ERROR IN CRIMINAL LAW

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Abstract

The Romanian legislator defines in art.51 paragraph 4 of the Penal Code the principle according to which "the ignorance or wrong knowledge of the criminal law does not excuse the criminal nature of the offense". The reasoning of the legislator when setting up this rule was based on the fact that the penal rules establish conduct rules that have the role to ensure the observance and preservation of important social values whose trespassing would attract the application of a sanction stipulated by the criminal law. Insisting upon the idea according to which people must be aware of the criminal rules in order to establish a social order necessary for a normal living in the society, the Romanian legislator institutionalized an absolute presumption of knowledge of the criminal law by its addressees.

While in the past the laws were limited in number and could be known by the citizens, nowadays the extent of the criminal rules, the continuous change of the laws, the wide area of the social relations set up by law make it impossible for this principle to be applied. If the incriminations of serious offenses such as murder, robbery, bodily injury, etc., are no special cases, there are incriminations in the criminal laws to which the perpetrator may have some reduced or no access at all.

In the Romanian doctrine, the error in criminal law has been the subject of interesting debates.

The new Penal Code included the error in criminal law among the causes of the lack of criminal guilt of the undersigned, stating that[1] "The act stipulated by criminal law committed as a result of ignorance or wrong knowledge of its illicit character due to a certain circumstance which could not have been avoided is not ascribable". This solution is accepted by the majority of modern legislations.

The analysis of the institution of error in criminal law in different legislations provides interesting results, taking into account that several solutions are suggested in this case.

Keywords

error in criminal law, nemo censetur ignorare legem, invincible error, inevitable error, New Penal Code.

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[1]In art.30, paragraph 5 of the New Penal Code from 2009 that shall enter into force in 2011.

In the Romanian criminal law, the presumption of knowledge of the law is a consequence of the legality principle, and therefore one cannot claim that one is unaware of the criminal law (*nemo censetur ignorare legem*). From the moment a law enters into force, it is enforced upon all the citizens, stateless persons and foreigners who find themselves on the territory of the Romanian state, without having the right to claim that they were unaware of the criminal law.

The saying *nemo censetur ignorare legem* was elaborated during different historic conditions from those existing nowadays, when the law was applied to smaller communities and when the people directly participated in the elaboration of the laws. This situation has changed when the social life became more and more complex and the indictment texts more numerous, the absolute presumption of knowledge of the law being imposed as a politic necessity to ensure the law authority and to preserve legal order (G. Antoniu, (2002), : 342-343).

In the criminal doctrine this presumption of knowledge of the law has become unrealistic, illusory considering the great number of criminal regulations, frequent changes of their content, the inconsistent practice of the courts, the presence of foreign citizens from countries with different legislations.

The European Court of Human Rights decided in its jurisprudence on the interpretation of art.7[1] of the European Convention of Human Rights, laying stress on the need of accessibility and foreseeability of criminal law[2]. A law should be elaborated with enough clarity to allow the citizens without legal training to conform their conduct by understanding what the incrimination law allows one or doesn't allow one to do.

The strict application of the principle *nemo censetur ignorare legem* may become objectionable in some particular circumstances when the author is sanctioned although it was impossible for him to be aware of the legal provision.

Unlike the error in the extra-criminal law which is a form of the error in actual fact (de facto) in the Romanian legislation, the error in criminal law refers to the existence of the incrimination directive. The error in criminal law can be defined as being "that error that may appear in case of a criminal interdiction, in case of a significance of a directive (direct error) or in case of the existence or limits of applications of the exonerating causes (indirect error), assuming the lack of understanding of the illicit character of the act. .(Sergiu Bogdan (2008), : 164)

[1] No person may be punished for an act or omission that was not a criminal offence at the time of its commission under either national or international law. The Article also prohibits a heavier penalty being imposed than was applicable at the time when the criminal act was committed.

[2] See the Kruslin trial against France and Huvig against France, judge decisions on April 24th 1990.

If, for example, while the civil law admits that the invincible error determines juridical effects- *error communis facit jus*, the criminal law applies the principle *nemo censetur ignorare legem.*

The Romanian legislator defines in art.51 paragraph 4 of the Penal Code the principle according to which "the ignorance or wrong knowledge of the criminal law does not excuse the criminal nature of the offense". The reasoning of the legislator when setting up this rule was based on the fact that the penal rules establish conduct rules that have the role to ensure the observance and preservation of important social values whose trespassing would attract the application of a sanction stipulated by the criminal law. Insisting upon the idea according to which people must be aware of the criminal rules in order to establish a social order necessary for a normal living in the society, the Romanian legislator institutionalized an absolute presumption of knowledge of the criminal law by its addressees. Thus, the main reason was for the addressees of the criminal law to show a particular concern regarding the cognizance of the conduct imposed by the criminal rule and to discourage from the beginning the perpetrator's infantile justifications of unawareness of the criminal law.

The question weather there may be some situations which may be considered as exceptions from this principle and which, if ignored, would lead to an objective criminal liability is raised.

While in the past the laws were limited in number and could be known by the citizens, nowadays the extent of the criminal rules, the continuous change of the laws, the wide area of the social relations set up by law make it impossible for this principle to be applied. If the incriminations of serious offenses such as murder, robbery, bodily injury, etc., are no special cases, there are incriminations[1] in the criminal laws to which the perpetrator may have some reduced or no access at all.

We can mention certain situations as the limited access to information in certain remote areas, the impossibility to publish it in the Official Gazette due to exceptional situations (earthquake, floods) or other circumstances that make a person unable to take cognizance of the adoption a criminal provision.

In the Romanian doctrine, the error in criminal law has been the subject of interesting debates. Most authors have considered that paragraph 4 of art. 51 Penal Code restricts the effects of error in criminal law to error in actual fact (V. Dongoroz, (2003), :431).

The new Penal Code included the error in criminal law among the causes of the lack of criminal guilt of the undersigned, stating that[2] *"The act stipulated by criminal law committed as a result of ignorance or wrong knowledge of its illicit character due to a certain circumstance which could not have been avoided is not ascribable*". This solution is accepted by the majority of modern legislations.

[1] For example in the area of hunting, fishing.

[2]In art.30, paragraph 5 of the New Penal Code from 2009 that shall enter into force in 2011.

The enunciation of the New Penal Code has been criticized by some authors (G. Antoniu, (2007),:16-17) who believe that there is no solid argument for turning the error in criminal law into an error on the illicitness of the act. It is considered that an illicit act is an act contrary to criminal law, but an act can also contravene the criminal law even when legal. The terms of licit, illicit should not be mistaken for the terms legal, illegal.

The analysis of this institution should be made in terms of the modernization of the criminal legislation, all the more so as the interest in this aspect is manifested by all European systems. In the comparative literature and legislation several solutions are suggested in case of error in criminal law.

A large number of legislations expressly stipulate the effects of the error in law on the criminal liability.

The first Penal Code that defined the error in law was the Norwegian one in 1902. After numerous debates in the doctrine of prosecution, the Swiss Penal Code provides in art.20 this exonerating cause.

The German Penal Code[1] provides in paragraph 17 the effects of the error in law, concluding that "in case the author of a crime was unaware that she/he acted illicitly when committing the respective crime, the author is considered without guilt if he/she was unable to avoid this error".

Art.9 of the Austrian Penal Code[2] stipulates that "one who is unaware, because of an error in law, of the character of one's act contrary to law, has no fault in case this error cannot be imputed to one".

The French Penal Code[3] stipulates in art.122-3[4] that a person who righteously thought that because of an error in law unable to avoid could rightfully commit the respective act is not criminally liable. Thus, the error is defined as a justificatory cause of exoneration of criminal liability [5].

Other Penal Codes define the principle *nemo censetur ignorare legem* expressly, and in this case the error in law no longer has an exonerating character. Thus, the Italian Penal Code[6] stipulates in art.5 that "no one can claim ignorance of the criminal law in his favor", being considered that this principle stems from the principle of the legality of incrimination principle. The Italian jurisprudence admitted that, by way of interpretation, one may not appeal to the ignorance of law unless the error is invincible –in case for one is absolutely impossible to take cognizance of the criminal law or if the error is

[1] http://www.gesetze-im-internet.de/stgb/
[2] http://www.sbg.ac.at/ssk/docs/stgb/stgb_index.htm
[3] http://www.legifrance.gouv.fr/html/codes_traduits/code_penal_textan.htm
[4] In 1994 the invincible error in law was legislatively defined in art.122-3 of the French Penal Code.
[5] In order to manifest its exonerating effect, the error must be invincible. In spite of this, in the legal practice the French courts are reticent in applying this exonerating cause of criminal liability.
[6] http://www.studiocelentano.it/codice-penale-dei-reati-in-generale-1/

pardonable, being determined by the inconsistent practices of the courts, by unclear laws, by a previous decision of discharge of the agent for an identical act, etc.. (Antoniu, (2002), : 343). The solutions of such cases were based on the truthfulness of the perpetrator which is not excluded by art.5 of the Italian penal code. In 1988, the Italian Constitutional Court[1] considered that art.5 contradicts the provisions of the Constitution every time law ignorance was inevitable.

There are legislations which, although the penal codes do not bring under regulation the error in penal law, acknowledged the exonerating effects of the invincible error in legal practice. Such situation is present in the Dutch law in case of which the principle *nullum crimen sine culpa* which exists ever since the unwritten law operates - in case the author of a crime was unaware that she/he acted illicitly when committing the respective crime, he/she is considered without guilt because he/she would have been unable or he/she shouldn't have known the illicit character of his/her act.

In the U.S.A. the legal practice does not admit that the error in law is an exonerating cause, believing that in this way they would allow for the contradiction of the fundamental moral values preserved by the criminal law (W.R. LaFave, A.W. Scott, (1986), : 415). In spite of this, sometimes the courts admit the exonerating effects of the error in penal law, when for example the text is unavailable for the accused, when the text is too vague or when the error was determined by information provided by an authority.

The Anglo-American conception (Hall, (1960), : 405-406) pleaded for a distinction between the ignorance of law when it refers to a serious crime, case in which the error or the ignorance would be null and void because in such circumstances the legal interdiction reflects the trespassing of universally acknowledged moral principles, and the error and ignorance of the law when it refers to minor offenses[2] which cannot be always intuitively acknowledged as immoral. As far as the latter are concerned, it has been suggested that the invincible error in law should be exonerated from liability.

Nowadays, there is a tendency to admit the error in penal law when the error is inevitable and reasonable. This solution is based on the principle *nullum crimen sine culpa*, according to which only the agent who may know that his act is legally forbidden acts in a culpable way.

Accepting the solution according to which the error in criminal law removes criminal guilt or reduces criminal liability is the result of a long way which is currently controversial. The guilt is removed only if the error is inevitable, in which case a reduced sanctioning treatment could be applied, the way the German criminal law stipulates.

While from a theoretical point of view it is easy to affirm that the lack of awareness of the illicit removes criminal guilt, a major issue raised in practice

[1] By Decision no.364 adopted on March 24th 1988 by the Italian Constitutional Court.
[2] The so-called petty offenses.

was finding some criteria to be used for determining weather the error was inevitable or not (Sergiu Bogdan, (2008), : 166-170).

The German majority doctrine claimed that the justification of avoidability has to be related to guilt as a characteristic of the offense and not to a certain guilt or special obligation of the agent. The German legislator used the word "avoidable" in order to highlight the blame that could be put on the agent. Therefore, the error is inevitable when the agent may be aware of the illicit character of his/her act. In this case, the offender will be held criminally liable because he failed to use his knowledge or his capacity to recognize the illicit character of his behaviour.

Both in German theory and practice, two criteria able to determine the inevitable character of error in penal law have been stated: the agent reflecting upon the possible illicit character of his act and the obligation of the agent to get informed. If the offender has certain doubts regarding the applicability of an incrimination law in respect to a concrete conduct he/she performed, he/she has the obligation to inquire about consequences before committing the act (Jescheck, (1988), : 409). In legal practice there are very strict conditions regarding the self-assessment of the agent on the illicit character of the act. It has been considered that the agent must use his entire knowledge and his entire moral capacity of evaluation in order to take the right decision regarding the illicit character if his behavior (Jescheck, (1988), : 413). It is admitted that the error is always avoidable when the agent realized that he/she committed an immoral act or an act contrary to the sense of justice or fairness, in this cases the legal interdiction can be easily deduced.

The legal practice rejected the idea of invincible error in case the offender had already received the superficial legal advice of a lawyer or when it was based on a decision of termination of criminal prosecution stated by the prosecutor, no matter if the erroneous interpretation was made by several lawmen. On the other hand, if the offender has committed an act for which he/she had been subsequently acquitted, he/she may plead for error in criminal law.

On principle, the citizens must be informed on the way in which the law evaluates their behaviour in the society. If they haven't met this obligation, but acted in good faith from a subjective point of view, we consider that they should be treated differently from those who act willingly and knowingly against the law. Consequently, as in the case of the German law, we believe that a reduction of guilt could be made.

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