors who gives an absolute nature to the principle of determination promote the idea that the rule should always be a precise one so that the beneficiary of the rule knows what it is permitted under the law and what it is not permitted; consequently, expansion by analogy of the criminalization is unthinkable as it cast a shadow of uncertainty on the applicable law, irrespective if it is about the criminalization rules or rules which define the supporting causes or rules regarding the causes which remove the criminal nature of the deed or the criminal liability.

Another opinion argues that, since the rule which regards the supporting causes or which remove the criminal nature of the deed or the criminal liability is not one with the criminalization norm, being independent rules with specific functions, their expansion by analogy in favor of the defendant would be possible. Expansion by analogy of incrimination is objectionable only if it expresses an abuse on the part of the judge, which reason is not longer applicable in case of applying by analogy certain rules in favor of the defendant.

The prevailing doctrine admitted the analogy in favor of the defendant only provided that: a) it can be clearly concluded that it involves ***eadem ratio***, from which the analogy develops logically and naturally; b) the favorable provision has such a degree of determination which allows for similarity relations to be established; c) it would not involve exceptional rules when the interdiction of the criminalization analogy operates in an absolute manner. There is no unity of opinions in respect of defining the concept of exceptional rules. According to certain authors, the rules which remove the criminal nature of the deed being rules which depart from the criminalization rules, they appear as exceptional and, consequently, they cannot be expanded by analogy. Other authors think that the indicated rules are independent expressions of certain general principles, and, therefore, the respective matters represent the common law and are not subject to the analogy interdiction. Thus, the analogy was used to expand the immediate nature of the assault and the situation when a sequestered child kills the sleeping guard to escape the violences the guard threatened him with when awake or in case the sequestered person kills the guard knowing that the ransom asked would not be paid or in case of a person who carried a gun without authorization to defend himself against a lion which fled from the zoo or the concept of the incapacity to understand and want was extended also to the persons in wilderness (man wolf), as well as to the minors who lived in isolation and became free all of a sudden.

The analogy was not admitted in case of the norms regarding immunity because they are only an exception from the rule according to which any person can be held criminally accountable, or in case of the rules regarding the termination of the penalty because they are an exception from the rule according to which any offence triggers application of the penalty or regarding the rules concerning the mitigating circumstances

which are an exception from the rule providing that the penalty is applied between a maximum and a minimum.

26. Nullum crimen sine lege preavia, expresses the idea that the criminal law must be **prior** to the time when the deed described in the criminalization rule was committed. No matter how immoral and dangerous the deed is, it cannot be sanctioned unless laid-down in a criminalization rule prior to the perpetration thereof *(lex moneat priusquam feriat),* namely the law must first warn and then sanction.

This requirement of the Enlightenment supporters was formulated in opposition with the arbitrary of the Feudal senior and the absolute monarch who used to criminalize and sanction at their will, irrespective if a law had or had not existed before, criminalizing and sanctioning the respective deeds.

In a positive form, this requirement expresses the idea that a criminal law could only be effective as long as it is in-force, namely from the moment when it started to be binding for the beneficiaries of the criminal law and until the moment when it was repealed (the principle of the activity of the criminal law). In a negative form, the same idea is expressed through the requirement for the criminal law to be neither **retroactive**, namely not to be applicable to the deeds committed before its effective date, nor **ultra active**, namely not to apply to the deeds committed after the time when it came out of force.

The moment when the criminal law came into effect is the same with neither the moment when it was adopted by the Parliament, nor the one when it was promulgated by the head of the state, but after 3 days since its publication in the Official Gazette (art. 78 of the Constitution) or on a subsequent date set-out in the very text of the law. Repealing of the law could be either express or implied, general or partial, in a direct and precise wording or in an indirect and general wording (for example all the provisions contrary to this law are to be repealed). Partial repealing can take place by suppressing a provision in a law or replacing such with another provision: replacement can be either total or partial (amendment). Repealing of a rule does not prevent the survival of the repealed provisions when either the new provisions allows for the repealed rule to be temporarily applicable (transitory rule), or the repealed provisions survive in content other rules (referral rule) under the form of a borrowed rule.

The thesis according to which the criminal would cease to produce effects when the **social and political conditions** which determined adoption of the law **change** or, in case of the temporary laws, when their validity expires, or, in case of exceptional laws, when the exceptional situation which justified their adoption disappeared, as found in a special item of legislation, remains a controversial one. Such situations are similar with repealing and downgrading an item of legislation inferior to the law if not confirmed by the Parliament.

Although the criminal law is always active, it does not exclude the existence of certain departures from the rule. Thus, in certain cases, the criminal law can be retroactive (for instance, in case of interpretative criminal laws, of the decriminalization law, of a more favorable law) or ultra active (for instance in case of temporary laws or when the older law is more favorable).

The retroactivity exception of the criminal law was extended also to the laws regarding crimes against peace and mankind. The International Pact regarding the Civil and Political Rights (art. 15), as well as the European Convention of the Human Rights (art. 7) provided for these exceptions to ensure such deeds of an exceptional severity are sanctioned, whenever committed.

27. The principle of the non-retroactivity of the criminal law was devoted in all criminal laws as a safeguard for observance of the rights and freedoms of the citizens. Politically, this principle determines the rule, an expression of the political reasoning, according to which the new law can only regulate the legal relations born under it and not the relations prior to the appearance of the law. In the criminal law this rule entails, as shown above, the impossibility of applying the criminal law to certain deeds committed prior to the entering into effect of the law, when the criminal law was not known by the perpetrator (he/she was not warned of the forbidden content of the deed). This rule gives expression to a superior principle *(favor libertatis)* which has always accompanied the principle of the criminal legality, together with the other principles in the field.

Even in the English and American system of the court precedent, the judge is bound to thoroughly abide by the rule of the non-retroactivity of the criminal law: any sanction can only apply to those illegal deeds which find a precedent in the prior case-law. The justice may depart from the precedent only in exceptional cases.

In the Romanian doctrine, the principle of the non-retroactivity of the criminal law is recognized as a **substantial criminal law principle**. In respect of the laws of criminal procedure, another principle applies, namely *tempus regit actum*, that is to say the lawsuit and proceeding instruments and measures are subject not to the law in-force at the time when the deeds which triggered the lawsuit were committed, but to the law

in effect at the time when the procedural documents were executed. These acts remain valid also under the new law. Exceptionally, the provisions of the previous laws on jurisdiction remain too in effect under the new law, but only provided that a decision was issued on the grounds of the old law, except for the case when the previous court was abolished.

28. Formal legality and substantial legality. The requirements of the criminal law previously reviewed underlay the formal criminal legality, namely the legality which derives from the criminal rule as drafted by the law-maker, and the criminal offence and the penalty cannot be conceived outside an existing criminalization rule. The criminal nature of the deed depends, therefore, on the **will of the law-maker**, as transcribed in the criminalization norm (and which meets the requirements looked into above) and not on realities prior to the rule. To the contrary, **the substantial criminal legality** relies on the idea that the criminal offence is a socially dangerous deed for the penalty and it derives not from the rule, but from the social and political realities external to the rule. Therefore, for instance, according to certain authors the criminal offence is a socially dangerous deed for the penalty and it derives not from the rule, but from the social and political realities external to the rule. Consequently, dangerous deeds could be sanctioned also when there is no specific criminalization rule (based on expanding the criminalization by analogy) and should the social danger be missing, the deed can no longer be sanctioned as it is no longer an offence, even if the rule criminalizing these deeds continues to apply. The positivist criminal school, the school of the free law, embraced this position according to which the law would originate in the socialist conscience of the justice body or from the healthy spirit of the people mirrored in the orders of the state leader (Führer) and in other concepts.

In the criminal doctrine, the principle of formal legality was recognized as the only solution to avoid the arbitrary of the executive power and of the judicial power and to ensure the legal equality of the citizens, as well as a guarantee that the rights and freedoms of the citizens are realized. This solution is not, however, free of disadvantages, such as the **impossibility to ensure a prompt reaction of the criminal law-maker** against the antisocial deeds (adoption of new criminal laws takes time as a result of the often unsatisfactory pace of the legislative activities).

Similarly, the principle of the formal legality does not stand for a genuine safeguard against the abuses of the law-maker himself, who might claim for his most arbitrary measures to be complied with. On the other hand, certain deeds, although incriminated, could have lost their importance and no longer be seen as antisocial in the conscience of the social group. The formal legality stimulates the conservatory approach of fetishizing the law when the solutions of the law-maker would be unfair *(summum jus summa injuria)*.

To an equal extent, the shortcomings of the substantial legality were also reported, such as the use of double-meaning concepts liable of contradictory interpretations (revolutionary conscience, healthy spirit of the people, social conscience, etc.) and which blaze the trail for discriminations, uncertainty in the legal relations, arbitrary and despotism.

The experience of centuries of the mankind has shown that the formal legality, with all its disadvantages, represents a better solution that the substantial legality as it is a stronger obstacle against an amplification of the arbitrary on the part of both the law-maker and the judge, defends in a more consistent manner the fundamental social values, ensures a better safeguard for the realization of the rights and freedoms of the citizen.

29. The last paragraph of art. 2 refers to the limits between which the penalty could be set and applied. The difference between the general limits and the special limits of the penalty is made in the criminal doctrine simply to underline the penalty limits which could be exceeded through the intervention of certain causes for modification of the penalty in the course of the process of individualizing the penalty and the penalty limits which could not be exceeded.

Had the law-maker intended to bring some clarifications also in connection with the penalties, he should have dealt with both the general limits and the special limits, which both had to be defined and underlined in respect of importance. Under para. (3) of art. 2, beside the fact that the details provided in the text are also useless relative to the details provided on the same purpose in the criminal doctrine.

The last paragraph of art. 2 forbids, therefore, application of a penalty outside the general limits thereof. Such a text is present neither in the criminal law in-force, not in the new Criminal Code adopted under Law no. 301 of 2004; furthermore, a similar text has never existed in either the Romanian criminal codes or the foreign legislations. The explanation of this solution is a simple one. Conceptually, the general limits of the penalties are understood as those limits which cannot be exceeded, unlike the special penalty limits, which,

under the system of the mitigating and aggravating circumstances, can be exceeded to go beyond the general penalty limits.

Therefore, as the solution above was devoted in the criminal doctrine, to form the very substance of the concept of general penalty limits, the criminal law didn't feel the need to provide an explicit provision in its content. Such a regulation was not demanded by the case-law either, and in the court practice, the cases in which the general penalty limits were exceeded were but rare and, therefore, immaterial.

Why the new law-maker introduced such a regulation in the Criminal Code is beyond understanding, as neither the practice, nor the theory have ever demanded it or challenged the principle underlaying the regulation.

There are several conclusions available in the criminal doctrine, unanimously accepted in connection with the meaning of certain criminal concepts or institutions. These conclusions, if turned into criminal law provisions *(de lege lata)* , would make the Criminal Code a non-rational volume.

The conclusion we need to draw from the way art. 1 and 2 of the New Criminal Code were worded is that the law-maker, besides giving a correct solution to the problems raised in those texts, dealt also with solutions liable to controversies, which should be highlighted by the doctrine until the entering into effect of the New Criminal Code, as well as afterwards, in the process of constant improvement of the criminal legislation.

The data from the compared criminal law is equally interesting in the matters of concern for us.

30. The **French Criminal Code,** under art. 111-2, para (1), formulates in a consistent manner the principle of the legality of the criminal offences and of the penalty. "The law determines the crimes and offences and sets the penalties applicable to their perpetrators", and the same idea is worded in a different form under art. 111-3. "No person can be sanction for a crime or offence whose elements are not defined under the law" [art. 111-3 para (1)]. "No person can be sanction for a penalty which is not defined under the law" [art. 111-3 para (3)].

The French criminal law, as noticed, makes no reference whatsoever about any educational or safety measure, going for a general wording and including in the broader term of penalty both the criminal penalties (correctional penalties), as well as the right depriving or restrictive penalties (art. 131-6), including safety and educational measures. Similarly, no reference is made to minors who, according to art. 122-8, in case they committed an offence, are applied protection, assistance, supervision, educational measures, subject to the conditions set under a special law. This piece of law determines also the cases in which penalties may be applied to minor older than 13 years.

It is implied that these means of sanctioning are also subject to the principle of the criminal offences and of the penalty, as worded under art. 111-2 and art. 111-3, even if not expressly indicated in the texts above.

31. The **Spanish Criminal Code** provides for a somehow different solution. First of all, the criminal law provides expressly for the legality of criminalization under art. 1 para. (1). "No action or lack of action will be sanctioned unless provided under the law before being committed". Art. 2 of the law refers to the penalty: "No person will be sanctioned for an offence or misdemeanor, unless provided under the law before being committed [art. 2 para. (1)].

This regulation of the principle of the legality of the criminal offences and of the penalty inspired also the authors of the New Romanian Criminal Code.

Secondly, the Spanish criminal law explicitly indicates the situation of the safety measures [art. 8 para. (2) and art. 2 2nd Thesis], expanding the principle of the legality of the criminal offences and of the penalties also to those.

32. The **Italian Criminal Code,** under art. 1, devotes, **in one single text**, the principle of the legality of the criminal offences and of the penalty (no person can be sanctioned for a deed which has not been explicitly provided by the law as offence, and no penalties which have not been set-out under the law can be applied).

In respect of the safety measures, art. 199 also provides that no person can be submitted to a safety measure unless such measure has been explicitly laid-down under the law and outside the cases provided by the law.

33. The **German Criminal Code,** devotes the principle of the legality of the criminal offences and of the penalty under para. 1 having the marginal title "No person can be sanctioned without the law" and in the

content of the rule it is stipulated that: “a deed can be sanctioned when the law determined the content and the penalties before the deed was committed”.

As one can notice, the German criminal code makes no special reference whatsoever to the safety measures, educational measures or penalties for minors (see the special law dated 11 December 1979), but the principle of the legality is expanded also to the measures and the penalties which can be taken or applied in such situations.

The special criminal law provides under art. 5 para. (2) that an offence committed by a minor can be sanctioned with penalties for minors, if the educational measures didn’t prove satisfactory.

34. The fact that the new Criminal Code failed to indicate also the *functions* of the criminal law, which functions are carried-out through the measures we have already indicated and which both the Criminal Code in effect and the new Criminal Code refer to, cannot be thrown back at this Code. Such a presentation is absent also from the foreign criminal code and it is usually left to the criminal doctrine.

It is about the general prevention function and the special prevention function which the criminal doctrine in our country and in other countries explain in details as a matter closely and unavoidably connected with the content of the criminal repression.

35. This intervention did not mean to open a debate on the new criminal legislation and exhaust all the aspects in connection with this topic. The interventions still to come shall analyze individually all the institutions of the new Criminal Code and of the new Code of Criminal Procedure, highlighting both the strengths and the weaknesses of the new legislation out of the desire to point out useful ideas to the law-maker and suggest those improvements which are necessary to achieve the excellence of the legislation before its entering into effect or even after its entering into effect, based on the experience gained by applying the new provisions for a certain period of time.

Only after such a critical and constructive testing of the new legislation we shall be able to draw an overall picture of all essential sides thereof and to assess the contribution of this new criminal legislation to the consolidation of the rule of law in our country, given the new living conditions in Romania.