Constants of Criminal Law?

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Abstract

This study highlights the results of the research activity which was carried out in the first year under the CNCSIS PN II Contract no.33/29.04.2013 concerning "The Constants of Criminal Law and the Normative Identity of the Romanian Society". The research conducted at this stage fully prepared the ground for the achievement of the project objective: constructing a theory of criminal law concepts which reflects the actual order of Romanian society inspired by Hans Welzel and Vintila Dongoroz, starting from Savigny's so-called political element of law and moving through the relation between the positions of Carl Schmitt and Mircea Djuvara in respect to the role that concrete social reality and logical system of legal concepts should play in law science.

Keywords: Hans Welzel, Vintila Dongoroz, natural law, Savigny, Historical School of Law

General Framework

The organisation of the new legal dispositions of the code in the systematic form of a new Romanian penal law has to reconcile the traditional paradigm of legal thought with the new theoretical framework chosen by the legislator of 2009 in the form of that what the Explanatory Memorandum to the draft considered to be the Italian-German tradition. At least in first analysis, the compatibility of the two paradigms is highly questionable: maintaining old regulations regarding e.g. the (improper) participants to crime while introducing the difference between justification and excuse may appear questionable from the German perspective, so as also the differences between the German and Italian approach on justification and excuse may be regarded as a proper mark for the complexity of the issues raised by the reception in Italy of German doctrines and also for the problems which Romanian criminal law doctrine will have to face within the near future. The research on methodological foundations of the criminal law science presents is the more necessary as the penal reform process seems to have been scientifically supported on the one hand by a certain critical attitude in relation to the old scholarship, and on the other hand by the over-evaluation of the benefits of comparative law investigation benefits at costs of a realistic estimation of its limits and even of the dangers involved in such investigation if the fundamental issues should have not been previously clarified.

Gaining clarity on this issue requires however exact knowledge about the formation of all involved foreign paradigms as well as about their influence on the Romanian scholars which significantly contributed to the formation of the Romanian traditional approach; the reception of German doctrines e.g. in Spain shows it not less clearly as the same process in the Anglo-American area. The absence of research monographs which analyze in all due historical and systematic details the thought of the main Romanian scholars is as significant as the lack of detailed studies on the specific German methodology of criminal law system. This led in many cases to an often uncertain and sometimes even completely distorted reception of ideas and concepts from within the area dominated by German scholarship. Similarly, the preference shown by the most Romanian scholars for a rather selective choice of German, Italian or Spanish treaties and manuals as well as the lack of references to the main German, Italian or Spanish academic journals may explain the significant gap between the systematic achievements in Romania and the actual knowledge and debate stand at the international level.

The historical and systematic analysis of the main lines within a comprehensive comparative approach may presumably help to get out of these problems, and more specifically a comprehensive comparative analysis of two lines of thought which are of paradigmatic value for the criminal law scholarship in Romania and Germany also because of their immanent philosophical background: the thought of Vintila Dongoroz (1898-1976) considered from its late foundation in the so-called constants

of law and the so-called finalistic doctrine of Hans Welzel (1904-1977) built on the objective logical structures (*sachlogische Strukturen*) of the human practice.

A first basis for this comparative approach offers the quite near academic-biographical correspondence between both great scholars. Three years after obtaining his L.D. with a thesis on *The Natural Law Doctrine of Samuel Pufendorf* (published more than three decades later, in 1958), Welzel opens his publishing with a study on the relationship between *Criminal Law and Legal Philosophy*; in the same year 1930 Dongoroz gives to the print the first and only volume of his *Criminal Law, Special Part*, after having already achieved academic fame due to his thousands of notes to the 1924-1927 renewed edition of Ioan Tanoviceanu's treaty on *Criminal Law and Criminal Procedural Law*, everything under the sign of complete methodological separation between criminal law and philosophy. The consolidation of these opposite programs takes place then till 1939, when simultaneously appear both the substantial *Studies on the System of Criminal Law* by Welzel [1] and the treaty on *Criminal Law* by Dongoroz [2]. These programs will be crowned after the war in the same year 1969 by Welzel`s eleventh edition of his treaty on *German Penal Law* [3] and Dongoroz' *Theoretical Explanation of the Romanian Penal Code* [4] on the ground of a slightly different philosophical foundation, which is as such expressed in the 1950-ies resp. 1960-ies: the program of the objective logical structures resp. the constants of law.

The theoretical background of both scholars is however in each case different. For Welzel it is the philosophical tradition departs from Aristotle and ascends via Thomas Aquinas and Samuel Pufendorf to Immanuel Kant and Georg Wilhelm Friedrich Hegel - the heritage of the natural law doctrines [5]– which has also to serve as ground for the criminal law system: defining the action as goal-oriented conduct of a human individual and the culpability as personal breach of the legal duty to respect a legal norm which prohibits or imposes a determinate conduct leads to important consequences for the configuration of the offence sides as well as to important special doctrines regarding particular institutions as e.g. the error or the complicity [6]. On the Romanian side, it may be as well considered that Dongoroz also has begun during the 1960-ies to reconfigure theoretically the relations between legal philosophy and criminal law doctrine by his outstanding innovative approach to the constants of law as they have to be understood and fructified by the criminal law scholarship, moreover: he was the first scholar who conferred to this approach its academic depth and peculiar brightness through his study on *The Main Transformations of the Criminal Law of the People's Republic of Romania* published in 1960 [7], which was only four years later followed by the other scholars and refined by the same Dongoroz in a second study on *The Socio-Political Content and the Normative Content of the Criminal Law of the Socialist Republic of Romania* [8].

Beyond the surface of the inescapable ideological formulae, both studies develop a highly valuable approach of the relation between political regime, criminal law regulation and objective social structure, whose methodological lines are not ideological distorted and prove themselves as being fully consonant with the actual international debates on the same issues of the criminal law science. Although reciprocal citations are missing, the relation between the doctrines of Dongoroz and Welzel can be reconstructed from the perspective of the permanent critic that Welzel has constantly directed against the methodology which Dongoroz did profess in his early work (legally technical approach), but also from the objections risen non explicitly against Welzel yet easily recognisable as such which Dongoroz formulates in 1960-ies as Welzel's work reached wide European prestige, the latter ones being during the 1990-ies perpetuated as such by Romanian scholars [9]. Starting from a distorted image of Welzel's system, this critics points nevertheless rightly to the wounded point in this system – Welzel's separation between psychological intent and normative culpability, i.e. the contradiction between an individual-oriented approach concerning the intent and the social normativity inherent to the culpability [10] – and comes in the end to correct conclusions. This may also explain the option of Dongoroz to reject the dogmatic system which was adopted subsequently by the main stream of the German scholarship, so that the *traditional* Romanian *rejection* of the theory of crime as deed having as attributes the so-called conformity to the legal type, illegality and culpability meets today an increasing tendence of the German as well as international approach. On the other hand, the German debates around the concept of final (goal-oriented) action in the same 1960-ies led first to the criminal-politically grounded variants of the so called objective imputation of the event and subsequently to the doctrine of objective imputation which grounds in the normative structures of the social order. Still less acquainted in Romania although meanwhile famous worldwide, this latter doctrine is closely tied to Welzel's work, especially in its early phase; on the other hand, even the larger methodology of a functional doctrine of criminal law – the initial opposite program to Welzel in the German scholarship – may be nevertheless considered as related to Welzel's objective logical structures.

The Political and the Technical in Law

The results of the project documentation fully confirmed the existence of the link between the displacement of the center of gravity of the criminal law theory from the real social order towards the logical construction of concepts and the imperative of possible separation of the theory of criminal law as a science from the inevitably distortions produced by the specific ideological totalitarianism constraints of the twentieth century which politically blocked theorists access to any other perspective on the social order outside the one officially propagated. This link has been shown in Germany and Romania both because of the imperative of overcoming a totalitarian regime in the past. After 1945 the science of criminal law in Germany by Hans Welzel becomes manifestly apolitical in order to clearly differentiate from the previous discourse [11], while the science of criminal law in Romania through the voice of Vintilă Dongoroz focuses during the 1960-ies on the so-called "constants of criminal law", allegedly independent of any social order and any political regime, in order to ensure the survival of the criminal law science aganist ideological pressure of a totalitarian regime in force [12]. Although different in terms of content, both Welzel's ontological structures and Dongoroz's criminal law constants range on the same plane of an abstract logical structure, namely: apart from the actual order of the society of their time.

The separation between the logical plan of abstract legal concepts and the real social order cannot be fully understood if it is analyzed only in the particular context of the twentieth century totalitarianism and its overcoming. This separation is really an essential feature of modern legal science, which is historically established after the disintegration of traditional social order (as a science of an abstract social order), rationally justified in opposition to traditional legal science (which is considered only an interpretation by specific categories of the real, historically justified social order,). This becomes clear in the context of natural law paradigm of the seventeenth century, causing the methodological shift in the modern legal science from topic to systematic and consequently, the formal logical structure of fundamental legal concepts (the same structure, which, although different in substance, can be found in both Welzel's ontological structures and Dongoroz's normative constants) - usually analyzed in research related to the philosophy of law and history of fundamental legal doctrines - could be fully utilized in terms of including in the research of the difference between political and technical element of law promoted by Friedrich Carl von Savigny [13], the founder of the historical school of law and of the modern science of private law in Germany in the early nineteenth century under the specific political conditions of the French Revolution and Restoration.

The results achieved so far by the research of private law evolution under the construction by Savigny of the legal science as both historical and systematic science - highlighting the ideological factor already affecting Savigny's so-called political element of law, as well as side effects provoked by the separation of the actual order from the conceptual one - could then be used in turn to explain identical structural dynamics of criminal law science in the twentieth century. In the line extended historically from Savigny to the never achieved direct dialogue between Welzel and Dongoroz, a special attention in research was given to the comparative study of the positions defended during the Second World War by the Romanian legal philosopher Mircea Djuvara and the German constitutionalist Carl Schmitt. Confronted themselves with totalitarian twentieth century, the two great scholars demonstrate how theoretical positions totally antagonistic at first may prove at a closer look surprisingly close and how totalitarianism's concrete pressure can lead to theoretical perspectives hitherto not taken into consideration, especially: return of Carl Schmitt to a reassessment of the historical heritage of both Roman law and Savigny's historical approach [14] as well as Mircea Djuvara's moving from a rigid Kantian conceptualism to a reconsideration of the role that concrete social reality should regain in criminal law science, alongside the logical system of legal concepts [15]. It was precisely this confrontation which has made possible to restore the original meaning of the political element in law science - the actual order (rather than ideologically constructed) as a normative identity of society - paving the way toward a genuine understanding of the legal science as a science whose task is the construction of legal categories that reflect the order and concrete realities of a given society [16]. This being so, the research conducted at this stage [17] fully prepared the ground for the achievement of the project objective: constructing a theory of criminal law concepts which reflect the actual order of Romanian society.

Perspectives

The international actuality of the entire work of Welzel together with the actuality of Dongoroz` work to the same extent correlated to the present lack of a consistent methodology both for the study of fundamental questions related to the new Romanian penal code and the trends forming the so-

called European of criminal law may be appreciated as supporting the opportunity of the fundamental research in criminal law science which could bridge the gap between the traditional and the new Romanian scholarship on criminal law. If the same issues which are today received from the Germany-oriented scholarly area will be identified in the older Romanian literature, than it will be also possible to identify and to eliminate false problems, which arise only by using new terminologies for expressing the same realities; in the same time, it would be also possible to concentrate the efforts on the real new problems corresponding to the actual stand of knowledge. Beyond this impact on the national level, the emphasis set on the synthesis between logical universality and social particularity as the very core of the constants of law will lead to the opportunity of regaining and fructifying the international visibility which the constants of law already had in the 1970-ies in connection with the actual international impact of the objective logical structures by exploiting their joint potential in the fields of international and European actual debates on criminal law theory. Bridging logical and empirical research methods on structural theory of crime by a consolidated approach would also testify the potential results of extending the research to the Special Part of Criminal Law, where the research efforts and also the results on systematic and comparative level may be seen as rather undeveloped relatively to those in the field of the General Part.

References

[1] Dongoroz, V. (1939). Drept penal. Socec, Bucuresti.
[2] Welzel, H. (1939). Studien zum System des Strafrechts. Zeitschrift für die gesamte Strafrechtswissenschaft 58, pp. 491-566.
[3] Welzel, H. (1969). Das Deutsche Strafrecht. Eine systematische Darstellung. Walter de Gruyter, Berlin.
[4] Dongoroz, V. (ed., 1969-1972). Explicatii teoretice ale codului penal roman. Vols.1-4, Editura Academiei Republicii Socialiste Romania, Bucuresti
[5] Welzel, H. (1962). Naturrecht und materiale Gerechigkeit. Vandenhoeck & Ruprecht, Fourth Edition, Göttingen.
[6] Sticht, O. (2003). Sachlogik als Naturrecht? Zur Rechtsphilosophie Hans Welzels (1904-1977). Schöningh, Paderborn.
[7] Dongoroz, V. (1960). Principalele transformari ale dreptului penal al RPR in lumina conceptiei marxist-leniniste. Studii juridice (1), pp. 393-432.
[8] Dongoroz, V. (1965). Dreptul penal socialist al tarii noastre. Raportul dintre continutul social-politic si continutul normativ al dreptului penal din RSR. Studii si cercetari juridice 10 (3), pp. 465-495.
[9] Antoniu, G. (1995). Vinovatia penala. Editura Academiei Romane, Bucuresti.
[10] Jakobs, G. (2003). Handlungssteurung und Antriebssteuerung. Zu Hans Welzels Verbrechensbegriff. Festschrift für Hans-Ludwig Schreiber, ed. K. Amelung et al, Verlag C.F.Müller, Heidelberg, pp. 949-958.
[11] Jakobs, G. (2007). Strafrecht als wissenschaftliche Disziplin. Die Zukunft der Rechtswissenschaften (ed. C. Engel), Verlag Mohr Siebeck, Tübingen, pp. 103-135, 123-126.
[12] Ionascu, T. and Dutu, M. (2014). Istoria stiintelor juridice in Romania. Editura Academiei Romane, Bucuresti, pp. 100-106.
[13] Savigny, F. C. von (1814). Zum Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft. Verlag J.C.B. Mohr, Heidelberg, p.14.
[14] Schmitt, C. (1950). Die Lage der europäischen Rechtswissenschaft. Greven Verlag, Köln.
[15] Djuvara, M. (1997, ed. N. Culic). Eseuri de filosofie a dreptului. Editura Trei, Bucuresti
[16] Jakobs, G. (1996). ¿Ciencia del derecho : tecnica o humanistica ?. Universidad Externado de Columbia, Bogota
[17] For the full documentation see Avrigeanu, T. (2014). Friedrich Carl von Savigny si "constantele dreptului", Pandectele Romane (forthcoming).