

THE ESSENTIAL FEATURES OF THE OFFENSE IN THE NEW ROMANIAN CRIMINAL CODE

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Abstract

Proper legal classification of an act as an offense represents a rigorous process involving the use of several specific operations, during which the act receives the pattern of criminal law and where the status quo is identified with all the national criminal provisions applicable to that case.

In this article, the author examines the concept of offense and its essential features in terms of the New Romanian Criminal Code in relation to the Romanian Criminal Code of 1969, pointing out the main reasons that explain the need for a new regulatory framework.

Keywords: *New Criminal Code, essential features of the offense, criminal offense, guilt, unjustified act, imputability.*

1. Introduction

By Law no. 286/2009 it has been adopted a new Criminal Code in Romania¹. According to Article 446 of Law no. 286/2009 there are set out the following: “(1) This Code shall enter into force on the date established by the implementation law, except the provisions of par. (2) and (3), which will enter into force four days after the publication date in the Official Journal of Romania, Part I, of this Code”. With the adoption of Law no. 187/2012 for the implementation of Law no. 286/2009 on the Criminal Code it has been established that on February 14, 2014, Law no. 286/2009 on the Criminal Code will come into force.

Was a new Criminal Code necessary or not? This is a question we will try answer briefly, but concisely in the following lines.

We start with the adoption of the Romanian Constitution of 1991, amended in 2003, as a primary reason for the adoption of a new Criminal Code. We also outline the need for adoption in relation to Romania’s entry into the European Union as a full member and, we will continue with the development of the Romanian society in the last twenty years, so as finally, to consider the harmonization of national legislation with the European one, which had to take place also in the matter of criminal justice, a sine que non condition in sustaining the necessity of adopting a new code.

The above mentioned form, in our vision, the main pillars on which substantiates the answer that a new Criminal Code had become a necessity and not a fad doctrine. At the same time, the adoption of the new Criminal Code represented only one of the legislative measures that had to be taken. The second one is represented by the adoption of a new Criminal Procedure Code, a code that must be closely correlated with the Criminal Code.

2. Definition of the offense

In the Criminal Code of 1969², the offense was defined as an act that has social danger, committed with guilt and provided by criminal law.

The New Criminal Code states in Article 15 a new definition of the offense. According to it, an offense is an act provided by criminal law, perpetrated with guilt, unjustified and imputable to the person who committed it. It is shown also that the offense represents the only basis for criminal liability.

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¹ Law no. 286/2009 was published in the Official Journal of Romania, no. 510 from 24 July 2009

² Law no. 15/1968 republished in the Official Journal of Romania no. 65 from 16 Aprilie 1997, with subsequent amendments.

At a first sight we notice that the difference from the old definition provided by the Criminal Code of 1969 is that the social danger is absorbed into the essential feature of being provided by criminal law. In addition, it is required to be cumulatively fulfilled other two essential features for the existence of the crime, namely that of an unjustified act and imputable to the person who committed it.

We appreciate that in the new Criminal Code through Article 15 para. (1), the legislator had correctly removed the criminal-juridical pleonasm that existed in Article 17 para. (1) of the old Criminal Code, and that because, the trait of being provided by criminal law already includes the incrimination of an act with a sufficient degree of social danger. We however disagree with the idea expressed in the doctrine that the social danger disappears as an essential feature of the offense. Moreover, there would not be possible that such an essential feature to disappear completely in the vision of the legislator, that because, in this way it would have been denied even the existential roots of the institution of criminal offense. We believe that the characteristic of being provided by criminal law absorbs the trait of social danger, the latter being found in the content of the first one. However, it shall be taken into consideration the distinction between the abstract social danger, as an essential feature of the offense (provided by criminal law) and the specific danger to public order, as a condition for taking the preventive measure of arrest, provided by Article 223 para. (2) of the new Criminal Procedure Code.

Also, in the new Criminal Code it has been abandoned not only the element of social danger, but also dropped the determination of the purpose of criminal law, the old text comprising an incomplete regulation of the social values protected by criminal law against crimes, being listed barely the most important social values, the others being included in the overall formula “and the whole order of law”³. Under this aspect, the new definition marks an evolution, that places the Romanian criminal legislation among others that defines in such a way the offense.

3. Act provided by criminal law

As we can draw from the above definition, in the new vision, the first essential feature of the offense is that of the act that had to be provided by criminal law. Therefore we are witnessing a reprioritization of the essential features of the offense in the current Criminal Code. This bears out the idea expressed by J.J.Rousseau according to, it is only to law that humans owe justice and liberty. The law (“that celestial voice” as he called it) comes before justice and not justice before the law.⁴

The enunciation of this feature has a certain ambiguity regarding the clarification of the meaning of *act*. An act represents a manifestation of an individual in the sphere of reality, within the framework of social relations. An act is the activity of a member of the society within the social relations, within the relations with his fellow men⁵.

We must admit that the notion of act from the formula “act provided by criminal law” refers to a specific act, because only such an act could be related to the incrimination rule so as to constitute an offense. As Professor Vintilă Dongoroz showed, a specific act never identifies with the act prescribed by law, but only compares to it, verifying that the characteristics of the specific act correspond to the description of incriminating texts.⁶

The legal definition of the offense represents thus also a very useful tool for law practitioners who will be able to determine whether the specific acts have or not a criminal character, by reporting the commission of those specific acts to the legal concept of offense.

³ Article 1 of the Criminal Code of 1969 – The purpose of criminal law: “Criminal law protects against crime, Romania, sovereignty, independence, unity and indivisibility of the state, the individual, its rights and freedoms, the property, as well as the whole order of law”

⁴ Tracy B. Strong, J.J. Rousseau, *The politics of the Ordinary*, Rowman & Littlefield Publishers, Inc., 2002, United States of America, p. 88-89

⁵ Constantin Mitrache, Cristian Mitrache, *Romanian Criminal Law. General Part*, „Universul Juridic” Publishing House, Bucharest, 2010, p. 104

⁶ Vintilă Dongoroz and collaborators, *Theoretical explanations of the Criminal Procedure Code*, The Romanian Academy Publishing House, vol. V, 3rd Edition, Bucharest, 2003, p. 54

4. Act perpetrated with guilt

The New Criminal Code, through the definition of crime, mentions guilt as the second essential feature of the offense. Unlike the old Criminal Code, guilt lies after the assertion of the feature of being provided by the criminal law. This systematization is natural, representing not only an offense features' reprioritization in order of their importance, but also the logical and legal reflection of the fact that, in terms of practice, the judiciary bodies first check the existence of a rule incriminating the act they have been notified to, and subsequently verify that the act was committed with the guilt required by law.

Guilt is both an essential feature of the offense and an element of the subjective side of the offense. As a novelty, compared to the old legislation, the New Criminal Code comprises in Article 16 para. (2) the express consecration of exceeded intention as a form of guilt. Also, it has been waived the differential treatment that existed between the offenses committed by action and by omission referred to in Article 19 para. (2) and (3) of the Criminal Code of 1969, provisions that were intensely criticized in the specialized literature, the New Criminal Code offering thus a clearer vision by providing that both the acts committed through action and omission constitute offenses when committed intentionally and, when committed recklessly, only if the law expressly provides. Under the new regulations, the legislator enshrines the situation of a commissive act committed by omission, issue however resolved definitively and unquestionably in case law and criminal doctrine.

5. Unjustified act

In addition to the requirement that the act should be provided by criminal law and be committed with guilt, the legislator inserted in the definition of the offense two other new essential feature, namely: the unjustified nature of the act and the imputability of the act.

The notion of unjustified is susceptible of multiple meanings. According to doctrine, the unjustified nature of the act expresses the contradiction of the act with the whole legal system⁷. However, sometimes anti-juridicity was seen as a consequence of tipicity which implies lack of a justificative cause, and not as one of the essential features of an offense⁸.

Starting from the criminal doctrine where it has been shown that it is possible that a specific act, although meets all the requirements of law to be considered an offense, not to represent an offense, being thus permitted by the criminal law (as in case of insult and libel, which have sparked controversy because of the declaration of unconstitutionality of their repealing law, issue resolved recently through a decision of the Romanian Constitutional Court, according to which those offenses continue to be effective, a decision at odds with those expressed by the High Court of Cassation in 2010 by an Appeal on a Point of Law).

Therefore, we consider legitimate the provision in the New Criminal Code of the unjustified nature of an act as an essential feature of the offense, thereby offering a complete definition, an overview that includes both positive and negative features of the offense.

6. Act imputable to the person who committed it

Finally, the fourth essential feature of the offense relates to the imputability of the act.

The notion of imputability comes from the Latin word "*imputatio*" that means assigning liability.

Vintilă Dongoroz defined imputability as "the legal situation where a person to whom has been assigned a criminal act committed by him/her with guilt, is found"⁹. Also, in the Romanian doctrine, imputability was addressed strictly objective, by using the concept of "chargeability

⁷ George Antoniu, *Justificative causes in the project of the new Criminal Code*, in „Revista de Drept Penal” no. 2/2004, p. 15.

⁸ Florin Streteanu, *Treaty of criminal law. General Part. Vol.I*, C.H.Beck Publishing House, Bucharest, 2008, p. 245.

⁹ Vintilă Dongoroz and collaborators, *Theoretical explanations of the Romanian Criminal Procedure Code*, vol. I, 2nd Edition, All Beck Publishing House, Bucharest, 2003, p. 8.

conduct in accordance with the rule”¹⁰. This chargeability involves ”the possibility to claim the subject to comply with the standard precept”¹¹.

As far as we are concerned, we consider that imputability should be reported to the intellectual factor, as well as to the volitional factor, the perpetrator having in mind the representation of his actions or inactions, the outcome thereof and the will to commit the act.

7. Conclusions

It is obvious that social relations were created by the individuals, around and related to them, in respect of the rights and interests of the person and the protection of the universality of goods, their protection being not only necessary but also sufficient. It comes much easier and worthwhile to protect specific social values, as legal object, than abstract notions. The creative legislator of the New Criminal Code provide protection through a democratic system, in which the person, its rights and interests and its assets are the purpose of criminal law.

The legal classification of an act as an offense is the result of the expertise and of inurement to apply the criminal law, to identify in the state of affairs based on the evidence the essential circumstances corresponding to the traits of the legal content of a crime.

In conclusion, this legal classification is a rigorous process of implementing several specific operations whereby the act receives the pattern of criminal law and where the real state of affairs identifies with all the criminal provisions applicable to the case.

References

[1] Tracy B. Strong, J.J.Rousseau - The politics of the Ordinary, Rowman & Littlefield Publishers, Inc., 2002, United States of America, p. 88-89.

[2] Constantin Mitache, Cristian Mitache, Romanian Criminal Law. General Part, „Universul Juridic” Publishing House, Bucharest, 2010, p. 104.

[3] Vintilă Dongroz and colaborators, Theoretical explanations of the Criminal Procedure Code, The Romanian Academy Publishing House, vol. V, 3rd Edition, Bucharest, 2003, p. 54.

[4] George Antoniu, Justificative causes in the project of the new Criminal Code, in ”Revista de Drept Penal” no. 2/2004, p. 15.

[5] Florin Streteanu, Treaty of criminal law. General Part. Vol.I, C.H.Beck Publishing House, Bucharest, 2008, p. 245.

[6] Vintilă Dongoroz and colaborators, Theoretical explanations of the Romanian Criminal Procedure Code, vol. I, 2nd Edition, All Beck Publishing House, Bucharest, 2003, p. 8.

[7] Florin Streteanu, Criminal Law. General Part, Rosetti Publishing House, Bucharest, 2003, p. 487.

[8] Nasty Marian Vlădoiu, Criminal Law Course. Special Part, Hamangiu Publishing House, Bucharest, 2013.

¹⁰ Florin Streteanu, *Criminal Law. General Part*, Rosetti Publishing House, Bucharest, 2003, p. 487.

¹¹ *Ibidem*.