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CRIMINALIZATION: BETWEEN SCIENTIFIC METHOD, GENERAL PRINCIPLES AND SUBJECTIVISM (I)

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Abstract: *The article aims to be the first, in a series of studies that will analyze several aspects of the complex criminalization process. This process is becoming increasingly complicated, precisely because of the interaction between technological evolution, the existence of principles that have become established at the level of genuine constitutional taboos, increasingly harsh criteria imposed by the need for legal certainty, but also the relationship between domestic law and international norms. The main focus of this article will be the general rules according to which a social value can gain legal recognition in the criminal field.*

Keywords: *incrimination; criminal law; legal certainty; legal values*

1. General Aspects

The incrimination process is definitely complex, but we rarely ask ourselves whether it is a scientific endeavor, which follows clear rules, or a rather subjective process and an almost emotional reaction.

Raffaele Garofalo defined the notion of "natural crime" as a crime of universal character, regardless of the law or form of government (1914, p. 47)[2], which consists of an act that is harmful to society and which, at the same time, violates elementary feelings such as mercy or probity. "Natural crime" represents a violation of feelings, not of rights, and thus (Garofalo pointed out), there will be no risk of bringing into the sphere of crime acts that constitute only immoral inclinations and which will not be punishable criminally. This notion could form the basis of an international Criminal Code, recognized by all civilized nations, such crimes being contrary to human nature[3].

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[2] Raffale Garofalo, (1914), *Criminology*, Ed. Little, Brown and Company, Boston, p. 47
[3] R. Garofalo, *Criminology…., op. cit.*,p. 60

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The concept of natural crime is outdated today, but the idea of an international Criminal Code remains current. So does the fact that currently all criminal codes (and with some exceptions from almost all times) criminalize certain acts. For example, it would be inconceivable to have a criminal system in which murder, treason, theft, etc. would not be criminalized. We therefore accept such criminalization as a reality that can no longer be contested (otherwise the result would be the impossibility of maintaining an organized social system and there would be no question of any rule of law). At the same time, there are principles of law with axiomatic value, such as the principle of non-retroactivity of criminal law, the presumption of innocence, the prohibition of torture, etc. The ideas enunciated by Beccaria in *Dei delitti e delle pene* seem to be so revolutionary for the year 1764, that the first edition is published without the author's name.

"*To anyone who would tell me that the same punishment applied to a nobleman and a commoner does not have exactly the same value because of the difference in education, because of the infamy that covers an illustrious family, I would reply that it is not the sensitivity of the guilty party that constitutes the measure of punishment, but the public harm caused, which is all the greater the more favored the perpetrator is; that the equality of punishments can only be extrinsic, [the punishment] being really different from individual to individual [...]*" [1]. This statement of Beccaria seems, from some points of view, difficult to understand even for today's penal systems, at least in terms of the incrimination of acts related to white-collar crime. What was probably shocking for that mid-18th century, however, was the concept of leniency of punishments, in the context in which European penal codes still provided for medieval punishments.

The entire spectacle of torturing the defendant would disappear – as Michel Foucault showed – in just a few decades. Apparently, what remains for the legislator to do today in the criminal field may seem an easier task than the truly pioneering work of authors such as Beccaria, respecting only a few rules, such as: respecting assumed international norms and constitutional ones; drafting criminal norms based on scientific analyses; respecting certain norms of legislative technique (such as those provided for, for example, in Law no. 24/2000 on the norms of legislative technique for the elaboration of normative acts); pursuing penal policies at least over an average period of time. In reality, although the path seems to have already been paved in broad outline, the task of today's legislator, in the criminal field, seems to be infinitely more difficult. Without claiming to exhaust this vast subject, we will try in this article and in several other issues of the Criminal Sciences Journal of the "Alexandru Ioan Cuza" Police Academy, to offer, if not explanations, at least questions and possible solutions to some dilemmas.

[1] Cesare Beccaria, (2007), *Despre infracţiuni şi pedepse,* Ed. Humanitas, Bucharest, p. 147

2. Social values and how they become criminal legal values

Both the recognition of a value, on which the organization or the very existence of society depends, and its protection through norms are extremely complex and long-lasting processes. There are some difficulties in defining the notion of value, difficulties that do not arise from the subjectivity of value judgments, but from the diversity that value acquires in modern society, from the multi-valued construction of human civilization. If from antiquity to the Middle Ages there was an attempt to order society under the influence of a single superior value, modern science can no longer search for a "philosopher's stone", a unique principle that coordinates the entire human existence or a principle from which all things are made (a principle that pre-Socratic philosophy sought, for example). The specificity of human civilization, as a necessary premise for the existence and evolution of our species, consists in the recognition of a multitude of values.

The protection of values is found in several branches of science, for example, human life is not only important for legal sciences, but also for medicine, sociology, philosophy, etc. However, only through legal norms and, where necessary, through coercion, can protection be effectively ensured; this is because in the rule of law, law fulfills the mission of intermediary between moral, philosophical ideals and real forces, between order and life[1].

The need for criminal law regulation has a double conditioning[2]: on the one hand, the interest of society to ensure the effective protection of its value system by precisely establishing socially dangerous acts and the sanctions necessary to prevent and combat them, and on the other hand, the same interest of society that social protection be carried out in strict accordance with its will and with rigorous respect for the rights of the offender. Criminal policy therefore appears as a part or an aspect of the general policy of the state, which includes the set of measures and means to prevent and combat the criminal phenomenon, as well as the set of principles for the development and application of these means and measures, adopted at a given time, in a given country; criminal policy is oriented in two main directions, namely towards the prevention of acts dangerous to social values and towards the repression of those who have committed such acts[3].

Values also acquire special characteristics in the field of criminal law. As it has been shown in the doctrine (Antoniu, 2008, p. 145) [4], the identification of fundamental social values that deserve special protection, as well as the evaluation of different human behaviors in relation to these values, have always been conditioned by the particularities of political and social life, by the traditions and mentality of the people. A certain behavior may represent a serious violation of fundamental values in one people and, at the same time, it may be considered as an aberration or it may be tolerated in the vision of another penal system. Even if it is obvious

[1] Popa Nicolae, (1997), *Teoria generală a dreptului*, Ed. Actami, Bucharest, p. 120
[2] Costică Bulai, Bogdan Bulai, (2007) Manual de *Drept penal. Partea generală*, Ed. Universul Juridic, Bucharest, p. 15
[3] C. Bulai, B. Bulai, *op. cit.*, p. 23
[4] George Antoniu, (2008) *Legea penală română în condiţiile postaderării* in *Dreptul comunitar şi dreptul intern. Aspecte privind legislaţia şi practica judiciară*, Ed. Hamangiu, Bucharest, p. 145

that there is a need for common principles of criminal law at European level, in order to face new challenges or to respond more effectively to criminal phenomena (organized crime, crimes against the financial interests of the EU etc.), we do not consider that the existence of criminal laws in other European states is always a sufficient argument for changes to national legislation, especially if they are called upon to replace institutions and principles of criminal law that have already proven their efficiency at national level[1]. The object of the crime means the social value and the social relations formed around that value, against which the act that constitutes a material element of the crime is directed and which are harmed or endangered by the commission of the crime[2].

The social values protected by the criminal law were specified in the provisions of art. 1 of the previous Criminal Code, according to which the criminal law defends, against crimes, Romania, the sovereignty, independence, unity and indivisibility of the state, the person, his rights and freedoms, property, as well as the entire legal order. In the Romanian Criminal Code in force today, the legislator considered that such an enumeration was not exhaustive anyway, so he completely abandoned the specification of the values and the idea of an article stating the purpose of the criminal law. We believe that the enumeration in the previous Code was not intended to be complete, but rather a declaration of principles, meant to underline the importance of criminal law, of the values defended and of the particularly serious consequences resulting from disregarding the criminal law[3]. The social values protected by the current Criminal Code now result from the Code as a whole. The emergence of acts likely to seriously harm important social values for people, such as: life, bodily integrity, health, common or personal goods and other important values, has determined human society to defend itself against such acts and for this purpose, mandatory norms of social conduct have begun to be adopted[4].

A hierarchy between the values defended by the criminal law is, in our opinion, not only very difficult but also dangerous. These values are not simple desires or expectations of a particular individual, but there is a presumption that they are fundamental for the majority of citizens (and more often than not they are, a fact supported, legitimized, by the overwhelmingly high proportion of compliance relations compared to conflict relations). The values to which we refer have a very high degree of generality and any comparison or hierarchy between very general notions, can lead to undesirable consequences not only for criminal policy, but also for the rule of law and implicitly for the individual. Could we say that protecting human rights

[1] Alexandru Ionaş, Alexandru F. Măgureanu, Cristina Dinu, Mihaela Rotaru, (2024) *Drept penal. Partea specială*, Ediția a II-a, Ed. Universul Juridic, Bucharest, p. 8

[2] Costică Bulai, (1992), *Drept penal român, Partea Generală, Vol 1*, Casa de Editură şi Presă Şansa, Bucharest,p. 145; Gheorghe Nistoreanu, Vasile Dobrinoiu, Alexandru Boroi, Ilie Pascu, Ioan Molnar, Valerică Lazăr, (1997) *Drept penal. Partea specială,* Ed. Europa Nova, Bucharest, p. 138

[3] Art. 1 of the previous Criminal Code, with the marginal title "The Purpose of Criminal Law" provided: "The criminal law defends, against crimes, Romania, the sovereignty, independence, unity and indivisibility of the state, the person, their rights and freedoms, property, as well as the entire legal order."

[4] Alexandru Ionaş, Diana Ionaş, Cristina Ionaş, (2009) *Drept penal român. Partea generală,* Ed. University Transilvania Braşov, p. 24

is more important, that it is a more important value than protecting the state? Or conversely, that protecting the rule of law is more important than protecting the individual? Or that the life of an elderly person is less important than that of a young person? Criminal law avoids making different categories, depending on the importance of certain incriminations. We should start from the premise that any incrimination is important and that any crime can have very serious consequences. In the penal codes we will not find categorical statements, that the incrimination of one act is more important than another. Human rights cannot be guaranteed and recognized outside the rule of law, just as the rule of law cannot exist without society. There are links between the values protected by law that cannot be broken.

There are also rights that can be limited, just as there are values that cannot be achieved or negotiated. However, the primary purpose of criminal law should be to protect the entire legal order, not necessarily because this would be considered the most important value in a hierarchy, but because it is the very means by which other rights and values are protected. According to constitutional principles, the republican form of government of the state, its democratic character, political pluralism and other fundamental values must also be defended.

In doctrine[1] it has been shown that there is no need for a special article in the Criminal Code, through which an enumeration or hierarchy of social values protected by criminal law would be attempted, because the simple affirmation of the purpose is not sufficient for its achievement.

A socially recognized value can receive legal protection in the most energetic possible form – the criminal legal norm. Although very complex, this process can be summarized by a few general rules that can be considered principles of incrimination. Incrimination, in a broad sense, is, however, a period with variable extension in time and with a mixed character, the concept including both elements of selection of social values and elements of legislative technique.

According to an author, "*the legislative model is invariably complex, because it must include not only the first-order effects, but also the cascading effects, the counter-effects, the cross-effects*" [2]. Although it is difficult to generalize, the way in which social values are transformed into legal values must follow some elementary rules.

a) *the value that requires protection should be socially recognized*. First of all, we must take into account the differences between law and morality, especially in the criminal field (where we also find the principle of minimal intervention). Not every moral rule can become a legal norm, let alone a criminal norm[3]. On the other hand, any penal system is based on the

[1] Matei Basarab, Viorel Paşca, Gheorghiţă Mateuţ, Constantin Butiuc, (2007) *Codul penal comentat*, vol. I. Partea generală, Ed. Hamangiu, Bucharest, p. 3

[2] Sofia Popescu, (2001) *Sociologie juridică,* Ed. Lumina Lex, Bucharest, p. 121

[3] A broader discussion about the differentiation between law and morality exceeds the scope of this work, but given that criminal law is essentially what we could call the "last line of defense" established as a science in its own right, we consider it obvious that a criminal rule can contradict, when appropriate, a moral precept.

compliance relationship. Even the survival of the system would become difficult if the majority of penal legal relationships were conflict relationships. In an opinion[1], conformity or obedience to social norms is due to the contribution of at least four factors:

- group pressure exerted on the individual and his conformist integration into the respective group;
- the process of socialization and social learning of norms;
- the awareness that violating norms entails repressive sanctions, while conformity represents socially normal behavior, being positively rewarded;
- the fact that the individual is often unaware of the possibility of choosing alternative modes of behavior.

Regarding legislation, in a general sense, it is useful to consult public opinion, including through legislative opinion polls. On the one hand, legislation is too technical in nature, so that public opinion must be viewed with reservations by the legislator; on the other hand, the agreement of public opinion offers much more chances for laws to be respected[2]. Given the public law nature of criminal law, the use of legislative opinion polls is limited. Even if they bring some benefits, their applicability is limited. Analysis of social realities can prove much more useful to criminal law. Unlike other branches of law, in the criminal field we find, perhaps, the greatest dependence of norms on national, cultural and economic specificities. Some authors have also identified, at the level of a general principle, the correspondence of criminal legal norms with objective reality[3].

Currently, the majority opinion is that criminal law legal relations arise, not from the moment a violation occurs, but from the moment a criminal law enters into force[4].

b) *not be contrary to already guaranteed values or contrary to general principles.*

It is not excluded that, sometimes, the criminal law intervenes against the will of the majority of citizens, or against certain customs, no matter how widespread or accepted they may be (probably the hardest thing in the world is to explain this to someone without legal training). For example, let's imagine that most citizens would like to reintroduce the death penalty. This would not be possible, because there are international and constitutional guarantees that constitute true legal taboos.

At the same time, the way in which certain values are asserted in society is often random, which makes their transformation, into legally recognized values, much more difficult. If the birth of social values is not governed by scientific rules, then it seems almost impossible for their legal transformation into rules to be scientific.

[1] Sorin Rădulescu, Dan Banciu, (1996) *Sociologia crimei şi criminalităţii*, Ed. Şansa, Bucharest, p.18
[2] Sofia Popescu, (2001) *Sociologie op.cit.*, p. 122
[3] Ionuț Andrei Barbu, (2022) *Drept penal Partea generală*, Ed. Universul Juridic, Bucharest, p. 14
[4] Spre exemplu, Constantin Mitrache, Cristian Mitrache, (2016) *Drept penal român Partea generală,* Ed. Universul Juridic, Bucharest, p. 25

c) *there should be the possibility of effective protection, and not just at a declarative level* The mere declaration of rights, when there are no realistic conditions for their operation, transforms them into invalid rights[1]. In the indicated opinion, this mystification in the issue of human rights can serve either a domestic or an international purpose. In the first case, governments attempt to pacify the population by promising those rights, although in reality they do not want those rights to become a reality[2]. In the second case, national governments argue to the national community that these rights exist because they are enshrined in the constitution[3]. It is also true that a consecration of such rights, even when the necessary levers to implement them are lacking, can create, in certain situations, the necessary impulses for the existence of those levers[4]. The Universal Declaration of Human Rights of 1948 was initially devoid of legal force, being at that time only a declaration of principles. At the same time, however, in criminal law there cannot be legal provisions that have only the value of declarations of principles, as this would violate the principle of legality and generate a lack of legal certainty, which could have catastrophic effects;

d) *protection through criminal law must be achieved by respecting the principle of legality but also certain norms of legislative technique*. The principle of legality is the "keystone" of the criminal system and implies the idea that everything that is not prohibited by a legal text is permitted and that, consequently, a person will not be able to be tried and punished except for a behavior prohibited by law and this behavior will not be able to attract any other punishment except that provided by law[5]. Another consequence of the principle of legality is the need for criminal law to be certain and not to be applied retroactively. The abundance of unconstitutionality decisions, both by the Romanian Constitutional Court and at the European level, cannot be interpreted (even in the context of the constitutionalization of criminal law, which is increasingly being discussed), except as a legislative inefficiency. Respect not only for the "legal taboos" or constitutional principles but also for the formal rules for drafting criminal norms is of particular importance. The norms of legislative technique are not only important for the effectiveness of the norms; the very existence of the criminal norm may depend on their compliance. For example, failure to comply with the constitutional provisions leads to the cessation of the applicability of the respective norm. In most European countries, the Constitutional Court exercises both a priori and a posteriori control. According to art. 147 of the Romanian Constitution, the Parliament or the Government must amend the normative provisions declared unconstitutional within 45 days.

e) *protection must be circumscribed by a broader criminal policy, thought out at least in the medium or long term.* In explaining the concept of criminal purpose, the notion of "criminal policy" is also used, which can be defined as a "set of procedures through which the social body

[1] Adam Podgorecki, (1991) „*Toward a Sociology of Human Rights*" , în „*Laws and Rights*" , Ed. Vincenzo Ferrari, Milano, dott. A. Giuffre, editore, p. 417-425, 427-428, 430-431, *indicat în* S. Popescu, (2001) *op. cit.*, pp. 155-157
[2] *Ibidem,* p. 156
[3] *Ibidem,* p. 157
[4] Alexandru F. Măgureanu, (2011) *Principiile generale ale dreptului,* Ed. Universul Juridic, Bucharest, p. 308
[5] Danièle Saint-Laurent, (1994) *Principes de droit constitutionnel et penal,* ediţia a 2-a, Modulo Éditeur, Quebec, p. 126

organizes the response to the criminal phenomenon" [1] or in short, "criminal policy is the study of all means of combating crime, preventive or repressive" [2]. Criminal policy is different in different states, or even in areas of states, depending on the nature of the crimes that prevail in a given geographical area or even in a given social class, because the reasons for committing crimes are almost always complex and the criminal policy of a state must contain packages of complex and effective measures, which are related to social reality, to prevent the commission of crimes. Discontinuous or isolated protection of recognized values will not only affect a specific norm, but will have consequences for an entire criminal system.

f) *The means of criminal law must represent the last resort for the protection of value (the ultima ratio character of criminal law), and the intervention must be minimal but proportionate.* There is a direct link between proportionality and the *ultima ratio* character of criminal law. As noted in the doctrine, this link seems to be even stronger in Romanian criminal law, given the fact that, not being a federal state, Romania has no experience with the principle of subsidiarity (Neagu, 2019, p. 23)[3].

3. Can the criminal legal norm educate, imprint a certain type of behavior, or can it only discipline conduct?

The criminal legal norm is intended to guide and discipline human conduct, in its case the ability to guide and discipline is stronger, due to the coercion exercised through the threat of punishment[4].

Several authors recognize, as a principle, the minimal intervention of criminal law, in the sense that resorting to criminal sanctions, which are much more restrictive, may appear disproportionate if ensuring the protection of social value can be achieved through less restrictive means[5]. This principle is imposed primarily on the legislator, who has the duty to avoid over-criminalization and to a lesser extent in the process of law enforcement. It is true that in the application of criminal law there are institutions that allow the avoidance of a criminal sanction when the violation is minimal, but these institutions have numerous conditions. The main way to regulate the seriousness of the violation of a value through incrimination remains the legislative process.

Law in general, and especially criminal law, is not limited to choosing between different values existing in society and deciding which of them to invest with legal force. And in the

[1] M. Delmas-Marty, (1983) *Modèles et mouvements de politique criminelle*, p. 13, indicat de Jean Pradel, (2019) *Droit pénal général*, ed. 22, Ed. Éditions Cujas, Paris, pp. 58-59

[2] Jean Pradel, (2019) *Droit pénal général,* ed. 22, Ed. Éditions Cujas, Paris, pp. 22-23

[3] Norel Neagu, (2019) *Drept penal Partea generală,* Ed. Universul Juridic, Bucharest, p.23 –it is also worth noting that the indicated author distinctly analyzes the principles of incrimination.

[4] Florin Streteanu, Daniel Nițu, (2014) *Drept penal. Partea generală, vol. I,* Ed. Universul Juridic, p. 88; regarding the ability of the criminal norm to guide and discipline human conduct, the authors point out to F. Desportes, F. Le Gunehec, (2004) Droit pénal général, 11eme éd, Ed. Economica, Paris, p. 190

[5] F. Streteanu, D. Nițu, (2014) *op. cit.*, p. 63

field of law, as in mathematical, physical or sociological judgments, what is true is determined, because we say that the judgment we make is true; but the content of this truth is not to ascertain what is, but to judge whether an action is indeed just, whether a person has the right to do it or not[1]. Rational legal values are ultimate values; in this sense, justice imposes itself through its own authority[2]. Justice – the same author shows – must be listened to for itself and in itself, without reference to any other purpose, because there can be no purpose superior to it. Although it seems to be used less and less, criminal law also has the duty to "educate" and to impose a certain behavior. In this case, the criminal norm ceases to be a simple legal investment of a social value, it becomes a creator of values.

Conclusions

The criminal legal norm is constructed as a command, but, as a rule, only in terms of its immediate application to concrete cases and not as an immutable character of this legal norm. At the same time, however, criminal law cannot be restricted to the role of resolving conflicts but must inevitably make certain "value statements", the role of laws being to protect certain values important to society (including, when necessary, against the expectations or desires of a segment of society or even a majority[3]. Unlike criminal law, alternative dispute resolution procedures do not pursue an ideal of justice or fairness. The ultimate goal of criminal law is the protection of social values considered fundamental. Such protection can only be achieved through a continuous analysis of concrete reality, a continuous reassessment of the survival of certain values.

Any legislative change in the criminal field must be based on solid scientific arguments and ensure either the continuity of the protection of the social value, or the replacement (when necessary) of the norm and, implicitly, the cessation of protection, or, finally, the introduction of a new value (the hypothesis of law as the "architect" of value). However, the criminal protection of social values must be done following scientific, objective rules. Given that the way in which values are enshrined in society is often neither scientific nor rational, there is a risk of "contamination" of the legal field with pseudo-values. At the same time, criminal law, given its character as public law and as an ultima ratio, is to a lesser extent the result of social negotiation. Even if we are increasingly talking about negotiated justice or alternative justice, the command norm retains a special importance in the criminal field.

[1] Mircea Djuvara, (1999) Teoria generală a dreptului (Enciclopedia juridică), Ed. All Beck, Bucharest, (Restitutio), p. 509

[2] *Ibid.*, p. 511

[3] Barbu I.A., Măgureanu A.F., (2018) *The correspondence of criminal legal norms with the objective reality*, The 7`th International Scientific Conference "Challenges and Strategies in Public Safety and Order" , Bucharest, 6-7 December 2018, organized by the „Al. I. Cuza" Police Academy, Ed. Sitech, Craiova, p. 142

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