SOURCES OF CRIMINAL LAW IN THE CONTEXT OF THE DIGITAL SOCIETY

Aurelian Olimpiu SABĂU POP[*]

ABSTRACT: *In the legal doctrine, the term "source of law" has several meanings, distinguishing between material and formal sources, between domestic and foreign sources, between direct and indirect sources. In this matter, which is studied by "The General Theory of Law" discipline, we will only discuss a few particular aspects of criminal law.*
In criminal law, the normative acts issued by the legislatures are considered to be the formal and direct sources which, through their form and content, provide a clear and precise expression of the obligations of conduct specific to this branch of law.
The courts' case-law in the Romano-Germanic system is not legally imposed as a true source of law, but the reasons for a unitary case-law must ensure a uniform judgment of certain case categories, namely court case-law, such as a certain amount of the sanctions applied by any court in the country for similar offenses.
The judge gets the role of bridging the legislative shortcomings, the inconsistencies in the legislator's phrasing, not also the capacity to change the legal system or to establish new rules of law. The judge's contribution will not consist of completing or amending the legal framework, the very principle of separation of powers in state contradicts such a situation.
The digital society, provokes the legislators and the case-law systems, which one can adapt better?

KEY WORDS: *criminal law, doctrine, legislation, legal norms, case-law*
JEL Code: *K14*

1. CONCEPT

In the legal doctrine, the term "source of law" has several meanings, distinguishing between material and formal sources, between domestic and foreign sources, between direct and indirect sources. In this matter, which is studied by "The General Theory of Law" discipline, we will only discuss a few particular aspects of criminal law.

In criminal law, the normative acts issued by the legislatures are considered to be the formal and direct sources which, through their form and content, provide a clear and precise expression of the obligations of conduct specific to this branch of law (Bulai, 1997) (Oancea, 1994) (Luburici & Ceterchi, 1989).

[*] Associate Professor PhD., Faculty of Economics and Law, University of Medicine, Pharmacy, Science &Technology "George Emil Palade", Târgu Mureș, ROMANIA.

Similarly, the criminal provisions are encompassed by the provisions of the Constitution of Romania, as well by certain provisions of the international treaties and covenants to which our country is a party. This is why the Constitution, as well as the international treaties or covenants mentioned, are also sources of criminal law.

Defining the formal sources of criminal law it can be said to be those normative acts which, in their content, establish the offenses, the sanctions that can be applied, the conditions of the criminal liability, as well as the normative acts envisaging injunctions[1] in the process of lawmaking and enforcement of criminal law (Dobrinoiu, et al., 1996).

2. THE SPECIFIC NATURE OF THE SOURCES OF CRIMINAL LAW

In comparison to other branches of law, the sources of criminal law are more limited in number and, being precisely determined, offer the possibility of an exact delimitation and interpretation of the legal norms of criminal law.

In terms of form, the sources of criminal law can only be criminal laws in the sense of Art. 173 of the Criminal Code. This limitation of the sources of criminal law is explained by the particular character of the criminal legal norms, which establish a well-determined conduct, the non-compliance of which entails repressive sanctions by the courts of law (Oancea, 1999) (Zolyneak & Michinici, 1999). The legal and social implications resulting from the criminal rules require that they be elaborated, adopted and promulgated through a special procedure at the level of the legislative bodies (Ximena Moldovan, 2017).

At the same time, an important number of regulations are encountered in some non-criminal special laws that regulate social relationships in certain areas of activity.

3. THE SOURCES OF CRIMINAL LAW

3.1 The Constitution of Romania

A first source is represented by the fundamental law, which, through its norms, enshrines the essential values of our state, which are also protected by legal norms of criminal law, among which we mention: sovereignty, independence, the human person with his rights and freedoms, property, constitutional order. Of particular importance for criminal law are the constitutional provisions explicitly targeting the regulatory scope of the criminal law, namely: Art. 19 regulating the general framework of extradition and deportation, Art. 53 which provides for the possibility of restricting the exercise of certain rights or freedoms, Art. 23 defining the presumption of innocence, that is, until the judgment of the conviction is final the person is considered innocent (paragraph 9).

Title II, Chapters II and III of the Constitution are also of particular interest for the criminal law, enshrining the fundamental rights and freedoms and the fundamental duties. The rules of criminal law, based on the fundamental rights, freedoms and duties, must provide the necessary framework for these rights, freedoms and duties to be respected or fulfilled in fact.

[1] In this respect, see Law no. 24/2000 on legal technical regulations for the drafting of normative acts, republished (Official Gazette no. 777 of 25 August 2004)

3.2. International treaties and covenants

After their ratification, the international treaties and covenants are sources of criminal law in the field of crime prevention and fighting.

The criminal legal literature makes a distinction between the international treaties and covenants that become direct or indirect (mediated) sources of criminal law.

The first category includes treaties or covenants on international legal assistance (i.e. extradition covenants between certain states), legal acts which mainly state substantive criminal law procedures and rules.

In the second category we find the treaties and covenants embodying the commitments of the States Parties to domestically incriminate certain acts that violate the norms of social cohabitation. Thus, our country ratified the Geneva Convention on the abolition of slavery, suppressing the slave trade, slavery institutions and practices, adopting it on 06 September 1956. As a result of ratifying this Convention and others in the matter, the domestic law, namely Art. 190 of the Criminal Code, incriminated slavery. By Decree-Law no. 111/1990[2], our country adhered to the International Convention Against the Taking of Hostages, adopted in New York on 17 December 1979. Following the accession to this Convention, it was necessary to amend Art. 189 of the former Criminal Code which was criminalizing the unlawful deprivation of a person's liberty, this being done through the instrumentality of Decree-Law no. 112/1990 amending and supplementing Art. 189 of the previous Criminal Code[3]. The international covenants and treaties with implications in the scope of criminal law are many and we may also mention those related to: piracy, illegal drug trade, counterfeiting of currency or other securities, genocide, obstruction of air or sea traffic, prohibition of torture, etc.

The international treaties and covenants are an indirect source for the Romanian criminal law, materialized in the obligation incumbent upon the national legislature to criminalize certain human conduct provided, after the ratification of these international legal acts.

According to Art. 20 par. (2) of the Constitution, *when there are inconsistencies between the covenants and treaties on fundamental human rights to which Romania is a party to and the domestic laws, priority is given to the international regulations, unless the Constitution or the laws contain more favorable provisions*. As an exception, in this hypothesis the international covenant or treaty becomes a direct source.

3.3 Criminal laws as the main sources of criminal law

The main source of criminal law is represented by criminal laws, namely the organic laws governing the social relations that are formed between the state and individuals, in the sense of imposing a conduct of abstention from committing criminal activity and in order to regulate the criminal relations of conflict arising after the offenses were committed. In other words, most of the legal norms that form the content of criminal law as a branch of law are contained in these domestic normative acts generically known as criminal laws.

[2] Official Gazette no. 48 of 2 April 1990
[3] Ibidem

On the Romanian territory, the first criminal laws in an embryonic form were issued during the late feudalism. The domestic law introduced criminal provisions to stop the law of talion (lex talionis) (Cernea & Molcuș, 1995).

During the Turkish-Phanariot regime, the written laws that were passed (Pravilniceasca condică [legal code], Callimachi Code, Caragea Law Code) also included criminal provisions.

The criminal law that came closer to the modern sense was Criminaliceasca condică [criminal code], drafted between 1820-1826 in Moldavia and in 1851 in Wallachia, under the considerable influences of the law of the land, but also of the Austrian and French codes.

In the scope of criminal law, the Criminal Code is the most important source of criminal law, as it encompasses all the general criminal norms and most offenses criminalized by the legislator.

The first Criminal Code of Modern Romania was that drafted in 1864 during the rule of Alexandru Ioan Cuza; it was of French inspiration similar to the French inspired Civil Code.

In 1936, another Criminal Code was adopted, denominated The Penal Code of Carol II, which entered into force on 01 January 1937. This Penal Code was revised and republished in 1948 after numerous amendments and additions, in force until 01 January 1969.

The Criminal Code[4] adopted on 21 July 1968 in force from 1 January 1969 to 2014. The General Part contained rules of general principles relating to the purpose of criminal law and its application in space and time, the concept of offense and its collateral concepts, the concept of criminal liability and criminal sanctions. The Special Part of the Criminal Code grouped the most important categories of offenses into 10 titles, among which we mention: crimes against the national security, crimes against the person, patrimony, crimes against authority, forgery, crimes against peace and humanity, etc. The Criminal Code has undergone several amendments in view of the fundamental changes that the Romanian State had undergone throughout the validity period of the Criminal Code.

The New Criminal Code, currently in force since 01 February 2014, is divided into two parts: the General Part and the Special Part, classified by titles and chapters, taking over much of the special criminal legislation criminalizing offenses in the special part of the code.

The norms contained in the General Part apply both to the offenses provided by the Special Part of the Criminal Code and to the criminalization we encounter in some special laws containing criminal provisions.

The current Romanian Criminal Code includes concepts that are constant in law and which, regardless of the socio-political changes that may occur in society, preserve their actuality and enforceability. As an example, in this regard we may highlight most of the provisions of the General Part, as well as some offenses such as: treason, espionage, attempt, murder, injury to corporal integrity, rape, theft, robbery, piracy, property damage, embezzlement, assault, abuse of power in service, bribery, false testimony,

[4] Republished (Official Gazette no. 65 of 16 April 1997), recently amended by: Law no. 160/2005, Law no. 247/2005, and Law no. 278/2006

escape, currency forgery or document forgery, non-compliance with the provisions on import-export operations, non-compliance with the arms and ammunition regime, and others.

The structural changes that occurred in the Romanian society after the events of December 1989, the adoption of a new Constitution, the transition to the market economy, but most of all the strong recrudescence of the high crime rate phenomenon emphasized the need for a new criminal code. This legislative moment of utmost importance must be prepared with full attention and care by those working in the field of criminal law, but especially by the theorists who serve this branch of law.

In addition to the Criminal Code which is the main source of criminal law, there are other special criminal laws with a narrower scope, such as Law 302/2004 on International Judicial Cooperation in Criminal Matters[5] or Law no. 254/2013 on the execution of sentences and measures ordered by judicial bodies in criminal proceedings[6]. This category of laws also includes acts granting amnesty and pardon. Specific to these laws is that they have a narrower scope as they concern a particular concept or several concepts of criminal law. On the other hand, it is worth noting that the provisions contained in these laws are all of a criminal nature. These provisions complement the general regulatory framework or introduce certain waivers from this framework, which forms the common law in the field. In the specialty doctrine, these laws are also called complementary laws.

The criminal provisions of these laws outside the criminal scope are in line with the provisions of the Special Part of the Criminal Code and together constitute the Special Part of Criminal Law (Bulai, 1997) (Oancea, 1997).

3.4 National case-law as a source of criminal law

Generally speaking, in the specialty literature it is considered that case-law is not a source of law.

There were opinions (Diamant, 2002) according to which case-law may be a source of law. The reasoning for this argument started with the possibility of invoking the exception of unconstitutionality of a law or ordinance, or of a provision of a law or ordinance in force, related to the judgment of a case.

3.4.1 CCR case-law

According to Art. 29 of Law no. 47/1992 on the organization and functioning of the Constitutional Court[7], *The Constitutional Court decides on exceptions brought to the Courts of law as to the unconstitutionality of laws and ordinance, or of a provision of a law or ordinance in force, which relates to the settlement of the case, at any stage of the dispute and whatever its subject. An exception may be invoked at the request of one of the parties or ex officio by the court of law. The exception may also be invoked by the public prosecutor before the court in the cases to which it participates. The intimation of the Constitutional Court is ruled by the court of law before which the exception of unconstitutionality has brought, by means of a resolution stating the parties' points of*

[5] Official Gazette no. 594 of 1 July 2004, amended by the Law no. 224/2006, published in the Official Gazette no. 534 of 21 June 2006

[6] Official Gazette no. 627 of 20 July 2006.

[7] Republished (Official Gazette no. 643 of 16 July 2004)

view, the court's opinion on the exception, and shall be accompanied by the evidence provided by the parties. During the settlement of the objection of unconstitutionality, the case is adjourned.

The decision to ascertain the unconstitutionality of a law or ordinance or of a provision of a law or ordinance in force is final and binding.

The provisions of the laws and ordinances in force found to be unconstitutional shall cease to have legal effects within 45 days of publication of the Constitutional Court's decision if, within this interval, the Parliament or the Government, as the case may be, does not amend and rectify the unconstitutional provisions. During this period, the provisions found to be unconstitutional are legally suspended.

As already stated, according to Art. 31 paragraph (1), *the decision to ascertain the unconstitutionality of a law or ordinance or of a provision of a law or ordinance in force is final and binding*. It is ascertained that the text above is a solid argument that case-law is a source of law.

3.4.2 HCCJ decisions on RILs (reviews for uniform interpretation of law) and on solving legal issues

The decisions of the High Court of Cassation and Justice - the Joint Chambers - in solving reviews for uniform interpretation of law also represent sources of criminal law.

In such cases, the resolutions are solely ruled in the interest of the law, having no effect on the judgments under examination or on the parties in those proceedings. However, the resolution of the legal issues in the matter is binding for courts when they will face similar situations. If a particular lawsuit is in progress and its subject is one of those called for review for uniform interpretation of the law, the final decision will address the resolution of the review for uniform interpretation of the law.

The decisions of the High Court of Cassation and Justice in the resolution of certain questions of law under the conditions of Art. 477 of the Criminal Procedure Code also represent sources of criminal law.

The decisions ruled by the High Court of Cassation and Justice in resolving reviews for uniform interpretation of the law or questions of law in criminal matters are binding on the courts of law.

3.4.3 The decisions of other common law courts

More delicate is the aspect of court decisions that are not ruled in the remedies at law mentioned above.

The Anglo-Saxon system grants courts' case-law the main role of lawmaking and the judicial precedent system requires judges to be bound to comply with their own previous decisions. In settling the cases brought to the court, during the first stage the courts are obliged to identify other resolutions previously ruled and if the award is favorable they will apply it in the case pending. The judicial precedent only refers to the rule of law applicable in the present case, not to the entire court decision referred to (Popescu & Manea, 2012).

The courts' case-law in the Romano-Germanic system is not legally imposed as a true source of law, but the reasons for a unitary case-law must ensure a uniform judgment of certain case categories, namely court case-law, such as a certain amount of the sanctions applied by any court in the country for similar offenses.

The judge gets the role of bridging the legislative shortcomings, the inconsistencies in the legislator's phrasing, not also the capacity to change the legal system or to establish

new rules of law. The judge's contribution will not consist of completing or amending the legal framework, the very principle of separation of powers in state contradicts such a situation.

However, in certain specific cases, in terms of the sanction amount, the rationale for the uniformity of judicial case-law can only be achieved if we accept case-law as a source of law, optional and not mandatory. A situation where the judge is not bound to follow a rule of law established by another court, but may consider it when awarding a specific punishment to an offense under trial. Given that the punishments provided by the legislator fall within special minimum and maximum limits, it is up to the court to ascertain and asses it's actual amount; and this process by which a specific punishment is awarded must also pass through the filter of the already existing case-law - otherwise, different punishments could be awarded to similar cases, a situation that we believe would violate the desideratum of a unitary case-law or of equality before the law (Moldovan, 2017).

3.4.4. The case-law of the European Court of Human Rights and the Court of Justice of the EU

The judgments of the European Court of Human Rights have the status of sources of law according to the provisions of Art. 20 par. 1 of the Constitution, the constitutional provisions regarding citizens' rights and freedoms shall be interpreted and applied in accordance with the Universal Declaration of Human Rights and Freedoms and the other covenants and treaties Romania is a party to. The decisions of this supranational court ensure the protection of human rights by awarding binding rulings to national authorities and courts of law.

The case-law of the CJEU is among the sources of Union law, developing the general principles of Community law, creatively creating judicial legislation based on the principle of the judicial precedent (Popescu & Manea, 2012).

3.5 Emergency ordinances as sources of criminal law

In respect of the regulation of criminal law by way of emergency ordinances (Pașca, 1999) not only reality makes us face such a situation, but also opinions expressed in this regard in the legal literature, according to which emergency ordinances may be sources of criminal law.

Emergency ordinances may be sources of criminal law, but the use of this lawmaking procedure is justified only in genuinely exceptional circumstances which justify an emergency intervention by the executive.

In order to have the power of a law, emergency ordinances must be approved by organic laws. The practice of approving emergency ordinances after several sessions since the ordinance was issued, some even after periods of more than one year, may have the most undesirable implications in the field of criminal legal relations. The Parliament may approve the emergency ordinance, modify it, or reject it.

3.6 Considerations as to whether or not customs are sources of criminal law

A custom implies the uniform, constant and general observance of unwritten practices in a certain social or territorial environment over a period of time, having the conviction of its legal valences.

Thus, customs are defined by a material element consisting of a series of repeated, lasting facts, and a legal element represented by the certainty of its binding nature.

Under the current circumstances, it is impossible to consider customs as sources of criminal law, especially because there is no criminalizing custom, the creation of new offenses or the determination of punishments being the exclusive attribute of the legislator.

However, the custom may intervene as a source of criminal law in the cases that exclude the offense from the scope of criminal offenses in interpretation of the criminal laws.

a) Thus, as a result of the existence of a custom, perforation of the ear lobe in female toddlers to be able to wear earrings or the physical punishments for disciplining children by their parents - even though their bodily integrity is damaged - will not constitute offenses. Nor the excessive use of the car horn by persons who are returning from a football match or are participating in the celebration of a marriage shall there be considered to be offenses against public order and tranquility or against good moral character.

b) When it comes to interpreting expressions such as: "good moral character", "common decency", "obscene act", etc., we resort to custom, as the meaning and significance of these phrases depend on the social concepts and practices existing at a given time (Streteanu, 2003). In example, an act that was obscene 50 years ago can now be approved or at least tolerated (the presence of a half-clothed woman in a particular leaflet).

REFERENCES

Bulai, C., 1997. *Manual of criminal law, General part.* Bucureşti: All Publishing House, p.52.

Bulai, C., 1997. *Criminal law. General part.*. Bucureşti: All Publishing house, p.54.

Cernea, E. & Molcuş, E., 1995. *History of the Romanian Law.* Bucuresti: Actamis Publishing House.

Diamant, B., 2002. Arguments in Support of the Theory that Case-Law is a Source of Law. *Revista Dreptul*, Issue 4, p. 107.

Dobrinoiu, V. et al., 1996. *Criminal law. General part.* Bucureşti: Atlas Publishing house, p.27.

Luburici, M. & Ceterchi, I., 1989. *The General Theory of Law and State.* Bucuresti: s.n.

Moldovan X., L. Chiriac., 2017. No one shall be trield twice for the same offence. Ne bis in idem. *Revista Curentul Juridic*, vol.69(nr.2), pp.108-115.

Moldovan, X., 2017. Release of seizure ordered in the criminal investigation stage, in the case of romanian criminal proceedings peremptory settled. *Curentul Juridic*, vol.69(nr.2), p.116-120.

Oancea, I., 1994. *Criminal law. General part.* Bucuresti: All Publishing House, p. 44.

Oancea, I., 1997. *Criminal law. General part.* Bucureşti: Publishing house All., p. 47.

Oancea, I., 1999. *Criminal law, General part.* Iaşi: Publishing house Chemarea, p.46.

Paşca, V., 1999. Emergency Ordinance, Source of Criminal Law. *R.D.P.*, Issue 2, p. 56.

Popescu, S. & Manea, L., 2012. The Case-Law of the Court of Justice of the European Union between the Anglo-Saxon and Romano-Germanic law systems.. *Legal Value, Buletin de informare legislativă (Law Bulletin)*, Issue 2, p. 6.

Streteanu, F., 2003. *Criminal Law. General Part.* Bucharest: Rosetti Publishing House.

Zolyneak, M. & Michinici, M., 1999. *Criminal law, General part.* Iași: Publishing House Chemarea, p.53.