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THE NEW ROMANIAN PENAL CODE IN THE EUROPEAN CONTEXT

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Abstract:

Elaborating and adopting a new Penal Code represents a crucial moment in the legislative evolution of any state. The decision to move on to a new Penal Code is not simply the manifestation of the political will, but equally a corollary of the socio-economical evolution and of the doctrine and jurisprudence.

The profound transformations on a political, social and economical plan which have taken place in the Romanian society for almost four decades since the adoption of the Penal Code in 1968, and especially after 1989, leave no room for doubt that adopting a new Penal Code was necessary.

Keywords:

New Penal Code, supportive causes and the unimputability, punishment, sanctioning system, the renouncement to apply the punishment

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I. General considerations

Once our country has joined the European Union, a series of mechanisms which have favored the increase of cross-border type crimes have been set off. In order to face this phenomenon, judicial bodies were forced to adapt to it, but to be able to fight it off, they had to create an appropriate legal frame.

In the elaboration process of the new Penal Code the following objectives have been pursued:

- creating a penally coherent legislative frame and avoiding needless norm overlapping in the present Penal Code and in special laws;
- simplifying regulation of substantial law, meant to facilitate their application unitarily and with expedience in the activity of the judicial bodies;
- ensuring the accomplishment of the exigencies which derive from the fundamental principles of penology established by the Constitution and by the pacts and treaties regarding the fundamental human rights, to which Romania is part of;
- transferring regulations adopted throughout the European Union to the national penal legislative frame;
- conforming the Romanian substantive criminal law with the systems of other member states of the European Union, as a premise of judicial cooperation in the penal field based on mutual acknowledgement and trust;

The general part of the new Penal Code has suffered a series of important alterations, or, better said, it was rethought from the basics.

II. Main alterations brought by the new Penal Code in the general part

A crime is defined in the new Penal Code in article 15 paragraph (1) as „a statutory deed, done with guilt, unjustified and imputable to the person who did it." The 1968 Penal Code defined crime (art. 17, paragraph (1)) as the deed which brings about social danger, done with guilt and statutory.

One can notice that in the new Penal Code only two of the essential elements which appeared in the old Penal Code can be found, that is the deed is statutory and done with guilt.

From the perspective of the new Penal Code, a crime is conditioned by cumulatively meeting the following 4 essential features:

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- *typicity* which requires that the deed meets all the conditions stated in the incrimination norm, in the light of all the objective and subjective elements;
- *anti-legality* by which it is emphasized that the deed is not permitted by legal order, feature which is determined by acknowledging the lack of supportive causes incidence;
- *imputability* meaning that the deed can be imputed to the person who did it, feature which is determined by acknowledging the lack of unimputability causes incidence;
- *guilt* – requirement which makes it mandatory that the deed be done with the guilt form required by the special norm of incrimination (intent, fault, oblique intent).

The lack of one of the essential traits leads to the non-existence of the crime and, as consequence, to the exclusion of penal liability as the crime is the sole basis of penal liability.

According to art. 16 paragraph (6) new Penal Code, „The deed consisting of an action or inaction is a crime when it is done with intent. The deed done with fault is a crime only when the law states so expressly." Drawing a parallel with the similar regulation of the 1968 Penal Code which stated at art. 19 paragraph (3) "the deed consisting in an inaction is a crime whether it is done with guilt or fault, apart from the case when the law sanctions only when it is done with intent", we can reach the conclusion that art. 16 paragraph (6) of the new Penal Code will produce retroactive effects, in the way that it will be considered a law of decriminalization for a series of crimes done with fault stated as such in the old Penal Code. For example, the crime in art. 262, 1968 Penal Code: the non-denunciation of crimes could be done subjectively, both with intent and with fault, as stated in art. 19 paragraph (3). Nevertheless, the new Penal Code incriminates at art. 266 the same crime, but in accordance with art. 16 paragraph (6), this one can be done only with intent.

The new Penal Code regulates in art. 18-31 the supportive causes and the unimputability causes which, in the light of the old regulation, were causes which eliminated the penal feature of the deed. The supportive causes are as follows: self-defense (art. 19), state of necessity (art. 20), exercising a right or fulfilling an obligation (art. 21) – also stated in the 1936 Penal Code as well as in most of the European legislations (art.20, point 7 Spanish Penal Code, art. 51 Italian Penal Code, art. 36 Portuguese Penal Code) and the consent of the aggrieved party (art. 21)

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also stated in the European Legislations (art. 50 Italian Penal Code, art 38 Portuguese Penal Code). The last two supportive causes mentioned cannot be found in the old legislation.

An important alteration was brought by the new Penal Code in relation with the plurality of crimes. Thus, for the concurrence of crimes stated at art. 38 new Penal Code, the calculation of the resulting punishment is done in two stages: The punishment for each crime is established and, the heaviest punishment is mandatorily increased with one third of the total of the other punishments. When imprisonment and a fine have been established as punishments, the fine is added in its entirety to the imprisonment punishment.

This type of sanctioning system limits the freedom of the judge to establish a quantum of the punishment that is equitable according to his conscience and assessment, which can lead to applying absurd punishments in certain situations. For example, lately people have been deceived over the phone, in the way that the aggrieved party is tricked into believing that a close relative has been in some kind of accident and, in exchange for a sum of money, the deceiver promises to help the respective relative get out of trouble. The problem is that with this type of crime, there can be up to 200 victims. If only one crime of the 200 was committed after February 1st 2014, the date when the new Penal Code was adopted, according to the law which applies the new Penal Code, the sanctioning system for the crimes concurrence will be the one stated in the new Penal Code. According to art. 244 new Penal Code, deceiving through fraudulent means or through using false names is punishable by one to five years in prison. Suppose the judge establishes for each crime a 1 year in prison punishment, and then applies the regulations for the crimes concurrence, thus resulting a punishment of 67 years and 4 months in prison.

Taking into consideration the general limitations of prison punishment, stated in art. 60 new Penal Code, the judge will have to set a punishment of 30 years in prison, which, in the light of the seriousness of the crimes committed, is absurd.

The sanctioning system of postsentencing recurrence (art. 42 new Penal Code) was changed compared to the old regulation regarding arithmetic cumulus. There has also been an alteration regarding the postexecutory recurrence sanctioning system by *mandatorily* increasing by half the limits of punishment stated by the law.

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Unlike the old legislation which stated that sanctioning the international recurrence (the first term of recurrence consists of a conviction for a crime committed abroad) was optional, the new penal law states that this recurrence be mandatorily sanctioned if two conditions are met: there has to be a double incrimination and the foreign court order has to be acknowledged according to the law. There is an exception from the incumbency of the double incrimination, stated by Law 302/2004 at art. 239 paragraph (1) for a number of 38 crimes (participating in an organized criminal group, terrorism, person trafficking, child sexual abuse and child pornography, drug and substances trafficking, arms, ammunition and explosives trafficking, corruption, fraud – including that which damages the financial interests of the European Communities as stated in the July 26th 1995 Convention regarding the protection of the financial interests of the European Communities, laundering crime products, counterfeiting currency – including euro, IT crimes, environment crimes – including endangered species of animals and plants trafficking, facilitating illegal entrance and residence, homicide, battery, human organs and tissue trafficking, kidnapping, unlawful confinement and taking hostages, racism and xenophobia, organized theft or robbery, illegal trafficking of cultural goods – including antiques and works of art – deceit, racketeering and extortion, products counterfeiting and piracy, illegal trafficking of hormonal substances and other growth factors, illegal trafficking of nuclear or radioactive materials, stolen vehicles trafficking, rape, arson, crimes in the jurisdiction of the International Penal Court, hijacking of ships and planes, sabotage, behaviors which break regulations related to traffic, including breaking regulations concerning driving hours and rest periods, regulations concerning dangerous goods, smuggling, breaking intellectual property rights, threats and acts of violence against people, including violence at sports events, prejudices under penal law, theft), situation in which the analysis of the double incrimination is no longer necessary as the decisions from the issuing state are admitted and carried out.

Another change of outlook was brought by the new Penal Code by changing the order of applying the states or causes of aggravation of the punishment, as follows: aggravating circumstances, ongoing crime, postexecutory recurrence, concurrence, postsentencing recurrence, intermediate plurality.

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The new Penal Code maintains the same outlook on the types of main punishments which can be set for the major criminal. The main punishments are stated at art. 53 new Penal Code as follows: life sentence, prison (15 days-30 years) and penal fine.

The institution of penal fine was completely reformed thus giving the judge a greater power of assessing its quantum. The quantum of the penal fine is established through the fine per day system. The corresponding sum of a fine per day is 10-500 lei, which is multiplied with the number of days (30-400 days). The fine per day is established taking into consideration the material situation of the convict and the real obligations of the convict to the persons whom he supports.

This system of application of the fine punishment is seen in the penal codes of Germany (§ 40), Spain (art. 50), France (art. 131-5), Portugal (art. 47), Switzerland (art. 34, in effect since January 1st 2007), Sweden (chapter 25, section 1), Finland (chapter 2, section 4).

The number of days for the fine is established within the following special limits:

- 60 and 180 days when the law states only paying the fine for the crime committed;
- 120 and 240 days when for the crime committed the law states paying the fine and punishment by prison for 2 years at the most;
- 180 and 300 days when for the crime committed the law states paying the fine and punishment by prison for more than 2 years.

According to art. 187 new Penal Code, "The punishment stated by the law means the punishment stated in the text of the law which incriminates the deed committed in consumed form, without taking into consideration the causes of reduction or increase of the punishment.

The new penal law allows for the *optional* increase by a third of the special limits of the fine per day if a patrimonial benefit was pursued when committing the crime.

When the convict is objectively unable to pay the fine established by the sentence, the judge delegated with the enforcement has the possibility to replace the enforcement method, if the convict consents to it, with unpaid community work, except when the convict cannot work for reasons of health [art. 63, paragraph (3)].

The obligation to do unpaid community work ceases when the fine or the rest of the fine is paid by substracting the fine days carried out by means of unpaid community work.

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The old legislation allowed for replacing the penal fine with prison punishment only when the law stated an alternate prison and fine punishment for the crime for which the criminal was convicted, and the application of the penal fine punishment was not established because mitigating circumstances were retained. The new legislation eliminates those obstacles stated in the old law, allowing the judge to replace penal fine with prison when, according to the law for which the criminal was sentenced only the fine punishment is stated or when the penal fine punishment was set because mitigating circumstances were retained.

The new penal law does not bring essential alterations regarding the legal mitigating circumstances and aggravating circumstances because, basically, the old and the new regulations are the same. As for the judicial aggravating circumstances, the new legislation no longer allows their retention since this would come into conflict with art. 7 from the European Convention of Human Rights.

Regarding the effects of the mitigating circumstances, drawing a parallel with the old legislation, these are more diminished, the special limits stated by the law being reduced by a third, and when the law states that a complementary punishment is mandatory, retaining the mitigating circumstances no longer offer the judge the possibility of not applying such a punishment.

The new Penal Code regulates in art. 80-82 a new institution, "the renouncement to apply the punishment". The judge can relinquish the application of the punishment when, in relation to the criminal and the seriousness of the crime committed, he assesses that applying a punishment is not adequate because of the negative consequences which the punishment would have on the person committing the crime. Criminals can benefit from this institution unless they have a criminal record and the punishment stated by the law is of no more than 5 years.

The renouncement to apply the punishment could work, for example, when a major criminal without a criminal record steals a bag of potatoes from the side of a public road.

Regulating the renouncement to apply the punishment was necessary because the sentence "deed which presents a social danger" was eliminated from the definition of the crime, thus giving the possibility to the judge to no longer set a punishment in certain cases.

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This institution is also regulated in legislations from Germany (§ 60 Penal Code), Portugal (art. 60 and 74 Penal Code), France (art. 132-58 Penal Code), Switzerland (art. 53-54 Penal Code).

The new penal law modifies all the system of sanctioning minor criminals. Only *educative* measures, not punishments – as the old legislation allowed, can be applied to minor criminals aged 14-18.

Educative measures can suppose confinement or not. The rule of the matter here is represented by applying a non-confinement measure, except when the punishment stated by the law is 7 years or more, or the minor has been sentenced to a non-confinement sentence and he commits a crime again.

The educative non-confinement measure are: a stage of civic training (can be set for a period of 1-3 years) and boarding in a detention center (which can be set for a period of 2-5 years, except when the punishment for the crime is prison for 20 years or more or life sentence, when it can be set for a period 5-15 years). The duration of the measure is compatible with the international regulations and practices (for example, the Resolution adopted in the Congress of the International Association of Penal Law in Beijing in 2004 recommends all states not to set confinement punishments over 15 years for minors).

The new Code of penal procedure, unlike the old procedural legislation, no longer gives the minor suspects/defendants a privileged procedural position, as they are, just like major suspects/defendants, subject to a lapse term in order to be a civil part in a penal trial, and when preventive measures are set, they must be met in the same conditions as for the majors.

The model which inspired the regulation in the new penal law is the Organic Law no. 5/2000 concerning the regulation of penal responsibility of the minors in Spain (modified by the Organic Law no. 8/2006), but regulations from the law of France (February 2nd 1945 Organic Bill with subsequent alterations), Germany (the 1953 Law of courts for minors with subsequent alterations) and Austria (the 1988 law concerning juvenile justice) were taken into consideration.

III. A general analysis of the special part of the new Penal Code

The special part comprises the main crimes, grouped according to the social values whose protection is achieved through incrimination.

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There have been considered, in order to be included in the special part of the Code, categories of crimes with which the judicial practice is faced frequently, those which damage social values for a democratic society, and also the deeds whose incrimination is imposed by the development of the contemporary society.

As for the special part, for systematizing purposes, the structure of previous penal codes was abandoned and the crimes which bring damage to persons and their rights were first regulated, and then the crimes which damage the attributes of the state.

This structure can be found in the most European recent codes, such as in Austria, Spain, France, Portugal etc and reflect the current conception on the place of the individual and his liberties in the hierarchy of the values which are protected, including by penal means.

The new penal law significantly reduces the special maximum of the punishment for most of the crimes. For example, theft (art. 209, 1968 Penal Code) was sanctioned with a punishment of 1-12 years in prison and, according to the new legislation it is sanctioned with prison punishment for 6 months to 3 years or fine.

As to the special minimum of the punishment, the legislator did not maintain the same outlook of reduction, because there are many crimes whose special minimum limit increased, even if the special maximum decreased. As examples, we can mention the following crimes: determining or facilitating suicide (3-7 years in prison, compared to the punishment set by the old penal law, that is 2-7 years in prison), fatal battery or bodily harm (6-12 years in prison, compared to the punishment set by the old penal law, that is 5-15 years of prison), material forgery in official documents (6 months-3 years in prison, compared to the punishment set by the old penal law, that is 3 months-3 years in prison).

From the analysis of the special part of the new Penal Code we can notice a significant increase of prison punishments alternated with penal fine punishments. There can also be noticed a change of the penal policy through emphasizing the pecuniary type sanctions, alteration sustained by the possibility of the court of law to apply prison and fine punishment for the same crime if material benefits were pursued. Another argument which sustained the emphasizing of the pecuniary character of the punishments is the significant increase of the general limits of the penal fine in the new law from 300-200.000 lei, compared to the old legislation which stated limits between 100-50.000 lei.

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The new penal law adapts itself to the new social realities and to the development of IT which has become essential for most Romanian citizens, through incrimination of new deeds as crimes. We can mention the following examples: murder at the request of the victim (art. 190), fetus damaging (art. 202), harassment (art. 208), recruiting minors for sexual purposes (art. 222), trespassing professional headquarters (art. 225), invading private life (art. 226), abuse of trust through fraud of lenders (art. 239), insurance deceit (art. 245), patrimonial exploitation of a vulnerable person (art. 247), obstructing justice (art. 271), revenge for getting help from justice (art. 274), abusive use of position for sexual purposes (art. 229), forgery of technical records (art. 324).

With the implementation of the new penal legislation the objective was to standardize the solutions given by courts in terms of legal framing, thus eliminating the controversies both in the legal practice and in the specialty doctrine. The new Penal Code no longer promotes the aggravating circumstance from art. 178 paragraph (3) 1968 Penal Code, which appeared when manslaughter was committed by a driver of a mechanic traction vehicle who had a blood alcohol content over the legal limit or who had been drinking. In the new law, the respective deeds will be classified as crimes concurrence, thus eliminating present controversies both in the specialty literature and in the legal practice, either as a concurrence, or a complex crime.

Another controversy which disappeared when the new penal law was in effect is represented by the legal classification of breaking an entrance in order to steal goods. In the legal practice, this deed had two distinct classifications: a complex crime of aggravated theft done by breaking an entrance [art. 209 paragraph (1) letter i)] as well as a plurality of crimes, a concurrence of aggravated theft [art. 209 paragraph (1) letter i)] and trespassing (art. 192). The new Penal Code ends this controversy by clearly regulating in art. 229 paragraph (2) letter b) the theft done by trespassing a home or a professional headquarter as a complex single crime.

Conclusions

Starting with February 1st 20014, Romania has a new modernized Penal Code which restructures the main existent penal institutions and introduces new penal institutions in order to meet the new challenges of social realities.

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The efficiency of a new penal law can be observed over a longer period of time in the decrease of the number of committed crimes, of the number of criminals who repeat a crime during their punishment or after, as well as in the recovery of material prejudice of the state.

One first test to which the new Penal Code is subjected is through applying a more favorable penal law until the final judgment of the cause. In the legal practice, there are controversies regarding the application of a more favorable penal law; some courts consider that the more favorable penal law is applied in its entirety, others consider that the more favorable penal law is established through the analysis of each institution (concurrence, recurrence, ongoing crime, mitigating circumstances, aggravating circumstances, limitation etc.), thus a combination of dispositions of the old penal law and of the new penal law being possible.

Such inconsistent practice is very dangerous because there can be very large differences between the applied punishments. Suppose a criminal is judged after the new Penal Code is in effect for a concurrence of two crimes of aggravated theft using a gun (2-7 years in prison punishment according to the new Penal Code/3-15 years in prison punishment according to the 1968 Penal Code) and two crimes of deceit using false names (1-5 years in prison punishment according to the new Penal Code/3-15 years in prison punishment according to the 1968 Penal Code) done in the light of the old legislation for which the court opts to apply the special minimum of the punishment for each crime. When the court considers that the more favorable penal law is applied in its entirety, the new Penal Code is the more favorable law in terms of punishment for each crime, but the punishment which results is prison for 3-6 months. If the more favorable law were applied, through analyzing all the penal institutions, the resulting punishment would be 2 years in prison.

The Constitutional Court practice supports the application of the more favorable law in its entirety. Because of the inconsistent practice of the courts, The High Court of Cassation will decide in the following period by a recourse in the interest of the law.

Although at a first glance the new penal law seems milder when it comes to punishments, after a thorough analysis we can notice that this reduction of punishments is counterbalanced by the aggravating causes (concurrence, recurrence, intermediate plurality), the reduction of mitigating circumstances and the compulsoriness to apply complementary

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punishments for a higher number of crimes; thus we can conclude that the new penal law is not milder in every circumstance.

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