

SOME OBSERVATIONS ON THE ESSENTIAL CHARACTERISTICS OF THE OFFENSE IN THE NEW ROMANIAN CRIMINAL CODE

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ABSTRACT: *The authors examine the issues raised by the key characteristic of the offense according to the new Romanian Criminal Code in relation to the Criminal Code in force, pointing out some observations on those features of the offense in the new Criminal Code.*

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The new Criminal Code adopted by Law 286/2009¹ by the Government assuming responsibility lies on the position of the necessity for a definition of the criminal offence among the provisions of the penal code, however adopting a formal definition of the criminal offence. In this way the new criminal code differs from the criminal code in force, which as we know contains a substantial definition (or semi-substantial) of the offense.

In the vision of the Romanian doctrine (Dongoroz, 2000), the offense is a segment of life, a human episodic event that occurred at some time and could occur again, which is assessed by the legislator in comparison with his own criteria as being a threat to social order, establishing its prevention, repetition by using constraint (i.e. penalty).

If we were to reduce the criminal offence to the most simple and schematic form of speech, we would say that criminal offence is a *clash* of wills: that of the offender and of the legislator, as well as the outcome of this collision, namely defeat (the crime) of the legislator's will.

The new definition is this way formulated, criminal offence is the deed provided by the criminal law, committed with guilt, unjustified and attributed to the person who committed it (Article 15 al.1.C.pen.). Designing, in this way, the essential characteristics

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of the criminal offense is a novelty in comparison with the new criminal code adopted by Law no. 301/2004², which defined the criminal offense as the offense under the criminal law, which presents danger to society and is committed to guilty.

As can be observed, the new definition abandons the notion that criminal offense is the deed that presents social danger, thus meeting the requirements of the doctrine to abjure the social danger as the essential characteristic of the criminal offense, which places it on the position of a formal conception on the definition of the criminal offence³. Also, in the new criminal code not only the element of social danger has been abjured, moreover, it was also dropped defining the purpose of criminal law. It was considered, rightfully, that the text that was given up does not include a specific regulation but is more a statement of principles, statement which is incomplete as it does not lists all the social values protected by criminal law against crime but only the most important, the others are covered under a comprehensive formula “*entire law order*”.⁴

Under this aspect the new definition is a step forward, so the Romanian criminal doctrine and other criminal doctrines which define in this manner the criminal offense (the criminal offense provided by the criminal law committed with guilt).

In this new vision, the first essential characteristic of the criminal offence is that the deed has to be referred to by the criminal law, priority fully deserved of this essential characteristic that we find in the Criminal Code in force, albeit in a different position than priority. Therefore it is confirmed, the idea expressed by Professor Vintila Dongoroz, as per which the rule “*creates*” the offense, it is the legal clothing of the deed, the legal frame that assignees to the specific deed the character provided by the criminal law; in it’s absence it is understood that there can be no infringement because there is no incrimination.

A certain ambiguity that however causes the first essential characteristic of the criminal offense (which is provided by the criminal law) is the meaning of the notion of ‘deed’ which was clarified in criminal doctrine.

It was argued correctly that to the extent that the law uses the notion of deed in a generic way, without specifying whether it is referring to a real deed or a deed depicted by the rule of criminality, we must admit that the deed provided by the criminal law can be only a real deed, because only such an act could relate to the incrimination standard in order to constitute an offense. The real deed is never identified with the deed described in the standard, but only compared to it, verifying whether the characteristics of the deed meet the characteristics described in the incriminating texts (Dongoroz, 2000).

The new definition of the criminal offense mentioned *guilt*, regarded as second essential characteristic of the criminal offense, systematized, as natural, following the characteristic regarding the deed provided by the criminal law; unlike current law which places guilt before the requirement of the deed being provided by criminal law.

The new systematization, which gives priority to the requirement that the deed be provided by the criminal law in reference to guilt has been convincingly justified by the criminal doctrine. It was reasoned that the judiciary in practice are firstly concerned with

² Published in the official Gazette no 575 dated 29th of June 2004

³ Consequently there have been dropped the text that defined the social danger of the crime or the notion of “offense does not have a criminal social danger” (18 and 181 C.p. in force)

⁴ Art. I of the penal code in force has proclamative character stating that the purpose of criminal law is to protect the Romanian state against crime.

the existence of an indictment rule providing the reported offence and only after this it is verified if the deed provided by criminal law was committed with guilt. On the other hand such a systematization takes into consideration that guilt represents a *posterius* (Antoniu, 2002), meaning the objective existence of deed provided by the criminal law, based on which the psychological position of the perpetrator would be analyzed.

The position of guilt among the essential characteristics of the criminal offence can cause some queries. Indeed, in principle, the provision of the deed in criminal law, i.e. typicality of the actual deed, might suggest the idea that this provision refers not only the objective elements of the criminal offence, but also to those subjective.

Indeed, there are many types of incrimination, which include data also referring to guilt (so for example, if the offence committed by negligence, the legal pattern provides compulsory fault, as constituent element of the crime content); Rarely the legal pattern includes intention as constituent feature; an example would be the collision offence (Art. 345 al. 2) where in the aggravated content of the offence appears the explicit reference to the perpetrator's intent).

This situation is explained by the fact that the vast majority of criminal offences are committed by a positive attitude (by action) operating the presumption derived from Art. 19. 2 that in such cases the offender's conduct is based on intent. Such an assumption derived from Art. 19 final al. of the existing law integrates, completes all the contents of offence committed by action, and such crimes can not be committed but intentionally. However, typicality (deed to be provided by the criminal law) listed as an essential characteristic, particularized by guilt, means that this requirement can only refer to the concordance of the objective elements of the offence with those of content.

In view of the Romanian criminal doctrine (Dongoroz, 2000), guilt is an element of the subjective nature of the offence and appears in the form of intent, exceeded intent (*praeterintentionia*) and guilt; at the same time it also represents an essential characteristic of the offence art. 16 al.2 C.p). We note as positive that in the definition of guilt of the new criminal code has been introduced the exceeded intent as a mixed form of guilt.

Therefore, the new regulation has not maintained the current art.19 al.3, as being capable either of inequity (can not be identically evaluated the deliberate inaction with the guilt one) or controversy (whether Art. 19 al.3 refers to improper omissions). Also positive is the renunciation of the treatment differentiation currently in place (art.19 al 3 C. pen) between crimes committed by action (committee) and those caused by inaction (omission).

As we know currently omission offenses could be committed either intentionally or negligently unless the law punishes only the deed intentionally committed (for example, when failure is accompanied by the words "*with bad faith*" or "*with knowledge*".) in the absence of these expression omission is sanctioned identical regardless if it was committed intentionally or negligently.

Such a solution has been rightfully criticized the doctrine emphasizing that between the two omission behaviors is a clear distinction of social danger which should be reflected in their different sanctions (e.g., one person notes that before his eyes a crime was committed, if he doesn't deliberately denounces the offence then his attitude will present a much greater degree of danger than if due to daily occupations the person fails to denounce the deed that he witnessed.

This differential evaluation between the two situations in terms of their social danger is avoided by the new criminal code which unifies the above facts providing that both the commission and the omission constitutes a criminal offense when committed intentionally, and negligently only when provided explicitly by the law .

The new criminal code introduces a new provision governing the state of the commission offense committed by omission. Such an addition to the new criminal code was not required by the law or criminal doctrine, the problem itself being solved in the criminal doctrine definitively and indisputably.

The doctrine states that a committed offense (when the offender does what the law prohibits) and may be committed by omission (e.g., mother who refuses to give her newborn child to eat not to survive, commits a deed that the law prohibits, killing a newborn child). Such a combination is known for a long time in the Romanian criminal doctrine in the sense that a committee may be achieved by omission as an oversight can be achieved by the commission but was never the object of regulatory Romanian legislation.

Besides these two essential characteristics (the requirement is that the deed be referred by the criminal law and committed with guilt), the new criminal code introduces among the essential characteristics of the offence, two new characteristics namely: “*unjustified*” character of the deed (i.e. lack of supporting causes) and also the “*imputable*” character of the crime. The notion of an unjustified in Romanian language has multiple meanings (unnecessarily severe, mild, unjustified in the sense of not having a reason, a ration, etc.) and not only that the cause lacks evidence. Paragraph 2 of the text remains unchanged under the new criminal code (the offense is the only basis for criminal liability). Referring to the unjustified nature of the deed we see that such an essential feature does not exist in the criminal law in force, although criminal doctrine revealed that it is possible that a concrete action to meet all the positive features listed by law, including the negative condition (to have none of the causes that can eliminate any of these characteristics) and with all this for deed not to be an offence but to be permitted by the criminal law.

Modern criminal doctrine has introduced in the evaluation as offence the concrete deed, a new reference reality that is objectionable in light of her character overall juridical character (supporting cases). As a result, a deed would constitute criminal offense under the criminal law if it is committed with guilt and as a whole, considered impermissible by law overall. This fact was not previously listed in addition to other key features of the offense because basically it is an *overall* characterization of the concrete deed. This, although accomplishes the essential features of an offense meaning it exists as deed with criminal relevance, was referred by the criminal law and the author acted with similar mental processes guilt, did not constitute, in light of this overall assessment, an offence, but an lawful act (allowed).As a result, the new penal code properly admitted that in the systematization of the offence matter, to exist besides listing the essential features of its positive and immediately thereafter, the negative requirement namely lack of supporting causes⁵. This way the offense could be properly defined both through positive

⁵ Supporting causes covered in the new Criminal Code in Articles 18, 22, are: General provisions (Article 18 Penal Code.) Self defence (art.19C.pen), state of emergency (article 20 Penal Code) exercise a right or fulfilling an obligation (Article 21 Penal Code) and concept of the injured person (Penal Code Article 22.).

characteristics (the deed to be referred by the criminal law and are committed with guilt) and by the absence of supporting reasons.

Departing from such a definition of the new Criminal Code introduced another essential feature that of *attributable* of the deed to the person who committed the crime, as the fourth essential feature of the concept of crime. In criminal doctrine has been emphasized the *equivocal* nature of the concept of attributable. This may carry the meaning of causal link (an act is attributable to X because it is the effect of his action) as it may have the sense of guilt (an act that is attributable to X because he committed the act with guilt).

In both cases the concept of attributable seems unnecessary since both causation and guilt link are implicitly or explicitly outlined by the contribution of other features. Relevant criminal deed involves at the same time an action and omission and thus follow their immediate connection between the external event and immediate aftermath, and guilt appears explicitly as a distinct concept in formulating the essential features of the offense.

Some authors use the term in the sense of criminal responsibility including fact and mental imputability; other authors (especially Italians) use this term in the sense of psycho-physical ability and teacher Dongoroz believes that imputability expresses physical and moral appearances of a deed of the author who committed an offense (to put on someone's account) (Dongoroz, 2000). Also, the professor distinguishes between the causes explicit and implicit non- imputability causes (Dongoroz, 2000).

The concept of accountability of a deed committed with guilt as a new essential feature of the offense is a tautology, because guilt has already been passed through the key features of the crime and therefore could not appear twice in the crime as key features. We would suggest the offense to be defined as a deed provided by the criminal law, without the occurrence of any of the evidence causes provided by law, and committed with guilt.

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