

International Conference

NEW CRIMINAL LEGISLATION
*important phase in the development
of Romanian law*

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Editor

Mircea Dutu, Mihaela Tomita

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Foreword

THE NEW CRIMINAL LEGISLATION IN THE EQUATION OF SCIENTIFIC RESEARCH

By the entry into force on the 1st of February 2014, of the New Criminal Code (Law no. 286/2009) and the New Criminal Procedure Code (Law no. 135/2010) basically the series of the great codes ends and with the broad legislative reform in the last 24 years. It was made such a legal reform by recoding, imposed mainly by the effects of the major rupture occurred in the Romanian society after 1989, following the return to representative democracy, transition to the market economy and accession of the country after joining the European Union, to the Union-European legal system and the affirmation of the globalization phenomenon, including the law. The fundamental social discontinuity imposed, in terms of the collective imaginary, a change to be considered radical, and from another perspective, only the adoption of new codes could leave such a general impression. We can say now that the last major legal regulations adopted before 1989, in the spirit of those times, came out of force, and fled definitively in history. Following these developments, the new Romanian law system completes its legislative building, branded by post-modernity, expressing reception demands of the European Union law and requirements of globalization.

There follows a stage as much, if not more important: the application and collection of the first data on the real life reactions to the legal provisions of the new regulations. They will show how the conception and legal provisions that have been adapted to the context particularities, the obvious imperfections and need to remove them, including any suggestions for improvement. A special role will be, in this context, of the new doctrine – of private law, respectively, criminal law, designed to provide the first theoretical explanations of the new legislative framework.

In terms of the opportunity and the content of the current recoding in the criminal law area, it is obvious that the political choice has played a decisive role. Thus, the need for legislative order received two offers, each technically satisfactory: the missed Criminal Code in 2004 (Law no. 301/2004) and, respectively, Law no. 286/2009, undertaken by the Government and entered into force on February 1st 2014. But the first, supported the continuation of tradition, both by following the French model and the capitalizing on the overall design of the criminal code before 1968, while the current clamp rupture marking, both by loans from the Spanish Criminal Code of 1994, with the necessary symbols and the eclipse of wording and the tendency to reject previous conceptions.

Drafting, adopting and the entry into force of the new Criminal Code and a new Code of Criminal Procedure are cardinal points in the legislative and cultural evolution of a state, them highlighting the three key aspects of an order of law: the legal aspect taking the essence of legislative regulation, the decision aspect highlighted by the manifestation of political will in a particular historical time and place, and the institutional aspect revealed by the overall economic and social development, and the doctrine and jurisprudence.

As the grand Romanian criminologist Dongoroz Vintilă wrote in 1932, any legal coding (criminal) means "a perfect adaptation to the realities and therefore perfect knowledge of them". From this point of view, the profound changes in the political, social and economic area suffered by the Romanian society in the four and a half decades that have passed since the adoption of the Criminal Code in force, especially in the period after 1989, leaves no doubt as to the inadequacy of the latter to the actual order of Romanian society. On the other hand, this inadequacy is not itself, other than the initiators of the new code think - regardless of their political affiliation - a sufficient argument for passing to a new coding. Again Vintilă Dongoroz: "It's hard, it's too hard, that when you find yourself in the dazzling and deafening potpourri of events that precipitate, you can get the exact look and tone and feature the events that gush and feed them. It is good that the big reforms, as the major surgeries, are made after the fever decreased and the working conditions became favorable". In other words, the key to the success of a new codification is surprising, by the legislature, of the new realities in determining parameters of a new social order.

The initiators effort to get closer to this goal cannot be disputed. As it is known, for the draft of the new Criminal Code there was established in the Ministry of Justice a panel of academics, judges, prosecutors, lawyers, with the participation of representatives of the Legislative Council, of renowned experts in both Romanian and foreign matter, and last but not least, with the Institute for Legal

Research. It is noteworthy that during the way followed by the new Criminal Code from draft and to the entry into force, all relevant political parties were involved in the political decision of this normative act, so that we can talk about a certain consensus that should lie the Code above the daily political struggle. No less, however, the discussions occasioned by the recent entry into force on February 1st shows that we still have to deal, at this point, with a very difficult goal to achieve.

This being so, the fact that some general characteristics such as trying to simplify the text of criminality, avoiding overlaps between different incriminations and avoiding overlapping with the general part texts and reducing the statutory limits of punishment for most crimes - a general trend in Europe and located in line with Romanian judiciary practice - were presented almost as a separate legal favoring of the offender, should be regarded in any case as a warning as to the issue of communication between citizens and legislators, not incidentally presented as one of the capital problems of post-modern law worldwide. On the other hand, the simple alignment of the Romanian legislator with these European trends does not represent any guarantee of an adequate regulation of the concrete order of contemporary Romanian society. The reduced legal limits of punishments are normal for well-positioned societies in their own order. But it is true that Romanian society still has a long way to go to such a good settlement, and given the modern doctrines regarding the meaning and purpose of punishment, it would not be bad that the Romanian legislature to reflect more closely on Hegel's words: "When the society is still reluctant itself, there should be set examples by way of penalties, as punishment is itself an example to the example of crime. But when the society is consolidating itself, the danger of crime is so low, that its suppression must follow the same extent. Stringent penalties are not therefore in and for itself something wrong, but they stand in relation to the time situation".

As stated in the Explanatory memorandum, in the draft there was intended on the one hand, the valorification of Romanian criminal law traditions and, on the other hand, the connection with the current regulatory trends of the legal systems of reference in European criminal law. To the new position of Romania as a member state of the European Union and in the wider context of globalization and in the legal area, the need of synchronization cannot be disputed, as, to quote again Vintilă Dongoroz, "nothing is more dangerous for the legal order than the brutal breaking than of links with the past. There is in any social group this static background, created by tradition, which the criminal law could not ignore without risking to appear as unjust, arbitrary and tyrannical, that losing the prestige it does not lose its effectiveness". But it is much easier to assert the need for double synchronization of encoding with the past (national) and the present (European) than to truly achieve a criminal code which, according to the same Vintilă Dongoroz to represent "a true expression of a system of criminal law." The initiators of the new Criminal Code stated that in the exploitation of our criminal law tradition it was started from the Criminal Code of 1936, many of them maintained by the Criminal Code of 1968, provisions having broadly the same German and Italian substrate as today the criminal rules with the greater influence on the European law, but they were equally kept and a number of institutions specific to the Code of 1968, which proved their functionality (eg, improper participation was maintained, although most laws operate in these assumptions with the institution of mediated author). But there are two sets which are conceptually compatible, so the end result can be truly the expression of a system and not a compilation?

The answer to this question, as other no less important (such as the compatibility between the theoretical substrate of the old and new regulations that do not necessarily fully follow the national-political criteria), are to be found in the coming years, through the efforts of law science, legal doctrine and jurisprudence. Similarly, the following years will show whether the innovations brought by new Criminal Procedure Code to the protection of rights of persons involved in criminal proceedings (especially the accused and defendant) including the introduction of new categories (such as the suspect) can coexist with maintaining the severe inquisitorial line characteristic to the old regulations, or if the amendments to the matter of degrees of jurisdiction and powers of courts will help achieve key goals of the regulation, consisting on the one hand, of the technical optimization and functioning of the criminal justice and, on the other hand, to restore the society's confidence in making by the state through the criminal trial of the criminal law function itself: reaffirming the social order itself, despite its symbolic denial by committing offenses.

Believing that making a new Criminal Code or a new Criminal Procedure Code would bring extra juridical security is an illusion, the French authors concluded. A code, whatever the talent of the one who conceives it is, is just a tool for assembling disparate provisions. It does not stop, by itself, the course of time, nor the public authorities tendency to multiply and diversify legal texts. If an appeal should be launched in this context, it would be done with the wisdom of the legislature to realize that

the law is not a mere act of power, but one of justice, wisdom and reason. It requires, above all, a constant update of the knowledge regarding legislative news. This is because, if on a new institution, it is possible to appreciate the benefits strictly theoretically, the same cannot be said regarding the inconveniences, that the practice alone can discover. In short, to remember that the law must be kneaded long, that the words of the text should be chosen carefully, and in the application of the rule, it is necessary to establish a sufficient time frame to be able to make an assessment as complete as possible on its merits and its weaknesses.

If he would have lived on January 31st 2014, Vintilă Dongoroz would have repeated, probably, what he had written in 1932: "far from us our intention to argue that the current criminal laws would be perfect ... on the contrary, we believe that between the law and reality there is a deep mismatch and that, sooner or later, a new criminal law, adequate to these realities, will take the place of the positive criminal law that governs us today. We consider that the present moment is not favorable for the development of this new criminal law". From February 1st 2014, however, the doctrine and jurisprudence in Romania must refer to Hegel's dictum cited in *The principles of law philosophy*: hic Rhodus, hic Saltus. And for the step not to be empty, even fatal, the role of law science (criminal) is certainly more important than both the doctrine and jurisprudence seem willing to admit today.

Under the auspices of such considerations, the International Conference with the theme of the *New criminal legislation - milestone in the development of criminal law*, whose communications come together in this volume, is intended as an opportunity to discuss the prospects of development of the new Romanian criminal doctrine.

Ph.D. Professor Mircea Duțu

*Director of the Legal Research Institute
„Acad. Andrei Rădulescu of the Romanian Academy”*

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