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THE OFFENCE - CONSTITUTIONAL CHALLENGES OR CONTROVERSIES

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Abstract

The legal assessment 11 years after the entry into force of the new Criminal Code allows us to argue that the current regulation has posed important challenges for legal theorists and practitioners, with some regulations being declared unconstitutional, others being modified and supplemented to meet the demands imposed by the new realities.

The outlined evolution of Romanian criminal law in the new Criminal Code from the initial moment of its adoption until this date creates the impression of a slightly cracked base for a lasting reform, even if the legislator's intention was to abandon the traditional influence and to follow a normal and natural path of assimilation of European criminal law, in order to actively contribute to the homogenization of the criminal justice system at the level of the European Union.

Within the framework of this theoretical approach that we have proposed, we intend to make a brief analysis of the concept of offence, as a fundamental institution of criminal law, which polarizes all the regulations in criminal law.

The current Criminal Code defines the concept of offence differently from the previous regulation, abandoning social danger as an essential feature of the offence. The new approach transposed into the provisions of art.15 of the Criminal Code, which we wish to develop, including from the perspective of comparative criminal law, is not immune to criticism, as in judicial practice situations have been identified in which the unconstitutionality of the legal text was invoked, since the content of the typical elements of a offence does not refer to the social danger of the committed act. In relation to these aspects, we propose to demonstrate that the current regulation complies with constitutional and European requirements, even if, from the perspective of the accuracy of the norm, we have objections.

Key words: *offence, general features of the offence, ultimo ratio, principle of legality of incrimination and punishment, constitutionality.*

INTRODUCTION

The offence represents a fundamental institution of criminal law and is regulated in the current Criminal Code [1], in Title II, Chapter I "General Provisions", the legislator intending to provide a formal definition of the offense, unlike the old regulation which had adopted a substantial definition.

The comparative analysis of the provisions of art.15 of the current Criminal Code and art.17 of the 1968 Criminal Code regarding the concept of offense allows us to highlight that both general criminal laws define the essential features of the offense.

A offence is nothing more than a concrete human act that endangers one or more social values protected by the criminal norm, for which the perpetrator will be subject to a criminal sanction. The concrete act committed in reality is a offence only to the extent that the perpetrator adopted a conduct prohibited by the criminal law or remained passive, although he had the obligation to act, an act that produces a certain consequence not permitted by the state legal order and which can be attributed to the natural or legal person who committed it, it being necessary for there to be a correspondence between the concrete act committed by the perpetrator and the objective and subjective elements established by the legislator in the abstract model provided for by the incrimination norm.

Within our theoretical approach, we will analyze the evolution of the regulation regarding the concept of offence, the legal definition and the essential features of the offence, trying to demonstrate that the elimination of social danger as an essential feature of the offence does not violate the provisions of art. 21 of the Constitution and the ultimo ratio rule, since for offences that present a low degree of social danger and that do not justify, in relation to the concrete elements of the case, the continuation of the criminal trial, the prosecutor may waive the exercise of criminal action, in relation to the provisions of art. 7 paragraph 2 of the Criminal Procedure Code combined with art. 318 of the Criminal Procedure Code, and the court may order the waiver of the application of the penalty, according to art. 80 of the Criminal Procedure Code.

[1] Law no. 286/2009 on the Criminal Code, publ. in the Official Gazette no. 510/24.07.2009, in force since 1.02.2014, successively amended, the last by Law no. 269/2024 amending and supplementing Law no. 286/2009 on the Criminal Code, publ. in the Official Gazette no. 1089/31.10.2024.

I. BRIEF INTRODUCTORY CONSIDERATIONS REGARDING LEGISLATIVE DEVELOPMENTS

The fundamental institutions of criminal law - the general part are: offence (art.15-52 Criminal Code.), criminal liability (art.113-171 Criminal Code and criminal sanctions (art.53-112/1 Criminal Code).

Offence with its definition, essential features, unity and plurality of offences and plurality of criminals polarize the whole of the regulations in the criminal law, and the coherence and accuracy of the norm are strictly required for the understanding and correct application of the provisions of the general and special parts of the Criminal Code.

Defining the notion of offence and its essential features, directly and completely, are requirements imposed by the principle of the legality of incrimination.

A general definition of the concept of offence is not found in the Criminal Codes adopted until the first half of the 20th century, motivated by the fact that the task of defining it falls to the doctrine.

In Romania, the Criminal Code of 1864, with a strong French influence (*C.Mitrache, Cr.Mitrache, 2023, p.31*), but also the one of 1936, of French and Italian inspiration (*J. Rinceanu, 2010, p.15*), approached a formal conception of the notion of offence, art. 1 referring to "an act incriminated by law and sanctioned by punishment", and through the amendment made by Decree no. 187/1948[2], the offence was defined indirectly, in relation to specifying the purpose of the criminal law, without however including all of its essential features in its content (*T.Vasiliu and al., 1972, p.84*).

Another vision of the legislator is found in the 1968 Criminal Code, in art. 17, giving a substantial definition of the notion of offence, which is "an act that poses a social danger, committed with guilt and provided for by the criminal law". Therefore, the aforementioned legal text provided that only an act incriminated by the criminal law that poses a danger to social values protected by law, a danger that cannot be removed by other means than by applying a criminal sanction, constitutes a offence.

It is necessary to mention that the offence was defined in the same manner in art. 7 of the Criminal Code of the USSR, art. 3 of the Bulgarian and Hungarian Criminal Codes, art. 4 of the Czechoslovak Criminal Code, art. 14 of the Greek Criminal Code.

[2] Decree no. 187/1948 on the repeal of Law no. 831 of 16.11.1942 for the suspension of the trial and execution of the sentence pronounced against some criminals who are part of the elements of the army and of Law no. 677 of 14.10.1943 for the application of the provisions of Law no. 831/1942 to some categories of criminals, publ. in the Official Gazette, Part I, no. 182/9.08.1948, in force from 9.08.1948 to 13.01.1974, repealed by Decree no. 691/1973.

The French Criminal Code of 1994 provides, in art. 111-1, that offences are classified, "depending on their seriousness, into offences, misdemeanors and contraventions."

The Romanian legislator, through the new regulation, has reconsidered the institution of the offence, in art.15 paragraph 1 of the Criminal Code, providing for a formal conception of the offence, by including its essential features and renouncing the inclusion of the feature of social danger in its content.

The institution of the offence, as developed in the Criminal Code in force, is based on definitions given to this notion in the European Criminal Codes and revives the traditional conception of the interwar Romanian criminal law in this segment.

I. 1. COMPARATIVE LAW ASPECTS

European criminal codes contain formal definitions of offence, as a fundamental institution of criminal law.

Although we do not propose an exhaustive analysis from the perspective of comparative law, we will give some references in the sense of what was stated previously.

The Italian criminal code, in Title IV regarding the perpetrator and the victim of the offence, does not expressly clarify the notion of criminal act, in legal doctrine emphasizing that "the action with criminal relevance must appear as an effective work of a determined subject, to belong to the subject" (*G.Fiandaca, E.Musco, 1995, p.187*). Art.85 of the Italian Criminal Code, provides that "no one can be punished if he did not commit an act with conscience and will", in the sphere of conscious and willful acts being included "both those that have their origin in a conscious impulse, and those that derive from an inertia of the will and which could have been prevented" (*G.Fiandaca, E.Musco, 1995, p.187*).

European criminal codes contain formal definitions of offence, as a fundamental institution of criminal law.

The German Criminal Code, in Title II, General Part, defines the offence of commission and omission (section 13) and regulates the liability of the person acting through another person (section 14), the guilt (sections 15, 18) etc., without containing an explicit provision regarding the meaning of the action or inaction with criminal relevance, which would define the action as an act of the subject's free will (*G.Antoniu, 2000, p. 17*). In German legal doctrine, it was stated that the offence requires that the act be willed, therefore it must belong to the subject and be oriented in a certain direction, based on a mental process that imprints a certain finality, and the intention was defined as the knowledge and will to achieve the objective features of the incriminating norms (*H.H.Jescheck, 1988, p.201-202, 264 , apud G.Antoniu, 2000, p.18*). At the same time, in German criminal law it is argued that the existence of social danger is the core of the offence.

The Spanish Criminal Code does not define the concept of offence, but regulates in the Title "Offence" the action and inaction committed intentionally and through negligence (art.10-12), classifies and defines offences into serious, less serious and minor ones (art.13), etc., using the concept of criminal responsibility regarding the invincible error of fact or law.

With an overwhelming pragmatism, American legislation and legal doctrine have focused on identifying the necessary solutions to resolve the problems that have arisen in judicial practice regarding offence, especially on identifying the realities that can constitute convincing defenses, capable of removing the accusation that a person has committed a specific offence, arguing that meeting the content of the offence in the concrete act is only an appearance[3]. Article 2.01 of Chapter II of the American Model Criminal Code provides that "a person cannot be held criminally liable unless he committed a voluntary act or a voluntary omission to perform an act that he was capable of performing."

We note that, in the legislation of the aforementioned states, the institution of the offense is inextricably linked to that of criminal liability, and the latter with the institution of criminal sanctions, which can only be applied if an offense has been committed and the perpetrator is criminally liable.

Moreover, from this perspective, the situation is similar in the national regulation, where the provisions of art.15 paragraph 2 of the Criminal Code provide that "the offense is the only basis for criminal liability", an aspect that derives directly from the principles of the legality of incrimination and punishment provided for in art.1 and 2 of the Criminal Code.

I. 2. ANALYSIS OF THE TEXT OF ART. 15 PARAGRAPH 1 OF THE CRIMINAL CODE

According to the provisions of art. 15 paragraph 1 of the Criminal Code, "A offence is an act provided for by criminal law, committed with guilt, unjustified and attributable to the person who committed it."

As we have previously highlighted, the old legislator, but also the current one, define the notion of offence in the Criminal Code - general part, specifying that the current definition allows the introduction of a clear demarcation line between offences and misdemeanors, in order to comply with the standards imposed by the principle of legality provided for in art. 1 and 2 of the Criminal Code. The Constitutional Court, by decision no. 405/2016[4], ruled that "the criminalization of an act as a offence must intervene as a last resort in the protection of social values", and the task of applying the *ultimo ratio* principle belongs not only to the legislator, but also to the judicial body called upon to

[3] Model Penal Code, The American Law Institute, Philadelphia, P.A1985, p.8 et sequens. *apud G.Antoniu, op.cit*., p.21.
[4] Publ. in the Official Gazette, no.517/8.07.2016.

apply the law[5], in order to comply with the principle of legality of criminalization and punishment, of the provisions of art. 23 paragraph 12 of the Constitution of Romania. At the same time, the constitutional court emphasized that the mere existence of an active criminal norm is not sufficient, its quality is also relevant, since the law must provide in an accessible, predictable, unitary and uniform manner the content of the offense and the conditions under which criminal liability[6] arises, and the doctrine has embraced this thesis (*S. Franguloiu, N.E. Hegheș, 2024, pp. 101-120*).

The concept of offence in the current general criminal law is the expression of the principle of legality of incrimination (*nullum offencen sine lege*) and the principle of legality of criminal sanctions (*nulla poena sine lege*). Regarding these principles, by decision no. 4/2015, the High Court of Cassation and Justice - Panel for resolving legal issues[7], emphasized that no act can be considered a offence if there is no law that provides for this and no criminal sanction can be applied if it is not provided for by the criminal law for the respective act.

Returning to the definition given in the Criminal Code to the notion of offence, it is necessary to emphasize that it highlights the essential and common features of all offences - typicality, illegality, imputability and guilt.

The act committed by the perpetrator through an action or inaction must be provided for by the criminal law, respectively, to be criminally illicit. This essential feature of the offense is the expression of the principle of legality of incrimination and presupposes the existence of the incrimination norm, the commission of the concrete act and the existence of a correspondence between the concrete act committed by the perpetrator with the form of guilt provided for by the law and the elements of an objective and subjective nature[8] established in the abstract model provided for by the incrimination norm[9]. The act by which a legal value protected by the criminal norm is affected is a typical act, between it and the

[5] Oradea Court of Appeal - Criminal and Minors Section, criminal decision no. 25/CP/2020 of 30.09.2020, pronounced in file no. 292/35/2020, unpublished, in the considerations of which, starting from the fact that the task of applying the *ultimo ratio* principle rests, on the one hand, with the legislator, and, on the other hand, with the judicial body called upon to apply the law, the preliminary chamber judge states that, correctly, by the contested dismissal order, it was found that in the case the act complained of by the complaint filed by the petitioner does not meet, from an objective and subjective point of view, the constitutive elements of the offence of abuse of office, provided for by art. 297 paragraph 1 of the Penal Code, since in order to be in the presence of the offence of abuse of office there must be a duty of service that has been violated, however, this duty of service cannot be confused with the result of its performance, which depends on the diligence of the official in exercising this duty.

[6] RCC, decision no. 650/2018, publ. in the Official Gazette, no.97/7.02.2019.

[7] Publ. in the Official Gazette, Part I, no. 244/9.04.2015.

[8] RCC, decision no. 631/2014, publ. in the Official Gazette, no. 77/21.01.2015.

[9] HCCJ- Panel for resolving certain legal issues, decision no. 10/2015, publ. in the Official Gazette, Part I, no. 458/25.06.2015.

injured legal value it is necessary to have an indissoluble link, *per a contrario* it would end up as typicality consecrating disobedience to the law and, implicitly, to recognize apparent typicality (*G.Fiandaca, E.Musco, 1995, p.155*). Even though the legislator does not use the notion of typicality in the content of the norm provided for by art.15 paragraph 1 of the Criminal Code, but the phrase "the act provided for by the criminal law", the legal doctrine unanimously accepts the expression of typicality, which reveals the objective concordance between the concrete act and the legal model provided for by the incrimination norm. Typicality highlights the high social danger of the act described in the criminal norm, but does not always lead to a punishment, since criminal liability is subjective, which is why it is necessary for the act to be committed with the form of guilt provided for by the law.

The ambiguities regarding this essential feature of the offence - the act must be provided for by the criminal law - have been clarified in legal doctrine, correctly opining that, when the law uses the notion of act generically, we must speak of a concrete act, since only this can relate to the incrimination norm and can constitute a offence (*V.Dongoroz, 2012, p. 124*). In this sense, we agree with the opinion (*G.Antoniu, 1997, p.18*) expressed that, in the content of the provisions of art.15 paragraph 1 of the Criminal Code, it should have been mentioned that the offence is the concrete act provided for by the criminal law or the typical concrete act, committed with guilt, unjustified and attributable to the person who committed it, in relation to the previously highlighted aspects and the need to ensure the rigor of the regulation.

The second autonomous feature of the offence, illegality, refers to the unjustified nature of the act provided for by the criminal law, namely that the act is in conflict or is not permitted by the legal order. In addition to typicality, criminal wrongdoing also implies the lack of a justifiable cause. Consequently, we are in the presence of a offence if “the act is in accordance with the legal typical and if it is assessed as affecting values protected by the criminal law, and only if there is no superior social value in the name of which the commission of the respective act is permitted” (*G.Antoniu, 1997, p.18*). In the hypothesis in which we are talking about a typical act, it must be verified whether it is not permitted by a legal norm, unjustified, since if it is justified, by the existence of a justifiable cause from those provided for in art.18-22 of the Criminal Code, it does not constitute criminal wrongdoing. The analysis of illegality involves proving that the specific act complies with the incriminating norm and that there is no justifiable cause that prevents the initiation and exercise of criminal action.

It is important to emphasize that in the 1968 Criminal Code, illegality was not an essential feature of the offence, yet, correctly, it was emphasized in the doctrine that the notion seemed to result from the very way in which the concept of social danger was used, "which only apparently replaced that of illegality, since

the notion of social danger completed and explained that of typicality"(*G.Antoniu, 1997, p.18*).

The third essential feature of the offence is imputability, which is presumed from the existence of typicality or illegality and assumes that the specific act provided for by the criminal law can be imputable to the person who committed it. The notion of imputability has been defined as the attribute of the act to be objectively and subjectively attributed to the author, so we are talking about two components - objective imputability and subjective imputability -, the first emphasizing the causal link between the acts and the author, and the second, the psychophysical capacity of the author of the act to understand and desire the criminal act. The doctrine has shown that "the notion of imputation of an act committed with guilt as an essential feature of the offence appears as a tautology, since guilt is an essential feature of the offence and, consequently, cannot appear twice as an essential feature of the offence"(*I. Ifrim, 2010, p.75*). In the opinion of other authors, guilt, despite the fact that it is inserted in the content of art.15 paragraph 1 of the Criminal Code as an essential feature of the offence, "does not in fact constitute a distinct essential feature, but an element of subjective nature within the scope of the incrimination norm (*M.Udroiu, 2014, p.38*). We cannot agree with these opinions, because it is necessary to establish a clear line of demarcation between subjective imputability and guilt: both are essential features of the offence, but guilt refers to the existence of the subjective element in the constitutive content of the offence and we find it in the form of intention, fault and premeditation (art.16 paragraphs 2-5 of the Criminal Code). Additionally, we argue that the provisions of art.15 paragraph 1 sentence II of the Criminal Code. must be corroborated with the provisions of art. 16 paragraph 5 of the Penal Code, according to which "the act consisting of an action or inaction constitutes a offence when committed intentionally. The act committed through negligence constitutes a offence only when the law expressly provides for it".

The fourth essential feature of the offence refers to guilt. This reaffirms the principle of subjective criminal liability (*nulla poena sine culpa*), since the foundation of criminal liability is guilt. Although we have proposed to analyze only the provisions relating to the concept of offence, provided for in art. 15 of the Criminal Code, in order to explain this feature of the offence we will also refer to the provisions of art. 16 paragraph 1 of the Criminal Code, according to which "the act constitutes a offence only if it was committed with the form of guilt required by the criminal law", which demonstrates that guilt is an autonomous feature of the offence. Since in the previous paragraph we have shown which are the forms of guilt with which the act must be committed in order to constitute a offence and which are the rules for determining the form of guilt from the content of the incrimination norm (art. 16 paragraphs 3-5 and 6), we will not return with developments on this segment.

II. OBSERVATIONS ON OFFENCE. CONSTITUTIONAL CHALLENGES OR CONTROVERSIES

In judicial practice, the unconstitutionality of the provisions of art.15 paragraph 1 of the Criminal Code[10] has been invoked, arguing that the removal by definition of social danger as the essential feature for an act to be considered a offence violates the right to a fair trial and the principle of proportionality, provided for in art.21 paragraph 3 and art.53 of the Romanian Constitution. It has been shown that according to the current definition of the offence, if in practice there has been a very small infringement of the social values protected by the criminal law, we are still talking about a offence, which implies important consequences for the defendant, which would not have happened in relation to the provisions of art.17 of the Criminal Code from 1968, according to which, the defining element of the offence was the existence of social danger, as an essential feature of the offence, and in the event that an act did not present the degree of social danger of a offence, the provisions of art. 18/1 of the 1968 Penal Code with the marginal name "act that does not present the degree of social danger of a offence", allowed the application of an administrative sanction.

To identify these aspects, first of all, we must refer to the fact that any legal definition that specifies the content of a notion is a legitimate means of legislative technique. The Constitutional Court, by decision no. 650/2018, emphasized that the norms of legislative technique impose mandatory criteria for the adoption of normative acts, in order to meet the requirements imposed by the principle of security of legal relations regarding clarity and accessibility, which is why, in our opinion, a balance must be found between the law and its interpretation, between the principle of legality and the need for clarity and accessibility of legal norms.

In the old regulation, a substantial definition of the notion of offence was introduced in order to more easily differentiate the field of criminal law from the sphere of contravention, civil law offenses and disciplinary law offenses.

According to art.17 of the 1968 Criminal Code, a offence was defined as an act that poses a social danger, committed with guilt provided for by the criminal law. In this definition, we distinguish three essential characteristic features of a offence - the act must pose a social danger, the act must be committed with guilt, the act must be provided for by the criminal law. In art. 18 of the 1968 Criminal Code, the act presenting a social danger was defined as the action or inaction by which a value mentioned in art. 1 of the Criminal Code is violated, and art. 18/1 of the 1968 Criminal Code stipulated that the act provided for by the criminal law did not constitute a offence if, by the minimal violation brought to one of the values protected by the law and by its concrete content,

[10] Cluj Court of Appeal, file no. 2259/117/2019/a3, decision of 22.02.2024 by which the Constitutional Court was notified with the exception of unconstitutionality, among others, of the provisions of art. 15 paragraph 1 of the Criminal Code.

being clearly lacking in importance, it did not present the degree of social danger of a offence.

Regarding the social danger of the act as an autonomous feature of the notion of offence, it is necessary to specify that this concept is characteristic of the former socialist criminal law systems, in Romania being sketched at the beginning of the 20th century and explained by V. Dongoroz. In the conception of the old legislator, the act had social danger when there was an action or inaction that presented a danger to social values, requiring the application of a punishment. Therefore, it was talking about the material aspect of the act, the social aspect and, not in the last resort, the legal aspect of the offence. In doctrine and jurisprudence, it had been emphasized that socially dangerous acts must be analyzed not only *in abstracto*, but also *in concreto (J.Rinceanu, 2010, p.23)*, the first category referring to special incriminations, generically defined by the Criminal Code, and the second, considering the concrete act, the danger of which had to be assessed by the court, in a broad process of judicial individualization of the punishment.
Art.18 of the 1968 Criminal Code referred to the social danger of the act without distinguishing between abstract and concrete social danger, explaining the content of social danger as an attribute of the act that harms not only the social values listed in art.1 (Romania, sovereignty, independence, unity and indivisibility of the state, the person, their rights and freedoms, property, as well as the entire legal order), but also the other protected social values not explicitly mentioned, for which a punishment was necessary. Therefore, it was correctly emphasized in the doctrine that, as a whole, the concept of social danger was related to the criterion of the values harmed and that of the punishment (*G.Antoniu and al., 2010, p.15*). V.Dongoroz emphasized that, in order to delimit the criminal illicit from the extra-criminal illicit, it is necessary to use an objective qualitative criterion, in the content of which two elements should be included: "the criminal act with a certain social resonance and the provoking of a state of anxiety and insecurity among the members of the social group". However, it was assessed that an appropriate conclusion could not be reached and that is why the Romanian legislator added the criterion of punishment, in order to delimit contraventions from offences. Social danger was considered to have the character of a concrete social danger, with a role in defining social danger as an essential feature of the offence. After the adoption of the incrimination norm, in which the act is described and the sanction corresponding to its gravity is established, in relation to the manner of assessing the concrete social danger by the judicial body, it was assessed that the concrete social danger has a function of individualizing the sanction within the minimum and maximum special limits established by the incrimination norm and corresponding to the value of the abstract danger of the act, but also a function equivalent to that of the abstract social danger of selecting acts susceptible to being incriminated or not.

The legislator, through the provisions of art.17 of the 1968 Criminal Code, regarding the concept of offence, indicating the social danger defined in art.18, as one of the essential features, took into account the function of the social danger of individualizing the concrete sanction, which was regulated in the chapter on punishment. For these reasons, taking into account the provisions of art.18/1 of the 1968 Criminal Code, it can be easily seen that in the legislator's vision, an act could not constitute a offence only when its danger was at the level of the abstract danger assessed by incriminating the act, which determined that when the degree of concrete social danger was reduced, the concrete act did not constitute a criminal offense.

At the same time, the assessment of the concrete social danger did not fulfill, according to the old Criminal Code, only a function equivalent to that of the abstract social danger, but also a complementary function, through which certain activities, permitted by law, were legitimized.

It has been judiciously emphasized in the doctrine that this concept of social danger contains multiple contradictions and represents an anachronism, the application of this theory only harming the certainty of the legal norms. Additionally, the concept contains an ambiguity, since the social danger of the act overlaps with the social danger of the offender and does not contribute to the clarity of the norm (*G.Antoniu and al., 2010, p.15; T. Avrigeanu, 2010, p.35-37*), a requirement imposed by the principle of the legality of incrimination and affirmed by decision no. 732/2014 by the Constitutional Court[11]. At the same time, social danger cannot replace illegality, as an essential feature of the offence.

The concept of social danger contains multiple contradictions, which have determined the current legislator to abandon a substantial definition of the offence and to adopt the formal definition of the offence.

Returning to the issue of constitutionality of the current regulation regarding the concept of offence, we emphasize that the normative provision, even in the absence of the accuracy we spoke about previously (*Infra.3*), is, in our opinion, able to pass the constitutionality test. We do not intend to enter into a controversy with the supporters of the exception of unconstitutionality, judiciously argued, and we will not expand the field of discussion by correlating the legal norm regarding the institution of the offence with criminal procedural norms, but we will try to demonstrate that the provisions of art.15 of the Criminal Code comply with constitutional and European requirements.

Criminal law defends the social values of the community, by prohibiting those actions that could harm them or by requiring a certain conduct to protect them and, for this purpose, establishes criminal sanctions.

[11] RCC, decision n0.732/2014, publ. in the Official Gazette, no. 69/2015.

Offence, as a fundamental institution of criminal law, is the most serious form of legal wrongdoing and must be interpreted restrictively, so as to comply with the requirements imposed by the principle of legality and subsidiarity.

The principle of legality of incrimination is a general principle of law and requires that the law clearly define offences and punishments so that any person can know, starting from the text of the norm and, if applicable, with the help of the interpretation given to this text, what are the actions and omissions that could entail his criminal liability.

As regards the requirements of the principle of legality, it is necessary to specify that the normative provision included in the content of art.1 paragraph 2 of the Criminal Code is enshrined in the provisions of art.1 paragraph 5 of the Romanian Constitution and is in full agreement with the provisions of art.49 paragraph 1 of the Charter of Fundamental Rights of the European Union and art.7 of the ECHR.

The Court of Justice of the European Union (CJEU) has established through its case law [12] that the legal norm in order to comply with the requirements imposed by the principle of legality, which is a specific expression of the general principle of legal certainty and implies that the law clearly defines offences and penalties, must be foreseeable and precise.

Regarding interpretation, the Strasbourg Court, in the *Plechkov/Romania* case, by its judgment of 16.09.2014, ruled that, no matter how clear a legal provision may be, in any legal system, including in the field of criminal law, there is inevitably an element of judicial interpretation, since, often, requirements arise for elucidating doubtful aspects and adapting to changes in the situation, which is why the provisions of art. 7 of the ECHR Convention need to be interpreted in the sense that they do not prohibit the progressive clarification of the norm relating to criminal liability, with judges proceeding to the judicial interpretation of each case, but which must be subject to the condition that the result is consistent with the substance of the offence and reasonably foreseeable.

Returning to the issue under discussion, we consider that the text of art. 15 paragraph 1 of the Criminal Code which defines the offence in terms of the essential features mentioned in section 3 of this paper, corresponds to the requirements imposed by the principle of legality, the regulation being fully in accordance with the requirements of European criminal law in this segment.

The traditionalist conception found in the provisions of the old Criminal Code, including the mention of social danger as an autonomous feature of the offence, was interrupted and replaced with one of European inspiration in order to ensure the homogenization of the criminal justice system at European level.

Regarding this last aspect, it is worth mentioning that the Union's criminal policy is based on the respect for subsidiarity, a basic principle, provided for in

[12] CJEU, C 42/17, judgment of 5 December 2017, M.A.S. and M.B., EU:C:2017:936.

Article 5 of the Treaty on European Union (TEU), given that at this level the Union only has shared competences, according to Article 2(2) combined with Article 67(3) and (4) of the Treaty on the Functioning of the European Union (TFEU), as well as the principle of necessity and proportionality (*ultimo ratio*), but also of some special principles, among which we mention the principle of the offence, proportionality, punishment worthiness principle, culpability principle, retroactive application of the milder criminal law (*mitior lex*), etc.

The principle of necessity and proportionality, which we referred to in a previous section, including through case law, is a basic principle at European level and lies in the fact that criminal law is used only as a last resort, namely when there is no other, less harmful way to protect fundamental interests, fundamental rights being necessary to be "indexed" in international standards (*M. Bitanga, S. Franguloiu, F. Sanchez-Hermosilla, 2018, p. 18*). The principle has its origin in the principle of the legality of incrimination and regarding this, the constitutional court ruled that incriminating an act as a offence must intervene as a last resort, when there is a criminal norm adopted by the competent legislator and the incriminated act harms protected social values, respectively presents a certain gravity. The Court noted that, in principle, the extraordinary remedy of cassation appeal, provided for by the provisions of art. 433 et seq. Criminal Procedure Code, since through this extraordinary remedy it is not possible to reassess the factual elements, but only to verify the existence of the result of the offence, as a requirement of the objective content, not of the extent or concrete seriousness of the result.

If we analyze the concept of offence through the prism of the *ultimo ratio* rule, it is necessary to mention that the criminal norm provided for by art.15 of the Criminal Code is active and clear, since it regulates the offence in an accessible, predictable, unitary and uniform manner. The fact that, through the provisions of art.15 of the Criminal Code, the traditionalist conception regarding social danger, as an essential feature of the offence, was abandoned does not equate to disregarding social danger, as it is valued, because in the complex structure of the offence we have, among other things, as an element, the existence of an act provided for by the criminal law, committed by a person, or it is not about any act committed by a person, but only the one sanctioned as a offence and considered by the legislator as presenting a high social danger. Additionally, it is necessary to mention that social danger is embedded in the concept of typicality, the high social danger of the act described in the incrimination norm being presumed by the legislator to exist in relation to any concrete act committed that fits the abstract model of the incrimination norm. Consequently, it cannot be argued that social danger was disregarded in the legislator's new vision of the concept of offence, even if it no longer constitutes an autonomous feature of the offence.

The principle of the offence (*nullum nullum iniuria sine*), which provides that, since criminal law aims to protect relevant social interests, a certain type of

behavior should be punished only if it results in a risk to the legally protected good, is inextricably linked to the principle of necessity and proportionality.

Only in the event that these requirements are missing can we speak of the ineffectiveness of the norm, which can be found by the constitutional court and sanctioned as such.

Regarding the principle of equality of citizens before the law, provided for in the provisions of art. 20 of the CFREU, art. 6 of the TEU and art. 16 of the Romanian Constitution, a general principle of criminal law, we must mention that it refers to equality before the law, in other words to the absence of discrimination for those in identical or similar situations, but does not exclude the different judicial individualization of the criminal sanction, in relation to the concrete social danger of the act and the perpetrator, taking into account the provisions of art. 74 of the Criminal Code.

Consequently, we consider that the legislator, through the manner in which it regulated the notion of offence in the content of art. 15 paragraph 1 of the Criminal Code, complied with the European provisions, all the principles analyzed above and which we also find in the domestic constitutional provisions - art. 1 paragraph 5, art. 11, 16 paragraphs 1-2, art. 23, art. 53 (in interdependence with the provisions of art. 52 of the CFREU).

CONCLUSION

The legal assessment 11 years after the entry into force of the new Criminal Code allows us to claim that the current regulation has come with important challenges for legal theorists and practitioners, some regulations being declared unconstitutional, others modified and supplemented to meet the demands imposed by the new realities.

The outlined evolution of Romanian criminal law in the new Criminal Code from the initial moment of its adoption, until this date, the legislative inconsistency in certain segments, creates the impression of a slightly cracked base for a lasting reform, even if the legislator's intention was to abandon the traditional influence and to follow a normal and natural path of assimilation of European criminal law, in order to actively contribute to the homogenization of the criminal justice system at the level of the European Union.

As previously mentioned, the current Criminal Code defines the concept of offence differently from the regulation in the 1968 Criminal Code, abandoning social danger as an essential feature of the offence.

The new approach transposed into the provisions of art.15 of the Criminal Code is not immune to criticism, as in judicial practice there have been situations identified, as we specified in the last section, in which the unconstitutionality of the legal text was invoked, since the content of the typical elements of a offence does not refer to the social danger of the act committed. In relation to these aspects, we have tried to demonstrate that the current regulation complies with

constitutional and European requirements, but from the perspective of the accuracy of the norm we have objections.

In this regard, the content of the provisions of art.15 paragraph 1 of the Criminal Code should have mentioned that the offence is the specific act provided for by the criminal law or the specific act typical, committed with guilt, unjustified and attributable to the person who committed it.

The notion of offence does not contain vague and imprecise provisions that would be incompatible with the requirements imposed by the principle of legality, since persons who disregard the criminal law may know the extent to which their acts engage criminal liability. The criminalization of acts as offences allows the legislator to adopt sanctions appropriate in nature and degree of severity, against perpetrators who, regardless of the nature of their motives, acted in full knowledge of the facts.

Criticisms aimed at the accuracy of these normative provisions, without depriving them of their predictable and accessible character, cannot lead to the unconstitutionality of the text in question, it being essential to take into account the nature of the text whose validity is questioned and the competence of the legislator to adopt a definition, even a formal one, as is the case with regard to the provisions of art.15 of the Criminal Code, regarding the notion of offence.

We propose de lege ferenda, the intervention of the legislator in the sense of modifying the content of art.15 paragraph 1 of the Criminal Code, by modifying the legal text in the sense that the offence is the concrete act provided for by the criminal law, committed with guilt, unjustified and attributable to the person who committed it.

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